

Major Changes To Company Law

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The *Company Law Review Act 1998* ("the *Act*") commenced on 1 July 1998. The *Act* ushers in the most profound changes to company law since the introduction of the *Corporations Law*. The objective of the *Act* is to improve the efficiency of corporate regulation and reduce regulatory burdens on companies and other users of the *Corporations Law*. As a separate part of the reform package, the Australian Securities Commission was replaced with the Australian Securities and Investments Commission ("ASIC") on 1 July 1998. In this article, Gabia Roberts and Christopher Lee highlight the principal changes to the *Corporations Law*.

Constitution

Companies now have a choice between having a constitution of their own making or relying upon provisions in the *Corporations Law* known as replaceable rules. Existing companies may choose to retain their current memorandum and articles of association as their constitution allowing the content of these to displace the replaceable rules in the *Corporations Law*. Neither the memorandum nor the articles of association are changed but they are collectively known as the constitution.

Replaceable Rules

While sprinkled throughout the *Corporations Law*, a table listing where the replaceable rules are to be found has been provided at section 141 of the *Act*. The replaceable rules come into effect if a company repeals its constitution altogether or specifically adopts particular replaceable rules. For companies incorporated after 1 July 1998, replaceable rules are the default position. Some of the replaceable rules are mandatory for public companies.

Common Seal

The use of a common seal has now become optional but the company's constitution may require the affixation of a common seal, in which case the provisions of the constitution apply.

Execution Without Common Seal

If a seal is not used, then the document (including a deed) will require the signature of either two directors or one director and the secretary of the company or for a proprietary company that has a sole director who is also the sole company secretary - that director.

Assumptions

The assumptions which an outside party could previously have relied upon under the *Corporations Law* continue to apply. In addition to the previous assumptions is the assumption that a document is properly executed when a document is executed without a company seal and is signed either by two directors, a director and a secretary, or by a director as sole director/secretary. This is in line with the removal of the need to have a common seal.

Australian Company Numbers

ACNs may appear at any place on the page of a public document in which the company's name first appears as opposed to the previous requirement that the ACN appear after the first occurrence of the company's name.

Registered Office

Proprietary companies are still required to have a registered office but are no longer required to have it open to the public. Examination of registers will be on a seven

day notice basis. A company must display its name prominently at every place at which the company carries on business and that is open to the public. A public company must also display its name and the words "Registered Office" prominently at its registered office.

Principal Place of Business

A company must lodge a notice of change of the principal place of business not later than 14 days after the date on which the change occurs.

Lodgement of Notices

The ASIC must be notified within 14 days of any change to:

- officeholders (previously 30 days);
- the registered office (previously 7 days); and
- alternate directors including their appointment.

ASIC Forms

Many ASIC forms that were prescribed in the regulations will now be forms approved by the ASIC.

Minimum 1 Member

Both public and proprietary companies are only required to have one member. Formerly, public companies (other than wholly owned subsidiaries) were required to have at least 5 shareholders.

Number of Directors

The requirements concerning the minimum number of directors continues unchanged. Proprietary companies must have at least one director (he or she must be ordinarily resident in Australia) and public companies must have at least three directors (at least two of whom must be ordinarily resident in Australia).

Directors' Meeting - Use of Technology

A director's meeting may be called or held using any technology consented to by all the directors. Any director will be able to veto the use of a particular technology by withdrawing their consent within a reasonable time before the meeting. This prevents directors threatening to withdraw their consent during the meeting and overcomes the uncertainty of meaning of the articles (or constitution) of many companies.

Members' Meeting - Resolutions Without Meetings

Shareholders of proprietary companies may pass any resolution (except in relation to the removal of an auditor) by obtaining the signature of every member on a statement setting out the terms of the resolution: they will not need to hold a meeting if all members sign. This has been possible since December 1995 for proprietary companies in relation to ordinary resolutions only. It is now extended to special resolutions.

Members' Meetings - Call By Director

In the case of listed companies each director has a right to call a meeting of the company's members. This is now a statutory right for a director of an Australian Stock Exchange ("ASX") listed company.

Members' Meetings - Call by Members

Members holding at least 5% of the votes have a right to call, convene and hold a meeting of shareholders. This right is now a right in law and is not displaceable by constitution. The member(s) calling the meeting must pay for the expenses of calling and holding the meeting.

Amount of Notice

All general meetings require 21 days' notice except that listed companies must give 28 days' notice of a meeting of members.

Short Notice

For general meetings other than Annual General Meetings ("AGM's"), members holding at least 95% of the votes will be able to agree to shorter notice. The previous requirement that short notice was to be agreed by a majority of the members (who between them had 95% of the votes) no longer applies. Greater flexibility is now given in that, for example, one member with 95% of the votes can consent to short notice.

Short Notice Not Allowed

Shorter notice will not be available for meetings involving resolutions to remove an auditor or replace a director (where the power to remove under the *Corporations Law* is sought to be used), ensuring that the auditor or director has sufficient time to respond to the resolution.

How Notice is Given

Notice of a members' meeting is required to be given individually to every member entitled to vote and to every director. This change recognises the importance of members receiving direct notice of meetings, even if they are overseas, in order to be able to exercise their rights. In addition to personal and postal service, notice can be given by the company by fax or electronically if a member so nominates.

Contents of Notice

It is now mandatory for companies to include in the notice of a members' meeting when, where and how the meeting is to be held, the general nature of the business to be considered, if the member is entitled to appoint a proxy and certain details concerning the appointment of proxies. If the meeting is to be held in 2 or more places, the notice must specify the technology that will be used to facilitate this. As is currently required, the notice must specify if it is intended to pass a special resolution and must state the resolution.

