

## TYPES OF BUSINESS STRUCTURES

Pship; Ltd pship, Incorp Ltd pship; ST; Unincorp & Incorp Assoc. (non-profit entities); Co's limited shares; Public Co's: def s 9; Pty Co's: def s 45A(1) Co's ltd guarantee; Unlimited Co's: def s 9; No-liability Co's: s 254M

## CORPORATE SOCIAL RESPONSIBILITY

Trad view: primary goal profit maximisation, benefit shareholders.  
Modern view: CSR: wider social responsibilities. Consider interest of other important stakeholders (employees, suppliers, consumers, broad comm & enviro)  
**Ford v Dodge:** was CSR, but said no profit max. Prob upheld now.  
Trend: Aus: CAMAC Report: consider CA amended to legally oblige D's consider broad interests. Found no amendment, view act already allows D have regard broader stakeholders without being mandatory: *Dodge v Forde*  
**S 172 UK Co Act:** directors regard interest of employees, long term consequences, relationships with customers and suppliers, community and environmental reputation.  
**Exxon Debate:** shareholder revolt over headline approach to global warming. Firm refused to follow rival oil co's committing large scale capital investment to environmentally friendly technology wind power and solar.

## Company Directors and Officers

Co must act through directors: *Ferguson v Wilson*. S 198A (RR) provides business Co be managed by Ds. Ds not obtain SH approval sell Co's only business: *Strong v J Brough & Son*

## POWER WITHIN THE COMPANY: BOD and GM S-holder

- D only partic manage, not SHs: *Dep Com Tax v Clark*
- Cunninghame:** if powers management vested in Ds, only they can use.. GM cannot usurp board's role. [Ds of Co ordered by GM to sell Co's property, refused. Held: directions of GM were nullity, could be ignored by Ds. Consti gave management powers to BOD, incl power sell Co's property. Members not interfere with Ds as contractually bound by constitution.]
- Canadian Aero Services Ltd v O'Malley*
- SCC & B Lintas NZ Ltd v Murphy*
- Pacific Shipping Co Ltd v Anderson*
- Automatic Self-Cleansing Filter Syndicate v Cuninghame*
- Stanhma v National Trust of Aus:* also clear that if persons requisition meeting for purpose of dealing with matter that is *ultra vires* the meeting, no obligation on those responsible for calling meeting of include matter in notice of meeting.
- NRMA v Parker:** SHs called meet. Business of meeting to direct board to do something consti said only board do as part of management. Ds refused call meeting even though 200+ shareholders request, b/c propose invalid. Held: board management decisions, not SHs. Ds entitled refuse act on requisitions, b/c shareholders attempting to usurp Ds power of management in s 198A.
- Qld Press Ltd v Academy Instruments No 3 PL:** under consti D power sell shares Co owns or shares in Co. SHs objected, requisitioned meeting try sale. Court: Ds entitled to refuse to call requisition meeting.
- John Shaw (Salford) Ltd v Shaw:** prevent GM attempting override decision board bring legal actions against some Ds. Held BOD properly exercising powers management, GM couldn't usurp power. If Ds purport to exercise power that should properly have been exercised by GM, their action can be ratified by ord res of GM and improper exercise of power becomes valid.

**SHs in GM cannot usurp directors management powers: *Cunninghame; John Shaw & Sons.* Supported by *NRMA v Parker Qld Press; Stanham.***

## Functions and powers of the board

- Usually broad power of management; SHs usually power to appoint/replace Ds.
- Functions of board:**
- NB: Ds not have to obtain SH approval to sell Co's only business: *Strong v J Brough & Son*
  - Power of Co to take legal action is management part
  - Where conflict (eg self-interest) on board where D's decide not pursue litigation exercising management power s 198A
  - Element self-inter & no pursued litigation in *Marshall's*
  - Where interests justice demand, power initiate suit on Co's behalf not confined to board, even though strictly management power in s 198A(1); *Kraus v JG Lloyd PL*
  - Gen rule:** if Ds "interested" in stopping corp action being initiated, standard line no interference with D's management power on longer holds. SHs can "usurp litigation power otherwise controlled by Ds.
  - Deadlock** of BOD, members GM exercise reserve power and make managerial decisions.
  - Consti determines respective powers of board & GM. NB: RR's – members change consti if wish. SR 75%.

