JOSKE'S LAW AND PROCEDURE
AT MEETINGS IN AUSTRALIA

Now in its 10th edition, *Joske's Law and Procedure at Meetings in Australia* is well-established in the marketplace. This book explores the diverse sources of law governing meetings in Australia: common law, the *Corporations Act 2001* (Cth), and statutory law governing meetings of unit title and strata title companies in all Australian jurisdictions.

Assisting anyone who takes part in, or advises in connection to, a meeting, the book covers such topics as the convocation of meetings through notice and quorum, procedures and minutes, and the question of the effect of irregularity in proceedings. Logically divided into three parts, the 10th edition contains up-to-date legislation and recent case law.

Part 1 discusses the common law of meetings and the standard rules of meetings procedure.

Part 2 explores the law of meetings in a company context. Whereas previous editions of *Joske* examined the provisions of the Corporations Law, the 10th edition set outs and explores the relevant provisions of the *Corporations Act 2001* (Cth).

Part 3 comprises a thorough presentation of statutory law as it relates to meetings of unit title and strata title companies throughout Australia.

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AT MEETINGS IN AUSTRALIA

EILIS S MAGNER

Joske's

Law and Procedure at Meetings

in Australia

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Joske's
Law and Procedure at Meetings
in Australia

Tenth edition

by

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Preface

The first edition of this book was written by Percy Ernest Joske, later the Honourable Sir Percy Joske, CMG. It was published in 1938. The author, who received his legal education at the University of Melbourne, was subsequently appointed a judge of the Commonwealth Industrial Court, and of the Supreme Court of the Australian Capital Territory and the Northern Territory. Sir Percy Joske continued to write prodigiously throughout his life, which drew to a close on 26 April 1981. His authorship of another five editions of this book testify to his continuing interest in the evolution of the law governing meetings in Australia and his concern that this law should be accessible not only to lawyers but to all those whose interest is sparked by their role in meetings.

The aim of this book has been and continues to be that expressed by Joske in the preface to the sixth edition, where he wrote:

> "The aim of this work is to assist persons taking part in, or who may be called upon to advise in connection with meetings. Accordingly the respective points of view of the chair ... the secretary, the debater and the lawyer have all been considered in order that the work may prove useful to each and all of them. The method adopted has been to state the procedure in connection with meetings in a concise and clear form and to give sufficient authorities, including all relevant Australasian authorities, for any proposition of law, without over-burdening the work with authority so as to render it unsuitable for use from a practical standpoint."

The tenth edition incorporates a number of changes into the text in its endeavour to keep abreast of the law governing meetings in Australia. The book is divided into three parts. Part One addresses meetings in general and considers the impact of the common law and parliamentary procedure as relevant to all meetings held in Australia. Part Two considers the law of company meetings in particular. Part Three is devoted to the law governing meetings of bodies of proprietors.

The *Corporations Law* has been replaced by the *Corporations Act 2001* (Cth) but there are no changes of significance between these instruments. Many of the changes to the legislation effected by the *Corporate Law Reform Act 1998* (Cth) revolutionised the law of corporate meetings in Australia. It is therefore not surprising that there have been, since 2001, a number of decided cases that have contributed to an understanding of the current position.

The treatment of the laws governing meetings of bodies of proprietors has also been updated. Significant changes to these laws have been effected in the Australian Capital Territory and Queensland and these are incorporated here. In addition, the increasing availability of material on the internet led to a decision to expand this treatment to include more detailed consideration of regulations. This is particularly significant in relation to the treatment of these laws in Victoria and their discussion is for the first time given equal weight with the laws of other jurisdictions in this edition.

The problem of terminology that arose out of the widespread adoption of policies on the use of non-sexist language remains a concern. While this author wholeheartedly supports such policies, she recognises that these policies can conflict with the aim of producing euphonious text. The aim has been to achieve felicity of expression while avoiding any construction that might suggest that roles in meetings are linked in any way to the gender of the individual. It is noted that, speaking for the Commonwealth Government in the context of considering the *Second Corporate Law Simplification Bill*, John Howard denounced the use of the neologism "chairperson". The *Corporations Act* now uses the term "chair" to refer to the officer who presides over a meeting. This use of the term, according to the *Oxford English Dictionary*, was first observed in 1647 and while it has been adopted in Part II, it does not appear universally throughout the book. In addition to the term "chairperson", "president" and "presiding officer" are also used. Ultimately, the choice of term in the context of a particular association is a matter for those drafting its constitution.

In practice, an increasing trend to informality may affect the application of the law and procedure of meetings. There is, for example, a recommendation in this text that speakers should stand when addressing the meeting and sit when a point of order is raised until the chair has made a ruling. Many organisations today habitually adopt a less formal approach, as where all participants in a meeting are seated around a table. Where all are satisfied, a less formal approach, whether signified by allowing speakers to remain seated or in other ways, has much to recommend it. Meetings procedure, however, is important where there are strong opposing views. The observation of Young J of the Supreme Court of New South Wales in *Kelly v Wolstenholme* (1991) 9 ACLC 785 remains appropriate:

> "there comes a point when the issue between the parties is so serious that one has to put aside the 'she'll do mate' approach to company meetings and actually deal with the issues strictly according to law."

When that point is reached recourse to strict formality may provide a way forward. Accordingly, this book continues to provide a guide to the formal procedure of meetings.

I wish to thank Stephen Maher, of Tamworth, for calling my attention to the fact that it was time to produce a new edition, and Jack Pappas, a classmate of mine from long ago for his words of encouragement about the ninth edition. I acknowledge the work of Catherine J Page, who provided able editorial assistance, and Puddingburn Publishing Services, who compiled the index and tables. I have also appreciated the work on this project done by Corina Brooks, Julie Pak and Tali Budlender. As always, I acknowledge the support of my husband Don Clilverd.

EILIS S MAGNER

Armidale
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Table of Contents

PART III — MEETINGS OF PROPRIETORS

Part I

Meetings in general

Chapter 1

Meetings and public order

[1.05] Meetings are an important feature of social life. Any group enterprise, whether its aim is profit or not, will at regular intervals require some form of meeting. At the same time, because meetings involve a number of individuals in discussion and occasionally confrontation, issues of public order may arise.

Meeting procedure generally is governed by common law rules together with conventions that are modelled on parliamentary procedures as they have evolved historically. This is subject, in the case of particular types of organisation, to specific statutory provisions; and in the case of particular organisations, to the rules to be found in the constitutions of those bodies. If the rules to be derived from these three sources ever come into conflict, the conflict will be resolved by asking first whether there is a specific statutory provision that must be applied. If there is no such provision the constitution of the body will prevail; and only if both statute and constitution are silent will the general common law rules apply. But the courts may also intervene if the provisions of the organisation's constitution deny the principles of natural justice. Public authorities may also become involved where issues of public order arise.

DEFINITION OF "MEETING"

[1.10] The term "meeting" is used throughout this book in the third sense given by the *Oxford English Dictionary*, to indicate a gathering or assembly of a number of persons for the purposes of discussion, legislation or the like. It is restricted here to gatherings of a public character or assemblies of some organised society. At least two persons must usually be present to constitute a meeting.[1] Where the general rule that one person cannot constitute a meeting applies, it follows that when only one person is left at a meeting, from that moment there is no meeting.[2]

The principle that a meeting is a coming together in person of the members of an organisation, is not affected by the fact that the rules of the

1 *Sharp v Dawes* (1876) 2 QBD 26.

2 *Re London Flats Ltd* [1969] 1 WLR 711.

organisation may allow for the appointment of a personal representative for a member who cannot attend in person. It has been recognised[3] as a fact of modern corporate life that meetings of public companies are increasingly dominated by proxy machinery, through which the majority of shareholders are represented. Nevertheless the principle that a meeting is a personal coming together is maintained. A meeting is not only a venue at which people speak, but also an occasion where they meet each other in the flesh; social interaction may influence the decisions taken such that they might be different if the individuals did not meet. The normal rule therefore is that a telephone hook-up does not constitute a meeting. Where the rules of an organisation provide for resolutions to be approved by communication and by correspondence but not by way of telephone hook-up, the latter procedure will fail to validly effect any action.[4]

There are some indications that the courts may regard a meeting through video link as valid.[5] Through such technology, the parties may be "present" to each other. As yet, however, there is no clear authority for this proposition, in the absence of specific statutory provision. At least one court has commented on the factors that are relevant to whether a meeting through video conference link is appropriate.[6]

PUBLIC MEETINGS

[1.15] Certain rules of law apply to public meetings. To be classed as a public meeting, members of the public must be entitled to be present, by invitation or otherwise, and to take part in the proceedings at least to the extent of acclamation or dissent. The meeting must also be for the furtherance or discussion of a matter of public concern. If these conditions are satisfied, it is immaterial whether admission to the meeting is general or restricted. The mere fact that a sum is charged for admission does not prevent a meeting from being public, but it must appear that all who choose to pay the admission money will be admitted.[7]

A meeting held in public is not necessarily a public meeting. An essential element of a public meeting is that members of the public have the right to participate as well as to observe. Thus a meeting of a municipal council, unless it is expressly so classed by statute, is not a public meeting. This is so even though a statutory provision requires that the meeting shall be held with open doors and even though members of the public in fact attend the meeting as

3 *Re Marra Developments Ltd* (1976) 1 ACLR 470.

4 *Higgins v Nicol* (1971) 18 FLR 343.

5 See *Byng v London Life Association Ltd* [1989] 1 All ER 560.

6 See *Holzman v New Horizons Learning Centre Pty Ltd* (2004) 22 ACLC 446; [2004] NSWSC 90.

7 *McDowall v Bourke* [1920] SALR 344.

strangers or as an audience.[8] Thus, a charge of using insulting words at a public meeting must be dismissed where it appears that the words in question were used at a meeting of a municipal council. A private hall in which a meeting is held that members of the public have been invited to attend is not, in the absence of a statutory provision to the contrary, a public place for the purpose of founding a conviction for using insulting words in a public place.[9]

RIGHT OF PUBLIC MEETING

[1.20] The common law does not enshrine a right to hold public meetings. Neither does the Australian Constitution guarantee a right of assembly.

International humanitarian law does embody such a right. Article 20 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations provides that everyone has a right to freedom of peaceful assembly and association. This Declaration does not have any force of itself, but its principles have been embodied in Art 21 of the International Covenant on Civil and Political Rights.

Australia ratified the Convention in 1980. Australia also ratified the Optional Protocol to this Covenant in 1991. Because Australia is a party to the protocol, an Australian citizen now has the right to appeal to the Human Rights Committee of the United Nations if a municipal law of Australia unduly restricts the right of peaceful assembly guaranteed by Art 21 of the International Covenant.

The position nevertheless remains much the same as when the right of assembly was nothing more than a view taken by the courts of the individual liberty of the subject.[10] The right to meet may be controlled by statute[11] or bylaw, using the words of the International Covenant, "in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others". The state cannot, however, prohibit a public meeting unless it is of an unlawful character. At common law, there is no such thing as a right of protest. In *Campbell v Samuels* (1980) 23 SASR 389 at 393, Zelling J said (at 393):

> "I do not know of any such juristic right as a right of protest, save where the subject is petitioning parliament as to a grievance — a right given by a House of Commons resolution in 1669 which became part of our law by s 38 of the *Constitution Act* 1934 and its predecessors. The only other exception known to me is that contained in the *Public Assemblies Act* No 28 of 1972, which provides

8 *Berglund v Graham* [1937] VLR 162; cf *Tellby Corp v Mason* [1908] 1 Ch 457; cf *Taylor v Phelan* (1869) 6 WW & AB (L) 242.

9 *Gooden v Davies* [1934] VLR 143; *Gooden v Herkes* [1934] VLR 258.

10 *Duncan v Jones* [1936] 1 KB 218 at 222.

11 *Summary Offences Act 1988* (NSW), ss 22–27; *Public Assemblies Act 1972* (SA).

> for a proper assertion of the right to go in procession on the public streets and inferentially to exercise some form of public protest. I accept that there is a general democratic right to protest against unwelcome political decisions.
>
> What I do not accept is that there is a juristic right to use the street for that purpose unless sanctioned by law to do so as in the case of an order under the *Public Assemblies Act*."

The Universal Declaration of Human Rights, Art 19, and the International Covenant of Civil and Political Rights embody a right to freedom of opinion and freedom of expression, but the right to meet must be exercised peacefully. Liberty of speech is quite a distinct thing from the question of the place where such liberty may be exercised. There is no general right to hold meetings either on public property, for example, in parks and gardens,[12] or on private property.[13] Under a power to make bylaws for the prevention of nuisances and the preservation of order, a bylaw may be validly made prohibiting speeches or meetings in a park except with the permission of or in accordance with conditions prescribed by the local authority.[14]

Persons present at a public meeting held on private premises are there only by the leave and licence of the promoters of the meeting and not as of right. Consequently, if they do not leave when required to do so by the chairperson or promoters of the meeting, they become trespassers and may be removed, provided no more than necessary force is used for that purpose. It apparently makes no difference if payment was made for admission and the money was not returned to the ejected party.[15]

POLICE POWERS

[1.25] Apart from statutory provisions, it is not part of the duty of the police to assist in ejecting trespassers from private property. At the request of the chairperson or promoters of a meeting or the occupier of the premises, the police may, if they choose,[16] assist in ejecting a trespasser. Without statutory authority the police have, in relation to the conduct of meetings, no power to arrest unless a breach of the peace is committed. The police are bound to act in the case of an actual breach of the peace and may arrest without warrant where the breach of the peace occurs in their presence or if there is reason to

12 *Bailey v Williamson* (1873) LR 8 QB 118.

13 *Brighton Corp v Packham* (1908) 24 TLR 63.

14 *De Morgan v Metropolitan Board of Works* (1880) 5 QBD 155; *Slee v Meadows* (1911) 105 LT 127; see *Ex parte Harrington* (1901) 18 WN (NSW) 247; *Fox v Allchurch* [1926] SASR 384; [1927] SASR 328; (1927) 40 CLR 135; *Jones v Taylor* (1919) 21 WALR 67; *Howie v Winter* (1934) 12 LGR 62.

15 *Wood v Leadbitter* (1845) 14 LJ Ex 161; 13 M & W 838; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605.

16 *R v Chief Constable of the Devon and Cornwall Constabulary* [1981] 3 WLR 967.

believe that it will recur. Proof of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear", putting questions to a speaker and making observations on the speaker's statements, will not justify the chairperson of a meeting causing the person to be arrested. Such conduct does not amount to a breach of the peace.[17]

Statutory power may be given to the chairperson of a public meeting to deal with misbehaviour at the meeting and to direct the police to remove persons who the chair believes to be guilty of misbehaviour. See for example s 17(2) of the *Summary Offences Act 1966* (Vic).[18] This section applies where in the chair's opinion a person behaves in a riotous, indecent, offensive, threatening or insulting manner, or uses any threatening, abusive, obscene, indecent or insulting words in or near the room in which a public meeting is being held. It permits the chair to verbally direct any police officer present to remove such a person from the room or its neighbourhood, and then it is the duty of the police officer to remove the person.

UNLAWFUL MEETINGS

[1.30] A meeting may either be or become an unlawful assembly. An unlawful assembly is a meeting of three or more persons who come together for a common purpose, whether lawful or unlawful, in such a manner that a breach of the peace is committed or may reasonably be apprehended. There must be either actual violence or a threat of violence or fear to bystanders of ordinary courage and firmness. Taking part in an unlawful assembly is a misdemeanour and is punishable by fine and imprisonment.[19] In order to establish the offence, it is not sufficient merely to prove that the accused was present at the meeting; the accused must be shown to be a party to its unlawful character before a guilty verdict can be returned.

A lawful meeting does not become unlawful merely because other persons are determined to break it up and a breach of the peace is thereby rendered likely.[20] Persons may properly meet together in a legitimate way and no person has any right to interfere with a lawful meeting. A meeting may become unlawful because abusive or slanderous statements, made by its members, are such as to bring about a breach of the peace, or where the only way to preserve the peace is for the meeting to disperse and it refuses to do so. The police may disperse an unlawful assembly.[21]

17 *Wooding v Oxley* (1839) 9 C & P 1; 173 ER 174.

18 See also *Police Offences Act 1935* (Tas), s 20(2); *Summary Offences Act 1953* (SA), s 18a; *Summary Offences Act 2005* (Qld), s 20.

19 See eg *Public Order in Streets Act 1984* (WA).

20 *Beatty v Gillbanks* (1882) 9 QBD 308.

21 *R v Fursey* (1833) 6 C & P 81; 172 ER 1155.

Where a court of summary jurisdiction is satisfied that a person has, by speeches at a meeting, been guilty of inciting others to commit breaches of the peace and intends to persevere in such incitement, it may take steps to control the person. It may order the person to enter into recognisances, and to provide sureties for good behaviour, or be imprisoned in default of doing so, notwithstanding that the accused's conduct has not caused any individual person to go in bodily fear.[22]

Ordinarily speaking, the police have no more right to attend meetings on private premises than any other persons and require, in order to justify their presence, the leave and licence of the occupiers of the premises or the promoters of the meeting. It is different where the police have reasonable grounds for believing that their presence will prevent a crime from occurring. Police are entitled to attend a public meeting to prevent seditious speeches, incitements to violence and breaches of the peace, even if it is held on private premises and the occupier and promoter of the meeting objects to their presence.[23] Likewise, police have the right to attend where they have reason to believe that a breach of the peace is actually occurring. The holding of a public meeting which creates a reasonable apprehension of a breach of the peace may be forbidden by a police officer; a person who then persists in trying to hold the meeting is guilty of wilfully obstructing the officer in the execution of that officer's duty.[24] There are legislative provisions currently in force in New South Wales and South Australia requiring those organising public meetings to serve notice on the Commissioner of Police of the intended meeting. The Commissioner of Police or his deputy may thereupon object to the holding of the meeting. In such cases a court will determine whether or not the meeting may be held.[25]

There is authority for the proposition that there is no right to hold public meetings in a street, because such a right is irreconcilable with the public right of free passage,[26] but such meetings are lawful and are freely allowed so long as an obstruction is not caused.[27] On this point a decision of the English House of Lords is of some interest. In *DPP v Jones* [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257 Lord Chancellor Irvine held the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose. If he was wrong on that, he held that regard should be had to international human rights conventions which created a right of assembly. The position that peaceful assemblies were tortious but tolerated was incompatible

22 *Lansbury v Riley* [1914] 3 KB 229.

23 *Thomas v Sawkins* [1935] 2 KB 249.

24 *Duncan v Jones* [1936] 1 KB 218.

25 *Summary Offences Act 1988* (NSW), ss 23–26; *Public Assemblies Act 1972* (SA).

26 *Ex parte Lewis* (1882) 21 QBD 191. See also *Campbell v Samuels* (1980) 23 SASR 389.

27 *Burden v Rigler* [1911] 1 KB 337.

with the right of assembly.[28] Lord Hutton also held that common law recognises that there is a right for members of the public to assemble together to express views on matters of public concern. In his view, this right is unduly restricted unless it can be exercised in some circumstances on the public highway.[29] The House of Lords decision by a majority of three to two allowed an appeal against conviction by individuals who had joined a peaceful demonstration against the restriction of access to Stonehenge taking place on the verge of the A344 highway.

A meeting must be conducted such that it does not create an obstruction in a public place contrary to bylaws or statutory provisions. Obstruction has been defined as including any continuous physical occupation of a portion of a street, which appreciably diminishes the space available for passing and repassing.[30] Refusal to discontinue a meeting has been held to be a wilful obstruction.[31] Consequently the holding of a meeting in a street almost inevitably results in committing the offence of obstruction. This position is addressed in Victoria by s 5 of the *Summary Offences Act 1966*, which provides that where an obstruction is caused by an assemblage of persons, the court must be satisfied before convicting that, having regard to all the circumstances of the case and to the amount of traffic which was actually on the street at the time, there was an undue obstruction.

DEFAMATORY STATEMENTS

Statutes and common law

[1.35] Meetings sometimes provoke heated debate, and it is therefore relevant to make some reference here to the laws of defamation. However, in a short work of this sort, no more than an outline of the law governing defamation can be offered.[32] In 2005 the Australian States moved to adopt uniform defamation legislation to govern civil proceedings for defamation.[33] The Territories have not as yet followed suit.[34] A statement may constitute an actionable wrong in more than one State at the same time. For example, if a defamatory statement is contained in notice of meeting that is posted to members living in several States, it will be actionable in each of these States.

28 [1999] 2 AC 240 at 258; [1999] 2 All ER 257 at 265.

29 [1999] 2 AC 240 at 287; [1999] 2 All ER 257 at 292.

30 See *Hirst and Agu v Chief Constable of West Yorkshire* (1987) 85 Cr App R 143.

31 *Haywood v Mumford* (1908) 7 CLR 133.

32 See generally Fleming, *The Law of Torts* (8th ed, Law Book Co, Sydney, 1992), Ch 25; Morison and Sappideen, *Torts, Commentary & Materials* (8th ed, Law Book Co, Sydney, 1993), Ch 6.

33 *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas) *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

34 See *Civil Law (Wrongs) Act 2002* (ACT); *Defamation (Criminal Proceedings) Act 2001* (ACT); *Defamation Act* (NT).

The new legislation specifically addresses the question of the choice of law to be applied in these circumstances, so that when the action is brought in one State or Territory the court in that jurisdiction will also consider the law in the other jurisdictions in which the defamation was published so that the one judgment will remedy the whole grievance.[35]

Defamation may be actionable at both civil law and criminal law. The remedy at civil law may be an injunction to prevent further publication, an order for an apology, or damages. The remedy at criminal law will take the form of a fine or sentence of imprisonment. Even where a defamatory statement is confined to one of the States or Territories where statutory regimes are in force, there may be difficult questions[36] as to whether the defences allowed by the regulating statute are applicable to both or either of civil and criminal proceedings.

Nature of defamation

[1.40] It has been said that a defamatory statement is one which holds a person up to hatred, ridicule or contempt,[37] or which causes right-thinking members of society to shun or avoid that person. It should be noted that it is not necessary that the words excite feelings of disapprobation, as a person's standing is just as likely to be impaired by the attribution of misfortune as of contemptible conduct.[38] A statement that a person has contracted AIDS from a blood transfusion would, for example, be considered defamatory under this principle. The societal attitudes of the time will be taken into account in determining whether a particular statement is defamatory.[39] The question of whether or not a statement is defamatory must be judged according to the social standards of the time in which it is uttered. A statement that is, in itself, innocent may become defamatory when the circumstances in which it is uttered raise a defamatory implication.

A defamatory statement made in a permanent form is libel; a statement made in a transient form is slander. The importance of the distinction between libel and slander, where the common law applies, is that the former is actionable without proof of loss while the latter requires proof of actual loss. It is sometimes said that a written statement is libel and a spoken statement is slander but this, while true, is an over-simplification. A waxwork effigy has been held to be libellous,[40] and possibly a recording of a spoken statement would come within this category. Conversely, a gesture indicating that a

35 *Cawley v Australian Consolidated Press Ltd* [1981] 1 NSWLR 225.

36 *Western Australia Newspapers Ltd v Bridge* (1979) 141 CLR 535.

37 *Parmiter v Coupland* (1840) 6 M & W 105 at 108; 151 ER 340 at 342.

38 *Youssoupoff v MGM* (1934) 50 TLR 581 at 587.

39 See eg *Youssoupoff v MGM* (1934) 50 TLR 581 and *Morgan v Lingan* (1863) 8 LT 800.

40 *Monson v Tussaud's* [1894] 1 QB 671.

person was mentally unbalanced could be slander. A wink may bring a reputation down.[41]

Defences

[1.45] If a defamatory statement is made, the possible defences available generally are:

1. justification
2. absolute privilege
3. qualified privilege; and
4. fair comment on a matter of public importance.

Justification

[1.50] At common law, it was a complete defence to a civil action that the statement was true. If X said of Y that Y had been convicted of burglary, Y would have no action in defamation if in fact he or she had been convicted of burglary. From the mid-19th century on, however, the statutory provisions in force in some jurisdictions were based on the view that truth by itself was not sufficient justification. In the jurisdictions where the new legislation applies, the statute re-establishes the common law position. Truth by itself is a justification.[42] In the Australian Capital Territory it is a justification to prove that the contents are substantially true; contextual truth is also a defence.[43] Even at common law, truth as justification was not a defence in a prosecution for criminal defamation — that is, if it could be suggested that the defamation was with a malicious intent, it was not sufficient to prove that the statement was true.[44]

Absolute privilege

[1.55] Statements in Parliament, whether federal or State, are absolutely privileged. No action is possible by a person aggrieved, even if a statement is untrue and it is made irresponsibly and maliciously. Radio broadcasts of parliamentary proceedings are often given similar privilege by statute. Proceedings in a court of law also have absolute privilege. Again, communications at high government levels, for example, between Ministers of the Crown, may have the same protection.[45]

41 Jonathon Swift, *Journal of a Modern Lady* (Dublin, 1729).

42 *Defamation Act 2005* (NSW), s 25; *Defamation Act 2005* (Qld), s 25; *Defamation Act 2005* (SA), s 23; *Defamation Act 2005* (Tas), s 25; *Defamation Act 2005* (Vic), s 25; *Defamation Act 2005* (WA), s 25.

43 See *Civil Law (Wrongs) Act 2002* (ACT), ss 135, 136.

44 See Fleming, *The Law of Torts* (8th ed, Law Book Co, Sydney, 1992), p 607.

45 *Defamation Act 2005* (NSW), s 27; *Defamation Act 2005* (Qld), s 27; *Defamation Act 2005* (SA), s 25; *Defamation Act 2005* (Tas), s 27; *Defamation Act 2005* (Vic), s 27; *Defamation Act 2005* (WA), s 27.

Qualified privilege

[1.60] A statement made at a meeting by a person who is under a legal or moral duty to make it is privileged in the absence of malice. Statements which are made in such violent language as to be beyond and disproportionate to the occasion are regarded as malicious, as is a statement when the person making it does not believe it to be true. Calling other persons, to whom no duty to make the statement exists, into the meeting in order that they may hear it, is evidence of malice.[46]

It is up to a jury to ascertain the meaning of the words used, and in order to do this they are entitled to know the circumstances under which the words were uttered. Accordingly, evidence of the speech made by the chairperson of the meeting and the correspondence read to the meeting on the matter prior to the alleged defamatory words is admissible.[47]

Election speeches made to large audiences of unidentified persons are not necessarily privileged even though they may deal with matters of general interest to electors.[48] A question put at an election meeting is not actionable as slanderous, however, if it is put by an elector bona fide with the intention of gaining information or to determine the truth of an existing rumour.[49]

Statements made by a councillor at a meeting of a municipal council are subject to qualified privilege and are only actionable on proof that the person making them was motivated by malice. Qualified privilege applies when councillors have a right and a duty to discuss a matter freely. Its policy basis is that it may become necessary in such circumstances to make use of expressions which are defamatory, and if so councillors are entitled to do so.[50]

The new legislation provides that it is a defence to an action for the publication of defamatory matter if the defendant proves that the matter was or is contained in a fair report of a matter of public concern.[51] Indeed one of the main objects of this legislation was to ensure that the law of defamation did not "place unreasonable limits" on the discussion of matters of public interest and importance.[52] Apart from statutory provision, even if words are

46 *Pittard v Oliver* [1891] 1 QB 474.

47 *Mackay v Bacon* (1910) 11 CLR 530.

48 *Lang v Willis* (1934) 52 CLR 637.

49 *Crick v Butler* (1891) 12 LR (NSW) 75.

50 *Allison v Burrows* (1915) 3 LGR 2; *Smith v Purser* (1923) 6 LGR 149; *Gray v Chilman* [1935] SASR 260.

51 *Defamation Act 2005* (NSW), s 29; *Defamation Act 2005* (Qld), s 29; *Defamation Act 2005* (SA), s 27; *Defamation Act 2005* (Tas), s 29; *Defamation Act 2005* (Vic), s 29; *Defamation Act 2005* (WA), s 29; see also *Defamation Act* (NT), s 26.

52 *Defamation Act 2005* (NSW), s 3(b); *Defamation Act 2005* (Qld), s 3(b); *Defamation Act 2005* (SA), s 3(b); *Defamation Act 2005* (Tas), s 3(b); *Defamation Act 2005* (Vic), s 3(b); *Defamation Act 2005* (WA), s 3(b).

spoken on a privileged occasion, it does not follow that a newspaper that publishes them will be protected by the privilege.[53] Thus, in the absence of statutory authority, comments in a newspaper on the proceedings of a meeting of a local authority are not themselves privileged. It may be, however, that they would be covered by the plea that they constitute a fair and bona fide comment on a matter of public interest.[54] Notice of a council meeting containing defamatory matter should not be published to the ratepayers or general public.[55]

The right of the press to attend a meeting generally depends on the regulations of the particular body. Apart from such regulations, the press has no right to attend over and above the rights of other members of the public. A newspaper cannot, except by virtue of some statutory provision, claim privilege in respect of a report of proceedings at a public meeting. The newspaper is liable for defamatory statements contained in its report, unless such statements can be shown to be true. This is so even if such statements are an accurate report of the proceedings, published in good faith and without malice, and with the intention of giving information to the public with respect to a matter of public interest.[56]

Where a resolution containing defamatory statements is passed at a meeting of a body and the body has a duty to supply copies of the resolution to all its members, the occasion is privileged. In the absence of evidence of malicious motive on the part of the body or its executive, the privilege is not destroyed by any knowledge or motive of the person carrying out the decision. Thus the company was held not to be liable in a case where the secretary who actually handed over the copies of the resolution to members was aware that the defamatory statements were untrue. It was shown that the secretary entertained feelings of personal ill will against the person defamed.[57] Publication to members of a body of a resolution for expulsion of another member is privileged.[58]

Fair comment

[1.65] A speaker at a meeting is entitled to comment on any matter of public interest that arises. Provided that the comment is fair and relevant to the

53 *Pulcell v Sowler* (1877) 2 CPD 215; *Pittard v Oliver* [1891] 1 QB 474; *Ponsford v Financial Times* (1900) 16 TLR 248.

54 *Standen v South Essex Recorders Ltd* (1934) 50 TLR 365.

55 *De Buse v McCarthy* [1942] 1 KB 156.

56 *Cameron v Otago Daily Times* (1867) 1 NZR (CA) 1; *Gannon v White* (1886) 12 VLR 29. *Thompson v British Medical Association* [1924] AC 764; *Hay v A/asian Institute of Marine Engineers* (1906) 3 CLR 1002.

57 *Hay v A/asian Institute of Marine Engineers* (1906) 3 CLR 1002.

58 *Thompson v British Medical Association* [1924] AC 764.

subject matter, the speaker is not liable in an action for defamation. It is for the plaintiff to prove that the comment is unfair.

The existence of malice is not a conclusive answer to the defence of fair comment, though it may be a relevant factor.

Chapter 2

The decision to meet

[2.05] An organised meeting cannot happen unless steps have been taken to summon it and make appropriate arrangements for a venue. To call or cause a meeting to assemble is to convoke it.

Any individual or group of individuals may decide to summon a public meeting, but someone must undertake to make the necessary arrangements. In the case of an unincorporated association, a trade union, a company or any other organised body, its constitution will normally confer authority on some officer of the body to summon general meetings.

The decision to convoke a general meeting will be implemented by sending out a notice of meeting. Accordingly, the two topics of convocation and notice are very closely linked and may well be treated together, although the courts periodically assert the distinction between them.[1]

As a rule, general meetings of organised bodies are convoked by the executive committee of the body in exercising the executive function. Legislation controlling companies in Australia has long contained provisions allowing the members to cause the board of directors to summon a general meeting on requisition. Such provisions may also be found in some corporate constitutions.[2] It is open to other bodies to include such provisions in their constitutions. In the absence of such provisions, the members of such an organisation do not have the power to summon meetings independently of the executive power. However, if unanimous agreement can be obtained, it is unlikely, even if the question arose before a court, that the court would sustain any objection.

It is open to a court in the exercise of equitable powers to give orders that a meeting should be held. There is specific provision in the *Corporations Act* to this effect.[3] In the case of other bodies, the court would have the same power even in the absence of statutory provisions.[4]

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1 See eg *Vawdon v South Sydney Junior Rugby League Club* (unreported, SC NSW, Wooten J, 29 March 1976).

2 See eg *Vawdon v South Sydney Junior Rugby League Club* (unreported, SC NSW, Wooten J, 29 March 1976); see Ch 19.

3 *Corporations Act*, s 249G.

4 *Ball v Pearsall* (1987) 10 NSWLR 700; compare *Stanham v National Trust of Australia* (1989) 7 ACLC 628.

The obligation to make the necessary arrangements to enable a meeting to be held customarily falls on the secretary of the organisation. Whether the duties are in fact entrusted to the secretary or to someone using another title, it is important to ensure that attention is paid to the following details.

VENUE

[2.10] It will be necessary to arrange for premises in which to hold the meeting and to determine a place and time. It may be desirable to limit admission to the meeting. In the case of a public meeting, this may be done in any fashion that seems appropriate. In the case of the meeting of an organised body, members with voting rights cannot be excluded but arrangements may be made to ensure that non-members are not admitted. Unless a rule requires production of a membership ticket in order to obtain entry to a meeting, members of the body cannot be refused entry where they fail to produce membership tickets. Any such refusal wrongfully excludes them from the meeting and may render proceedings at the meeting void.[5]

AGENDA

[2.15] The agenda and the notice of meeting are separate documents. The notice is the first document the ordinary member would peruse. It would, however, be appropriate to frame the agenda before drafting the notice of meeting. Where the meeting is an annual general meeting, the business may all be routine but the order of business should be considered. Where another meeting is called, the decision to summon it will relate to some major item of business. It may well be necessary, however, to conduct certain routine business at the meeting. Items of business to be dealt with should be placed in regular order. Where the assembly is a meeting of a permanently organised body, there will normally be an established order of business. This will specify the sequence in which certain types or classes of business are to be brought up. If there is no binding order of business, any member who obtains the floor can introduce any legitimate matter at any time when no business is pending. It would be standard for the order of business to include the following items.

5 *Wishart v Bodkin* (1960) 3 FLR 464.

ORDER OF BUSINESS

- Appointment of chair
- Confirmation of minutes
- Correspondence
- Reports:
  — Standing committees
  — Special committees
- Payments
- Special business
- Unfinished business
- General business
- Notices of motion

Once the agenda has been drawn up, it is easy to determine which business should be mentioned in the notice of meeting. It is only necessary to include the details of any special business which will be considered by the meeting.

The agenda is frequently circulated prior to the meeting, along with the notice of meeting. In this case the order of business should not as a rule be departed from, as members may be misled if a matter which appears late in the agenda is dealt with, during their absence, in the early part of the meeting. The meeting may nevertheless determine to take the business in some order other than that listed in the agenda.

Where a rule provides that business at a meeting is to be conducted in accordance with the agenda, the chair is not entitled to insert any item not listed into the agenda. No resolution can be put to the meeting in respect of any matter not included on the agenda. If it is essential that such a resolution be considered, the chair should seek permission from the meeting. While the presiding officer may utilise provisions in the rules for the suspension of standing orders, this is only permissible if the prescribed majority for their suspension is obtained.[6]

A wide margin for notes should be left on the right side of the agenda paper. It is often wise, particularly when some information comes to hand just before the meeting convenes, to prepare a specially detailed agenda for the presiding officer that gives sufficient additional information to provide a quick understanding of each matter. If the matters appearing in the ordinary agenda are in black ink on this special agenda and the additional details for the

6 *John v Rees* [1970] 1 Ch 345.

information of the chair appear in red ink, or if different typefaces are used, it will be obvious at a glance just how much information is in the hands of the other persons present and in what respects these persons should be given further information.

NOTICE

[2.20] Arrangements must be made to inform all those entitled to notice of the time, date and place of meeting and of any special business that will come before the meeting. The constitution of an organised body will often stipulate what notice is to be given and how it is to be served. The secretary or some person fulfilling this function must ensure that these provisions are complied with.

PROXIES

[2.25] Where proxies may be used at the meeting, a requirement that the proxies should be lodged prior to the meeting is usual. If such a requirement exists, the secretary should inspect the proxies which have been lodged in order to be certain of their validity, both as to form and as to the eligibility of the appointees to act as proxies. The secretary must ascertain whether or not they have been lodged within the time allowed by the rules of the body. It is also advisable to number the proxies and to draw up a list of proxies, as this will simplify matters in the event of a poll being demanded at the meeting.

SECRETARY TO THE MEETING

[2.30] The secretarial function is not discharged once preliminary arrangements for the meeting have been made. It continues at the meeting and after the meeting. The secretary as such is not entitled to vote at the meeting. If the secretary is also a member of the organisation in their individual right then the fact that he or she is acting as secretary to the meeting does not disenfranchise the individual.

At the meeting the secretary must be present but should not take sides.[7] The secretary may, however, give information and advice, and it is proper for the secretary to seek permission from the chair to make a statement for this purpose. The secretary should keep the chair informed of any matters that may invalidate proceedings at a meeting; for example, the absence of a quorum.

The main function of the secretary at the meeting is to record the minutes: see below, Ch 12. Clear and simple language should be used, and care should be taken that the minutes are a clear, complete and accurate record of what has taken place at a meeting.

7 *Re Elections in Electrical Trades Union* (1961) 3 FLR 86.

Finally, there will be secretarial functions to discharge after the meeting. It is normal practice for rough notes to be taken at the meeting and for the secretary to produce a finished version of the minutes after adjournment. The secretary may also be asked to attend to correspondence, as the meeting directs. In transacting the business of the organisation, a secretary is not entitled to act otherwise than in accordance with lawful authority. If the secretary, without lawful authority, uses moneys of the organisation, the secretary must account for those moneys and repay them to the organisation. This will also be the situation where the moneys have come into the hands of the secretary under a resolution that is invalid.[8] Every public company registered under the *Corporations Act* must have a secretary who resides in Australia.[9] A change that was effective in 2001 means that a proprietary company no longer requires a secretary.[10] The secretary is much more than a mere clerk and has wide authority to bind the company by contracts in the area of administration.[11]

8 *Gordon v Carroll* (1975) 6 ALR 579.

9 *Corporations Act 2001* (Cth), s 204A(2).

10 *Corporations Act 2001* (Cth), s 204A(1).

11 *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] QB 711; see *Corporations Act 2001* (Cth), s 204E.

Chapter 3

Notice of meetings

[3.05] A meeting must be properly convened.[1] The notice of meeting has a central role in determining whether the meeting has been properly convened. The contents of the notice must comply with the requirements of the constitution. The notice must be given to all those entitled to notice. The manner in which the notice is given and the period of notice are also dictated by the constitution of the association. If the notice of meeting is irregular, the meeting will be invalid unless the irregularity is condoned.

CONTENTS OF NOTICE

[3.10] A notice of meeting should set out the date, time and place of the meeting.[2] Where a meeting of a body has to be convened for a particular purpose, the nature of the business to be transacted must be set out and it may be relevant to indicate whether the meeting is an ordinary or extra-ordinary meeting. If the time and place of meeting is prescribed by rules, these must be observed. Where rules provide for a meeting to be called in a particular manner, a meeting is not duly convened when the notice calling it does not indicate that this procedure has been followed. For example, if the rules state that the meeting must be convened by order of the president, or by notice under the hand of the secretary, the meeting is not properly convened if the notice makes no reference to the president or is not signed by the secretary.[3]

A meeting cannot travel outside the scope of the notice relating to it,[4] so the notice should be drawn in such a way as not to unduly restrict the business that can be done under it. The meeting is competent to consider amendments to motions of which notice has been given, but the amendment must be such that it comes within the scope of the notified business.[5] Where special business

1 *Barron v Potter* [1914] 1 Ch 895.
2 *Wishart v Foster* (1961) 4 FLR 72.
3 *Wishart v Foster* (1961) 4 FLR 72.
4 *Symes v Weedow* (1893) 14 ALT 197; cf *Smith v Deighton* (1852) 8 Moo PC 179; 14 ER 69.
5 *Efstathis v Greek Orthodox Community of St George* (1988) 6 ACLC 709.

is to be dealt with, the notice should state it to be such. Under a heading "other business", "ordinary business", or "general business", matters of a routine nature may be considered. If a rule provides that no business shall be transacted at a meeting unless mentioned in the notice of meeting, the rule must be complied with; a notice stating "and any other business properly brought forward" is insufficient. Consequently, a resolution relating to a matter not sufficiently specified by the notice of meeting is not binding.[6]

STANDARD OF SUFFICIENCY

[3.15] There should be an adequate and candid description of the business to be transacted; failure to give such a description may invalidate what is done at the meeting. Thus, when expulsion or suspension of a person is to be discussed at a special meeting, this should be clear from the notice. The purpose of notice is to enable persons to know what business is proposed for a meeting, so that they can make up their minds whether or not to attend. The notice should be drafted so that ordinary minds can fairly understand its meaning.[7]

It must not be a tricky notice, artfully framed. An insufficient notice is a misleading notice. It is not necessary, however, to give notice in minute detail of the business to be transacted; a notice is sufficient so long as the nature and intent of the business is clearly indicated and brought to the minds of the recipients.[8] The information must not be presented in such a way that persons reading the notice quickly might be misled. They must be able to get the general drift without studying the notice in detail.[9]

PERSONS ENTITLED TO NOTICE

[3.20] Notice must be given to a member notwithstanding that that member has previously indicated an inability to attend or has directed that such notice should not be sent. Under older authority there were exceptions to this rule in the case of a member who is so far away that it is physically impossible for the member to attend and, possibly, in the case of members who are so dangerously ill that it is impossible to move them.[10] It is questionable whether such exceptions should endure in this time of easy world travel without special provision in the constitution. Where the rules of a body require that notice of meeting should be given to all members, this means that notice must be given to members even if they are not entitled to vote at the meeting. If such

6 *Helwig v Jonas* [1922] VLR 261.
7 *Henderson v Bank of Asia* (1890) 45 Ch D 330 at 337; *McLure v Mitchell* (1975) 6 ALR 471 at 494.
8 *Ex parte MacNamara* (1893) 10 WN (NSW) 83; *Campbell v Higgins* (1957) 3 FLR 317.
9 *Re Marra Developments Ltd* (1976) 1 ACLR 470.
10 *Young v Ladies' Imperial Club* [1920] 2 KB 523; *Daly v Gallagher* [1925] QSR 1.

members do not receive notice, the meeting is invalidly convened and the resolutions passed at it are not valid.[11] The effect of wrongful exclusion of members from participation in the meeting and business of a body is that they lose not only the right to participate in, but also the right to influence, the deliberations.[12]

MANNER OF NOTICE

[3.25] Where the rules of an association prescribe no method of calling meetings, meetings should be called in a way that will bring notice of them to every member.[13] If, however, it is common knowledge that meetings take place on definite days at regular intervals, further notice is unnecessary. Unless such notice is specifically provided for in the constitution, a notification merely placed on a notice board or in a journal or newspaper is insufficient. Notice must be given in such a manner as may reasonably be expected to come to the attention of members.[14] Normally, it should be sent by post to the registered address of each member.

Advertising a meeting is not, unless rules provide that it shall be sufficient, equivalent to giving notice to every member.[15] However, for a public meeting, an advertisement in the press is sufficient notice, unless there is express provision for another form of notice.

LENGTH OF NOTICE

[3.30] Where no length of notice is prescribed, the notice given must be a reasonable one. It must be given in such time as to give members a reasonable opportunity of attending the meeting.[16] The times prescribed in the constitution as to when notice of meetings should be given and the length of the notice must be observed. However, giving longer notice than the rules require is normally not a ground of objection. Where "seven days' notice" of meeting is prescribed, that does not mean precisely seven days and no more, it means at least seven days; nor does it mean that all persons entitled to notice must actually receive their notice on the same day.

It is often provided that there shall be so many "clear" days' notice. A reference to "clear" days is a reference to days exclusive of the day of notice and the day of meeting. Where "seven days' notice at least" is to be given,

11 *Royal Mutual Benefit Building Society v Sharmall* [1963] 1 WLR 581.
12 *Cooper v Marr* (1966) 9 FLR 371.
13 *Campbell v Higgins* (1957) 3 FLR 317; *Higgins v Nicol* (1971) 18 FLR 343.
14 *Winter v McAdam* (1957) 1 FLR 210; *Leary v Australian Builders' Labourers' Federation* (1961) 2 FLR 342 at 347.
15 *Charlton v Barkly Reef GM Co* (1877) 3 VLR (L) 101.
16 *Winter v McAdam* (1957) 1 FLR 210.

this means,[17] unless statute provides otherwise,[18] seven "clear" days' notice. That is to say, there must be a space of seven days between the day of notice and the day of meeting, both such days being excluded.[19] Where it is provided that "a fortnight's notice" shall be given, a notice issued on the first day of the month for a meeting on the 14th day of the month is insufficient by two days.[20] A person who attends a meeting and challenges its validity on certain grounds but not on the ground of inadequate length of notice is not precluded from taking the latter objection in legal proceedings.[21] Sundays and holidays, in the absence of a provision to the contrary, are not excluded when computing time, but are counted as ordinary days. The fact that time expires on a Sunday or holiday does not give an additional day for doing an act or excuse performance on a previous day.

The post office, being the ordinary channel of communication, is available for sending a notice. Where the notice is posted, the day of notice is the day on which it would be received in the ordinary course of post. It is immaterial that the advertisement does not actually come to the notice of a person the number of prescribed days before the date of meeting. If the law was otherwise, it would be impossible to calculate the period of time for notice of a meeting.[22] Where it is provided that a meeting shall be convened by a seven days' notice inserted twice in one newspaper, both advertisements must take place at least seven days before the meeting.[23] Where statute provides for advertisements in two different publications at least seven days before a meeting, the minimum notice must be given in the case of each publication.[24] Where a body's constitution requires nomination of candidates to its governing body to be made "at least 21 days" prior to the date of a meeting, the governing body cannot require nominations to be received earlier. This position is not altered by another provision in the constitution that gives the governing body power to prescribe the procedure for the conduct of elections.[25]

17 *Re Railway Sleepers Supply Co* (1885) 29 Ch D 204.
18 *Re Anglo-Australian Investment Co* (1894) 4 BC (NSW) 63.
19 *White v Godfrey* (1959) 1 FLR 357 at 362; *Gates v Vickery* (1973) ACLC 27,518.
20 *Labouchere v Wharncliffe* (1879) 13 Ch D 346.
21 *Ryan v Kings Cross RSL Club Ltd* [1972] 2 NSWLR 79; cf *Re Katoomba Coal & Shale Co Ltd* (1892) 13 LR (NSW) (Eq) 70. See also *Werner v Boehm* (1890) 16 VLR 73.
22 *Mercantile Investment & General Trust Co v International Co of Mexico* [1893] 1 Ch 494n; *Sneath v Valley Gold Ltd* [1893] 1 Ch 477.
23 *Dalrymple v Prince of Wales and Bonshaw United Co* (1895) 16 ALT 168.
24 *Re John Plunkett Consolidated Pty Ltd* (1977) 3 ACLR 285.
25 *Brown v Wireless Institute of Australia, NSW Division* (1980) 4 ACLR 847.

EFFECT OF IRREGULARITY IN NOTICE

[3.35] A notice of meeting must be sufficient both as to time[26] and form or it will be invalid. Where a rule provides for the time of meeting being set out in the notice of meeting, failure to observe the rule by not stating any time in the notice renders the meeting invalid. A meeting is also rendered invalid if it is held at a time earlier than is stated in the notice of meeting. A resolution may be rendered invalid by failure to give adequate notice of it, even if the meeting is valid.[27]

Where a meeting is held irregularly, a person who attends it and listens to what is going on does not acquiesce in or submit to the proceedings.[28] If notice of a special meeting is given at an ordinary meeting and does not come to the notice of all members, the notice is insufficient and the special meeting is rendered invalid.[29] Failure to give notice of meeting to any person entitled to be present at it will, unless such a person happens to be present, invalidate the meeting and any resolutions passed at it.

Failure to give adequate notice means that the meeting is not properly convened, and all business purported to be done at the meeting must be treated as void and of no effect.[30] When a notice is invalid in part because it includes matters which are beyond the scope of a meeting, the rest of the notice is not necessarily invalid.[31]

CONDONING IRREGULAR NOTICE

[3.40] Where a meeting is convened by a notice which would be invalid, the meeting may nevertheless be valid if the irregularity is condoned. If all members of the particular body are present and unanimously consent to the meeting proceeding with the business, the irregularity is condoned.[32] Where all members of a body are present and agree to waive formalities with regard to notice, the business they execute will be valid notwithstanding the absence of notice.[33] Notwithstanding irregularities in connection with a notice of meeting, resolutions passed at that meeting may be held to be valid and effective where they have always been acted on without objection and been adopted by a long course of acquiescence.[34]

26 *McLure v Mitchell* (1975) 6 ALR 471 at 492.
27 *Helwig v Jonas* [1922] VLR 261.
28 *Werner v Boehm* (1890) 16 VLR 73.
29 *Campbell v Higgins* (1957) 3 FLR 317.
30 *Campbell v Higgins* (1957) 3 FLR 317.
31 *Cleve v Financial Corp* (1873) LR 16 Eq 363.
32 *McLure v Mitchell* (1975) 6 ALR 471 at 494; *Efstathis v Greek Orthodox Community of St George* (1988) 6 ACLC 709.
33 *Machell v Nevinson* (1724) 11 East 84n; 103 ER 936; *Walsh v Stephens* (1873) 3 QSCR 98 at 112.
34 *Daly v Gallagher* [1925] QSR 1.

Chapter 4

Proxy rights

[4.05] The word "proxy" means "substitute" or "person acting by procuration". It is also used for the instrument appointing a proxy. As a substitute for the member, a proxy may be given the right to attend the meeting, and may be counted as part of the quorum in some circumstances. A proxy may have a right to speak in the debate, to call for a poll vote, and to vote on resolutions and in elections.

The *Corporations Act 2001* (Cth) confers the right to vote by proxy on members of public companies. It is much more uncertain whether the members of other organised bodies have the right to vote by proxy. At common law there was no right to vote by proxy. This derived from an early rule concerning the rights of members in quasi-public organisations, such as religious and municipal corporations, in which membership rights were accorded on a personal basis, not measured in regard to the member's financial interest in the body.[1] In bodies where membership rights are regarded as personal privileges, the other members can expect a vote to be a reflection of the member's interest in the welfare of the general body, influenced by the member's personal experience. In these circumstances the other members may have a right to object to a system which would entitle an outsider to vote. It was clear under Anglo-Australian law, even before a statutory right to vote by proxy was created, that the constitution of a company limited by shares might confer the right to vote by proxy as an incident of the contract of membership.[2] In the context of partnership, an early Australian decision disallowed a claim to vote by proxy even in the presence of a specific agreement to allow such voting.[3] There is American authority for the proposition that an express grant of statutory power was necessary before a right to vote by proxy could be claimed, regardless of the existence of any

1 *Dean v Chapter of Fernes* (1607) Davis 42; 80 ER 529; *Attorney-General v Scott* (1745) 1 Ves Sen 413; 27 ER 1113.

2 *Harben v Phillips* (1882) 23 Ch D 14; *Cousins v International Brick Co Ltd* [1931] 2 Ch 90 at 93.

3 *Sheldon v Phillips* (1884) 15 LR (NSW) (Eq) 98.

contractual right under the constitution of the body.[4] It was suggested that "if one member might appear and vote by proxy, then all may and so the welfare and interest of the company and of the public (might) be utterly neglected".

In New South Wales the *Registered Clubs Act* at one stage provided that no person was to vote as a proxy at any meeting of the club or of a committee of the club or at any election of the club.[5] In general, however, the position in Australia is that if the constitution provides a right to vote by proxy, the courts will recognise the right so long as the provisions of the constitution have been observed meticulously.

If the constitution or any relevant legislation empowers a member to appoint a proxy, the member must select an eligible person to hold the proxy. As for any person on whom legal power is conferred, the proxy must be both sane and adult and must be under no other disqualification. This granted, the only concern of the law is with the relationship between the prospective proxy and the company. There may be a requirement that the proxy should also be a member of the company. Officers of the body may hold a proxy, and will frequently be nominated as proxy, if the executive committee circulates proxy forms.[6]

PROXY FORMS

[4.10] Once a member of an organisation has decided to exercise the right to appoint a proxy, the decision must be embodied in a document framed so that the organisation will honour it. It is usually possible in such organisations to obtain a printed proxy form from the secretary, but the use of such a form is not mandatory.

Members are free to ignore that form and prepare their own proxy form. The appointment of a proxy does not require any particular form, but there must be an appointment for a definite purpose and the business or matter in respect of which the proxy is to act for her or his principal must be stated. If it is a proxy to vote, the form should state that the proxy is to vote for the principal at a particular meeting, or at all meetings for a specified time, or for a particular purpose. It must express in some definite form the matters in respect of which the proxy is to act. The mere appointment of an agent and a statement that whatever the agent does will be ratified is too indefinite to have effect as a proxy appointment; it lacks the necessary particularity.[7]

4 *Taylor v Griswold* (1834) 14 NJLR 222 at 228.

5 *Registered Clubs Act 1976* (NSW), s 10(1)(b), provision since amended. The Act now provides (s 36) that elections shall be run by the Electoral Commission.

6 See eg *Re John O'Brien Consolidated Industries Pty Ltd* (1975) 1 ACLR 311; *Re Marra Developments Ltd* (1976) 1 ACLR 470.

7 *Sheldon v Phillips* (1884) 15 LR (NSW) (Eq) 98; cf *Howard v Hill* (1888) 59 LT 818.

Proxy forms may contain instructions as to how the proxy is to vote; where such instructions are given, they will be regarded as binding in contract.

Where such instructions are not given, as where a printed form enumerating the resolutions and allowing an indication of for or against is not completed, the proxy will be free to vote as he or she sees fit.[8] The proxy may also have such discretion when conflicting directions are given.[9]

There are no specific requirements as to how a proxy should be executed, although the constitution of an organisation normally contains some provision requiring the proxy to be in writing under the hand of the appointer or of the appointer's attorney duly authorised in writing.[10] The prime objective, recognised by the courts and aimed at by such constitutions in laying down requirements as to execution of the proxy, is to ensure the production of acceptable evidence that the member has expressed an intention to register a vote by the agency of a particular representative. Where the member can be deemed to have expressed such an intention, a court concerned with a statutory right to vote by proxy would be unlikely to hold that formal requirements as to execution need be observed.

It is established law that the fact that a blank was left in the proxy form will not invalidate it. The proxy holder will be deemed to have authority to fill up such a blank.[11] In a case in which the day of the month was omitted from the date on the proxy, it was held that the omission was so trivial and so insignificant in context that it should not be allowed to disenfranchise a member.[12]

Lodgment and inspection of proxy forms

[4.15] Constitutions that confer or regulate the right to vote by proxy frequently require that the proxy should be lodged with the organisation a day or two before the meeting is to be held.[13] Such provisions are sometimes seen as unfair and unreasonable in that they threaten to effectively disenfranchise a number of members and shorten the time available to insurgents to organise opposition to the incumbent management.[14] Provisions requiring prelodgment of proxies have, however, been enforced as mandatory in Australia.[15]

8 *Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd* (1988) 6 ACLC 426.

9 *Re Trident Contractors Ltd* (1992) 30 NSWLR 615.

10 See *Corporations Act 2001* (Cth), s 250A; and eg the former *Corporations Law*, Sch 1, Table A, Art 54(1).

11 *Re Lancaster; Ex parte Lancaster* (1877) 5 Ch D 911; *ANZ Nominees Ltd v Allied Resources Corp Ltd* (1984) 2 ACLC 783.

12 *ANZ Nominees Ltd v Allied Resources Corp Ltd* (1984) 2 ACLC 783 at 787.

13 See eg *Corporations Act 2001* (Cth), s 250B.

14 See Aranow and Einhorn, *Proxy Contests for Corporate Control* (2nd ed, Columbia University Press, New York, 1968), pp 310–311.

15 *Armstrong v Landmark Corp Ltd* (1966) 85 WN (Pt 1) (NSW) 238.

One reason why prelodgment is required is to facilitate inspection of the proxy forms by executive officers running the meeting. The purpose of this inspection is to take reasonable precautions to ensure that those who vote are entitled to do so. The inspection is usually carried out by the secretary, or the auditor of a company. Doubtful instruments are referred to the chair for a decision as to validity. There is frequently a provision in the constitution that the chair's decision as to the right to vote is final.[16] It has been held that, although such a provision is necessary and useful in regulating the conduct of a meeting, it does not oust the jurisdiction of a court to correct an error of law. Where there is a statutory right to vote by proxy, it has been held that the member did not and could not agree not to appeal a ruling that was plainly wrong in law and deprived the member of voting rights. A ruling that is wrong in law is ultra vires and void despite the presence of such an article.[17] It is unclear whether the same result might be reached if the question arose in the context of a body not registered under the *Corporations Act 2001* (Cth), where there was no statutory right to vote by proxy.

