

Topic 5 –Constitution & Replaceable Rules

Chapter 4 Constitution and replaceable rules

1. Alteration of Constitution and Replaceable Rules

(1) Displacing/ Modifying Replaceable Rules

Replaceable Rules (<i>Set by Corporation Act</i>)	S135 (2)	Can be displaced/ modified by adopting a provision in constitution
Resolution	S136 (1) (b)	Constitution is adopted if it is passed by at least 75% of votes cast by members

(2) Modifying/ Repeal Constitution

Constitution –Special Resolution	S136 (2)	_____ (Company) can modify/ repeal its constitution/ provision of constitution in Special Resolution, which is required to be passed by at least 75% of votes cast by members.
	<i>Shuttleworth v Cox Bros & Co</i>	-Director being removed -The court rejected the argument that the clause in the constitution appointing the director created a contract that could not be varied without his consent -Appointing him as a director for life was subject to the statutory power given to companies to alter their constitution (No separate contract independent of the constitution)
Useless of Special Resolution	S136 (3)	As a constitution that restrict _____ (company) to modify/ repeal its constitution existed, imposing further requirement for _____ (alternations) over and above a special resolution is required.
		→Special Resolution does not have any effect unless a further requirement
	S136 (4)	Unless the constitution provides otherwise, _____ (company) may modify or repeal a further requirement described in (3) only if the further requirement in itself complied with
Notice of Meeting	S249L (1) (c)	Notice of meeting to set out an intention to propose the special resolution and state the resolution is required.
Lodge with ASIC	S136 (5)	_____ (company) is required to lodge with ASIC a copy of a special resolution adopting, modifying or repealing its constitution within 14 days after it is passed

2. Limitation on Right to Alter Constitution

There are some statutory safe guards/ rights which protect minority shareholders against unfair alterations of constitutions, which is affecting their rights unfairly.

(a) Not bound by modification	S140 (2)	<ul style="list-style-type: none"> ➤ Requires the members to take up additional shares; ➤ Increases the member's liability to contribute to the share capital of the company/ otherwise to pay money to the company ➤ Imposes/ increases a restriction on the right to transfer the shares already held by the member
(b) Entrenching Provision	S136 (3)	Company's constitution may contain entrenching provisions that restrict the company's ability to modify or repeal its constitution, by imposing further requirement.
		<p><i>Example:</i> founder of company may wish to ensure they retain control after formation</p> <p>→ Choose to contain an entrenching provision that confers weighted voting rights on a particular person/ holder of a particular class of shares</p>
(c) Variation of Class Rights (Topic 12)	S246B~S246G	<p>-Designed to restrict majority shareholders from varying or cancelling class shares:</p> <ul style="list-style-type: none"> ➤ Can be varied or cancelled only with the approval of a special resolution of both the company and the holders of the affected class <p>-The company can issue preference shares only if certain rights attached to those shares are set out in the company's constitution, otherwise, proved by resolution</p>
(d) Oppression Remedy (Topic 10)	S232	Enables members to apply remedy if the majority votes in favour of a resolution altering the constitution or replaceable rules that is contrary to the interests of the members

Under Common Law

Can the constitution be altered to compulsorily acquire the shares owned by minority shareholders?

X Expropriation	Allen v Gold Reefs of West Africa Ltd	<p>If an alternation did not involve an Expropriation of shares → The alternation was VALID. Unless the alternation is:</p> <ul style="list-style-type: none"> ➤ Beyond any purpose contemplated by the constitution; or oppressive
Expropriation of Shares		
(a) Expropriation of Shares	Gambotto v WCP Ltd	An alternation of a constitution involved an expropriation of the shares owned by _____ (minority shareholders) the alternation was valid only if the majority shareholders proved it is for a proper purpose and fair in all circumstances.
(b) proper purpose	Gambotto v WCP Ltd	<p>Proper purpose if prevents the company from suffering significant detriment/ harm:</p> <ul style="list-style-type: none"> ➤ Prevent a shareholder who is competing with the company ➤ Necessary to meet legislative requirements in relation to shareholders' maximum holdings ➤ If the minority's continued shareholding will be detrimental to the company + Expropriation is a reasonable means of eliminating this detriment.