

A. INTERNAL MANAGEMENT

PART 1: COMPANY CONSTITUTION AND REPLACEABLE RULES

NATURE OF CORPORATE GOVERNANCE RULES

What is it?

- Corporate governance rules are rules determining the internal operations of a corporation – i.e. a set of internal rules that define the relationships between the company, its members and officers
- Typically includes object – why it was set up
- Rules governing admission to and retention of membership
- Rules dealing with powers, right and duties of members
- Appointment of officers and their powers
- Alternation of rules
- What is to happen if the association is dissolved

Sources

- *Corporations Act* – includes some mandatory rules (can't be contracted out of) and some voluntary rules (called replaceable rules)
- General law – i.e. case law
- Company constitution

Framework pre 1 July 1998

If a co. was incorporated before 1 July 1998, its constitution will consist of:

- For a co that retained its memorandum & articles of association – these become its company constitution (s1408 CA)
- For a co that changed its internal rules after 1 July 1998:
 - For a co that *completely repealed* its internal rules after 1 July 1998 – replaceable rules in CA now apply
 - For a co that *modified* its internal rules after 1 July 1998 – modified rules apply only and the replaceable rules in CA do not apply
 - For a co that adopted a *new* constitution after 1 July 1998 – new constitution applies and the replaceable rules apply to the extent they are not displaced

REPLACEABLE RULES

- RR are a set of rules contained in the CA which apply to a company unless the company's constitution displaces them (s 135(1)(b))
 - Doesn't explicitly have to exclude RR, it is enough if the provision in the con. is contrary to RR
- Can identify RR as it says replaceable rule in the heading (s 135(1)(a))
- **s 141**: list of provisions in the CA that apply as RR (see printed sheet)

Note:

- Pty cos only: eg **s254D, 254W, 1072G**
- Public cos: **s249X** – mandatory for public cos, appointment of proxies
- RRs do not apply to sole director/SH: **s135(1)**. Instead, *special rules* apply to these cos, eg
 - **s198E** confers on the sole director all the powers to manage the business and all the powers of the company
 - **201F** allows the sole director to appoint other directors
 - **202C** provides the sole director is to be paid any remuneration that the company determines by resolution
- **s135(3)** RRs are different from the rest of the CA because failure to comply with a RR is not of itself a contravention of the CA ()

MANDATORY RULES

- Still apply!
- Eg CA:
 - **s191**: requires a director with a material personal interest to give the other directors notice of the interest
 - **s199A**: prohibits indemnities for officers and auditors
 - **s200B**: limits benefits given in retirement from office
 - **s203D**: authorises members of a public company to remove a director
 - **s249H**: notice requirements for members meetings
 - **Chapter 2M**: provides framework for financial reporting and audits
- Eg – *General Law 'Rules'*:
 - A members right to receive truly informative notice of a meeting (*Kaye v Croydon Tramways Co*)
 - Members right to have their voting right protected against improper action of directors (*Residues Treatment*)

THE CONSTITUTION

- The constitution is a set of customised internal governance rules
- Contents of a constitution:
 - Generally not prescribed
 - Co ltd by guarantee: **s150(1)** if company wants to omit ltd from its name, then its constitution has to require the company to pursue charitable purposes only and has to prohibit distributions being made to members and fees being paid to directors
 - No liability co: **s112** requires certain things in the con. In particular, the con. has to state the sole objects of the company are mining purposes and has to state the company has no contractual right to recover calls made on shares from a shareholder who fails to pay
 - Listed companies: **ASX Listing Rules** e.g. the con. needs to include provision dealing with electronic share trading

- Objects clauses: s125(2) no longer required for constitution to set out objects clause

2

Adopting a Constitution – s 136

- *On registration: s 136(1)*; constitution adopted if each person consenting to become a member agrees in writing to the terms of the constitution
- *After registration: s 136(2)* company passing a special resolution or by a court order under s233
 - What is a special resolution? (**ss9** (definition), **249L, 249H**) a matter put to the vote, a resolution i.e. proposal which must be passed by 75% or more approval from shareholders who are present and eligible to vote and elect to vote (c.f. ordinary resolution only needs 50% + 1)
 - **s249H** – 21 days notice of the meeting must be given the shareholders, notice needs to state that the resolution is going to be proposed as a special resolution
 - Requirement for lodgement with ASIC (public co only: **s136(5)**) notice of the change to the constitution – has 14 days to do so
 - When does adoption take effect? **s 137** on the day in which the resolution is passed, unless a later date is specified
 - Requirement for consolidated copy: **s 138**
 - Provision of con. to members: **s 139** within 7 days if a member requests it

CONTRACTUAL EFFECT

- **s140 CA** gives the con. and RRs the effect of a contract between:
 - a) the company and each member
 - b) the company and each director and company secretary
 - c) a member and each other member
- **s140(b)** Directors/secretary are bound even if they hold no shares and they've had no say in the adoption of the con.
- What happens in situations where there is a related contract of service?
 - A company can alter its constitution, in a way that would contravene the contract of service but then there might be liability for breach of contract of service – i.e. be mindful of what other contracts are in place, in addition to the constitution (*Carrier Australasia v Hunt*)
- How does the statutory contract differ from an 'ordinary' contract?
 - Written consent is not needed by all shareholders (only 75% have to vote to support a change)
 - Constitution can be altered without agreement of all parties
 - Remedies available for breach of the constitution are more limited, in particular they don't include damages
 - No consideration is given for adopting a constitution