The right of an individual who is not an officer of the meeting to inspect proxy forms is unclear. In *Armstrong v Landmark Corp Ltd* (1966) 85 WN (Pt 1) (NSW) 238, a dissident director and shareholder was held to be entitled to inspect such instruments in the exercise of a director's right to inspect corporate documents. The court refused, however, to make an order that would allow the dissident to be present while the management check of proxies was being carried out. It was also held that it would be unreasonable to expect management to complete the checking procedure early enough to allow the plaintiff to exercise the right of inspection before the meeting. Accordingly the order was that the defendant should make the proxies available for inspection at the conclusion of the meeting. It was subsequently recognised that if those opposing incumbent management were denied an opportunity to see the proxies before the meeting, it must be open to the dissidents to challenge the validity of votes cast at the meeting after the event.[18]

RIGHTS OF A PROXY

[4.20] It would appear that in the absence of statutory provisions, the rights the proxy is to enjoy at the meeting are subject to the provisions of the constitution. To enable the proxy to effectively represent the principal, it would appear that the recognition of a right to speak and vote at the meeting is

16 See eg former *Corporations Law*, Sch 1, Table A, Art 53(2).

17 *ANZ Nominees Ltd v Allied Resources Corp Ltd* (1984) 2 ACLC 783; *Scullion v Family Planning Association of Queensland* (1985) 10 ACLR 249.

18 *Industrial Equity Ltd v New Redhead Estate & Coal Co* [1969] 1 NSWR 565.

essential. The *Corporations Act 2001* (Cth) provides these rights, and also the right to join in demanding a poll vote.[19] The legislation does allow the company to limit the right of proxies to vote on show of hands, but the corporate constitution may stipulate that proxies shall have this power. This appears to be on the basis that voting by show of hands is intended to be a simplified procedure and where two proxy holders are appointed and are allowed to vote by show of hands it may effectively double an individual's voting power.[20]

REVOKING THE AUTHORITY OF A PROXY

[4.25] Statute may limit the duration of the authority conferred by a proxy, but if no such limitation is expressed by statute, the instrument itself will determine the duration. There is no requirement in Australia that a proxy should be limited as to its duration.[21] Regardless of whether the proxy was conferred for a limited or an indefinite period, the proxy may be effectively revoked by the action of the principal. A proxy can be expressly and formally revoked, so that the company cannot rely on the ostensible authority it confers, by written notice to the company at its registered office before the commencement of the meeting or as otherwise provided by the constitution.[22] It has also been held in the United States of America that a proxy is revoked when a subsequent proxy in respect of the same membership right is lodged as required.[23] A slightly more difficult problem is whether the presence of the member at the meeting or the exercise by the member of the powers delegated under the proxy revokes the proxy. In *Ansett v Butler Air Transport (No 2)* (1958) 75 WN (NSW) 306, the members attended the meeting and voted on the show of hands but refrained from voting on the poll. It was held that such behaviour manifested an intention objectively apparent to the chair that the proxies continued in force and had not been revoked by the member. It was also pointed out that in the circumstances the members had not exercised in person any of the powers conferred under the proxy.

19 *Corporations Act 2001* (Cth), s 249Y; see Ch 21.

20 *Clifton v Mount Morgan Ltd* (1940) 40 SR (NSW) 355.

21 *Coachcraft Ltd v SVP Fruit Co Ltd* [1978] VR 706.

22 See eg former *Corporations Law*, Sch 1, Table A, Art 56.

23 *Burleson v Hayutin* (1954) 273 P 2d 124 (Colo SC).

FORM OF PROXY

[Replace with Name of Association]

[Replace with name and current address of member(s)]

I/We, [Replace with name/s of member/s] of [Replace with address as it appears in records of association] being a member/members of the Association, hereby appoint [Replace with name of preferred proxy] of [Replace with address of preferred proxy] or, [Replace with name of second choice as proxy] of [Replace with address of second choice as proxy] failing whom or if no person is named above the chair of the meeting as my/our proxy.

1. I authorise my proxy to vote for me (strike out one of the following options)

EITHER

at the general meeting of the association to be held on the [Replace with date of meeting, day, month and year] and at any adjournment thereof.

OR

at all general meetings of the association to be held before [Replace with relevant date, day, month, and year].

2. I instruct my proxy to vote as follows: (strike out one of the following options)

EITHER

at his or her discretion on all resolutions to be considered at the meeting.

OR

according to the following instructions and in all other cases according to his/her discretion.

(circle one of the three choices)

Resolution 1:	For	Against	Abstain
Resolution 2:	For	Against	Abstain
Resolution 3:	For	Against	Abstain

(if more resolutions are to be considered — insert paragraphs as relevant)

Signed on [Replace with date on which proxy is executed]

[Replace with signature of member/s]

Chapter 5

The quorum

[5.05] It is usual for rules to provide for the presence of a certain number of persons at meetings. The prescribed number is known as the quorum. A quorum of a body is attained when a sufficient number of members attend a duly constituted meeting when all should and might be present. A quorum is not obtained when a casual meeting of the required number of the body occurs. Unless provision is made for a quorum, all the members of a body must be present at a meeting, as otherwise its acts will not be valid.[1] Circumstances may, however, indicate that the consensual compact between the parties has moved away from the position that only a meeting at which everybody is present is effective. To determine what the consensual compact is, one can look to the activities of the members after the original agreement was recorded in writing.[2]

If the rules of a body do not regulate the matter, the accepted view of Anglo-Australian law is that the quorum must be present at the commencement of the meeting and continue throughout. Where there is no quorum there is no meeting and any business transacted is invalid.[3] It is immaterial whether or not attention has been drawn to the insufficient number present. This is subject only to the rule that, if the court can see that for an improper reason the plaintiff has brought the meeting to a premature end, it may in the exercise of its equitable jurisdiction refuse to grant relief.[4]

It has been decided that a reference in the constitution to the point of time at which a quorum must be present will prevent the general rule from applying. Where the constitution of the organisation stipulates that the

1 *Ball v Pearsall* (1987) 10 NSWLR 700; *Green v The Queen* (1891) 17 VLR 329; *St Leonards Municipality v Williams* [1966] Tas SR 166.

2 *Ball v Pearsall* (1987) 10 NSWLR 700 citing *Attorney-General v Murdoch* (1852) 1 De G M & G 86; 42 ER 484.

3 See *Re Greymouth Point Elizabeth Railway Co* [1904] 1 Ch 32; *Walsh v Stephens* (1873) 3 QSCR 98; *Old Welshman's Reef Co v Bucirde* (1871) 7 VLR (Eq) 115; *Re Alma Spinning Co* (1880) 16 Ch D 681; *Newhaven Local Board v Newhaven School Board* (1885) 30 Ch D 350; *Steuart v Oliver (No 2)* (1971) 18 FLR 83. Cf *McDonald v Thorley* [1976] Qd R 208 at 213.

4 *Ball v Pearsall* (1987) 10 NSWLR 700 at 705.

meeting may proceed to business when there is a quorum, it is sufficient that there is a quorum present at the beginning of the meeting. If so, business may be validly transacted at the meeting even though the number present falls below the number required for a quorum.[5] The constitution of a body may include the steps to be taken if a quorum ceases to be present after the start of a meeting.[6]

One of the main duties of the chairperson of a meeting is to see that there is always a quorum. The meeting may not proceed to business unless there is a quorum. Further, if the general rule applies, there is no quorum as soon as the meeting is left without the requisite number to form a quorum, which may be at the moment a motion is being moved and before it is voted on.[7] If the general rule applies and members leave the meeting, the meeting lapses, unless rules provide otherwise. The rules may provide that, in this contingency, the meeting is to be adjourned to the time and place of the next ordinary meeting. An appointment made when there is no quorum is null.

The presence of a quorum means a quorum competent to transact and vote upon the business before the meeting. If some who are present are disqualified from voting, and there is not otherwise a quorum, no business can be validly done.[8] Where certain persons present at a meeting are not competent to vote on a particular matter, they are not to be counted for the purpose of a quorum in relation to a vote to be taken on the matter. If there are not sufficient other persons present, and entitled to vote on the matter, so to constitute a quorum in relation to it, any vote taken on the matter is ineffective and void. So long as a quorum remains present, it is immaterial that the number actually voting is less than the number required for a quorum, unless a special majority is necessary, for example, a majority of those present.

Where a subsequent meeting at which there is a quorum passes a formal resolution to carry out a decision finally resolved upon at an earlier meeting at which there was no quorum, this does not validate the earlier decision. The absence of a quorum at a previous meeting will not, however, invalidate a resolution of a substantive and independent character that is duly passed at a later meeting at which there is a quorum.[9]

The chairperson, if a member, and a member asserting that a quorum is not present are to be counted in determining whether there is a quorum.[10]

5 *Re Hartley Baird Ltd* [1955] Ch 143; *Re London Flats Ltd* [1969] 1 WLR 711.
6 See eg *McDonald v Thorley* [1976] Qd R 208.
7 *Re London Flats Ltd* [1969] 1 WLR 711.
8 *Re Greymouth Point Elizabeth Railway Co* [1904] 1 Ch 32.
9 *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112.
10 *McDonald v Thorley* [1976] Qd R 208.

Chapter 6

The chair

[6.05] The chairperson of a meeting exercises procedural control over the meeting.[1] This includes nominating who is to speak, dealing with the order of business, putting questions to the meeting, declaring resolutions carried or not carried, in due course asking for any general business, and declaring the meeting closed.[2] It is essential that a meeting has a chairperson, whether he or she is called by that title or another title, as otherwise the meeting is unlikely to be conducted in an orderly manner.[3] The title accorded to the person occupying the chair will be determined by the constitution of the organisation and will not affect the power with which the position is invested, but the use of a gender-neutral term is desirable.

ELECTION OF CHAIR

[6.10] The rules of regularly constituted bodies should provide for the election of a president or officer to chair their meetings and should also contain provisions for the election of a substitute in case the chairperson is absent from a meeting.

Where there is no permanent chairperson, or when that person is absent, the first business of a meeting, subject to the rules of the particular body, is to elect a person to fill the chair. If the permanent chairperson is ill or absent for some reason or the circumstances are such that another should occupy the chair, the members of the body are entitled to appoint another chairperson for the occasion.[4] This could occur where a question of expulsion is to be considered and the chairperson is in the position of the accuser. Where more than one person is nominated to fill the chair, an election is necessary. The voting is usually by show of hands, but unless rules provide otherwise, the meeting may determine the method of voting.

1 *Kelly v Wolstenholme* (1991) 9 ACLC 785 at 787 per Young J (SC NSW).
2 *Kelly v Wolstenholme* (1991) 9 ACLC 785 at 787 per Young J (SC NSW).
3 *Colorado Corp Pty Ltd v Plautus* [1966] 2 NSWR 598.
4 *Dickason v Edwards* (1910) 10 CLR 243.

In order to hold the election, it is wise to appoint a temporary chairperson; this should not be one of the candidates, since "one may not judge one's own cause". No individual should preside over her, or his, own election.[5] This fundamental provision of election law must be observed. A candidate is vitally interested in the outcome of the election and therefore he or she should not take part in its conduct lest the suspicion arise that the result was influenced by self-interest and thus unfair to the other candidates. Such a suspicion may result in candidates who would otherwise be prepared to nominate, and voters who would normally vote, refusing to do so; they expect that the candidate conducting the election will ensure for personal victory. They may well assume that it is useless to nominate as, or vote for, an opposing candidate. It is impossible to rule out such an election having been affected by the irregularity.[6]

It is proper for individuals to propose or second their own nomination as chairperson and to vote in their own interest. It is clear that a person cannot assume the chair merely by declaring that they occupy the position. This is especially true when the individual fails to take procedural control of the meeting.[7] On the other hand, where such a declaration is met by acquiescence and the individual making the declaration subsequently controls the affairs of the meeting, the chairperson may be deemed to have been chosen by acquiescence.[8] Objections to the appointment of a chairperson should, therefore, be made immediately to prevent acquiescence from curing any informality or irregularity.

If a deputy is elected to take the chair in the absence of the permanent chairperson, the deputy is entitled to retain the chair even though the permanent chairperson subsequently arrives at the meeting. As an act of courtesy the deputy will usually resign the chair, or offer to do so, on the arrival of the permanent chairperson. As a matter of practicality the permanent chairperson should decline the offer unless the debate on issues is entering a totally new phase.

DUTIES OF THE CHAIR

[6.15] The chairperson has a number of important duties to perform. These duties are first listed here and then explained in the pages that follow. The person in the chair must:

- preside at meetings
- conduct proceedings regularly

5 *R v Owens* (1849) 28 LJQB 316 at 318; *Fanagan v Kernan* (1881) 8 LR Ir 44 at 48, 49; *R v White* (1867) LR 2 QB 557 at 561.

6 *Re Amalgamated Engineering Union* (1963) 4 FLR 325 at 327 per Joske J.

7 *Kelly v Wolstenholme* (1991) 9 ACLC 785 (SC NSW).

8 *Kelly v Wolstenholme* (1991) 9 ACLC 785 (SC NSW) at 787.

- determine the sense of the meeting
- preserve order
- adjourn the meeting if necessary
- control the voting process
- declare the meeting closed; and
- sign the minutes.

Preside at meetings

[6.20] Authority to preside over a meeting does not give dictatorial power, but merely makes a chairperson, as "first among equals", the designated person to fulfill certain functions, such as taking the chair and carrying on the meeting so that the business before it may be disposed of.[9]

Conduct proceedings regularly

[6.25] Proceedings must be conducted regularly and in accordance with the rules of the particular body which is meeting. The chairperson should make sure that proper notice of the meeting has been given and that a quorum is present throughout the whole of a meeting: if a quorum cannot be obtained, the chair should not allow the meeting to continue. The chairperson should call upon speakers by name, requiring them to rise when speaking and to address the chair, and should insist upon the proper conduct of debate. A chairperson should be impartial, should insist on rulings on matters of procedure and points of order, and should not allow a ruling to be disputed or accept or put a motion of dissent from his ruling on these matters.

No discussion should be permitted unless there is a motion before the meeting. Although rules provide for the "consideration and adoption" of a report, there should be a motion for the adoption of the report before the meeting prior to consideration being given to the report, and on such motion the report should then be discussed in accordance with the rules of debate.[10] Irrelevant discussion should be terminated. The chairperson's remarks should be brief.

Determine the sense of the meeting

[6.30] The chair must take care that the sense of the meeting is properly ascertained with regard to any question before it.[11] Sufficient opportunity to speak must be given to those present so that opposing views are presented

9 *Wishart v Henneberry* (1962) 3 FLR 171.

10 *Wishart v Henneberry* (1962) 3 FLR 171.

11 *Gosling v Veley* (1847) 16 LJQB 201 at 217–218; *Second Consolidated Trust v Ceylon Amalgamated Co* [1943] 2 All ER 567.

to the meeting. With the consent of the majority of those present, debate may be terminated after reasonable discussion has taken place. The chairperson must put motions and amendments to the vote and has no implied power to adjourn a meeting in order to avoid its coming to a decision.[12] The chair is charged with excluding irrelevant motions and permitting voting only upon such motions as are within the purposes and competency of a meeting.[13] The chair may refuse to put motions and amendments which are not couched in clear terms,[14] but if an amendment is otherwise relevant and proper and within the scope of the meeting, the chair cannot refuse to put it.

It is for the chair to decide whether a motion or amendment falls within the terms of a notice of meeting. A chairperson cannot rule out of order a motion which is within the competence of a meeting when all the conditions incidental to the submission of the matter to the meeting have been observed.[15]

The chairperson may advise and counsel the meeting, but has no power to:

- direct what is to be done
- deny discussion on what is to be done
- refuse motions thereon; or
- disregard or overrule the opinion of members.[16]

Preserve order

[6.35] The preservation of order includes preventing private talk or heckling from interfering with speakers, and prohibiting offensive statements or the imputation of improper motives. The chair can call upon speakers to withdraw and apologise, and may require them to resume their seats. This last power may also be exercised in the case of speakers who are unduly longwinded or who do not keep to the point under discussion.

The duty to preserve order includes not only the prevention of disorder but also the furtherance of the business of the meeting in accordance with the rules of the body which is meeting. If the chair disregards such rules, it is incompatible with his or her duty to keep order.[17]

Maintaining order is one of the primary duties of the chair and there are a number of ways in which it may be enforced. The chair may rise to address the meeting, upon which any person speaking must yield the floor, and then

12 *Wishart v Henneberry* (1962) 3 FLR 171.

13 See *Second Consolidated Trust Ltd v Ceylon Amalgamated Co* [1943] 2 All ER 567.

14 *Henderson v Bank of A/asia* (1890) 45 Ch D 330; *R v Neeson; Ex parte Koch* [1937] VLR 211; *Breay v Browne* (1896) 41 Sol Jo 159; *Wishart v Henneberry* (1962) 3 FLR 171.

15 *R v Neeson; Ex parte Koch* [1937] VLR 211; *Wishart v Henneberry* (1962) 3 FLR 171.

16 *Wishart v Henneberry* (1962) 3 FLR 171.

17 *Wishart v Henneberry* (1962) 3 FLR 171.

the chair can request that order should be kept. The chair is entitled to call the meeting or a specific person to order. A general call to order should be issued before any specific person is named, as this is less likely to awaken specific antagonisms. If a specific person persists in being disorderly, the chair may call upon that person by name and ask him or her to withdraw from the meeting. The chair may also remove or order the removal of any disorderly person, using as much but no more force than is necessary to exclude the person and keep her or him excluded.[18] An organisation may have a rule which provides that the chair may fine a member if the member refuses to be silent upon a call to order by the chair, but this is not intended to prevent a member from moving a motion. Neither is it intended to prevent the member from moving a motion of dissent from the ruling that the motion is out of order. Any call to order by the chair by way of compelling the member to desist from doing so is an improper call to order and an abuse of authority.[19] These common law powers may be supplemented by statute.[20]

Disorder at a meeting may become so gross as to bring about its deferment or justify those not creating the disorder in retiring, in which event unfinished business can no longer be proceeded with but must be delayed.[21] More licence may be allowed to some kinds of meetings than to others. A meeting of university students "should not be judged by reference to the more stately conduct of affairs at a meeting of a sedate men's (sic) club".[22] Where real violence breaks out, the chairperson can use her or his authority to adjourn immediately, but real violence is something more than pushing and jostling.[23] It cannot be said that disorder has frustrated a meeting so that it has ceased to be a meeting where it is still possible to put motions to the vote and to ascertain a clear division of those for and against the motion.[24]

Adjourn the meeting if necessary

[6.40] Although in the normal course of events the meeting itself should decide when to adjourn, the chair may be invested with the power to adjourn a meeting in certain circumstances. Constitutions of organised bodies customarily provide the chairperson with the power to adjourn the meeting to another place and time if a quorum has not been obtained. But even the absence of a contrary provision in the constitution is sufficient for the chairperson to exercise this power so that the meeting may obtain a quorum.[25]

18 *Doyle v Falconer* (1866) LR 1 PC 328 at 340.

19 *Wishart v Henneberry* (1962) 3 FLR 171.

20 See eg *Summary Offences Act 1966* (Vic), s 17(2) as discussed above in Ch 1.

21 *Colorado Corp Pty Ltd v Plautus* [1966] 2 NSWR 598.

22 *Flynn v University of Sydney* [1971] 1 NSWLR 857 at 858 per Street J.

23 *John v Rees* [1970] 1 Ch 345.

24 *Flynn v University of Sydney* [1971] 1 NSWLR 857 at 858 per Street J.

25 *McDonald v Thorley* [1976] Qd R 208.

It may also be necessary to adjourn the meeting for other reasons, such as if it is impossible to maintain order, if the venue is inadequate or if certain documents are not at hand.

Before adjourning for any purpose, the chair should seek to comply with the rules as regards adjournment and endeavour to secure a vote on a motion for adjournment. Where the disorder is serious, it may well be impossible to follow rules relating to adjournment; in this case the chairperson may have to exercise the authority vested in the presiding officer. This authority is quite restricted, and must be exercised with a view to maximising the rights of all members of the organisation to exercise their rights to speak and vote on the business of the organisation.

There is case law suggesting that the chair only has the power to adjourn for the minimum period reasonably necessary for the restoration of order to enable the business of the meeting to be carried on.[26] It has been held that an adjournment to an indefinite future date is not a proper exercise of the power of the chair to preserve order and so would be void.

However, a recent English decision indicates that these principles do not always apply. A meeting had been called to consider a contentious point concerning the amendment of the constitution of the body. A venue was booked which would have been ample accommodation for the average of 80 members that usually attended general meetings, but it proved grossly inadequate for the 600 plus members who actually attended. In the circumstances, the meeting was unable to proceed and the chair decided to adjourn the meeting and reconvene it that afternoon in other premises. Some of the members protested that they would be unable to attend in the afternoon, and as it was a provision of the constitution that members must lodge proxies 48 hours before the meeting, these members would be unrepresented. The English Court of Appeal, finding that the business of the meeting was not so urgent that another meeting could not have been summoned, held that the chairperson's decision to reconvene in the afternoon was not supported by the residual power. It followed that the decisions made at the reconvened meeting were null and void.[27]

Where it has proved possible to convene the meeting, and the adjournment is caused by disorder on the floor, a chairperson should apply the following principles in determining whether to exercise the inherent right to adjourn. Any adjournment must be:

- for the purposes of forwarding and facilitating the meeting, and not for the purpose of interruption or procrastination; and
- for no longer than the needs of the case indicate and the chairperson considers reasonably necessary for the restoration of order.

26 *McDonald v Thorley* [1976] Qd R 208.

27 *Byng v London Life Association Ltd* [1989] 1 All ER 560.

Control the voting process

[6.45] The chair must ensure that all persons present and entitled to vote have a reasonable opportunity to do so.[28] If a poll is demanded, the chairperson determines the time and manner of taking it. It may be taken there and then,[29] or if this is not possible the meeting may be adjourned for the purpose of taking the poll. It is the duty of the chairperson to declare the poll. Where the voting is by show of hands and the chairperson is doubtful as to the show of hands, it is correct to take another vote even if the result of the first vote has already been declared. The chairperson may order a poll to be taken even though the meeting desires voting by a show of hands. The entry in the minute book of the result of the poll is prima facie evidence of that result.[30]

The chairperson has, in the absence of statutory provision to the contrary, an original vote; and the constitution of the body in question may also provide the chair with a casting vote in the event of a tied vote. In the absence of such provision there is no casting vote at common law.[31] The casting vote may be exercised contingently in the event of there being an equal split of votes.[32] It is customary to exercise a casting vote to preserve the status quo, so that there can be further discussion on the proposal that is before the meeting. It might be inequitable for a chair to exercise a casting vote, as where there is an implied undertaking it should not be used. In such a case the chairperson could be ordered by a court not to use the legal power.[33] An original vote should be exercised by the chairperson before the voting figures are known.

Declare the meeting closed

[6.50] At the conclusion of the business of a meeting, the presiding officer should declare the meeting closed.

Sign the minutes

[6.55] The person in the chair vouches for the correctness of the minutes of a meeting by signing them. The secretary has the function of recording the minutes and if there is an issue about the correctness of these minutes the issue is to be resolved at the next meeting. The signature of the chairperson signifies the assent of the meeting to the minutes and not the chair's personal approbation.

28 *R v D'Oyley* (1840) 12 A & E 139 at 159; 113 ER 763 at 771.

29 *Re Chillington Iron Co* (1885) 29 Ch D 159.

30 *Re Indian Zoedone Co* (1884) 26 Ch D 70.

31 *Nell v Longbottom* [1894] 1 QB 767 at 771.

32 *Bland v Buchanan* [1901] 2 KB 75.

33 *Re Medefield Pty Ltd* (1977) 2 ACLR 406.

INTERACTION BETWEEN THE CHAIR AND THE MEETING

[6.60] By electing a person to the chair, the organisation or the meeting delegates to that person the authority and duty to make necessary rulings on questions of meetings procedure. Any member has the right to ask for a ruling on a point of procedure. If not satisfied with the ruling, any two members can appeal from it to the meeting.

Point of order

[6.65] As a matter of terminology, a member who requests a ruling on a matter of procedure is said to take or make a point of order or raise a question of order. Such a point of order may be taken whenever a breach of the rules occurs or is about to occur. It can be taken when another has the floor and a member can interrupt a speaker to make a point of order if it genuinely requires attention at that time. It does not require a seconder. A point of order takes precedence over any pending question out of which it may arise. If it is attached to a main motion, it yields to a motion to lay the matter on the table. The chair will normally rule upon a point of order without debate. The chair can allow the member making the point of order to explain the matter of concern briefly and may seek the advice of a member with knowledge of meetings procedure without opening debate. If still in doubt the chair can refer the point of order to the meeting. The point then becomes debatable. A point of order is normally disposed of by a ruling from the chair. The chair should briefly state the reasons for the ruling and these should be recorded in the minutes. The ruling cannot be reconsidered.

Appeal

[6.70] Subject to the rules of a body,[34] when the chair rules on matters of procedure the chair should insist on the ruling, and not allow it to be disputed. In particular, the decision of the chair on a point of order may not be discussed or challenged unless the rules of a body so provide. Accordingly, in the absence of such a provision, the chair is entitled to refuse to accept or to put a motion of disagreement with a decision as to a point of order.

Rules may give any two members the right to appeal from a ruling of the chair to the meeting. A motion of appeal, when it has been moved and seconded, takes the question from the chair and vests the matter in the assembly for final decision. Such a motion takes precedence over any question pending at the time the chair made the ruling that is being appealed. The only ruling by the presiding officer that cannot be appealed is a ruling on a point of order raised while an appeal from another ruling is being considered.

34 *Wishart v Henneberry* (1962) 3 FLR 171.

An appeal is improper if there is no other reasonable opinion about the question than the opinion reflected in the chair's ruling.

The appeal is in order when another has the floor, but it must be made at the time of the ruling. It must be seconded, and is debatable unless the resolution was not debatable. It is not amendable. A member can speak once in the debate; the chair can speak twice. It is appropriate for the chair to explain the reasons for the ruling at the outset and to have the right of reply at the end of the debate. An ordinary majority or tie vote sustains the decision of the chair. The chair can vote to sustain the ruling. The motion can be reconsidered.

Dissenting from a ruling by the chair

[6.75] If the chair rules a motion out of order, but it is within the competence of the meeting, the chairperson must be prepared to accept a motion of dissent. If such a motion is put, the chairperson must leave the chair as provided by the rules, and allow the question to be determined in accordance with the rules of the organisation. Where the rules give a meeting control of the business of the organisation, members are entitled to have the business placed before the meeting for discussion.[35]

Reviewing the performance of the chair

[6.80] Members of an organisation may review the performance of the officer in the chair with a view to either commending or censuring the performance. It is appropriate, before such an action is discussed, for the officer in question to leave the chair. A member can open such a discussion by suggesting that the officer should "surrender the gavel" or "leave the chair". Even if this suggestion does not come from the floor, the individual in the chair should immediately turn the chair over to another officer or member as soon as the direction of the discussion becomes clear. This rule applies because of the clear conflict of interests that would arise if the officer continued to preside over a discussion of this nature.

Removing a person from the chair

[6.85] In the absence of express provision to the contrary, a chairperson has no definite term of office and may be removed at any time. However, a motion of no confidence in the chair is not the proper motion for this purpose and should not be accepted from the chair or put to the meeting. When it is intended to elect a new chairperson, the motion should be that another person (whose name is stated) take the chair,[36] not that the chairperson leave the chair. A motion that the presiding officer should leave the chair, standing alone, has the effect of adjourning the meeting.

35 *Wishart v Henneberry* (1962) 3 FLR 171.

36 *Wishart v Henneberry* (1962) 3 FLR 171 at 173.

It is entirely inappropriate to attempt to remove an officer from the chair by moving a motion of no confidence. A motion of no confidence is designed to question the position of the leader of the majority party in a Westminster democracy, who may serve only while retaining that confidence. The officer in the chair of a meeting does not serve only while he or she retains the confidence of the meeting. This officer serves for the term for which he or she has been elected and can only be removed for breach of duty. In these circumstances, to move a motion of no confidence is to breach the time-honoured rule that personalities should not be a matter of debate.[37]

If the chair culpably fails to perform the duties that pertain to the office while presiding over a meeting, it may be possible for a member to move that "the meeting should declare the chair vacant and proceed to elect a new chair". It will not be open for the meeting to take this step if the officer has been elected to the position for a term of years. Unless the officer voluntarily resigns, the organisation's only recourse will be to proceed by way of a hearing before a domestic tribunal to suspend or expel the individual from membership: see Ch 14.

If the chairperson leaves the meeting before the business is completed, the meeting may, unless it has been properly adjourned, elect a new chairperson and continue the business that remains to be transacted. It is within the power of the chairperson to rule that the meeting is at an end. There must, however, be good reason for so ruling, and the reasons are subject to review by a court. Where such a ruling is made, the meeting will be at an end unless an intention to dissent and to continue the meeting is clearly indicated. If, in the absence of such clear indication, some of the members of the body retire, because of the ruling from the chair, then the meeting becomes incompetent to deal with further business.[38]

Requiring the chair to discharge a duty

[6.90] Orders to compel an official, such as a chairperson, to discharge a duty can be obtained from a court. Such orders at common law were known as orders of mandamus, and the expression "orders in the nature of mandamus" is still used by lawyers. If, however, the chair has reasonable grounds for being doubtful whether a matter is within the competence of the body and is acting bona fide in refusing to submit it to a meeting, such an order will not be issued.[39]

The chairperson of a meeting will be bound by the rules of the organisation and cannot refuse to put motions which are in order under those rules.

37 G Petyt, *Lex Parliamentaria* (1689); Sarah Corbin Robert, Henry M Robert III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p xxix.

38 *Meek v Dunn* (1893) 12 NZLR 342; *R v Gaborian* (1809) 11 East 77; 103 ER 933.

39 *R v Foley; Ex parte Miller* [1928] VLR 1.

The chairperson of a public meeting in the full sense of those words is in an entirely different position and has control of the business of the meeting as long as the meeting permits.[40] Where the rules of an organisation are silent upon the course to be followed at a meeting, it is for the meeting to decide the course to be followed.

POWERS OF ACTING CHAIR

[6.95] The constitution of an organisation may provide that powers are vested in named officials either of the organisation itself or of another named organisation. There will be circumstances in which the person regularly appointed to that position is not available at the time. In these circumstances the powers that are vested in a person by reason of the fact that they hold a particular position pass to the person who is acting in that position.[41]

40 *Mayor of Dannevirke v Ries* (1908) 27 NZLR 751; *Wishart v Henneberry* (1962) 3 FLR 171.

41 See *Interpretation Act 1987* (NSW) s 19; *Acts Interpretation Act 1954* (Qld) s 23(2); *Acts Interpretation Act 1915* (SA) s 35; *Acts Interpretation Act 1931* (Tas) s 20; *Interpretation Act 1984* (WA) s 49.

Chapter 7

Conduct of debate

[7.05] The purpose of debate is to allow members to state relevant facts and express their views on the business before the meeting. This is an essential part of the democratic process by which organisations reach decisions. Members should be allowed to share their information and to attempt to persuade their fellows of the rightness of their views. The objective is that the decision reached at the meeting will be an informed one. Controlling the conduct of debate and the progress of the meeting are the major responsibilities of the presiding officer or chair.

ASSIGNMENT OF THE FLOOR

[7.10] Persons not speaking should be seated. Any person who desires to move a motion or amendment, or to take part in any discussion, should rise and address the chair, and should resume their seat at the close of their remarks. When the chairperson rises or proceeds to speak, the person speaking should be silent and should sit down again. The person proposing a motion or an amendment should state its nature before addressing the meeting on the topic. Full opportunity to speak should be given but, except by way of explanation, or to speak to a point of order, only one speech on the same matter should be allowed to each person. An exception to this rule allows the person proposing a motion the right of reply at the end of the debate.

Although an amendment must relate to the matter involved in a motion and not to something else, it is viewed as a fresh matter. Accordingly, previous speakers are at liberty to speak upon it. Likewise, a motion for the adjournment of the debate is a fresh matter, upon which a person who has already spoken may speak again. By permission of the chair, and when no other person is speaking, a person who has already spoken may speak briefly to explain her or his own previous remarks. In this case, the person must concisely state the point to be explained and must keep to that point. Such a speaker may not interrupt other speakers in order to explain, nor employ additional arguments.

Speakers should be called upon by name. Whenever they have official titles, as in the case of members of a local government body, they should be designated by such titles. If two or more persons rise to speak at the same

time, the chair decides who is entitled to priority. As a rule, the person first observed by the chair is given priority and other persons who have risen should then resume their seats. A meeting may, however, resolve that a particular person should or should not be heard. A motion to that effect may be moved and seconded but should not be debated. Likewise, a motion that a person be no longer heard may be moved and seconded, but may not be debated.

Speakers must keep to the particular matter then before the meeting, whether it is a motion, an amendment, a point of order or a personal explanation. Irrelevant discussion should not be allowed. Persons present should be prevented from interfering with the meeting by private talk or heckling tactics. The use of offensive language and the imputation of improper motives are both disorderly and should be stopped. "In an appropriate case the law will deny validity to proceedings at a meeting attended by gross departures from ordinary standards of conduct".[1]

The chair has a duty to deal with these matters. More licence may be allowed in the case of some kinds of meetings than others.[2] The chair is entitled to require a speaker to withdraw and apologise. Speakers who do not keep to the matter before the meeting, or who are unduly long-winded, may be ordered to resume their seats.

Apart from motions for the closure of the debate or that the speaker be no longer heard, a speaker should not be interrupted unless called to order. If called to order, the speaker should sit down until the person who has done this has been heard and the point of order determined, whereupon the speaker may perhaps be allowed to proceed with the subject. Any person may at any time rise and address the chair on a point of order, but must at once state that a point of order is being taken and must confine any observations to the point of order raised. No other interruptions are permissible. A point of order should be taken as soon as the breach of order occurs. It may be taken with regard to any irregularity in the proceedings. For example, the following might be taken as points of order:

- the motion before the meeting lies outside the scope of the notice calling the meeting
- there is no quorum present
- there has been a failure to comply with some rule or bylaw
- abusive or insulting language has been used.

Neither an explanation nor a contradiction is a point of order.

1 *Flynn v University of Sydney* [1971] 1 NSWLR 957 at 958 per Street J.
2 *Flynn v University of Sydney* [1971] 1 NSWLR 957 at 958 per Street J.

A speaker called to order should be given an opportunity to explain and the chair may give others permission to speak briefly, but new matters may not be introduced.

LIMITING, EXTENDING AND ADJOURNING DEBATE

[7.15] Debate can be limited, extended or adjourned by agreement of the meeting. Debate is limited when, by agreement of the meeting, the rules are altered to limit the time allotted to each speaker. Alternatively, the meeting may agree that debate will only continue until a certain time; thereafter the matter may be put to a vote or the debate may be adjourned to be taken up at a later time or meeting. Debate is extended when it is agreed that the rules, which limit the number of times a speaker can be heard on a matter or which limit the amount of time available to any one speaker, are waived. Rather than limiting the debate and adopting a motion that has not been thoroughly considered, it may be desirable to adjourn the debate to another time so that the meeting can move on to consider urgent business.

Where the matter is adjourned to a new meeting, the business to which the debate relates should be placed on the agenda paper of the new meeting. Adjourned business usually has priority over any other business, except formal business. If the debate is merely adjourned until a later time, even a later meeting, it is not treated as new business when the debate resumes. This means that those who have already spoken on the motion, with the exception of the person who moved the motion (who retains the right of reply), will not be able to speak again. If, instead of merely adjourning the debate, the matter was referred to a committee, when the committee brings its report and recommendations back to the meeting it should be treated as new business.

Because the decision to limit debate interferes with the basic rights of all members to full discussion, it is appropriate to require a two-thirds majority for such a motion.

PARTICIPATION OF NON-MEMBERS

[7.20] There is no general rule that meeting participation as a member by a person who is not actually a member of a body necessarily invalidates either the vote or the whole of the proceedings at the meeting.[3] The circumstances of each particular case have to be considered. These circumstances include the facts about the lack of membership, which may be due to disqualification, lack of qualification or otherwise; and about the form of participation, which may be speaking in the debate or voting. It may be that so many unqualified persons are present at the meeting or that their participation in the meeting is such that a court would hold that it could not be regarded as a meeting of

3 See eg *Williams v The Queen* [1977] Tas SR (Pt 2) 135.

the particular body. Also, where the presence of an unqualified person is relied upon to constitute a quorum, the proceedings at the meeting are ineffectual.

The principle that where a disqualified person votes a resolution is invalid appears to apply to all cases where a body is acting in a quasi-judicial capacity in the sense of having legal authority to determine questions affecting the rights of citizens and of having the duty to act judicially.[4] It has been held that, where a meeting passed a rule in accordance with the requisite voting majority of persons entitled to vote, the presence and participation of unauthorised persons at the meeting did not render the rule invalid.[5] This case does not call for the principles of natural justice to be applied. An appointment made at a meeting of a body on a motion moved and seconded by persons not members of the body but carried by unanimous vote of a quorum of members and of a number of others not entitled to vote has, therefore, been held valid.[6] Where, however, a motion was moved by an unqualified person, who was not entitled to vote but who had a personal interest in the subject matter of the motion, and where this person participated in the discussion and voted in favour of the resolution, it was held invalid. It made no difference that the unqualified person's vote was not vital to the resolution's passage, as it was impossible to say that the promotion and support of the resolution had no influence on the other voters.[7] The chair of a meeting should not allow a motion to be moved by a person who is known to be unqualified to vote.[8]

DISCUSSION NOT RELATED TO A MOTION

[7.25] There is some question as to whether there is any right at a meeting to discuss a question when there is no motion before the meeting.[9] Whatever the situation, when the executive committee is unwilling to have a topic discussed, but everyone else concerned is willing to discuss it, the courts will not interfere.[10] The introduction of a statutory right for members of companies to ask questions at meetings (see Ch 24) indicates a growing trend to allow discussion unrelated to a motion.

Where the meeting is proceeding formally, the procedure for obtaining information is also formal. In the context of debate, a member may ask a question of the chair about meeting procedure or through the chair seek information about the matter at hand. Where a parliamentary inquiry or an inquiry about procedure is made, the chair will respond with an opinion.

4 See eg *Williams v The Queen* [1977] Tas SR (Pt 2) 135.
5 *Steuart v Oliver (No 2)* (1971) 18 FLR 83.
6 *Barter v Maher* (1972) 21 FLR 10.
7 *Lynch v Hodges* (1963) 4 FLR 348.
8 *Lynch v Hodges* (1963) 4 FLR 348.
9 *NRMA v Parker* (1986) 11 ACLR 1; *Stanham v National Trust of Australia* (1989) 7 ACLC 628.
10 *Stanham v National Trust of Australia* (1989) 7 ACLC 628.

Where a point of information is raised and the member desires information from the speaker, the chair should ask the speaker if they are willing to entertain a question. If the question is permitted, the inquiry, the reply and any resulting colloquy should be made in the third person through the chair. To protect decorum, members are not allowed to carry on discussion directly with one another.[11]

11 See Sarah Corbin Robert, Henry M Roberts III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p 286.

Chapter 8

Motions and amendments

[8.05] Business is brought before the meeting in the form of motions moved by members authorised to speak in the meeting. A motion may be introduced baldly or as part of presenting a report to the meeting. A motion is a formal proposal by a member that the meeting should resolve in certain terms. Motions and amendments are normally proposed and seconded, but unless rules or bylaws provide that this shall be done, it is not strictly necessary in law to have either a proposer or a seconder.[1] Motions come before the assembly without the need for a proposer or a seconder when the question on the motion is stated from the chair. Once the question has been stated from the chair, it is open to debate. At the close of the debate, the chair puts the question — by restating it and outlining the procedure for voting. At the conclusion of the voting process, the chair indicates whether the motion or resolution has been adopted or lost.

FORM OF MOTION

[8.10] Motions and amendments should not be vague or ambiguous;[2] they should be couched in precise and definite language and should comply with any regulations as to form and notice; otherwise the chair should refuse to allow them to be put. In particular, a motion should be affirmative in form. Certain provisions are frequently found in rules and bylaws governing the form of motions that are acceptable. Some examples are:

- No motion initiating a subject for discussion may be made unless written notice has previously been given.
- Motions shall be moved in the order in which they have been received.
- No motion shall be proceeded with in the absence of the person giving notice unless some other person has been authorised to move it by the person who gave notice.

1 *Re Horbury Bridge, Etc Co* (1879) 11 Ch D 109 at 118.

2 *Harvey v Adelaide and Hindmarsh Tramway Co* (1881) 15 SALR 136.

- All amendments must be put in writing.
- Neither a motion nor an amendment should go beyond the terms of the notice calling the meeting or the nature of the business the meeting is entitled to transact.

Where a motion has been seconded, it cannot be withdrawn without the seconder's permission.[3] Subject to the rules of a body, a resolution may be put to a meeting by the chair even if it has not been otherwise proposed or seconded.[4] The chair may, however, exercise discretion to refuse to put a motion that has not been seconded. The decision to second a motion does not imply that the seconder supports the motion. A member who believes that the meeting should consider the matter may second a motion in order that the meeting can reject it.[5]

Before the motion is stated for the meeting by the chair, another member may suggest a modification to the motion. If the member proposing the motion accepts the modification, it takes the modified form. In these circumstances, the member suggesting the modification is taken to have seconded the motion.[6]

AMENDMENTS

[8.15] An amendment must relate to the matter involved in the motion and not to something else. On a motion that the town clerk's salary should be fixed at a certain figure, it would not be proper to allow an amendment substituting the word "treasurer" for the words "town clerk", where it was clear that the terms referred to two different officials. The competency of an amendment depends upon the general scope and not the particular terms of a motion. An amendment must not be of such a nature that the original motion loses its identity. Substantial amendment is permissible so long as the substantial identity of the motion remains. This applies whether or not notice of motion has been given.

The fact that a motion or notice of motion is cast in terms of great particularity does not subject the right of amendment to any greater restrictions than in the case of a motion or notice of motion in more general terms. Any amendment that is germane to the motion is permissible.[7] The substitution of 14 days' notice for seven days' notice is a legitimate

3 *R v Mayor of Dover* [1903] 1 KB 668.

4 *Henderson v Bank of Adelaide* (1890) 45 Ch D 330.

5 See Sarah Corbin Robert, Henry M Roberts III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p 35.

6 Sarah Corbin Robert, Henry M Roberts III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p 39.

7 *James v Arnott* (1918) 14 Tas LR 99; *Betts & Co Ltd v MacNaghten* [1910] 1 Ch 430.

amendment.[8] An amendment may insert words, add them to or leave them out of a motion, or leave out some words and insert or add others by way of substitution or otherwise. An amendment to leave out all words of a motion except the initial word "That" and to insert other words is in order, provided the new words are relevant and do not amount to a direct negation. An amendment that suggests the direct opposite of the motion proposed is not a legitimate amendment.[9] It has, however, been suggested that where failure to observe this rule is not challenged at the meeting, the resulting resolution might not amount to a nullity at law.[10] If the chair refuses to put a proper amendment to the meeting, this may invalidate the resolution that is eventually adopted, but only relevant and intelligible amendments should be allowed. Amendments should, as a matter of prudence, be put in writing. A motion of which notice has been given may be amended, although no notice of the proposed amendment was given prior to the meeting, provided the amendment is within the scope of the original motion and does not alter its nature. Additions and alterations to the original motion are allowed, so long as the nature of the motion is not affected, irrespective of whether or not notice of amendment was given before the meeting.

Unless the rules provide otherwise, a particular individual may move or second only one amendment to each motion, but may speak with regard to amendments moved by others. The mover or seconder of the motion may not move or second an amendment to it, but is entitled to speak upon any amendment and to vote in favour of it. In the absence of rules to the contrary, a meeting may consent to an amendment standing in one person's name being moved by another person.

Only discussion relevant to the particular amendment that is being dealt with should be allowed. The mover of an original motion may exercise a right of reply, but this reply should be confined to answering remarks previously made and should not introduce new matter. The mover of an amendment has no right of reply and there is no right of reply to an amended motion. The right of reply is exercisable at the end of the debate, unless one or more amendments are brought forward, in which event the mover of the original motion must reply at the end of the debate on the first amendment. The seconder of a motion may, in the absence of rules to the contrary, reserve the right to speak on the motion until later, provided the intention to do so is stated, but the seconder then runs the risk of the debate concluding before the right can be exercised.

8 *Daly v Gallagher* [1925] QSR 1.

9 *Walkley v District Council of Northern Yorke Peninsula* (1987) 27 APAD 381 at 390.

10 *Walkley v District Council of Northern Yorke Peninsula* (1987) 27 APAD 381 at 390.

If possible, amendments should be taken in the order in which they affect the terms of the motion. No amendment should be allowed with regard to those parts of the motion which have already been accepted. That is to say, subsequent amendments may only be moved to that part of the motion which comes after the point where an amendment has already been made. Consequently, a person wishing to move an amendment must watch any other proposed amendment. Should another amendment threaten to foreclose discussion of the amendment intended by the member, he or she should seek the consent of the mover of the amendment and of the meeting to temporarily withdraw the other amendment, pending the consideration of her or his own amendment. Where this is done, the mover of the postponed amendment, on again moving it, may briefly repeat previous remarks, but persons who have previously spoken on it may not speak again. Amendments should be put to the meeting before the motion is put; they cannot be subsequently moved. The meeting must decide whether it will deal with amendments one by one, or all together.[11] In order to keep matters straight and prevent misunderstandings, it is wise to put only one amendment at a time; after it has been voted upon another amendment may be put, and so on. Amendment of an amendment should be avoided.

When an amendment is carried, it is incorporated into the motion and the motion as amended becomes the motion before the meeting. Without being further proposed or seconded, it is put to the meeting in its amended form, when it may be either carried or rejected. If it is rejected, the original motion is not revived. An amended motion can be discussed as if it were the original motion. Once a motion is adopted, it becomes a resolution. Where a motion on notice lapses, a fresh notice of motion is required.

After amendments have been carried, an amendment that proposes to revert to the terms of the original motion, or is inconsistent with what has been carried, is out of order. The same motion or the same amendment to a motion, save in the case of formal motions and amendments, may not be moved more than once at the same meeting. A motion that has been defeated may be brought forward at a subsequent meeting, provided any rules as to lapse of time and notice are obeyed. Where a resolution has been given effect, for example where work has been carried out or an appointment made on the faith of it, as a general rule it cannot be rescinded.[12]

ROLE OF CHAIR

[8.20] It is the chair's duty to put motions and amendments to the vote and thus to ascertain the sense of the meeting. The chair is not entitled to rule a

11 *Campbell v Australian Mutual Provident Society* (1906) 7 SR (NSW) 99.

12 *Ex parte Wright* (1925) 7 LGR (NSW) 79; *Ex parte Renouf* (1924) 24 SR (NSW) 463; *Ex parte Forssberg* (1927) 27 SR (NSW) 200; *R v Howes* (1874) 5 AJR 107.

motion out of order if it is within the competence of the meeting and all the conditions incidental to submitting the matter to the meeting have been observed.[13]

Towards the end of ascertaining the meeting's sense, the chair has the power to rule on the forms of the motion and any amendments, on the conduct of the debate and on the manner of taking the vote. If the individual in the chair is a member of the assembly, the individual has the right to speak in the debate and to vote on any motion. However, the necessity of maintaining impartiality in order to ascertain the intention of the meeting suggests that the chair should refrain from speaking in the debate and from voting, except in a poll.

Motions and amendments can only be withdrawn when the majority of those present consent. A motion for withdrawal is open to debate, but this should be confined to the matter of withdrawal. When a motion is withdrawn, amendments cannot be put to the vote. Accordingly, when an amendment is before a meeting it must be decided; until then, the motion cannot be withdrawn. Where the original motion could have been moved without notice, the amendment may be moved as a substantive motion.

The remedy of an order in the form of mandamus may be granted in a proper case to compel the chairperson to put a motion to a meeting.[14] Where the chair has reasonable doubts as to the matter, it may properly refuse to submit the motion to the meeting and, provided the action is bona fide and it is not clear that the doubts were wrong, mandamus will not go.[15]

The debate should be terminated when the proposer of the motion has replied, but before calling for a reply the chair should make sure no other person wishes to speak. At the close of the reply the chair should put the motion. Once the vote has been taken, the meeting cannot further debate the motion, nor can it be amended. After a motion has been lost, a meeting may, by agreement and in the absence of any objection, rediscuss it and appoint a subcommittee thereon and then adjourn, in which case the matter may be reconsidered at the reconvened meeting.[16] With the support of the majority of the persons present, the chair may terminate debate at any stage after reasonable discussion has taken place.[17] While the majority should allow the minority to state their opinions, discussion for an unreasonable period so as to obstruct the will of the majority need not be permitted.

13 *R v Neeson; Ex parte Koch* [1937] VLR 211; [1937] ALR 346; *Wishart v Henneberry* (1962) 3 FLR 171.

14 *Ex parte Atkins* (1898) 1 N & S 70; *Wishart v Henneberry* (1962) 3 FLR 171.

15 *R v Foley; Ex parte Miller* [1928] VLR 1.

16 *Montgomerie's Brewery v Spencer* (1899) 5 ALR 112.

17 *Wall v London and Northern Assets Corp* [1898] 2 Ch 469 at 483.

Chapter 9

Formal motions

[9.05] Decisions reached by the meeting are recorded in the form of motions and processed as described in Chapter 8. Motions are also used to bring a matter to a vote, or prevent it from being brought to a vote. To distinguish these latter motions from those addressed to a particular item of business, the term "formal motions" is frequently used. They are also known as procedural, functional or secondary motions. In this chapter we describe these motions and then summarise them in Table 1.

The language in which formal motions are couched and the names by which they are called are arcane and confusing. For this reason we will class them according to their functions, which are to either:

- cause the meeting to postpone the matter or move on without a decision
- bring a matter to a vote; or
- bring a matter previously considered back to the attention of the meeting.

Formal or functional motions are secondary to the business of the meeting.[1] As such, they are outside the reach of a number of rules which apply to main motions. Examples of main motions might include a motion to send a delegate to a convention, to buy a clubhouse, or to amend the constitution. Notice requirements apply to main motions, and only one main motion can be considered at a time. These rules do not apply to secondary motions, and these can usually be proposed without prior notice. Secondary motions can also be considered when a main motion is still before the assembly, without violating the principle that the meeting can consider only one question at a time.

Once a secondary motion has been properly made and the chair has acknowledged that it is in order, it must be disposed of before the direct consideration of the main question can continue. Most secondary motions are

1 Sarah Corbin Robert, Henry M Robert III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p 58.

in order even when another member has the floor. Some, but not all, secondary motions require a seconder. As secondary motions can be proposed while other business is before the meeting, it is necessary to establish an order of precedence among them. The order of precedence described here has evolved through collective experience.

TO MOVE ON WITHOUT A DECISION

[9.10] Even if a motion has been properly notified, moved and seconded, there may be circumstances in which it is desirable that the motion should not be put to the vote. This may be because the question is one that for some reason should not be considered by the meeting, for example if debate has indicated that further information is needed; if other business is more pressing; or if one or more members believe that the meeting is likely to reach an unacceptable conclusion. Members may deal with the first situation by moving an objection to consideration of the question.

Depending on the circumstances, the fact that the meeting's deliberations have not yet reached a point of decision can be dealt with by postponing the matter to a specified time, causing the matter to lie on the table, or referring it to a committee. The matter may also be postponed indefinitely. The meeting may resolve to proceed to the next business or that the previous question should not now be put. Each of these motions is described here, and there are strong resemblances between some of them, particularly between the motions to postpone indefinitely, to proceed to next business and that the previous question not now be put.

Objection to consideration of the question

[9.15] This motion is used to avoid a particular original main motion altogether. It may be moved by a member who believes it would be strongly undesirable for the main motion to come before the assembly. In adopting the motion, the assembly indicates that it agrees with the suggestion. This motion is not an appropriate response to the fact that the matter is outside the society's objects, or its constitutional power. These problems should be dealt with by a ruling from the chair that the problematic motion is out of order.

The objection motion takes precedence over the original main motion but can only be raised before there has been any debate, or any subsidiary motion stated by the chair. It yields to a motion to lie on the table. It can be applied to original main motions and to any communication not from a superior body. It is in order when another has the floor and does not require a seconder. It is not debatable or amendable and reasons should not be stated.

When an objection to consideration of the question is lodged, the chair should ask members to vote for or against consideration of the question. As the motion has the effect of stifling the democratic process of debate, a two-thirds

vote against consideration of the question is required to sustain the objection. To sustain the objection, members vote in the negative. A negative vote can be reconsidered, but not an affirmative vote. The motion can be introduced from the chair even if no member appears to have a problem with the question.

When the rules are applied properly, it works this way. A member proposes a motion, which is seconded. The member who wishes to lodge the objection immediately claims the attention of the meeting. Once the debate has commenced, it is too late to lodge the objection. The member states: "I object to the consideration of the question". The chair then puts the objection immediately to the vote by asking: "Should we consider the matter?" Where 30 persons vote on the motion, 20 must vote against consideration of the matter for the objection to be sustained.

Postponing the matter to a specified time

[9.20] This motion is used to put a main motion off until a specified time, meeting, or hour, or until after a certain event. It takes precedence over the main motion, and over proposals to postpone the matter indefinitely, to amend the motion, and to refer it to a committee. It also takes precedence over any motions relating to the way the question is to be considered.

This motion is out of order when another has the floor. It must be seconded, and is debatable. However, the debate may not go into the merits of the main question, other than to ascertain the appropriateness of postponing. The motion is amendable as to the time to be specified. This only requires a simple majority vote. The meeting may wish to ensure that the motion will be considered at the specified future time. In this case the motion should specify that the matter is to be brought back as special business.

A motion to bring the matter back as ordinary business is adopted if it receives an ordinary majority. A motion to bring the matter back as special business must be supported by a two-thirds majority. If the next meeting is to take place more than a quarter of a year later, business cannot be postponed by this type of resolution beyond the end of the meeting. If the next meeting will take place within the quarter, business cannot be postponed beyond the next meeting. A resolution to postpone the matter to a specified time will be out of order if it would defeat the motion's main purpose. For example, a motion to send a representative to a regional meeting to be held on August 15 cannot be postponed until August 20.

Lay the matter on the table

[9.25] The effect of this motion is that the question or communication is not further discussed and that the meeting proceeds to the next business. This motion can be used to lay a matter aside temporarily when something of

immediate urgency has arisen. It differs from the motion to postpone to a specified time in that there is no set time for taking the matter up again. Consideration of the matter can be resumed at the will of the majority. It is sometimes used where it is not intended to take any further notice of a particular matter, or where there is nothing calling for discussion or no wish for discussion. These uses of the motion are not advisable.

The motion takes precedence over all subsidiary motions. It may be moved on any question or amendment before the meeting. If it is moved and carried on an amendment, the original question is also laid on the table. It is only in order when the matter is actually pending. The proposer cannot claim the floor for the purpose of moving this resolution but must have been recognised in due turn. The proposer can only move it if they have not already moved, seconded or spoken on the question or communication. There is no right of reply and no amendment can be allowed. It cannot be debated but the proposer may be allowed to state a reason.

It will be adopted if supported by a simple majority. It is not appropriate to reconsider the matter. It may be renewed if circumstances change so that it appears the assembly may have changed its mind. There can be a subsequent motion, either at the same or a later meeting, to take the question or communication from the table (see below).

Refer to committee

[9.30] This motion is used to send a pending question to a relatively small group of selected persons (the committee) so that the question may be carefully investigated and put into better shape for the meeting to consider. Where the matter has been brought before the meeting on the report of a committee, the committee may be asked to consider the matter again. This is normally understood to be a way of rejecting the committee's recommendation. If the proceedings of the meeting are conducted formally, the matter may also be referred to the committee of the whole. This will mean that it is debated in the general assembly but with greater freedom of debate; specifically, there will be no limit on the number of times a member can speak.

This motion takes precedence over a main motion, and over a motion to amend the main motion or postpone it indefinitely. It is out of order unless the proposer has been recognised in due turn. It must be seconded. It is debatable but the debate cannot extend to the merits of the main question. It is amendable as to the committee, its composition and manner of selection, and the instructions to be given to the committee. It requires a majority, and can be reconsidered.

It can be ruled out of order if it would defeat the purpose of the main motion, as in the example given for a proposal to postpone to a specified time.

