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The Law of Close Corporations

Australia

National Reporter for Australia:

Dr Pamela Hanrahan

Melbourne Law School, The University of Melbourne

Melbourne, Australia

e-mail: p.hanrahan@unimelb.edu.au

This Report explains the law and practice of close corporations in Australia. The emphasis is on close corporations as a legal form for small and medium-sized enterprises, including family businesses. These corporations are characterised by the following typical features: (1) legal personality, (2) limited liability, (3) small number of shareholders, (4) no ready market and transfer restrictions for the shares, and (5) shareholder participation in management.

I. General Information on Close Corporations in Australia

In Australia, the principal legal business form for closely held firms with the typical features of a close corporation (including separate legal personality and limited liability) is the **proprietary company limited by shares**. These companies have the words "Proprietary Limited" or the abbreviation "Pty Ltd" after their name. The proprietary company is a distinct type of company, different from a public company. The distinction between public and proprietary companies in Australia goes back to the late 19th century.

In order to register as (and remain as) a proprietary company, the company must:

- have at least one shareholder (who may be a natural person or a body corporate) and may not have more than 50 shareholders (excluding employees)
- have at least one director who is a natural person over the age of 18 years and who is ordinarily resident in Australia
- not undertaking fundraising activities requiring the issue of a prospectus under Australian law. In effect, this means that a proprietary company cannot raise capital by way of a public offer of securities.[1]

In return for foregoing to ability to raise capital in this way proprietary companies are usually exempted from a number of statutory requirements that work to protect the interests of outside shareholders of public companies, such as compulsory audit and disclosure of financial statements, the requirement for an annual general meeting, and statutory restrictions relating to appointing and removing directors, and transacting with directors and majority shareholders.

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[1] Corporations Act s 113.

From 1 January 1901 (when the Commonwealth of Australia was formed) until 2001, companies legislation was the responsibility of the various state governments; however from the 1960s onwards state governments moved towards increasing uniform laws and co-operative approaches to administration and regulation. In 2001, power to make laws with respect to companies was referred by the states to the Commonwealth government. The principal piece of legislation covering the formation, operation and regulation of Australian companies (both public and proprietary) is now the *Corporations Act 2001* (Cth). Chapters 2A (registering a company), 2B (basic features of a company), 2C (registers), 2D (officers and employees), 2F (members' rights and remedies), 2G (meetings), 2H (shares) and 2J (transactions affecting share capital) of the *Corporations Act* are particularly pertinent to proprietary companies, and Chapter 5 deals with the external administration of companies (including companies being wound up in insolvency). The other chapters of the *Corporations Act* are more relevant to public companies, including related party transactions restrictions (Chapter 2E), financial reporting and audit (Chapter 2M) and continuous disclosure (Chapter 6CA). The *Corporations Act* also contains the Australian law regulating collective investments schemes (Chapter 5C), takeovers (Chapters 6 – 6C), fundraising by the offer of securities (Chapter 6D), and financial services and markets (Chapter 7).

Administration of the companies laws is the responsibility of the Australian Securities and Investments Commission (ASIC), which is an independent agency of the Commonwealth government responsible for the registration of companies and for (among other things) corporations, securities and financial market regulation.[2]

The 2001 Commonwealth legislation was closely based on the earlier uniform laws that had been adopted by the Australian states, including the Corporations Law of 1991. A number of reforms directed simplifying the law and reducing the regulatory burden on proprietary companies were made to that legislation during the 1990s. Among other things these reforms allow for the formation of true 'one person' proprietary companies.[3] Since then, the law applying to proprietary companies in Australia has remained fairly stable. The introduction of a separate legislative framework for close corporations in Australia was considered in the late

[2] See the *Australian Securities and Investments Commission Act 2001* (Cth).

[3] Before these reforms, every proprietary company was required to have at least two natural persons as directors. Now, a company can be formed with only one person as its sole director and shareholder.

1980s,[4] but the proposal did not proceed and it is unlikely that it will be revived. No significant law reform affecting the matters in this report is currently proposed.

As at June 2013, there were 2,012,241 registered companies in Australia, of which 1,990,292 were proprietary companies limited by shares.

Of these proprietary companies, ASIC estimates that about 49% have only one shareholder; a further 38% have two shareholders and the remaining 13% have more than two shareholders. Overall, a significant majority of Australian proprietary companies have only natural persons as shareholders (80-87%). About 12% have only corporations as shareholders (indicating they are part of a corporate group) and the remainder have a mix of natural persons and corporations as shareholders.[5]

Hybrid business forms and corporate-type uncorporations, which combine elements of partnership and corporate law (e.g. LLC, LLP) and which are present in other jurisdictions, are not available in Australia, The registered company is the only business form for closely held firms that has the attributes of separate legal personality and limited liability.

II. Formation of a Close Corporation

Registering a new proprietary company in Australia is simple and quick. An applicant for registration completes a form (in paper or on-line) and lodges it with ASIC. If the required information concerning the new company's proposed name (which may be the same as the nine-digit Australian Company Number allocated to it by ASIC on registration), its share structure, its officers and members, and the address of its registered office is provided and the prescribed fee (currently AUD 444.00) is paid, ASIC will register the new company within one business day. The company comes into existence as a body corporate at the beginning of the day it is registered. [6]

There is no minimum capital requirement. Nor are issued shares required to have a par value ascribed to them.

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[4] Close Corporations Bill 1998.

[5] This statistical data is based on an analysis of ASIC's companies register as at 23 September 2013 conducted at the request of the reporter by Richard Harrison and Alex Erskine of ASIC, whose generous assistance is gratefully acknowledged. The record of their analysis is held by the reporter.

[6] Corporations Act Pt 2A.2 and ASIC *Annual Report 2011- 2012*.

For its internal governance rules (the equivalent of articles of association), a proprietary company may choose to adopt a **constitution** which is customised for that company, or instead to rely in whole or in part on a set of 42 standard rules, located in the *Corporations Act* but operating as contractual rather than statutory provisions, known as the **replaceable rules**. The way in which these internal governance rules operate is explained in Section III below. An applicant for registration of a proprietary company is not required to provide the internal governance rules to ASIC or to have them approved.