## Shareholders bring actions

**Marshall's Valve:** management decision whether Co brings legal action. Members "interfere" & initiate actions certain ltd circs. Facts: Co owned rival patent, SHs wanted action preserve patent. Some Ds interest in another Co wanted patent. Court: SHs interfere & bring action element self interest in directors provided exception.  
**Automatic Self-Cleansing Filter Syndicate Co v Cunningham** – directors of co ordered by GM to sell Co's property. Ds refused to do, relying on provision in

Consti similar s 198A. Members argued Consti subject to overriding rule that D, as agents of Co, obliged to follow instructions of principal, the Co; the will of Co being a resolution of GM. CA reject argument. Held directions of GM were a nullity that could be ignored by directors. Constitution gave management powers to board of directors, included power to sell co's property. Members could not interfere with Ds in this respect as were contractually bound by Consti.  
**John Shaw & Sons (Salford) Ltd v Shaw** – principle applied to prevent GM attempting to override decision of board to bring legal actions against some Ds. Held BOD properly exercising powers of management vested in it by constitution and GM could not usurp power. If directors purport to exercise a power that should properly have been exercised by GM, their action can be ratified by an ordinary resolution of GM and improper exercise of power becomes valid.

**Self interest on the Board:** s 191 & 195: Ds public Co's must (1) declare interests, (2) leave room interests considered; (3) not vote.

## Definition of a Director – s 9 "director" as

(a) a person who: (i) appointed to position of D; or (ii) appointed to position of alternate director & acting in that capacity; regardless name given to position; and (b) unless contrary intention appears, person not validly appointed as D if: (i) act in position of D; or (D in fact even though not properly appointed – DFD) (ii) directors of Co or body accustomed act in accordance with person's instructions or wishes." (shadow director)  
• Subparagraph (b)(ii) N/A merely because Ds act on advice given by person in proper performance of functions attaching to person's professional capacity, or person's business r'ship with Ds or Co or body."

## "De facto" and "shadow" directors

- CAC v Drysdale:** continued act after term expired. Liable DFD for breaches duty, despite not properly appointed. (attended meetings, voted, took part in decisions). Person may be regarded as DFD if driving force behind Co, despite not appointed position, or continues participate management Co after expiration of term of appointment as D.
- S 201M:** DFD bind Co "act done by D effective even if appointment invalid"
- Venture Acceptance Corp Ltd v Kirton:** D not hold
- # qual shares. Co went bad, said not D b/c qual shares, decision not valid. Court applied s 201M – decisions valid.
- NB: DFD & SD can be liable breaches Ds duty, even though not properly appointed (ie personally liable Co's debts s 588G
- Re Hydrodam (Corby) Ltd:** Ds parent Co issuing orders to subsidiary Co Ds. Subsid Ds accustomed to act – each Co sep. **Ds of parent held to be shadow Ds s 9.**
- Need:** patterns behaviour board not exercise any discretion or judgment of own, but acted accordance direction of others
- Grimaldi:** G external consultant, into Co, threw weight into boardroom. Negotiated mining rights in Fiji, prepared prospectus for funds, organised appointment to board of new directors, brought people onto board. Held: were high level management decisions, decisions director would make. He was "doing the work of a director", held de-facto, liable for breaches of directors duty (s 180, 181, 182), breach FD.
- DFC of T v Austin:** Q of degree, consideration duties performed in context of operations and circs of Co. Necessary condition acting D: person exercised top level management functions. Re small Co: where person acted as Co in relation to important matters, may indicate person acted in capacity of director. Large Co: many important matters are delegated to employees and exercise of such discretions not necessarily indicate person is D. Also consider how person claimed to be D is perceived by outsiders who deal with CO where person been held out to be D.
- Shadow:** instructions or wishes customarily followed. Not regarded D merely b/c Ds act advice given by person in performance of functions attaching to person's professional capacity, or business r'ship with directors. "accustomed to act in accordance"

## Exec. Non-Exec and CEO:

- Executive:** Employee & D; On board for expertise. SHs (qual shares), interest in Co
- Non Exec:** Not employees; appointed objectivity & outside experience; should be independent (no business contact/ affiliation with Co's execs); No lower standard care: *Daniels v Anderson*;
- Audit committee:** oversees financial decisions of board
- Nominating committee:** selection of directors
- Compensation committee:** remuneration of D and senior executives. **S 202A(1)** remun of Ds must be voted by members by GM. (Ss can take back power to determine remuneration of Ds)
- Managing Directors (or CEO):** Dual capacity. Employee. 198C: Ds may confer (or revoke) powers on MD. *Harold Holdsworth (Wakefield) v Caddies*: if need be, BOD can control & limit powers MD. RR 201J empowers Ds appoint MD. NB: Ds cannot delegate all functions to MD, nor rely blindly expert opinion