Postpone indefinitely

[9.35] This is the first of three similar motions that can be used in effect to kill the main motion. It suggests that the meeting should not take a position on the main question. It puts an end to the main motion for the duration of the session and is thus useful for disposing of a badly chosen main motion. It is sometimes used strategically by those who oppose the main motion, both to test their own power and to gain another opportunity to speak.[2]

It takes precedence only over the main question, and can only be applied to it. It is out of order when another has the floor. It must be seconded, and is debatable. The debate can refer to the merits of the main question. It is not amendable, and can be passed by a simple majority. An affirmative vote can be reconsidered while a negative vote cannot.

Proceed to next business

[9.40] The object of the motion "that the meeting proceed to the next business" is to shelve for the time being the particular matter then before the meeting. It is very similar to the motion to postpone indefinitely but there are some slight differences of emphasis and restrictions.

This motion cannot be moved while another person is speaking, but subject to that it can be moved at any time. It can only be moved and seconded by persons who have not previously moved, seconded or spoken on the main motion or on any amendment. It should be put to the vote at once, without speech or discussion. It cannot be amended.

If it is carried, it terminates discussion on the matter before the meeting, and the meeting proceeds to the next business; the matter under debate is considered disposed of for that meeting. This motion may be moved even though an amendment is being considered. In this case, if it is carried the meeting resumes discussion on the main motion. If the motion that the meeting proceed to the next business is not carried, it may be put again to the meeting after an interval has elapsed. Business shelved by a resolution that the meeting proceed to the next business may be brought up again at another meeting if due notice is given in accordance with any rules.

Previous question

[9.45] The previous question motion is moved in order to prevent a vote being taken on a motion or, in other words, to shelve the motion. Joske suggests that it is given its name because it calls for a previous decision before the original motion or question. It has the secondary effect of closing debate on the matter, whether or not it is passed.

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2 Sarah Corbin Robert, Henry M Robert III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p 125.

The form of this motion is "that the question be not now put". It is an exception to the rule that a motion must be affirmative in form. This motion requires a seconder and can only be moved upon a motion, not while an amendment is being discussed. It can, however, be moved after the disposal of an amendment, and it takes priority over all other amendments.

The previous question may be discussed and the meeting may even be adjourned to debate it further. It is desirable, however, that discussion should be limited as much as possible. But the main motion, on which the mover of the previous question decides to forestall a vote, may be debated during the discussion. The mover of the previous question has no right of reply. If the previous question is carried, the motion cannot be brought forward again at the same meeting. It can, of course, be proposed afresh at a subsequent meeting. If the previous question is not carried, the motion before the meeting must be voted upon immediately, without further discussion or amendment.

The previous question cannot be moved or seconded by anyone who has moved, seconded or spoken on the motion under consideration or any amendment thereto. As, however, it is fresh matter, previous speakers may speak upon it. Amendments to it cannot be moved, but a motion that the meeting be adjourned may be moved.

Since the motion effectively suspends the right of the assembly to decide matters put before it, a two-thirds vote is necessary unless the rules of the organisation specify otherwise. The previous question can only be moved when no other person is speaking. The chair has discretion as to whether to allow the previous question to be moved. It cannot be moved during the election of a chair, nor in committee. Rules sometimes provide that the previous question should not be moved, but that instead a person may move that the meeting proceed to the next business.

TO BRING A MATTER TO A VOTE

[9.50] Some members may wish to bring the matter to a vote while other members are still keen to continue the debate. An example of this is when a filibuster is underway. A filibuster is an attempt to obstruct the passage of a motion when it is anticipated that the motion will attract majority support. Specifically, it is an attempt by a vocal minority to delay the vote by extending the debate. The closure motion is employed to terminate debate and bring a matter to the vote. Its object is to prevent undue obstruction. The American authority,[3] *Robert's Rules of Order*, refers to a form of previous question motion not known to earlier authors of this text.

3 Sarah Corbin Robert, Henry M Robert III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), pp 194–206.

The actual form of the motion, whether it is called the closure or the previous question, is "that the question be now put". Alternatively, the motion could be that the question should be put at a specified time in the near future. It should be proposed and seconded in a few words and should not be discussed, amended or adjourned. If it is affirmed, a vote must be taken on the original motion without further discussion or amendment. If it is negatived, discussion continues. The closure motion may also be applied to an amendment, in which case the amendment may be immediately put to the vote.

The chair has discretion as to whether to accept a closure motion, but may accept it even if only one person has spoken in favour and one has spoken against the proposal that is before the meeting.[4] The chair should be satisfied that the matter has been reasonably discussed and that the views of the minority have been heard. The chair has discretion to put the motion to the meeting without requiring it to be seconded.

The closure may be moved while another person is speaking.[5] It may not be moved or seconded by a person who has already moved, seconded or spoken about the main motion or any amendment. It is not debatable.

As this motion suspends the rules, takes away the rights of the members to full discussion and may also restrict a minority's right to present its case, a two-thirds majority is required for adoption. It can be reconsidered during the remaining time before the end of the debate or, if applied to a series of motions, to those motions that have not yet been voted upon. Moving the closure prevents any other formal motion being made except a motion to lay the matter on the table.

TO BRING A MATTER BEFORE THE MEETING AGAIN

[9.55] There are a number of methods by which a matter that has been before the meeting once can be brought before it again. If something has been postponed to a specified time, the effect of the original motion is not spent until the matter has been brought before the meeting again at the appointed time. If something has been laid on the table it can be taken from the table. If something has been referred to a committee, the committee can be discharged. Something that has been decided can in some circumstances be reconsidered. Alternatively, a resolution that has been passed or previously adopted can be rescinded or amended by means of a formal motion. The resolution to postpone to a specified time has been described above. The effect of discharging a committee will be considered in Chapter 13; the other formal motions are described below.

4 *Wall v London and Northern Assets Corp* [1898] 2 Ch 469.

5 Contra Sarah Corbin Robert, Henry M Robert III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p 190.

Take from table

[9.60] The effect of a resolution to take a matter from the table is to make pending again a motion that was previously laid on the table. As the proper use of a motion to lay a matter on the table is to set the matter aside temporarily when something of immediate urgency has arisen, there is an assumption that the matter may be taken from the table after the assembly has dealt with the more pressing matter. This is, however, subject to the will of the majority, so the method for bringing such a matter to the attention of the meeting again is to move a resolution to take the matter from the table.

Such a motion does not take precedence over a pending motion, but it does take precedence over a main motion that has been moved but not yet stated. The motion can be applied to any question or series of connected questions that lie on the table together. It is not in order until some business or interrupting matter has been transacted or dealt with, after the motion to lay the matter on the table was passed. If voted down, the motion to take something from the table cannot be renewed until some further business has been transacted. The motion is out of order when another has the floor, but a member can claim precedence for the purpose of making this motion. It must be seconded, is not debatable, and is not amendable.

The motion to take something from the table requires only a simple majority vote, but it cannot be reconsidered. Time limits apply, so if a motion to take a matter from the table is not moved before the end of a certain period the matter will lapse and will have to be brought forward as a new matter. This means that the motion to take something from the table will be in order if moved at the same meeting at which the matter was laid on the table or, if the next meeting is held within a quarter, at that next meeting.

Rescind/amend something previously adopted

[9.65] A main motion that has been adopted can be rescinded, repealed or annulled; it can also be amended. A motion to rescind, repeal or annul strikes out an entire main motion that was adopted at a previous time. The three terms rescind, repeal and annul are synonymous and mean to render a decision of no effect. Such a motion can be applied to any main motion that has been adopted, provided that no action approved by the main motion has been carried out such that it is too late to undo. A motion to reconsider should be preferred to a motion to rescind.

Motions to rescind do not take precedence over anything; therefore, they can be moved only when no other motion is pending. Notice of an intention to move such a resolution can be given while something else is pending, provided the speaker is not interrupted. The motion must be seconded, and is debatable and amendable. The debate can go into the merits of the main motion.

Because the motion calls upon the meeting to alter a decision previously reached, it requires either a special majority or specific notice. A special majority may be defined by the rules of the organisation. If the organisation is governed by the *Corporations Act 2001* (Cth) this is a three-quarters majority; in other cases it may be a two-thirds majority. If notice of the intention to move a rescission has been given either at a previous meeting or in the written notice of meeting, a rescission motion can be passed by an ordinary majority. The notice of the intention to move for rescission must specify the complete substance of the proposed change. In the absence of such notice, a rescission motion requires a two-thirds vote, or alternatively an absolute majority of the membership. An absolute majority is a majority of all members, calculated without regard to the number that attend the meeting. If an organisation has 100 members, an absolute majority is 51. If 60 members attend the meeting, a simple majority is 31. Although a rescission motion can be amended, if the amendment exceeds the scope of the previous notice, the amendment may require more than a simple majority. A negative vote can be reconsidered but not an affirmative vote.

A variation of the rescission motion, which calls for the resolution to be rescinded and expunged from the minutes, is used to express strong disapprobation of the earlier decision. It requires an absolute majority regardless of the notice given. If such a resolution is passed, a line must be put through the offending resolution in the minutes, with the notation that the matter has been expunged from the record. The offending matter must not be cut out of the official minute book because it must be possible to observe that the limits of the rescission motion have been observed. If the minutes are to be published, the published version does not include the expunged material.

Reconsider

[9.70] This motion enables a majority in an assembly, within a limited time and without notice, to bring back for further consideration a motion which has already been voted on. It appears to be of American origin. It is used to permit correction of hasty, ill-advised or erroneous action, or to take into account new information or a changed situation.

The motion is in order even after another member has been assigned the floor, but not while another is speaking. It must be seconded, and is debatable if the main motion was debatable. It is not amendable, requires only a majority vote, and cannot be reconsidered.

A motion to reconsider a matter can be made only by a member who voted with the prevailing side. This rule aims to prevent the dilatory use of the measure by a defeated minority and does not apply to the member who seconds the motion to reconsider. The motion is also subject to time limits. It can be moved later on the same day that the original motion was decided. If the meeting is a multi-day session it can be moved on the succeeding day.

It cannot be moved later. This limit does not apply to meetings of a standing committee.

Uniquely, the making of the resolution has a higher rank than its consideration. It can be moved and seconded even when it cannot be considered. For example, it can be moved after the meeting has resolved to adjourn. In this case the resolution will be considered at the next duly convened meeting, allowing the time limit to be observed even if the resolution is not then considered. Moving the resolution takes precedence over any other motion and yields to nothing. It is in order when another question is pending and, as already stated, even after the assembly has voted to adjourn. It takes precedence over closure on another question. The consideration of a motion to reconsider has only the same rank as the motion to be reconsidered.

The motion to reconsider can be applied to a vote on any motion except a motion that can be renewed within a reasonable time. It cannot however be applied to a resolution that was adopted and whose provisions have been partly carried out. It cannot be applied to a resolution approving a contract when the other party has notice or if the action on the resolution is impossible to undo. It is not in order when the same result can be achieved in some other way.

TABLE 1: Formal Motions

Name	Moved by	In order	Second	Debatable	Amendable	Majority	Re-visit?
To move on without a decision							
Object to consideration	another member, chair	before debate begins	needed	no	no	2/3	N.O.
Postpone to specified time	any member	gains floor	not needed	yes – L	yes	O.M.	yes
and make special business at that time	any member	gains floor	needed	yes – L	yes	2/3	yes
Lay on table	any member	gains floor	needed	no	no	O. M.	no
Refer to committee	any member	gains floor	needed	yes – L	yes	O.M.	yes
Postpone indefinitely	an opposing member	gains floor	needed	yes	no	O M.	A.O.
Proceed to next business	a member who has not spoken	gains floor	needed*	no	no	O M.	no
Previous question (not now be put)	a member who has not spoken	gains floor, in discretion of chair	needed	yes	no	2/3	N.O.
To bring a matter to a vote							
Closure	any member	gains floor	needed	no	no	2/3	yes*
To bring a matter before the meeting again							
Take from table	a supporter	gains floor	needed	no	no	*	N.O.
Rescind/ amend	any member	gains floor	needed	yes	yes		N.O.
Reconsider	a member who voted with the majority originally	not while another is speaking	needed	yes*	no	O.M.	no

Legend
A.M. = absolute majority
N.O. = negative only
A.O. = affirmative only
O.M. = ordinary majority
L = debate is limited to procedural motion
* = refer to text

Chapter 10

Voting procedures

[10.05] The common law method of voting is by show of hands; that is, "by counting the persons present who are entitled to vote and who choose to vote by holding up their hands".[1] A person may, however, vote in many ways. The form in which acquiescence is demonstrated is immaterial if acquiescence is actually indicated. In a vote by show of hands, each voter has one vote only and proxies are not counted.[2] In the event of a doubt as to the result of a show of hands, another vote may be taken forthwith, even if the result of the vote has already been declared. At the second vote, persons who previously abstained from voting may vote.[3] After a vote has been taken by show of hands, a poll — that is, a vote in writing — may be demanded. Unless a poll is demanded, the result of the vote by show of hands is binding;[4] the declaration thereof by the chair is conclusive in the absence of fraud or mistake.

POLL VOTE

[10.10] A demand for a poll, even if the poll is not taken,[5] terminates the effect of a vote by show of hands. Although a poll may be demanded after a motion has been lost by a show of hands, the meeting can abandon the poll if no one objects. The motion must then be resubmitted to the meeting for a new vote by show of hands. This may be done even if some of those present have left the meeting on the demand for the poll being made, as long as it is clear that no injustice is being done to anyone and that a fresh demand for a poll is not prevented.[6] Neither the chair nor the meeting can refuse a demand for a poll if it complies with the conditions in the constitution.[7]

1 *Ernest v Loma Gold Mines Ltd* [1897] 1 Ch 1 at 6.
2 *Re Caratal (New) Mines Ltd* [1902] 2 Ch 498.
3 *Hickman v Kent Sheepbreeders' Association* (1920) 36 TLR 528; 37 TLR 163.
4 *Re Horbury Bridge Etc Co* (1879) 11 Ch D 109.
5 *R v Cooper* (1870) LR 5 QB 457.
6 *Montgomerie's Brewery v Spencer* (1899) 5 ALR 112.
7 *Ex parte Grossmith* (1841) 10 LJ QB 359.

The chair is under a legal duty to demand a poll only where it is necessary in order to give effect to the real sense of the meeting.[8]

A poll may be demanded as soon as the result of the show of hands is declared.[9] It may be made privately to the chair.[10] The taking of a poll is a mere enlargement of the meeting at which it is demanded. Any person present who is qualified to vote may, in the absence of regulations to the contrary, demand a poll, and all persons duly qualified, whether at the meeting in the first place or not, are entitled to vote at the poll.[11] If qualified persons are excluded from voting, the poll may be invalidated,[12] unless the result of the poll was not affected by the exclusion.[13] The demand for a poll cannot be withdrawn after the meeting adjourns to take it.[14] Unless rules provide otherwise, a poll may either be taken then and there, at the meeting at which it is demanded,[15] or after the meeting has adjourned for the purpose. If there are no directions in the rules of the particular body, the chair determines how the poll is to be conducted and may prescribe when it is to take place and how long it will remain open for the receipt of votes. Where there is more than one resolution, each must be put to the poll separately. After taking the poll, no further amendment can be brought forward.[16]

At a poll, plural voting can be exercised. Although there is no right at common law to vote by proxy,[17] if the rules in the constitution allow it proxies may be used on a poll vote. The chair has a duty to declare the poll. Even if the result is not declared until a subsequent day to that on which the poll was taken, polling is complete on the day of the vote; consequently the election of the successful candidate takes place on the polling day. The actual decision is complete as soon as the ballot closes; the ballot has been finally determined and the result is in the ballot box. The election is by the votes. The declaration of the poll is not the election, but merely a ministerial act that declares the result of the election.[18]

8 *Second Consolidated Trust v Ceylon Amalgamated Co* [1943] 2 All ER 567.
9 *R v Vicar of St Asaph* (1883) 52 LJQB 671; *R v Thomas* (1883) 11 QBD 282.
10 *Re Phoenix Electric Light and Power Co* (1883) 48 LT 260; 31 WN 398.
11 *R v Wimbledon Local Board* (1882) 8 QBD 459; *R v Vestry of St Pancras* (1839) 11 A & E 15 at 26; 113 ER 317 at 321.
12 *R v Rector of St Mary, Lambeth* (1838) 8 A & E 356; 112 ER 873.
13 *Attorney-General v City of Kew* [1948] ALR 55; *Ex parte Mawby* (1854) 3 E & B 718; 118 ER 1310.
14 *R v Mayor of Dover* [1903] 1 KB 668.
15 *Re Chillington Iron Co* (1885) 29 Ch D 159.
16 *R v Roberts* (1863) 3 B & S 495; 122 ER 186.
17 *Harben v Phillips* (1883) 23 Ch D 14 at 35.
18 *Holmes v Keyes* [1958] Ch 670; *Beeson v Blayney* (1966) 8 FLR 292.

VOTERS TO BE PRESENT

[10.15] There is no right known to the common law of forwarding voting papers to the polling place. Persons voting, even though they vote as holders of proxies, must be personally present at the poll to tender their votes,[19] unless the rules of the body otherwise direct. Thus, where a ballot is to be conducted at the time and place fixed for an annual meeting, postal voting is not permissible.[20] The chair may order a poll to be taken even if it is not demanded and the meeting desires a show of hands.[21]

DESCRIPTION

[10.20] If the minutes state that a resolution was passed unanimously, this is interpreted to mean that every member present voted for it.[22] By contrast, the expression "nem con" indicates that no one spoke or voted against the resolution. Where the majority is clear, there is generally no duty to record that negative votes were cast, but members have the right to request that this should be done. The terms of the request should govern whether the number of negative votes is recorded alone or whether the names of some or all of those who voted in the negative are recorded. Members may also request that abstentions be recorded. Where the minutes record that a resolution of congratulations was passed by acclamation, this indicates that there were cheers and applause when the resolution was moved.

CASTING VOTE

[10.25] The chair of a meeting has an original vote but, at common law, no casting vote. The constitution of the particular body may confer a casting vote on the chair, exercisable in the event of an equality of votes. The general practice is to exercise the casting vote against the proposal before the meeting, so as to give further opportunity for discussion, but absent a provision in the constitution there is no general rule that dictates this must be done. The chair, before exercising a casting vote, may invite the meeting to discuss the matter further and then take another vote.

A casting vote may be exercised conditionally to take effect if the valid votes are equal, and not to take effect if they are unequal.[23] The chair should not exercise an original vote at a time when the result of the voting is known, even though the result has not been formally declared. Where there is an equality of votes and the chair does not have, or refuses to exercise, a casting

19 *McMillan v Le Roi Mining Co* [1906] 1 Ch 331.
20 *Keep v Hurstville Soldiers Club* (1964) 80 WN (NSW) 1947.
21 *R v Rector of Birmingham* (1837) 7 A & E 254; 112 ER 467.
22 *Everett v Griffiths* [1924] 1 KB 941; *Honeybone v Glass* [1908] VLR 466.
23 *Bland v Buchanan* [1901] 2 KB 75.

vote, the result is that the proposal is rejected. In the absence of rules to the contrary, where a chairperson has a casting vote it may be exercised in connection with the election of the next chairperson.[24]

TYPES OF MAJORITY

[10.30] The rules of a body may prescribe a particular method of voting and may abrogate the common law rule that merely requires a majority of votes. It is often provided that a motion must be passed by a majority of those present at a meeting. A majority of those present does not mean a majority of those voting. Consequently, where a majority of those present is required, a motion may be defeated if a number of those present abstain from voting.[25] Where a resolution was required to be passed by a two-thirds majority of those present and, of the 37 persons present, 20 voted in favour of the resolution and 17 abstained from voting, the resolution was lost.[26] Similarly, where a simple majority of those present was necessary and, of the 35 present, 16 voted for the motion and eight against it, while 11 did not vote at all, the motion was lost.[27] The chair of a meeting, by stating an intention to merely preside at the meeting and not to vote, is not absent for the purpose of the vote. Consequently, if the voting was 11 one way and ten the other, with the chair not voting, there would not be a majority of those present to carry a motion.[28] Unless a particular majority is prescribed — for example, a majority of those present — the majority means the majority of those who choose to take part in the proceedings of the meeting. If some of those present decline to carry on the meeting in a proper manner, it is open to the remainder to continue proceedings regularly.[29] The "majority entitled to vote" means the majority present, either personally or by proxy, at the meeting when the proposal is put to it, who at that meeting can properly vote.[30]

24 *R v Deane* (1890) 3 QLJ 195; *Ex parte Howarth* (1900) 21 LR (NSW) 32; see *R v Fitzgerald* (1868) 7 SCR (NSW) 233. See also [6.45] above.

25 *Labouchere v Wharncliffe* (1879) 13 Ch D 346; *Re Eynsham Parish* (1849) 18 LJQB 210; *R v Overseers of Christchurch* (1857) 7 E & B 409; 119 ER 1299.

26 *Re Eynsham Parish* (1849) 18 LJQB 210.

27 *R v Overseers of Christchurch* (1857) 7 E & B 409; 119 ER 1299.

28 *R v Griffiths* (1851) 17 QB 164; 117 ER 1243.

29 *Gosling v Veley* (1847) 16 LJQB 201 at 217–218; *Wishart v Henneberry* (1962) 3 FLR 171.

30 *Knowles v Zoological Society* [1959] 2 All ER 595.

Chapter 11

Adjournment

[11.05] The chair has the responsibility for maintaining order and for ensuring that the agenda is observed. In pursuing these objects, the chair has the power to adjourn the meeting or declare a recess. The meeting may also take the decision to adjourn or recess, on the initiative of a member who puts forward a resolution that is approved by the majority at the meeting.

An adjournment postpones the meeting to another time, or to another time and place. Technically, a short break may be called an adjournment, since the meeting's deliberations are postponed for, say, a quarter of an hour. However, the term "recess" is more correctly used for a short break. A recess is a short intermission in proceedings. It does not close the meeting, and after the recess business will be resumed at exactly the point at which it was interrupted.

CHAIR'S POWER TO ADJOURN THE MEETING

[11.10] As discussed in Chapter 6, the chair may, in order to maintain order, adjourn a meeting for a short period, or until another day, and leave the chair. A short adjournment is also proper in order to allow a quorum to assemble.[1] The meeting may also be adjourned for the purpose of taking a poll, where this is the only way to give all persons concerned a reasonable opportunity of voting and where the poll cannot be taken immediately.[2]

If the notice of meeting or an agenda that has been properly adopted indicates when the meeting will rise, the chair is responsible for implementing this agenda. If the chair does not do this without prompting, any member may raise the point. Departing from such an agenda has the potential to affect member's rights and must be approved by a two-thirds majority.

The chair may, in addition, declare a meeting closed when the business before it is, in fact, finished, but not otherwise. An erroneous declaration that the business is finished is not sufficient.

1 *McDonald v Thorley* [1976] Qd R 208.

2 *R v D'Oyley* (1840) 12 A & E 139; 113 ER 763; *R v Archdeacon of Chester* (1834) 1 A & E 342; 110 ER 1236; see *Jackson v Hamlyn* [1953] Ch 577.

MEMBER'S INITIATIVE

[11.15] Apart from the cases specified above, and in the absence of any rules extending the chair's power to adjourn, the right to decide whether the meeting should be stopped, either for a short time or for a longer period, belongs to the meeting itself. Such a decision is within the power of the majority of those present.

A motion suggesting an immediate recess can be made at any time, even if another question is pending. A motion to take a recess at a future time, however, is only in order when no other question is pending. Before moving a resolution to approve an immediate recess, the proposer must be recognised by the chair. The motion must be seconded and is not debatable, but can be amended as to the length of the recess. It requires a majority vote and the decision cannot be reconsidered. As members should not be forced to continue in session substantially longer than the will of the majority decides, a motion to adjourn can be proposed at any time. Making the decision should not be allowed to consume time. Accordingly, the motion is not debatable or amendable. It is not in order, however, while the assembly is voting or verifying a vote, or before the result of a vote has been announced.

Where the organisation does not have regularly scheduled meetings, or where the members desire to meet in advance of the set date, a decision as to when the meeting will reconvene may be necessary. A resolution to address the question of when and where the meeting will reconvene has no effect on the time at which the present meeting will adjourn. On the other hand, such a resolution can be moved even after the meeting has voted to adjourn, provided the chair has not declared the meeting closed. It is out of order when another has the floor and must be seconded. It is not debatable, but is amendable. It requires only majority approval and can be reconsidered.

INEFFECTIVE ADJOURNMENT

[11.20] If the presiding officer leaves the chair or adjourns the meeting, without the consent of the majority present and without otherwise having the power to do so, there is in fact no adjournment.[3] The persons continuing to stay, even if a minority, can elect a chairperson and continue with the business that still remains outstanding.[4] Of course, the presence of a quorum is still essential. If the chair acts correctly in declaring an adjournment, the meeting cannot be continued by the persons remaining, and any attempt to continue it and any resolutions that may be passed will be invalid.

3 *Shaw v Thompson* (1876) 3 Ch D 233 at 249; *Wishart v Henneberry* (1962) 3 FLR 171.

4 *Catesby v Burnett* [1916] 2 Ch 325; *National Dwellings Society v Sykes* [1894] 3 Ch 159; *Wishart v Henneberry* (1962) 3 FLR 171.

There is authority for the proposition that a meeting cannot be postponed without first being held.[5] The facts of the case, however, show that the adjournment was not planned until, on the day of the meeting, the premises were found to be already occupied. The meeting, in some disorder, was then adjourned to the following day. Not all persons entitled to receive notice did so. Where a postponement is attempted without adjourning the meeting, a quorum may attend and carry on the business.[6]

In principle, there is no reason why, if things were done in a more orderly fashion, the convening authority could not cancel a meeting and set a new meeting before the first meeting convenes. It appears essential to send a notice cancelling or "postponing" the original meeting and setting a new time and place for the meeting in a timely fashion. The notice should be timed so that all those entitled to attend the meeting have sufficient notice to make plans to be available at that time. It is also desirable that they receive the notice of the change well in advance, so that they are not inconvenienced.

An adjourned meeting for the purpose of completing the unfinished business of the previous meeting is deemed a continuation of that meeting, and, unless the rules prescribe otherwise, no new notice is required for it.[7] If new business is to be brought forward, further notice is necessary. Where an adjournment is to an indefinite date, notice of the adjourned meeting naturally becomes necessary.

5 *Re Wholesale Groceries Ltd* [1923] 2 DLR 491; 3 CBR 650.

6 *John v Rees* [1970] 1 Ch 345.

7 *Scadding v Lorant* (1851) 3 HLC 418; 10 ER 1458; *Wills v Murlay* (1850) 4 Exch 843; 154 ER 1458.

Chapter 12

Minutes: A secretarial responsibility

[12.05] Minutes of all proceedings of each meeting of a body should be kept. This is the responsibility of the secretary.

CONTENTS OF MINUTES

[12.10] The minutes should be an accurate record of everything that is done at the meeting. It is frequently added that the minutes should be a complete record of the proceedings. This does not mean, however, that the minutes should be a word-for-word transcription of everything that was said at the meeting. Such minutes are too cumbersome to be useful. It is sufficient if the minutes are a complete record of every decision reached by the meeting.

Minutes should first describe the nature of the meeting, specifying whether it is an ordinary, special or adjourned meeting, and give the date, time and place of the meeting. The names of those present and of the chairperson should be set out. Next there should be a record of the business of the meeting. The order in which the business is transacted should be stated, but the minutes may be recorded in the order in which the business appeared in the agenda. The appointment of a chairperson, the confirmation or adoption of the minutes of the previous meeting, and a brief statement of the correspondence laid before the meeting, and what is decided about it, should be noted.

All decisions arrived at by the meeting should be recorded in the minutes. The precise words of all motions and amendments that are proposed, together, if desired, with the names of the movers and seconders, and whether the proposals are carried or rejected, should appear. If any person wishes to have her or his dissent or abstention from a resolution noted in the minutes, this should be done.[1] It is also proper to set out the numbers voting for or against any proposal before the meeting, but this is only necessary when rules require that a stated number or percentage is necessary before a motion can be

1 See [10.20] above.

carried. The minutes should refer to any reports of committees that are presented to the meeting.

CONFIRMATION OF MINUTES

[12.15] After the president takes the chair, the first business of a meeting is usually reading the minutes of the previous meeting and passing a resolution confirming those minutes. Sometimes it is moved that the minutes be taken as read, but this is not desirable unless they have been previously circulated amongst members.

Confirmation of the minutes, whether it is called confirmation or adoption, indicates that they are an accurate record of the proceedings. It in no way gives effect to any previous decision, nor does such a decision need to be approved. Consequently, the only discussion permitted concerns the accuracy of the minutes as a record of proceedings. In particular, a person cannot attempt to reopen at this stage any question previously decided. Should someone desire to reopen such a question, the proper action is to subsequently propose, in accordance with the rules of the body, a motion for rescission. By voting to confirm minutes, a person not present at the previous meeting does not become responsible for what was done there.

The chair should sign the minutes after they have been confirmed. Although it is usual to confirm the minutes at the next meeting, strictly speaking they may be confirmed at the end of a meeting if they are already in final form. The chairperson may also decide to sign the minutes before they are confirmed by the meeting, if satisfied of their accuracy. When they are confirmed at a subsequent meeting, the chairperson may sign them even if he or she was not present at the previous meeting. As the minutes are confirmed as being a true record of proceedings, it is customary, but not essential, that someone who was present at the meeting the minutes relate to should propose the motion for confirmation.

Minutes should not, as a matter of general principle, be altered once they are signed. If an inaccuracy is noticed prior to signature, a correction should be made and initialled by the chairperson. The chairperson should regard it as part of their duty to see that the minutes are correct. Minutes that have been signed by the chairperson are prima facie evidence of what took place at a meeting, but they may still be proved to be inaccurate or incomplete.[2]

ALTERATION OF MINUTES

[12.20] If it appears, after the minutes are signed, that they are inaccurate, a subsequent meeting may provide for their correction by resolving that the minutes, notwithstanding that they have been confirmed and signed, be

2 See below, Ch 27.

amended by deleting the inaccuracies and substituting the alterations necessary to make them correct. In such a case the chairperson should initial the alterations after the motion is passed.

Care should be taken against the fraudulent alteration of minutes. Loose-leaf books are particularly vulnerable to falsification and should be avoided. For the same reason, a hard copy of the minutes should be produced in preference to relying on a version on a computer disk.

USE OF MINUTES

[12.25] Properly authenticated minutes, which show that a body exists, its nature, and its name, are admissible as evidence to show how the body functions; for example, whether it is carrying on as a body under State or federal law.[3] Minutes recording that a particular proceeding took place at a meeting are, if properly authenticated, evidence that it did take place.[4] Minutes containing statements that two directors were present at a meeting and that they took part in the proceedings are evidence that they were present and of their part in the proceedings.[5]

Members of an organised body are normally considered to be entitled to a copy of the minutes on request. At common law, members had no right to a list of other members or to inspect any of the documents of a corporation unless they had a particular interest in the relevant document. If such an interest was claimed, it had to be vindicated against the body as a whole.[6]

SECRETARIAL RESPONSIBILITIES

[12.30] The secretary to an organisation plays a key role in many facets of meeting procedure. This is perhaps most apparent in the importance of the minutes. Unless the responsibility to record accurate minutes is faithfully carried out, the meeting will fail to achieve its purpose. The secretary must also be ready to make the minutes available to all members upon request. It is appropriate here to acknowledge the other tasks that the secretary normally carries out. These include sending out the notice of meeting and keeping an official membership roll for the purpose. The secretary fixes the agenda for the meeting, in consultation with the executive committee and the chair. The secretary is responsible for keeping all committee reports on file, for notifying officers of their election or appointment, and for maintaining record books in which the constitution and regulations of the organisation are contained, together with any amendments to these. The secretary is frequently also

3 *Egan v Harradine* (1975) 6 ALR 507.
4 *Potts v Miller* (1940) 40 SR (NSW) 351.
5 *R v Staples* (1893) 19 VLR 47.
6 *Stanham v National Trust of Australia* (1989) 7 ACLC 628.

responsible for the correspondence of the organisation. Because there are so many different tasks, the rules of an organisation frequently provide for these duties to be split. For example, it is not uncommon for a correspondence secretary to be appointed in addition to the minutes secretary or recorder. This matter should be considered when drafting the constitution of the organisation.

Chapter 13

Committees

[13.05] A committee is a body of one or more persons elected, appointed or directed by an assembly or society to consider, investigate or take action on certain matters. Its authority is limited and depends upon the nature and scope of the powers delegated to it, and on the terms of reference (the wording) of the resolution under which it is established. A committee has no power to do a thing which the body appointing it cannot do.[1] The appointment of a committee is merely machinery of the body making the appointment in order to discharge its business, and the acts of the committee are all subject to that body's approval.

A committee may be established by the constitution of the organisation. Such a committee may be referred to as a standing committee. Alternatively, a committee may be established for a particular purpose. Such a committee may be referred to as a special committee, although the resolution to establish the committee will normally refer simply to a committee to be appointed.

The power to designate the members of the committee can be delegated to the chair of the meeting establishing the committee or exercised by that meeting. Non-members may be nominated to a committee, but if the chair is exercising the power to appoint, the names of the non-members must be submitted to the meeting for approval.[2] A person appointed to a committee has a right to resign from the committee.[3]

A committee has a duty to report to the body from which it derives its authority. Its report may be submitted in the form of the minutes of the committee proceedings. The body has discretion to adopt the report or refer it back to the committee for reconsideration.

One person may constitute a committee.[4] A committee usually appoints its own chair, but the main body should fix the quorum of a committee.

1 *Bean v Flaxton Council* [1929] 1 KB 450.
2 See Sarah Corbin Robert, Henry M Robert III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p 172.
3 *R v Sunderland Corp* [1911] 2 KB 458.
4 *Re Taurine Co* (1883) 25 Ch D 118.

No business may be transacted at a committee meeting unless a quorum is present. In the event of no quorum being fixed, the committee can only act when all its members are assembled.

If a vacancy occurs on a committee, the main body and not the committee has the power to fill it. So, too, in the absence of express power, a committee cannot add to its number or co-opt other members.[5] In the absence of express authorisation, a committee cannot delegate its powers, due to the principle that a delegate cannot, in turn, delegate the powers to another (in Latin: *delegatus non potest delegare*).

The body appointing a committee can subsequently extend, limit or withdraw the power it has conferred on the committee.[6] Since there is power to revoke the authority of a committee as a whole, there must also be power to revoke the authority of a single member of the committee.[7] Notice of a committee meeting generally does not state the nature of the business of the meeting, as a committee is usually appointed for certain definite purposes and no others.

The chair of a committee meeting often finds that better results are achieved by relaxing the formal rules of debate and allowing informal discussion. It is up to the chair to decide the extent to which this may be allowed, exercising the discretion invested in the position.

5 See *Cook v Ward* (1877) 2 CPD 255; 36 LT 893; *Re Liverpool Household Stores* (1890) 59 LJ Ch 616.

6 See *Huth v Clarke* (1890) 25 QBD 391.

7 *Manton v Brighton Corp* [1951] 2 KB 393.

Chapter 14

Expulsion and suspension

[14.05] The power to expel someone from membership of an unincorporated body does not exist by implication. Unless express power is given by the rules of the body, no power to expel exists. A club or society has no inherent power to alter its rules so as to introduce a power to expel. Where no power to expel is given by the rules, such power may be obtained if all the members agree to its being embodied in the rules. Alternatively, where power to alter the rules in the general interests of the particular body exists, they may be altered by adding a power to expel.[1]

Unless the conditions prescribed by the rules for the exercise of the power to expel are strictly observed, a purported expulsion will be invalid.[2] Courts have traditionally been reluctant to interfere in the affairs of "clubs" to correct such invalidities but may, in some circumstances, be prevailed upon to do so. In particular, if the exclusion impacts on the livelihood of the person the club has decided to discipline, the courts will enforce a high standard of natural justice or procedural fairness.[3]

The terms "natural justice" and "procedural fairness" are used synonymously. Although a number of judgments[4] contain comments on reasons for preferring the term "procedural justice", the term "natural justice" is still the most popular choice.

Whether the proposal to expel a member must appear in a notice of meeting depends upon the rules of the particular body. If the rules provide that expulsion may only be ordered at a meeting specially convened for the purpose, the notice of meeting must state the purpose of that meeting. If the rules enable the power of expulsion to be exercised at any meeting, it is not

1 *Dawkins v Antrobus* (1881) 17 Ch D 615; *Folks v Woolf* [1933] VLR 403; *Kelly v National Society of Operative Printers* (1915) 31 TLR 632; *Webster v Bread Carters' Union* (1930) 30 SR (NSW) 267 at 272.

2 *Gates v Vickery* (1973) ACLC 27,518.

3 See JRS Forbes, *Disciplinary Tribunals* (2nd ed, Federation Press, 1996).

4 See *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 316; *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201 at 226; and *McInnes v Onslow-Fane* [1978] 1 WLR 1520 at 1530.

necessary to state in the notice of meeting that a question of expulsion will arise; in this case, no entry in or omission from the notice of meeting can exclude or limit the exercise of any power at the meeting. However, proof of hasty or immature action may be evidence of a lack of good faith or that a fair hearing has been denied.[5]

The rules of a body must be construed in accordance with the principles of natural justice. Accordingly, where rules do not contain express provisions relating to the exercise of a power of expulsion, the principles of natural justice (see below) must be applied in exercising the power.[6]

The question of how the move to discipline a member should be publicised is complicated. This is separate from the question of whether the member to be disciplined must be notified. The laws of defamation and the rules of the body must be considered. The rules of a body may specify that the power to recommend expulsion or other disciplinary action is vested in a committee. Alternatively, the rules may vest the power in the general meeting. Before a power to expel can be exercised by a meeting, notice stating the purpose of the meeting must be given to all the members. Such rules require notice to be given to every person entitled to be present at the meeting,[7] unless some are at such a distance away as to make it physically impossible for them to attend the meeting, or are too ill to be moved. It is not sufficient merely to give notice to those who ordinarily attend meetings, even if those to whom notice has not been given have asked not to receive notices.[8] The notice should specifically state that the question of expulsion of the particular member will be dealt with by the meeting. The rules of the particular body relating to the time and manner of giving notice of the meeting must be obeyed.[9]

The rules may make written notice of a charge a condition precedent to hearing the charge. If this is the case and the notice does not comply with the rules, an expulsion is illegal.[10] Unless the rules provide otherwise, it is sufficient if the person concerned is informed either orally or in writing of the subject matter of the inquiry.[11]

Where rules provide for expulsion on specific grounds, there must be a specific charge or charges on one or more of those grounds; a charge of conduct unbecoming a member is too general in this case.[12] Often, however,

5 *Petitt v South Australian Tattersall's Club* [1930] SASR 258.

6 *Wishart v Australian Builders Labourers' Federation* (1960) 2 FLR 298.

7 See *Freedman v Petty and Greyhound Racing Control Board* [1981] VR 1001; see Ch 3.

8 *Young v Ladies' Imperial Club* [1920] 2 KB 523.

9 *Labouchere v Wharncliffe* (1879) 13 Ch D 346; *Ryan v Kings Cross RSL Ltd* [1972] 2 NSWLR 79; *Gates v Vickery* (1973) ACLC 27,518.

10 *Carbines v Pittock* [1908] VLR 292.

11 *Montgomery v Lee Steere* (1926) 29 WALR 70.

12 *O'Malley v Dawborn* [1919] QSR 128 at 142; *Carbines v Pittock* [1908] VLR 292.

having regard to the language of the relevant rules, the charge is of a general character. It may thus be reasonable for the person charged to request particulars, but the matters underlying the real charge — the heads of the accusation — may be evolved in the course of the inquiry. The alleged offender must be acquainted with the charge or charges and afforded an opportunity of meeting them. In such a case a general finding must be referred to the particular matters evolved in the course of the inquiry. Want of formal notice of the meeting which will consider the question of expulsion does not necessarily make an expulsion bad; it may be valid if the person accused knows the date of meeting and has previously furnished reasons in writing for not being expelled.[13]

Where the rules of a body require a particular majority of the persons to be present at a meeting in order to make an expulsion effective, that majority of the persons must be present; it is not sufficient that there be that majority of the persons voting. When some of those present abstain from voting, those not voting must be counted as opposed to the expulsion.[14]

NATURAL JUSTICE

[14.10] Three important rules of natural justice are:

1. Decision-makers should be free of bias. This is traditionally expressed in the maxim: "No individual may be a judge in their own cause."
2. Individuals must be informed of the charges against them and must be given the opportunity to respond to the charges.
3. The case should be decided on the basis of logically probative material.[15]

The meeting should make due inquiry into the charge made against the particular member and must act impartially. There is no due inquiry made unless the party concerned has reasonable notice of the proceedings, including fair, adequate and sufficient notice of the charge levelled against them[16] and a reasonable opportunity of attending the meeting and answering the charge or giving any explanation with regard to the matter.[17]

A rule denying a person the right to legal representation may be invalid, particularly in the case of a statutory tribunal.[18]

13 *Stockwell v Ryder* (1906) 4 CLR 469; *Sharpe v Brown* [1918] VLR 678.

14 *Labouchere v Wharncliffe* (1879) 13 Ch D 346.

15 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366–368; *Mahon v Air New Zealand Ltd* [1984] AC 808.

16 *Wilmot v Cooper* (1956) 1 FLR 5.

17 *D'Arcy v Adamson* (1913) 29 TLR 367; *Gray v Allison* (1909) 25 TLR 531; *Sydney Corp v Harris* (1912) 14 CLR 1 at 7; *Montgomery v Lee Steere* (1926) 29 WALR 70; *Wishart v Australian Builders' Labourers' Federation* (1960) 2 FLR 298; *Egan v Harradine* (1975) 6 ALR 507.

18 *Freedman v Petty and Greyhound Racing Control Board* [1981] VR 1001.

In considering the question of expulsion, members of a body act in a quasi-judicial capacity. Their decision will be void if any of them has a pecuniary interest in the decision or is biased to such an extent as to render the member other than an impartial judge.[19] Where the body hearing the matter is a statutory one, no person may sit who may reasonably be suspected of being biased; but where the body is consensual or a domestic tribunal, actual bias must be proved.[20]

A person may not be both judge and accuser. The impartiality of an individual is impugned if that individual has taken part in the proceedings as an accuser; such conduct creates in the minds of reasonable persons a suspicion of bias.[21] An individual complaining of an offence which constitutes a personal injury to the complainant is normally excluded from adjudicating upon this complaint. This applies even when the individual takes no active part in the proceedings, but acts only in a nominal capacity.

Where the constitution of the body that is contemplating taking disciplinary action refers the matter to a committee in the first place, a question arises as to whether members of the committee may also vote in the general assembly. If the committee's role was purely investigatory, the committee members may vote in general assembly; but if the committee's role was to decide on disciplinary action and the role of the general assembly is to decide an appeal, the members of the committee may not vote in general assembly.[22] The most express and peremptory language in the rules of a body is required to exclude the principle that the decision maker must be impartial. The fact that rules provide that a particular individual shall preside at a meeting does not either require or permit that individual to preside in her or his own cause, and some other person must be appointed to preside in that case, just as if the chair were absent.[23] It is not proper that a person should take any part in an inquiry unless the person is present throughout and has heard the whole case.[24] The expulsion of a member by a tribunal with authority to expel is invalid when a person acting as chair or as a member of the tribunal is not entitled to be present as a member of the tribunal.[25]

19 *Thompson v British Medical Association* [1924] AC 764 at 780.

20 *Maloney v New South Wales National Coursing Association* [1978] 1 NSWLR 161; *Cains v Jenkins* (1979) 28 ALR 219.

21 *Petitt v South Australian Tattersall's Club* [1930] SASR 258; *R v Optical Board of Registration* [1933] SASR 1. See *Australian Workers' Union v Bowen (No 2)* (1948) 77 CLR 601; *Campbell v Higgins* (1957) 3 FLR 317; *Wishart v Thorp* (1961) 2 FLR 317; *Wishart v Australian Builders' Labourers' Federation* (1960) 2 FLR 298; *Holmes v O'Toole* (1957) 1 FLR 212; *Freedman v Petty and Greyhound Racing Control Board* [1981] VR 1001.

22 *Re Macquarie University; Ex parte Ong* [1989] 17 NSWLR 113; (1989) 17 ALD 664.

23 *Dickason v Edwards* (1910) 10 CLR 243.

24 *Petitt v South Australian Tattersall's Club* [1930] SASR 258.

25 *Lynch v McLachlan (No 2)* (1962) 3 FLR 242; *MacSween v Fraser* (1956) 1 FLR 10.

Information that is adverse to a person's interest and which is credible, relevant and significant to the decision to be made should normally be disclosed.[26] It is immaterial that the decision-maker disclaims reliance on the adverse material. This rule is part of the right to be heard and is also related to the rule that the decision should be based on logically probative material.

The mere existence of a right of appeal under the rules of a body does not debar a person from taking legal action in respect of expulsion.[27] An appeal hearing that conforms to the rules of natural justice may cure defects in natural justice at an original hearing. The appeal hearing must not automatically endorse the original finding. The test is whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the body.[28]

SUSPENSION AND CENSURE

[14.15] There is no inherent common law power in an unincorporated association to suspend a member. Such power, if it exists, must be found clearly expressed in the rules of the association binding upon members.[29] Indefinite suspension is not an expulsion under the rules of a body and requires an express power.[30] Before a power of suspension is exercised against a member, the member must be given adequate notice of the charge and a reasonable opportunity to present a defence.[31]

In relation to the rules of natural justice, there is no distinction between suspension and expulsion.[32] However, where a statute makes provision for the suspension of an officer or employee and dismissal after an inquiry, the officer or employee need not be heard at the suspension stage if there is a right to be heard at the inquiry.[33]

Observance of the rules of natural justice also applies to resolutions of censure.[34]

26 *Kioa v West* (1985) 159 CLR 550.

27 *Daly v Gallagher* [1925] QSR 1. See *Lynch v McLachlan (No 2)* (1962) 3 FLR 242.

28 *Calvin v Carr* (1979) 22 ALR 417.

29 *Alford v Healy* (1951) 70 CAR 432.

30 *Joseph v Elliott* (1952) 74 CAR 36.

31 *Joseph v Elliott* (1952) 74 CAR 36.

32 *Burn v Amalgamated Labourers' Union* [1920] 2 Ch 364; *Ridge v Baldwin* [1964] AC 40.

33 *Halcrow v Port Macquarie Shire Council* [1979] 1 NSWLR 64.

34 *Lynch v Waters* (1967) 11 FLR 116.

RELIEF BY THE COURTS

[14.20] Where a power to expel is exercised and an expulsion order is made, it will not be interfered with by a court unless it can be shown that:

1. the rules relating to expulsion are contrary to natural justice
2. the rules have not been observed; for example, where the power has not been exercised by the particular persons authorised to exercise it or has been exercised upon some ground that is not a ground for expulsion
3. the power to expel has not been exercised bona fide;[35] or
4. the use of the power to expel deprives the person expelled of a legal right.

A distinction exists between cases where rules provide that there can be no expulsion without specific cause prescribed by the rules, and cases where the rules give a majority of the members an absolute discretion to expel. A person who, by membership of a society, contracts to abide by the latter type of rules, cannot complain if they are exercised.[36] In order to form an opinion as to whether a person has been guilty of conduct justifying expulsion, members of a committee are entitled to take facts into account that have come to their own knowledge or of which they are credibly informed by other members of the committee.[37] They must, however, act in good faith. In such a case it is essential that they give the person concerned a proper opportunity of meeting such facts before they arrive at their decision.[38] If a determination arrived at by the constituted authority in a society is made from an improper motive and not in good faith in the performance of its duty, then the determination is void.[39] Where a person is not afforded a proper opportunity to be heard, a decision to exclude or suspend that person is contrary to natural justice.[40]

The jurisdiction of a court to grant relief may be based on property rights in the body,[41] on the concept of breach of an express or implied contract,[42] or on the "right to work", which expulsion, particularly from a trade union, may have destroyed.[43]

35 *Dawkins v Antrobus* (1881) 17 Ch D 615; *Daly v Gallagher* [1925] QSR 1.
36 *Amalgamated Society of Engineers v Smith* (1913) 16 CLR 537 at 551–552.
37 *Fearnley v Berry* [1924] QSR 280.
38 *R v Milk Board* [1944] VLR 187.
39 *Newberry v Gale* (1930) 29 CAR 51.
40 *Edgar v Meade* (1916) 23 CLR 29.
41 *Cameron v Hogan* (1934) 51 CLR 358.
42 *Attorney-General (NSW) v Grant* (1976) 10 ALR 1.
43 See eg *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corp* [1977] 1 NSWLR 43 at 55.

Part II

Meetings of companies

Chapter 15

General context

[15.05] A corporation is an organisation that is recognised, under the provisions of the *Corporations Act 2001* (Cth), as possessing a legal personality. Such recognition is accorded to several types of organisation. If the organisation is originally registered within the jurisdiction then it is also called a company. This Act replaced the *Corporations Law*, which was in force from 1991. In many instances the wording of provisions in the *Corporations Act 2001* is identical to that of the comparable provisions in the earlier legislation.

As a corporation is an artificial entity, its business must be conducted by a human being or by agreement among human beings. Accordingly, meetings are a central feature of corporate life. Proceedings at company meetings are governed primarily by the statutory provisions in the *Corporations Act 2001*. These provisions may be amplified, or if they are "replaceable rules" (see below) modified, by provisions in the company's own constitution.

When there is no specific provision in the *Corporations Act 2001*, one may refer to the common law of meetings. The courts are asked to consider questions about company meetings more frequently than they are asked to consider questions about other meetings. These cases often define aspects of meeting law of interest to other organisations.

COMPANY CONSTITUTION

[15.10] For over a hundred years, companies applying for incorporation in Australia were required to lodge a memorandum of association. Many companies were also required to lodge articles of association. Other companies were deemed to have adopted, as articles of association, the regulations contained in a schedule to the companies legislation applicable at the time.

Together these two documents, the memorandum of association and the articles of association, constituted the company's constitution. Notionally the memorandum of association governed matters of interest to those dealing with the corporation as outsiders while the articles of association contained regulations to control the internal procedures of the organisation.

Companies incorporated after amendments to the *Corporations Law* were enacted in 1998 are not required to lodge a memorandum of association or articles of incorporation. Such organisations can adopt a constitution.[1] If such a company does not adopt a constitution, their proceedings will be governed by the provisions of the legislation.

Companies that were in existence before the adoption of this legislation will continue to be governed by the provisions in the memorandum and articles, which were imposed by the legislation when these companies were established. References in the *Corporations Act 2001* to provisions of the company constitution are to be interpreted as referring to provisions in the memorandum and articles.[2]

REPLACEABLE RULES

[15.15] The amendments to the *Corporations Law* effected in 1998 repealed the Schedule which had contained the Table A or Table B articles. These regulations applied to companies incorporated while they were in force, unless the individual corporation chose to adopt other provisions. The regulations governed a number of aspects of corporate organisation and included provisions for meeting procedure.

Many of these provisions were moved into the body of the *Corporations Law* as replaceable rules. A section or subsection in the legislation whose heading contains the words "replaceable rule" is to apply as a replaceable rule to a company that was registered after the commencement of the amendments. It may also apply to a company registered before that time if the company in question repeals its constitution. Some sections or subsections operate as replaceable rules when applied to proprietary companies but are mandatory rules when applied to public companies.[3]

A replaceable rule will not apply if the company's constitution contains a provision which displaces it or modifies it.[4] Even if a replaceable rule applies, failure to comply with it will not, of itself, constitute a contravention of the *Corporations Act*.[5] Such a failure might, however, be evidence of bad faith or negligence on the part of the company's officers.

TYPES OF COMPANY

[15.20] To be registered under the *Corporations Act*, a company must be either a proprietary company or a public company. Proprietary companies may be

1 *Corporations Act 2001* (Cth), s 136.
2 *Corporations Act 2001* (Cth), ss 1402–1408.
3 *Corporations Act 2001* (Cth), s 135(1).
4 *Corporations Act 2001* (Cth), s 135(2).
5 *Corporations Act 2001* (Cth), s 135(3).

limited by shares or may be unlimited with a share capital. A public company may be limited by shares, or by guarantee, unlimited with a share capital, or no liability.[6]

A proprietary company must have no more than 50 non-employee shareholders and must not engage in any activity that would require the lodgment of a prospectus with the Australian Securities and Investments Commission (ASIC).[7] There are reduced financial reporting requirements for proprietary companies that qualify as small proprietary company for a financial year. To qualify as a small proprietary company, the company must meet two of three specifications in the *Corporations Act*. These specifications relate to the size of the gross operating revenue, the value of the consolidated gross assets, and the number of employees.[8]

A person is a member of a company if the person is a member on registration, or if their name is entered in the register of members with their agreement after registration.[9] Where a company has share capital, members or owners of the organisation will hold shares. In the case of a company that is limited by guarantee there will be no shareholders. The term "member" is thus more inclusive than the term "shareholder" and will often be preferred in this text.

NATURE AND KINDS OF COMPANY MEETINGS

[15.25] As a general rule, one person cannot constitute a meeting, even with proxies from other members.[10] But the legislation now states that a company may have one member.[11] In such a case, there must still be a procedure for decision making. There is authority that where a class is composed of one person, there may be a "meeting" of less than two persons, for example where a meeting of preference shareholders is necessary but only one person holds preference shares.[12] The company's constitution may also allow a meeting to consist of one person.

The *Corporations Act 2001* makes provision for three kinds of members' meetings: annual general meetings, other general meetings, and class meetings. The requirement in the *Corporations Law* that companies issuing shares to the public should hold a statutory meeting within a set period of

6 *Corporations Act 2001* (Cth), s 112(1).
7 *Corporations Act 2001* (Cth), s 113.
8 *Corporations Act 2001* (Cth), s 45A.
9 *Corporations Act 2001* (Cth), s 231.
10 *Sharp v Dawes* (1876) 2 QBD 26; cf *R v Cogdon* (1877) 3 VLR (L) 88; *R v Leech* (1879) 5 VLR (L) 494; *Re London Flats* [1969] 1 WLR 711.
11 *Corporations Act 2001* (Cth), s 114.
12 *East v Bennett Bros Ltd* [1911] 1 Ch 163; cf *Re Thomas* (1911) 55 Sol Jo 482; *Re Taurine Co* (1833) 25 Ch D 118; *Re Fireproof Doors* [1916] 2 Ch 142.

first doing so was repealed in 1998. An outline of the three types of meeting is provided below; each is discussed in more detail below.

The *Corporations Act* also makes provision for meetings of company creditors. These provisions normally apply only in situations where the company is in financial difficulty. Finally, the executive committee or board of directors of the company will be required to meet.

Annual general meeting

[15.30] Every public company that has more than one member must hold a general meeting of shareholders once every calendar year.[13] The meeting must be held within five months of the end of the company's financial year.

Other general meetings

[15.35] The term extraordinary general meeting was once used in the legislation for any general meeting other than the annual general meeting. The term has not been used in the legislation since 1991, although it is still heard in everyday speech. A company may meet when necessary to consider general business whenever a person or persons with the power to convene such a meeting decide to use it.

A replaceable rule in the *Corporations Act* gives the directors power to call additional meetings.[14] Such powers may be conferred or removed by the company's constitution. The *Corporations Act* gives a specified minimum number of shareholders the right to requisition a meeting and requires the directors to act on such a requisition.[15] The power to convene a meeting is also conferred on the court in certain circumstances.[16] If for any reason it is impracticable to convene a meeting in any manner in which meetings may be convened or to conduct the meeting in the manner prescribed by the company constitution or the *Corporations Act*, a court may make orders to deal with the situation. The court may make such orders on its own motion or on the application of a director or shareholder entitled to vote at the meeting. The orders may provide for the manner in which the meeting is to be convened, held and conducted. The court may order that one shareholder present in person or by proxy shall be deemed to constitute a meeting.[17]

13 *Corporations Act 2001* (Cth), s 250N; see below, Ch 16.
14 *Corporations Act 2001* (Cth), s 249C; see below, Ch 17.
15 *Corporations Act 2001* (Cth), s 249D.
16 *Corporations Act 2001* (Cth), ss 249G and 1319. See *Re Totex-Adon Pty Ltd* (1979) 4 ACLR 769.
17 *Re El Sombrero Ltd* [1958] Ch 900.

Class meetings[18]

[15.40] Class meetings are required only when it is proposed to vary rights attached to a class of shares. Where a company's shares are of different classes, or there are different classes of members and such a proposal is brought forward, the company may be required to hold a meeting of the members or shareholders of the particular class as well as to obtain approval from the company generally. This will depend in part on the provisions in the company constitution about variations to class rights.