III. Articles of Association and Shareholder Agreements

Until 1998, Australian companies were required to have both a memorandum of association and articles of association. The legislation was amended in 1998 to simplify the position by allowing a company to adopt a constitution, or to rely instead on default internal governance rules located in the *Corporations Act*.[7]

Accordingly, a proprietary company's internal management may be governed by provisions of the *Corporations Act* that apply to the company as replaceable rules, by a constitution, or by a combination of both. (The replaceable rules do not apply, however, to a proprietary company while the same natural person is both its sole director and sole shareholder; instead three specific statutory provisions deal with the appointment, powers and remuneration of the director for these companies.) Although they are located in the *Corporations Act*, the replaceable rules are differentiated from the other statutory provisions by having the words 'replaceable rule' in the heading to the section; a failure to comply with the replaceable rule is not of itself a contravention of the *Corporations Act*.

The 42 replaceable rules deal with a range of matters related to the internal governance of the company, including appointment, removal, powers and remuneration of officers, members' right to inspect the company's books, directors' meetings, members' meetings, dividends, and transfer and transmission of shares. A constitution would usually deal with similar matters. There is no need to include a statement of the objects of the company; under Australian law the legal capacity and powers of companies are conferred by statute and the doctrine of *ultra vires* does not operate.[8]

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[7] Corporations Act Pt 2B.4.

[8] Corporations Act ss 124 and 125. A constitution may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers, or set out the company's objects. However the exercise of a power is

For a company that adopts a constitution, there are no standard terms or mandatory minimum content requirements.

The binding nature of the constitution and the replaceable rules derives from statute. The *Corporations Act* provides that a company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:

(a) between the company and each member;

(b) between the company and each director and (if it has one) company secretary;

(c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.[9]

Because the internal governance rules operate as a contract between the company and each member, the company and each officer, and the members *inter se*, they are interpreted in accordance with rules of contractual rather than legislative interpretation.

A company may adopt a constitution on registration by agreement between the members. After the company is registered, it may adopt, modify or repeal the constitution, or a provision of the constitution, by a special resolution of the members in general meeting. (A special resolution is one is respect of which the prescribed notice has been given and that is passed by at least 75% of the votes cast by members entitled to vote on the resolution.) A constitution may provide for additional hurdles and restrictions for its amendment or repeal; if so these must also be followed.

Constitutional amendments that have the effect of varying or cancelling the rights attaching to shares in a class of shares must follow a special statutory procedure, under which a special resolution of the affected class, as well as that of the members as a whole, must be given and dissenting members comprising at least 10% of the class have a right to approach a Court to have the variation or cancellation set aside on the basis that it would unfairly prejudice them.[10]

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not invalid merely because it is contrary to an express restriction or prohibition, and an act of the company is not invalid merely because it is contrary to or beyond any specified objects. Instead, such exercise or act is a contravention of the statutory contract created by Corporations Act s 140.

[9] Corporations Act s 140.

[10] Corporations Act Pt 2F.2.

Members of a proprietary company are free to enter into separate shareholder agreements (contractual side agreements) and these may be used to deal with matters not covered by the company's internal governance rules. As with a constitution, a shareholders' agreement cannot displace a mandatory requirement of the *Corporations Act.* The enforceability of a shareholders' agreement depends on ordinary principles of contract law; it binds only those persons who are parties to it. Where a provision in a shareholders' agreement is inconsistent with a provision of the company's constitution or the replaceable rules (whichever applies), ordinary principles of contract law apply; usually the later agreement if it is binding will be taken to vary the earlier one as between the same parties. There are no mandatory disclosure requirements relating to shareholder agreements.

Paradigm case 1: All founding shareholders of a close corporation enter into a voting agreement among themselves. Validity and enforceability of such an agreement? Specific requirements such as written form? Legal spillover-effect on the corporate sphere: influence on the construction of the articles of association? Contestability of shareholder resolutions that deviate from the shareholder agreement?

Key principles: A voting agreement entered into between shareholders in a proprietary company is valid and enforceable as between the parties to that agreement, according to ordinary principles of contract law.[11] There is no formal legal requirement that the agreement be in writing.

A voting agreement cannot take away rights conferred by the *Corporations Act* or the company's internal governance rules (that is, the constitution or replaceable rules) such as the right attend and vote at a meeting of shareholders or the right to appoint a proxy. 'Contractual rights as between shareholders or as between shareholders and third parties, while they may ultimately affect what happens in a company's affairs, should not intrude into the administration of the company's affairs as governed by the *Corporations Act* and by the company's constitution. For example, it would produce an impossible situation if a company with a large membership had to ascertain at every general meeting whether every shareholder was subject to contractual or other obligations to third parties which regulated whether the shareholder was entitled to attend and vote, or was required to vote in any particular way. In determining the voting rights of shareholders, a company should be required to have regard to nothing more than the Corporations Act and its constitution.'[12] However as between the parties, the terms of an agreement to refrain from voting or to vote in a particular way will be enforceable. Agreements as to how votes attaching to shares will be exercised are not uncommon and there is no obstacle in principle in enforcing them by the remedies of specific performance and injunction.[13]

[11] That is, there must be agreement, consideration, intention to create legal relations, and certainty.

[12] *Cordiant Communications (Aust) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322 at [131] per Palmer J.

[13] *Cordiant Communications (Aust) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322 at [162].

IV. Internal Governance and Management of the Company

The allocation of competences between shareholders' meeting (shareholders) and management body (board of directors) is determined by the company's internal governance rules (that is, the constitution or the replaceable rules, whichever apply), the *Corporations Act* and the general law of companies (that is, applicable principles of common law and equity).