Holding Meetings Using Technology

Companies can take advantage of technology, such as video-links, in holding members' meetings at different places so long as the members as a whole have a reasonable opportunity to participate in the meeting. For most companies, a reasonable opportunity to participate would mean that each member is able to communicate with the chair and be heard by other members. Companies can choose to have a constitution restricting the use of technology to hold meetings or specifying acceptable technologies.

Quorum

There is a replaceable rule that the quorum for a members' meeting will be 2 for both proprietary and public companies. Public companies no longer require a quorum of 3 members unless its constitution provides otherwise. The replaceable rule reflected the reduction of the minimum number of public company members from 5 to 1.

Rights of Proxies

A proxy will have the same rights as the member to speak, vote and join in the demand for a poll at the meeting. Voting, however, is "*only to the extent allowed by the appointment*". A proxy will also be able to vote on a show of hands unless the constitution provides otherwise. This is a reversal of the previous position which required the company's constitution to specifically give the proxy that right.

Listed Companies - Receipt of Proxies

The notice of meeting for listed companies must specify a fax number for the receipt of proxies and may specify an electronic address.

Body Corporate Representative

A company is able to identify its representative by reference to an office, avoiding the cost of making another appointment if the specified person is not available. The appointment can be a standing appointment for all meetings which the company could attend as a member. The appointment can restrict the representative's powers, such as preventing them voting on a resolution without a meeting.

Annual General Meetings

Public companies must hold an AGM unless they have only one member. Proprietary companies are not required to hold an AGM. (This has been the position since the change to the *Corporations Law* in December 1995.)

Asking Questions At An AGM

The chair of an AGM must allow "*members as a whole*" a reasonable opportunity to question or comment on the management of the company and to question the auditor, if present at the AGM. The words "*as a whole*" confirm that each individual does not have the right to ask a question.

Minutes

Listed companies must record in the minutes of a meeting, in respect of each notified resolution, the total number of proxy votes exercisable by all proxies validly appointed together with how many proxy votes were directed to vote no, yes, abstain or were discretionary. This information must be given to the ASX where required.

No Par Value

The concept of par value is abolished for all shares whether issued before or after 1 July 1998 as are related matters as share premiums and share discounts.

Share Capital

A provision in a company's constitution which states the amount of the company's share capital or divides it into shares of a fixed amount is now repealed. (Notes, however, that a company may specify a numerical limit on the number of shares if it so desires.)

Limit On Further Share Issue

Members holding 5% of votes had until 30 September 1998 to serve a notice on the company under s.1427 of the transitional provisions. If they did so the limitation on issuing further shares as contained in the original memorandum continues.

Options

The previous 5 year limit on an option to take up unissued shares in a company no longer applies. There is now no time limit for exercising an option over unissued shares.

Capital Reductions

There is no longer the need for court approval for capital reductions, however, it must be fair and reasonable, must not materially prejudice the company's ability to pay its creditors and be approved by the company's shareholders. If it is an equal reduction, an ordinary resolution will suffice but it is a selective reduction, a special resolution will be required.

Financial Assistance

A company's ability to give financial assistance for the purchase of its shares or the shares of its holding company has been relaxed. The key tests are to determine whether giving the assistance would materially prejudice the interests of the company or its shareholders, or materially prejudice the company's ability to pay its creditors. If it does not, the financial assistance can be given without the need for any shareholder approval. If it would cause material prejudice, the assistance may still be given if either a listed exception is available or shareholder approval is obtained.

Directors' Report

The directors' statement is incorporated into a single directors' report. The directors' declaration is a declaration that the financial statements and notes comply with

accounting standards and truth and fairness and that the company is solvent.

Listed Company Director's Report

For a listed company, the directors' report must include:

- (a) the policy for determining the nature and amount of emoluments of board members and senior executives;
- (b) the relationship between the policy in (a) and the company's performance; and
- (c) details of the nature and amount of the emoluments of each director and each of the 5 named officers receiving the highest emolument.

Environmental Regulation

If a listed company's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory the directors' report for the financial year must disclose details of the entity's performance in relation to environmental regulation.

Annual Report

A company will be able to send its members a concise version of its annual report. A member may request that no report be sent. The annual return for a company has been shortened.

Incorporation

Setting up a company has been simplified so that only one form is required to be lodged with the ASIC. This is the new Form 201.

Companies Limited By Guarantee

Companies limited by guarantee are permitted to convert into companies limited by shares only where the rights of creditors would not be materially prejudiced. Conversion, however, may be challenged by members who claim oppression and by creditors seeking review of the ASIC's decision to change the company's status. No longer will 10% of members be able to challenge the conversion.

Limited By Both Shares and Guarantee

Companies are not permitted to be incorporated as companies limited by both shares and guarantee. Existing companies will be permitted to maintain their current status.

"Limited" In Name

Companies permitted to omit "*Limited*" from their names will be restricted to charitable organisations. Existing companies are permitted to maintain their current status.

Deregistration

It is now cheaper and easier to deregister a defunct company that has no outstanding liabilities. An advertisement in a newspaper notifying creditors and interested parties of its intention to apply for deregistration is no longer required.

Reinstatement

A deregistered company may be sued by a person without the need for an application to be made to the court to reinstate the company's registration.

Disclosure

Listed companies incorporated in Australia that disclose information overseas must also disclose that information in Australia.

It must be emphasised that this article covers only some of the more important changes to the *Corporation Law*.

The process of simplifying the *Corporation Law* is part of an ongoing process by the Federal Government known as the Corporate Law Economic Reform Programme ("CLERP"). Other legislation currently in the pipeline relates to accounting standards, fundraising, directors' duties and corporate governance, and takeovers and is still being reviewed by Parliament.

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