Where provisions in the company's constitution govern the manner in which such alterations are to be implemented, the legislation requires that such provisions be observed.[19] Where the company's constitution does not stipulate that these rights are unalterable but does not stipulate how they may be altered, the *Corporations Act* provides that the consent of a three-quarters majority of members or shareholders is necessary.[20] Such consent is to be given in writing or by a special resolution passed at a class meeting.

It is further provided that, even where these provisions have been complied with, the holders of not less in aggregate than 10 per cent of those rights can apply to the court to have the variation or abrogations set aside,[21] but must do so within one month.[22] The court, after hearing the application, may set aside the variation if satisfied that it would unfairly prejudice the members of the class, but otherwise it will confirm the variation.[23]

The presence, at a separate meeting of the holders of one class of shares, of other shareholders of a different class does not invalidate the meeting as a separate class meeting, or the poll as the result of such a meeting. The other shareholders must not vote, either by show of hands or on a poll.[24]

INCIDENTS OF COMPANY MEETINGS

[15.45] Company meetings share many incidents in common with meetings in general:

- company meetings must be convened
- notice must be duly given
- decisions of the meeting will be embodied in resolutions

18 *Corporations Act 2001* (Cth), s 246B.
19 *Corporations Act 2001* (Cth), s 246B(1).
20 *Corporations Act 2001* (Cth), s 246B(2).
21 *Corporations Act 2001* (Cth), s 246D(1).
22 *Corporations Act 2001* (Cth), s 246D(2).
23 *Corporations Act 2001* (Cth), s 246D(5).
24 *Carruth v Imperial Chemical Industries Ltd* [1937] AC 707.

- the meeting must be chaired and minutes must be kept; and
- the meeting may need to be adjourned to another time and place, and will in any case be adjourned when the business is finished.

However, there are specific provisions in the *Corporations Act* governing several of these procedures. Where the provisions are complex, or where the courts have had an opportunity to elaborate upon the requirements, we examine the topic in more detail. Thus, separate chapters are devoted to the power to convene meetings, notice of meeting, resolutions and voting. Other topics are dealt with briefly in this chapter.

There are also certain rules that apply to company meetings but have no direct equivalents in general meetings law. Members of companies are given statutory rights to request the company to hold meetings, and to circulate resolutions and statements about resolutions. These provisions are examined in the chapter on requests and company meetings: see Ch 24. In addition, there are statutory provisions applicable to situations in which company meetings procedure has not been strictly complied with. These provisions are examined in the chapter on informality and irregularity: see Ch 27.

Resolutions

[15.50] The *Corporations Act 2001* (Cth) does not define the expression "ordinary resolution", but it is clear from general meetings law that an ordinary resolution must be passed by a simple majority of the votes cast for and against it at a meeting. An ordinary resolution will be effective whenever the legislation or the company's constitution do not require a larger majority: see Ch 10. Special resolutions will be covered more fully below in Chapter 22. In essence, a special resolution is one passed by a three-fourths majority of votes, cast at a meeting after 21 days' notice that the resolution would be put. Special resolutions are used for most of the important decisions of a company, for example:

1. to alter the company constitution[25]
2. to selectively reduce the capital of the company[26]
3. to wind up the company voluntarily[27]
4. to approve provision of financial assistance in connection with the purchase of shares in the company.[28]

25 *Corporations Act 2001* (Cth), s 136.
26 *Corporations Act 2001* (Cth), s 256C(2).
27 *Corporations Act 2001* (Cth), s 491(1).
28 *Corporations Act 2001* (Cth), s 260B.

Voting rights

[15.55] The constitution of a company usually stipulates what voting rights are held by the shareholders. In the absence of any provision to the contrary in the constitution, in the case of a company having share capital, every member has one vote on a show of hands and on a poll one vote for each share owned.[29]

Quorums

[15.60] Company constitutions should, and generally do, stipulate what number of shareholders shall constitute a quorum at a meeting of a company. The replaceable rule in the *Corporations Act*[30] states that the quorum for a meeting is two members of the company. By definition, a quorum must be present at a time and place when all should or might be present, and is not created by a casual meeting of the required number.[31] Where the constitution provides that two members shall constitute a quorum, the presence of two out of four persons who are registered as joint holders of all the shares in the company is sufficient.[32] The constitution may require a quorum to vary according to the importance of various meetings. Thus, where the constitution provides that generally the quorum at a general meeting is a certain number, it may require the quorum of a meeting dealing with certain specified matters to be substantially larger.[33]

The absence of a quorum is a matter relating to the internal management of a company, so it does not affect the rights of third persons in their dealings with the company, where they have no notice of the irregularity.[34] The Supreme Court has power to cure the irregularity and validate proceedings where a quorum is absent at a meeting of the company or its directors.[35] The constitution may expressly or by necessary implication provide that a quorum need not be present throughout a meeting. The replaceable rule in the *Corporations Act*, however, requires the quorum to be present at all times during the meeting.[36] Where the constitution provides that no business should be transacted unless a quorum is present when the meeting proceeds to business, it is only necessary for a quorum to be present at that stage. It is not necessary that the quorum should be present later in the meeting. Consequently, the failure of members to remain so that a quorum is present

29 *Corporations Act 2001* (Cth), s 250E.
30 *Corporations Act 2001* (Cth), s 249T(1)(a).
31 *Brougham v Melbourne Banking Corp* (1880) 6 VLR (Eq) 214 at 222; see also Ch 5.
32 *Re Transcontinental Hotel Ltd* [1947] SASR 49.
33 *Grand Lodge etc Co v Sly* (1913) 13 SR (NSW) 512.
34 *County of Gloucester Bank v Rudry Merthyr Co* [1895] 1 Ch 629.
35 *Corporations Act 2001* (Cth), s 1322.
36 *Corporations Act 2001* (Cth), s 249T(1).

throughout the meeting does not invalidate the meeting, in whole or in part, or render void any business carried out at the meeting.[37] If the general rule that one person cannot constitute a meeting applies, then if only one person is left at a meeting, from that moment there is no meeting.[38]

Under the replaceable rule in s 249T of the *Corporations Act 2001* (Cth), proxies are counted in determining whether a quorum is present. However, if a member has appointed more than one proxy, only one of them will count in determining whether a quorum is present. Also, where a member attends both as a member and as a proxy holder, the member is counted only once. The Table A articles, which apply unless excluded to companies registered before 1 July 1998, also provided that proxy holders could be counted in determining a quorum. In the absence of specific provision, the question may arise whether two proxy holders representing one shareholder may constitute a quorum. Note that the legislation allows a shareholder to appoint "not more than two" proxy holders.[39] The question was answered in the negative in *Donrob Enterprises Pty Ltd v Queensland Petroleum Management Ltd* (1989) 7 ACLC 249. Two proxy holders of one shareholder do not constitute a quorum.

Where the company states that "two members personally present" constitute a quorum, one member and the representative of another company are sufficient to constitute a valid meeting.[40] Where, in connection with the meeting of a particular class of shareholders, the constitution provides that a three-fourths majority of those present in person or by proxy is necessary, this requirement operates not only at an original meeting of the class but also at any adjourned meeting. This is so even if the reason for the adjournment is the absence of a quorum, and even if the constitution provides that, if at an adjourned meeting a quorum is not present within half an hour, those present shall form a quorum. If a resolution is declared "carried" at the adjourned meeting, without a three-fourths majority the resolution is not valid. The shareholders of a particular class possess a privilege of which they cannot be deprived.[41]

Chair

[15.65] As a matter of terminology, the *Corporations Law* eschews the use of the word "chairperson". The term "chair" is used, in this context, not only for the position from which the power of presiding at a meeting is exercised but also for the individual who possesses the power. Company constitutions may, of course, confer the title of chairperson or any other title on this individual. The replaceable rule in the *Corporations Act 2001* (Cth) indicates that directors

37 *Re Hartley Baird Ltd* [1955] Ch 143.
38 *Re London Flats Ltd* [1969] 1 WLR 711.
39 *Corporations Act 2001* (Cth), s 249X(3).
40 *Re Kelantan Coco Nut Estates Ltd* [1920] WN 274.
41 *Hemans v Hotchkiss Ordnance Co* [1899] 1 Ch 115.

may elect an individual to chair meetings of the company's members.[42] It further provides that the directors must exercise this power at a meeting of members if they have not previously done so or if the individual chosen earlier is not available.[43] In default of a selection by the directors, the members must elect a member present at the meeting to chair the meeting.[44] In the absence of the regular chair, members of a company who are present choose a chair, voting by show of hands. A provision in the constitution that a poll shall be taken "in such a manner as the chairman directs" does not give a right to demand a poll in order to choose a chair.[45]

Certain powers are inherent in the position of chair of a meeting. For example, a resolution may be put to a meeting by the chair even if it has not been proposed or seconded.[46] However, where a motion cannot get a seconder it can have no chance of success, and the chair may accordingly decline to put it to the meeting. So the general rule is that a resolution is dropped when no one seconds it.

The chair may be called upon to decide whether a matter may be addressed by the meeting. A resolution outside the scope of the notice calling the meeting cannot be put; it follows that an amendment to such a resolution cannot be put if it is outside the scope of the notice. Where the chair rules that an amendment is outside the scope of the notice, the person moving the amendment should not contest the ruling, nor need this person leave the meeting. A person who moves a resolution is entitled to vote against the ruling and thereby does not acquiesce in the ruling. A wrongful refusal to put a proper amendment withdraws a material and relevant question from the consideration of the meeting and the resolution as carried must accordingly be set aside.[47]

There are some limits on the power of the chair. As long as any matter remains to be dealt with that is reasonably and properly pertinent to the business of a meeting, the members are entitled to have the meeting continue. The officer presiding cannot, by leaving the chair, terminate the meeting contrary to the wish of the majority present before the meeting has disposed of its business.[48] The shareholders may stay on and appoint another chair in order to continue the meeting and proceed with the business for which it was convened.[49]

42 *Corporations Act 2001* (Cth), s 249U(1).
43 *Corporations Act 2001* (Cth), s 249U(2).
44 *Corporations Act 2001* (Cth), s 249U(3).
45 *James v Rymill* [1933] SASR 97.
46 *Re Horbury Bridge etc Co* (1879) 11 Ch D 109 at 118.
47 *Henderson v Bank of Australasia* (1890) 45 Ch D 330.
48 *National Dwellings Society v Sykes* [1894] 3 Ch 159.
49 *Oliver v North Nuggetty Ajax Co* [1912] VLR 416; but see *New South Wales Henry George Foundation Ltd v Booth* (2002) 54 NSWLR 433; and *Link Agricultural Pty Ltd v Shanahan, McCallum & Pivot Ltd* [1999] 1 VR 466.

The replaceable rule in the *Corporations Act* states that the chair must adjourn the meeting if the members present so resolve by a majority of votes.[50] The position is otherwise, however, where the constitution gives the chair the power to adjourn. In this case the chair has discretion whether or not to adjourn. Even where the constitution provides that the chair may adjourn "with the consent of the members present at the meeting", the chair is not bound to adjourn the meeting where a majority of the shareholders present desire an adjournment.[51]

It is usual for the chair at a meeting of shareholders to propose and speak in favour of motions that the company directors wish to be carried.

Adjournment

[15.70] There is authority for the proposition that a meeting once duly called cannot be postponed by notice.[52] It may, however, be adjourned upon assembling. If a meeting has not been duly called, as where insufficient notice has been given, the meeting is invalid. In such a case it cannot be held. It cannot be validated by an adjournment. The correct procedure is to give notice of cancellation of the meeting and to call a new meeting. In the absence of a constitutional provision requiring it, notice of the time and place to which a meeting is adjourned need not be given to shareholders.[53]

The only business that may be dealt with at an adjourned meeting is business that was not completed at the previous meeting.[54] When it is desired to bring forward new business, a further meeting should be called to take place at the conclusion of the adjourned meeting. The adjourned meeting simply continues the prior meeting. Consequently, where it is provided that notices must be given before the "meeting", this means the original meeting. Thus unless proxies are in order for the original meeting, they cannot be used for the adjourned meeting, except where the constitution expressly so provides. In the event of an election being adjourned and the constitution providing for things being done before the "day of election", this phrase must refer to the date of the adjourned meeting rather than the date of the original meeting.[55]

It is provided[56] that, where a resolution is passed at an adjourned meeting, the resolution shall for all purposes be treated as having been passed on the

50 *Corporations Act 2001* (Cth), s 249U(4).

51 *Salisbury Gold Mining Co v Hathorn* [1897] AC 268.

52 *Smith v Paringa Mines Ltd* [1906] 2 Ch 193; *Bell Resources Ltd v Turnbridge Pty Ltd* (1988) 6 ACLC 842.

53 *James v Rymill* [1932] SASR 364.

54 *Corporations Act 2001* (Cth), s 249W(2).

55 *Catesby v Burnett* [1916] 2 Ch 325.

56 *Corporations Act 2001* (Cth), s 249W(1).

date on which it was in fact passed. This also applies to resolutions passed at an adjourned meeting of creditors or contributories of a company, except where a meeting of the company at which a resolution for voluntary winding up is to be proposed is adjourned. Any resolution passed at the meeting of creditors, summoned coordinately with a meeting of members to consider winding up, shall have effect as if it had been passed immediately after the resolution for winding-up was passed.[57]

DEFAMATORY STATEMENTS

[15.75] Statements concerning the affairs of a company made at a meeting of the company are made upon a privileged occasion. This protects speakers from liability in respect of any defamatory statements they may have made; but it is a qualified and not an absolute privilege. The speaker must not be guilty of malice and must not exceed the limits of the privilege. A shareholder who summons a meeting of shareholders to consider business of importance to the shareholders may be liable for defamatory remarks where the press is invited to attend. The presence of the press on the direct invitation of the person who makes defamatory statements prevents the occasion from being privileged.[58] It has also been held that publication, in the press, of a report of a meeting of a company, when that report contained defamatory statements about an officer of the company, was not privileged.[59]

Reports concerning company affairs that are forwarded to shareholders are as a rule subject to qualified privilege. Thus where the auditors make a report concerning the company's financial affairs, it is within the duty of the directors to forward it on to the shareholders, and it is in the interest of the shareholders to receive it. Accordingly, the directors are justified in printing it for distribution amongst the shareholders even if it contains defamatory matter.[60] Where certain members of a company caused a circular concerning the affairs of the company to be printed and sent to shareholders, suggesting a meeting for the purpose of protecting their interests, this was held to be privileged in the absence of proof of malice. Although the statements contained in the circular were of a libellous nature, their agent escaped liability for defamation on the basis that the circular went only to shareholders.[61]

57 *Corporations Act 2001* (Cth), s 498(4).

58 *Parsons v Surgey* (1864) 4 F & F 247; 176 ER 551.

59 *Ponsford v Financial Times* (1900) 16 TLR 248.

60 *Lawless v Anglo-Egyptian Cotton Co* (1869) LR 4 QB 262.

61 *Quartz Hill Gold Mining Co Ltd v Beall* (1882) 20 Ch D 501.

Chapter 16

Annual general meeting

[16.05] An annual meeting of the members or shareholders of a company is an important event. The basis on which the company is obliged to hold an annual general meeting is explained in *Re South British Insurance Co Ltd* (1980) CLC 34,419, where Holland J said (at 34,421):

> "Not only is there a statutory obligation on the company to call such a meeting, it contracts with its shareholders by its articles of association that it will do so. It is the one occasion in the year when the shareholders have a right to meet the directors or their representatives and to question them on the company's accounts, the Directors' Report and the company's position and prospects. In addition they have a right to vote on, and if appropriate discuss, resolutions as to dividends and the election of directors."

A public company that has more than one shareholder must, in addition to any other meeting it holds, hold a general meeting, to be called the "annual general meeting". Such a meeting must be held at least once in every calendar year and within five months after the end of the company's financial year.[1] A calendar year runs from 1 January to 31 December. A company may define its own financial year, but in default of such a definition it will run from the date of registration of the company.[2]

The legislation uses the acronym "AGM", defined as "an annual general meeting of a company that section 250N requires to be held".[3] "Hold", means more than "convene". It is not enough to call a meeting within one calendar year and then adjourn it to the next. There is some authority for the proposition that all the business required by the Act and the constitution to be done by the annual general meeting must be done before the year-end.[4] A court might also hold that the meeting must be completed before the year-end.[5] It seems that where an obligation is cast upon a person by the legislation

1 *Corporations Act 2001* (Cth), s 250N(1).
2 *Gibson v Barton* (1875) LR 10 QB 329.
3 *Corporations Act 2001* (Cth), s 9.
4 *Guss v Veenhuizen* (1976) 9 ALR 461 at 469.
5 *Guss v Veenhuizen* (1976) 9 ALR 461 at 464.

to do something at a general meeting or within a certain time after a general meeting is held, no conviction can be recorded if the meeting is not held.[6]

The statutory provision[7] that a meeting of a company, other than a meeting for the passing of a special resolution, shall be called by written notice of at least 21 days, or longer if provided by the constitution, applies to the annual general meeting. Nevertheless, the annual general meeting may be called by shorter notice if it is agreed in advance by all the members entitled to attend and vote at the meeting.[8] This clearly requires the agreement of all such members, whether or not they attend the meeting. It is arguable that, if the constitution provided for shorter notice of an annual general meeting when the member joined the company, the act of joining the company would constitute such prior agreement.

The Australian Securities and Investment Commission (ASIC) may, at the request of a company, extend the period of five months referred to in the legislation and permit an annual general meeting to be held outside the calendar year in which it should otherwise be held.[9] Such an extension must be applied for before the end of the calendar year or the period in which the company would have been required to hold its meeting.[10] ASIC may specify the period of the extension and may impose conditions when granting it.[11] A company may hold its first annual general meeting at any time within the first 18 months after its incorporation.[12]

NO REQUIREMENT OF ANNUAL GENERAL MEETING

[16.10] The corporations legislation no longer requires proprietary companies to hold annual general meetings. Until 1995 there were provisions in the *Corporations Law* dealing with exempt proprietary companies. Under these provisions, where all the members of an exempt proprietary company signed a document approving a resolution set out in the document, they were deemed to have passed the resolution at a meeting.[13] Where an exempt proprietary company was deemed to have held a general meeting and to have passed a resolution dealing with all the matters that are required to be dealt with at an annual general meeting, the company was deemed to have held

6 See *Jensen v Viney* (1979) 4 ACLR 230.
7 *Corporations Act 2001* (Cth), s 249H(1).
8 *Corporations Act 2001* (Cth), s 249H(2)(a).
9 *Corporations Act 2001* (Cth), s 250P(1).
10 *Corporations Act 2001* (Cth), s 250P(2).
11 *Corporations Act 2001* (Cth), s 250P(4); see *Re Futuris Corporation Ltd & Australian Securities Commission* (1995) 19 ACSR 276 (AAT Cth); *Exicom Ltd v Futuris Corporation Ltd* (1995) 14 ACLC 39 (Fed Ct), Carr J; *Re Oilmin NL* (1981) 6 ACLR 219 (SC Qld); *Re Gem Exploration & Minerals NL and Companies Act* [1975] 2 NSWLR 584; 1 ACLR 317; [1975] ACLC 28,380.
12 *Corporations Act 2001* (Cth), s 250N(1).
13 *Corporations Law*, s 255, repealed in 1995.

an annual general meeting.[14] The provision allowing for resolutions to be passed by signature of all the members now apply to all proprietary companies.[15]There is now no equivalent to the provision for matters to be dealt with at an annual general meeting.

The provision for the passage of resolutions without a general meeting, however, applies in almost every case when a proprietary company's constitution requires a resolution to be passed at a general meeting. The exception is a resolution to remove an auditor.[16] It appears that this provision allows any requirement in the company's constitution for an annual general meeting to be circumvented. In appreciating the reasons for this major change in the legislation, it is relevant to note that the *Corporations Act* now allows the incorporation of companies with only one member.[17]

BUSINESS OF ANNUAL GENERAL MEETING

[16.15] The business of the annual general meeting includes four matters, even if they are not referred to in the notice of meeting.[18] The first of these matters is the consideration of reports, including the annual financial report, the directors' report and the auditor's report. The second matter is the election of directors. Appointing the auditor and setting the auditor's remuneration are the final two matters that can be considered without notice. Although all four matters can be dealt with even if not included in the notice, it is better practice to include all of them in the notice of meeting. The meeting may also consider any other business in the notice.

Annual reports

[16.20] The company's directors must report to members for a financial year, by sending them either copies of three reports or a concise report complying with the statutory description.[19] The three reports specified are the financial report for the year, the directors' report for the year, and the auditor's report on the financial report. To comply with the statutory description, the concise report must include:

- the concise financial report, drawn up in accordance with relevant accounting standards
- the directors' report

14 *Corporations Law*, s 245(4), repealed in 1995.
15 *Corporations Act 2001* (Cth), s 249A.
16 *Corporations Act 2001* (Cth), s 249A(1).
17 *Corporations Act 2001* (Cth), s 114.
18 *Corporations Act 2001* (Cth), s 250R.
19 *Corporations Act 2001* (Cth), s 314.

- a statement by the auditor indicating that the financial report has been audited and whether it complies with the accounting standards
- a copy of any qualification in the auditor's report; and
- a statement that the report is a concise report and that the full reports will be sent to the member free of charge on request.

A member may request the company not to send them the material required by s 314 or to send them the three full reports. This may be a standing request or a request for a particular financial year.[20] Each member is entitled to one copy of the reports free of charge.[21]

The three reports (the financial report, the directors' report and the auditor's report), are to be laid before the AGM.[22] A company that is required to prepare or obtain a report for a financial year must lodge the report with ASIC within three or four months after the end of the financial year.[23]

Election of directors

[16.25] Directors may be elected or appointed at the AGM. An election is normally part of the meeting. The constitution will determine whether the terms of office of the directors are staggered; for example, one third of the directors may retire each year. Public companies are required to consider the election of each director independently. A single resolution appointing or confirming the appointment of two or more directors will be void unless the meeting resolved that the appointments could be voted on together and no votes were cast against the resolution.[24] The provision does not prevent the company from using a single ballot paper on which the voter may record a number of votes equal to the number of positions open[25] or from utilising a preferential voting system.[26] Where directors are appointed by the other directors to fill a casual vacancy, the appointment must be confirmed by a general meeting. In the case of a proprietary company, the confirming resolution must be passed within two months.[27] In the case of a public company, the appointment must be confirmed at the company's next annual general meeting.[28]

20 *Corporations Act 2001* (Cth), s 316(1).
21 *Corporations Act 2001* (Cth), s 316(3).
22 *Corporations Act 2001* (Cth), s 317.
23 *Corporations Act 2001* (Cth), s 319.
24 *Corporations Act 2001* (Cth), s 201E.
25 *Corporations Act 2001* (Cth), s 201E(2).
26 *Corporations Act 2001* (Cth), s 201E(3).
27 *Corporations Act 2001* (Cth), s 201H(2).
28 *Corporations Act 2001* (Cth), s 201H(3).

AUDITOR'S RIGHT TO ATTEND MEETINGS

[16.30] An auditor of a company is entitled to receive notice of general meetings, and any other communications relating to the general meeting that a member is entitled to receive.[29] The auditor may attend any general meeting of the company[30] and be heard on any part of the business of the meeting of professional concern.[31] The auditor may act through an agent authorised in writing to attend and speak at any general meeting.[32] The auditor is entitled to be heard even if the auditor's position is surrendered or terminated at the meeting.[33]

29 *Corporations Act 2001* (Cth), s 249K.
30 *Corporations Act 2001* (Cth), s 249V(1).
31 *Corporations Act 2001* (Cth), s 249V(2).
32 *Corporations Act 2001* (Cth), s 249V(4).
33 *Corporations Act 2001* (Cth), s 249V(3).

Chapter 17

Other general meetings

[17.05] The *Corporations Act 2001* (Cth)[1] provides in a replaceable rule that a director may call a meeting of the company's members. If the company is incorporated in Australia and listed on the Australian Stock Exchange then the provision that entitles a director to call a meeting of the company's members applies regardless of anything in the company's constitution.[2] The company constitution may provide that directors may, whenever they think fit, convene an extraordinary general meeting.[3] Under the replaceable rule, the power is confided to any director and can be exercised by an individual acting alone. Under the provision in the older form, the power is to be exercised by the board of directors acting collectively.

These provisions enable the directors acting collectively, or individually, to summon a general meeting of company members whenever there is business to be put before the meeting. Such business might include decisions about the company's financial structure or constitution.

In addition, the members have a statutory right to request the board of directors to call a general meeting of the company.[4] In making such a request, the members must indicate the terms of any resolution that will be proposed at the meeting. If the object of a member request to call a meeting could in no manner and by no machinery be effected legally, the directors may refuse to call the meeting. However, if the object could be carried out in a legal way, it is not right for directors to limit the notice so as to prevent the meeting from considering the question, even if it means that the terms of the notice cover a resolution that would be ultra vires.[5] This is so even where the request is expressed so that a resolution following its precise terms would be illegal. Once an extraordinary meeting of a company has been called, the terms of

1 *Corporations Act 2001* (Cth), s 249C(1).
2 *Corporations Act 2001* (Cth), s 249CA.
3 See *Corporations Law* (1991–1998), Sch 1, Table A, Art 40; Table B, Art 24.
4 *Corporations Act 2001* (Cth), s 249D; see Ch 24.
5 *Isle of Wight Railway Co v Tahourdin* (1883) 25 Ch D 320. See also *Turner v Berner* [1978] 1 NSWLR 66.

the notice of meeting will not prevent other business being brought forward at the meeting, provided members have sufficient notice of it before the meeting. Statutory power may enable the court to validate the calling of a meeting if omission to give notice has not been likely to prejudice anyone.[6]

6. *Corporations Act 2001* (Cth), s 1322. See *Holmes v Life Funds of Australia Ltd* [1971] 1 NSWLR 860.

Chapter 18

Meetings of creditors and others

[18.05] Companies have relationships with other groups besides members. In particular, companies may accumulate debt to several creditors, either by ordinary trading or by setting up a registered management investment scheme. There are a number of specific situations in which it may be necessary to summon meetings of creditors of the company to consider specific proposals. Such situations normally arise where the company has encountered financial difficulties. In such circumstances, creditors or holders of interests in a management investment scheme may seek an accounting from the company. Alternatively, the company may initiate the meeting. It may do so because it seeks to effect a rearrangement or amalgamation of various classes of debt or shareholding. It may seek to enter a deed of arrangement whereby the creditors will agree to an extended period of time to pay or perhaps accept less than is due to them in full payment of the debt. The company may decide to wind up its affairs and be dissolved in a voluntary liquidation, or it may be forced into liquidation by a court order. In each of these situations, it is necessary to give those whose interests are involved an opportunity to express their views through the medium of a meeting. This chapter surveys the provisions that apply to such meetings.

MEETINGS OF PERSONS WITH INTERESTS

[18.10] A managed investment scheme is a way for participants to share in the profits or assets of a company, other than through shares, debentures, insurance policies or partnership. Provisions in the *Corporations Act 2001* (Cth) govern meetings of members of registered investment schemes.[1] These provisions are very similar to those governing meetings of members. A meeting of the members of a registered investment scheme may be convened by the responsible entity[2] and must be convened when requested by 100 members

1. *Corporations Act 2001* (Cth), Pt 2G.4.
2. *Corporations Act 2001* (Cth), s 252A.

or by members holding 5 per cent of the votes.[3] The regulations may prescribe a different number of members for the purpose of applying this requirement to a particular scheme or class of scheme.[4] The *Corporations Act* stipulates that the deeds controlling the investment interests may be modified if the modification has been approved by a special resolution of the members of the scheme or if the responsible entity reasonably considers that the change will not adversely affect members' rights.[5]

COMPROMISES AND ARRANGEMENTS

[18.15] Provisions in Pt 5.1 of the *Corporations Act* provide for the reconstruction and amalgamation of companies that have a number of subsidiaries or a number of classes of members or creditors. These provisions are expressed to apply to Pt 5.1 bodies. That term is defined in s 9 of the *Corporations Act* to mean a company or a body registered under Pt 4.1 that is a registrable body carrying on business in Australia.

Where for any reason it is considered that some rearrangement of interests should be undertaken, the company or any creditor or member of the company — or, in the case of a company being wound up, the liquidator — may apply to the court to order a meeting or meetings.[6] This application is to be disposed of by the court in a summary way: without a lengthy hearing as to the merits of the proposal. However, it has been held that the court has discretion to refuse an order under this section if the proposal is clearly contrary to public policy.[7] Applicants for such an order must provide the court with full information concerning the class or classes of members and/or creditors of the company so that the court may decide on what meetings to order.[8]

The court may order a meeting or meetings of the creditors, or a class of creditors, or of the members of the company or a class of members to be convened in such manner and held in such place or places as the court directs. This direction must be followed to the letter. In a case where it appeared that orders had been made on three matters involving the same group of companies for the same time, the group decided to hold one of the meetings

3 *Corporations Act 2001* (Cth), s 252B.

4 *Corporations Act 2001* (Cth), s 252B(1A).

5 *Corporations Act 2001* (Cth), s 601GC.

6 *Corporations Act 2001* (Cth), s 411(1). See *K Rees Emporiums Ltd* [1969] VR 981 for discussion of an earlier form of this provision. The section refers to separate meetings in other jurisdictions. It is not clear whether this section would allow the court to order different meetings of the same class in different places at the same time, so that a creditor might choose which meeting to attend. See *Re Kailis Groote Eylandt Fisheries Pty Ltd* (1977) 2 ACLR 510, a decision on ss 314 and 315 of the *Uniform Companies Act 1961*.

7 *Re Buildmat (Australia) Ltd* (1983) 1 ACLC 919.

8 *Re Stewart and Sullivan Farms Ltd* (1981) CLC 33,245.

two hours later without applying to the court for a variation of the order. It was held that "if the court has not amended its order before the holding of the meeting and the meeting is not held at the time and place ordered by the court and with the chair selected by the court, then that is not the court's meeting; it is somebody else's meeting".[9] In the absence of an application under s 1322 to cure the irregularity, the meeting was accordingly held to be incapable of achieving its object.

Where the court orders a meeting or meetings to be held, it may also approve the explanatory statement required by the Act to accompany notices of the meeting or meetings, or may require it to be amended.[10] Such an explanatory statement must be sent with every notice summoning the meeting sent to a creditor or member. There are no other statutory provisions as to the manner in which notice must be given. These are not needed because it is within the power of the court to give directions on this matter. In *Re High Spirits Cellars Pty Ltd* (1988) 6 ACLC 644, it was an additional ground for invalidating the proceedings that notice had not been given to every creditor. Young J observed (at 646):

> "Although the accounting profession doubtless regards schemes of arrangement as just the processing of so much paperwork, the effect on the creditor of the company is that the creditor's debt is barred or, alternatively, the creditor is made to take a small amount of money in full consideration for its debt. Accordingly, the scheme of arrangement has a very serious effect on the individual creditor and if the proponents of the scheme think that the scheme will confer some commercial advantage on them then the price they have to pay for that commercial advantage is strict adherence to the rights of creditors, even creditors who they may consider have small, insignificant debts."

Although there are no provisions about the manner of service of notice, there are elaborate provisions about the contents of the explanatory statement. It must explain the effect of the compromise or arrangement. In particular it must state any material interests of the directors, whether as directors or as members or creditors of the company or otherwise, and the effect of the compromise or arrangement on them in so far as it differs from the effect on the like interests of other persons. The statement must also set out information material to the decision of a creditor or member as to whether or not to agree to the compromise or arrangement. The legislation requires that certain information be provided. Any other information that is known to the directors and has not previously been made known to the creditors or members must also be disclosed. It is also required that every advertisement of the meeting must contain a copy of the statement or say where a copy may be obtained.[11]

9 *Re High Spirits Cellars Pty Ltd* (1988) 6 ACLC 644.

10 *Corporations Act 2001* (Cth), s 411(1).

11 *Corporations Act 2001* (Cth), s 412. See *Re Ferro Constructions Pty Ltd* (1976) 2 ACLR 18.

Failure to comply with the obligation to send the statement is fatal to a scheme.[12] Sufficient information must be placed before the meeting to enable those present to decide whether or not the scheme is to their advantage;[13] that is, in the interest of the class to which they belong.[14]

Separate meetings of different classes of members and of different classes of creditors must be summoned. The holders of shares issued as partly paid, where the uncalled balance is paid in advance of calls and carries interest, are a different class from holders of fully paid shares.[15] Secured and unsecured creditors are different classes but it will not be necessary in every case to call separate meetings of the two classes. Although there is older authority to support the proposition that the court will err on the side of calling separate meetings,[16] the courts have pointed out that to break creditors up into classes will give each class an opportunity to veto the scheme. As the process undermines the basic approach of decision by a large majority, it should only be permitted if there are dissimilar interests related to the company, and its scheme, to be protected. The fact that two views may be expressed at a meeting is not a reason for calling separate meetings.[17]

Provisions were inserted into the legislation in 1990 to allow for consolidated meetings where a compromise or arrangement is proposed and the company has a number of subsidiaries. If there are more than 30 subsidiaries, the court may order a meeting or meetings on a consolidated basis of the creditors of the holding company and of each of the subsidiaries. Three conditions must be satisfied:

1. the compromise or arrangement proposed must be between the subsidiaries and the creditors of each of those subsidiaries or between the holding company and a class of creditors of the holding company
2. the proposal must include a term that orders will be sought transferring the whole of the undertaking and the property and liabilities of the subsidiary to the holding company; and
3. the court must be satisfied that the number of meetings that would be required would be so great as to result in a significant impediment to the timely and effective consideration of the proposed rearrangement.[18]

12 *Re Stewart and Sullivan Farms Ltd* (1981) CLC 33,245.

13 See *Re Dorman Long & Co Ltd* [1934] 1 Ch 635; *Re Metropolitan Fuel Pty Ltd* [1962] VR 675; *Re Chevron (Sydney) Ltd* [1963] VR 249.

14 *Re Wedgwood Coal & Iron Co* (1877) 6 Ch D 627.

15 *Re United Provident Assurance Co Ltd* [1910] 2 Ch 477.

16 *Re Stewart and Sullivan Farms Ltd* (1981) CLC 33,245.

17 *Re International Harvester Australia Ltd (Receivers and Managers Appointed)* (1983) 1 ACLC 889.

18 *Corporations Act 2001* (Cth), s 411(1A).

The court may also make such an order where the number of subsidiaries is less than 30 but the conditions are satisfied and the court considers that the circumstances would justify the consolidated meeting.[19]

There are two preconditions to orders for a meeting under s 411:

1. ASIC must have received 14 days' notice; and
2. the court must be satisfied that ASIC has had an opportunity to examine the terms of the proposed compromise or arrangement and the draft explanatory statement and make submissions to the court.[20]

The court will direct the manner in which the meeting is to be summoned. Accordingly, it may fix the date of the meeting, name the chair, determine the form of notice of meeting and give such other directions as to calling and holding the meeting as may be necessary.[21] Where there are two or more meetings of creditors or classes of creditors, the meetings are deemed to be a single meeting and the votes cast for and against the resolution are aggregated. A similar rule applies in the case of meetings of classes of shareholders.[22]

An arrangement, reconstruction or compromise will become binding if, and only if, it is approved by the specified proportion of members or creditors, and subsequently by order of the court. In the case of a compromise between a body and its creditors or a class of creditors, the proposal must be approved by a majority in number of the creditors present and voting. The majority must have a claim to at least 75 per cent of the total amount of the debts and claims of the creditors present and voting in person or by proxy.[23] A compromise or arrangement with members must be approved by a like majority.[24] Two points may be made. First, while the majority must be a three-fourths majority in value, it is sufficient if it is a simple majority in number. Second, a majority of the persons present and voting is required, so that those who are not present, or who, being present, do not vote, are not taken into consideration either from the point of view of number or value.[25] The chair may determine the value of the debts the company owes, and it has been held that where this is done in good faith, there are reasonable grounds to support it, and it is in accordance with relevant law, the chair's assessment

19 *Corporations Act 2001* (Cth), s 411(1B).

20 *Corporations Act 2001* (Cth), s 411(2).

21 As to noncompliance with directions, see *Re Anglo-Spanish Refineries Ltd* [1924] WN 222; *Re Stankey & Son Pty Ltd* [1968] SASR 156; *Re Mt Isa Mines Ltd* [1970] QWN 48; *Re Ferro Constructions Pty Ltd* (1976) 2 ACLR 18.

22 *Corporations Act 2001* (Cth), s 411(5). The rule was otherwise under the *Uniform Companies Act 1961* (Cth), s 151. See eg *Re Associated Minerals Consolidated Ltd* (1981) 5 ACLR 544.

23 *Corporations Act 2001* (Cth), s 411(4)(a)(i).

24 *Corporations Act 2001* (Cth), s 411(4)(a)(ii).

25 *Re Bessemer Steel & Ordnance Co* (1875) 1 Ch D 251.

should be accepted as correct. The onus is on the person who challenges such an assessment to prove that there are grounds for invalidating it.[26]

The court's approval must not be given unless two conditions are met. First, the court must be satisfied that the proposal is not designed to enable a person to avoid the operation of any provision governing the acquisition of shares. Second, a written statement from ASIC that it has no objection to the compromise or arrangement must be presented to the court.[27] The court's approval may be subject to such alterations or conditions as it thinks just.[28]

In *Re CM Banks Ltd* [1944] NZLR 248, Smith J said (at 253) that before approving a scheme the court would have to be satisfied:

> "1. That there had been compliance with the statutory provisions as to meeting, resolutions, the application to the court, and the like;
>
> 2. That the scheme has been fairly put before the class or classes concerned; and that if a circular or circulars have been sent out, as is usual, whether before or after the making of the application to the court, they give all the information reasonably necessary to enable the recipients to judge and vote upon the proposals;
>
> 3. That the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide, and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and
>
> 4. That the scheme is such that an intelligent and honest [person] of business, a member of the class concerned and acting in respect of his [or her] interest, might reasonably approve."

Upon approval by the court, a person will be appointed to administer the compromise or arrangement. That person must be a registered liquidator and must not have a previous connection with the body affected by the compromise or arrangement.[29] The order approving the compromise becomes effective when a copy is lodged with ASIC.[30] There is provision in the legislation for the acquisition of the shares of shareholders who dissent from the scheme approved by the majority. Such an acquisition may be either on the motion of the company or of the dissenting shareholder.[31] Where it is proposed to amend a scheme after it has been notified to creditors, a new application must be made to the court.[32] An adjourned meeting cannot

26 *Re Triden Contractors Ltd* (1992) 30 NSWLR 615 at 616–617; see also *McLean Bros and Rigg Ltd v Grice* (1906) 4 CLR 835; *Re Telford Inns Pty Ltd* (1985) 10 ACLR 312.

27 *Corporations Act 2001* (Cth), s 411(17).

28 *Corporations Act 2001* (Cth), s 411(6).

29 *Corporations Act 2001* (Cth), s 411(7).

30 *Corporations Act 2001* (Cth), s 411(10).

31 *Corporations Act 2001* (Cth), s 414.

32 *Re Forklift Sales (SA) Pty Ltd* (1971–1973) CLC 40,040.

approve a scheme that differs from that put forward at the first meeting.[33] The court has various other powers[34] designed to facilitate reconstruction and amalgamation of companies.

ADMINISTRATION AND DEEDS OF ARRANGEMENT

[18.20] Before 1993, a company that encountered financial difficulties could either be placed under official management or wound up.[35] The concept of official management was replaced in 1993 by administration with a view to executing a deed of arrangement. The object is to provide for the business property and affairs of the company to be administered in a way that maximises the chances of the company (or as much as possible of its business) remaining in existence. In the worst case it is considered that administration may result in a better return for the company's creditors and members than would result from an immediate winding up of the company.[36]

The administration will begin when the board of directors appoints an administrator.[37] An administrator may also be appointed by the liquidator,[38] or by a chargee.[39] The administration normally ends with one of three events. In the first place, administration will end if a deed of arrangement is executed. It will also end if the company's creditors resolve that the administration should end, or that the company should be wound up.[40]

The first task for an administrator is to call a meeting of the company's creditors to determine whether a committee of creditors should be appointed. This meeting must be held within five business days after the administration begins. It is to be convened by written notice to as many of the company's creditors as reasonably practicable and by advertisement in a national newspaper or in a daily newspaper in circulation in each jurisdiction in which the company carries on business. This advertisement must appear at least two days before the meeting.[41] If the meeting determines to appoint a committee of creditors then it will also decide the membership of the committee. The functions of the committee will be to consult with the administrator and receive reports from the administrator.[42]

33 *Re Stewart and Sullivan Farms Ltd* (1981) CLC 33,245.

34 *Corporations Act 2001* (Cth), s 413.

35 *Corporations Law*, Ch 5: External Management.

36 *Corporations Act 2001* (Cth), s 435A.

37 *Corporations Act 2001* (Cth), s 436A.

38 *Corporations Act 2001* (Cth), s 436B.

39 *Corporations Act 2001* (Cth), s 436C.

40 *Corporations Act 2001* (Cth), s 435C.

41 *Corporations Act 2001* (Cth), s 436E.

42 *Corporations Act 2001* (Cth), ss 436F, 436G.

The administrator takes control of the company's business, property and affairs,[43] displacing the board of directors.[44] The administrator investigates these affairs and forms an opinion as to which course of action would best fit the creditors' interests.[45]

The administrator must, within a specified period, convene a meeting to inform the creditors of the position the company occupies.[46] The specified period for convening the meeting is a period of 21 days from the day on which the administration begins, unless that day falls in December or less than 28 days before Good Friday, in which case it is a period of 28 days from the day the administration commenced.[47] The court may extend the convening period. The meeting must be held within five days after the end of the convening period.[48] The notice of this meeting is to be served in writing on as many creditors as practicable and to be published in a newspaper as with the first meeting.[49] The notice is to be accompanied by a report by the administrator and a statement setting out the administrator's opinion about specified matters.[50] The administrator has qualified privilege with respect to any statement he or she makes in the course of performing the functions and powers of administrator.[51]

The administrator should preside at the meeting.[52] The meeting may adjourn from time to time but not to a day that is more than 60 days after the first day on which the meeting was held.[53] At this meeting the creditors have the power to decide that the company should execute a specific deed of company arrangement or that the administration should end or the company be wound up.[54] If a deed of arrangement is executed, the administrator of the company is to be the administrator of the deed unless the creditors, by resolution passed at the meeting, appoint someone else to be administrator.[55]

43 *Corporations Act 2001* (Cth), s 437A.
44 *Corporations Act 2001* (Cth), s 437C.
45 *Corporations Act 2001* (Cth), s 438A.
46 *Corporations Act 2001* (Cth), s 439A(1).
47 *Corporations Act 2001* (Cth), s 439A(5).
48 *Corporations Act 2001* (Cth), s 439A(2).
49 *Corporations Act 2001* (Cth), s 439A(3).
50 *Corporations Act 2001* (Cth), s 439A(4).
51 *Corporations Act 2001* (Cth), s 442E.
52 *Corporations Act 2001* (Cth), s 439B(1); see *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612; *Re A&D Hagan Pty Ltd (Receiver and Manager Appointed) (Administrator Appointed)* (2003) 46 ACSR 434; *Holzman v New Horizons Learning Centre Pty Ltd* (2004) 22 ACLC 446; [2004] NSWSC 90.
53 *Corporations Act 2001* (Cth), s 439B(2).
54 *Corporations Act 2001* (Cth), s 439C.
55 *Corporations Act 2001* (Cth), s 444A(2).

Where a deed of arrangement is in place, it may be varied by a meeting of creditors called under s 445F.[56] Under s 445C the deed may also be terminated by a resolution of creditors or by an order of the court. The creditors may also, at such a meeting, terminate the deed and resolve that the company be wound up.[57] A meeting may be called under s 445F at any time at the administrator's discretion. Alternatively, such a meeting must be convened on written request by creditors holding not less than 10 per cent of creditor's claims against the company. The meeting is again to be convened by a written notice setting out the terms of a proposed resolution, which is sent to the creditors and published in the press.

MEETINGS CALLED BY THE LIQUIDATOR

[18.25] Liquidation is the process whereby a company's existence is terminated. A company can enter into liquidation voluntarily or may be compelled into liquidation by a court order. In either case, control of the process is vested in a liquidator. If the liquidation is compulsory, the court will appoint the liquidator.[58] Even in a compulsory winding-up, a meeting of creditors may set the liquidator's remuneration, and provision is made for summoning a meeting for this purpose.[59] It is also provided that, subject to the statutory provisions governing compulsory liquidation, the liquidator must have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection. In the case of conflict, any directions given by the creditors or contributories override any directions given by the committee of inspection.[60] The liquidator is empowered to call general meetings of creditors or contributories (members of the erstwhile company). This may be done at the liquidator's motion for the purpose of ascertaining creditors' wishes. It shall be done at such times as the creditors or contributories direct by resolution or whenever the liquidator is requested to do so by creditors holding at least one-tenth of the debt.[61]

To enter into voluntary liquidation, the company must pass a special resolution mandating the course of action.[62] The company must thereafter lodge a copy of the resolution with ASIC and publish notice of it in the *Gazette*.[63] Where it is proposed to wind up a company voluntarily, the directors may make a declaration of solvency. That means that they have formed the

56 *Corporations Act 2001* (Cth), s 445A.
57 *Corporations Act 2001* (Cth), s 445E.
58 *Corporations Act 2001* (Cth), s 472.
59 *Corporations Act 2001* (Cth), s 473(3), (4).
60 *Corporations Act 2001* (Cth), s 479(1).
61 *Corporations Act 2001* (Cth), s 479(2).
62 *Corporations Act 2001* (Cth), s 491(1).
63 *Corporations Act 2001* (Cth), s 491(2).

opinion that the company will be able to pay its debts in full within a period of 12 months after the commencement of the winding-up.[64] If such a declaration is made, the winding-up will be under the control of the members, who will then appoint a liquidator in general meeting.[65]

If the liquidator is, at any time, of the opinion that the company will not be able to pay its debts within the 12 months, the liquidator must take one of three courses of action. The choices are:

1. to apply under s 459P for the company to be wound up in insolvency under the control of the court;
2. to appoint an administrator under s 436B (see above); or
3. to convene a meeting of the company's creditors to take control of the winding-up.[66]

If the directors are unable to make a declaration of solvency, they must call a creditors' meeting under s 497 at the same time that they call the members' meeting. It is provided in s 497(1) that, where the company enters into a voluntary winding-up, a meeting of creditors shall be convened under s 497. It is stipulated that notices of the meeting shall be served by post on the creditors at the same time that the notice of meeting is served on the members. The meeting of creditors shall be held on the same day as the meeting of members or on the next day. It is provided in s 497(2) that the company shall convene a meeting at a date, place and time convenient to the majority in value of the creditors and give the creditors seven days' notice by post of the meeting, together with statements about the company's affairs and debts. The notice shall be lodged with ASIC and published in a daily newspaper.

Where the meeting is called under s 497, the directors must lay a report in the prescribed form before the meeting, attend the meeting and disclose the affairs of the company. Where the meeting of creditors is called under s 496, the liquidator is obliged to prepare a statement of assets and liabilities. Where the meeting is called under s 497, one of the directors and the secretary of the company must attend the meeting,[67] and unless the creditors appoint one of their number the director will chair the meeting of creditors.[68] The person presiding at such a meeting shall determine whether the meeting time was convenient to the majority in value of the creditors. If it is determined that it was not convenient, the meeting may resolve to adjourn the meeting to a day and time not later than 21 days after the day on which the meeting

64 *Corporations Act 2001* (Cth), s 494.
65 *Corporations Act 2001* (Cth), s 495(1).
66 *Corporations Act 2001* (Cth), s 496(1).
67 *Corporations Act 2001* (Cth), s 497(6).
68 *Corporations Act 2001* (Cth), s 497(8).

was originally convened.[69] The meeting will determine whether a committee of inspection shall be appointed[70] and may nominate a person to be liquidator.[71] If the voluntary winding-up continues for more than one year, the liquidator must call a meeting. In the case of a member's voluntary winding-up, this will be a general meeting of the company. In the case of a creditor's voluntary winding-up, a meeting of creditors will also be necessary. The liquidator is to lay before this meeting, or meetings, an account of the conduct of the winding-up and of acts and dealings with the property of the company.[72] As soon as the affairs of the company are fully wound up, the liquidator shall convene a general meeting of the company, or of the company and the creditors, and lay the final accounts before that meeting.

This meeting shall be advertised in the *Gazette* and the liquidator must lodge a return showing that the meeting has been convened, whether or not a quorum was obtained. The company is dissolved three months after the lodging of this return.

COMMITTEES OF INSPECTION

[18.30] A committee of inspection may be appointed to work with the liquidator of a company. The liquidator of a company must, upon the request of a creditor or contributory, convene separate meetings of the creditors and contributories for the purpose of determining whether a committee of inspection should be appointed. If these meetings determine to appoint a committee of inspection they must also decide how many members of the committee will represent the interests of the creditors and how many will represent the interests of the contributories. Each meeting will then select the persons who are to act as representatives of its interests.[73] If there is a difference between the determinations of the two meetings, the court may resolve the difference and make orders as it thinks proper.[74]

The only persons eligible for appointment to a committee of inspection are members of the group appointing the committee or their representatives. This group, depending on the decision to establish the committee, is either the creditors or the contributories of the company. A representative may be authorised by general power of attorney or specifically in writing. A committee of inspection shall meet at such times and places as its members from time to time appoint. The liquidator or a member of the committee may convene a meeting of the committee. A committee may act by a majority of its members

69 *Corporations Act 2001* (Cth), s 498(1).
70 *Corporations Act 2001* (Cth), s 497(10).
71 *Corporations Act 2001* (Cth), s 499.
72 *Corporations Act 2001* (Cth), s 508.
73 *Corporations Act 2001* (Cth), s 548(1).
74 *Corporations Act 2001* (Cth), s 548(2).

present at a meeting, but may not act unless a majority of its members are present.[75] Provision is made for the resignation of members and the vacating of an office by insolvency or by absence from five consecutive meetings. The appointment of a member of the committee may be terminated by a resolution of the interests that made the appointment. Further provisions are made for filling vacancies and for the functioning of the committee while vacancies are unfilled.[76]

75 *Corporations Act 2001* (Cth), s 549.
76 *Corporations Act 2001* (Cth), s 550.

Chapter 19

The power to convene meetings

[19.05] The board of directors is the executive committee of the company. It follows that it is a normal function of the board of directors to call meetings of members. It is also now possible, regardless of anything in the company's constitution, for the members of a company to call a general meeting without the intervention of the directors. There are also provisions in the legislation that allow members to ask the directors to call a meeting. Finally, there are provisions in the legislation to allow the court to call a meeting of members where it is impracticable to call a meeting in any other way.

MEETINGS CONVENED BY DIRECTORS

[19.10] Company meetings are normally convened by the directors and the decision to do so may be taken collectively. Company constitutions frequently spell this out, but even if they do not, the convocation of a general meeting falls within the general powers of management typically conferred on the board.[1] Since 1998, the legislation entitles any director acting alone to call a general meeting.[2]

The power to convene a meeting is a "fiduciary power of a discretionary nature".[3] Unless the company constitution specifies when and where meetings are to be held, the directors have an implied discretion to fix the time and place of meeting. In exercising this discretion, directors must consider the convenience of the members. Directors will be restrained from holding the annual general meeting on a particular date when their object is to prevent members from exercising their voting powers.[4]

1 *Corporations Act 2001* (Cth), s 198A(1); see also Ch 2.
2 *Corporations Act 2001* (Cth), s 249C.
3 *Australian Innovation Ltd v Petrovsky* (1996) 14 ACLC 1,357 (Fed Ct), Lockhart J; *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809 (Ch), Pennycuick J at 814.
4 *Smith v Sadler* (1997) 25 ACSR 672; 15 ACLC 1,683 (SC NSW), Young J; *Cannon v Trask* (1875) LR 20 Eq 669.

An individual acting as company secretary does not have the authority to summon a general meeting of his or her own initiative by virtue solely of that appointment.[5] If the individual is also a director of the company, the fact that the individual is also the company secretary does not prevent the individual from exercising the statutory power to summon a meeting conferred on each company director. A secretary may convene a meeting on the authority of a resolution of directors sitting as a board. In this case the notice should be signed by the secretary "by order of the board of directors". A notice irregularly issued by the secretary may, however, be subsequently ratified at a board meeting.[6] The fact that a single director has authority to summon a meeting also implies that a single director may ratify such an action by the secretary.

Resolutions of a meeting convened by de facto directors are not invalid owing to there being some irregularity in the constitution of the board.[7] Acquiescence in an irregularity may prevent objection being subsequently taken to it.[8]

MEETINGS SUMMONED BY MEMBERS

[19.15] The *Corporations Act 2001* (Cth) empowers members with a sufficient interest in the company to summon a general meeting.[9] To exercise this power, the members must control at least 5 per cent of the votes that may be cast at the meeting. This measure replaces a legislative provision[10] to the effect that members may summon a general meeting "so far as the articles do not make other provisions".

MEETINGS REQUESTED BY MEMBERS

[19.20] The legislative provisions in s 249D, which enable members to request a meeting and thus cause the directors to convene a general meeting, are discussed in Chapter 24. Where the members have complied either with the statutory requirements or with the requirements in the company constitution as to requests, the directors must call a meeting within a stipulated period. Such a request may be answered by suggesting that the purpose for which the meeting is requested is beyond the power of the meeting under the constitution of the company.[11] This may not be the case in a small proprietary

5 *Re State of Wyoming Syndicate* [1901] 2 Ch 431.
6 *Hooper v Kerr, Stuart & Co Ltd* (1900) 83 LT 729.
7 *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148.
8 *Southern Counties Deposit Bank Ltd v Rider* (1895) 73 LT 374.
9 *Corporations Act 2001* (Cth), s 249F.
10 *Corporations Law*, s 247(1) repealed in 1998.
11 *NRMA v Parker* (1986) 4 ACLC 609; *Stanham v National Trust of Australia* (1989) 7 ACLC 628.

company.[12] It is not an answer to suggest that there are reasons why the resolution should not be passed.[13]

MEETINGS ORDERED BY THE COURT

[19.25] The court may, under the terms of s 249G of the *Corporations Act*, order that a company meeting should be held. This power may be exercised if, for any reason, it is impracticable to convene a meeting in any manner in which meetings may be convened or to conduct the meeting in the manner prescribed by the company's constitution or the *Corporations Act*. The court may, in doing so, act either on its own motion or on the application of any director or member who would be entitled to vote at the meeting.[14] The personal representative of a deceased member has the same rights for the purpose of applying for a meeting to be held under the order of the court as the deceased member.[15]

In making such an order, the court may give directions for the manner in which such a meeting should be convened, held and conducted, and may give such ancillary or consequential directions as it thinks fit.[16] An order that a meeting will be constituted by one member is appropriate and may be necessary where, by refusal to cooperate with the majority member(s), minority members threaten the company with deadlock.[17] Once a court has ordered a meeting, it will be reluctant to rescind the order.[18] A court does not have the power to give directions about the conduct of a meeting it has not convened.[19]

The court may order a meeting or order that a question be put before a meeting when it is appropriate in the context of litigation with which the court is dealing.[20]

The power of the court under s 249G depends on a finding that it is impracticable to call the meeting in any other way. In determining this, older case law may be relevant. In the case of *Re Totex-Adon Pty Ltd* [1980] 1 NSWLR 605, the question was whether the provisions in the company

12 *Papapavlou v Karageorge* (1987) 6 ACLC 75.
13 *Audimco v Euralba Mining Ltd* (1985) 3 ACLC 820.
14 *Corporations Act 2001* (Cth), s 249G(2).
15 *Corporations Act 2001* (Cth), s 1091AA.
16 *Corporations Act 2001* (Cth), s 1319. See *Re Johnston, Dunster & Co* (1891) 17 VLR 100; *Re Beckers Pty Ltd* (1942) 59 WN (NSW) 206; *Re El Sombrero Ltd* [1958] Ch 900; *Re Jeda Holdings Pty Ltd* (1977) 2 ACLR 438; *Re Totex-Adon Pty Ltd* (1979) 4 ACLR 769; *Re South British Insurance Co Ltd* (1980) CLC 34,419.
17 *Re Totex-Adon Pty Ltd* (1979) 4 ACLR 769; *Re Opera Photographic Ltd* [1989] 1 WLR 634.
18 *Re North Flinders Mines Ltd* (1996) 19 ACSR 602; 14 ACLC 629; but see *CMPS & F Pty Ltd v Crooks Mitchell Ltd* (1997)147 ALR 292; 24 ACSR 367; 15 ACLC 1,153.
19 *Favretto v Eagland* (1995) 13 ACLC 1,515 (SC NSW).
20 *Darvall v North Sydney Brick & Tile Co Ltd (No 2)* (1988) 6 ACLC 184.

constitution for methods of calling company meetings applied. The question arose in the context of a company that did not have directors because the necessity to call annual general meetings had been ignored and the directors' terms of office had expired. It was held that because provisions in the company constitution were frustrated by the facts of the case, recourse to the power of the court was required.[21]

The effect of the new provision entitling members to call general meetings on the power of the court to call a meeting has not yet been considered. As the new provision will have the effect of allowing a meeting to be called even in the absence of directors, it may make it harder to establish that it is impracticable to call a meeting in any other way. The provision does not indicate that the court may exercise the power whenever it is impracticable to hold a meeting in the absence of directions given under s 1319, but such a provision may be desirable.