In most proprietary companies, the board of directors is given a general power of management by the company's internal governance rules. For example, the replaceable rules provide that 'the business of the company is to be managed by or under the direction of the directors'.[14] In such cases the board of directors is competent to make all decisions and exercise all corporate powers other than those expressly reserved to the shareholders in general meeting by the internal governance rules, the *Corporations Act* or the general law. The board of directors is not subject to the instructions or wishes of the general meeting in relation to matters within its competences.[15]

There are certain things that a proprietary company can do only by way of a resolution of shareholders in general meeting. (These are the mandatory competences of the shareholders' meeting.) Under the *Corporations Act*, a shareholders' resolution is required to adopt, amend or repeal a constitution or constitutional provision,[16] to change the company's name or type,[17] to vary or cancel rights attaching to classes of shares,[18] and to undertake certain transactions affecting share capital, including conducting certain types of share buy-backs and reductions of capital.[19] A company's internal governance rules usually confer additional powers on the shareholders in general meeting, including to appoint and remove directors and to approve their remuneration, but this is not mandatory.[20] Finally, the shareholders' meeting has certain residual competences that arise under the general law. These may include the right to resolve that the company be wound up, the right to pass resolutions when the board is unable to act,

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[14] See the replaceable rule in Corporations Act s 198A.

[15] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34; *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113.

[16] Corporations Act s 136.

[17] Corporations Act Pt 2B.6 and Pt 2B.7.

[18] Corporations Act Pt 2F.2.

[19] Corporations Act Pt 2J.1 and Pt 2J.3.

[20] See, for example, the replaceable rules in Corporations Act ss 201G, 201H, 201J, 201K, 202A, 203C.

the right to ratify breach of a directors' general law duties, and in relation to a decision to commence legal proceedings against wrongdoing controllers or directors.

The management of the company is the responsibility of its director or, if there is more than one director, the board of directors. Usually a board must act by way of a properly convened directors' meeting for which the notice and quorum requirements set out in the company's internal governance rules must be met.[21] The board may delegate its powers to a single director (such as a managing director), a committee of the board, or some other person.[22] If it does so, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves unless the director can show that he or she believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on director by the *Corporations Act* and the constitution (if any), and the director believed on reasonable grounds, in good faith and after making proper inquiry if the circumstances indicated the need for inquiry, that that delegate was reliable and competent in relation to the power delegated. [23]

The manner of appointment and removal of directors will be specified in the company's internal governance rules. For companies that rely on the replaceable rules, a director may be appointed by an ordinary resolution of the members or by the board itself so long as the appointment is confirmed by an ordinary resolution of members within two months. The replaceable rules also provide for a director to be removed by ordinary resolution of the members in general meeting. However a proprietary company is free to adopt different arrangement for appointing and removing directors in a constitution.

Regardless of what is specified in the internal governance rules, to be eligible to be appointed as a director in Australia, the person must be a natural person aged over 18 years, must give their consent, and must not be disqualified from managing a corporation (for example, because they are a bankrupt or because they have been convicted of an offence of dishonestly or disqualified by order of a Court).[24]

There are statutory restrictions on indemnities, insurance and termination payments for company officers. For example, a company cannot exempt a person from a liability to the

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[21] See, for example, the replaceable rules relating to directors' meetings in Corporations Act ss 248A, 248B, 248C, 248E, 248F and 248G.

[22] Corporations Act s 198D.

[23] Corporations Act s 190.

[24] Corporations Act ss 201B and 201D and Pt 2D.6.

company incurred as an officer; and it cannot indemnify a person against liabilities (other than for legal costs) incurred or to third parties arising out of conduct involving lack of good faith, or to the company itself or a related body corporate. It cannot indemnify an officer against certain civil penalties or compensation orders made under the *Corporations Act*. It may indemnify officers against legal costs in certain proceedings, including criminal proceedings in which the person is acquitted.[25]

There is no recognition in Australian law of additional corporate bodies such as supervisory boards or advisory boards.

Australian proprietary company directors are subject to a number of statutory and general law duties that apply to the discharge by them of their functions and powers. The main statutory duties require that a director:

- exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director of a corporation in the corporation's circumstances and occupied the office held by, and had the same responsibilities within the corporation, as the director;[26]
- exercise their powers and discharge their duties in good faith in the interests of the corporation, and for a proper purpose;[27]
- not improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to the corporation;[28]
- not improperly use information obtained because they are, or have been, a director to gain an advantage for themselves or someone else or cause detriment to the company;[29] and
- prevent the company from incurring a debt while it is insolvent or that causes its insolvency, in circumstances where the director knows or ought to know there are reasonable grounds for suspecting the company is insolvent.[30]

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[25] Corporations Act Pt 2D.2.

[26] Corporations Act s 180.

[27] Corporations Act s 181.

[28] Corporations Act s 182.

[29] Corporations Act s 183.

[30] Corporations Act s 588G.

Each of these duties is a 'civil penalty provision' for the purposes of the *Corporations Act*.[31] This means that the duties can be enforced by ASIC, not just the company. If a director contravenes one of these duties, ASIC may apply to a Court for a declaration of contravention and for certain consequential orders, including pecuniary penalties (if the contravention materially prejudices the interests of the company or its members, or materially prejudices the company's ability to pay its creditors, or is serious),[32] orders disqualifying the director from managing companies in future (if the Court is satisfied that disqualification is justified),[33] and orders that the director compensate the company for any damage suffered by it that resulted from the contravention (including any profits made by any person resulting from the contravention).[34] The company may apply for compensation orders.[35]

Additional rules apply to interested directors. A director who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of that interest under the *Corporations Act*, unless certain exceptions apply.[36]

Certain general law duties (arising at common law and in equity) also apply to company directors; they are not excluded or codified by the *Corporations Act*, but operate in conjunction with the statutory duties. These duties are owed to the company, not to individual shareholders, creditors or other stakeholders. Directors are in a fiduciary relationship with the company, and as such may not act in circumstances in which there is a real and sensible possibility that the director's personal interests or duty to another person may conflict with their duty to the company, without the company's fully informed consent. Nor, as fiduciaries, may they make their office, or any information or opportunity arising from it, a source of profit from themselves or someone else without the company's fully informed consent. However the operation of the fiduciary principles is affected by the company's internal governance rules. The company's internal governance rules will usually provide that, if the director has given the required notice of his or her interest in a matter, the director may vote on matters that relate to the interest; any transactions that relate to the interest may proceed; the director may retain benefits under the transaction even though the director has the interest;

[31] Corporations Act s 1317E.

[32] Corporations Act s 1317G(1).

[33] Corporations Act s 206C.

[34] Corporations Act s 1317H.

[35] Corporations Act s 1317H.