## APPOINTMENT OF DIRECTORS

- S 201A: Pty Co have at least 1 D, public Co at least 3 Ds

- Where # of validly appointed Ds falls below min #, purported acts of board such as passing res invalid, however court may validate irregularity s 1322(4): *Gosford Christian School v Totanjan*
- Persons under 18 can't be appointed as Ds: s 201B(1)
- Cannot be a body corporate, must be a natural person
- At least 2 Ds of public Co must ordinarily reside in Aus. Pty: at least 1 must reside in Australia: s 201A(1) and (2)
- Can be D of >1 Co. Same person be D + secretary of Co.
- D must consent writing to being appointed to position. Co must keep copy of consent, but not have to be lodged ASIC. Application for reg of new Co must have consent when application is lodged with ASIC: s 117(5)
- Co contravenes s 201D if person not give Co signed consent to act as director before being appointed.
- s 201G - RR:** subsequent appointments Ds be made by SHs res passed at GM.
- Public Co's: where appointment of Ds by GM, each D must be individually appointed by separate resolution: s 201E
- >1 D may be appointed by single resolution if GM has first unanimously agreed to resolution to that effect: 201E(1).
- RR s 201H** – provision Ds to appoint other D to fill casual vacancy. (other than retirement). Pty Co: appointment must be confirmed by res of SHs within 2 mths after appointment made: 201H(2). If public Co, appointment must be confirmed by members at Co's next AGM: 201H(3)
- Single D/SH of Pty Co may appoint another D by recording appointment and signing record: s 201F
- Appoint or remove by simple majority at GM
- Consti of CO may require D to hold min # shares in Co.
- In voting for Ds, 1 share 1 vote usually. Cum & class voting. Cumulative: save votes, smaller SHs more power, greater chance rep on board. Class: only ppl in class can vote

**RETRING:** Usual retire rotation. 1/3 board per/yr. Eligible stand re-election.  
**200B(1):** retirement benefits to be approved by GM.  
**Brehm v Eisner:** big payout to top exec that board wished to remove. Court held decision wasn't negligent as bad publicity and director hopeless.

## Removal:

**Pty CO** by resolution remove from office: s 203C(a)  
**Public Co:** by res remove D from office: s 203D(1)  
Sacking director genuine power of shareholders. Directors themselves cannot remove fellow director: s 203E – *Re EPHS Ltd Stavrou*  
Special notice required for sacking motion: 2 months. D right be heard at meeting and circulate views.

## Dismissals in breach of service contracts

*Southern Foundries Ltd v Shirlaw*  
*Shindler v Northern Raincoat Co Ltd:* MD dismissed in GM as director. Couldn't be MD. Consti says remove director by ordinary director, need to be director to be MD. Should have realised could be removed easily. 10 year contract cut short, pay dismissal and breach of payment, even though within constitution  
*Stirling v Maitland:* "if a party enters into arrangement which can only take effect by continuance of a certain existing state of circumstances, is implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative." Can't exploit situation to remove someone  
*Carrier Australasia Ltd v Hunt*

**Mitigation damages:** must. Cannot turn away satisfactory alternative work.  
*Brice v Calder:* D dismissed offered and refused suitable alt employment. Awarded only nominal damages.

## Remuneration of directors and executives

- D no inherent right to be paid.
  - D to be paid remuneration Co determines by res: s 202A(1) (RR) - sanctions payment of travelling & other expenses properly incurred by Ds in connection with Co's business.
  - S 300(1)(d):** annual report contain details of share options
  - Disclosure:** Must disclose Ds remunerations if 5% votes or 100 members request: s 202B
  - Must disclose all remuneration paid to Ds regardless of whether paid to D in capacity as D or another capacity.
  - Statement must be audited, sent to members and laid before next general meeting: s 202B(2)
  - Annual Directors' Report must contain remuneration in clearly identified segment: s 300A (incl top 5 officers of company (non board) and each directors remuneration) directors money, top 5 execs, group of Co's, top 5 elces in group. "details the nature and amount of each element of emolument of each director & each of 5 named officers of Co receiving highest emolument.
  - Must be discussion at AGM shareholders have advisory vote: s 209R
  - Resolution will be put – s 249L
- CONTROLS OVER EXEC REMUN (shareholder dissatisfaction)**  
*Guinness P/L v Saunders:* £5.2m to D, repaid as unauthorised. Action alleging breach of FD: not acting best interests of Co. Share price on market declining rapidly. Amount halved.