21 *Re Totex Adon Pty Ltd* [1980] 1 NSWLR 605 at 610; see Magner, "Convocations of General Meetings in Company Law: Reflections on *Re Totex Adon Pty Ltd and the Companies Act*" (1981) 9 ABLR 79. See also *LC O'Neil Enterprises Pty Ltd v Toxic Treatments Ltd* (1986) 10 ACLR 337 (CA NSW).

Chapter 20

Notice of meetings

[20.05] In order to establish that a meeting of a company was validly held, it is generally necessary to show that proper notice was given. However, if notice reaches the members, enabling them to attend the meeting, an absence of formalities may not be grounds for alleging the meeting was invalid. The topic of notice is discussed more generally in Chapter 3; in addition, for companies the following rules apply.

PERSONS ENTITLED TO NOTICE

[20.10] The legislation provides[1] that written notice of a meeting of company members must be given individually to each member entitled to vote at the meeting, and to each director. This is a mandatory rule. The legislation also requires notice to be given to the auditor.[2]

Replaceable rules enacted in 1998 may apply to govern the notice rights of the personal representative of a deceased member and of the trustee in bankruptcy. The personal representative is entitled to be registered as holder of the shares, once the information reasonably required by the directors is supplied.[3] The personal representative, whether or not registered as the holder of the shares, is entitled to the same rights as the deceased member. The trustee in bankruptcy of a member also has the right to elect to be registered as the holder of the shares.[4] Where the trustee in bankruptcy has been registered as the holder of the shares, the trustee is entitled to the same rights to notice as the bankrupt.[5]

The Table A articles, which will form part of the constitution of many companies for years to come, provide that notice must be given to a number of persons. Every member, and every person entitled to a share in consequence of the death or bankruptcy of a member, who would have been entitled to

1 *Corporations Act 2001* (Cth), s 249J (1).
2 *Corporations Act 2001* (Cth), s 249K.
3 *Corporations Act 2001* (Cth), s 1091AA(3).
4 *Corporations Act 2001* (Cth), s 1091AB(1), (2).
5 *Corporations Act 2001* (Cth), s 1091A.

receive notice of the meeting, and the auditor of the company for the time being are entitled to notice.

Notice does not have to be sent to the representative of a deceased member until that person's entitlement has been entered on the register of members.[6] It is unclear in this context what effect will be given to the provision in the replaceable rule that the personal representative, whether registered as a member or not, has the same rights as the member. The company cannot logically be required to give notice to a person of whose entitlement they have no knowledge. The provision could sensibly be interpreted by concluding that the company is obliged to give notice to the deceased member until the personal representative has exercised the election and, further, that when the personal representative receives notice addressed to the deceased member, the personal representative can act in the place of the deceased member. The current legislation contains a replaceable rule to the effect that, where shares are held jointly, notice must be given to the joint member named first in the register of members.[7] There is older authority on the effect of the company's knowledge of the death of one joint holder. It was held that where the company knows of the death of one joint member, it should not send notices to that individual. Notices should be sent to the other joint holder, who has become sole owner by survivorship; otherwise the company cannot rely on the notice.[8]

Apart from special provision in the company constitution, preference members[9] and other members[10] who have no right to vote at general meetings are not entitled to notice of general meetings of the company.

OMISSION TO GIVE NOTICE

[20.15] Accidental omission to give notice to a member, or non-receipt by the member of notice, does not invalidate resolutions passed at a meeting.[11] Apart from this provision, which in any event is limited to "accidental omission", omission to give proper notice of a meeting invalidates the proceedings.[12] The provision is not to be construed so as to dispense with notice to an appreciable or large number of members.[13]

6 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 670.
7 *Corporations Act 2001* (Cth), s 249J(2).
8 *Ward v Dublin Milling Co* [1919] 1 IR 5.
9 *Re Mackenzie & Co Ltd* [1916] 2 Ch 450.
10 *Mutual Home Loans Fund of Australia (Qld) Ltd v Commissioner for Corporate Affairs* (1977) 3 ACLR 340 at 348.
11 *Corporations Act 2001* (Cth), s 1322(3). See *Re West Canadian Collieries Ltd* [1961] 3 WLR 1416 and discussion below, Ch 27.
12 *Re Merchant and Shippers SS Co* (1917) 17 SR (NSW) 146; 34 WN (NSW) 61; *Musselwhite v C H Musselwhite & Son Ltd* [1962] Ch 964.
13 *Holmes v Life Funds of Australia Ltd* [1971] 1 NSWLR 860 at 865.

Where there is no provision in the company's constitution to the contrary, notices required to be served on members of a company need not be served on members whose registered addresses are outside the postal area under the control of the Commonwealth of Australia. Within Australia, notice must be served on every member entitled to notice. This applies unless the member's place of residence and the ordinary means of communication with her or him are such that, if notice has to be given as provided by the constitution, the delay occasioned would seriously hamper the transaction of business.[14] The legislation contains a replaceable rule to the effect that notice must be given of a meeting that is adjourned for one month or more.[15] In the absence of constitutional provision requiring it, notice of the time and place of an adjourned meeting need not be given to members of a company,[16] but it may be desirable to give such notice. Where the company's constitution provides for giving notice of an adjourned meeting, notice similar to that required in the case of the original meeting should be given.[17]

CONTENTS OF THE NOTICE

[20.20] The notice must indicate the time, date and place at which the meeting will be held.[18] This legislative provision is a mandatory rule. Until it was enacted it was possible, but highly unusual, for these matters to be determined by the constitution of the company. The same clause in the legislation also requires the notice to indicate, if the meeting is to be held in two or more places, the technology that will be used to facilitate this.[19]

If a special resolution is to be proposed at the meeting, the notice of general meeting must indicate the intention to propose the resolution and set out the resolution.[20] If a member of the company is entitled to appoint a proxy, the notice of meeting must include information about these rights.[21] The notice must include a statement setting out the information that the member has a right to appoint a proxy and indicating whether or not the proxy needs to be a member of the company. The statement must further indicate that a member that is entitled to cast two or more votes may appoint two proxies and may specify the proportion or number of votes each proxy is appointed to exercise. This provision, which applies as a mandatory rule to all companies, was enacted in 1998 and replaced a comparable provision that applied only to public companies.

14 *Re Merchant and Shippers SS Co* (1917) 17 SR (NSW) 146; 34 WN (NSW) 61.
15 *Corporations Act 2001* (Cth), s 249M.
16 *James v Rymill* [1932] SASR 364.
17 *Robert Batcheller & Sons v Batcheller* [1945] Ch 169.
18 *Corporations Act 2001* (Cth), s 249L(1)(a).
19 *Corporations Act 2001* (Cth), s 249L(1)(a).
20 *Corporations Act 2001* (Cth), s 249L(1)(c).
21 *Corporations Act 2001* (Cth), s 249L(1)(d).

The notice must also state clearly and fairly the object of the meeting and the general nature of the business to be transacted.[22] A notice of an annual general meeting need not state that the business to be transacted at the meeting includes four matters. These matters are consideration of the accounts and the reports of the directors and auditors, the election of directors in the place of those retiring, the election of the auditor, and setting the auditor's remuneration.[23] Historically the declaration of a dividend, was a matter that the general meeting could deal with even if notice had not been given. This has been changed and the power to declare a dividend is now vested not in the general meeting but in the board of directors.[24] Any special business to be transacted at an annual general meeting must be clearly indicated in the notice. All the business of an extraordinary general meeting needs to be indicated in the notice.

If the nature of special business is not included in the notice, the meeting is not considered competent to dispose of it unless all members are present or otherwise consent.[25] All material facts must be stated in the notice of meeting. The fact that the directors, or one of them, would obtain a benefit under the resolution is a material fact.[26] Notice of a meeting at which it is proposed to increase the share capital must specify the actual increase proposed.[27] A notice convening a meeting at which a resolution under a particular section of the *Corporations Act* is to be submitted should distinctly state that it is proposed to proceed under that section.

ACCOMPANYING EXPLANATORY MATERIAL

[20.25] A circular giving some explanation of the matters to be considered by the meeting may accompany the notice of meeting. Without such explanatory material, the meeting would still be competent at common law to consider the matters. However, in some circumstances the courts will find that there was an equitable obligation on those summoning the meeting to provide such material.[28] Such an obligation is incurred whenever the directors stand to benefit under a resolution to be considered by the meeting and

22 *Corporations Act 2001* (Cth), s 249L(1)(b).

23 *Corporations Act 2001* (Cth), s 250R.

24 *Corporations Act 2001* (Cth), s 254U.

25 *Colhoun v Green* [1919] VLR 196; *Devereaux Holdings Pty Ltd v Pelsart Resources NL (No 2)* (1985) 9 ACLR 956; see also *Chequepoint Securities Ltd v Claremont Petroleum NL* (1987) 11 ACLR 94.

26 *Tiessen v Henderson* [1899] 1 Ch 861; *Colhoun v Green* [1919] VLR 196.

27 *MacConnell v E Prill & Co Ltd* [1916] 2 Ch 57 at 61.

28 *Chequepoint Securities Ltd v Claremont Petroleum NL* (1987) 11 ACLR 94.

whenever the directors choose to recommend or advise members to take a particular course of action.[29]

At general law, the board of directors could advise members on how to vote on any issue at the company's expense. In *Peel v London and North Western Railway Co* [1907] 1 Ch 5, there was a conflict between the board and certain members. The board sent a circular to members and solicited proxies, using company funds to meet the expenses. The opposing members sought to restrain the expenditure. The Court of Appeal held that since it was the duty of the board to inform and advise members, the charge to company funds was permissible so long as the board had acted bona fide.

Where such explanatory material is distributed, it should be full, frank and open. It must not in any sense be misleading or "tricky", whether by suppression of facts or in what it actually states.[30] Thus the circular should adequately disclose the actual benefit the directors will personally receive as a result of a resolution being passed.[31] A notice of meeting is not to be given a benevolent construction.

The meaning to be given to the notice and explanatory material is that which business persons would attribute to it. The test is whether it gives fair warning to members of the matters to be dealt with by the meeting.[32] Where the business included in a notice is "to elect directors", even though one director only is retiring, more than one director may be elected when this does not increase the number of directors beyond that specified in the constitution.[33]

Where the explanatory material is less than adequate, the courts may issue orders restraining the company from meeting. The courts have occasionally expressed some concern about restraining the conduct of members assembled in general meeting, on the basis that "the best way to resolve most disputes within company structures is to get the members into general meeting as soon as possible".[34] Although the courts have, on numerous occasions, asserted the right to set aside resolutions where they have followed misleading circulars or misleading notices, this necessitates the artificial and unsatisfactory process of trying to reconstruct the situation to see how they would have voted had they not been misinformed. Depending on the circumstances, the court may prefer

29 *Chequepoint Securities Ltd v Claremont Petroleum NL* (1987) 11 ACLR 94. See also Magner, "Notice of Purpose of Company General Meetings: The Common Law Requirement, the Fiduciary Duty" (1987) 5 *Companies and Securities Law Review* 34.

30 *Baillie v Oriental Telephone Co* [1915] 1 Ch 503; *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423.

31 *Kaye v Croydon Tramways* [1898] 1 Ch 358; cf *Colhoun v Green* [1919] VLR 196.

32 *Ryan v Edna May Junction GM Co* (1916) 21 CLR 487.

33 *Choppington Collieries v Johnson* [1944] 1 All ER 762.

34 *Hillhouse v Gold Copper Explorations NL* (1987) 13 ACLR 208 at 213.

to restrain the meeting,[35] as, for example, in *TNT Australia Pty Ltd v Poseidon* (1989) 52 SASR 379.[36] In that case, the court suggested (at 381) that the defendants were entitled to apply for a discharge of the order if further material was circulated to the members to remedy the deficiencies which had been identified.[37]

STANDARD OF SUFFICIENCY

[20.30] The notice and explanatory material must be clear and sufficient. In the case of matters of importance to members, they should be fully told what is proposed. Members should be able to make an informed decision on the basis of the notice.[38] Care should be taken that the notice is not so detailed and complicated that a member reading it quickly would be misled. "It would be unreal to assume that prudent business [persons] ... always sit down and read every document which they receive carefully through from beginning to end."[39]

It may be a good idea to forward to members an explanatory memorandum in addition to the notice of meeting.[40] The fact that the memorandum or statements made at the meeting may be misleading does not invalidate resolutions passed at the meeting in the absence of proof of fraud, oppression or other abuse of power.[41]

If at the meeting the full facts and the true nature of the proposed transaction are stated, this is not sufficient to justify an incomplete notice, as members who are absent from the meeting might have attended if they had previously possessed such additional knowledge.[42] It may be enough that the members received all the relevant information before the meeting, partly from the directors and partly from opponents of a scheme proposed by the directors.[43]

If a report circulated with a notice of a meeting, distinctly gives notice that the directors have done an act in excess of their authority, and it appears from

35 *Hillhouse v Gold Copper Explorations NL* (1987) 13 ACLR 208 at 213.

36 See also *TNT Australia Pty Ltd v Poseidon (No 2)* (1989) 52 SASR 383.

37 For other cases in which alleged insufficiency in notice or explanatory material was invoked see *Re Pheon Pty Ltd* (1987) 11 ACLR 142; *Devereaux Holdings Pty Ltd v Parry Corp Ltd* (1985) 9 ACLR 837; *Bancorp Investments Ltd v Primac Holdings Ltd* (1984) 9 ACLR 263; *Bain & Co Nominees Pty Ltd v Grace Bros Holdings Ltd* (1983) 7 ACLR 777.

38 *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423; *Re Castlereagh Securities Ltd* [1973] 1 NSWLR 624.

39 *Re Marra Developments Ltd* (1976) 1 ACLR 470 at 478 per Wootten J.

40 *Young v South African Syndicate* [1896] 2 Ch 268.

41 *Peters American Delicacy Co Ltd v Heath* (1939) 61 CLR 457.

42 *Ryan v Edna May Junction GM Co NL* (1916) 21 CLR 487.

43 *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 at 705.

the report and notice that the meeting will be asked to confirm the report and thereby to ratify the act, this is sufficient notice of the proposed business.[44]

CONTINGENT NOTICE

[20.35] A notice of two meetings to be held in immediate succession to consider alternative resolutions, one at each meeting, may be given. The notice of the second meeting is not rendered invalid by an express provision that it will only be held in the event of the first resolution not being passed at the first meeting.[45]

PERIOD OF NOTICE

[20.40] A meeting of a company or of a class of members, other than a meeting to pass a special resolution, shall be summoned by not less than 21 days' notice in writing or such longer period as is provided in the constitution.[46] This provision replaces an earlier provision,[47] which provided for 14 days' notice to be sufficient unless a special resolution was proposed. If the company is incorporated in Australia and included in an official list of the Exchange, at least 28 days' notice of general meetings must be given.[48] Twenty-one days' notice means 21 clear days, excluding the day of service and the day of the meeting.[49] A provision is frequently found in corporate constitutions to the effect that notice is deemed to have been received on the day after it was posted. The legislation does not affect the application of such a provision.

A company may call a meeting on shorter notice if the conditions are met. An AGM may be called on shorter notice if all the members entitled to attend and vote agree in advance. Any other general meeting may be called on shorter notice if members with at least 95 per cent of the votes that may be cast agree beforehand.[50] These conditions are fairly onerous and it is unclear whether the prior approval must be for a specific meeting. In any case, shorter notice is not allowed if the company is a public company and it is proposed to move certain resolutions under specified statutory provisions. These are resolutions to remove a director, or to appoint a director to replace a director so removed.[51] Nor is shorter notice allowed if a resolution to remove an auditor

44 *Boschoek Pty Ltd v Fuke* [1906] 1 Ch 148.

45 *Tiessen v Henderson* [1899] 1 Ch 861.

46 *Corporations Act 2001* (Cth), s 249H(1).

47 *Corporations Act 2001* (Cth), s 247(3), repealed by Act No 61 of 1998.

48 *Corporations Act 2001* (Cth), s 249HA.

49 See *Re Hector Whaling Ltd* [1936] Ch 208; *Railway Sleepers Supply Co* (1885) 29 Ch D 204; *Mount Oxide Mines Ltd v Gould* (1915) 15 SR (NSW) 290.

50 *Corporations Act 2001* (Cth), s 249H(2).

51 *Corporations Act 2001* (Cth), s 249H(3).

will be moved at the meeting.[52] It has been held that this provision has no application where a director is to be removed under a provision in the constitution, but here there is an implied need to ensure strict adherence to the requirements as to notice.[53]

Failure to give the proper length of notice of meeting, unless the shorter period has been approved in the requisite manner, will invalidate the meeting as between the company and its members. It does not necessarily affect the rights of creditors of the company. This distinction may be of importance on the winding-up of the company.[54]

SERVICE OF NOTICE

[20.45] The legislation provides four methods of serving notice. First, a company may give notice personally. This means that the notice may be handed to the member. Notice may also be given by mailing it to the member's address as listed in the register of members, or to any other address nominated by the member. Third, notice may now be given by sending it to the fax number or email address nominated by the member. Finally, notice may be given by any other means that the company's constitution permits.[55] For example, the constitution may provide for notice to be given by advertisement in a particular newspaper or magazine, or by posting it on a notice board.

Before the legislative amendments, case authority rejected the proposition that the companies legislation should be read as though actual personal service was the proper method of serving notices of general meetings, subject only to some limited indulgence which allows service by post. As a matter of practicality, service usually takes place by post except where there are only a handful of members, but this is not a legal requirement.[56] Where a notice was sent by post, service of the notice was deemed, under provisions in the Table A articles, to be effected by properly addressing, prepaying and posting a letter containing the notice.[57] It was deemed to have been effected, in the case of a notice of a meeting, on the day after the date of its posting and, in any other case, at the time at which the letter would be delivered in the ordinary course of post.[58] It is immaterial if a letter was not, in fact, received.[59]

52 *Corporations Act 2001* (Cth), s 249H(4).
53 *Howard v Mechtler* (1999) 30 ACSR 434; 17 ACLC 632 (SC NSW), Austin J.
54 See *Re Millers Dale and Ashwood Dale Lime Co* (1885) 31 Ch D 211.
55 *Corporations Act 2001* (Cth), s 249J(3).
56 *National Mutual Life Association of A/asia Ltd v Windsor* (1991) 9 ACLC 480 at 489.
57 *Corporations Law*, Sch 1, Table A, Art 95(2), repealed by Act No 61 of 1998.
58 *Corporations Law*, Sch 1, Table A, Art 95(2) repealed by Act No 61 of 1998.
59 *R v Westminster Unions Assessment Committee* [1917] 1 KB 832.

The provisions as to the service of notice by post apply only to notices relating to the ordinary business of the company. Service by this means is insufficient to make the member aware of a misrepresentation that could be relied upon to repudiate the shares.[60] Service by post means passage through the post; it is not enough to deliver by hand or to place the notice in a letterbox at the member's address. There must be an actual placing in the post; handing a letter to a postal worker to post is not sufficient.[61] It is unnecessary to serve members who live and have their registered addresses outside the jurisdiction.[62]

A notice given in accordance with the constitution will be effective even if it does not reach the person for whom it was intended. Thus, where the constitution provides for posting notice to a member's registered address, it is immaterial that, owing to an omission by the member to notify the company of a change of address, the member does not receive it and it is returned to the company as a dead letter.[63]

Where there is no need to serve notice of a meeting owing to the absence of an address, the meeting is not invalidated by reason of non-notice.[64] In such circumstances it is always permissible, though not compulsory, for the company to advertise notice.

60 *Re London and Staffordshire Fire Insurance Co* (1883) 25 Ch D 149.
61 *Re London and Northern Bank* [1900] 1 Ch 220.
62 *Re Warden and Hotchkiss Ltd* [1945] Ch 270.
63 *James v Chartered Accountants Institute* (1908) 98 LT 225.
64 *Dickson v Halesowen Steel* [1928] WN 33.

Chapter 21

Representation at company meetings

[21.05] Members of companies may need to appoint a representative to act for them at company meetings for a number of reasons; for example, when the member is unable to attend personally. Natural persons who are unable to attend a meeting may appoint a proxy where such a right can be found in the legislation or in the company's constitution. The expression "natural person" is used to distinguish between humans and bodies corporate. Bodies corporate may also take advantage of the proxy system, but the legislation gives a body corporate another method of appointing a representative. The term "proxy" is properly applied both to the document that appoints a representative and to the individual to whom the authority is given. In this chapter, proxy is used to denote the individual when the context makes it clear; otherwise the term "proxy holder" is used.

THE PROXY SYSTEM

[21.10] A company member who is entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, may appoint a proxy to attend and vote for the member at the meeting.[1] This provision of the *Corporations Act 2001* (Cth) is a mandatory rule for public companies and a replaceable rule for proprietary companies. These legislative provisions are important, as there was no common law right to vote by proxy: see Ch 4.[2]

There is authority that a person holding a power of attorney may represent a shareholder at a meeting.[3]

In the case of a company limited by shares, a member who is entitled to cast two or more votes at a meeting may appoint two proxies. Where a member opts to appoint two proxies, it is best practice to specify in the

1 *Corporations Act 2001* (Cth), s 249X.

2 See also *New South Wales Henry George Foundation Ltd v Booth* (2002) 54 NSWLR 433.

3 *New South Wales Henry George Foundation Ltd v Booth* (2002) 54 NSWLR 433.

instrument of appointment how many shares the proxy is to represent. Where this is not done, the legislation now provides that each proxy may exercise half the votes.[4] This is a great improvement over the former provision that stipulated that unless each proxy was appointed to represent a specified proportion of the member's voting rights, the appointment of two proxies was of no effect.[5] The current legislation further provides that if any fractions of votes result from such apportionment, these are to be disregarded.[6] For example, a member who holds 535 shares may appoint two proxy holders, each to exercise half of her or his voting rights. Each proxy will be entitled to cast 267 votes, and one vote will be forfeited. If numbers are likely to matter it would be better to stipulate that one proxy is to exercise 268 votes and the other 267 votes. In Joske's view, as expressed in the sixth edition of this book, a proxy that names alternative persons is in order.

The current legislation contains no stipulation as to whether the proxy must be a member of the company. The legislation that was repealed in 1998 specified that if the company did not have share capital, the proxy must be another member unless the articles conferred the right to appoint a non-member as proxy.[7] As the current legislative provision that a member may "appoint a person" as proxy is a replaceable rule for proprietary companies, it is clear that such companies' constitutions may stipulate that the proxy must be a member. Because the statutory provision is a mandatory rule for public companies, it is less clear whether public companies, for example companies limited by guarantee, may stipulate in their constitutions that proxies must be members. The better view is probably that this is permissible. This is because many public companies limited by guarantee are formed on the basis that the members have a common interest. An example is the New South Wales Bridge Association Limited, whose constitution currently contains a provision that a member may appoint another member as proxy. This provision is not directly inconsistent with the statutory provision that a member may "appoint a person" as proxy, and it was suggested that, if asked to rule on the matter, a court would uphold the continued operation of this provision. This suggestion is supported by the relevant provision about notice, which stipulates that the notice should state whether the proxy needs to be a member.[8] This was not the view taken in *New South Wales Henry George Foundation Ltd v Booth* (2002) 54 NSWLR 433, where it was held that the right to appoint a person could not be limited to the right to appoint a member. The arguments canvassed here were not considered in that case.

4 *Corporations Act 2001* (Cth), s 249X(3).
5 *Corporations Law*, s 250(3) repealed by Act No 61 of 1998.
6 *Corporations Act 2001* (Cth), s 249X(4).
7 *Corporations Law*, s 250(1)(a) repealed by Act No 61 of 1998.
8 *Corporations Act 2001* (Cth), s 249L(d)(ii).

Because the statutory rule is a replaceable rule for proprietary companies, such companies may impose restrictions, or limitations, on the right or may exclude it by provisions in their constitution. The provision that only a member can be appointed a proxy, discussed in the preceding paragraph, is one example of such a limitation. The right to appoint a proxy may not be subjected to any other restriction than those contained in the constitution. In *Scullion v Family Planning Association of Queensland* (1985) 4 ACLC 78, the articles did not contain a provision requiring proxies to be lodged before the meeting. The notice of meeting requested members to lodge proxies 48 hours before the meeting. When a member proposed to lodge proxies at the meeting, the administrator questioned the member's right to do so. The meeting passed a resolution rejecting the proxies. When the decision was challenged in court, Ryan J in the Supreme Court of Queensland held that it was invalid. The fact that the right to vote by proxy was conferred by statute was emphasised. It was held (at 81) that in the absence of any provision in the articles there is no authority in the administrator or council to require proxies to be lodged before a meeting or to reject them if they are lodged at a meeting. However, in light of the fact that the result of the election in question would not have been affected if the proxies were accepted, the judge applied statutory provisions to cure the irregularity (see below, Ch 27). The sole relief granted to the plaintiffs was a declaration. Although the corporation is prevented from imposing additional limits on the use of the statutory right to appoint a proxy, the member exercising the right does not appear to be affected by these provisions. The member, therefore, has absolute discretion as to the limits, if any, to be imposed on the authority.

Notice of proxy rights

[21.15] The legislation requires that if a member is entitled to appoint a proxy, every notice convening a meeting of the company's members should contain a statement about the right. The statement must set out the fact that the member has a right to appoint a proxy and indicate whether or not the proxy needs to be a member of the company. It must state that a member who is entitled to cast two or more votes may appoint two proxies and specify the number or proportion of votes each proxy is appointed to exercise.[9] If a company sends a member a proxy appointment form or a list of members willing to act as proxies, the company will be obliged to treat all members equally. If the form or list is sent in response to a request, the company must send the same information to every member who makes such a request. If the form or list is sent without being requested, a form or list must be sent to all members.[10]

9 *Corporations Act 2001* (Cth), s 249L(d).
10 *Corporations Act 2001* (Cth), s 249Z.

Documenting the appointment

[21.20] The legislation provides that the appointment of a proxy is valid if it is signed by the member making the appointment and contains four items of information.[11] The information that may be required is the member's name and address, the company's name, the proxy's name or the name of the office held by the proxy, and an indication of the meetings to which the appointment relates. A standing appointment may be made.[12]

The *Corporations Act 2001* (Cth) allows the company, by provision in its constitution, to provide that any appointment is valid even if it contains only some of the information specified above.[13] There is a strong implication that any provision in a company's constitution is void if it would require further information. The legislation specifies that an undated appointment is taken to have been dated on the day it is given to the company.[14]

The fact that it is stipulated that an appointment will be valid if "signed by the member" indicates that attestation is not necessary. The point is made even clearer by the provision that an appointment does not need to be witnessed.[15] An older case is authority for the proposition that, where the articles stated that a proxy must be attested, a proxy that was not attested should not be accepted.[16] In the eighth edition of this book, it was suggested that such a requirement might be invalidated on the ground that it cut down the member's rights. The fact that the legislation has been changed to indicate that an appointment need not be witnessed indicates that this suggestion was warranted.

The provisions in the Table A articles, where they continue to apply as part of the corporate constitution, require the instrument appointing a proxy to be in the form, or in a similar form, of that set out in the articles.[17] This provision was rendered ineffective by s 250A of the current legislation, which is not a replaceable rule. The current law clearly allows an appointment form to specify the way the proxy is to vote on a particular resolution.[18]

It has been held that a proxy may be executed under a power of attorney, despite the fact that the legislation requires the proxy to be signed by the

11 *Corporations Act 2001* (Cth), s 250A.
12 *Corporations Act 2001* (Cth), s 250A(1).
13 *Corporations Act 2001* (Cth), s 250A(2).
14 *Corporations Act 2001* (Cth), s 250A(3).
15 *Corporations Act 2001* (Cth), s 250A(6).
16 *Harben v Phillips* (1883) 23 Ch D 14 at 32.
17 *Corporations Law*, Sch 1, Table A, reg 54. The schedule was repealed by Act No 61 of 1998, but see observations in Ch 15.
18 *Corporations Act 2001* (Cth), s 250A(4).

member who is exercising the right to appoint a representative.[19] It has further been held that the proxy will satisfy the requirement that it contain the name of the company if it "either expressly states the name or else refers to the name of the company in a way which, as a matter of commercial practicality, is readily identified by the parties".[20]

In recent years, some proxy solicitation campaigns have used the tactic of sending out pre-completed forms, hoping that shareholders will more readily sign and return the form if they do not also have to fill in the name of the company, the name of the proxy holder and other such details. There is conflicting authority on whether such forms are valid. In *Totally and Permanently Incapacitated Veterans' Association v Gadd* (1998) 28 ACSR 549, Young J in the Supreme Court of New South Wales gave reasons for the decision that such forms would not be valid. More recently in *Fast Scout Ltd v Bergel* [2001] WASC 343, Templeman J of the Supreme Court of Western Australia held that such forms were valid. Unfortunately, Templeman J did not refer to the earlier decision.

Lodgment of proxy forms

[21.25] For a proxy appointment to be effective, the *Corporations Act* stipulates that the relevant documents have to be received by the company at least 48 hours before the meeting.[21] The relevant documents are the appointment itself, and, if the appointment is signed under a power of attorney, that authority or a certified copy of it.[22] The period of 48 hours may be reduced by the company's constitution, but not be extended.[23]

A company receives the relevant documents when they are lodged "at any of the following". Three methods of delivering the relevant documents are then specified. The documents may be received at the registered office of the company. This is clearly a reference to any act which lodges the documents physically at that office. They can be delivered in person or by a courier or by post. The documents may also be sent by fax to a fax number at the company's registered office.[24] Finally, the documents may be received at a place, fax number, or electronic address specified for the purpose in the notice

19 See *Re NRMA Insurance Ltd (No 1)* (2000) 33 ACSR 595 at 649; [2000] NSWSC 82, *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322.
20 *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322; see also *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303.
21 *Corporations Act 2001* (Cth), s 250B(1).
22 *Corporations Act 2001* (Cth), s 250B(1)(a), (b).
23 *Corporations Act 2001* (Cth), s 250B(4).
24 See *Talbot v NRMA Holdings Ltd* (1996) 139 ALR 755; 21 ACSR 577; 14 ACLC 1,532 (Fed Ct), Burchett J on the meaning of the term "registered office".

of meeting.[25] These three methods of delivery are alternatives. A company would be prevented from rejecting proxy appointments because they are received at the registered office instead of at the address specified. Although the appointment of a proxy must be in writing, it is not necessary that the actual proxy forms should be placed before the meeting. It is sufficient for them to have been lodged in accordance with the legislative provisions. If this is done, the company must acknowledge the authority at the meeting and the proxies should then be counted.[26]

The reason for requiring proxies to be lodged before the meeting is to allow the company's officers to check whether the proxies are valid. This involves checking whether each person executing a proxy has the right to vote or the authority to appoint a proxy and whether the statutory requirements for the proxy have been complied with. In one case, it was held that a proxy should have been rejected by the chair because, although the proxy in question was in a telex which purported to come from a corporate creditor, it did not provide any evidence of the position of the person who signed the telex.[27]

If a meeting has been adjourned, an appointment and any authority received by the company at least 48 hours before the resumption of the meeting are effective for the resumed part of the meeting.[28] As an adjourned meeting is a continuance of the original meeting, a proxy that could have been exercised at the original meeting also remains in force for the adjourned meeting. It does not need to be renewed.[29]

Rights of proxy

[21.30] If the appointment of a proxy is valid, the proxy is entitled to exercise certain rights in acting for the member of the company. The proxy has few, if any, rights that can be exercised against the member, and any that exist arise strictly under the terms of the contract between them.

The *Corporations Act 2001* (Cth) provides that a proxy appointed to attend and vote for a member has the same rights as a member.[30] Specifically, the proxy may speak at the meeting;[31] may vote;[32] and may join in demanding a poll.[33] If the company has a constitution, the constitution may provide that

25 *Corporations Act 2001* (Cth), s 250B(3).
26 *Re English, Scottish and Australian Bank* [1893] 3 Ch 385.
27 *Re K Wong Holdings Pty Ltd* (1983) 1 ACLC 738.
28 *Corporations Act 2001* (Cth), s 250B(2).
29 *Spiller v Mayo (Rhodesia) Development Co* [1926] WN 78.
30 *Corporations Act 2001* (Cth), s 249Y(1).
31 *Corporations Act 2001* (Cth), s 249Y(1)(a).
32 *Corporations Act 2001* (Cth), s 249Y(1)(b).
33 *Corporations Act 2001* (Cth), s 249Y(1)(c).

a proxy is not entitled to vote on a show of hands.[34] This replaces the earlier provision stipulating that "unless the articles otherwise provide" a proxy is not entitled to vote except on a poll.[35] The standard position now is that a proxy can vote by show of hands.[36]

The common law rule was that proxies were not counted[37] unless, possibly, the proxy holder was not a member of the company.[38] The replaceable rule now stipulates that a resolution is to be put by show of hands unless a poll is demanded. It further stipulates that before the vote is taken, the chair must inform the meeting as to whether any proxy votes have been received and how they are to be cast.[39] Finally, it indicates that on a vote by show of hands, a declaration of the chair is conclusive evidence of the result, provided that the declaration reflects the show of hands and the votes of the proxies received.[40]

This provision clearly changes the common law rule. It appears designed to deal with the situation, which arises particularly in a large public company, where the company has received proxies stipulating how the vote is to be exercised. Although the terms of the provision do not limit it to this situation, its application in a situation where the proxy holder is left a broad discretion is unclear if not impractical. Accordingly, where the proxy holder is left discretion, the better view, based on the common law authorities, would probably be that the proxy might only exercise one vote on a show of hands. This view is also supported by the provisions as to how the proxy is to vote, specified immediately below.

Obligations of proxy holder

[21.35] The legislation indicates that an appointment may specify the way the proxy is to vote on a particular resolution.[41] It then specifies how the proxy is to resolve certain questions that might arise out of these instructions. It states that a proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote as instructed by the member.[42] If the proxy has two or more appointments that specify different ways to vote on the resolution, the *Corporations Act 2001* (Cth) prohibits the proxy from voting on a show of hands.[43] If the voting is by poll and the proxy is the chair of the meeting,

34 *Corporations Act 2001* (Cth), s 249Y(2).
35 *Corporations Law*, s 250(2), repealed by Act No 61 of 1998.
36 See Ch 4.
37 *Re Horbury Bridge etc Co* (1879) 11 Ch D 109; cf *Re Caratal (New) Mines Ltd* [1902] 2 Ch 498; *Arnot v United African Lands Ltd* [1901] 1 Ch 518.
38 *Ernest v Loma Gold Mines Ltd* [1897] 1 Ch 1.
39 *Corporations Act 2001* (Cth), s 250J(2).
40 *Corporations Act 2001* (Cth), s 250J(3).
41 *Corporations Act 2001* (Cth), s 250A(4).
42 *Corporations Act 2001* (Cth), s 250A(4)(a).
43 *Corporations Act 2001* (Cth), s 250A(4)(b).

the legislation stipulates that the proxy must vote and must vote as instructed.[44] Finally, if the voting is by poll and the proxy is not the chair, the proxy need not vote on the poll, but if the proxy does so, the proxy must vote as specified.[45]

A question arises as to whether the proxy holder is under any obligation to attend the meeting and use the proxy. It would seem that the mere fact of appointment as a proxy does not impose such an obligation. If, however, the proxy holder is an office holder in the company and the proxy form contains instructions as to how the proxy is to be exercised, there may be an obligation to cast those votes. This obligation is owed to the person appointing the proxy.

There is authority for this proposition in the case of creditor's meetings and it was recently considered in the context of shareholder's meetings. In the context of a meeting of creditors, the court order stipulated that proxies were to be entrusted to the directors. Proxies were received but not exercised. It was held that the proxies had to be counted.[46]

The New South Wales Court of Appeal's decision in *Whitlam v Australian Securities and Investments Commission*[47] confirms the proposition that proxy votes held by the chair must be cast. However, the court held that a failure to cast these votes is not a breach of the chair's duties as director of the company. The duty is owed, it held, to the particular shareholder/s who appointed the director as proxy.[48]

These provisions about how a proxy should behave if the appointment specifies how the proxy is to vote do not affect the way the proxy may exercise any personal votes held by the proxy as a member.[49] This exclusion is particularly relevant to the way a proxy is to vote on a show of hands. A proxy who is also a member may hold a proxy specifying a desire to vote against the resolution. If the proxy as a member wishes to vote in favour of the resolution, he or she may do so. Best practice in such a situation is probably to ask for a poll vote, but no obligation is imposed by the law.

It is also important to observe that these provisions as to how the proxy is to vote in the presence of such an indication should be borne in mind when choosing a proxy. In some situations the notice of meeting may indicate a choice of persons who are willing to accept proxies. The appointing member should bear in mind that if anyone other than the chair is nominated as proxy, the proxy may choose whether or not to exercise the vote, even on a poll.

44 *Corporations Act 2001* (Cth), s 250A(4)(c).
45 *Corporations Act 2001* (Cth), s 250A(4)(d).
46 *Re Dorman Long & Co Ltd* [1934] 1 Ch 635.
47 (2003) 57NSWLR 559, 596–598.
48 *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559, 600–601.
49 *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559, 601.

A proxy "to vote for or against a scheme" entitles the holder to use it to vote against an amendment and for the adjournment of consideration of the scheme. In such a case the form in which the proxy is given entitles the holder to vote upon any incidental question which arises.[50] The proxy holder does not need to expressly state that the proxy is being exercised; the circumstances surrounding the poll and the voting may show that this is the intention and that the proxy holder is not simply exercising personal voting rights.[51]

Revocation of proxy

[21.40] A proxy is inherently revocable. A person cannot use the proxy device to exercise voting powers that could not be used under the articles. In *Coachcraft Ltd v SVP Fruit Co Ltd* (1980) 28 ALR 319, the articles of a company provided that no person might hold more than 10,000 shares in the company. A company bought over 60,000 shares from different sellers, leaving the shares in the names of the sellers. As part of the sale transactions the sellers executed irrevocable proxies nominated by the buyer. It was held that the chair acted properly in refusing the votes.

A company constitution may provide for the effect of a member's presence at the meeting on the authority of a proxy appointed by that member. If the constitution does not deal with this, the legislation specifies that the proxy's authority to speak and vote for a member at the meeting is suspended while the member is present at the meeting.[52] This statutory rule displaces the older position, which was that members could decide whether to limit their proxies to voting in their absence. It had also been held that even though a proxy was not revoked in accordance with the articles, the member who had given the proxy was free to attend at a meeting and vote personally; when the member did so, the vote tendered by the proxy should be rejected.[53] The result was that even where a proxy was not limited to voting "in the absence" of a member, the position was the same as if the proxy were so limited when the member attended the meeting, provided the member voted before the proxy. Attendance and prior vote of the member, however, did not revoke the proxy. If the member chose not to vote, but to stand by and allow the proxy to vote, that vote was valid. This is no longer the position, although it still appears that attendance by the member does not revoke the proxy, so that it is still valid at an adjourned meeting of the company or for other purposes.[54]

50 *Re Waxed Papers Ltd* [1937] 2 All ER 481.
51 *Clifton v Mt Morgan Ltd* (1940) 63 CLR 329.
52 *Corporations Act 2001* (Cth), s 249Y(3); see also *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322.
53 *Cousins v International Brick Co Ltd* [1931] 2 Ch 90.
54 *Ansett v Butler Air Transport (No 2)* (1958) 75 WN (NSW) 306.

Although a member cannot be prevented from limiting or revoking the authority of a proxy, the company is legitimately concerned to determine the validity of the vote. Accordingly, the legislation protects the company in situations where problems might otherwise arise, by requiring that written notice be given to the company upon revocation of the authority. Such written notice must be received before the start or resumption of the meeting at which a proxy votes. If notice is not received before the meeting, the vote will be valid. This provision applies in five situations: (1) where the appointing member dies, or (2) becomes mentally incapacitated before the meeting; (3) where the member revokes the proxy's appointment or (4) the power of attorney under which a third person appointed the proxy; and (5) where the member transfers the shares in respect of which the proxy was given.[55]

A constitutional provision that the chair's decision as to whether a proxy is valid is final does not prevent the court from considering whether the chair has exercised this discretion properly. Where the legislation confers a right to vote, the articles cannot render the right nugatory.[56] It has been held that the statutory right to appoint a proxy should take priority over strict observation of technicalities, rules or procedures.[57] Failure by the presiding officer to raise the non-compliance of an instrument of proxy with the constitution at the meeting may lead to the company being taken to waive compliance.[58]

BODY CORPORATE REPRESENTATIVES

[21.45] A company is a legal person[59] and thus may be entitled to exercise various rights that fall to be exercised at a meeting either of members or creditors. As a corporate body cannot attend, speak or vote at a meeting except through human agency, there are provisions in the *Corporations Act 2001* (Cth) designed to provide for the representation of companies at meetings. The Act provides that a body corporate may, by resolution of its board, authorise a specified person to act as its representative at meetings that the body, if it were a natural person, would be entitled to attend as a member or creditor of a company.[60] There must be a valid resolution conferring authority on the representative. A copy of the resolution is sufficient proof of the authority.[61] The person so authorised is, in accordance with the authority

55 *Corporations Act 2001* (Cth), s 250C(3).

56 *Industrial Equity Ltd v New Redhead etc Ltd* [1969] 1 NSWR 565. See *Link Agricultural Pty Ltd v Shanahan* (1998) 28 ACSR 498; 16 ACLC 1,462 (SC CA Vic) affirming *Shanahan v Pivot Pty Ltd* (1998) 26 ACSR 740; 16 ACLC 859 (SC Vic), Beach J.

57 *Shanahan v Pivot Pty Ltd* (1998) 26 ACSR 740; 16 ACLC 859 (SC Vic), Beach J.

58 *Dominion Mining NL v Hill [No 1]* [1971–1973] ACLC 27,217 (40-021) (SC NSW), Street J at 27,219–27,220.

59 *Corporations Act 2001* (Cth), ss 85A, 124.

60 *Corporations Act 2001* (Cth), s 250D(3).

61 *Colonial Gold Reef Ltd v Free State Rand Ltd* [1914] 1 Ch 382.

conferred, and until this authority is revoked by the body corporate, entitled to exercise the same powers on behalf of the body corporate as the body corporate could exercise at the meeting or in voting on a resolution. It is specifically provided that the appointment may be a standing one.[62] It has been held that this sort of appointment is fundamentally different in its legal character and consequences from the appointment of a proxy. The company's representative is not the company's agent but the embodiment of the company for all purposes at the meeting.[63]

For the purpose of constituting a quorum, the representative is to be counted as a person personally present at the meeting. The representative may speak and vote by show of hands, as well as on a poll. The corporation may set out limitations on the representative's powers and may make the appointment dependent on the individual holding a particular office.[64] This power would presumably be used to nominate as representative a person who holds an office of the nominating corporation. As an example, the managing director of a corporation may be appointed as its representative to another corporation. If this is intended, the instrument making the appointment must identify the position to be held by its representative.[65]

The provision adopted in 1998 makes it clear that a company can appoint more than one representative, but it specifies that only one representative may exercise the body's powers at any one time.[66] It resolved some difficulties to which recent litigation had called attention. Specifically, it overcomes doubts regarding the validity of standing appointments[67] and also the effect of an earlier judgment[68] that required the appointment to be made by name.[69]

The legislation no longer contains a provision to the effect that a corporation is deemed to be personally present when represented at a meeting by a body corporate representative. The older provision stipulated that, where a person authorised to act as the representative of a body corporate is present at the meeting and that person is not otherwise entitled to be present at the meeting, the body corporate was deemed to be personally present at

62 *Corporations Act 2001* (Cth), s 250D(4).

63 *Atkins v St Barbara Mines Ltd* (1997) 138 FLR 425; *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322.

64 *Corporations Act 2001* (Cth), s 250D(2).

65 *Corporations Act 2001* (Cth), s 250D(2).

66 *Corporations Act 2001* (Cth), s 250D(3). See *Atkins v St Barbara Mines Ltd* (1997) 15 ACLC 800 (FC SC WA).

67 See *Re Sidex Australia Pty Ltd (rec and mgr apptd); Sipod Holding DDPO v Popovic* (1995) 18 ACSR 436.

68 See *Atkins v St Barbara Mines Ltd* (1996) 22 ACSR 187 (on appeal *Atkins v St Barbara Mines Ltd* (1997) 15 ACLC 800 (FC SC Vic)).

69 See Ford HAJ, Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (9th ed, Sydney: Butterworths, 1999), p 253.

the meeting.[70] This provision applied to allow such a representative to be counted for the purpose of a quorum,[71] to be elected to the chair, and to exercise voting rights both on a poll and by show of hands. The current legislation provides specifically that a body corporate representative is to be counted in determining the quorum.[72] It is unclear how this change affects the proposition that a body corporate representative can be elected to the chair. The provision in s 250D(4) that a representative may exercise all of the powers that the company could exercise at the meeting does not resolve this question, as a company could not occupy the chair or exercise the powers of a presiding officer. A proxy for a company differs from a representative[73] and is in the same position as a proxy for an individual member. The proxy holder cannot vote except on a poll, but can call for, or join in calling for, a poll.

70 *Corporations Law*, s 249(5), repealed by Act No 61 of 1998.
71 *Re Kelantan Coco Nut Estates Ltd* [1920] WN 274.
72 *Corporations Act 2001* (Cth), s 249T(2).
73 See eg *Re O'Brien (John L) etc Ltd* (1975) ACLC 28,374.

Chapter 22

Resolutions

[22.05] The business of a company in general meeting will normally be disposed of by ordinary resolution: see Ch 8. Unless there is a provision requiring more than an ordinary resolution, an ordinary resolution will, by necessary implication, suffice. A provision requiring a resolution to be passed by a special majority, or after special notice, may be contained in either the legislation or the corporate constitution. The *Corporations Act 2001* (Cth) contains provisions requiring that business should, in certain situations, be conducted by special resolution. The legislation may also require business to be conducted by a resolution of which special notice is given.

ORDINARY RESOLUTIONS

[22.10] An ordinary resolution now requires 21 days' notice.[1] It may be passed by a bare majority, which is defined as a majority of the votes cast. For example, if a company limited by guarantee has 100 members, and 50 of these attend the meeting but only 20 vote; a bare majority is 11 votes.

Ordinary resolutions are effective unless there is provision in the legislation or the corporate constitution imposing a more onerous requirement. Where it is provided that a company may do a thing by resolution, this means by ordinary resolution. An example of such a provision is found in s 254H of the *Corporations Act 2001* (Cth). This provision enables a company to convert all or any of its shares into a larger or smaller number of shares, so long as it does not involve returning capital to the company. It is also specifically stipulated by the legislation that a company in general meeting may approve the cancellation of forfeited shares by ordinary resolution.[2] An ordinary resolution may also be used to approve a reduction of capital,[3] which is an equal reduction as defined in the legislation.[4] These cases are offered by way of example only and by no means constitute a complete list. There are other similar provisions in the legislation.

1 *Corporations Act 2001* (Cth), s 249H.
2 *Corporations Act 2001* (Cth), s 258D.
3 *Corporations Act 2001* (Cth), s 256C.
4 *Corporations Act 2001* (Cth), s 256B(2).

SPECIAL RESOLUTIONS

[22.15] The legislation requires special resolutions to:

1. alter the constitution of a company[5]
2. decide to change the company's name[6]
3. convert a company of one type into a company of another type as permitted by the legislation[7]
4. authorise the variation or abrogation of rights attached to a class of shares (this resolution is to be passed at a class meeting)[8]
5. authorise the company to provide financial assistance to a person who desires to acquire shares in the company[9]
6. reduce share capital selectively;[10] and
7. provide that unpaid share capital may be called only if the company falls under external administration.[11]

There are also situations in which the corporate constitution might require a special resolution. Other situations in which special resolutions are required are referred to in the context of Chapter 19 (meetings of creditors).

Two features distinguish a special resolution from an ordinary resolution. These are the details of notice (see below) and the size of the majority required. Until 1998, the length of the period of notice also served to distinguish special resolutions from ordinary resolutions. The period of notice required for a special resolution was not altered, but the period of notice for ordinary resolutions was lengthened to match it.

A special resolution must be passed by a majority of not less than three-quarters of the votes cast by members entitled to vote on the resolution.[12] This means that the resolution is passed if it obtains at least three out of four of all the valid votes cast at a properly convened meeting. Although the company cannot alter the requirements for a special resolution by provision in the constitution, it is possible for the company acting in advance in general meeting to waive the requisite period of notice.[13] However, this requires an absolute majority of 95 per cent of the votes. An absolute majority is a majority

5 *Corporations Act 2001* (Cth), s 136.
6 *Corporations Act 2001* (Cth), s 157.
7 *Corporations Act 2001* (Cth), s 162.
8 *Corporations Act 2001* (Cth), s 246B.
9 *Corporations Act 2001* (Cth), s 260B.
10 *Corporations Act 2001* (Cth), s 256C(2).
11 *Corporations Act 2001* (Cth), s 254N.
12 *Corporations Act 2001* (Cth), s 9.
13 *Corporations Act 2001* (Cth), s 249H(2).

of all votes that could potentially be cast on the resolution. If a company has 100 shares, all of which confer voting rights, a proposal to pass a special resolution with less than 21 days' notice would require prior approval by members holding 95 shares.

The term "extraordinary resolution", once commonly used, is no longer employed in the legislation. If the company's constitution still uses this term, it is expected that a court will consider that a special resolution satisfies the requirement. This would be in line with the statutory provision in force until 1998.[14]

Where the requirement for a special resolution is found in the legislation, the company cannot in its constitution alter the requirements for a valid special resolution. A special resolution carried in the manner provided by the *Companies Act* was held to be valid notwithstanding that the constitution provided for a different procedure.[15] As none of the provisions in question constitutes a replaceable rule, it would appear that this remains the position.

Where the requirement for more than a bare majority or more than a minimum period of notice is imposed by the company's constitution, it would appear that the company is free, for example, to stipulate 24 days' notice and a two-thirds majority.

Notice of special resolution

[22.20] The notice of a meeting at which a special resolution is to be proposed must clearly state that the resolution is to be considered as a special resolution and set out the resolution.[16] If the notice fails to comply with these requirements, the resolution is of no effect[17] and the chair should refuse to accept it unless all the shareholders assembled in general meeting agree to waive the formalities.[18] The resolution put at the meeting may not depart in any significant detail from the resolution in the notice. In the English case *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40, a notice was sent to the members informing them that a special resolution would be put at a meeting to cancel the share premium account. It was then discovered that some small amount of money would have to remain in the account and, at the meeting, the resolution was put to reduce the share premium account to this figure. Over 7 million votes were cast in favour of the resolution and just over 7000 votes were cast against. Slade J held (at 55) that the resolution had not been properly carried: "There must be absolute identity between the

14 *Corporations Law*, s 253(9), repealed in 1998.
15 *James v Evening Standard Newspaper Co* (1895) 21 VLR 399.
16 *Corporations Act 2001* (Cth), s 249L(b).
17 *MacConnell v E Prill & Co Ltd* [1916] 2 Ch 57; *Re North Victoria Deep Leads Gold Mines Ltd* [1934] ALR 221.
18 *Re Oxted Motor Co Ltd* [1921] 3 KB 32.

intended resolution referred to in the notice and the resolution actually passed." Correction of grammar and the use of more formal language than in the notice may, however, be allowed. Slade J referred to a number of cases decided under earlier English legislation[19] and to an older Australian case.[20] In these cases it had been held that amendments to special resolutions could be passed at a meeting provided that they did not alter the nature of the resolution. These cases were distinguished on the basis that the applicable provisions were not as precise as those which applied to a reduction of capital. The English legislative requirements considered in this case were closely comparable to the detailed provisions in the *Corporations Law* repealed in 1998.[21]

Lodgment of copies

[22.25] The legislation no longer requires that the company should lodge a printed copy of each special resolution with ASIC.[22] However, a number of provisions require lodgment of copies of resolutions to effect specific changes. ASIC must be notified and receive a copy of a special resolution passed to change the company's name,[23] to change the company's type,[24] or to alter class rights.[25] In addition, where the company alters class rights it must provide a copy of the documents and resolutions lodged with ASIC to any member who asks for them.[26]

RESOLUTIONS REQUIRING SPECIAL NOTICE

[22.30] The *Corporations Act 2001* (Cth) does not use the term "special notice". However, it still stipulates that in some cases a resolution can be passed only after special procedures involving notice to the company have been followed. These procedures apply only where it is proposed to remove a director or auditor under statutory powers.[27] In such a case the resolution is not effective unless notice of the intention to move it is given to the company. This notice must be in writing and must be left at the company's registered office not less than two months before the meeting at which the resolution is to be moved. The meeting may pass the resolution even if the meeting is held less than two months after the notice of intention is given.

19 Eg *Henderson v Bank of Australasia* (1890) 45 Ch D 330; *Betts & Co Ltd v MacNaghten* [1910] 1 Ch 430; and *Torbock v Lord Westbury* [1902] 2 Ch 871.

20 *Re Picturesque Atlas Co Ltd* (1892) 13 LR (NSW) (Eq) 44.

21 Compare s 148 of the *Companies Act 1948* (UK), and s 253 of the *Corporations Law*.

22 *Corporations Law*, s 256(1) was repealed in 1998.

23 *Corporations Act 2001* (Cth), s 157.

24 *Corporations Act 2001* (Cth), s 163.

25 *Corporations Act 2001* (Cth), s 246F.

26 *Corporations Act 2001* (Cth), s 246G.

27 *Corporations Act 2001* (Cth), s 227.

The statutory language is awkward, but here is an example of what appears to be intended. Assume that a company's annual general meeting has been held on the second Tuesday in December for the last five years and that, in the year in question the second Tuesday in December will be December 12. The dissidents who wish to remove a director would have to give notice of their intention to move a resolution to remove directors on or before October 11. Once such notice has been given, the incumbent board cannot avoid having the resolution to remove a director put to the vote by arranging to hold the annual general meeting on the last Tuesday in November.

The company must give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting. This period of notice, unlike notice of other matters, cannot be shortened.[28] Older legislation stipulated that the company must send the director concerned a copy of the notice as soon as practicable after the company has received the notice. That director then had the right to require the company to circulate any written representations the director cared to make to every member of the company who received notice of meeting.[29] The company could be excused only if the representations exceeded a reasonable length or were received too late. If the representations were not circulated, the director concerned had a right to have the representations read out to the meeting. This right was independent of any right to be heard.[30] These provisions are no longer found in the legislation.

However, there is nothing in the legislation to prevent a company from continuing to follow these procedures. Further, it is suggested that if the individual director or auditor was not given notice of the intention to pass a resolution to remove him or her from office at an early opportunity, the individual would be able to claim a remedy from a court on the basis of a denial of natural justice. It is less clear that such a remedy would be available if the individual's representations were not circulated. However, if the individual is a member of the company and has a sufficient holding, they might be able to invoke rights under s 249P: see Ch 24.

RESOLUTIONS WITHOUT MEETING

[22.35] A recent provision allows members of a proprietary company to pass a resolution without needing to meet. The provision applies where the *Corporations Act 2001* (Cth), or the company constitution, requires or permits a resolution to be passed in general meeting. The one exception is a resolution under s 329 to remove an auditor.[31] In this case a meeting is required.

28 *Corporations Act 2001* (Cth), s 249H(3).

29 *Corporations Act 2001* (Cth), s 227(5).

30 *Corporations Act 2001* (Cth), s 227(6).

31 *Corporations Act 2001* (Cth), s 249A(1).