[36] Corporations Act ss 191, 192 and 193.

and the company cannot avoid the transaction merely because of the existence of the interest.[37]

Paradigm case 2: A shareholder serving as a director usurps a corporate opportunity for his own profit. Liability vis-à-vis the company? Enforcement mechanisms within the company? Derivative action of minority shareholders? Validity of indemnification clauses in the articles of association or the service contract?

Key principles: A director who takes a corporate opportunity for his or her own profit without having first obtained the fully informed consent of the company is in breach of his or her statutory and general law duties as a director. The director is liable to account to the company for the profit received. The company may bring proceedings either under the *Corporations Act* for breach of the director's duty not to misuse his or her position,[38] or for breach of fiduciary duty.[39]

If the company refuses to proceed against the wrongdoing director, a minority shareholder may be able to bring a derivative action. The *Corporations Act* contains a statutory mechanism allowing a shareholder to bring proceedings on behalf of (and in the name of) the company with the leave of the Court.[40] On the application of a shareholder, the Court must grant leave if five condition are met: (1) it is probable that the company will not itself bring the proceedings; (2) the applicant is acting in good faith; (3) it is in the best interests of the company that the applicant be granted leave; (4) there is a serious question to be tried; and (5) notice of the application has been given to the company or the requirement for notice is waived by the Court.[41]

Alternatively, the director's conduct may be the basis for a claim by a shareholder for relief under the statutory remedy for oppression,[42] or may be grounds for an order that the company be wound up.[43]

The Corporations Act provides that a company cannot exempt a person from a liability to the company incurred as an officer, and cannot indemnify a person against a liability owed to the company. An indemnification clause in the company's internal governance rules or the director's service contract is void to the extent it contravenes the statutory prohibition.[44]

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[37] See, for example, the replaceable rule in Corporations Act s 194.

[38] Corporations Act s 1317H allows a company to obtain compensation or an account of profits where a director has contravened his or her statutory duty not to improperly use their position to gain an advantage for themselves.

[39] See e.g., *Cook v Deeks* [1916] 1 AC 554; *Pacifica Shipping Co Ltd v Anderson* [1986] 2 NZLR 328; *SEA Food International Pty Ltd v Lam* (1998) 16 ACLC 552.

[40] Corporations Act Pt 2F.1A. The statutory mechanism replaces (and abolishes) the general law right of a person to bring, or intervene in, proceedings on behalf of a company under the exceptions to the rule in *Foss v Harbottle*.

[41] Corporations Act s 237.

[42] Corporations Act ss 232 and 233; s 461(1). See e.g. *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; *Re Bright Pine Mills Pty Ltd* [1969] VR 1002; *Webb v Stanfield* (1990) 2 ACSR 283.

[43] Corporations Act s 461(1).

[44] Corporations Act ss 199A and 199C.

V. Transfer of Shares

A share in a proprietary company is a form of personal property recognised by Australian law. It belongs to the person whose name appears in the register of members maintained by the company in accordance with the requirements of the *Corporations Act*. It is transferable or transmissible as provide by the company's internal governance rules and is capable of devolution by will or by operation of law.[45] For example, the replaceable rules provide for the transmission of shares on death, bankruptcy or mental incapacity.[46] A company's internal governance rules may impose restrictions or requirement on the transfer of shares. For example, the replaceable rules provide requirements for registration of transfers and give directors of a proprietary company a discretion to refuse to register a transfer for any reason.[47]

Usually, shares in a proprietary company are transferred by lodging a written transfer of shares in the agreed form with the company, signed by the person shown in the register as the current member and the person intending to become the member. The company then alters the register of members to remove the name of the transferring shareholder and include the name of the new shareholder, at which time the transfer occurs. But the precise legal and formal requirements for a particular company depend on ordinary principles of contract law and the terms of the company's internal governance rules and any relevant and binding side agreements (such as shareholder agreements). For example, the company's internal governance rules or a shareholder agreement might include pre-emption rights, drag-along rights, tag-along rights, board approval requirements, shareholder approval requirements, founding shareholder approval requirements and so on. These are, as a matter of practice, commonly adopted by close corporations in Australia.

For example, the replaceable rules provide that the directors are not required to register a transfer of shares unless the transfer and any share certificate have been lodged at the registered office, any fee payable on registration of the transfer has been paid, and the directors have been given any further information they reasonably require to establishing the right of the person transferring the shares to make the transfer, and that they may refuse to register the transfer if the shares are not fully-paid or are subject to a lien. The replaceable

[45] Corporations Act s 1070A.

[46] See the replaceable rules in Corporations Act ss 1072A, 1072B and 1072D.

[47] See the replaceable rules in Corporations Act ss 1072F and 1072G.

rules also allow directors to suspend registration for up to 30 days in a calendar year. They give the directors a general right to refuse a transfer of shares for any reason.[48]

Where the directors or the shareholders in general meeting have the power to refuse or restrict share transfers, those powers must be exercised in accordance with statutory and general law principles that work to protect the interests of the company and of individual shareholders. These are explained in Section IV (directors' duties) and Section VII (shareholder conflicts) of this report. In particular:

- Any decision by a director or the board to delay or refuse a transfer of shares must be made in conformance with the directors' statutory and general law duties, including their duty to act in good faith in the interests of the company and for a proper purpose. A decision to refuse to register a transfer of shares that amounts to a fraud on the power (that is, that is made for a purpose outside of or inconsistent with the purpose for which the power to refuse transfers was conferred on directors) amounts to a breach of the directors' duties.
- A controller or majority shareholder is not a fiduciary under Australian law. A shareholder may vote in his or her self-interest. However the equitable doctrine of fraud on the minority places some limits on the kinds of resolutions the majority can pass. If the majority passes a resolution which no body of reasonable persons could have supposed to be within the scope of the majority's power, having regard to the contemplated purposes of the company, the resolution is liable to be declared void by a Court.
- An aggrieved shareholder has a statutory right to seek relief from a Court in cases of oppression.
- An aggrieved shareholder can apply to a Court for the winding up (that is, dissolution) of the company on various grounds, including oppression.

