

## Delegation by the board

- ▶ May delegate certain functions to committees of the board e.g. audit, remuneration, nomination: s 198D
  - S 190: each director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves (exceptions on p.221)
- ▶ Generally delegate day-to-day management to the CEO / managing director: RR 198C

## Board meetings

- ▶ All directors must receive “reasonable notice” (i.e. more flexible, depends on the nature of the decisions to be taken – e.g. board can be meeting every day when there is a crisis)– s 248C [RR]
- ▶ May have a quorum requirement eg RR s 248F (2 directors)
- ▶ Voting disqualifications can apply – dealt with in later lectures eg material personal interest.
- ▶ Use of technology (eg video conference, telephone) permitted under s 248D (all directors must agree)
- ▶ “Paper meetings” are possible – see eg RR s 248A – where all directors agree

## What can members decide?

- ▶ Member votes are done in general meetings
- ▶ Internal management rules or the Corporations Act give right to make certain limited decisions about the company to the members
- ▶ Some rules and sections differ for public and proprietary companies (e.g. voting for board members)

## Member control over company's structure

- ▶ Member approval is required to:
  - adopt, modify or repeal the constitution: s 136(2)
    - ▶ S 136(3) & (4): additional requirements on amendment or repeal included in constitution must also be met
    - ▶ The proposal can be initiated by director or member
    - ▶ Changes that are passed by a special resolution of members are binding on the company and its directors, even if the directors disagree
  - change the company's name requires special resolution: s 157
    - ▶ Other conditions for changing name are set out in Div 2 of Pt 2B.6
  - change type (e.g. from proprietary to public): s 162
    - ▶ automatically if there are 51 or more shareholders without shareholder vote, meaning that more legal compliance will be required.
    - ▶ S 162(1): contains a table setting out the permitted changes of type
    - ▶ S 162(1)(a): changing type requires special resolution
    - ▶ Company must also comply with s 163 and s164 to effect the change
- ▶ Special resolution is required in each case

Can have a 'member vote' list for the exam and things not on the list should be director vote.

## Variation of class rights

- ▶ Ordinary shares

- ▶ Default voting right of one vote per share (RR s. 250E)
- ▶ If members have different rights attaching to their shares, then those shares are treated as being in different classes (not necessarily specified in constitution or the terms of issue): see *Crumpton v Morrish Hall Pty Ltd*
- ▶ It is possible for companies to propose additional classes of shares:
  - ▶ Ordinary Bs (with different number of votes per share)
  - ▶ Preference shares
  - ▶ Combinations (redeemable, non-redeemable, cumulative redeemable etc.)
- ▶ What is a variation of class rights?
  - Case: *Greenhalgh v Arderne Cinemas Ltd* (p.144)
    - It did not vary Mr Greenhalgh's strict legal rights (one vote for each share) as he enjoyed before the resolution was passed although his voting rights were affected in a business sense.
  - Case: *White v Bristol Aeroplane Co*
    - A bonus issue of shares to ordinary shareholders that greatly diluted the voting rights of preference shareholders, was held not to amount to a variation of the class rights attaching to the preference shares.
- ▶ General law test is narrow – effect on enjoyment is not enough; **strict legal rights** must be varied
  - Strict legal rights are NOT affected by adding an additional class of shares, but power will be affected. (e.g. power will be DILUTED if the additional class of shares issued has more votes per share. In this case, Common law will interfere to protect the existing shareholders)
- ▶ CA adds to general law by deeming (i.e. adding on) some other actions to be variations (i.e. additional situations where i can seek a remedy.)
- ▶ Section 246C: certain actions will amount to variation of class rights (focus on 1,2,5,6)
  - ▶ Splitting a class into two
    - Class 1 keeps its original voting rights (e.g. 5 votes per share)
    - Class 2 are to get 10 votes per share
    - class 2 got their rights varied hence there will be protected by the general law. s 246C(1) suggests that class 1 will then form a separate class.
  - ▶ Varying the rights of some members only
    - ◆ S 246C(2): if the rights attached to some of the shares in a class of shares in a company are varied
  - ▶ Issuing new shares where only one class
    - 246C(5): There are no variation of rights attached to existing shares if the rights attached to the new shares are the same as the existing share.
    - It does not apply if the company has more than one class of shares
    - It is not a variation if the rights attached to the new shares are provided in the constitution (which means that it had been passed by a special resolution --> 75% agreed)
    - a notice/document or resolution that is lodged with ASIC
  - ▶ New preference shares ranking equally
    - ◆ 246C(6)
    - ◆ Not variation if the (a) terms of issue of the existing preference shares or (b) the constitution prior to the issue of existing preference says that it the rights can be diluted/varied.

Action	Whose rights are varied?	Resolutions required
Shares in a class are divided into further classes and after the division the rights attaching to all the shares are not the same	All holders of shares in the original class	Special resolution of the company Special resolution of each class existing after the division
Rights attaching to some of the shares in a class are varied	All holders of shares in the original class	Special resolution of the company Special resolution of the members whose rights were varied Special resolution of the members whose rights were not varied
Issue of new shares in a company with only one class of shares, if the rights attaching to the new shares are different from the rights attaching to shares already issued and are not provided for in the company's constitution or a notice, document or resolution lodged with ASIC	Holders of existing shares	Special resolution of the company
Issue of new preference shares ranking equally with existing preference shares, unless the issue is authorised by the terms of issue of the preference shares or the company's constitution as in force at the time the original preference shares were issued	Holders of the existing preference shares	Special resolution of the company Special resolution of the holders of the existing preference shares

### How can the company vary its class rights?

- ▶ Section 246B: variation or cancellation permitted only:
  - 246B(1): in accordance with the procedure set out in the constitution, or
  - 246B(2): where the constitution is silent, by special resolution of the company and a separate special resolution of each of the new classes
- ▶ Section 246C: applies to company limited by shares regarding when class rights are varied or cancelled (p.142)
  - For 246c (1) and (2)
    - ▶ 1. meeting of the whole company
    - ▶ 2. meeting of a1 who are likely to vote against and
    - ▶ 3. meeting of a2 who are likely to vote for it.
  - s 246C(5)
    - ▶ the company only has one class of shares
    - ▶ Not dividing the same class
    - ▶ The vote of the company and the vote of people whose shares are to be varied (100% of the shareholders) are same group of people.
  - s 246C(6)

- ▶ Existing preference shareholders' rights are varied hence they will have a special resolution
- (5)&(6) These two are to expand the company

### **What if members aren't happy with the variation?**

- ▶ Section 246D: rights of dissenting members where the variation, cancellation or modification does not have unanimous consent.
- ▶ Members holding at least 10% (upper limit is 25%) of the class can apply to the Court for change to be set aside for ***unfair prejudice***
  - ▶ ONLY when it is UNFAIR! not just a prejudice
  - ▶ why would 75% of the class agree if there is a prejudice initially?
  - ▶ the reason is probably that they also own shares from the other class (losing in this class, but winning in the other)
  - ▶ S 246D(5): the court must confirm the variation if the court is not satisfied of unfair prejudice → comes into effect when application withdrawn or finally determined
- ▶ S 246E: unanimous consent → takes effect immediately or on a specified date
- ▶ S 254W: a special resolution required to approve a decision by an unlisted public company to pay different dividends to members of the same class.