A proprietary company may pass a resolution without holding a meeting if all the members entitled to vote on it sign a document stating that they are in favour of the resolution. The document must set out the terms of the resolution. If a share is held jointly, each of the joint members must sign.[32] Separate copies of the document may be used if the wording of the resolution and statement are identical in each copy.[33]

The resolution is passed when the last member signs the statement.[34] If notice to ASIC is required, this is satisfied when the company lodges a copy of the document with ASIC, together with the information or documents that were circulated with the copy of the document for signature.[35]

If the company has only one member, the company may pass a resolution by having the member record it and sign the record. If the *Corporations Act 2001* (Cth) requires that information about the resolution be lodged with ASIC, the requirement will be satisfied by lodging the information or document with the resolution that has been signed.[36]

Similar provisions apply to allow directors to pass resolutions without meeting. If the company has more than one director, the resolution is passed when the last director signs the document setting out the resolution and stating that they are in favour of it.[37] If the company has only one director, the resolution is passed by recording it and signing the record.[38] A similar procedure applies to allow the sole director of a proprietary company to make a declaration as required by s 295 or s 494 of the *Corporations Act 2001* (Cth).[39]

32 *Corporations Act 2001* (Cth), s 249A(2).
33 *Corporations Act 2001* (Cth), s 249A(3).
34 *Corporations Act 2001* (Cth), s 249A(4).
35 *Corporations Act 2001* (Cth), s 249A(5).
36 *Corporations Act 2001* (Cth), s 249B.
37 *Corporations Act 2001* (Cth), s 248A.
38 *Corporations Act 2001* (Cth), s 248B.
39 *Corporations Act 2001* (Cth), s 248B(2).

Chapter 23

Voting

[23.05] The company constitution will determine who is entitled to vote at general meetings. The legislation[1] requires the company to keep a register of members, and it has been held that an unregistered member has no right to vote at general meetings.[2]

Standard corporate constitutions provide that, on a show of hands, each person present is entitled to one vote; on a poll, each is entitled to one vote for each share held.[3] Unless the constitution contains other specific provisions, no other method of voting is valid. Neither the common law nor the *Corporations Act 2001* (Cth) authorise voting by use of polling papers or ballot: see Ch 10. Consequently, in the absence of specific provision in the constitution, the chair is not entitled to direct that a poll be taken by means of polling papers signed by members and delivered at the company's offices.[4] A motion that does not obtain the required majority is lost, and this applies when the votes cast for and against a motion requiring a simple majority are equal. However, there are some other provisions of interest in the legislation that govern the way in which votes are to be counted.

THE CHAIR

[23.10] The chair is to be chosen at the meeting and it follows that the choice of a person to occupy the chair is not an appropriate question for a poll vote. This proposition is not affected by a provision in the constitution saying that the poll shall be taken in such manner as the chair directs.[5]

The officer presiding in the chair has a casting vote only when this is expressed in the corporate constitution. Under the replaceable rule in the legislation, the chair has a casting vote whether or not the individual is also a

1 *Corporations Act 2001* (Cth), ss 168, 169.
2 *Chew Investment Australia Pty Ltd v General Corp of Australia Ltd* (1988) 6 ACLC 85.
3 *Corporations Act 2001* (Cth), Sch 1, Table A, reg 49.
4 *McMillan v Le Roi Mining Co* [1906] 1 Ch 331.
5 *James v Rymill* [1933] SASR 97.

member of the company. If the person in the chair is also a member, the right to vote in that capacity is not lost by assuming the presiding role.[6]

An American manual of meetings procedure suggests that the individual in the chair may vote on a ballot or poll but should not vote otherwise unless the vote will affect the result. In this case, the manual states that the chair cannot vote twice.[7] A rule that the casting vote must be exercised to preserve the status quo may be specifically imposed by the constitution, but does not apply otherwise.

VOTING BY SHOW OF HANDS

[23.15] Unless a poll is demanded, voting is by show of hands. On a show of hands, the rule is one vote for every person entitled to vote. The result of the vote depends simply on the number of hands shown. The number of shares is not counted.

On a vote by show of hands, two separate resolutions may be put to a meeting together; the vote will be valid unless a shareholder objects to the procedure.[8]

The *Corporations Act 2001* (Cth) provides that[9] the declaration of the chair that a resolution has been carried on a show of hands, a poll not having been demanded, is conclusive evidence that the resolution has been carried if it reflects the result of the vote. This rule displaces the older rule that the decision of the chair was absolutely, not merely initially, evidence as to the result of such a vote.[10] It may be difficult to provide evidence that a declaration does not reflect the result. This is easily overcome where the declaration on its face shows that the statutory majority has not voted in favour of the resolution, as, for example, where the chair states the number of votes cast each way.[11] The courts assume that, if a person present at the meeting intends to challenge the declaration by the chair of the result of a show of hands, that person will immediately demand a poll.

Even under the older law, the declaration by the chair was conclusive only as to the counting of votes; it did not cure irregularities or informalities in the meeting itself.[12]

6 *Corporations Act 2001* (Cth), s 250E(3).
7 Sarah Corbin Robert, Henry M Roberts III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), pp 400–401.
8 *Re Jones Ltd* (1933) 50 TLR 31.
9 *Corporations Act 2001* (Cth), s 250J(2).
10 *Arnot v United African Lands Ltd* [1901] 1 Ch 518.
11 *Re Caratal (New) Mines Ltd* [1902] 2 Ch 498.
12 *Re Fraser & Co Ltd* (1896) 22 VLR 385.

POLL

[23.20] Shareholders have a right at common law to demand a poll. The *Corporations Act 2001* (Cth) provides[13] that a poll may be demanded on any resolution. It allows the company to exclude, by constitutional provision, the right to demand a poll on any resolution concerning the election of the chair of a meeting and the adjournment of the meeting.[14]

The demand for a poll will be effective if supported by five members entitled to vote on the resolution, or by members with at least 5 per cent of the votes that may be cast on the resolution on a poll.[15] It is clear that these are alternative limitations; if one member has the requisite 5 per cent interest, that member may effectively demand a poll. It has also been held that the five members do not need to be personally present at the meeting, one individual holding five proxies may effectively demand a poll.[16] The company constitution may provide that fewer members, or members with a lesser percentage of votes, can demand a poll — but it cannot provide that such a demand must be supported by more members.[17]

Where the persons present at a meeting do not form a quorum unless proxies are counted, the chair may have a duty to call for a poll and use the proxies. The duty was held to arise where the chair knew that if the proxies were counted the vote would be different from the result of a show of hands.[18] Where a poll is taken, votes are to be counted according to the voting rights held.[19] Majorities are calculated by reference to the number of valid votes cast and not by reference to the number of individuals who cast one or more votes. This applies even where the legislation requires a resolution passed by not less than three-fourths "of the members" who vote at a meeting; three-fourths of the valid votes cast are both necessary and sufficient.[20]

When two resolutions before a meeting have been separately voted upon and a poll has been demanded in respect of these, a separate poll must be taken on each resolution.[21]

When a poll is demanded at a meeting of a company, it may be decided to take it at a future date. A meeting at which such a direction is given is to be considered as continuing until the result of the poll is ascertained. The time

13 *Corporations Act 2001* (Cth), s 250K(1).
14 *Corporations Act 2001* (Cth), s 250K(2).
15 *Corporations Act 2001* (Cth), s 250L(1).
16 *Chew Investment Australia Pty Ltd v General Corp of Australia Ltd* (1988) 6 ACLC 85.
17 *Corporations Act 2001* (Cth), s 250L(2).
18 *Second Consolidated Trust v Ceylon Amalgamated Co* [1943] 2 All ER 567.
19 *Re Horbury Bridge etc Co* (1879) 11 Ch D 109.
20 *Resource Securities Pty Ltd v Munro* (1981) ACLC 33,253.
21 *Blair Open Hearth Furnace Co v Reigart* (1913) 108 LT 655.

for the directors to obtain their qualification shares after appointment will run from the date when the result of the poll is ascertained and not from the date on which the poll to elect them is taken.[22]

The mode of taking a poll depends on the provisions of the constitution. It is usual to prescribe that the directors, or the chair of the meeting, shall determine how the poll is to be taken. Where there is no provision in the company's constitution and a poll is demanded to elect of a chair or adjourn the meeting, the poll must be taken immediately.[23] In other cases, where there is no provision in the constitution, the chair must decide when and in what manner a poll is to be taken.[24] If the chair orders a poll to be taken then and there, and the constitution prescribes that it must be taken within seven days of the meeting, the poll is invalid.[25]

A demand for a poll can be made before a vote is taken, before the result of a show of hands is declared, and immediately after the result of such a vote is declared.[26] A vote can be taken by poll even if it is not preceded by a demand for a poll following a vote by show of hands.[27] The chair has only a ministerial duty to perform in terms of declaring the results of a poll. The statutory provisions do not make the chair's declaration an essential part of the proceedings.[28] The entry of the result of the poll in the minute book is, however, prima facie evidence of the result; the onus of displacing that evidence is thrown upon those who impeach the entry.[29]

VOTING RIGHTS

[23.25] The legislation provides, by way of replaceable rule, that on a show of hands each member has one vote.[30] Where the company has share capital, the replaceable rule provides that on a poll each member has one vote for each share they hold.[31] Where the company does not have share capital, each member of the company has one vote, both on a vote by show of hands and a poll.[32] It is often provided in the company constitution that the holders of

22 *Holmes v Keyes* [1959] Ch 199.
23 *Corporations Act 2001* (Cth), s 250M(2).
24 *Corporations Act 2001* (Cth), s 250M(1).
25 *Re British Flax Producers Co* (1889) 60 LT 215.
26 *Corporations Act 2001* (Cth), s 250L(3).
27 *Ryan v South Sydney Junior Rugby League Club Ltd* (1974) 3 ACLR 486. The judgment of Holland J in this case is extremely valuable on many questions of voting rights and methods, proxies and scrutineers.
28 *Harben v Phillips* (1883) 23 Ch D 14 at 23.
29 *Re Indian Zoedone Co* (1884) 26 Ch D 70.
30 *Corporations Act 2001* (Cth), s 250E(1)(a).
31 *Corporations Act 2001* (Cth) s 250E(1)(b).
32 *Corporations Act 2001* (Cth) s 250E(2).

particular classes of shares (for example, preference shareholders) shall not have power to vote, or that they may only vote in respect of certain matters. A shareholder who is a bankrupt, but whose name remains on the company's register, is entitled to vote in person or by proxy at meetings, unless the company constitution provides otherwise. Such a shareholder may be required under the law of bankruptcy to exercise any voting rights as directed by the person beneficially entitled to the shares.[33]

The general rule is that a person's decision as to how to vote is unrestricted.[34] However, an injunction will be granted to enforce an agreement whereby a shareholder has agreed to vote as instructed by the other party to the agreement.[35] To be enforceable, such an agreement must be based upon valuable consideration.

A shareholder may exercise the right to vote notwithstanding that the shareholder has an interest which may conflict or tend to conflict with the interests of the company. Where the company's constitution provides that a director may not vote in respect of any matter in which the director is interested, this does not prevent the director from voting in respect of such a matter at a meeting of the company in the capacity of shareholder.[36] On a poll taken at a meeting, a person entitled to more than one vote need not, even if voting, use all of these votes or cast all the votes in the one way.[37] Where a share is held jointly and more than one member votes in respect of that share, only the vote of the member listed first in the register of members counts.[38] This was a replaceable rule inserted into the *Corporations Law* in 1998. In order to enable joint holders of shares to effectually exercise their voting power, they are entitled to have their holding split into two joint holdings with their names in different orders.[39]

It is doubtful whether a company constitution can confer voting rights upon a person who is not a shareholder in the company. However, there is authority suggesting that it may confer voting rights on a shareholder other than by reference to the number or kinds of shares held.[40] Where voting shares are sold, the right to vote remains with the vendor until the transfer is

33 *Morgan v Gray* [1953] Ch 83.
34 *Siemens Bros & Co v Burns* [1918] 2 Ch 324.
35 *Puddephatt v Leith* [1916] 1 Ch 200.
36 *East Pant Du United Lead Mining Co v Merryweather* (1864) 2 H & M 254.
37 *Corporations Act 2001* (Cth), s 250H.
38 *Corporations Act 2001* (Cth), s 250F.
39 *Burns v Siemens Brothers Dynamo Works Ltd* [1919] 1 Ch 225; *Dawson v Dawson* [1945] VLR 99.
40 *Kolotex (Hosiery) Australia Pty Ltd v Commissioner of Taxation (Cth)* (1975) 5 ALR 89 at 104, 119, 129.

registered.[41] The purchaser is entitled to direct the exercise of voting rights once the vendor has been paid. Before payment, the vendor has a prima facie right to decide how the votes are to be cast. The stock exchange's introduction of an electronic system for registering transfers was a potential source of problems in calculating voting rights.[42] To deal with the problem, provisions in the legislation stipulate when voting rights for a number of purposes are to be calculated.[43]

The *Corporations Act 2001* (Cth) contains provisions that apply if a company obtains control of an entity that holds shares in the company, or an entity it controls acquires shares in the company. Within 12 months, either the company must cease to control the entity or the entity must cease to hold shares in the company.[44] In the interim before the divestiture occurs, the legislation stipulates that any voting rights attached to the shares cannot be exercised.[45] For example, if Corporation A acquires control of Corporation B while Corporation B holds shares in Corporation A, the votes attached to these shares cannot be used until either Corporation A sells its interest in Corporation B or Corporation B sells the shares to an outsider.

OBJECTIONS AND SCRUTINEERS

[23.30] A challenge to a right to vote may be lodged at a meeting of company members. The replaceable rule in the *Corporations Act 2001* (Cth) provides that such a challenge can only be made at a meeting of the company and must be determined by the chair, whose decision is final.[46] The constitution of a company may, alternatively or in addition, make provision for the appointment of scrutineers and may give a member the right to appoint a scrutineer. Failure to allow a scrutineer to act or to give the scrutineer facilities to perform the assigned functions may give a member a right of action against the company.[47]

The duties of a scrutineer have been judicially defined. The duties "embrace ascertaining the procedure which is to be adopted for the election in order to judge if it is a fair and proper procedure; observing the conduct of the election to see that the procedure is regularly being followed; and examining matters going to the validity of the votes cast and to the correctness of the count".[48] Unless the company constitution stipulates that scrutineers must be appointed, they are not essential.[49]

A director may be able to exercise powers to inspect company documents in order to observe and scrutinise voting procedures. It has been held that if such an inspection threatens to unreasonably interfere with the orderly task of preparation for the meeting, it must wait until after the meeting.[50]

41 *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964; [1962] 2 WLR 374; [1962] 1 All ER 201; *Re Fernlake Pty Ltd* [1995] 1 Qd R 597; 13 ACSR 600; 12 ACLC 453 (SC Qd). See also *Sung Li Holdings Ltd v Medicom Finance Pty Ltd* (1995) 13 ACLC 955 (SC NSW).

42 See Ford HAJ, Austin RP and Ramsay IM, *Ford's Principles of Corporations Act 2001 (Cth)* (9th ed, Sydney: Butterworths, 1999), p 258.

43 *Corporations Act 2001* (Cth), ss 249D(4), 249F(3), 249N(4), 249P(5), 250L(4); see also s 250C(2)(e).

44 *Corporations Act 2001* (Cth), s 259D(1).

45 *Corporations Act 2001* (Cth), s 259D(3).

46 *Corporations Act 2001* (Cth), s 250G.

47 *Ryan v South Sydney Junior Rugby League Club Ltd* (1974) 3 ACLR 486.

48 *Ryan v South Sydney Junior Rugby League Club Ltd* (1974) 3 ACLR 486 at 493 per Holland J.

49 *Wandsworth and Putney Gas Co v Wright* (1870) 22 LT 404; see also discussion above at [4.15].

50 *Re Coles Myer Ltd; Lev v Coles Myer Ltd* (2002) 43 ACSR 432.

Chapter 24

Requests and company meetings

[24.05] Members of a company who are outsiders to the board of directors may wish to summon a general meeting to consider a proposal; bring a matter before a general meeting that has already been convened; or put their arguments to that meeting for action. As the right to do these things is essential to the operation of corporate democracy, the *Corporations Act 2001* (Cth) provides avenues for achieving these purposes. The assumption on which these provisions initially operate is that the management of the company will cooperate in good faith in order to achieve these aims. Therefore, the procedures are to be initiated by request to the company management.

In the legislation in force until 1998, the term "requisition" was used instead of the word "request". The two terms are almost synonymous. The term requisition, however, carries stronger overtones of formality and also of rightful demand. The commander of an army unit might requisition certain supplies from the quartermaster, with confidence that they would be forthcoming. Substituting the word "request" for the word "requisition" is probably not intended to suggest that procedures become less formal or less an entitlement of the members; more likely it is an attempt to make the language more generally accessible.

REQUESTING A MEETING

[24.10] Company members, if they have a sufficient interest in the company, have a statutory right to request the directors to summon a meeting to consider any lawful proposal that the members wish to put forward. The directors of a company must call and arrange to hold a general meeting of the company when requested to do so under s 249D of the *Corporations Act*. In the case of a company with share capital, the request must be signed by at least 100 members entitled to vote at the general meeting.[1] Alternatively, a member or members entitled to at least 5 per cent of the total voting rights

1 *Corporations Act 2001* (Cth), s 249D(1)(b).

that may be cast at the general meeting may make the request.[2] The legislation allows the regulations to prescribe a different number of members to exercise this right in a particular company or a particular class of company.[3] The reference to a "right to vote at general meetings" excludes those whose voting rights are only to be exercised at class meetings from exercising the power.

The request must be in writing. It must state any resolution to be proposed at the meeting. It must be signed by the members making the request and be deposited at the registered office of the company.[4] It may consist of several documents if the request is identical in each copy. If there are several documents, each must set out the request in identical terms, and together the documents must be signed by the stipulated number of members.[5] There is case authority for the proposition that all joint holders of a share or shares must sign.[6] It appears, from the requirement that the request state any resolution to be proposed at the meeting, that it is not possible for the meeting to decide any other matters, unless perhaps the company's constitution permits it.[7]

When making a request, members may act to further their own interests, provided that the request is made bona fide and not for an improper purpose.[8] The court will be reluctant to set aside a request unless it is clear that the requisitionists' purpose is improper.[9]

The directors must call the meeting within 21 days after the request is given to the company.[10] The meeting is to be held not later than two months after the request is given to the company, but may be held at a place and time within this period chosen by the directors.[11] Lodgment of the request by members having the necessary voting power and number of shares is the sole condition bringing into existence the duty of directors to call a meeting. The withdrawal by a member who has signed the request does not affect the company's obligations.[12]

2 *Corporations Act 2001* (Cth), s 249D(1)(a).
3 *Corporations Act 2001* (Cth), s 249D(1A).
4 *Corporations Act 2001* (Cth), s 249D(2).
5 *Corporations Act 2001* (Cth), s 249D(3).
6 *Patentwood Syndicate v Pearse* [1906] WN 164.
7 *Ball v Metal Industries Ltd* [1957] SLT 124.
8 *Humes Ltd v Unity APA Ltd [No 1]* [1987] VR 467; 11 ACLR 641. See *Australian Innovation Ltd v Petrovsky* (1996) 14 ACLC 1,257 (Fed Ct), Whitlam J.
9 *Humes Ltd v Unity APA Ltd [No 1]* [1987] VR 467; 11 ACLR 641, Beach J at 472. *Premier Gold NL v Ocean Resources NL* (1994) 14 ACSR 695; 12 ACLC 931 (SC WA).
10 *Corporations Act 2001* (Cth), s 249D(5).
11 *Corporations Act 2001* (Cth), s 249D(5).
12 *South Norseman Co v Macdonald* [1937] SASR 53.

Under the older legislation, the meeting had to be held as soon as practicable and no later than two months after the company received the request. In a case in which one meeting had already been called in answer to a request, the court upheld the refusal of the company directors to issue notice so that the business set out in a second request could be dealt with at the same meeting. It was held that the range of facts and circumstances that can bear on what is practicable is wide. The directors in convening the meeting can clearly pay due attention, the court held, to other pressing business and to ordering business in a way which is thought to be wise by those on whom the duty is laid.[13]

Where a request is received, the directors acting together should call the meeting. It is irregular for the secretary to give notice after having secured the consent of the directors separately,[14] but on ratification by the directors at a subsequent meeting a notice sent out by the secretary irregularly becomes good for all purposes.[15]

If the directors do not act to convene a meeting within 21 days after the date of deposit of the request, the members who made the request, or any of them representing more than half of the total voting rights of all of them, may themselves convene a meeting.[16] The meeting must be called in the same way, so far as is possible, in which general meetings of the meeting may be called. It must be held not later than three months after the request is given to the company.[17]

The power conferred on members making such a request by the failure of the directors to comply with it is given to them in a ministerial capacity as quasi-officials of the company; it is not a proprietary right. It is subject to the same control by the court as the power given to directors to convene meetings. Accordingly, members must exercise proper discretion when convening such meetings, and the court will restrain them from deliberately calling a meeting under circumstances which would result in many of the members not being able to exercise their votes.[18] Until the directors fail to convene a meeting, the members have no power to call a meeting. If they proceed to do so before such default, the meeting does not become valid by reason of the directors' subsequent default.[19]

13 *Vision Nominees Pty Ltd v Pangea Resources Ltd* (1988) 6 ACLC 770.
14 *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch 230; *Re State of Wyoming Syndicate* [1901] 2 Ch 431.
15 *Hooper v Kerr, Stuart & Co Ltd* (1900) 83 LT 729.
16 *Corporations Act 2001* (Cth), s 249E(1).
17 *Corporations Act 2001* (Cth), s 249E(2).
18 *Adams v Adhesives Pty Ltd* (1932) 32 SR (NSW) 398.
19 *Aberfeldie Gold Mining Co v Walters* (1876) 2 VLR (Eq) 116.

A meeting convened by the members in these circumstances must be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors. For these purposes, they may require the company to supply a copy of the register of members. This request must be satisfied, without charge.[20]

The company must pay any reasonable expenses incurred by the members by reason of the failure of the directors to convene a meeting.[21] Any sum so paid by the company may be retained by the company out of any sums due or becoming due from the company to such of the directors as are in default.[22] This provision contains a real incentive for the directors to comply with the member request. If they call the meeting, the expenses will be borne by the company; but if they fail to do so, the expenses will be charged against any fees or dividends due to the directors from the company.

MEMBER'S RESOLUTIONS

[24.15] Members with a sufficient interest in the company may give notice of a resolution that they propose to move at a general meeting. A "sufficient interest" is defined by the legislation as at least 5 per cent of the votes that may be cast on the resolution. A sufficient interest is also indicated when at least 100 members who are entitled to vote at the general meeting support the proposal.[23] The regulations may prescribe a different number of members who may exercise this right in the case of a particular company or class of company.[24] The percentage of votes that is controlled by these members is to be worked out as at the midnight before the notice is given.[25]

The notice of such a proposed resolution must be in writing. It must set out the wording of the proposed resolution and be signed by the member or members proposing to move the resolution.[26] Separate copies of the document setting out the notice may be used for signing by members as long as the wording of the notice is identical in each document.[27]

If a company has been given notice of a resolution under these provisions, the resolution is to be considered at the next general meeting that occurs more than two months after the notice is given.[28] The company must, in summoning this meeting, give all its members notice of the resolution at the same time,

20 *Corporations Act 2001* (Cth), s 249E(3).
21 *Corporations Act 2001* (Cth), s 249E(4).
22 *Corporations Act 2001* (Cth), s 249E(5).
23 *Corporations Act 2001* (Cth), s 249N(1).
24 *Corporations Act 2001* (Cth), s 249N(1A).
25 *Corporations Act 2001* (Cth), s 249N(4).
26 *Corporations Act 2001* (Cth), s 249N(2).
27 *Corporations Act 2001* (Cth), s 249N(3).
28 *Corporations Act 2001* (Cth), s 249O(1).

or as soon as practicable afterwards, and in the same way as it gives notice of a meeting.[29] The company is responsible for the cost of doing so if the notice is received in time to send it out with the notice of meeting.[30] If the notice has not been received so that it can be circulated with the notice of meeting, the members "requesting the meeting" are jointly and individually liable for the expenses reasonably incurred by the company in giving notice of the resolution. The company in general meeting may, however, resolve to meet the expenses itself.[31]

This provision as to the members' liability seems to contain a drafting error. The reference to members "requesting the meeting" would be appropriate in the context of s 249D. It is inappropriate in the context of s 249O. The provision should indicate that members proposing the resolution are jointly and severally liable for the expense of circulating the notice of resolution separate from the notice of meeting. It is questionable whether this drafting error can have any practical consequences and probable that a court would be able to overcome the problem by interpretation, since it appears that the intention is clear.

The company is under no obligation to act upon the notice of proposed resolution if the notice is more than 1000 words long or defamatory. If the notice is over length, the company may choose to circulate it anyway. If the notice is defamatory, the company would become liable for publishing the defamation by circulating the notice; management should therefore refuse to do so. Where the expense of sending the notice out is to be borne by the members, the company is excused from acting upon the notice unless the members give the company a sum reasonably sufficient to meet the expenses that will be incurred in giving the notice.[32]

REQUESTING CIRCULATION OF A POSITION STATEMENT

[24.20] Members may request a company to give all members a statement provided by the members making the request. The statement may relate to any resolution that is proposed to be moved at a general meeting or to any other matter that may be properly considered at a general meeting.[33] It is clear that the statement may relate to a resolution proposed by management as well as to a resolution proposed by the members themselves. The members may have a practical difficulty in obtaining information about a management

29 *Corporations Act 2001* (Cth), s 249O(2).
30 *Corporations Act 2001* (Cth), s 249O(3).
31 *Corporations Act 2001* (Cth), s 249O(4).
32 *Corporations Act 2001* (Cth), s 249O(5).
33 *Corporations Act 2001* (Cth), s 249P(1).

resolution early enough to allow them to draft a statement and deliver it to the company in time for circulation with the notice of motion. Once this difficulty is overcome, the statutory right applies.

The request must be made by 100 members or by members with at least 5 per cent of the votes to be cast on the resolution.[34] The number or percentage holding of the members required to sign such a statement may be altered by the regulations.[35] It must be in writing, signed by the members making the request, and given to the company. Separate copies of the document can be used for collecting the signatures as long as the wording of the request in each copy is identical.[36] The percentage of votes of the member signatories is to be worked out as at the midnight before the request is given to the company.[37]

Upon receipt of the request, the company must give all its members a copy of the statement at the same time or as soon afterwards, and in the same way, as it gives notice of the general meeting.[38] The company is responsible for the cost of doing so if the statement is received in time to send it out with the notice of meeting.[39] If the statement is received too late for circulation with the notice of meeting, the members requesting its circulation are jointly and individually liable for the expenses reasonably incurred by the company in complying with the request. The company in general meeting may, however, resolve to meet the expenses itself.[40]

As with notice of resolution, the company is under no obligation to circulate a position statement if it is more than 1000 words long or defamatory. Where the expenses of circulating the statement are to be borne by the members, the company need not comply with the request unless funds to cover the expenses are presented.[41]

34 *Corporations Act 2001* (Cth), s 249P(2).
35 *Corporations Act 2001* (Cth), s 249P(2A).
36 *Corporations Act 2001* (Cth), s 249P(4).
37 *Corporations Act 2001* (Cth), s 249O(5).
38 *Corporations Act 2001* (Cth), s 249P(6).
39 *Corporations Act 2001* (Cth), s 249P(7).
40 *Corporations Act 2001* (Cth), s 249P(8).
41 *Corporations Act 2001* (Cth), s 249P(9).

Chapter 25

Meetings of directors

[25.05] The *Corporations Act 2001* (Cth) provides that a public company must have at least three directors and a proprietary company at least two. Only a "natural person" may be appointed as a director. Thus, a company cannot be a director of another company. In the case of a public company, at least two directors must ordinarily reside within Australia; and, in the case of a proprietary company, at least one director must do so.[1]

Directors usually must act together, and this involves their coming together at a properly convened meeting presided over by a chair,[2] to which requirements as to notice, quorum and minutes will apply. Thus, for example, if a company's constitution provides that "the directors may, whenever they think fit, convene an extraordinary general meeting", this means they can only do so at a duly convened meeting of directors, not that some may do so without consulting the others.[3]

Directors have no power to delegate their powers to committees, unless the company's constitution expressly gives them this power.[4] Such power, however, is normally provided by the company constitution.[5]

FUNCTIONS OF THE BOARD OF DIRECTORS

[25.10] The *Corporations Act 2001* (Cth) requires that the directors of the company acting as a body must perform certain functions. The legislation no longer uses the term "board", which was previously used to differentiate between the decisions of the directors acting together and the directors acting individually. It is suggested that this change in terminology is less than helpful, but it is nevertheless adopted below. The directors are responsible for the annual financial statements that the company is required to produce.[6]

1 *Corporations Act 2001* (Cth), s 221.
2 *Re Charles Atkins & Co* [1929] SASR 129.
3 *Browne v La Trinidad* (1887) 37 Ch D 1 at 17; cf *Re State of Wyoming Syndicate* [1901] 2 Ch 431.
4 *Thorby v Goldberg* (1964) 112 CLR 597.
5 *Corporations Act 2001* (Cth), s 226D.
6 See *Corporations Act 2001* (Cth), s 295(4).

They are also charged with the duty of preventing insolvent trading.[7] Otherwise the company is free to determine, by inserting provisions into the company's constitution, whether the meeting of directors or the general meeting is to have the power and responsibility for various types of business. However, there is an assumption that the business of a company is to be managed by the directors, and clear words will be needed to negate that assumption.

Where the company constitution gives directors the power to manage, then so long as the directors act bona fide and in the interests of the company[8] and do not exceed their powers or use them for an improper purpose,[9] the members cannot control their acts. A resolution instructing the directors to act in a certain way in a matter within the directors' discretion is of no effect and invalid.[10] The remedy of the members, if they do not approve the actions of the directors, is to change the directors or alter the company's constitution. Where the company's constitution gives the members control over the directors in the management of the company, the directors must act on the resolutions of the members. Company constitutions of this sort are rare. The replaceable rule in the *Corporations Act* states that the business of a company is to be managed by or under the direction of the directors.[11] It further provides that the directors may exercise all the powers of the company except any powers that the *Corporations Act 2001* (Cth) or the company's constitution (if any) requires the company to exercise in general meeting.[12] This replaceable rule is very similar to a provision that was contained in the Table A regulations.[13] It appears that the case law interpreting that provision and its precursors applies. Under these authorities, it seems settled that the members do not have control over the directors in the management of the company.[14]

Where for any reason the directors cannot exercise a power given to them, the company in general meeting can exercise the power.[15]

7 *Corporations Act 2001* (Cth), s 588G.

8 *Mills v Mills* (1938) 60 CLR 158.

9 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.

10 *Quin and Axtens Ltd v Salmon* [1909] 1 Ch 311; *Shaw Ltd v Shaw* [1935] 2 KB 113; *Leigo v Berner* [1976] 1 NSWLR 502.

11 *Corporations Act 2001* (Cth), s 198A(1).

12 *Corporations Act 2001* (Cth), s 198A(2).

13 *Corporations Law*, Sch 1, Table A, reg 73, repealed by Act No 61 of 1998.

14 *Quin and Axtens Ltd v Salmon* [1909] 1 Ch 311; *Shaw Ltd v Shaw* [1935] 2 KB 113; *Leigo v Berner* [1976] 1 NSWLR 502.

15 *Barron v Potter* [1914] 1 Ch 895; *Alexander Ward v Samyang Navigation Co Ltd* [1975] 1 WLR 673; [1975] 2 All ER 424.

CONVENING DIRECTORS' MEETINGS

[25.15] The directors may meet together for the dispatch of business, and adjourn and otherwise regulate their meetings, as they think fit. A director may call a meeting of directors by giving reasonable notice individually to every other director.[16] A director who has appointed an alternate director may ask for such notice to be sent to the alternate director.

The presence of directors at a meeting of the company does not constitute a meeting of directors, because they are present for a different object and in a different capacity, and their approval of a matter at that meeting does not amount to a "recommendation of the board of directors".[17] Thus, where a transfer of shares was subject to the refusal of the directors, it has been held that until the transfer was accepted by a meeting of directors, there was no authority for entry of the transfer on the share register.[18]

A directors' meeting may be called or held using any technology consented to by all the directors. Such consent may be standing, to apply in all cases until revoked. A director may withdraw such consent but must do so a reasonable period before the meeting.[19]

NOTICE OF MEETING

[25.20] Where special business is to be transacted at a directors' meeting, it is advisable to give notice of such business. As a matter of law, however, notice of the business, as distinct from notice of the meeting, is unnecessary in the case of a directors' meeting. Directors assembled can deal with all the concerns of the company that come up for consideration or need attention and, unless the company's constitution provides otherwise, it is not necessary for notice of special business to be given.[20] The directors can deal with the business of the meeting in any order they think fit.[21]

Subject to the provisions of the company's constitution, notice of directors' meetings must be a reasonable notice and may be oral.[22] Merely giving slightly longer notice than that to which members of a company are entitled does not invalidate resolutions passed at a meeting.[23] In the absence of proper notice, a meeting is not valid unless every director is present,[24] but it seems that if all

16 *Corporations Act 2001* (Cth), s 248C.

17 *Re East Norfolk Tramways Co, Barber's Case* (1877) 5 Ch D 963.

18 *Chida Mines v Anderson* (1905) 22 TLR 27; *Re Copal Varnish Co Ltd* [1917] 2 Ch 349.

19 *Corporations Act 2001* (Cth), s 248D.

20 *La Compagnie de Mayville v Whitley* [1896] 1 Ch 788.

21 *Re Cawley & Co* (1889) 42 Ch D 209.

22 Cf *Browne v La Trinidad* (1887) 37 Ch D 1.

23 *Re Vale of Clwydd CM Co* (1912) 29 WN (NSW) 189.

24 *Harben v Phillips* (1883) 23 Ch D 14.

the directors agree to something, a formal meeting is unnecessary.[25] All directors who can be reached should be sent notice of meetings but, unless the company's constitution specifically states otherwise, a director who is abroad need not be given notice.[26]

QUORUM REQUIREMENTS

[25.25] The company's constitution generally stipulates the number of directors that constitute a quorum. The replaceable rule in the *Corporations Act* specifies that "unless the directors determine otherwise", the quorum for a directors' meeting is two. The replaceable rule further specifies that the quorum must be present at all times during the meeting.[27]

The mere physical presence or individual assent of directors is not sufficient to constitute a meeting. An accidental encounter of two directors at the company office will not constitute a directors' meeting at the wish of one of them but against the will of the other. This applies even where two directors form a quorum and one has sent a notice calling a meeting to the other, which the latter did not receive.[28]

A constitutional provision that the company shall have not less than a certain number of directors will prevent business from being validly transacted at a meeting if the number of directors falls short of the required number owing to vacancies in the offices of director. This is so even if the constitution stipulates that a lesser number of directors constitute a quorum and that number is present at the meeting.[29] This proposition is founded on case authority and may be affected by the application of a replaceable rule in the *Corporations Act 2001* (Cth).[30] Under this provision, in the event of a vacancy or vacancies in the office of director, the remaining directors may act. If the number of remaining directors is not sufficient to constitute a quorum, they may act only for the purpose of increasing the number of directors to a number sufficient to constitute a quorum.[31] The appointment of a director under this power will need to be confirmed by a general meeting. A proprietary company is required[32] to hold such a meeting within two months of the casual appointment or the appointment will lapse. A public company

25 *Ex parte Kennedy* (1890) 44 Ch D 472.

26 *Halifax Sugar Refining Co v Francklyn* (1890) 59 LJ Ch 591.

27 *Corporations Act 2001* (Cth), s 248F.

28 *Barron v Potter* [1914] 1 Ch 895; *Bullfinch Etc Co v Butler* (1913) 35 ALT 99; *Re Charles Atkins & Co* [1929] SASR 129.

29 *Re Sly, Spink & Co* [1911] 2 Ch 430.

30 *Corporations Act 2001* (Cth), s 201H(1).

31 *Corporations Act 2001* (Cth), s 201H.

32 *Corporations Act 2001* (Cth), s 201H(2).

must confirm the appointment of a director under this power at the company's next annual general meeting.[33]

Where the constitution provides that directors shall not vote upon any matter in which they have an interest,[34] such directors cannot form part of a quorum for the purpose of dealing with the matter.[35] They are also prevented from voting upon a resolution to alter the quorum temporarily for the purposes of passing a resolution relating to a matter in which they are interested.[36] Where there is no such prohibition in the constitution, the effect of counting a director who is affected by a conflict of interests as part of the quorum may be to render the transaction to which the resolution relates voidable. The transaction is not void.[37]

Rules that prevent directors from voting as director on a question in which they are interested do not apply when they are voting as members. The constitution may give a member who is also director special voting rights in respect of a motion to remove that director from office.[38] A director may, with the approval of the other directors, appoint a person (whether a member of the company or not) to be an alternate director. An alternate director has the power to act instead of the director during such period as is necessary. An alternate director is entitled to notice of meetings of the directors. Under the replaceable rule in the legislation, this is only if the appointing director requests that such notice be given.[39] If the appointer is not present, the alternate is entitled to attend and vote. An alternate director may exercise any powers that the appointer may exercise and the exercise of any such power by the alternate director shall be deemed to be the exercise of the power by the appointer. The company is to receive written notice[40] of the appointment, and the termination of appointment, of an alternate director.[41]

The presence of a quorum does not prevent additional directors from attending. Those already present are not entitled to exclude the other directors.[42] Where no quorum is stipulated, a majority of the directors is entitled to act.[43] A resolution that is a mere formal carrying out of a decision

33 *Corporations Act 2001* (Cth), s 201H(3).

34 See *Corporations Act 2001* (Cth), ss 231, 243H.

35 *Yuill v Greymouth Point Elizabeth Railway Co* [1904] 1 Ch 32.

36 *Re North Eastern Insurance Co Ltd* [1919] 1 Ch 198.

37 See *Furs Ltd v Tomkies* (1936) 54 CLR 583; *People's Prudential Assurance Co Ltd v Australian Federal Life and General Assurance Co Ltd* (1935) 35 SR (NSW) 253; *A M Spicer & Son Pty Ltd (in liq) v Spicer* (1931) 47 CLR 151.

38 *Bushell v Faith* [1970] AC 1099.

39 *Corporations Act 2001* (Cth), s 201K.

40 *Corporations Act 2001* (Cth), s 201K(5).

41 *Corporations Act 2001* (Cth), s 201K(4).

42 *Harben v Phillips* (1883) 23 Ch D 14 at 26.

43 *York Tramways Co v Willows* (1882) 8 QBD 685.

finally resolved upon at an earlier meeting at which there was no quorum does not validate that earlier decision. The absence of a quorum at a previous meeting does not, however, invalidate a resolution, which is a substantive and independent exercise of the power of directors to bind a company, when it is duly passed at a later meeting at which there is a quorum.[44]

CHAIR

[25.30] The company's constitution may provide that an individual is to be elected by the general meeting to the chair. Where such a provision applies, this person will normally chair meetings of directors as well as general meetings. In the absence of such a provision, the replaceable rule in the *Corporations Act 2001* (Cth) gives directors the power to select a director as chair and to determine the period for which that person is to hold office.[45] Where a meeting is held and a chair has not been elected or the elected chair is not available or declines to act, the directors present must elect a director who is present to the chair.[46] A person appointed by directors as chair of their meeting has not, in the absence of special contract, any right to retain that position so long as the individual remains a director. A new chair may be appointed from time to time.[47]

VOTING

[25.35] Questions arising at a meeting of directors are to be decided by a majority of votes cast by directors present and entitled to vote.[48] In the case of an equality of votes, the chair may exercise a casting vote as well as voting in the capacity of director.[49] If the chair has not been appointed in accordance with the constitution, so that the appointment is invalid, the invalidity is not cured by acquiescence or lapse of time, and resolutions carried on the casting vote will be void and of no effect.[50]

VALIDITY OF ACTS

[25.40] Persons outside a company have, in relation to acts within the power of a company, a right to assume that the internal affairs of a company are in order.[51] Section 226 of the *Corporations Act 2001* (Cth) provides that the acts

44 *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112. See *Clamp v Fairway Pty Ltd* (1974) ACLC 27,599 at 27,613.

45 *Corporations Act 2001* (Cth), s 248E(1).

46 *Corporations Act 2001* (Cth), s 248E(2).

47 *Foster v Foster* [1916] 1 Ch 532.

48 *Corporations Act 2001* (Cth), s 248G.

49 *Corporations Act 2001* (Cth), s 248G(2).

50 *Clark v Workman* [1920] 1 IR 107, but see *Corporations Act 2001* (Cth), s 226.

51 *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886.

of a director are valid notwithstanding any defect that may afterwards be discovered in the director's appointment or qualification. In this respect there is a difference between a defective appointment and no appointment at all; the *Corporations Act* applies only to the former.[52]

Finally, it should be noted that a company in general meeting could ratify what the directors have done informally or in excess of their powers. Provided that the matter is within the power of the company, that the meeting has sufficient knowledge of all the relevant circumstances, and that proper notice of meeting has been given, such ratification will be effective.[53]

52 *Morris v Kanssen* [1946] AC 459; *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1; *Omega Estates Pty Ltd v Ganke* (1964) 80 WN (NSW) 1218.

53 *Grant v United Kingdom Switchback Railways Co* (1888) 40 Ch D 135; *Colhoun v Green* [1919] VLR 196; *Hogg v Cramphorn Ltd* [1967] Ch 254; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 but contra *Massey v Wales (2003) 57 NSWLR 218;* (2003) 177 FLR 1.

Chapter 26

Minutes of company meetings

[26.05] Every company must keep minute books. This is necessary both to comply with the legislative requirements and for internal purposes. The *Corporations Act 2001* (Cth) dictates that the company is to keep minute books which are updated within one month after each relevant event. Details to be recorded in the minute books include proceedings and resolutions of meetings of the company's members and directors, and of resolutions that are passed without a meeting. Where the company is a proprietary company with only one director, the minute books shall also contain a record of the making of declarations by the director.[1]

The company must ensure that those minutes are signed within a reasonable time, either by the chair of the relevant meeting, or the chair of the next meeting.[2] Where the minutes record a resolution passed without a meeting,[3] a director must sign the minute within a reasonable time.[4] A director making a declaration must also sign the minute book within a reasonable time.[5] Minutes appearing on typed or written sheets of paper pasted into a bound book and duly signed comply with the statutory provision whether they were pasted into the book before or after signature.[6] A loose-leaf volume — that is, a collection of loose leaves held together between two covers[7] — may be a minute book so as to bring into operation the statutory provisions; but, where minutes are not kept in a bound book, reasonable precautions should be taken to prevent falsification. A rough notebook from which entries are made into a formal minute book may come within the statutory provision.[8]

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1 *Corporations Act 2001* (Cth), s 251A(1).
2 *Corporations Act 2001* (Cth), s 251A(2).
3 See [22.35] above.
4 *Corporations Act 2001* (Cth), s 251A(3).
5 *Corporations Act 2001* (Cth), s 251A(4).
6 *Donohoe v Joynton Smith* (1948) 22 ALJ 62.
7 *Kirwan v Long* [1936] VLR 283; *Wilson v Parry* (1937) 13 NSW LGR 196.
8 *Legal & General Life Assurance Co v Gill* (1878) 4 VLR (L) 204.

It has been held that failure to enter minutes within a reasonable time will invalidate a resolution where the company's constitution requires that entries shall be made in the minutes even though the constitution does not specify a period.[9] Presumably, in view of the statutory provision, it is now sufficient, as well as necessary, to enter the minutes in the minute book within one month.

Every minute that is entered and signed in compliance with the statutory provision is evidence of the proceedings to which it relates, unless the record is proven false.[10] In *R v Staples* (1893) 19 VLR 47, it was held that minutes of a meeting of directors containing the statement that two directors were present could be given as evidence in criminal proceedings.

Where minutes have been entered and signed as required by the legislation then, unless the contrary is proved, certain assumptions may be made. The first of these is an assumption that the meeting was duly held and convened. The second is that all proceedings, recorded in the minutes as having taken place at the meeting, actually did take place there. The third is that all appointments, whether of officers or auditors, recorded in the minutes as having been made at the meeting are valid.[11]

Any person who wishes to impeach the minutes must establish that they are incorrect. Until their incorrectness is proven they are accepted as evidence of what took place at the meeting.[12] The fact that minutes are to be received as evidence does not mean that other evidence cannot be given to show that the minutes do not contain a full and accurate record of what took place.[13] The company constitution may, however, provide that minutes signed by the chair are conclusive evidence, without any further proof of the facts stated therein. Conclusive evidence is not to be displaced and is conclusive as between the parties bound by the minutes so as to be a bar to any evidence being tendered to show that they are incorrect.[14] Where a resolution contains an ambiguity which is disclosed upon ascertaining the surrounding circumstances, oral evidence may be admitted to show what the resolution means.[15]

In the absence of minutes, any other evidence that is available can be used to prove the proceedings at meetings.[16] The fact that matters do not appear in the minutes of a meeting is prima facie evidence that they have not been dealt with at the meeting; but the prima facie presumption may be rebutted.[17]

9 *Toms v Cinema Trust Co* [1915] WN 29.
10 *Corporations Act 2001* (Cth), s 251A(6).
11 See *Evidence Act 1995* (Cth and NSW), ss 144–160.
12 *Re Indian Zoedone Co* (1884) 26 Ch D 70 at 77.
13 *Bayswater Road's Board v Stone* (1910) 12 WALR 133.
14 *Kerr v Mottram Ltd* [1940] 1 Ch 657; *Fraser v Fraser and Jenkinson Ltd* (1945) 19 ALJ 17.
15 *Westralia Etc, Co v Lang* (1897) 23 VLR 36.
16 *McLean Bros and Rigg Ltd v Grice* (1906) 4 CLR 835.
17 *Re Fireproof Doors* [1916] 2 Ch 142, where proof was given of a resolution which was not set out in the minutes.

The notice calling the meeting should be set out or referred to in the minutes, and must be taken as part of them. In order to determine whether proceedings at meetings are regular, regard may be had to the notice of meeting; the chair's declaration in the minutes is not conclusive as to the sufficiency of the notice.[18]

A declaration by a director at a meeting of directors disclosing an interest in any contract, property or office, disclosure of which is required to be made pursuant to the *Corporations Act 2001* (Cth), shall be recorded by the secretary in the minutes of the meeting at which it was made.[19]

The minute books must be kept at the registered office of the company or at its principal place of business in Australia or at another place approved by ASIC.[20] The company must ensure that the minute books for the meetings of its members and for resolutions of members passed without meetings are open for inspection by members free of charge.[21]

A member of a company may make a written request to the company for a copy of any minutes of a general meeting or any minutes of a resolution passed without a meeting.[22] Where such a request is made, the company may require payment of an amount not exceeding the prescribed amount.[23] The company must send the copy to the person within 14 days after payment of such a sum, or where no payment is required, within 14 days after receipt of the request.

A difficulty potentially arises from the contrast between the rights vested in members under s 251B(1) and the right vested in "a member" by s 251B(2). The legislation stipulates that the minute books must be open for inspection by "members". It is unlikely that a company would want to deny an individual member access to the minute books where access could be obtained if two members sought it. If this should become an issue, however, the standard rules of interpretation would suggest that they could do so. These standard rules assume that differences in wording, such as between s 251B(1) and s 251B(2), are intended to be significant.

It is usual for the minutes of one meeting to be read and adopted by the next meeting of the same kind, but the legislation does not require this procedure to be followed.

18 *Betts & Co Ltd v MacNaghten* [1910] 1 Ch 430.
19 *Corporations Act 2001* (Cth), s 231(8).
20 *Corporations Act 2001* (Cth), s 251A(5).
21 *Corporations Act 2001* (Cth), s 251B(1).
22 *Corporations Act 2001* (Cth), s 251B(2).
23 *Corporations Act 2001* (Cth), s 251B(4).

At common law, a member of a company had no other general rights to access the company's books.[24] The member would be given access to a particular document if, and only if, it was relevant to an action to vindicate an individual right against the corporation as a whole. Provisions in company constitutions often reinforce this position. However, in 1985 provisions were introduced to allow a member of a company to get an order from a court authorising an auditor or legal practitioner to inspect the books of the company on behalf of the member.[25] In 1998 the provision was changed so that it now also allows the court to make an order that the applicant may personally inspect the books.[26] The court must be satisfied that the member is acting in good faith and for a proper purpose and may restrict the use to be made of information so acquired.[27]

24 See *Edman v Ross* (1922) 22 SR (NSW) 351; *Stanham v National Trust of Australia* (1989) 7 ACLC 628.

25 *Corporations Act 2001* (Cth), s 247A(1)(b). For interpretation of this provision see *Knightswood Nominees Pty Ltd v Sherwin* (1989) 15 ACLR 151; *Humes Ltd v Unity APA Ltd* (1987) 11 ACLR 641; *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 387; affirmed [1988] 1 Qd R 606 [12 ACLR 630]; *Biala Pty Ltd v Mallina Holdings Ltd* (1989) 15 ACLR 208; *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115.

26 *Corporations Act 2001* (Cth), s 247A(1)(a).

27 *Corporations Act 2001* (Cth), s 247B.

Chapter 27

Informality and irregularity

[27.05] Ordinarily, when some matter is within the powers of the members under the corporate constitution or the *Corporations Act 2001* (Cth), the members must proceed by means of a resolution at a properly convened meeting of the company. A procedural irregularity will render the resolution null and void unless it can be saved by an application either of the equitable doctrine of unanimous informal consent or the provision in the legislation that deals with procedural irregularities.

UNANIMOUS INFORMAL CONSENT

[27.10] In certain circumstances the law will accept the unanimous consent of the members, expressed in some manner other than a resolution at a members' meeting. The provisions in the *Corporations Act 2001* (Cth) that allow resolutions to be passed without a meeting[1] may reduce the occasions on which reliance will need to be placed on this general law doctrine. Those provisions, however, stipulate that they do not affect any rule of law relating to the assent of members not given at a general meeting.[2] This stipulation specifically preserves the application of the general law doctrine and will be outlined here.

These three situations in which such a doctrine has been applied will be considered:

1. where there is an irregularity in the convening or conduct of a meeting
2. where the company's constitution requires a resolution and consent is given in some other way; and
3. where the *Corporations Act 2001* (Cth) requires a resolution and consent is given in some other way.

1 See [22.35] above.

2 *Corporations Act 2001* (Cth), s 249A(7).

In each case, when the doctrine of unanimous informal consent is invoked, it is clear that the consent must be informed and real.[3] Members must have sufficient information to enable them to make an informed decision when they assent.[4] Assent will not be imputed merely because the members could have achieved an agreed result by other means.[5]

Irregularity in the calling or conduct of a meeting

[27.15] It is clear at general law that an irregularity in the manner of convening or conducting a meeting may be waived. If all the members of the company entitled to vote are present at the meeting and act unanimously, the proceedings may be regularised. This principle applies no matter whether the formal requirement that is waived is a requirement of the company's constitution or of the legislation.[6]

Failure to give notice to a member as required by the company's constitution may be fatal even when the member is a mere nominee of the other members and could be compelled to vote according to their instructions.[7] This applies even where a non-voting member with a right to attend meetings is not given notice.[8] In neither of these cases is the assent of all the other members sufficient to regularise the meeting. As noted, s 249H(2) of the *Corporations Act 2001* (Cth) provides that an irregularity consisting of short notice of an ordinary resolution may be waived by the members of the company. In the case of an annual general meeting, the consent of all the members must be obtained. In the case of any other meeting, 95 per cent of the company's voting power is sufficient.

Where a resolution is required by the constitution

[27.20] As far as consent given outside a meeting is concerned, it was said in *Re George Newman & Co Ltd* [1895] 1 Ch 674 that individual assents given separately are not equivalent to the assent of a meeting. The case concerned a gift by the company to one of its directors. If the consent of all the members is given at a meeting other than a members' meeting, the consent is just as effective as consent at a members' meeting. In *Re Express Engineering Works Ltd* [1920] 1 Ch 466, the company had five directors who were also the only

3 *Re Freehouse Pty Ltd; Jordan v Avram* (1997) 26 ACSR 663 sub nom *Jordan v Avram* (1997) 16 ACLC 867 (SC Vic) Gillard J; *Simon v HPM Industries Pty Ltd* (1989) 15 ACLR 427 (SC NSW), on appeal *Herrman v Simon* (1990) 4 ACSR 81; 8 ACLC 1,094 (CA NSW); *Re D'Jan of London Ltd* [1993] BCLC 646 (Ch).

4 *Herrman v Simon* (1990) 4 ACSR 81; 8 ACLC 1,094 (CA NSW).

5 *Re ABC Plastik Pty Ltd* (1976) 1 ACLR 446 (SC NSW).

6 *Re Oxted Motor Co Ltd* [1921] 3 KB 32; *Dey Ltd v Dey* [1966] VR 464.

7 *Re Action Waste Collections Pty Ltd* (1976) 2 ACLR 253.

8 *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477.

five members of the company. At a meeting of the board of directors, the five directors unanimously agreed that the company should buy certain property of the directors. Such a transaction under the company's constitution required the approval of the members. The Court of Appeal said that all the members had given their assent at a meeting and it was immaterial that the meeting was a board meeting and not a members' meeting. The case of *Re George Newman & Co Ltd* was distinguished on two grounds. First, the transaction there was ultra vires and could not have been validated by the members at a meeting, and second, in that case no meeting of any kind had been held.

The case of *Parker and Cooper Ltd v Reading* [1926] Ch 975 goes further than *Re Express Engineering Ltd* and cannot be reconciled with *Re George Newman & Co Ltd*. It decided that if the assent of all the members is given to a course of action, it does not matter that the consent is given at different times and not at a meeting at all. In this case all four members of a company, at different times, approved the giving of security by the company for a loan. Astbury J said that the assents were equivalent to the consent of a general meeting. In *EBM Co Ltd v Dominion Bank* [1937] 3 All ER 555, the Privy Council expressly declined to give an opinion as to whether *Parker and Cooper Ltd v Reading* was correctly decided. In *Dey Ltd v Dey* [1966] VR 464, MacInerney J said that he did not have to decide the question.

In *Perseus Mining NL v Landbrokers Pty Ltd* [1972] WAR 12; (1973) 47 ALJ 98, Wickham J clearly considered that *Parker and Cooper Ltd v Reading* stated the law correctly. In *Perseus*, by an apparent oversight, the articles made no provision for the appointment of the first directors of the company. Wickham J held that the unanimous consent of all the members to the appointment of certain persons as directors was effective for that purpose even though there had apparently been no meeting.

There must, however, be actual consent. The fact that the members could have given their consent and probably would have given it if the question had been put to them is not enough if, in fact, they did not consent.[9] Only the unanimous consent of all the members with power to vote can take the place of a resolution at a properly convened meeting. If the company's constitution required a simple majority for a resolution at a meeting, the assent of a simple majority outside a meeting would not be sufficient.[10]

Where non-voting members are not entitled to attend a meeting, the unanimous consent of all the voting members outside a meeting is equivalent to the approval of a meeting. In certain circumstances, however, the company may still have to give information about a proposal to non-voting members. The reason is that although they cannot attend and vote at a meeting, the

9 *Re ABC Plastik Pty Ltd* (1976) 1 ACLR 446.

10 *EBM Co Ltd v Dominion Bank* [1937] 3 All ER 555.

non-voting members may still be able to influence the decision by making representations to the voting members.[11]

Where a resolution is required by the corporations legislation

[27.25] It seems to be settled that all the members may unanimously waive a procedural irregularity in the convening or conduct of a meeting required by the legislation. In *Re Oxted Motor Co Ltd* [1921] 3 KB 32,[12] the Act required a special resolution for winding up. A special resolution required 21 days' notice to be given. The court held that all the members could approve a special resolution of which less than 21 days' notice had been given. It has not been settled by decision in Australia whether the informal consent of the members outside a meeting can take the place of a resolution required by the Act.

In *Re Meyer Douglas Ltd* [1965] VR 638, Gowans J observed (at 649), that if all the members approved a course of action, a formal special resolution required by the Act was dispensed with. This decision relied on that in *Ho Tung v Man On Insurance Co Ltd* [1902] AC 232. In the latter case, the Hong Kong *Companies Act* required the first articles of the company to be signed by the subscribers to the memorandum. The first articles were not so signed but were registered. They were acted upon by the members for 19 years and were twice altered by special resolutions. Lord Davey said that the Privy Council could draw the inference that all the members had accepted and adopted the articles.