Paradigm case 3: A statutory or contractual provision makes the transfer of shares dependent on the company's approval. A shareholder wants to sell his shares, but does not receive the required approval in the shareholder meeting. Causes of action for the shareholder willing to leave the company? Judicial review of the shareholder resolution?

Key principles: There is no statutory requirement that transfer of shares is dependent on the company's approval.

Where a contractual provision (appearing in the internal governance rules or a shareholder agreement) requires company approval, that approval would usually be a matter for the board

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[48] See the replaceable rules in Corporations Act ss 1072F and 1072G.

of directors unless the relevant provision specifically provided that the approval must be given by the shareholders in general meeting.

In proprietary companies there is no legal or policy reason for assuming that shares should be freely transferrable. Where the participants in a proprietary company have given either the board or the general meeting the power to refuse registration of a transfer, they are entitled to exercise that power. Neither the board nor the general meeting owes fiduciary duties to the shareholder. However a refusal may be contrary to law: (1) if the board is in a breach of directors' duties; (2) if the refusal by the general meeting amounts to a fraud on the minority; or (3) the refusal (by either the board or the general meeting, as the case may be) is oppressive, unfairly prejudicial to or unfairly discriminatory against the shareholder, triggering the statutory oppression remedies or providing grounds for a winding up order.

If the consent of the directors is required, the law of directors' duties applies. Directors are in a fiduciary relationship with the company (although not, in the absence of special circumstances, with the individual shareholder) and any discretions they have (including the discretion to refuse to register a transfer) must be exercised in good faith in the interests of the company and for a proper purpose. Directors may not exercise that power for an improper purpose (for example, to force the shareholder to sell to the directors instead at a lower price). However the directors may consider a wide range of matters in deciding whether to register a transfer.[49]

If the power to refuse a transfer is given to the general meeting, the shareholders are free to exercise their voting rights in their own interests and do not owe fiduciary duties to the proposed transferor. That said, the majority cannot commit a fraud on the minority. The proposed transferor would be entitled to complain to a Court if the majority passed a resolution that no body of reasonable persons could have supposed to be within the scope of the majority's power, having regard to the contemplated purposes of the company.

Paradigm case 4: The parties of a joint venture agree in the articles of association or in a separate shareholder agreement that if the majority shareholder sells his stake, the minority shareholder has the right to sell his stake at the same terms and conditions (tag-along right). Conversely, if the majority shareholder sells his shares, the minority shareholder is forced to join the deal (drag-along right). Validity of those clauses?

Key principles: Such agreements are enforceable under Australian law. If the provision appears a shareholder agreement, its enforceability depends on ordinary principles of contract and the principles discussed in paradigm case 1 above. If it is in the internal governance rules, it will be binding all shareholders, including anyone who subsequently becomes a shareholder.[50]

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[49] See e.g., *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 15 ACLR 230 at 286.

[50] This is because the internal governance rules operate as a contract between the member and the company, and the members *inter se*, under Corporations Act s 140.

VI. Expulsion and Withdrawal of Shareholders

As a general rule, there is no statutory mechanism for expelling shareholders from proprietary companies against their will, or for allowing them to redeem their shares or withdraw from the company on request.

However a company's constitution or a shareholder agreement may give a shareholder a put or call option in respect of shares, on whatever terms (including terms as to triggers, valuation and compensation) the parties have agreed. In these cases ordinary principles of contract law apply.

Following an important decision of the High Court of Australia in 1995, it is clear that shareholders cannot amend a company's constitution to provide for the involuntary expropriation of shares or of valuable proprietary rights attaching to share except in the very limited circumstances where the continued presence of a shareholder is causing significant detriment or harm to the company (for example, because the company cannot pursue its principal business activity if a particular person is a shareholder) and, then, only if there is procedural and substantive fairness in the expropriation process.[51]

While the law allows the transfer of shares between shareholders, principles of maintenance of capital prevent the redemption or repurchase of shares by a company (either on the company's initiative or the shareholder's) otherwise than in accordance with the statutory procedure for share buy-backs and reductions of capital explained below, or by Court order. Courts have on occasion ordered the redemption or transfer of particular shareholders' shares under the statutory remedies available for oppression. Where this occurs, the parties to the litigation will be asked to arrive at an appropriate valuation to be adopted by the Court. In relation to a proposed expropriation of shares in a listed company, the High Court of Australia has said that a shareholder's interest "cannot be valued solely by the current market value of the shares. Whether the price offered is fair depends on a variety of factors, including assets, market value, dividends and the nature of the corporation and its likely future".[52]

Generally, ordinary shares in a proprietary company cannot be redeemed or repurchased by the company otherwise than in accordance with defined statutory procedures relating to share buy-backs and reductions of capital. The statutory procedures are intended to "protect the interests of shareholders and creditors by addressing the risk of these transactions leading to

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[51] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[52] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

the company's insolvency, seeking to ensure fairness between the company's shareholders and requiring the company to disclose all material information".[53]

An Australian company cannot own shares in itself and any shares it acquires by way of back-back or reduction must be cancelled.[54]

The first statutory procedure relates to share buy-backs.[55] A buy-back involves an offer by the company to purchase shares, which may be accepted or rejected by the shareholder. There is an absolute statutory prohibition on a company making a buy-back offer if it would materially prejudice the company's ability to pay its creditors. Beyond that, different procedural requirements apply depending on the nature of the offer (for example, if it is made pro-rata to all shareholders, or is selective).

A selective buy-back offer (that is, one made only to a particular shareholder or shareholders) must be approved either by a special resolution of the shareholders in general meeting, with no votes being cast in favour of the resolution by any person whose shares are proposed to be bought back or by their associates, or by a resolution agreed to, at a general meeting, by all ordinary shareholders. The notice of meeting must include a statement setting out all information known to the company that is material to the decision how to vote on the resolution. The written offer, accompanied by a statement setting out "all the information known to the company that is material to the decision whether to accept the offer", must be lodged with ASIC 14 days before the meeting. Any shares transferred to the company by a shareholder accepting the offer are cancelled.

