

2 ALTERING THE CONSTITUTION

ALTERING THE CONSTITUTION AND REPLACEABLE RULES

As X wishes to amend the constitution, this may only be done by special resolution (s 136(2)). The modification will take effect on date the resolution was passed or at a later date specified (s 137). Accordingly, all members are bound by the changes even if they did not vote for them.

As [Co] is a public company, the resolution must be lodged with ASIC within 14 days after it has passed (s 136(5)); as well as a copy of the modification (s 136(5)(b)).

Statutory Limits to alter constitution

1. The company must comply with any entrenching provisions in its constitution (s 136(3)).
 - o The company's constitution may provide that the special resolution does not have any effect unless a further requirement specified in the constitution relating to that modification or repeal has been complied with (s 136(3)).
2. A member will not be bound by an alteration that requires them to take up additional shares, increase liability or restricts the right to transfer shares, unless the member agrees in writing (s 140(2)).

Equitable limits to altering Constitution

As X wishes to expropriate the [shares/rights to the shares] (compulsory acquisition or extinction), it is subject to an equitable limitation that the majority members use their voting power for a proper purpose (*Gambotto*).

1. does the alteration create conflict of interest and advantage between the majority and minority?
 - NO – majority has the onus of proving that the alteration bona fide affects all shareholders equally (*Allen*)
 - YES – go to step 2
2. Does the alteration involve an actual or effective expropriation of shares or rights attaching to shares?
 - NO – alteration is valid unless ultra vires (ie. against any purpose in constitution or oppressive to minority shareholders)
 - o Onus is on the majority
 - YES – go to step 3

The onus is on the majority to prove that the resolution is passed for a proper purpose and the process and terms of the acquisition is fair in all the circumstances.

Proper Purpose

In determining whether it is in a proper purpose the resolution must be necessary to secure the company from significant detriment or harm (*Gambotto*).

Here, the securing of a benefit or advantage would be an improper purpose (*ibid*). Example of avoiding detriment is preventing the shareholder from competing with the company (*ibid*)

Terms of the acquisition is fair

In determining whether the acquisition is fair; fairness has both procedural and substantive elements (*Gambotto*). Procedural fairness requires the independent valuation of the shares to be expropriated and full disclosure of all material information. Whereas substantive fairness relates to the price paid (*Gambotto*).

In *Gambotto*, McHugh J commented that paying current market price may not always be sufficient for substantive fairness because markets can be inefficient in the short term.

It is noted that it is unlikely that a company would be able to expropriate minority shareholders nowadays via alteration of the constitution; it is better to use Ch 6A; compulsory acquisition procedure.