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Powers

Powers of directors

Section 198A (RR)

(1) The business of a company is to be managed by or under the direction of the directors.

See s 198E - powers of directors who are the single director/shareholder of pty

(2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting. For example, the directors may issue shares, borrow money and issue debentures.

- On the board – look after audits

Appointment and removal of directors

- Must be at least 18, and not disqualified: s 201B
- Grounds for disqualification: Part 2D.6 CA
- Minimum numbers of directors: s 201A
 - Pty Ltd companies – Must have at least one director (s 201A(1))
 - Ltd companies – Must have at least 3 directors, at least 2 must ordinarily reside in Aust (s 201A(2))
- Directors may be elected by members: See eg s 201G
 - S201G (RR): A company may appoint a person as a director by resolution passed in general meeting
- Directors of public companies – May be removed by members: s 203D; but not by other directors: s 203E
- Directors may appoint Alternate directors: s 201K (RR)

Remuneration – Listed companies

- Listed companies – must disclose their arrangements for remuneration of key management personnel in annual reports: s 300A
- Annual General Meetings (AGMs) of members of listed companies – Voting on advisory resolution of remuneration of key management personnel: s 250R
- If more than 25% of votes were against the adoption of the remuneration report – at next AGM board may face a “spill” resolution: s 249L

Decision Making powers

- Decision making power can be distributed by:
 - Corporate constitution
 - Corporations Act
 - ASX Listing Rules (for Ltd co listed on ASX)
 - By delegation of authority (see eg ss 198C, 198D)
- Some powers may be limited by contract
 - limited delegation
 - shareholders' agreement
 - corporate constitution (s125)
 - anything beyond the power of the constitution is ultra vires (does not exist anymore)
- A company makes a decision through its two main decision-making organs:
 1. **Resolution of majority of members in a general meeting**
 2. **Resolution of the board of directors**

= The company itself is making the decision

Members

- Certain powers are given to the members in a general meeting by the CA, **ASX Listing Rules** (for public listed co):
 - Approval of related party transactions (s208)
 - Approval of certain remuneration contracts (s200B)
 - Vote on remuneration report and vote to spill board positions (s250V)
 - Approval of certain capital changes (ss257B, 260B)
 - Voluntary winding up (s491)
 - Certain share issues require member approval
- Powers/rights may also be given by the **constitution**
 - eg, replaceable rules (see list in s 141)
 - Different share classes (eg preference shares, governor's share etc)
- Note also the role of **shareholder agreements**
 - ie. Contract between shareholders which determines how power is actually distributed
 - Common in joint venture companies, private equity acquisition vehicles and other closely-held co

Board of directors

- The board of directors obtains powers under s 198A (RR)
 - That power may be delegated (s198D), usually to a managing director
- The board acts as a collective
 - individual directors have no authority to bind the company as agents
 - only an executive position-eg MD- can bind as an agent
 - *Northside Developments Pty Ltd v R-G (NSW)* (1990) 170 CLR 146

Separation of powers

Management vs control powers

- **Management** powers are given to the board- i.e. decide what to do with assets
- **Control** powers are given to members – i.e. capacity to control composition of the board

Rules for separation

- Directors are not the mere agents of the members
 - *Automatic Self-Cleansing* case (majority shareholder could not force company directors to sell assets to them)
- ‘functions assigned to the company in general meeting are not exercisable by the board of directors and likewise those given to the board of directors are not exercisable by the company in general meeting.’ *Re Winlyn Developments Pty Ltd* [2011] NSWSC 1218
- Once the board of directors are given the power of management under the constitution, it can only be taken away by amending the constitution
- One decision making organ cannot use power to usurp the decision making power of the other organ.
- Members cannot pass a resolution to issue directions to the board about how to exercise the power of management
- Can’t change the constitution to require directors to follow directions from members:
 - *Capricornia Credit Union* [2007] FCAFC 79 (see eg at [78])
 - A potential takeover bidder who also controlled shares tried to change the company’s constitution to force the directors to recommend the takeover bid. Court said this infringed on management power.
- ‘The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individual’ *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 at 105
- ‘if the company’s constitution gives to the board the power to manage the company’s business, the directors are exclusively responsible for the management of the company and shareholders cannot control the directors in the exercise of that power or direct the board by resolution to exercise that power in a particular way (save for any matters that are within the power of the company in general meeting’ *Australasian Centre for Corporate Responsibility v CBA* [2015] FCA 785 at [16]
- ‘A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders’ *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134

Is there a residual power in a deadlock?

- *Massey v Wales* (2003)
 - Stated *Marshall’s Valve Gear* no longer good authority
 - Dispute between directors/shareholders, majority director commenced proceedings litigation commenced on behalf of co could proceed as it had support from the majority of members
 - Court held that there is no residual power in the members in a general meeting to exercise management decisions where the board is incapable of doing so (deadlock) and where the members have the ability to appoint new directors.
 - The court left open whether there is a reserve power in other cases where it is impossible for the board to act.
 - However, it is typical for a constitution to provide for the members to appoint new directors (s 201G RR) so it is difficult to see where this residual power could operate.

‘The only powers that shareholders have are those which the Act “requires” be exercised by the company in general meeting and none of those powers include a power to pass non-binding advisory resolutions. The terms of the constitution, which make clear that management of the company is vested exclusively in the directors, preclude the implication of any power in the general meeting to pass resolutions proffering opinions on the way in which the board exercises its powers.’ *Australasian Centre for Corporate Responsibility v CBA* [2015] FCA 785 at [34]

- Served request – three potential resolutions to put to membership – required bank to produce various reports related to the carbon omissions
- Managed power – force directors to produce reports – members can’t make this decision for them