The second procedure relates to other reductions of capital.[56] A reduction of capital, if conducted in accordance with the statutory procedure, is binding on all shareholders affected by it even if they do not agree. A reduction of capital can only occur if it is fair and reasonable to the company's shareholders as a whole; it does not materially prejudice the company's ability to pay its creditors, and it is approved by shareholders in accordance with the statute. Again, the approval requirements depend on whether the reduction is an equal reduction (apply to all ordinary shareholders pro rata) or a selective reduction. Special shareholder approval is required for a selective reduction. It must be approved either by a

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[53] Corporations Act s 256A.

[54] Corporations Act Pt 2J.2.

[55] Corporations Act Pt 2J.1, Div 2.

[56] Corporations Act Pt 2J.1, Div 1.

special resolution of the shareholders in general meeting, with no votes being cast in favour of the resolution by any person who is to receive consideration as part of the reduction or by their associates, or by a resolution agreed to, at a general meeting, by all ordinary shareholders. Where the reduction involves the cancellation of shares, it must also be approved by a special resolution passed at a meeting of the shareholders whose shares are to be cancelled. The notice of meeting must include a statement setting out all information known to the company that is material to the decision how to vote on the resolution, and must be lodged with ASIC.

Another alternative for removing particular shareholders is through a reorganisation of the company's capital by way of a Court supervised scheme of arrangement[57] but this is not routinely done in this context.

Paradigm case 5: A minority shareholder is expelled for good cause. Does he receive compensation for his shares? How is the compensation measured in the absence of contractual provisions (e.g. full compensation, fair value, liquidation value)? What is the role of courts and/or valuation experts in determining the compensation? Is a valuation clause valid that allots compensation at book value to the exiting shareholder?

Key principles: A minority shareholder cannot ordinarily be expelled, whether for good cause or otherwise, unless the company's internal governance rules or a shareholders agreement provides for this (and that is rare). That said, a Court may order that a minority shareholder be bought out by another shareholder or by the company in cases where the minority shareholder has acted in a manner that is contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity, under the statutory remedies provided to shareholders under the *Corporations Act*. It is likely under Australian law that the majority shareholder is not precluded from being an applicant under the statutory remedy. If a Court does order that the minority shareholder sell its shares, the Court will fix the basis for compensating the minority shareholder, based on a range of factors related to the fair value of the shares.

VII. Shareholder Conflicts

1. Oppressive Misconduct by the Majority Shareholder

The wide freedom of contract given to shareholders in proprietary companies means that shareholders who are in a position to negotiate for the inclusion of self-protection mechanism (such as veto rights, insertion of supermajority requirements, nomination rights, special rights of minority shareholders such as the right to serve as a director, and for minimum or priority

[57] Corporations Act Pt 5.1.

dividends[58]) are free to do so. Where these arrangements are included in the company's constitution they will be binding on the company and all present and future shareholders and officers.[59]

Under Australian law, a majority shareholder is not treated as a fiduciary, and does not owe fiduciary duties to the company or to the minority shareholders. The equitable doctrine of fraud on the minority, discussed above, places some constraints on the majority shareholder's exercise of its voting rights in a general meeting, but the starting principle is that the shareholder is free to vote in his or her own self-interest, so long as the resolution is not one which no body of reasonable persons could have supposed to be within the scope of the majority's power. Nevertheless the general law imposes severe limits on the majority's power to amend a company's constitution to expropriate shares or valuable proprietary rights attaching to shares.[60] The equitable principle has also been applied to defeat attempts by a majority to use its power to authorise the improper expropriation of property, advantages or rights which belong to the company[61] or to block the commencement of legal proceedings against wrongdoer controllers.[62]

In Australian law, the main protections against oppressive misconduct by the majority shareholder are statutory. These remedies are available to any shareholder; they are:

- **The oppression remedy**. A shareholder has standing to complain to a Court if the conduct of a company's affairs, or an actual or proposed act or omission by or on behalf of a company, or a resolution or proposed resolution of members or a class of members, is either contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity of in any other capacity. Where the cause of action is made out, a Court may make any order it considers appropriate in relation to the company, including an order that the company be wound up; that the company's existing constitution be modified or repealed; regulating the conduct of the company's affairs in future; for the purchase of shares by a member; for the purchase of shares by the

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[58] This is subject to an overriding restriction that a company may not pay a dividend unless it has an excess of assets over liabilities, the payment is fair and reasonable to all shareholders, and the payment does not materially prejudice the company's ability to pay its creditors: Corporations Act s 254T.

[59] Corporations Act s 140.

[60] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[61] *Menier v Hooper's Telegraph Works* (1874) LR 9 Ch App 350; *Ngurli Ltd v McCann* (1953) 90 CLR 425..

[62] *Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 11 ACLC 1082.

company with an appropriate reduction in the company's capital; for the company to institute, prosecute, defend or discontinue specified legal proceedings or authorising a member to do so; appointing a receiver or a receiver and manager to any or all of the company's property; restricting a person from engaging in specified conduct or from doing a specified act; or requiring a person to do a specified act.[63]

- **Winding up**. A shareholder can approach a Court to ask for an order that the company be wound up in various circumstances, including if directors have acted in a manner that appears to be unfair or unjust to other members, or if a resolution is passed or if the affairs of the company are conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member.[64] However Courts are reluctant to order the winding up of solvent companies, when other remedies are available.
- **Statutory injunction**. The legislation allows any person whose interests have been, are or will be affected by conduct that contravenes or would contravene the *Corporations Act* to apply for orders restraining the conduct. If a person is refuses or fails to do something required by the Corporations Act, a person affected can ask the Court to order that it be done.[65] This remedy is particularly useful to minority shareholders where directors are proposing to act in breach of their statutory duties, or where procedural requirements or voting restrictions imposed by the *Corporations Act* have not been observed. Shareholders can use the statutory injunction to require the company to observe the various personal rights granted to them by the Corporations Act, such as the right of a shareholder with more than 5% of the shares to require that a general meeting be held[66] or to have resolutions put before a general meeting;[67] and to require the preparation and audit of financial statements;[68] and to inspect the minutes of shareholder meetings[69] and the share register.[70]

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[63] Corporations Act Pt 2F.1.

[64] Corporations Act s 461.

[65] Corporations Act s 1324.

[66] Corporations Act ss 249D and 249F.

[67] Corporations Act s 249N.