*Re Viacom Inc:* Shareholders litigation: \$150m granted in compensation to Chair and 2 execs.

## Disclosure of Remuneration

CLERP 9 extended remun disc req. Time at GMs required SHs discuss remun (s 250SA); non-binding votes whether SHs adopt remun report (s 250R) – "advisory vote". AASB 1017 requires disclosure pay to Ds. AASB 1046. ASX Listing Rule 4.10.3 also requires disclosure of remuneration

## FIXING REMUNERATION

D not entitled receive any remun unless specifically permitted by shareholders, RR or consti: *Re George Newman & Co*

- Consti sometimes provide remun fixed by board under contract of employment. Not breach law to provide in consti that Ds may fix own remuneration: *Sail v SPC*
- Guinness – see notes**
- Payment excessive remun Ds may constitute oppressive or unfair conduct (232), especially where dividends not paid or reduced to small amount
- S 588FE(6A):** provides un'ble D related transactions entered into during 4 years prior to Co's WU are voidable. Ci's liquidator apply for court order requiring repayment of unreasonable amounts.
- An unreasonable D-related transaction incl un'ble remuneration to Ds or their close associates: s 588FDA

## Non-binding vote on remuneration report:

- Listed Co's: SHs right to express opinion, hold Ds accountable for, remuneration policies as chair must allow r'ble opportunity for discussion by SHs of remun report at AGM: s 250SA
- listed Co: must put & allow SHs vote on non-binding res as to whether adopt remuneration report: s 250R(2) and (3)
- notice meetings must inform SHs, such res be put: s 250L(2)
- non-binding SH res strengthened with 2-strike & re election process.

## 2-Strikes Rule: s 250U – 250Y

- If at least 25% votes cast AGM on res that remun report be adopted under ss 250R(2) against adoption of report; & at immediately preceding AGM at least 25% of votes cast on res that remun report be adopted also against adoption of report → board spill resolution must be put at latter AGM.
- ASB: s 1017 – disclosure to pay directors
- Listing Rule: 4.10.3 requires disclosure of remuneration

**Pty Co's:** Large: often subsidiaries of public Co's, s 45A defines – ply Co that isn't small is regarded as a large ply co. Small: S 45A(2): Pty Co regarded "small" for financial yr if satisfies at least 2 of following: consolidated operating revenue for financial year of Co and entities it control less than \$25m; value of consolidated gross assets at end of financial year of Co and entities it controls is less than \$12.5m; Co and entities it controls have fewer than 50 employees at end of financial year.

## PUBLIC COMPANIES: S 9: Co other than Pty. More onerous disc.

**NL Co:** Co's engaging mining. Public Co may be reg as NL Co or convert to one under s 162. To be registered, NL Co must: have share capita: state in consti that sole objects are mining purposes; have no contractual right under consti to recover calls made on shares from shareholder who fails to pay a call: s 112(2). Prohibit from engaging activities outside mining purpose objective( s 112(3)). Must have words "No Liability/NL" end name: s 148(4).

**Co Limited by Shares & Guarantee:** no longer be reg. Those in existence allowed remain. Essential feature: member of Co need not contribute more than aggregate of following: any sums unpaid on any shares held by member, & amount member undertaken to contrib to Co's property if Co WU. Co Ltd Guarantee: NFP: can't make profit for benefit members.

## Classes of shares

**Ord:** dividend entitlements not expressed terms fixed % issue price shares. dDividends if Co surplus profits after payment of pref shares divs. **Pref:** cannot be classed as pref share unless preferential rights over another class shares: *Beck v Weinstock*: higher claim assets & earning Dividend paid out before common & shares usually not voting rights. Priority in liquidation. Fixed dividend, **Founders:** or deferred shares. Holders only have rights to dividends if prescribed amount been paid to ord S. R'ship between deferred and ord similar to ord and pref shares.  
**Redeemable pref:** Co pay back issue price shares to S ("redeem"). May be redeemed at fixed time or option Co or shareholder: s 254A(3). Redeem pref shares only redeemed on terms which they were issued: s 254A(1). **Participating pref:** if S has right to receive additional dividends + preferential dividend entitlements. If Co WU, participating pref shareholders presumed at CL to be entitled to receive surplus capital after repayment of capital contribution: *Re Plashett Pastora Co*. Pref shares presumed to be non-partic where entitlement not expressly stated in Co's constitution: *Will v United Lankat Plantation*. **Cumulative Pref:** can be cum or non-cum. If Co not pay dividends in particular yr, cum pref S have right to be paid arrears of dividends in subsequent yrs ahead of ord S. Pref shares presumed to be cumulative if Co constitution silent on matter: *Webb v Earle*. **Voting rights:** pref usually have ltd voting rights.