Barwick CJ expressed doubt, in *Dalley & Co Pty Ltd v Sims* (1968) 120 CLR 603 at 614, as to whether, when a special resolution was required by statute, an informal assent would be counted as equivalent. The comment was, however, obiter and the judge did not discuss the principle. The judges seemed to assume, in both *Re Action Waste Collections Pty Ltd* (1976) 2 ACLR 253 and *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477, that the statutory requirement for a special resolution could be waived; but the point did not arise for decision. In England, it has been decided that all the members can change the company's constitution by an agreement outside a meeting even though the *Companies Act* provides for the alteration of articles by special resolution.[13]

THE LEGISLATIVE PROVISION

[27.30] Section 1322 of the *Corporations Act 2001* (Cth) contains a complex provision to deal with irregularities in proceedings under the corporations legislation. A provision of this sort has been contained in Australian companies

11 *Re Duomatic Ltd* [1969] 2 Ch 365.
12 See also *Re Sanders Ltd* (1932) 49 WN (NSW) 220.
13 *Cane v Jones* [1981] 1 All ER 533.

legislation for many years,[14] but it has been amended repeatedly since 1981 and has been the subject of much judicial interpretation over that period. As it now stands, the section applies to irregularities in proceedings. The term "proceeding" is defined very widely to include any proceeding, whether a legal proceeding or not, and it appears clear that the section is intended to cover irregularities in meetings procedures. This impression is reinforced by a specific provision that a procedural irregularity includes the absence of a quorum at a meeting of a corporation, or of the directors or creditors of a corporation, and a defect, irregularity or deficiency of notice or time.[15]

The section assumes that irregularities will not invalidate proceedings[16] or meetings.[17] This assumption with regard to proceedings may be set aside by court order if the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any other order of the court. Where the irregularity in regard to a meeting consists of the accidental omission to give notice or the non-receipt by any person of a notice of meeting, the meeting or any proceeding at the meeting will not be invalidated unless the court declares the proceedings to be void. The court may make such a declaration on application of the person who failed to receive notice or another person entitled to attend the meeting, or of ASIC.[18] The section now provides for the situation where a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at two or more venues. The meeting will only be invalid if the court believes that a substantial injustice has been caused or may be caused that cannot be remedied by any order of the court and accordingly declares the meeting invalid.[19]

A similar provision applies if voting rights are exercised in contravention of s 259D(3) of the *Corporations Act 2001* (Cth).[20] The court is given specific power to make four main types of orders, and such consequential or ancillary orders as the court thinks fit, by s 1322(4). It is made clear, however, that these specific powers are not intended to limit the generality of any other provision of the *Corporations Act 2001* (Cth). The orders may be made unconditionally or subject to such conditions as the court imposes.

Under the first subparagraph, the court is given the power to make an order declaring that anything that a person has purported to do, or any proceeding that has been instituted or taken under the law or in relation to a

14 See *Uniform Companies Acts*, s 366; *Companies Code*, s 539.
15 *Corporations Act 2001* (Cth), s 1322(1).
16 *Corporations Act 2001* (Cth), s 1322(2).
17 *Corporations Act 2001* (Cth), s 1322(3).
18 *Corporations Act 2001* (Cth), s 1322(3).
19 *Corporations Act 2001* (Cth), s 1322(3A).
20 *Corporations Act 2001* (Cth), s 1322(3B).

corporation, is not invalid. Such an order can be used to surmount an invalidity, which might arise from contravention of a provision of the *Corporations Act 2001* (Cth) or of the company constitution.[21] Three additional conditions are imposed on such an order. The thing or proceeding must be essentially of a procedural nature. The person or persons concerned in, or party to, the contravention must have acted honestly. It must be in the public interest that such an order should be made.[22] It is unclear on the face of the subsection imposing the additional conditions whether all three must be satisfied. The relevant subparagraph uses the word "or" not the word "and", but the courts have on occasion interpreted such provisions as imposing cumulative rather than alternative conditions despite such wording. This may be a case in which this interpretation would be appropriate.

The court is given power to make an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure to cause a thing to be done or a proceeding to be taken.[23] Such an order is not to be made unless the court is satisfied that the person subject to the civil liability has acted honestly.[24]

Finally, the court is given the power to make an order extending or abridging the period for doing any act, matter or thing or instituting or taking any proceeding in relation to a corporation or under the *Corporations Act 2001* (Cth). No order is to be made under this or any other power in this section, unless the court is satisfied that no substantial injustice has been or is likely to be caused to any person.[25] For the purposes of this provision, it does not matter if the contravention or failure that the order is designed to cure resulted in the commission of an offence. This fact does not prevent the court from making an order declaring that the action is not invalid or relieving a person from civil liability.[26]

21 *Corporations Act 2001* (Cth), s 1322(4)(a).
22 *Corporations Act 2001* (Cth), s 1322(6)(a).
23 *Corporations Act 2001* (Cth) s 1322(4)(c).
24 *Corporations Act 2001* (Cth), s 1322(6)(b).
25 *Corporations Act 2001* (Cth), s 1322(6)(c).
26 *Corporations Act 2001* (Cth), s 1322(5).

Part III

Meetings of proprietors

Chapter 28

Bodies of proprietors

[28.05] Legislation in all Australian States and Territories provide a method whereby a number of persons at arm's length can own property in common. The titles given to these schemes vary between States, but a common feature is that provision is made for certain decisions to be made in a meeting of proprietors. This part of the book considers the content of the provisions governing these meetings. There is no nationwide regulation of such schemes, so there is wide variety in the provisions governing such meetings. We will cover each topic generally and then note the provisions that apply in each State and Territory. Decisions may be made for the proprietors either by a general meeting or by a meeting of an executive council or a managing agent. To the extent that such decisions are made either by a general meeting or by a meeting of the council, the procedures will be considered in this book. The general principle is that such decisions will be reached by application of the democratic principle of majority rule, through a meeting of the body corporate. The procedures to be followed at such meetings, as at all other types of meeting considered in this book, are dictated first by the relevant legislation, then by the rules of the particular body, and finally by the common law of meetings.

LEGISLATION ESTABLISHING COMMON PROPERTY SCHEMES

[28.10] These matters are now governed in the Australian Capital Territory by the *Unit Titles Act 2001*, which replaced the older Unit Titles Act of 1971. This legislation contains a reasonably comprehensive set of provisions for the management of such schemes. The Northern Territory's legislation was adopted in 1976 and was modelled closely on the legislation then in force in the ACT. The Northern Territories legislation has been repeatedly amended and there were some significant differences between the two statutes even before the new ACT legislation was adopted.

In New South Wales, the legislation governing common property schemes has changed repeatedly.[1] Provisions for the management of such schemes and the resolution of disputes arising in connection with the management of strata schemes are now to be found in the *Strata Schemes Management Act 1996* (NSW). The provisions in this Act apply to strata schemes established with both freehold and leasehold tenure.

In Queensland, the relevant legislation is the *Body Corporate and Community Management Act 1997* (Qld). Major amendments were made to this legislation in 2003. The primary object of the legislation is to provide for flexible and contemporary communally-based arrangements for the use of freehold land.[2] It was considered that the responsibility for self-management was an inherent aspect of community title schemes, against which individual rights had to be balanced. The legislation was intended to provide bodies corporate with the flexibility they needed in their operations while providing an appropriate level of consumer protection for owners and intending buyers of lots included in such schemes; and to provide an efficient and effective dispute resolution process.[3]

The Tasmanian legislation is very recent, having been adopted in 1998,[4] while both the South Australian and Western Australian legislation predates it by at least a decade.[5] These three jurisdictions have all adopted the label "Strata Title" for their legislation. This is also the term New South Wales employs, but in Victoria the term is not used. The Victorian legislation adopted in 1988 preferred the term "subdivision".[6]

In Victoria and Queensland, regulations, rather than legislation, govern many of the matters we are concerned with here. Regulations are delegated legislation adopted under the authority of an Act; in Queensland the *Body Corporate and Community Management Act 1997*, in Victoria the *Subdivision Act 1988* (Vic). Regulations differ from legislation in two ways: they are less readily accessible and they are more readily changeable. Therefore, readers are advised to check whether the regulations discussed here are still in force.

FUNCTIONS

[28.15] The different jurisdictions stipulate different methods of naming the body corporate. There is also a wide range of provisions governing the functions of the organisation. The body corporate generally holds the common

1 *Strata Schemes (Freehold Development) Act 1973* (NSW); *Strata Schemes (Leasehold Development) Act 1986* (NSW); *Strata Schemes Management Act 1996* (NSW).
2 *Body Corporate and Community Management Act 1997* (Qld), s 3.
3 *Body Corporate and Community Management Act 1997* (Qld), s 4.
4 *Strata Titles Act 1998* (Tas).
5 *Strata Titles Act 1988* (SA); *Strata Titles Act 1985* (WA).
6 *Subdivision Act 1988* (Vic).

property as agent for the proprietors. It is vested with legal personality so that it has the authority to represent the proprietors in legal proceedings. Its principal responsibilities normally include organising the finances, keeping the records, insuring the common property and keeping it in repair.

Australian Capital Territory, Northern Territory

[28.20] The Unit Titles Acts of the Territories spell out that the registration of a units plan establishes a body corporate. In the ACT the body corporate is called "The Owners — Units Plan No _____" or "The Proprietors — Building Development Plan No_____"; the blank is filled by the number allotted to the units plan by the Registrar.[7] A body corporate in the Northern Territory is free to call itself by another name as long as the name includes the words "Building Management Corporation".[8]

The legislation specifies four responsibilities with which the body corporate is charged. These include ensuring that the articles are enforced and taking responsibility for the control, management and administration of the common property. The body corporate must keep the common property, and all chattels in its possession, in a state of good repair and properly maintain them. It must further keep in good repair and if necessary renew all equipment used in the provision of services to the units. This includes pipes, wires and cables, and ducts. Finally, it must comply with any requirement imposed by the law of the Territory.[9] The body corporate has a statutory duty to insure the buildings and property of the body corporate against the risks specified.[10] It must also keep the records specified.[11] It is specifically prohibited from engaging in business, except in the exercise of its functions.[12]

New South Wales

[28.25] Upon registration of a strata plan in New South Wales, an owners corporation is established for the strata scheme. The legislation does not use an apostrophe after the word owners. The name of the body corporate is "The Owners Strata Plan No X" (X being the registered number of the strata plan to which that strata scheme relates).[13]

The owners corporation has the principal responsibility for managing the scheme.[14] The owners corporation controls, manages and administers the

7 *Unit Titles Act 2001* (ACT), s 38; *Unit Titles Act 1976* (NT), s 28.
8 *Unit Titles Act 1976* (NT), s 28(2) and (3).
9 *Unit Titles Act 2001* (ACT), s 51; *Unit Titles Act 1976* (NT), s 34.
10 *Unit Titles Act 2001* (ACT), ss 131, 132; *Unit Titles Act 1976* (NT), s 80.
11 *Unit Titles Act 2001* (ACT), ss 70 and 91; *Unit Titles Act 1976* (NT), s 56.
12 *Unit Titles Act 2001* (ACT), s 57; *Unit Titles Act 1976* (NT), s 39.
13 *Strata Schemes Management Act 1996* (NSW), s 11.
14 *Strata Schemes Management Act 1996* (NSW), s 8.

common property of the strata scheme for the benefit of the owners.[15] Four matters are listed as being its principal responsibilities, although provisions in Part 6 of the Act cover other functions. The maintenance and repair of the common property of the strata scheme is the first specific responsibility listed. Managing the finances of the strata scheme comes next. The third responsibility is to take out insurance for the strata scheme. Finally, the owners corporation is charged with keeping accounts and records for the strata scheme.[16] There are detailed provisions in the legislation for the manner in which these responsibilities are to be discharged. There are seven sections governing maintenance and repairs, 20 governing the finances of the strata scheme, 15 governing insurance, 14 governing records and accounts. Finally there are seven other provisions relating to the function of the owners corporation.[17]

Queensland

[28.30] The *Body Corporate and Community Management Act 1997* (Qld) dictates that for each community management scheme there must be a single body corporate and a single community management statement.[18] The name of the body corporate for a community titles scheme consists of an identifying name shown in the community management statement and the words "Community management statement."[19]

The body corporate for a community titles scheme must perform three duties. First, it must administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme. It must also enforce the community management statement (including the bylaws affecting the common property). Finally, it must carry out the other functions given to the body corporate under the legislation and the community management statement.[20] The body corporate has the obligation to maintain records[21] and may be required to take out insurance for the scheme.[22]

South Australia

[28.35] There is no specific provision in the South Australian legislation establishing a body corporate. The legislation does, however, contain provisions as to the name, functions and proceedings of the body corporate.

15 *Strata Schemes Management Act 1996* (NSW), s 61(1).
16 *Strata Schemes Management Act 1996* (NSW), s 61(2).
17 *Strata Schemes Management Act 1996* (NSW), ss 62–115A.
18 *Body Corporate and Community Management Act 1997* (Qld), s 10.
19 *Body Corporate and Community Management Act 1997* (Qld), s 22.
20 *Body Corporate and Community Management Act 1997* (Qld), s 94.
21 *Body Corporate and Community Management Act 1997* (Qld), s 204
22 *Body Corporate and Community Management Act 1997* (Qld), s 189.

The name of a strata corporation is "Strata Corporation No _____ Incorporated" (the blank being the number of the deposited strata plan). The abbreviation "Inc" may be used.[23]

The principal function of the strata corporation is to administer and maintain the common property for the benefit of the unit holders and, to such extent as may be appropriate, other members of the strata community. It must also administer all other property of the corporation and enforce the articles of the corporation.[24] The body corporate has the power to require a unit holder to carry out specified work in pursuance of a duty of maintenance or repair imposed on the unit holder by the articles.[25] The strata corporation must keep all buildings and building improvements on the site insured to their replacement value against the specified risks.[26] There is no specific reference to the duties of the body corporate with respect to keeping records, but such duties are implied.

Tasmania

[28.40] In Tasmania, the registration of a strata plan establishes a body corporate under the name "Strata Corporation No _____" with the addition of the name of the strata scheme.[27] The body corporate so established has five functions spelt out in the legislation. It is responsible for enforcing the bylaws, and controlling and managing the common property. The common property is to be maintained in good condition and kept in good and serviceable repair. The body corporate is to maintain the insurance required by the Act and any further insurance that may be required by special resolution of the owners. Finally, it is to carry out further functions for the benefit of the owners.[28] The body corporate is also responsible for maintaining a roll. The roll must record the names and addresses of the owners of each lot, of any agent employed by the body corporate to carry out any of its functions in relation to the scheme, and the name and address of any lessee of a lot of which it has notice.[29] A Tasmanian strata corporation may establish and operate a business situated on the common property provided the business is related to use and enjoyment of the lots and common property by owners or occupiers of lots and is not conducted outside the site.[30]

23 *Strata Titles Act 1988* (SA), s 18.
24 *Strata Titles Act 1988* (SA), s 25.
25 *Strata Titles Act 1988* (SA), s 28.
26 *Strata Titles Act 1988* (SA), s 30.
27 *Strata Titles Act 1998* (Tas), s 71.
28 *Strata Titles Act 1998* (Tas), s 81.
29 *Strata Titles Act 1998* (Tas), s 86.
30 *Strata Titles Act 1998* (Tas), s 81(4).

Victoria

[28.45] The Victorian *Subdivisions Act 1988* allows plans filed under the Act to provide for the creation of one or more bodies corporate consisting of the owners of specified lots. It requires plans that contain common property to provide for the creation of one or more bodies corporate.[31] The Act stipulates that a body corporate and its members have the constitution, duties, functions, powers, rights and liabilities specified in the regulations.[32] The Act contains no provision stipulating the name to be applied to the body corporate. The forms in the *Subdivision (Body Corporate) Regulations 2001* use the title "Registered Cluster Plan No _____".

Western Australia

[28.50] In Western Australia, upon the registration of a strata/survey-strata plan, the proprietors from time to time shall constitute a strata company by the name of "The Owners of [the name of the scheme]". The name of the strata company also incorporates the number allocated to the strata/survey-strata plan by the Registrar of Titles.[33]

The Western Australian strata company is endowed with a legal personality and may do and suffer all things that bodies corporate generally may, by law, do and suffer and that are necessary for or incidental to its purposes.[34] It is charged with eight statutory duties, which include ensuring that the bylaws are enforced and that proper records are kept of a number of matters. Towards the head of the list of statutory duties is controlling and managing the common property for the benefit of all the proprietors. Also included is the duty of keeping in good and serviceable repair, properly maintaining and, where necessary, renewing and replacing the common property and any personal property vested in it. Last but not least are the duties of effecting insurance as required by Division 4 of the Act and complying with any notices and orders of competent public authorities.

DIVISION AND DELEGATION OF POWERS

[28.55] There is a key distinction between bodies of proprietors established under the legislation in force in the eight Australian jurisdictions and registered companies. The doctrine of division of powers does not apply to bodies of proprietors. In a registered company, meetings of shareholders cannot give directions to the board of directors as to how functions assigned to the board are to be exercised. In contrast, the legislation establishing strata corporations generally spells out that the council must comply with directions from the

31 *Subdivision Act 1988* (Vic), s 27.
32 *Subdivision Act 1988* (Vic), s 29.
33 *Strata Titles Act 1985* (WA), s 32.
34 *Strata Titles Act 1985* (WA), s 32(3)(d).

general meeting. However, it is difficult for a large meeting to make day-to-day decisions. Accordingly, the legislation allows the body of proprietors to delegate functions so that an executive committee, frequently called a council, may exercise some of them. Further, the council, or the general meeting, may approve the employment of a managing agent to conduct the affairs of the organisation on a day-to-day basis. These powers are inferred if they are not spelt out, but most of the Acts establishing such schemes do in fact make specific provision for division and delegation of powers.

Australian Capital Territory

[28.60] The *Unit Titles Act 2001* (ACT) declares that on the establishment of an owners corporation the executive committee is also established.[35] Until the first annual general meeting, all the owners are members of the executive committee.[36] If there are more than three members of the corporation, the corporation is to decide by resolution how large the executive committee is to be.[37] If at any stage thereafter the number of owners falls below the number so resolved, then all owners are again members of the executive committee.[38] The executive committee has the functions of the corporation. The committee may delegate its duties, functions and powers to one or more of the executive members.[39] Another provision allows the committee, for and on behalf of the corporation, to employ, on such terms and conditions as it thinks fit, agents to assist in the exercise of the corporation's functions.[40]

New South Wales

[28.65] In the heading to s 9, the *Strata Schemes Management Act 1996* (NSW) poses the question: "Who else may be involved in managing a strata scheme?" The answer is that the owners corporation may be assisted in carrying out its management functions by the executive committee and/or by a strata managing agent or caretaker. The legislation requires the owners corporation to appoint an executive committee but indicates that if this is not done the owners corporation must administer the strata scheme.[41] It is further provided that the executive committee may not make a decision on any matter which the corporation has determined is only to be decided in general meeting and that the owners corporation may exercise any or all of its functions despite the fact that an executive committee is in office.[42]

35 *Unit Titles Act 2001 (ACT)*, s 81.
36 *Unit Titles Act 2001 (ACT)*, s 83.
37 *Unit Titles Act 2001 (ACT)*, s 84(2).
38 *Unit Titles Act 2001 (ACT)*, s 84(3).
39 *Unit Titles Act 2001 (ACT)*, s 89.
40 *Unit Titles Act 2001 (ACT)*, s 90.
41 *Strata Schemes Management Act 1996 (NSW)*, s 16.
42 *Strata Schemes Management Act 1996 (NSW)*, s 21.

Northern Territory

[28.70] The *Unit Titles Act 1976* (NT) provides that, on and after the constitution of a corporation under the Act, there shall be a committee of the corporation. This committee shall perform all the duties and functions and may exercise all the powers imposed or conferred on the corporation.[43] In this context it is important to note, however, that a corporation may, in general meeting, decide what matters or class of matters, if any, shall be determined only by the corporation in general meeting.[44] The committee shall perform its duties "in such manner" as the corporation by resolution in general meeting directs or, in the absence of such resolution, in such manner as it thinks fit.[45] Unless restricted by a direction given by an ordinary resolution of the general meeting, the committee is authorised to delegate its duties to one or more "committee-men". Such a delegation is revocable at will and does not prevent the committee from exercising the duty, function or power.[46] The Act provides that the committee may, for and on behalf of the corporation, employ agents and servants in "connexion" with the performance of the duties, powers and functions. Any contract by which a servant or agent is employed may be terminated on 14 days notice given within 7 days after a general meeting.[47] However, the general meeting must have been held in compliance with s 59A.

Queensland[48]

[28.75] When establishing a body corporate in Queensland, the promoter registers a community management statement. This statement indicates which regulation module applies to the scheme. The module may require a committee to be established. If it does, s 100 of the *Body Corporate and Community Management Act 1997* (Qld) stipulates that a decision of the committee is a decision of the body corporate. It appears that the division of powers doctrine may apply in this context. The Act also provides that a body corporate manager may be appointed. The committee of the body corporate may delegate some or all of its powers to the body corporate manager. The terms of engagement of the body corporate manager must not purport to prevent the committee from exercising a power so delegated or exclude them from directing the body corporate manager about how a delegated power is to be exercised.[49]

43 *Unit Titles Act 1976 (NT)*, s 32(1).
44 *Unit Titles Act 1976 (NT)*, s 53A.
45 *Unit Titles Act 1976 (NT)*, s 32(2).
46 *Unit Titles Act 1976 (NT)*, s 54.
47 *Unit Titles Act 1976 (NT)*, s 55.
48 *Body Corporate and Community Management Act 1997* (Qld), s 90.
49 *Body Corporate and Community Management Act 1997* (Qld), s 120.

South Australia

[28.80] The *Strata Titles Act 1988* (SA) stipulates that a strata corporation must have a presiding officer, a secretary and a treasurer.[50] Unless all of the units comprised in the scheme consist of non-residential premises, the officers of the corporation must be unit holders.[51] The offices, or any two of them, may be held by a unit holder.[52] The strata corporation is authorised to appoint a management committee of unit holders.[53] Subject to any limitations imposed by the strata corporation, the management committee has full power to transact any corporate business.[54] There is no specific provision authorising a strata corporation to appoint servants or agents, but there are provisions that apply when they have done so, so the power must be implied.[55]

Tasmania

[28.85] Section 79(1)(c) of the *Strata Titles Act 1998* (Tas) authorises a body corporate to overrule a decision of the committee of management before it has been carried into effect. While in power, and subject to any limitations or directions imposed by the body corporate in general meeting, the committee may exercise any powers of the body corporate except those required to be exercised by special or unanimous resolution.[56] The Act also authorises a body corporate to appoint a manager and delegate to the manager functions related to the administration, management and control of the common property. The manager is subject to control and direction by the body corporate acting in general meeting or through a committee of management.[57]

Victoria

[28.90] There is nothing in the legislation relevant to the use of a management council or managing agent. The matter is governed by the regulations, which provide that the body corporate may appoint a secretary or a manager.[58] If the body corporate has 13 or more members it must elect a committee at each annual general meeting.[59] The committee must have at least three and not more than 12 members.[60] The body corporate may

50 *Strata Titles Act 1988* (SA), s 23.
51 *Strata Titles Act 1988* (SA), s 23(1a).
52 *Strata Titles Act 1988* (SA), s 23(2).
53 *Strata Titles Act 1988* (SA), s 35.
54 *Strata Titles Act 1988* (SA), s 35(2).
55 *Strata Titles Act 1988* (SA), s 36A.
56 *Strata Titles Act 1998* (Tas), s 79(2).
57 *Strata Titles Act 1998* (Tas), s 80.
58 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 301, 302.
59 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 305.
60 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 306.

delegate most of its powers or functions to a member or officer. Exceptions exist, to protect the holding of an annual general meeting, to preserve powers or functions requiring special or unanimous resolutions, the power to remove an officer and the power to delegate.[61]

Western Australia

[28.95] The legislation of Western Australia provides that the council of the strata corporation shall perform the functions of a strata company. This is expressed to be subject to the Act and to any restriction imposed or direction given at a general meeting. The constitution and performance of the council of a strata company is to be governed by the bylaws of the company.[62]

61 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 310.

62 *Strata Titles Act 1985* (WA), s 44.

Chapter 29

Organs of the body corporate

[29.05] In all Australian jurisdictions, the body corporate of a property holding group exercises its decision-making power either through the general meeting or through the executive committee or council, by whatever name it is called. There is a close parallel here with the organisation of a registered company considered in Part II. This chapter will consider the types of general meetings of proprietors and the functions of their executive committees.

MEETINGS OF THE BODY CORPORATE

[29.10] The legislation may distinguish three types of meetings of the bodies of proprietors. These are the first meeting, the "annual general meeting", and the extraordinary or special general meeting. The first meeting may be significant, because this is where the body of proprietors assumes responsibility for the common property from the building developer. All corporate bodies require periodic meetings on a regular basis to review and plan for the coming year. This function is served by the annual meeting. Finally, special needs may call for attention at a time when no general meeting is normally scheduled, so power to convene extraordinary general meetings is commonly conferred on the executive.

Australian Capital Territory

[29.15] The relevant legislation in the Australian Capital Territory stipulates that a corporation shall hold a general meeting, to be called the annual general meeting, in addition to any other general meeting. Such a meeting shall be held at least once a year. Each AGM must be held not more than 15 months after the previous AGM.[1]

The first AGM must be held within six months after the units plan is registered. It may be convened by the committee or by any member of the

1 *Unit Titles Act 2001* (ACT), s 94.

corporation.[2] A corporation must comply with the requirements as to the regular AGM and the first AGM. Otherwise the corporation is free to hold, adjourn and otherwise regulate general meetings as it thinks fit.[3]

New South Wales

[29.20] The *Strata Schemes Management Act 1996* (NSW) contains an elaborate set of provisions that place restrictions on the owners corporation prior to the first annual general meeting.[4] Other types of meeting are covered in Schedule 2 of the Act, which provides that an owners corporation is to cause AGMs to be convened.[5]

The Act stipulates that during the initial period, the owners corporation must not:

- make alterations to the common property
- borrow money
- employ an agent for longer than the period until the first AGM; or
- incur a debt that cannot be met from the amount currently on hand.[6]

There are also restrictions on the bylaws that can be made during the initial period.[7]

Schedule 4 defines the "initial period" as commencing on the day on which the owners corporation is constituted and ending on the day on which there are owners of lots the subject of the strata scheme concerned (other than the original owner), the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement.

The first meeting of the owners corporation must be convened and held in the prescribed manner, within two months after the end of the initial period.[8] If the first annual general meeting is not held within this period, an adjudicator appointed under the Act may make an order appointing a person to convene and hold such a meeting.[9]

AGMs are to be convened and held in accordance with Division 3 of Part 2 of Schedule 2 to the *Strata Schemes Management Act 1996* (NSW). Unless an adjudicator makes an order varying the time for holding the AGM, it is to be held each year. Further, it is to be held no earlier than one month before, and

2 *Unit Titles Act 2001* (ACT), s 95.
3 *Unit Titles Act 2001* (ACT), s 96.
4 *Strata Schemes Management Act 1996* (NSW), s 113.
5 *Strata Schemes Management Act 1996* (NSW), Sch 2, cl 6.
6 *Strata Schemes Management Act 1996* (NSW), s 113.
7 *Strata Schemes Management Act 1996* (NSW), ss 50, 56.
8 *Strata Schemes Management Act 1996* (NSW), Sch 2, cl 2(1).
9 *Strata Schemes Management Act 1996* (NSW), Sch 2, cl 5.

no later than one month after each anniversary of the first annual general meeting.[10] A general meeting of an owners corporation that is not an annual general meeting, may be convened by the executive committee at any time. Such a meeting is referred to by this legislation as an extraordinary general meeting, although this term is no longer used in the corporations legislation.[11]

Northern Territory

[29.25] The *Unit Titles Act 1976* (NT) contains provision for all three types of general meeting. A corporation is required to hold an annual general meeting, in addition to any other general meeting held in the same year, at least once a year. This meeting must be held not more than 15 months after the date of the previous AGM.[12] Other general meetings may be convened whenever the committee thinks fit and must be convened upon a requisition in writing signed by members having not less than 25 per cent of the aggregate unit entitlement.[13]

Before the first AGM, the committee of the corporation consists of all the members of the corporation. The committee is not to perform a duty or exercise a power conferred on the corporation unless it is authorised to do so either by the regulations or by a unanimous resolution.[14] The first annual meeting is to be convened within three months of the registration of a units plan. The duty of convening this meeting is imposed on the original proprietor, whether or not this person is still a proprietor at the time this duty falls to be performed.[15] The *Unit Titles Act 1976* (NT) itemises the information to be laid before the meeting, and the decisions to be made by it, in some detail.[16] Such a meeting must also be held within three months after the registration of a units plan relating to a second or subsequent stage of a condominium development or estate development.[17] For a meeting after registration of a further stage of development, the duty to convene falls upon the committee.

Queensland

[29.30] The *Body Corporate and Community Management Act 1997* (Qld) provides that the body corporate must hold meetings of the types, and for the purposes, prescribed under the regulation module applying to the

10 *Strata Schemes Management Act 1996* (NSW), Sch 2, cl 31(1).
11 *Strata Schemes Management Act 1996* (NSW), Sch 2, cl 31(2).
12 *Unit Titles Act 1976* (NT), s 58.
13 *Unit Titles Act 1976* (NT), s 60.
14 *Unit Titles Act 1976* (NT), s 48.
15 *Unit Titles Act 1976* (NT), s 59.
16 *Unit Titles Act 1976* (NT), s 59(2), (3).
17 *Unit Titles Act 1976* (NT), s 59A.

scheme.[18] A "regulation module" is a set of regulations under the Act. There are four modules: the standard module, the accommodation module, the commercial module and the small schemes module. The community management statement should identify which module applies.[19] The accommodation module stipulates that a general meeting is either an annual general meeting or an extraordinary general meeting.[20]

South Australia

[29.35] In South Australia, a strata corporation may hold a meeting of its members (a "general meeting") at any time.[21] The corporation must hold at least one such meeting (the "annual general meeting") in every calendar year and no more than 15 months after the last such meeting.[22] The first such meeting is to be called by the original registered proprietor.[23]

Tasmania

[29.40] The *Strata Titles Act 1998* (Tas) is very clear on this matter. An annual general meeting of the body corporate must be held within three months after the formation of the body corporate.[24] In subsequent years an AGM must be held within 15 months after the last annual general meeting.[25] The committee of management or the secretary of the body corporate is empowered to call a special general meeting at any time. They must do so if required by not less than one-third of the total number of members of the body corporate.[26]

Victoria

[29.45] The *Subdivision (Body Corporate) Regulations 2001* (Vic) provide that the applicant for registration of a plan, which provides for the creation of a body corporate, must convene the first meeting of the body corporate within 6 months of the registration of the plan.[27] This will be the first annual general meeting.[28] If the body corporate receives or pays out money within a financial year, it must hold an AGM within 15 months of the last AGM.[29] Special general

18 *Body Corporate and Community Management Act 1997* (Qld), s 104.
19 *Body Corporate and Community Management Act 1997* (Qld), s 21.
20 *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld), reg 37.
21 *Strata Titles Act 1988* (SA), s 33.
22 *Strata Titles Act 1988* (SA), s 33(4).
23 *Strata Titles Act 1988* (SA), s 33(2)(d).
24 *Strata Titles Act 1998* (Tas), s 75(1).
25 *Strata Titles Act 1998* (Tas), s 75(2).
26 *Strata Titles Act 1998* (Tas), s 75(3).
27 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 401.
28 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 403.
29 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 402.

meetings may be called by the secretary, manager or chairperson of the body corporate whenever there is a matter requiring decision. Members who together hold at least 25 per cent of all lot entitlements may petition the secretary, manager or committee to call a special general meeting, and the officer receiving such a petition must call the meeting.[30]

Western Australia

[29.50] The body of the *Strata Titles Act 1985* (WA) contains stipulations about the first meeting, while provisions governing other general meetings are contained in the first Schedule. The first annual general meeting is to be held within three months after registration of the strata plan. It is to be convened by the original proprietor, whether or not this person is still a proprietor at the time. The meeting is to be held within the prescribed period. If the meeting is held after this period it is still the first AGM[31] but a penalty of $2000 will be incurred.[32] The legislation details the material that must be delivered to the strata company by the original proprietor at that meeting.[33]

General meetings of the strata company shall be held once every year, with no more than 15 months between one AGM and the next.[34] All general meetings other than the AGM shall be called extraordinary general meetings.[35] Extraordinary general meetings can be called whenever the council thinks fit and shall be called upon a requisition in writing made by proprietors entitled to a quarter or more of the aggregate unit entitlement of the lots.[36]

EXECUTIVE OF THE BODY CORPORATE

[29.55] Bodies of proprietors, like all other group entities, normally find it desirable to appoint an executive body to oversee the day-to-day management of their business. The legislation in force in each jurisdiction assumes that there will be such an executive. The title given to the executive varies from council in Western Australia to committee of management in Tasmania, executive committee in New South Wales and committee of the corporation in the Territories.

There are other differences in the various legislative provisions. In some jurisdictions the composition and responsibilities of the executive are spelt out in the legislation. In other jurisdictions these details are controlled by regulations or the bylaws of the body corporate. The most elaborate provisions

30 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 404.
31 *Strata Titles Act 1985* (WA), s 49(4).
32 *Strata Titles Act 1985* (WA), s 49(1).
33 *Strata Titles Act 1985* (WA), s 49.
34 *Strata Titles Act 1985* (WA), Sch 1, cl 11(1).
35 *Strata Titles Act 1985* (WA), Sch 1, cl 11(2).
36 *Strata Titles Act 1985* (WA), Sch 1, cl 11(3).

apply in New South Wales, The Australian Capital Territory and the Northern Territory also have comprehensive provisions in this area. Queensland and Victoria leave the matter to the regulations. In most jurisdictions, positions on the executive must be filled by human beings. Western Australia allows positions to be filled by a corporation.

Australian Capital Territory

[29.60] As noted above, the *Unit Titles Act 2001* (ACT) states that the executive committee comes into existence on the establishment of the corporation.[37] At the beginning of a meeting, the executive members select a person who is present to act as chairperson for the meeting.[38] The legislation does not prevent the selection of an executive member who would normally take the chair when present.

The legislation does not expressly require the corporation to appoint a secretary or treasurer. It does, however, require the committee to perform certain functions normally entrusted to a secretary and a treasurer. The secretarial functions imposed include keeping minutes in a minute book and including in that minute book a record of every resolution, including unanimous resolutions, special resolutions and unopposed resolutions of the corporation.[39] The treasurer's functions, so specified, include causing proper records and books of account to be kept in respect of the assets and liabilities of the corporation.[40] The accounts and other records may be kept electronically but must be retained for five years.[41] At each annual general meeting the committee is to present financial statements that include all transactions up to a date that is not more than three months before the date of that meeting.[42] If these requirements are not complied with, each member of the executive is guilty of an offence punishable by fine. The individual may escape liability either by proving that he or she took reasonable steps to ensure that the default did not occur or by proving that the default occurred without his or her knowledge.[43]

New South Wales

[29.65] The *Strata Schemes Management Act 1996* (NSW) requires every body corporate to appoint an executive committee.[44] The council may be brought

37 *Unit Titles Act 2001* (ACT), s 81; see [28.60] above.
38 *Unit Titles Act 2001* (ACT), s 87.
39 *Unit Titles Act 2001* (ACT), s 91(1)(a)–(c).
40 *Unit Titles Act 2001* (ACT), s 91(1)(e).
41 *Unit Titles Act 2001* (ACT), s 91(2) and (1)(f).
42 *Unit Titles Act 2001* (ACT), s 91(3), (4).
43 *Unit Titles Act 2001* (ACT), s 91(5), (6).
44 *Strata Schemes Management Act 1996* (NSW), s 16(1).

into existence before the first annual general meeting.[45] If this has not been done it must be appointed at the first AGM.[46] If an executive committee has not been appointed, the adjudicator may make an order appointing a person to convene a meeting in order to elect an executive committee.[47]

Provisions as to the constitution of the executive committee are found in Part 1 of Schedule 3. If the strata scheme comprises two lots, the committee is to consist of two people. The members of the committee will be the owner of each lot that has only one owner, and one co-owner of each lot owned by co-owners. If a corporation owns the lot, the company nominee will be a member of the executive committee. In the case of co-owners, the member of the executive committee will either be one co-owner nominated by the other co-owner(s) or the first person named on the strata roll.[48]

If the strata scheme comprises more than two lots, the executive committee will consist of the number of members determined by the owners corporation, but this must not be more than nine.[49] In this case the members of an executive committee must be elected at each AGM of the owners corporation.[50] To be eligible for election, a person must be an owner of a lot, the company nominee of a corporate owner, or the nominee of an owner who is not a candidate for election.[51] Persons who are sole owners of lots may nominate themselves to the committee.[52] A co-owner must be nominated by someone else, either a sole owner of a lot or a co-owner who is not a candidate.[53]

At the first meeting of the executive committee, the members are to appoint a chairperson, a secretary and a treasurer from within their number.[54] A single individual may be appointed to more than one of these offices.[55] These officers are empowered to act not only for the council but also for the body corporate.[56] If these officers are not appointed, the adjudicator has power to intervene to ensure this is done.[57]

The functions of the secretary of the body corporate include the seven responsibilities set out in the Act.[58] The secretary is responsible for the

45 *Strata Schemes Management Act 1996* (NSW), s 16(2).
46 *Strata Schemes Management Act 1996* (NSW), s 16(3).
47 *Strata Schemes Management Act 1996* (NSW), s 17.
48 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 1.
49 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 2(2).
50 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 2(3).
51 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 2(4).
52 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 2(6).
53 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 2(5).
54 *Strata Schemes Management Act 1996* (NSW), s 18(1).
55 *Strata Schemes Management Act 1996* (NSW), s 18(3).
56 *Strata Schemes Management Act 1996* (NSW), s 18(2).
57 *Strata Schemes Management Act 1996* (NSW), s 19.
58 *Strata Schemes Management Act 1996* (NSW), s 22.

preparation and distribution of minutes of meetings of the body corporate and the submission of a motion for confirmation of the minutes to the next meeting of the body corporate.[59] The secretary is also responsible, on behalf of the body corporate and the council, for giving notices required under the Act[60] and for convening the meetings of the council and the body corporate.[61] Additional secretarial duties include maintaining the strata roll and supplying information on behalf of the body corporate if and as required under s 108 of the *Strata Schemes Management Act 1996* (NSW).[62] Answering communications addressed to the body corporate is also a secretarial function.[63]

The powers and duties of the treasurer are set out in s 23 of the Act. They include the duty of notifying proprietors of any contributions levied pursuant to the Act.[64] The treasurer must receive, acknowledge, bank and account for any money paid to the body corporate.[65] The treasurer is also responsible for preparing certificates applied for under Chapter 3, Part 5, Division 4 of the Act and for preparing a financial statement for each financial year of the body corporate.[66] A form of motion for the adoption of these financial statements must accompany every notice of annual general meeting: see below. The treasurer, with the consent of the executive committee, may delegate any of these functions to another member of the executive committee.[67] The executive committee of an owners corporation may, by a notice in writing served on the treasurer of the owners corporation, order the treasurer not to exercise any of the treasurer's functions that are specified in the notice unless the treasurer does so jointly with another person also specified.[68] Those appointed to the offices of chairperson, secretary or treasurer shall hold office until they cease to be a member of the council, until they resign, or until they are replaced by the council.[69] A council member shall vacate the office of councillor at the end of a meeting at which another person is elected to the position on the executive at a general meeting of the body corporate.[70] The office will also be vacated if the councillor ceases to be a proprietor, or the individual or company who nominated the councillor ceases to be a proprietor

59 *Strata Schemes Management Act 1996* (NSW), s 22(a).
60 *Strata Schemes Management Act 1996* (NSW), s 22(b).
61 *Strata Schemes Management Act 1996* (NSW), s 22(f).
62 *Strata Schemes Management Act 1996* (NSW), s 22(c), (d).
63 *Strata Schemes Management Act 1996* (NSW), s 22(e).
64 *Strata Schemes Management Act 1996* (NSW), s 23(1)(a).
65 *Strata Schemes Management Act 1996* (NSW), s 23(1)(b).
66 *Strata Schemes Management Act 1996* (NSW), s 23(1)(c)(d).
67 *Strata Schemes Management Act 1996* (NSW), s 23(2).
68 *Strata Schemes Management Act 1996* (NSW), s 23(4).
69 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 5.
70 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 2 (7)(d), 4(d).

or notifies the body corporate in writing that the office is vacated.[71] The councillor may resign,[72] and may be removed if the body corporate by a special resolution determining that the office of the individual as member of council be vacated.[73] When a vacancy occurs in the office of a member of an executive committee, other than by election of a new member of the executive, the owners corporation must appoint a person eligible for election as a member to fill the vacancy for the balance of the predecessor's term of office.[74] A council member may appoint a proprietor or the company nominee of a proprietor to act in his or her place at meetings of the council.[75] The individual selected to act may, but need not, be otherwise a member of the council.[76] If the proxy is already a member of the council, the proxy may vote separately in the capacity of member and of proxy.[77]

The legislation permits the owners corporation to pay an honorarium to the chairman, secretary, treasurer or a member of the executive. The amount to be paid shall be determined at an AGM after the services have been rendered. The honorarium may be paid in recognition of services performed since the last AGM.[78]

Northern Territory

[29.70] After the first annual general meeting of the proprietors, the committee of the corporation in the Northern Territory shall consist of the number of members determined at that meeting. The minimum number of committee members is two, the maximum seven.[79] The corporation may vary the number of members on the committee by ordinary resolution after the first AGM.[80] By special resolution, the corporation may resolve that the number of members on the committee will exceed seven.[81]

Where there are not more than three members of the corporation, or where the number of members of the corporation is less than or equal to the number of members of the committee, the members of the corporation shall all be members of the committee.[82] In any other case the members of the committee

71 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 4(a), (b).
72 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 4(c).
73 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 4(d).
74 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 4(2).
75 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 3(1).
76 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 3(3).
77 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 3(4).
78 *Strata Schemes Management Act 1996* (NSW), s 25.
79 *Unit Titles Act 1976* (NT), s 49(1).
80 *Unit Titles Act 1976* (NT), s 49(2).
81 *Unit Titles Act 1976* (NT), s 49(3).
82 *Unit Titles Act 1976* (NT), s 49(4).

shall be elected at each annual general meeting.[83] To be eligible for election to the committee an individual must be a proprietor, or the nominee of a body corporate that is a proprietor, or be nominated by a proprietor who is not a candidate for election.

There are provisions to allow a "committee-man" to appoint a substitute. These provisions bear a strong resemblance to those in force in New South Wales. A committee-man may, with the consent of the committee, appoint a proprietor or the company nominee of a proprietor to act in his or her place at meetings of the council.[84] The individual selected to act may, but need not, be otherwise a member of the committee.[85] If the substitute is already a member of the committee, the substitute may vote separately in the capacity of member and of substitute.[86]

At the first meeting of a committee, the committee shall appoint a "chairman", a secretary and a treasurer.[87] A person shall not be appointed to any of these offices unless he or she is a member of the committee. The same person may be appointed to more than one of these offices.[88] The chairperson, secretary or treasurer shall hold office until they cease to be a member of the committee, or the corporation receives a resignation in writing, or the committee replaces them.[89]

The chairperson appointed by the committee shall preside at all meetings of the committee at which he or she is present. If the chairperson is absent, the committee shall appoint one of their number to preside in the chairperson's absence.[90] The committee may require the treasurer to exercise his or her functions jointly with a specified person.[91] The treasurer may also, with the approval of the committee, delegate any of the powers or functions of the office to another member of the committee.[92] The legislation stipulates that a person shall not exercise any of the authorities and functions of the corporation or of the treasurer of the corporation relating to the receipt or expenditure of, or accounting for, moneys, or the keeping of the books of account, of the corporation, unless the person is the treasurer or someone authorised by the committee to act jointly with the treasurer. A penalty of

83 *Unit Titles Act 1976* (NT), s 49(5).
84 *Unit Titles Act 1976* (NT), s 49(9).
85 *Unit Titles Act 1976* (NT), s 49(10).
86 *Unit Titles Act 1976* (NT), s 49(11).
87 *Unit Titles Act 1976* (NT), s 51(1). The legislation uses the term "chairman", but subsequently we substitute "chairperson".
88 *Unit Titles Act 1976* (NT), s 51(2).
89 *Unit Titles Act 1976* (NT), s 51(3).
90 *Unit Titles Act 1976* (NT), s 51(4).
91 *Unit Titles Act 1976* (NT), s 51(7).
92 *Unit Titles Act 1976* (NT), s 51(6).

$500 may be imposed on anyone who exercises such authorities or functions in disregard of this restriction.[93]

An individual elected to the committee vacates the office if he or she ceases to be a proprietor, or the individual or company who nominated the councillor ceases to be a proprietor or notifies the body corporate in writing that the office is vacated.[94] A member of the committee may resign by notice in writing to the corporation. The resignation is effective when the corporation receives the notice.[95] In the normal course, members of the committee vacate their offices immediately before the election of committee-men at the next annual general election.[96] When a vacancy occurs in the office of a member of an executive committee, other than by election of new members of the executive, the remaining committee-men may appoint another member of the corporation in place of, and for the unexpired part of the term of office of, the committee-man whose office is vacant.[97]

The corporation may also remove any member of the committee before the expiration of his or her term of office. This will require a special resolution. The special resolution should also appoint another member of the corporation to hold office for the unexpired part of the term of office of the member of the committee so removed.[98]

Queensland

[29.75] The *Body Corporate and Community Management Act 1997* (Qld) contains no details about the composition of the committee or the manner in which the members are to be chosen. It provides that these matters are to be governed by the regulation module.[99] Where the accommodation module applies, there must be a chairperson, secretary and treasurer.[100] Also left to the regulation module is the term of office of a member of the committee, the circumstances in which a vacancy may be created, and how a casual vacancy is to be filled.[101] Finally, the regulation module provides for the procedures and powers of the committee.[102]

93 *Unit Titles Act 1976* (NT), s 51(5).
94 *Unit Titles Act 1976* (NT), s 49A(1)(a), (b).
95 *Unit Titles Act 1976* (NT), s 49A(1)(c).
96 *Unit Titles Act 1976* (NT), s 49A(1)(d).
97 *Unit Titles Act 1976* (NT), s 49(7).
98 *Unit Titles Act 1976* (NT), s 49(6).
99 *Body Corporate and Community Management Act 1997* (Qld), s 99(1) and (2).
100 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 10.
101 *Body Corporate and Community Management Act 1997* (Qld), s 99(3).
102 *Body Corporate and Community Management Act 1997* (Qld), s 101.

South Australia

[29.80] In South Australia, the strata corporation is required to have three officers: a secretary, a treasurer and an officer to preside over meetings.[103] Office holders are to be elected at a general meeting of the corporation.[104] Unless all of the units comprised in the strata scheme consist of non-residential premises, the officers of a strata corporation must be unit holders.[105] Any two or more of the above offices may be held simultaneously by the same person.[106] The strata corporation must not allow any of the offices to remain vacant for more than six months.[107] No provision expressly requires the executive officers to meet, but the power to do so would be implied. There is no provision for other members of the executive, nor any express description of the duties of the secretary and treasurer.

Tasmania

[29.85] The *Strata Titles Act 1998* (Tas) confers the power to appoint a committee of management on the body corporate. This power may be exercised by ordinary resolution.[108] The body corporate may also change the membership of the committee[109] or remove a committee of management from office[110] by ordinary resolution. The committee of management must consist of at least three members of the body corporate, and may consist of members representing sectional interests in the scheme.[111] There are no provisions in the legislation about the division of responsibilities among the members of the committee of management.

Victoria

[29.90] Provisions governing the constitution of the body corporate, including the executive, are found in the regulations. The only provision in the body of the legislation relating to the members of the committee exempts members from liability for actions performed in good faith. An action does not lie against a member of the committee of the body corporate who acts in good faith and in accordance with this Act and the regulations in respect of anything done or omitted to be done by the body corporate.[112]

103 *Strata Titles Act 1988* (SA), s 23(1).
104 *Strata Titles Act 1988* (SA), s 23(4).
105 *Strata Titles Act 1988* (SA), s 23(1a).
106 *Strata Titles Act 1988* (SA), s 23(2).
107 *Strata Titles Act 1988* (SA), s 23(5).
108 *Strata Titles Act 1998* (Tas), s 79(1)(a).
109 *Strata Titles Act 1998* (Tas), s 79(1)(b).
110 *Strata Titles Act 1998* (Tas), s 79(1)(d).
111 *Strata Titles Act 1998* (Tas), s 79(3).
112 *Subdivision Act 1988* (Vic), s 29(5).

The regulations stipulate that the committee must appoint a member of the committee to be chairperson.[113]

Western Australia

[29.95] The *Strata Titles Act 1985* (WA) stipulates that the council of a strata company shall be constituted and shall perform its functions in accordance with and in the manner provided by the bylaws of the strata company.[114] Uniquely, it stipulates that a corporation is eligible to be chairman, secretary or treasurer of the strata company or a member or alternate member of the council.[115] Procedurally, if appointed to such an office the corporation would authorise an individual to perform the function on its behalf. It would be free to rescind the authorisation at any time.[116] Where the individual performs the function, it is deemed that the corporation has performed the function.[117] It appears that the individual concerned thus escapes any liability that might arise out of such an action.

113 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 308.
114 *Strata Titles Act 1985* (WA), s 44(2).
115 *Strata Titles Act 1985* (WA), s 45.
116 *Strata Titles Act 1985* (WA), s 45(2).
117 *Strata Titles Act 1985* (WA) s 45(3).

Chapter 30

Notice of proprietors' meetings

[30.05] Seven of Australia's eight jurisdictions include some provision relevant to notice of meeting in the legislation establishing structures for joint ownership. Queensland's provision is the most rudimentary, merely stipulating that the regulations in the regulation module for the body corporate must be observed. New South Wales' provisions are the most elaborate.

The jurisdictions vary on the questions of who is entitled to notice, what length of notice is required, what method of serving notice is specified, and what stipulations as to the content of the notice apply.

There is a strong relationship between voting entitlement (see Chapter 33) and right to notice. Everyone entitled to vote is entitled to notice, but some are entitled to notice yet not entitled to vote. Each member and each registered first mortgagee is entitled to notice of meeting; this is spelt out in the legislation in most jurisdictions.

In New South Wales, the fact the person who is issuing notices of meeting need not give notice to himself or herself is spelt out. This provision is unnecessary, as the same result would be reached at common law. Possession of the information is what is required — not receipt of a written notice. The person issuing the notices would not be able to argue an unawareness of the contents.

Only in Western Australia is there provision to the effect that an accidental omission to give notice, or non-receipt of notice, will not affect the validity of a meeting. In other jurisdictions this result may be reached under dispute resolution powers created by the legislation: see Ch 37. In most Australian jurisdictions 14 days' notice of proprietor's meetings is required. However, in New South Wales and Tasmania the general rule is that only seven days' notice is required. In the Australian Capital Territory and the Northern Territory, 21 days' notice is required if a unanimous resolution is to be validly passed.

Until the New South Wales legislation was amended in 1996, it allowed notice of strata meetings to be posted on a notice board. A number of jurisdictions (New South Wales, Queensland, Victoria and Western Australia)

now leave it open to the relevant body corporate to determine how notice is to be served. The legislation in force in South Australia and Tasmania specifies that notice must be in writing and must be "given" to each member of the body corporate. In the Australian Capital Territory and the Northern Territory, notice must be sent by prepaid post. Where the secretary or person responsible for issuing notice of meeting resides in the same building as the recipient there may be some basis for querying this stipulation.

In five jurisdictions (Australian Capital Territory, Northern Territory, South Australia, Tasmania and Western Australia) the requirement that the notice must set out the time, date and place of the meeting is spelt out. Although the provisions in New South Wales are generally the most elaborate, they are silent on this point. On the other hand, the New South Wales legislation stipulates that the notice of the annual general meeting must include the listed matters and that all notices of meeting must contain certain information about voting entitlements. The New South Wales legislation also requires the "form of motion" for a number of routine matters to be set out. This is best interpreted as a requirement that the exact words of the resolution be included in the notice. By way of contrast, in Western Australia, it is sufficient to specify the general nature of any special business, unless a special resolution, resolution without dissent, or unanimous resolution is required. In South Australia and Tasmania, the text of the resolution must also be set out in the notice if a unanimous resolution is required.

The Western Australian legislation is unique in stipulating that if a special resolution or resolution without dissent is amended at the meeting, each person not represented at the meeting must be served with notice of the change in the text after the meeting.

AUSTRALIAN CAPITAL TERRITORY

[30.10] The *Unit Titles Act 2001* (ACT) requires that a notice for a general meeting shall specify the time, date and place fixed for the holding of the meeting.[1] Notice of general meeting must be given to all the members of the corporation and to all representatives of mortgagees.[2] A mortgagee's representative is appointed when a mortgagee elects to exercise their rights under s 112. Where the corporation has received such notice, this fact must be recorded in the corporate register.[3]

If it appears to the committee that any matter to be considered at the meeting requires an unopposed or unanimous resolution, the notice shall contain the text of the motion and identify the kind of motion that is required.[4]

1 *Unit Titles Act 2001* (ACT), s 97(3).
2 *Unit Titles Act 2001* (ACT), s 97(1).
3 *Unit Titles Act 2001* (ACT), s 70(2)(d).
4 *Unit Titles Act 2001* (ACT), s 97(3)(d).

Fourteen days' notice of the time for holding a general meeting is normally required.[5] However, if a matter to be considered at a general meeting requires a unanimous resolution, then 21 days' notice of the meeting must be given.[6] Notice may be sent by prepaid post as a letter to the address for correspondence recorded on the corporate register.[7] If that address is a building or unit on the parcel, the notice may be placed in the letterbox of that unit.[8] Alternatively, notice may be given by serving it in any way directed by the person to be served.[9]

NEW SOUTH WALES

[30.15] There are two separate sets of provisions governing notice of meeting for owners corporations in New South Wales. These apply respectively to the first annual general meeting and to subsequent meetings. Where the meeting in question is the first annual general meeting, the original proprietor is required to serve notice of the meeting as part of the duty to convene and hold a meeting of the body corporate imposed by the provision in Schedule 2.[10] For this purpose the original proprietor is assured the right to inspect the strata roll without making payment or written application, whether or not he or she remains a proprietor.[11]

Notice of first annual general meetings is to be served on each proprietor and each first mortgagee or covenant chargee whose name appears on the strata roll.[12] Notice of first annual general meetings is to be given 14 days in advance of the meeting.[13] The agenda of the meeting must be set out in the notice. It is restricted to the items referred to in clause 3 of Schedule 2. Notice of later annual general meetings and of extraordinary meetings, is to be served on each owner. If an item on the agenda for the meeting requires a special or unanimous resolution of the owners corporation, notice must also be served on each first mortgagee or covenant chargee whose name appears on the strata roll. The provisions for notice of later annual general meetings differ from those that apply to first annual general meetings in that the period of notice is cut in half. Notice of subsequent general meetings must be served at least seven days before the meeting.[14] No person issuing a notice of an

5 *Unit Titles Act 2001* (ACT), s 97(2)(a).
6 *Unit Titles Act 2001* (ACT), s 97(2)(b).
7 *Unit Titles Act 2001* (ACT), s 80(1)(a).
8 *Unit Titles Act 2001* (ACT), s 80(1)(b).
9 *Unit Titles Act 2001* (ACT), s 80(1)(c).
10 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 1, cl 2(1).
11 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 26.
12 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 27.
13 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 27.
14 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 32(1).

annual general meeting is required to serve notice on her or himself.[15] Clear indication should be given as to which, if any, of the motions included in the notice requires a special resolution or a unanimous resolution.[16]

Notice of annual general meeting must include the six matters listed in clause 34 of Schedule 2, Part 2. That is, it must be accompanied by a copy of the last financial statements prepared by the owners corporation together with any relevant auditor's report and include a form of motion for adoption of those reports.[17] It must include information about each current insurance policy held by the owners corporation,[18] and a form of motion to consider taking out the insurance referred to in s 88(2) of the Act. It must include forms of motion to consider the appointment of an auditor,[19] to decide the number of members on the executive committee,[20] and to elect the executive committee.[21] It must include a form of motion to confirm the minutes of the last general meeting of any kind,[22] and — if it is not a meeting to elect the executive committee — a form of motion of each other motion to be considered.[23] This exception is curious and may mean either that if the executive committee is to be elected no other business may be transacted or that if the executive committee is elected all other business may be conducted without notice. The better view is probably be the first interpretation. The term "form of motion" suggests that not only must the item be listed but the precise wording of the resolution to be proposed should be set out. There is an interesting contrast between the provision requiring a form of motion for election of the executive committee and the provision in the *Corporations Act 2001* (Cth) (s 201E(1)) requiring the election of individual directors to be voted on separately.