[68] Corporations Act ss 293 and 301.

[69] Corporations Act s 251B.

[70] Corporations Act s 173.

- **Statutory right to inspect the books of the company**. A shareholder may to apply to a Court for an order that they or their representative can inspect the books of the company, if the member is acting in good faith and the inspection is for a proper purpose. 'Books' is broadly defined and includes registers, financial reports and records, and other records. Proper purposes include obtaining information to enable the shareholder to calculate the value of shares, or about possible breaches of directors' duties.[71]
- **Statutory derivative action**. Derivative actions are legal proceedings commenced by someone other than the company itself (for example, a shareholder) in respect of a cause of action belonging to the company (for example, against a director for a breach of a duty owed to the company). In Australia, derivative action may only be commenced and conducted in accordance with the statutory procedure adopted in 2000, displacing the general law exceptions to the rule in *Foss v Harbottle*.[72] Under that procedure, a shareholder may apply to the Court for leave to bring a derivative proceedings in the name of the company; the Court must allow it if it is probable that the company will not itself bring the proceedings or properly take responsibility for them; the applicant is acting in good faith; it is in the best interests of the company that the applicant be granted leave; there is a serious question to be tried; and either the applicant has notified the company of their intention to apply and the reasons for it, or it is appropriate to grant leave despite the lack of notice. The fact that a majority shareholder has ratified or approved conduct does not prevent a person commencing derivative proceedings, but it is a factor the Court takes into account in deciding whether to grant leave. The Court has general powers to make relating to costs, and to make orders and give directions in connection with derivative proceedings, including directions relating to the conduct of proceedings (including requiring mediation) and for the appointment of an independent person to investigate and report to the Court the financial affairs of the company, the circumstances giving rise to the proceedings, and costs incurred.
- **Statutory protection of class rights**. The variation or cancellation of rights attached to shares in a class of shares can only occur in accordance with any procedure set out in the company's constitution, or if the company does not have a constitution or the

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[71] Corporations Act s 247A.

[72] (1843) 2 Hare 461. See Corporations Act Pt 2F.1A.

> constitution does not deal with the question, by a special resolution of both the whole company in general meeting, and a special resolution of the affected class. If the consent of the affected class is not unanimous, then the variation or modification may be reviewed by a Court on the application of shareholders with at least 10% of the votes in the affected class. The Court may set aside the variation or cancellation if it is satisfied that it would unfairly prejudice the applicants; otherwise the variation or cancellation must be confirmed.[73]

In addition, individual shareholders have certain personal rights arising at general law that can be enforced through the courts. Generally the remedies available to individual shareholders are limited to declarations and injunctions, rather than an award of compensation. For example, shareholders have a personal right to enforce provisions of the company's internal governance rules against the company and other shareholders, at least where the relevant provision confers rights on them that are personal to them as a shareholder. Courts have also recognised a personal right in a shareholder to receive fully informative notices of meeting; to vote at meetings unless that right is taken away by the constitution; to be protected against improper use by the directors of their share issue power (for example, to manipulate control of the general meeting); and to be protected from a majority exercising its voting rights in general meeting to commit a fraud on the minority.

Paradigm case 6 (related party transaction): The majority shareholder purchases corporation property for much less than market value ("sweetheart deal"). Which control mechanisms and legal remedies are available (e.g. ban on voting for the interested shareholder, mandatory approval by disinterested shareholders/directors, mandatory disclosure, prohibition of certain types of contracts)?

Key principles: The *Corporations Act* contains a number of restrictions on sweetheart deals between public companies (and entities controlled by public companies) and the public company's majority shareholder,[74] but these statutory requirements do not apply to proprietary companies.

In proprietary companies, such transactions are controlled at the board level. Where the shareholder is a director, the Corporations Act requires that the director declare his or her material personal interests in the matter to the board.[75] The director's fiduciary duty to the company would ordinarily require him or her to account to the company for the benefit received, unless (as is usual[76]) the company's internal governance rules allow for the director

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[73] Corporations Act Pt 2F.2.

[74] Corporations Act Ch 2E. Generally speaking, Ch 2E requires that the transaction be approved by the disinterested shareholders of the public company, following full disclosure provided to the shareholders and ASIC.

[75] Corporations Act s 191.

[76] See, for example, the replaceable rule in Corporations Act s 194.

to transact with the company and to retain any benefit derived from that transaction, provided that disclosure is made.

Even where the company's internal governance rules allow for directors to be interested in transactions with the company, it is likely to be a breach of the directors' statutory and general law duties, including their duty to act in the best interests of the company and not to use their position improperly to gain an advantage for themselves or someone else, to cause the company to enter into such a transaction. The general meeting cannot ratify a breach of directors' duties where the breach is tantamount to misappropriation or theft of the company's property.

Such a transaction may be the basis for a claim by the minority shareholder that the affairs of the company are being conduct in a manner either contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity of in any other capacity, triggering the statutory remedies for oppression[77] or the other shareholder remedies explained above.

Paradigm case 7 (excessive director's salary): The majority shareholder grants himself an excessive salary as director. Does he have a right to vote on his own salary in the shareholders' meeting? If so, does he violate his fiduciary duty so that the shareholder resolution can be set aside by the courts? Violation of the capital maintenance rules by way of a "disguised" or "hidden" contribution? Additional remedies for minority shareholders?

Key principles: Directors cannot receive remuneration unless that remuneration is provided for in the company's internal governance rules or approved by shareholders. Either the internal governance rules or the shareholders' resolution may allow for the board to fix the directors' remuneration. In practice, the internal governance rules of proprietary companies often provide that the directors' remuneration is to be determined by a resolution of the company.[78]

If the remuneration is fixed by the board, the directors must act in accordance with their statutory and general law duties, including their fiduciary duties. If the remuneration is fixed by the shareholders in general meeting, the majority shareholder is not precluding from voting on that resolution and is not treated as a fiduciary in exercising those voting rights. However, the majority shareholder cannot exercise his or her voting rights in such a way as to commit a fraud on the minority.[79] Excessive remuneration may be challenged under the oppression remedy contained in the *Corporations Act*.[80]

Paradigm case 8: (excessive retention of profits): The majority shareholder votes for full retention of profits in the shareholders' meeting over a period of years while simultaneously receiving a generous salary as director. The minority shareholder receives neither dividends

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[77] Corporations Act Pt 2F.1.