## RATIFICATION

*Members GM ratify past acts & approve future actions of directors.*  
**Beatty:** B sold steamship to Co and didn't tell was owner. As D should negotiating sale/purchase, driving price down. Personal interest to drive price up. Informed GM of conflict, proposed rat. B owned 280 shares. Rat passed 309 votes. Other SHs angry. Q whether could vote his shares when wrongdoer. Held: sep defaulting D, but forgiven in effect, can vote own shares as SH distinct from D

**Under Statute:** (1) Must be declared; (2) D cannot be in room when contract being considered; (3) Can't vote as D in boardroom  
 NB: breach of s 181 (loyalty)  
**Bamford:** Ds power issue new shares. Court: BOD issue shares control purposes. Shareholder at GM rat. Upheld.  
 • NB limits to rat by GM not clear cut. Some breaches duty committed in bad faith & acts ultra vires couldn't be ratified.  
**Forge:** can't ratify stat prov (civil penalty) b/c public rights involved.

## DISQUALIFICATION OF DIRECTORS

Insolvents, fraudsters and those breach corp law automatically excluded from "managing corps" for 5 years: s 206B

## Managing a Corporation

### Explained s 206A

Person who disq from MC commits offence if they:

- Make or participate in making decisions that affect whole or substantial part of corporations business; or
- Exercise capacity affect significantly Corps financial standing; or
- Communicate instructions or wishes to Ds knowing they are accustomed act in accordance with instructions or wishes or intending Ds act in accordance with those instructions or wishes

**Commissioner Corp Affairs v Bracht:** bankrupt participated in making decisions that affected substantial part of Co's business, therefore involved in MC. [Neg credit facilities with suppliers, rent increase with lessor of factory leased to Co, discussions with Co's bank manager regarding obtaining of bank guarantee.]  
**Managing Corp:** involves > performing clerical or admin acts. Exercise some responsibilities, need not involve exercise control.

## AUTOMATIC DISQUALIFICATION

S 206B(1): auto disq MC if convicted certain crim offences that:

- Concern making of decisions that affect business of Corp or concern an act with capacity to affect significantly corp's financial standing (s 206B(1)(a))
- Contravention CA punishable by imprisonment for period > 12 mths or other offence involving dishonesty punishable by imprisonment at least 3 mths: 206B(1)(b)

- If person imprisonment, period disq 5 yrs from release from prison
- If not serve term impris, period of disq if 5yrs from date of conviction: s 206B(2)
- ASIC apply to court before expiration of first year of automatic disqual to extend period up to further 15 years: s 206BA
- S 206B(3): auto disq person from MC if is an **undischarged bankrupt**. Similar auto disq applies to person who executed deeds of arrangement under **Pt X of the Bankruptcy Act 1966** (Cth) that have not been fully complied with or whose creditors accepted compositions and final payment has not been made: CA s 206B(4)

## COURT POWER

Contravene civil penalty provision: s 206C(1):

- Court power disq person from managing corps where court declared under s 1317E that person contravened civ pen provision.
- NB: app can only be made by ASIC. Court must be satisfied disq order is justified. Disq period court considers appropriate. (no fixed duration of disqualification)
- S 206C(2) directs court regard person's conduct, in relation to management, business or property of any corp and any other matters considered appropriate
- Insolvency and non-payment of debts – s 206D

## Failed companies

- 206D(1): power disq person MC up to 20 yrs if, within last 7 years, person officer 2+ failed Co's & court satisfied manner in which corp managed was responsible for failing  
*Applications can only be made by ASIC*
- 206D(2): corp regarded having failed if, eg, is compulsorily WU on grounds insolvency or enters voluntary admin & creditors unlikely to be fully paid
- Court to be satisfied order is justified
- Determining, 206D(3): directs court regard person's conduct in relation to management, business or property of any Corp and any other matters considered appropriate.

## Repeated contraventions of Corps Act

S 206E(1): power disqualify person MC if has at least twice:

- Officer of body corporate that has contravened CA & each time person failed take r'ble steps prevent contravention; or
- Contravened CA whilst he/she was an officer
  - Application only made by ASIC
  - Court must be satisfied disqual. is justified
  - 206E(2): regard to person's conduct in relation to management, business or property of any Corp and any other matters considered appropriate

→ No fixed duration (period court considers appropriate)

## ASIC's Power of Disqualification

- s 206F: power disq up to 5 yrs of someone involved in managing at least 2 insolvent Co's within 7 years.

- Person disq MC may only be appointed as D if appointment made with ASIC's permission 206F(5) or with court leave granted s 206G: s 201B(2)
- 1274AA requires ASIC keep register of persons disq from MC. (avail for public inspection)
- ASIC must give person "show cause" notice requiring person demonstrate why should not be disq & opportunity to be heard on question: s 206F(1)(b)
- ASIC may give notice: s 206F to person if within last 7 yrs has been officer 2+ Co's that were WU & whose liquidators lodged reports under s 533(1) about inability to pay debts
- If ASIC disq person from MC under s 206F, must serve notice on person advising of disq, takes effect from time notice is served

## Leave to manage

S 206G(1): apply court for leave MC or particular Corp. Must lodge notice with ASIC at least 21 days before apply for court leave: s 206G(2) (not lightly given)

- Court consider circs of disq, nature of applicant's involvement, general character & conduct since disq. Also takes account of structure of Co's and their businesses, interests of shareholders, creditors & employees including assessment of any risk to those persons & public which could arise from applicant obtaining leave: **Adams v ASIC**

S 206F(5): ASIC give disq written permission to manage particular corp or corps.

## Managing a corporation while disqualified

Commits offence – s 206A(1)

S 588Z: enables liquidator apply to court for order that person who contravened 206A be made personally liable for specified part of Co's liabilities.

**Re van Reesema:** refused permission act as D. Wanted back in management - shareholders distressed, need his leadership to make Co work. Judge refused leave.

**Zucker:** Readmitted. Suitcase forged US bank notes, banned from Co, sought permission come back. Vic SC let back in as D, even though Co director of had large turnover & suitable liabilities. Good past offence behaviour swayed court, "forgery not nice, but nothing to do with Co behaviour, not a management offence"  
**Re Schneider:** No permission to act as D, but could act in management. B/c: unblemished previous record before offence, evidence that had great respect from business community, no chance of him reoffending. Presence back in Co important for health of Co (good at running it, employees & creditors said might suffer if he left out of management).

**Adler:** A had breached all director provisions (180, 181, 182), received severe penalty, given 20 yrs to not be on board, point of case: judge said that this was a penalty. Although protection of public was the major factor, but no doubt it is also a penalty → imposition of penalty sanctioning of activities to society, making an example of you

**Rich:** HC: disqualification order imposed to protect Co's shareholders against further abuse; by way of punishment & general deterrence.

**Beekink:** protect public by providing deterrence others involved management corps

**Vizard:** ASIC sought 5yr disq over V's admission to breaches of s 183(1). Gave 10 years. Gen deterrence primary importance. V used confidential info trade approx \$850,000 worth of shares.

→ ASIC power of disq under "show cause" notice, s 206F.

**CCA v Chew:** Chew D & secretary, repeatedly failed comply Co's code & CA. Didn't put reports in on time, didn't notify regulator of changes in Ds; Failed lodge annual returns for Co's in charge of (40 occasions). ASIC asked him be banned, sent notice to ban 5 yrs & was to show cause why shouldn't be. Was banned **CCA (WA) v Ekemper:** Co repeatedly failed lodge financial returns, secretary banned from being officer of Co.

## SHAREHOLDERS' AND DIRECTORS' MEETINGS

### Annual General Meetings for public companies

- Must hold 1st AGM within 18mths of reg: s 250N(1). After, must hold AGM at least 1 every cal yr, within 5mths of end of its financial year: s 250N(2)
- May get ASIC's permission to extend stat periods: s 250P(1)
- Failure to hold AGM is offence under s 1311

### Meetings of proprietary companies

- Not required by CA to hold AGM
- Res can be passed without GM if all members entitled to vote & sign doc states agreement to res: s 249A(2), 249B(2)

**Meetings BOD:** Co's consti board manages Co: s 198A

### Directors' (board meetings (BM))

- Any D can convene board meeting: s 248C
- General rule that Ds entitled to r'ble notice of BM: **Eastern Resources Aus v Glass Reinforced Products**
- **Petsch v Kennedy:** BM must be formal enough to be effective.
- D must intend to be meeting or acquiesce to meeting proceeding. Casual discussions of affairs of Co insufficient: "informal discussion 'over coffee' between P & M not qualify as Ds meeting": **Society Manage v Pickering & McKenzie**
- Notice period must be r'ble in circumstances
- **Barron v Potter:** attempted surprise meeting on railway plat ineffective. Cannot force another into Ds meeting against will.