[78] See, for example, the replaceable rule in Corporations Act s 202A(1).

[79] The equitable doctrine of fraud on the minority prevents the majority from exercising its voting power 'as a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside, and even inconsistent with, the contemplated objects of the power': *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 511.

[80] *Sanford v Sandford Courier Service Pty Ltd* (1987) 10 ACLR 549.

nor other payments from the company. Statutory safeguards or remedies (e.g. minimum statutory dividends, court-ordered payment of dividends, violation of fiduciary duties).

Key principles: Dividends are a matter for the board, not the shareholders' meeting. The board may decide whether or not a dividend should be paid, and if so the amount of the dividend. This is subject to an overriding statutory restriction that a company must not pay a dividend unless the company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient to fund the dividend, the payment is fair and reasonable to the company's shareholders as a whole, and the payment of the dividend does not materially prejudice the company's ability to pay its creditors.[81] There is no minimum statutory dividend.

As with all powers and discretions vested in the board, decisions as to dividends must be made in accordance with the directors' statutory and general law duties. Artificially restricting dividends may be challenged under the oppression remedy contained in the *Corporations Act*. The fact that a dividend is not as high as it could be is not, of itself, oppressive. However where, for example, the directors failed to increase the dividends when the company's profitability increased, while at the same time granting themselves generous salary increases, the minority shareholder was entitled to a remedy.[82]

2. Ex post Opportunism of Minority Shareholders

There are no specific statutory or judicial safeguards against ex post opportunism of minority shareholders. For example, shareholders do not owe fiduciary duties to the company or other shareholders; there is no basis for ignoring or not counting the votes of obstructive shareholders who are free under Australian law to vote in their own self-interest; and there is no specific mechanism for expelling opportunistic minority shareholders. Usually these matters fall to be resolved commercially.

However there are cases where the obstructive conduct of a minority shareholder may be a basis for an application to a Court under the oppression remedy, or for a Court to order the winding up of the company on just and equitable groups.[83]

Paradigm case 9: A minority shareholder blocks an urgently needed capital increase by his veto power in order to extract private benefits.

Key principles: Generally, capital increases are a matter for the board, and do not require shareholder approval. If the company's internal governance rules or a shareholders agreement did give a minority shareholder veto power over such a decision, the shareholder is free to exercise that power in his or her own self-interest. However if the minority shareholder is acting opportunistically for the purpose of private gain, the majority shareholder may apply to

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[81] Corporations Act s 254T.

[82] *Shamsallah Holdings Pty Ltd v CBD Refrigeration and Airconditioning Services Pty Ltd* (2001) 12 ACLC 517.

[83] Corporations Act s 461.

a Court for relief under the oppression remedy contained in the *Corporations Act*. (Access to the oppression remedy is not limited to minority shareholders.) This allows the Court to make a variety of orders in circumstances where the conduct of the company's affairs or a resolution of members (among other things) is either contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity of in any other capacity.[84]

3. Deadlock

Australian proprietary companies use a range of contractual strategies or safeguards to avoid or solve a deadlock. These are usually contained in the company's internal governance rules or in a shareholder agreement. At board level, deadlocks might be resolved by giving the chairman of the board a casting or tie-breaking vote.[85] It is very rare, as a matter of practice, for Australian companies to confer a tie-breaking vote on a person outside the company such as corporate counsel or to delegate decision-making to a supervisory or advisory board. The general law recognises the capacity of shareholder in general meeting to act in circumstances where the board is deadlocked or otherwise unable to act – usually by appointing additional directors but on occasions by dealing with matters that would otherwise be within the competence of the board.

Where shareholders are deadlocked, the only realistic option available may be to apply to the Court for winding up (that is, dissolution) of the company on just and equitable grounds. While courts are usually reluctant to wind up solvent companies when other remedies are available, they will do so in situations of deadlock.[86]

Paradigm case 10: The founding shareholders of a close corporation agree in advance to a buy-sell procedure in cases of deadlock: Shareholder A (the party wishing to leave or take over the company) initiates the procedure by making an offer, either (1) to sell all his shares to shareholder B, or (2) to purchase all of B's shares for a specific price. Shareholder B can then freely decide whether to buy or sell. Validity of such a buy-sell agreement?

Key principles: Such a buy-sell agreement is valid under Australian law, and can be enforced in accordance with ordinary principles of contract law.

[84] Corporations Act Pt 2F.1.

[85] For example, this is done by the replaceable rule in Corporations Act s 248G.

[86] Corporations Act s 461.

4. Alternative Dispute Resolution

Different forms of alternative dispute resolution are routinely used in Australia, by agreement between parties to a dispute or as part of the process of adjudication by Courts.

In the case of disputes within proprietary companies, there is no specialist tribunal or arrangement for alternative dispute resolution. Parties may agree (either as part of a pre-existing shareholder agreement or in the course of a dispute) to submit to private mediation or arbitration. Otherwise, disputes are resolved by proceedings in civil justice system.

The *Corporations Act* confers jurisdiction on the Federal Court of Australia and on the Supreme Court of each state and territory of Australia with respect to civil matters arising under the *Corporations Act*. The choice of forum belongs to the party commencing the proceedings. The rules of the relevant Courts generally allow for and encourage alternative dispute resolution. For example, the rules of the Federal Court of Australia provide that 'parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable. If appropriate, the Court will help implement those options'.[87] Under the rules any party to a proceeding in the Federal Court may apply for an order that the proceeding or part of the proceeding be referred to an arbitrator, mediator, or some suitable person for resolution by an ADR process; that the proceeding be adjourned or stayed; and that the arbitrator, mediator, or person appointed to conduct an ADR process report to the Court on progress in the arbitration, mediation or ADR process. The ADR process must then be carried out in accordance with the Court rules.

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[87] Federal Court Rules 2011, Pt 28.

VIII. Bibliographical Information

Specialist texts and resources devoted exclusively to close corporations are rare in Australia. Most treatises and practitioner texts cover the law of both public and proprietary companies.

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