- Casual meetings not invalid – r'bleness of notice assessed in circs each case. D must intend there be meeting & be aware meeting taking place.
- Quorum at BM 2 Ds, until otherwise determined: 248F
- A maj of those Ds entitled to vote decide issues: 248G
- 'interested directors' excluded (s 195 for public Co's)
- Board res can be passed by circulating docs, permitted 248A.
- Technology permitted to run BMs, if all Ds consent 248D

## General Meetings

General meetings convened by directors

- Any D may call meeting of members: 249C (249CA list Co's)
- Ds must act *bona fide* & in Co's best interests when exercising this power. (Fid power: **Pergamon Press v Maxwell**)
- S 249C and 249R: members' meetings to be held for proper purpose and at a reasonable time and place

## Meetings convened by members: s 249F

- Members at least 5% votes cast GM, right call GM 249F(1)
- Co's constitution cannot take this right away
- However, meeting called under sec could be postponed by Ds, if consti permits: **Pinnacle VRB v Ronay Investments PL**
- While members exercise right, must ensure meeting held for PP & called same way GM of shareholders called: s 249F(2)

## Meetings requested by members: s 249D

- When members with at least 5% of votes cast at GM, or 100 members together request, Ds of Co must call & arrange to hold a GM: s 249D(1)
- Ds must call meeting within 21 days of receiving request, & hold meeting within 2 months of request: s 249D(5)

- BOD may refuse requests where not 'bona fide for PP'
- Harassing Co's manag, itself not PP: **Humes v Unity APA**
- S 249D(2): request be in writing, state Res to be proposed at meeting, be signed by members making request and be given to Co. If Ds fail to respond to request, requisitioning members, or those members with >50% of requisitioning group's votes, may convene meeting: s 249E. Co must reimburse requisitioning members for "r'ble expenses": 249E(4)

## Meetings convened by the court: s 249G(1), s 1319

- Where *impracticable* for meeting to be called any other way, court may order a meeting: s 249G(1)
- s 1319: court give any directions concerning convening, holding or conduct of meetings sees fit, if asked by D or any member entitled vote meeting: s 249G(2)
- Impracticable to hold a meeting? **Jenashare PL v Lemrib PL:** "impracticability cover wide range of circs, eg all killed to extremely inconvenient 4 meeting to be called"

**Re South British Insurance:** impracticable for Co hold meeting in manner prescribed by articles, "genuine fear on r'ble grounds of repetition conduct min shareholders to deprive maj rights. Min SHs threatened disrupt business of meeting.

## Notice of Meetings

- Written notice of meeting of members must be given individually each member entitled vote at meeting: 249J(1) & also to Co's Ds: s 249J(1) & auditors: 249K
- SHs need notice of meetings, decide whether interests require them to attend (or appoint proxy): **Re Adams International Food Traders PL; McLure v Mitchell; Symes v Weedow**

• If notice calls SHs together for particular purposes, other unrelated matters cannot be considered, unless all Co's SHs present & agree to waive notice formalities: **Ephstathis v Greek Orthodox Comm of St George; McLure v Mitchell**

## Time

- at least 21 days notice of members' meeting: 249H(1)
- Co's constitution may specify longer notice: s 240H(1)
- AGM may be called on shorter notice, if all members entitled to attend & vote in meeting agree beforehand: s 249H(2)(a)
- Any other GM can be convened with less notice, if members with at least 95% of votes that may be cast at meeting agree in advance: s 249H(2)(b)
- Shorter notice not permitted for meetings of members of *public Co*, where meeting convened to consider Res to remove D or appoint replacement D.
- Can't give shorter notice when removing auditor: 249H(3), (4)
- Listed Co: despite anything in consti, must be min 28 days notice: s 249HA(1)

## Manner

- Notice of meeting should be given personally, or by sending it by post to member's address found in register of members, or by sending to member's nominated fax/electronic address, or by another means in Co's constitution: s 249J(3)
- **Jenashare PL v Lemrib PL:** where Co's articles provide notices of meetings to be delivered personally/ by post, Co's intending to use fax machines must update articles of association.
- Notice by fax or other electronic means is taken to be given on business day after it was sent: s 249J(4)
- Notice by post taken to be given 3 days after posted: 249J(4)
- Meeting not invalid, despite lack of notice, unless court orders it invalid under s 1322.

## Content of notice

- Meagre notice, or notice "artfully framed" will not do: **McLure v Mitchell; Henderson v Bank of Australasia**
- Must fairly & reasonably give purpose of meeting in clear language: **Devereaux Holdings PL v Pelsart Resources NL (No 2); Jenashare PL Lemrib**
- Content must enable 'man on street' on run' to absorb & understand substance of meeting's business: **Killen v Marra Developments; Alexander v Simpson**
- Must be notice of place, date & time of meeting, gen nature of meeting's business & nature any special res to be proposed: s 249L. If meeting be held 2+ places, members must also be notified of technology used: s 249L(1)(a) and 249S.
- Notice must say if member can appoint proxy & whether proxy needs to be member of Co: s 249L(d)

## Notice of members' proposed resolutions

- If some members given Co notice of res propose to move at GM under s 249N, Co must give all members notice of intended res when gives notice of meeting; or as soon as practicable after gives notice of meeting: s 249O(2)
- Not required give notice of intended res, if notice more than 1000 words or defamatory: s 290O(5)

## Quorums

- Members' meeting = 2: s 249T, RR
- Co's constitution may specify another quorum
- Where Q not present 30 mins after scheduled start, meeting adjourned to time, date & place specified by Ds: 249T(3)
- CL – business cannot proceed without quorum.
- Under CA, absence of Q merely a 'procedural irregularity' and meeting may proceed: s 1322.
- Court can make order declaring as much: **Re Pembury PL**
- BM: Co's consti may say D shall not vote on any contract with Co in which interested. Interested Ds cannot be counted towards board quorum: **Re Greymouth Point Elizabeth Railway and Coal Co Ltd; Wilson v Permasnow (A'asia) Ltd**

## The role of the chair (C)

- If Co's consti not deal with chairing of meetings, s 249U (RR), provides Ds must elect individual to chair. D's say appoint D to chair D's meetings: s 248E.
- Members must elect C, if C not previously elected by Ds: s 249U(3)
- Power from board of GM. Controls conduct of meeting, cannot arbitrarily refuse to accept motions put from floor or board membership: **Wishard v Henneberry**, or refuse to put legitimate amendments: **Henderson v Bank of Australasia**.
- *Authority to preside over meeting not give dictatorial power:* makes C 1<sup>st</sup> amongst equals, imposes certain duties including taking C & carrying on business so business of body in Q before meeting disposed of as meeting desires, also presiding order at meeting: **Wishart**
- **Rich:** court take account peer expectations, governance law literature & authoritative recommendations on best practice in assessing what might be expected from C. Sometimes expect more from C than other non-exec Ds. "articulate & apply standard of care reflects contempt community expectations"
- C can adjourn meeting, provided exercises power 'bona fide, purpose forwarding & facilitating meeting, not purpose of interruption or procrast.": **John v Rees**
- Demonstrate impartiality, hearing both sides debate before reaching conclusion: **Re Bomac Batten Limited**.
- At BM, chair has original vote + casting vote – s 248G(2) (RR). No CL rule to vesting vote. May be inequitable for C exercise casting vote if implied undertaking not be used.
- Face disruptive tactics: **Re South British Insurance:** chair confronted at meeting what 'pandemonium, caused by something under ¼ of those present chanting, shouting, singing and blowing whistles". Similar events occurred next yr at AGM. No discussion of business possible. Acting under equiv s 249G, ordered meeting to be conducted with controls on debate and behaviour.
- **AWA Ltd v Daniels:** responsible > extent any other D for performance of board as whole & each member. Chair primary responsibility selecting matters & docs to be brought board's attention, formulating policy of board & promoting position of Co.

## Voting

- Co consti often provide Res be decided show hands, unless poll demanded. Where show hands used, dec by C conclusive evidence result: s 250J(2)
- Poll = vote cast writing, express voting power according to No voting shares held.
- If member thinks SoH not reflect true voting shares weight, can request poll.
- 5 members entitled to vote, or members with at least 5% of votes which may be cast, or C can call poll: s 250K, s 250L.
- If Chair improperly rejects proper demand for poll, any attempted res's voted on without poll may fail: see **Chew Investment Aus v Gen Corp fo Aus**
- A person entitled to 2+ votes can cast them diff: s 250H
- A Co may authorise specified person to act as representative at meetings of Co's members, or at meetings of creditors or debenture holders: s 250D
- Drawn vote = res fails. No CL right of C to have casting vote: **Nell v Longbottom**