Notice of subsequent meetings should be accompanied by a copy of the minutes if the notice is to a proprietor who has not previously been given a copy of those minutes. A copy of the minutes is also required if the proprietor has requested a copy of the minutes that has not yet been provided.[24] Notice of any general meeting must indicate that a vote at a meeting by the owner of a lot does not count if a priority vote in respect of the lot is cast in relation to the same matter.[25] It must also state that no vote may be cast at a meeting

15 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 27(2), 32(4).
16 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 35(2).
17 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 34(a), (b).
18 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 34(c).
19 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 34(d).
20 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 34(f).
21 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 34(e), 35(1)(b).
22 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 35(1)(a).
23 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 35(1)(c).
24 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 33.
25 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(1).

unless all contributions levied on the owner have been paid, along with any other amounts recoverable in relation to the lot and owing at the date of the notice.[26] This restriction does not apply where the legislation requires a unanimous resolution, and this should also be indicated.[27]

The notice must also inform each person to whom the notice is addressed of their voting entitlements.[28] If the notice is served on the mortgagee or chargee, it must include the name of the proprietor of the lot, the addresses of the lot and the place where the meeting is to be held.[29] The notice also must set out the provisions of this Act for determining the quorum at a general meeting.[30]

Strangely, there appears to be no requirement that notice given to a proprietor should say where the meeting is being held, and there is no express requirement that any notice should state when the meeting is being held. However, common law authorities support a requirement that these details be stated.

NORTHERN TERRITORY

[30.20] The *Unit Titles Act 1976* (NT) requires 14 days' notice for a general meeting, except in the case of an estate development, in which case one month's notice is required.[31] Where a matter to be considered at a general meeting requires unanimous resolution, not less than 21 days' notice of the time fixed for the meeting must be given.[32]

Notice of a general meeting must specify the time, date and place fixed for the meeting.[33] "[W]herever it appears to the committee" that a unanimous resolution is required, it must also indicate this.[34] Notice must be given to all the members of the corporation and to all mortgagees who have given notice to the corporation under s 65.[35]

"[N]otice is deemed to have been sufficiently given to a person" if sent by prepaid post as a letter properly addressed to the last address of that person notified to the corporation. If no such address has been notified, the letter may be sent to the person's last known place of abode. If the proprietor or

26 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(2).
27 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(2).
28 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(3).
29 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(4).
30 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(5).
31 *Unit Titles Act 1976* (NT), s 61(1).
32 *Unit Titles Act 1976* (NT), s 61(2).
33 *Unit Titles Act 1976* (NT), s 61(3)(a).
34 *Unit Titles Act 1976* (NT), s 61(3)(b).
35 *Unit Titles Act 1976* (NT), s 61(3)(c).

mortgagee is a body corporate, the letter may be sent to its registered office, its place of business or any other known address.[36]

QUEENSLAND

[30.25] The only reference in Queensland's legislation to the requirements for notice of general meeting is a stipulation that the provisions in the regulations of the body corporate about maintaining a mail box and notice board shall be observed.[37] The accommodation module specifies that notice must be given to the owner of each lot. Such notice may be served personally or sent to the owner's address. It must state the time and place of the meeting, include an agenda for the meeting and be accompanied by a proxy form and relevant explanatory information as required by the legislation.[38]

SOUTH AUSTRALIA

[30.30] A meeting (including the first general meeting) is convened by giving written notice of the day, time and place of the meeting to all members of the corporation. This must be done at least 14 days before the date of the meeting.[39] The notice must also set out the agenda for the meeting. Unless it is the first meeting, the agenda must include a motion confirming the minutes of the previous general meeting. If it is the first annual general meeting, the agenda must include the required matters specified in s 80(2). The agenda for an annual general meeting must include the presentation of accounts for the last financial year, the appointment of the auditor for the current financial year and the determination of contributions to be paid by members for the current financial year.[40] If any unanimous or special resolutions are to be considered at the meeting, the text of such resolutions must be set out in the agenda.[41]

TASMANIA

[30.35] The secretary has a duty to give notice of meeting to each member of the body corporate at least seven days before a general meeting. The written notice must set out the date, time and place of the meeting and state the nature of business to be transacted. If a special or unanimous resolution is to be put before the meeting, the notice must set out the terms of the proposed resolution.[42]

36 *Unit Titles Act 1976* (NT), s 61(4).

37 *Body Corporate and Community Management Act 1997* (Qld), s 153.

38 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 40.

39 *Community Titles Act 1996* (SA), s 81(2).

40 *Community Titles Act 1996* (SA), s 81(5).

41 *Community Titles Act 1996* (SA), s 81(5)(a).

42 *Strata Titles Act 1998* (TAS), s 75(4).

VICTORIA

[30.40] The *Subdivision (Body Corporate) Regulations 2001* (Vic) require that each member must be given notice in writing of an annual or special general meeting 14 days before the meeting is to be held. The notice must either be handed to the member or posted to their last known address. The notice must set out the time and place of the meeting and the general nature of the business to be transacted. If a special or unanimous resolution is to be moved, the text of that resolution should be set out in the notice. The notice must be accompanied by the required financial statements and must state that the member is entitled to appoint a proxy.[43]

WESTERN AUSTRALIA

[30.45] In Western Australia one set of provisions governs notice of meeting generally, and another set applies when a special or unanimous resolution is required. Under the provisions in the Schedule to the *Strata Titles Act 1985* (WA), every general meeting is to be convened by not less than 14 days' notice. The notice must specify the place, date and hour of the meeting and the general nature of any special business that will be considered. All business transacted at an extraordinary general meeting shall be considered special, as shall all business transacted at an annual general meeting except the consideration of accounts and the election of members to council.[44]

All proprietors and registered first mortgagees who have notified their interests to the strata company must receive notice. However, accidental omission to give notice to any proprietor or registered first mortgagee, or non-receipt of the notice, does not invalidate any proceeding at a general meeting.[45]

If a special resolution or resolution without dissent is required, sufficient notice of meeting is required under s 3C of the *Strata Titles Act 1985* (WA).[46] The period of notice stipulated is 14 days. Although there is no specific reference in s 3C to the lack of effect of accidental omission to give notice or non-receipt of notice, it is questionable whether this would make a real difference. If a special resolution or a resolution without dissent is passed with amendment at the meeting, the strata company is required to serve a copy of the amended resolution to each proprietor who was not present at the meeting either personally or by proxy at the time the resolution was put to the vote. If this is not done, the amended resolution is of no effect.[47]

43 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 405.

44 *Strata Titles Act 1985* (WA), Sch 1, reg 12(1).

45 *Strata Titles Act 1985* (WA), Sch 1, reg 11(5); see Ch 27.

46 *Strata Titles Act 1985* (WA), ss 3AC, 3B.

47 *Strata Titles Act 1985* (WA), s 3C(2), (3).

Chapter 31

Quorum and adjournments

[31.05] If a quorum is set too high it will be difficult to obtain and the meeting will be prevented from proceeding to business. If it is set too low a small minority may be able to ambush the association. In other contexts, the modern tendency is to set lower quorums.

The Queensland legislation makes no provision for the quorum at general meetings, leaving the matter to the regulation module. The legislation governing meetings of strata title bodies in New South Wales sets the quorum at a quarter of the members. In all other jurisdictions the quorum is set at half or slightly more than half the members. There are significant differences here between the legislation in force in the Australian Capital Territory and the Northern Territory. If a quorum is not obtained at the time and place originally set for the meeting, the meeting must be adjourned. In several jurisdictions, the legislation provides that if a quorum is not present at the appointed time, the meeting shall be adjourned to the following week, on the same day, in the same place and at the same time. It may be observed that, if members were unable to attend the meeting in the first place because it conflicted with a standing obligation, such as shift-work, it might be appropriate to allow the adjourned meeting to be held at a different time or on a different day of the week.

A small number of jurisdictions spell out the fact that a meeting may otherwise be adjourned and resumed at a later date. In the absence of such a provision, this result would flow from the general rule that a meeting controls its own procedure in the absence of some restriction on its powers: see [7.15] above.[1]

1 Sarah Corbin Robert, Henry M Robert III and William J Evans, *Robert's Rules of Order* (9th ed, Scott Foresman, 1990), p xliv.

AUSTRALIAN CAPITAL TERRITORY

[31.10] Business cannot be transacted at a general meeting unless a quorum is present. If the corporation has three or more members, a quorum is routinely constituted by persons entitled to exercise voting rights in respect of not less than half the total number of units.[2] Where there are only two members, both must be present to constitute a quorum.[3]

The 2001 legislation contains some very interesting provisions relating to the situation that arises in a corporation with three or more members if the quorum is not obtained within half an hour. If a quorum is not present by then, the meeting may proceed to business with a reduced quorum as specified in the legislation. A reduced quorum for this purpose is made up by two or more people present at the meeting who are entitled to vote. There is no obligation to proceed to business with a reduced quorum; those present may decide to adjourn the meeting.[4] If a reduced quorum is not present either, the meeting shall be adjourned. In both cases the meeting is, according to the legislation, adjourned to the same day of the next week, at the same place and time.[5] If at the adjourned meeting a quorum is not present, those present may proceed to business or adjourn the meeting for yet another week to the same time and place.[6]

Where a resolution is passed at a meeting with a reduced quorum, the owners corporation must give each person who was entitled to notice of the meeting, notice of the fact that a resolution was passed with a reduced quorum.[7] The decision will take effect 21 days after the resolution was passed, but only if such notice is given.[8] Further, a resolution passed with a reduced quorum will be disallowed if a petition requiring it to be disallowed is signed by a majority of those who would have been entitled to vote on the motion had they been present at the meeting.[9] For greater certainty, the reduced quorum decision may be confirmed at a subsequent meeting with a full quorum.[10] Finally, the legislation specifies that these provisions do not prevent recision of the reduced quorum decision by a general meeting.[11]

In addition to the provisions for adjourning a meeting if a quorum cannot be obtained, there are provisions that apply if the notice of the meeting is

2 *Unit Titles Act 2001* (ACT), s 99(1)(a).
3 *Unit Titles Act 2001* (ACT), s 102(1).
4 *Unit Titles Act 2001* (ACT), s 99(5).
5 *Unit Titles Act 2001* (ACT), s 99(3) and (5).
6 *Unit Titles Act 2001* (ACT), s 99(6).
7 *Unit Titles Act 2001* (ACT), s 100(1).
8 *Unit Titles Act 2001* (ACT), s 101(1) and (2).
9 *Unit Titles Act 2001* (ACT), s 101(3).
10 *Unit Titles Act 2001* (ACT), s 101(4).
11 *Unit Titles Act 2001* (ACT), s 101(5).

defective. These will normally be invoked where the required amount of notice has not been received. If a person has received a defective notice of meeting, that person or someone acting on his or her behalf may ask that the meeting be adjourned. Such a request, once received, must be given to the chairperson. The chairperson shall adjourn the meeting to a date to be determined by the persons present and voting at the meeting, if there are reasonable grounds that defective notice was received and that it would be unfair to allow the meeting to go ahead.[12]

NEW SOUTH WALES

[31.15] A motion submitted at a general meeting of an owners corporation must not be considered, and an election must not be held, unless a quorum is present to consider and vote on the motion or on the election.[13] A quorum for considering a matter at a meeting is one quarter of the number of persons entitled to vote on the matter.[14] Alternatively, proprietors whose unit entitlement is not less than one-quarter of the aggregate unit entitlement can constitute a quorum.[15] These persons can be present in person or by proxy.[16] If there is more than one owner in the strata scheme and the quorum of one-quarter of the persons involved would be less than two persons, then the quorum is two persons entitled to vote on the matter.[17] This means that if there are three to seven proprietors, the quorum is two.

If no quorum is achieved within half an hour at the first meeting at which a matter is to be considered, the meeting shall stand adjourned for at least seven days.[18] If at the time fixed for the adjourned meeting the quorum as previously defined is not obtained, those present in person or by proxy shall constitute a quorum.[19]

Notices of meeting[20] and of adjourned meetings[21] are required to set out the provisions "of this Act" for determining a quorum. There are no provisions dealing with quorums in the body of the *Strata Schemes Management Act 1996* (NSW), so it would be less confusing if the reference was to "provisions of this Schedule".

12 *Unit Titles Act 2001* (ACT), s 98.
13 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(1).
14 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(2)(a).
15 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(2)(b).
16 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(2)(a), (b).
17 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(3).
18 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(4).
19 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(5).
20 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(5).
21 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 13(3).

A general meeting of an owners corporation may also be adjourned for any reason if a motion is passed at the meeting for the adjournment.[22] It must be adjourned if a quorum is not present within half an hour, unless the meeting has already been adjourned for this reason.[23] If a meeting is adjourned, the person who was or would have been presiding at the meeting must fix the time and place for its resumption.[24] Notice of that time and place must be served by the secretary on the members of the owners corporation at least one day prior to the meeting.[25]

NORTHERN TERRITORY

[31.20] Before business can be transacted at a meeting of proprietors in the Northern Territory, a quorum consisting of persons entitled to exercise voting rights in respect of not less than half the total number of units must be present.[26]

If a quorum is not obtained within half an hour, the legislation requires the meeting to be adjourned. The meeting will be reconvened on the same day of the next week, at the same place and time. If a quorum is not then present, the persons present who are entitled to vote constitute a quorum.[27]

In addition to the provisions for adjourning a meeting if a quorum cannot be obtained, there are provisions that apply if less than the required period of notice was received. The required period may be 14 days, 21 days or one month (see [30.20] above). If a person who has received less than the required amount of notice requests it, the meeting shall be adjourned to a date determined by the persons present and voting at the meeting.[28]

QUEENSLAND

[31.25] The regulation module for the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld) provides that the quorum for a meeting is at least 25 per cent of the number of voters entitled to be present at the meeting, but if that number is three or more, at least two persons must be present in person. If that number is two or less, only one person need be present.[29] If a quorum is not present within 30 minutes of the set time then the meeting must be adjourned to the same place, day and time

22 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 13(1).
23 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 12(4), see above.
24 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 13(2)(a).
25 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 13(2)(b).
26 *Unit Titles Act 1976* (NT), s 63(1).
27 *Unit Titles Act 1976* (NT), s 63(2).
28 *Unit Titles Act 1976* (NT), s 61(6).
29 *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld), reg 46(2).

in the next week, unless that is not practicable, in which case another time or place may be appointed but all members must be advised in writing of that place and time.[30] If a quorum is not then obtained, the meeting may proceed to business if the chairperson or body corporate manager is present in person.[31]

SOUTH AUSTRALIA

[31.30] The quorum for a general meeting of proprietors in South Australia is determined by dividing the number of persons entitled to attend and vote at the meeting by two, disregarding any fraction and adding one. If the number of members present is equal to or larger than this number, the meeting may proceed to business. If a quorum is not present within half an hour of the time appointed for a general meeting, the members present must appoint another day, time and place for the meeting. The day so chosen must be at least seven but not more than 14 days later. The secretary of the corporation must cause "reasonable notice of the day time and place for the adjourned meeting to be given in writing to the members of the corporation". If on the subsequent occasion a quorum is not obtained within half an hour, the persons present and entitled to vote constitute a quorum.[32]

The only provisions in the *Community Titles Act 1996* (SA) governing the adjournment of meetings relate to the process to be followed where a quorum is not obtained at the first meeting. It follows that adjournment for any other cause is governed by the bylaws of the corporation or by the decision of the meeting as properly recorded in resolutions.[33]

VICTORIA

[31.35] The quorum for a meeting is at least 50 per cent of the total votes or of the total unit entitlement.[34] If there is no quorum, the meeting may proceed but all decisions are interim decisions. Written notice of all interim decisions must be forwarded to members within 14 days of the meeting. Upon receipt of such notice, members may petition the committee to hold another meeting within 28 days of the original meeting. If such a meeting is held it may confirm or rescind the interim decisions. If no petition is received, the interim decisions will take effect 29 days after the meeting.[35]

30 *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld), reg 46(3) and (5).
31 *Body Corporate and Community Management (Accommodation Module) Regulation* 1997 (Qld), reg 46(4).
32 *Community Titles Act 1996* (SA), s 83(4), (5).
33 *Community Titles Act 1996* (SA), s 83(9).
34 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 409.
35 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 410.

WESTERN AUSTRALIA

[31.40] The prescribed quorum for a general meeting of a strata company is normally one-half of the persons entitled to vote when present at such a general meeting. Proxies may be counted for the purpose of determining whether a quorum is present. If within half an hour of the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of proprietors, shall be dissolved. In any other case, the meeting is to be adjourned to the same day in the next week, at the same place and time. If, at the adjourned meeting, a quorum is not present within half an hour from the time appointed for the meeting, the persons entitled to vote and present constitute a quorum.[36]

For the purposes of a resolution passed without dissent or a special resolution, a sufficient quorum is:

- the proprietors of not less than 50 per cent of the lots in the scheme; or
- proprietors whose votes have a value of not less than 50 per cent of the aggregate unit entitlement of the lots in the scheme.[37]

These persons may be present either in person or by proxy.

In the case of a two-lot scheme, both proprietors must be present in person or by proxy to constitute a quorum for a general meeting.[38]

The chairperson may, with the consent of the meeting, adjourn any general meeting from time to time and from place to place. However, the only business that may be transacted at an adjourned meeting is the business left unfinished at the meeting from which the adjournment took place.[39]

36 *Strata Titles Act 1985* (WA), Sch 1, reg 12(3), (4).
37 *Strata Titles Act 1985* (WA), s 3C(2).
38 *Strata Titles Act 1985* (WA), s 50B.
39 *Strata Titles Act 1985* (WA), Sch 1, cl 12(5).

Chapter 32

Presiding officer

[32.05] Five Australian jurisdictions have some provisions in their legislation relevant to the selection and powers of the presiding officer at meetings of proprietors. Even in these jurisdictions the legislation does not deal with all relevant questions, which include the manner of selecting the presiding officer, the voting power and the ambit of control of the presiding officer.

In the Australian Capital Territory, the Northern Territory and South Australia, the members in general meeting choose the person who will preside at a proprietor's meeting. In New South Wales and Western Australia the selection is a matter for the executive committee or council. The selection of presiding officer may be effective only for the specific meeting, as in the Australian Capital Territory and the Northern Territory, or it may be for a term of office as in New South Wales, South Australia and Western Australia. If the general provision is that the presiding officer will serve for a term of office, the legislation may allow members to select a temporary replacement if that person cannot attend the meeting. There is such a fallback provision in every jurisdiction which provides for a term of office.

There are two issues relating to the voting powers of the presiding officer. The first issue is whether the presiding officer retains any power he or she might have to cast a deliberative vote. In the Australian Capital Territory, New South Wales and the Northern Territory the legislation specifies that the presiding officer is able to exercise the deliberative vote of a member. In other jurisdictions this result is reached by applying the general law of meetings: see [6.45] above.

The second issue is whether the presiding officer has the power to resolve deadlocks by using a casting vote: see [6.45] above. There is no provision for a casting vote in the legislation of New South Wales and South Australia, but it would be possible for strata title companies to confer such a vote through their constitutions. In the Australian Capital Territory and the Northern Territory, the legislation confers a casting vote on the presiding officer, but there is no rule as to how the casting vote should be exercised. In Western Australia the legislation provides that in the case of an equality of votes the question is to be decided in the negative. This provision is curious in that it may be possible

to word the resolution to predetermine the way a casting vote would be used. The intention appears to be to provide that the casting vote should be used to preserve the status quo, which is in line with other precedent.

Four jurisdictions embody some provisions about the presiding officer's powers of decision in their legislation. In the Australian Capital Territory, New South Wales, the Northern Territory and Western Australia, a declaration by the providing officer that a resolution has been passed is conclusive, without proof of the number of votes cast. The interpretation of this provision seems to be in line with the company law authority: see [23.15] above.

In New South Wales and Western Australia, the legislation also declares that a presiding officer has power to decide how a poll is to be conducted. In New South Wales the presiding officer's powers to declare a motion out of order and to decide who has voting rights are also confirmed by the legislation. In other jurisdictions these powers arise from the general law of meetings.

AUSTRALIAN CAPITAL TERRITORY, NORTHERN TERRITORY

[32.10] The members present at the meeting elect the presiding officer. If the officer so elected vacates the chair or is unwilling or unable to preside during the course of the meeting, the members present at the meeting elect another presiding officer.[1] This may be necessary if, for example, the chairman initially selected is personally interested in the resolution to be considered. Unless a unanimous resolution is required or a poll has been demanded, a declaration by the chairman of the meeting that a resolution has been carried is conclusive evidence of the fact, without proof of the number or proportion of votes recorded against or in favour of that resolution.[2]

The chairman of a general meeting is entitled to exercise his or her deliberative vote as a member.[3] If there is an equality of votes on an ordinary resolution, the chairman is entitled to a second or casting vote.[4] The casting vote may be exercised whether the voting has been by show of hands or on a poll. In the Australian Capital Territory a casting vote is not available if the corporation has only two members.[5]

NEW SOUTH WALES

[32.15] Where, in accordance with s 18(1) of the *Strata Schemes Management Act 1996* (NSW), the executive committee has met and appointed a chairperson, that individual will preside at any general meeting of the owners

1 *Unit Titles Act 2001* (ACT) s 103, *Unit Titles Act 1976* (NT), s 62.
2 *Unit Titles Act 2001* (ACT) s 122; *Unit Titles Act 1976* (NT), s 66.
3 *Unit Titles Act 2001* (ACT) s 118(a); *Unit Titles Act 1976* (NT), s 70.
4 *Unit Titles Act 2001* (ACT) s 118(b); *Unit Titles Act 1976* (NT), s 70.
5 *Unit Titles Act 2001* (ACT) s 87(4)(b).

corporation at which he or she is present.[6] If this individual is not present then the meeting may elect one of their number to preside at that meeting to fill the chair.[7] The chairperson does not have a casting vote in relation to any motion but may vote in his or her own right if otherwise entitled.[8] This means that the possibility of a meeting failing to resolve a matter exists. If this occurs the provisions in the *Strata Schemes Management Act 1996* (NSW) allow the adjudicator to make an order or settle a dispute.[9] The chair has the power to rule a motion out of order if it would conflict with the Act or bylaws or be unlawful or unenforceable.[10] A motion must also be declared out of order by the chairperson if notice of the motion has not been given, unless the motion is to amend a motion of which notice has been given.[11]

The chair may be called upon to announce the names of the persons who are entitled to vote on a matter before submitting the matter to a vote.[12] Any person present at the meeting and entitled to vote at a general meeting of the owners corporation may request that this be done.[13]

A poll, where called for, is to be conducted in such manner as the chairperson thinks fit.[14] When the votes have been counted, the chair's declaration of the result of the voting is conclusive, without the need for proof of the votes recorded for or against the motion.[15] This provision should be understood against the background of the discussion to be found above in Chapter 6. The declaration is conclusive without proof of votes recorded but not in opposition to the votes recorded.

QUEENSLAND

[32.20] The chairperson of the committee, if present at the general meeting, will chair the general meeting. If the chairperson is not present or the position is vacant then another person elected with their consent may chair the meeting. The body corporate manager may advise the chair but may not chair the meeting unless the body corporate manager is elected to the position or is the only person present at the meeting.[16] There is no provision in the regulations about what to do if the votes are equal.

6 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 15(1).
7 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 15(2).
8 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 15(3).
9 *Strata Schemes Management Act 1996* (NSW), s 138.
10 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 14(a).
11 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 14(b), 35(3).
12 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 16.
13 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 16.
14 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 19(1).
15 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 20.
16 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 44.

SOUTH AUSTRALIA

[32.25] Meetings of the general body of a community corporation are to be chaired by the presiding officer of the corporation. At the first meeting of the corporation, the developer, or one of them if there are several, will preside until the presiding officer has been appointed. In the absence of the presiding officer, those present may appoint one of their number to preside at the meeting.[17]

VICTORIA

[32.30] The general meeting may elect a chairperson. If the meeting does not do so, then the chairperson of the committee will chair the general meeting.[18] The chairperson may exercise any voting power possessed either personally or as a proxy. The chairperson may exercise a second or casting vote only if the voting is equal and the chairperson has voting power. It is provided that if the voting is equal and the chairperson does not vote then the motion is not passed.[19]

WESTERN AUSTRALIA

[32.35] Under the provisions in the bylaws contained in the First Schedule to the *Strata Titles Act 1985* (WA), the members of the strata company in general meeting elect the members of the council.[20] The members of the council then determine at the first meeting of the council who is to be the "chairman", secretary and treasurer of the council.[21] The chairman, secretary and treasurer of the council are also respectively the chairman, secretary and treasurer of the strata company.[22] The chairman so selected will normally preside at general meetings of the strata company. However, the bylaws allow a strata company, by resolution in general meeting, to authorise a person who is not a proprietor to act as the chairman of the strata company for the purposes of that meeting. A person so appointed may act until the end of the meeting for which he or she was appointed.[23]

Unless a poll is demanded, a declaration from the chair that a resolution has been carried on the show of hands is conclusive evidence of the fact, without proof of the number or proportion of votes recorded in favour of or against such resolution.[24] If a poll is demanded, it is to be taken in the manner

17 *Community Titles Act 1996* (SA), s 83.
18 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 411.
19 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 413.
20 *Strata Titles Act 1985* (WA), Sch 1, bylaw 4.
21 *Strata Titles Act 1985* (WA), Sch 1, bylaw 5.
22 *Strata Titles Act 1985* (WA), Sch 1, bylaw 7(1).
23 *Strata Titles Act 1985* (WA), Sch 1, bylaw 7(2), (3).
24 *Strata Titles Act 1985* (WA), Sch 1, bylaw 12(8).

determined by the presiding officer.[25] There is no provision in the bylaws as to whether the presiding officer has a deliberative vote. This may be explained by the fact that the presiding officer may or may not be a member of the body corporate. The result of the omission from the legislation is that it is open to the body corporate to adopt a bylaw stipulating that the presiding officer does or does not have a deliberative vote. In the absence of such a bylaw, the general law of meetings appears to apply, preventing the presiding officer from having a deliberative vote. If this issue was tested, the courts may try to avoid this result by inference, but the basis for such an inference is unclear. The position with regard to the presiding officer's casting vote is much clearer: because it is provided that in the case of an equality of votes the question is to be determined in the negative,[26] it is clear that the presiding officer does not have a casting vote.

25 *Strata Titles Act 1985* (WA), Sch 1, bylaw 12(10).
26 *Strata Titles Act 1985* (WA), Sch 1, bylaw 12(11).

Chapter 33

Voting entitlements

[33.05] There are provisions about voting entitlements in proprietors' corporations in the legislation in six Australian jurisdictions. These provisions are largely uniform. The provisions in Queensland and Victoria are found in the regulations.

In five jurisdictions the legislation specifies that unless all contributions in respect of the lot are paid, the right to vote is not available in the case of an ordinary resolution. The Tasmanian legislation does not so specify; the Victorian regulations are also silent on the topic. In five jurisdictions there are provisions which stipulate that, if the lot is subject to a mortgage and the mortgagee elects to exercise the right to vote on any matter, the right of the proprietor to vote is displaced. The legislation of South Australia is silent on this point. In cases where a unanimous resolution is required the owner is disqualified from voting in the Australian Capital Territory, the Northern Territory and Western Australia, whether or not the mortgagee chooses to vote. In New South Wales the provisions about priority votes apply, and it would appear that an owner would be deprived of the right to vote on a unanimous resolution only if the mortgagee or chargee opts to exercise their priority vote. The New South Wales approach is preferred; a unanimous resolution should require universal consent.

In the Australian Capital Territory, the Northern Territory and South Australia, the legislation specifies that where any of the lots consist of residential property, each owner shall be entitled to one vote. In all six jurisdictions the legislation specifies that, where the lot is held by joint owners, they must jointly appoint a proxy to exercise their voting rights. Finally, in three jurisdictions, the Australian Capital Territory, the Northern Territory and Western Australia, the legislation spells out who may vote in the case where the beneficial owner of a lot is under a legal disability. These provisions appear otiose, as the same result could and would be achieved under legislation dealing with the disabilities in question.

AUSTRALIAN CAPITAL TERRITORY

[33.10] The 2001 legislation in the Australian Capital Territory provides that at a general meeting the voting rights depend on ownership of the unit. Unless the vote is a poll vote, each vote is of equal value. For a poll vote, the weight of each vote is proportional to the unit entitlement of the unit for which it is exercised.[1]

If the unit is owned by a single individual, the unit owner has the right to vote on a motion at a general meeting. If the unit is owned by a single company, the company is entitled to vote through its representative. If the unit is owned jointly the unit owners' representative carries the voting rights.[2]

If a unit is subject to a mortgage and a mortgagee voting notice is in force for the unit, the person entitled to vote in respect of the unit is the mortgagee's representative.[3] A mortgagee voting notice may be given to the corporation by a mortgagee. This voting notice must: state that the unit is subject to a mortgage; state that the mortgagee proposes to exercise the voting rights in respect of the unit; and identify the mortgagee's representative, giving the full name and address for correspondence.[4] The mortgagee is entitled to give such notice where the interest of an owner of a half-share in the unit is subject to mortgage, but where there is more than one mortgage only the mortgagee with priority is entitled to give such notice.[5] The voting notice may be amended or revoked and will be revoked by discharge of the mortgage. If a mortgagee fails to give notice of the discharge of the mortgage to the corporation within 14 days after the discharge, a penalty applies.[6]

An owner may also be disentitled to vote, where the corporation has three or more members, if all amounts payable to the owners corporation for the unit have not been paid.[7] In addition, a person is not entitled to vote on a motion at a general meeting if a deadlock order is in force to withdraw that entitlement.[8] A deadlock order can be made by a magistrate's court on the application of the owners corporation, a member or a mortgagee's representative if an unsuccessful attempt has been made by an owners corporation to obtain the passage of motions requiring an unopposed or unanimous resolution.[9]

1 *Unit Titles Act 2001* (ACT), s 116.
2 *Unit Titles Act 2001* (ACT), s 110(1).
3 *Unit Titles Act 2001* (ACT), s 110(2).
4 *Unit Titles Act 2001* (ACT), s 112(1) and (2).
5 *Unit Titles Act 2001* (ACT), s 112(3) and (4).
6 *Unit Titles Act 2001* (ACT), s 113.
7 *Unit Titles Act 2001* (ACT), s 110(3).
8 *Unit Titles Act 2001* (ACT), s 110(4).
9 *Unit Titles Act 2001* (ACT), s 124.

NEW SOUTH WALES

[33.15] Each owner, and each person entitled to a priority vote, has voting rights that may be exercised at a general meeting of the owners corporation. The owner or person must be shown on the strata roll. In the case of a corporation, the company nominee is shown on the strata roll.[10]

The general rule is that a person has one vote for every lot owned and on a poll vote the rights are related to unit entitlement.[11] An exception to this rule provides that if the original proprietor still owns half the lots, the original proprietor's voting rights are one-third of this.[12] If there are 24 lots and the original proprietor owns 12 of these, the original proprietor has four votes on the election of the council. Other proprietors will have 12 votes. However, if the original proprietor owns one less than half the number of lots, the original proprietor will be able to exercise full voting rights for all those units. In the example given, 11 votes out of 24. It need hardly be pointed out that these 11 votes will give the original proprietor substantial voting control.

A priority vote is a vote by the mortgagee or covenant chargee shown on the strata roll as having priority.[13] If the mortgagee chooses to vote, the mortgagee's exercise of the vote will displace the right of the proprietor to vote.[14] In practice, mortgagees rarely choose to attend meetings or to vote. In the absence of the mortgagee the owner is entitled to vote. A person who has an interest in a lot that gives a right to cast a vote either personally or by nominee at meetings of the owners corporation must notify the owners corporation in writing of that interest.[15] The notice must specify:

- the person's full name
- an Australian address for service of notices
- the lot concerned and the exact nature of the person's interest in it
- the date on which the person acquired the interest; and
- if the voting entitlement is to be exercised by a nominee, the nominee's full name and address for service of notices.

If the interest conferring the right to vote is a mortgage, the notice must either be accompanied by confirmation by the mortgagor or be verified by statutory declaration of the mortgagee.[16] Apart from mortgagees and owners, such an interest may vest in the executor or administrator of a deceased estate, in the

10 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 10(1).
11 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 17(1), 17(3) and 18(1).
12 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 17(2), 17(4) and 18(3).
13 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 7(1).
14 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(9).
15 *Strata Schemes Management Act 1996* (NSW), s 118.
16 *Strata Schemes Management Act 1996* (NSW), s 118(2).

liquidator or receiver in bankruptcy of any person, and in any person who has an order of the court to this effect.

No person is entitled to vote on an ordinary resolution unless all contributions and other moneys payable to the body corporate have been duly paid before the commencement of the meeting.[17]

The *Strata Schemes Management Act 1996* (NSW) requires certain decisions to be made by unanimous resolution, including:

- the decision to seek exemption from requirements to insure the common property;[18]
- the decision not to establish a sinking fund,[19] or to distribute the surplus funds in an administrative or sinking fund;[20] and
- the decision to pay an owner for the transfer or lease of property.[21]

Strangely, there are no express provisions either in the *Strata Schemes Management Act 1996* (NSW), or in the Schedule to it, governing the procedure to be adopted when a unanimous resolution is required. The provision that no vote can be exercised if contributions are unpaid indicates that this does not apply in the case of a unanimous resolution.[22] The owners corporation is also required to give notice of general meeting to mortgagees or covenant chargees if an item on the agenda requires a special or unanimous resolution.[23]

If the interest that confers the right to vote is held jointly, provisions in the Schedule apply to regulate the manner in which they are to be exercised. If joint mortgagees or joint covenant chargees hold the interest, the vote may only be exercised by proxy duly appointed by all of them jointly. The proxy may be held by one of the joint mortgagees or joint chargees.[24] If the voting right belongs to joint owners of a unit, a proxy who may be one of the joint owners may exercise it.[25] If a proxy has not been duly executed and lodged, one of the joint owners may act as proxy if the other joint owners either consent or are absent.[26] If this is not the situation, the owner first named on the strata roll may vote.[27]

17 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(8).
18 *Strata Schemes Management Act 1996* (NSW), ss 86, 83.
19 *Strata Schemes Management Act 1996* (NSW), s 69.
20 *Strata Schemes Management Act 1996* (NSW), s 72.
21 *Strata Schemes Management Act 1996* (NSW), s 112.
22 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 8(2), (8).
23 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 32(2).
24 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(2).
25 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(4).
26 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(5)(a).
27 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(5)(b).

If there are owners of successive estates in a lot, only the owner of the first estate may vote at a general meeting.[28] If the owner of a lot holds it as trustee, a person beneficially entitled may not vote at a general meeting.[29]

NORTHERN TERRITORY

[33.20] At a general meeting of the corporation where a unanimous resolution is required, each member is entitled to exercise one vote. If a unanimous resolution is not required, one vote is exercisable in respect of each unit. That vote is exercisable by the member who is the proprietor of that unit or, where there are two or more proprietors of that unit, jointly by the members who are those proprietors.[30]

The right to vote in respect of a unit is not exercisable unless all amounts due and payable in respect of that unit to the corporation have been paid.[31] This provision does not apply where a unanimous resolution is required. The right of a person to vote at a general meeting may be exercised by him or her if he or she has attained the age of 18 years.[32] If the member has not attained the age of 18 years, then his or her guardian may exercise the vote.[33] If a person entitled to vote is under a legal disability, other than infancy, that prevents him or her from lawfully dealing with his or her property, then the person who is, for the time being, authorised by law to control that property may exercise the vote.[34]

The legislation also provides for situations in which it is impossible or impracticable to obtain the exercise by a person of his or her right to vote on a matter requiring a unanimous resolution. In this situation, the court, on the application of the corporation or of any other person entitled to vote on the matter, may intervene. The court may either appoint a fit and proper person to exercise the right to vote, or declare that any person's right to vote shall be dispensed with either on a particular occasion or generally. Such orders may also be made if it is not known who may exercise the right to vote.[35] If the court makes an order appointing a person to exercise the right to vote, that person may exercise the right either in person or by appointing a proxy.[36] If the estate or interest of the proprietor of a unit is subject to a mortgage, the mortgagee may give the corporation written notice that the unit is subject to

28 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(6).
29 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(7).
30 *Unit Titles Act 1976* (NT), s 64.
31 *Unit Titles Act 1976* (NT), s 71.
32 *Unit Titles Act 1976* (NT), s 74(a).
33 *Unit Titles Act 1976* (NT), s 74(c).
34 *Unit Titles Act 1976* (NT), s 74(b).
35 *Unit Titles Act 1976* (NT), s 75(1).
36 *Unit Titles Act 1976* (NT), s 75(2), (5).

the mortgage and that he or she proposes to exercise voting rights in respect of the unit. If there are two or more mortgages, the mortgagee who is entitled to priority may exercise the rights conferred by this section.[37] If two or more persons hold the unit as tenants in common, and one of those tenants in common has mortgaged their interest in the unit, these provisions still apply.[38]

Where a mortgagee of a unit has given the notice referred to and he or she or his or her proxy is present at a general meeting of the corporation at the time of voting, the proprietor's right to vote shall not be exercised. The mortgagee may, instead, exercise the right.[39] This provision does not apply if the mortgage has been discharged.[40] If the matter requires a unanimous resolution, the right to vote shall not be exercised by the proprietor; and may be exercised by the mortgagee.[41] It appears, from the wording of the provisions about unanimous resolutions, that a situation may arise in which the right to vote is not exercised. The proprietor is prevented from voting and the mortgagee has discretion as to whether or not to vote. The possibility that a resolution might be passed over the opposition of a proprietor because of apathy by the mortgagee is problematic.

Where two or more persons are entitled to exercise one vote jointly, only a person jointly appointed by them as their proxy shall exercise that vote.[42] The proxy may, but need not, be one of the joint holders. Where two or more persons are mortgagees of a unit as joint tenants or as tenants in common, the rights conferred by s 67 must be exercised jointly.[43] Further, those mortgagees shall be deemed not to be present at a meeting unless their proxy is present at that meeting.[44]

QUEENSLAND

[33.25] The legislation stipulates, in respect of each method of voting, that only one vote may be exercised for each lot included in the scheme.[45] Where a resolution without dissent or a special resolution is required, the vote may be cast in person, by proxy or in writing.[46] An ordinary resolution may be passed by show of hands or by poll, if a poll is not demanded. The motion is passed

37 *Unit Titles Act 1976* (NT), s 65(3).
38 *Unit Titles Act 1976* (NT), s 65(5).
39 *Unit Titles Act 1976* (NT), s 65(3).
40 *Unit Titles Act 1976* (NT), s 65(3)(c)
41 *Unit Titles Act 1976* (NT), s 65(2).
42 *Unit Titles Act 1976* (NT), s 73(1).
43 *Unit Titles Act 1976* (NT), s 65(4)(a), (b).
44 *Unit Titles Act 1976* (NT), s 65(4)(c).
45 *Body Corporate and Community Management Act 1997* (Qld), ss 105(2), 106(2), 107(2), 108(2), 110(2).
46 *Body Corporate and Community Management Act 1997* (Qld), ss 105, 106.

if more votes are cast for the motion than against the motion.[47] Any person entitled to vote at the meeting may ask for a poll. The request may be made in person or in writing and whether or not the motion has been voted on. However, the request must be made before the next motion is voted on or, if the motion in question is the last motion to be considered, before the meeting ends.[48] Where a request for a poll is made, the motion is only passed if the total of the contribution schedule lot entitlements for the lots for which votes are counted for the motion is more than the total of the contribution schedule lot entitlements for the lots for which votes are counted against the motion. Again, where a request for a poll is made, the vote may be cast personally or by proxy or in writing.

The regulations in the "Accommodation Module" define a voter for a general meeting as an individual whose name is entered on the corporate register as either an owner or the representative of an owner, a corporate owner nominee, a subsidiary scheme representative or a nominee of a corporation who is the representative of the owner.[49] To be treated as an owner's representative, a person must give the secretary a copy of the document signed by the owner appointing the representative and details of their address. The owner may revoke such an authority by written notice of revocation to the secretary.[50]

The right of an owner, or owner's representative, to vote in respect of the lot may be displaced if a mortgagee in possession gives written notice to the secretary claiming the right to vote in respect of that unit. Further, a person does not have the right to vote in respect of the unit if the owner owes money to the corporation. The owner's right to vote survives even when a debt is owed only where a resolution without dissent is required.[51]

There are elaborate provisions in the regulations relating to the preparation of voting papers[52] and voting tally sheets[53] for both open and secret ballots and relating to the appointment and functions of a returning officer.[54]

47 *Body Corporate and Community Management Act 1997* (Qld), s 108(3).
48 *Body Corporate and Community Management Act 1997* (Qld), s 109.
49 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 47.
50 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 47(3) and (4).
51 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 47A.
52 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 40A.
53 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 54.
54 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 52.

Interestingly, the regulations provide that the body corporate may decide by ordinary resolution to allow voting to be conducted electronically.[55] A secret ballot may be conducted electronically provided that the identity of the voter will not be disclosed and that votes will be rejected if cast by someone not entitled to vote.[56]

SOUTH AUSTRALIA

[33.30] The owner of a community lot is entitled to attend and vote at general meetings of the corporation, subject to restrictions found in the legislation. No vote is exercisable in relation to a lot unless all amounts payable to the corporation in respect of the lot have been paid.[57] Only one vote may be cast in respect of each community lot on any matter if any one or more of the lots is to be used solely or predominantly for residential purposes. In any other case the number of votes is the number prescribed by the bylaws — or if the bylaws are silent, one vote.[58] A unanimous resolution is required to vary the number of votes prescribed by the bylaws.[59] An owner of a development lot is not entitled to attend or vote at a general meeting in respect of that lot.[60] If the developer owns one or more of the community lots, he or she is entitled to the aggregate of the votes in respect of those lots. However, this is subject to the limitation that the developer's total voting rights can never be greater than the combined voting power of the other members of the corporation.[61] There is also a restriction on the developer or an associate of the developer when it comes to representing other owners. Such a person may not be nominated as a representative of an owner or owners if one or more of the community lots is used or to be used, solely or predominantly for residential purposes, unless the community parcel is subject to a leaseback arrangement.

If there is more than one owner of a lot, a person may be nominated by all of the owners to vote on their behalf. This person may, but need not, be one of the owners.[62] The nomination must be by written notice to the secretary and must be signed by all of the owners of the lot. It must specify the meeting or meetings to which it relates. Such notice may be revoked at any time by written notice to the secretary given by any one of the owners

55 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 40A(4)(f).

56 *Body Corporate and Community Management Act 1997 (Accommodation Module) Regulation 1997* (Qld), reg 51A.

57 *Community Titles Act 1996* (SA), s 84(14).

58 *Community Titles Act 1996* (SA), s 87(2).

59 *Community Titles Act 1996* (SA), s 87(1).

60 *Community Titles Act 1996* (SA), s 84(2).

61 *Community Titles Act 1996* (SA), s 87(3).

62 *Community Titles Act 1996* (SA), s 84(4).

of the lot.[63] Where there is more than one owner of a lot and there is no person entitled to vote on their behalf pursuant to a nomination, the legislation provides that if only one owner attends the meeting, that owner may vote. If two or more owners attend the meeting, the vote is exercisable by one of them in accordance with an agreement between all the owners attending the meeting. If there is no such agreement, none of the owners is entitled to vote.[64]

TASMANIA

[33.35] If the design of the strata scheme involves only a single body corporate, each owner of a lot is a member of the body corporate and entitled to vote at general meetings of the body corporate. If two or more bodies corporate have been constituted for the strata or community scheme, the membership and voting rights of the members of the body corporate are determined by the constituent documents registered under the *Strata Titles Act 1998* (Tas).[65] If a mortgagee is in possession of a lot under the mortgage, the mortgagee becomes entitled to exercise any voting rights the owner may have, to the exclusion of the rights of the owner.[66] The rights of co-owners to exercise voting entitlements depend on the voting procedure adopted: see Ch 35. Co-owners must appoint a proxy to exercise their voting rights. If co-owners have neglected to appoint a proxy, they are not entitled to vote on a show of hands, unless the motion requires a unanimous resolution. Any one co-owner may, however, require a poll; on a poll a co-owner is entitled to voting rights proportionate to the co-owner's interest in the lot.[67]

VICTORIA

[33.40] Where a vote is taken at a meeting by show of hands, the regulations provide that there is to be one vote for each lot.[68] Where a poll is requested, votes are collected by written ballot and the basis is one vote for each unit of lot entitlement.[69] Alternatively, voting can be by postal ballot. In this case the closing date for the ballot must be not less than 14 days after the date the notice of the ballot is posted. An ordinary resolution will be carried by postal ballot where it receives a majority of the votes cast, but the votes cast must not be less than the required quorum for a meeting, which is 50 per cent.[70]

63 *Community Titles Act 1996* (SA), s 84(6).

64 *Community Titles Act 1996* (SA), s 84(7).

65 *Strata Titles Act 1998* (Tas), s 74(1), (2).

66 *Strata Titles Act 1998* (Tas), s 74(3).

67 *Strata Titles Act 1998* (Tas), s 76(3).

68 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 412(1).

69 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 412(3).

70 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 408.

A member may use a written proxy to appoint a named individual to vote for him or her at a meeting. The written instrument must be delivered to the secretary of the body corporate either by post or in person. It may contain instructions as to how the proxy is to vote. It will lapse 12 months after the date on which it is executed unless it provides for an earlier termination.[71] The regulations also provide that a member who owes fees or other amounts to the body corporate is not entitled to vote unless a special or unanimous resolution is required.[72]

WESTERN AUSTRALIA

[33.45] Proprietors of units in a strata company, who are adults and who are not under a legal restriction, will normally exercise the voting rights conferred by their membership of the company. However, a proprietor may not vote unless all contributions payable in respect of her or his lot have been duly paid and any other moneys recoverable under the Act by the strata company from her or him at the date of the notice given to proprietors of the meeting have been duly paid before the commencement of the meeting.[73]

If the interest of the proprietor is subject to a registered mortgage and the mortgagee concerned has given written notice of the mortgage to the strata company, the power to vote is affected by that mortgage. In the case of a unanimous resolution, the proprietor is not entitled to exercise the vote. The power to vote is conferred, instead, on the mortgagee whose mortgage is first in priority. In any other case the proprietor may only vote if the mortgagee is not present at the meeting personally or by proxy.[74]

If the proprietor is an infant, the legally-appointed guardian may exercise the voting powers. If a proprietor is unable to control his or her property for any other reason, the person authorised by law to control his or her property may exercise the powers of voting.[75] If there is no person able to vote, or if the company is unable to find a person who is able to vote, in respect of a lot, the District Court is empowered to appoint the Public Trustee or some other fit and proper person to exercise powers of voting.[76]

Where proprietors are co-owners of a lot, they may vote by way of a jointly appointed proxy. If they neglect to jointly appoint a proxy, they are not entitled to vote on a show of hands unless a unanimous resolution is required.[77] On any poll each co-proprietor is entitled to such part of the vote

71 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 406.
72 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 414.
73 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(6).
74 *Strata Titles Act 1985* (WA), s 50(6).
75 *Strata Titles Act 1985* (WA), s 50(1).
76 *Strata Titles Act 1985* (WA), s 50(2).
77 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(7).

applicable to a lot as is proportionate to her or his interest in the lot.[78] If the vote is by poll and one or more co-owners elect to vote personally, the joint proxy has a vote proportionate to the interests in the lot of such of the joint proprietors as do not vote personally or by individual proxy.[79]

78 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(8).
79 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(9).

Chapter 34

Proxies

[34.05] The approach to the question of whether proxy voting should be allowed depends on the answer to the question of whether the right to vote is an incident of property or an aspect of democratic government: see Ch 4. In the context of proprietors' meetings, six Australian jurisdictions embody provisions relevant to proxy voting in their legislation. The South Australian legislation does not use the term but does provide for an equivalent. There are no relevant provisions in the Victorian legislation. In six jurisdictions the legislation provides that proxies can be utilised. The Queensland legislation stipulates that the regulation module may authorise proxy voting. It appears that generally in Australia the right to vote in proprietors' meetings is seen as an incident of property.

The New South Wales and Queensland legislation contains detailed provisions as to how proxy voting is to be managed. These provisions relate to such matters as the duration of the proxy and the imposition of limiting instructions. In the Australian Capital Territory, the Northern Territory and Tasmania, these details are governed by the constitution of the individual body corporate. The South Australian and Western Australian legislation contains some details.

A particular problem that arises in the context of proxy voting at proprietors' meetings relates to the use of the device to approve the appointment of the managing agent. The problem exists because many proprietors, as a matter of course, give their proxy to the managing agent. This can make the possibility of successfully challenging the choice of managing agent or the terms of the appointment very remote. The problem is exacerbated if the terms of appointment are only disclosed at the proprietors' meeting. This problem is addressed in New South Wales, South Australia and Western Australia by stipulations controlling the exercise of a proxy where the proxy holder is interested in a contract with the body corporate. These provisions may still allow the interested person to hold the proxy if the relevant details are disclosed before the meeting.

AUSTRALIAN CAPITAL TERRITORY, NORTHERN TERRITORY

[34.10] The provisions governing proxy voting in the Territories are very simple. Votes at a general meeting may be cast either personally or by proxy, whether on a poll or not. The legislation does not fix the form for the instrument appointing a proxy but stipulates that the committee shall do so.[1] In the Australian Capital Territory the legislation requires that a proxy form be sent with the notice of annual general meeting.[2]

NEW SOUTH WALES

[34.15] Individuals holding voting rights may exercise these rights in person or by proxy.[3] This applies whether the voting rights are held as owner, mortgagee or chargee. Voting rights held jointly should be exercised through the agency of a proxy: see Ch 33. A duly appointed proxy, referred to in clause 10 of Schedule 2 of the *Strata Schemes Management Act 1996* (NSW), is a proxy appointed by an instrument in the form dictated by clause 11 of the same Schedule.[4]

The prescribed form makes provision for instructions as to whether the proxy is able to vote on all matters and, if not, the matters on which the proxy is able to vote.[5] The form must also allow instructions to be given as to how the vote is to be exercised on a motion for the appointment or continuation in office of a managing agent for the strata scheme.[6] The instrument must contain the date on which it was made. It must be delivered to the secretary of the owners corporation at or before the first meeting in relation to which the instrument is to operate.[7]

An instrument appointing a proxy may be effective for more than one meeting. The person executing the proxy can specify the period for which it will be valid so long as this is not more than 12 months. However, Schedule 2 of the *Strata Schemes Management Act* specifies that a proxy is valid for the period specified or for two consecutive annual general meetings, if this is the greater period, unless it is revoked first.[8] There is an anomaly in the wording of the provision here. If the instrument specifies that the proxy is valid for six months, the proxy should arguably expire at the end of this period. If the

1 *Unit Titles Act 2001* (ACT), s 115; *Unit Titles Act 1976* (NT), s 68.
2 *Unit Titles Act 2001* (ACT), s 97(4)(a).
3 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 10(3)(a).
4 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 7(2).
5 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(2)(a).
6 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(2)(b).
7 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(3).
8 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(4).

instrument specifies that the proxy is only valid for six months, it seems that it would be revoked by its own terms at the expiry of the period; but this is far from clear. The proxy will be revoked by delivering to the secretary a later instrument appointing a proxy.[9] Presumably it can also be revoked by delivering to the secretary a notice that it is revoked.

If the right to vote is not held jointly, the proxy will be unable to vote if the person executing the proxy attends the meeting and votes in person.[10] If the instrument appointing a proxy limits the manner in which the proxy may vote at a meeting, a vote by the proxy that does not observe the limitation is invalid.[11]

Proxies may vote at a meeting of the owners corporation either on a show of hands or on a poll. The proxy may demand a poll.[12] A person appointed as proxy may exercise any votes held in his or her own right. The same person may hold several proxies and may, in this case, vote separately for each principal.[13]

QUEENSLAND

[34.20] There are provisions in the Queensland legislation permitting the regulation module to provide for proxy voting. Specifically the regulation module may stipulate whether or not a member of the body corporate may appoint a person to act as proxy at a general meeting of the body corporate.[14] If the use of proxies is permitted, the regulation module may specify who may or may not be appointed as a member's proxy.[15] Although it might appear that the legislation permits the regulation module to specify that a particular named individual may or may not be appointed as proxy, the courts may be expected to regard such provisions with suspicion.[16] The preferred interpretation should be that the regulation module may specify whether or not a member can appoint a non-member to hold their proxy.

Regulation modules may also govern the way a proxy is to be appointed, the way it may be used, and the maximum period a person's appointment as a member's proxy may stay in force.[17] Finally, the legislation stipulates that the regulation module may contain authority for the body corporate to prohibit

9 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(6).
10 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(5).
11 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(7).
12 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(8).
13 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 11(9).
14 *Body Corporate and Community Management Act 1997* (Qld), s 103(a).
15 *Body Corporate and Community Management Act 1997* (Qld), s 103(b).
16 See *Harben v Phillips* (1883) 23 Ch D 14 at 32.
17 *Body Corporate and Community Management Act 1997* (Qld), s 103(c), (d), (f).

the use of proxies for some or all matters.[18] Again, the way in which this final provision has been drafted calls for comment. On its face the statutory provision would allow the regulation module to authorise the body corporate to make individual decisions on whether or not proxies might be exercised in relation to a decision to be made on a specific occasion. The courts would be likely to regard such decisions with extreme suspicion. A better interpretation is that the regulation module may govern the type of matter for which a proxy might or might not be used.

SOUTH AUSTRALIA

[34.25] The term "proxy" is not used in the *Community Titles Act 1996* (SA), but the legislation does contain provisions authorising an owner to nominate another person to attend and vote at meetings on his or her behalf. Such a nomination must be made by written notice to the secretary of the corporation and may be revoked at any time by the owner by subsequent written notice to the secretary.[19] A person who has been so nominated must be regarded as a member of the corporation for the purposes of proceedings at the meeting.[20]

A person who has been nominated to attend and vote at meetings of a community corporation on behalf of another and who has a direct or indirect pecuniary interest in any matter to be voted on at a meeting must disclose that interest to the person who has made the nomination. The disclosure must, if practicable, be made before the vote is taken. If this is not possible, the nature of the interest must be made known as soon as practicable after the vote is taken. Failure to make such a disclosure may result in liability for a penalty of up to $15,000. A co-owner need not disclose an interest that he or she shares with the other co-owners. Moreover, a defendant may escape liability by proving that he or she was not aware at the time of the offence of the interest in the matter.[21]

TASMANIA

[34.30] The legislation provides that a member of a body corporate may vote either personally or by proxy on matters arising for decision at a general meeting.[22] Co-owners may preserve their full voting rights by jointly appointing a proxy.[23] The legislation is silent on whether the proxy may or must be one of them. It follows that the choice of proxy holder is open.

18 *Body Corporate and Community Management Act 1997* (Qld), s 103(e).
19 *Community Titles Act 1996* (SA), s 84(3), (5).
20 *Community Titles Act 1996* (SA), s 84(10).
21 *Community Titles Act 1996* (SA), s 85.
22 *Strata Titles Act 1998* (Tas), s 76(1).
23 *Strata Titles Act 1998* (Tas), s 76(3).

VICTORIA

[34.35] The Victorian regulations require the notice of general meeting to state that a member has the right to appoint a proxy.[24] The proxy holder may be given the right to attend, speak and vote on behalf of the member or the rights may be limited to the right to vote. A proxy holder may also be given the right to represent the member on a committee.[25] The proxy instrument may control how the proxy holder is to vote on a particular matter.[26] It will not authorise the proxy holder to vote on matters affecting the proxy holder in a personal capacity.[27] Neither does the regulation permit such authority to be given by written instruction. The formal requirements for the proxy are spelt out in the regulations. They include that the proxy must be in writing in the form included in a schedule to the regulations, must be delivered to the secretary and will lapse at the end of 12 months unless it stipulates an earlier termination date.[28]

WESTERN AUSTRALIA

[34.40] In Western Australia, the legislative definitions of the terms "resolution without dissent" and "special resolution" indicate that a proprietor can vote either in person or by proxy.[29] The provision as to quorum for a general meeting implies that a member can, in all cases, vote either personally or by proxy.[30]

The bylaws require an instrument appointing a proxy to be in writing under the hand of the appointer or the appointer's attorney. The proxy may be either general or for a particular meeting.[31] The person nominated to hold the proxy need not be a proprietor.[32]

The legislation disqualifies a person with a financial interest in a management contract or arrangement with the strata company from voting as a proxy for another on such a contract. In addition to the case in which the financial interest is direct, a person is considered to have such a financial interest in three situations: if they or their spouse own shares in a company, or are a member of a firm, or a director or employee of a company or of a firm, that benefits or will benefit directly from the contract or arrangement to which the motion relates.[33]

24 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 405 (6).
25 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 406 (1).
26 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 406 (2).
27 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 406 (4).
28 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 406 (3).
29 *Strata Titles Act 1985* (WA), ss 3AC(1)(b)(i), 3B(4).
30 *Strata Titles Act 1985* (WA), Sch 1, bylaw 12(3).
31 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(4).
32 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(5).
33 *Strata Titles Act 1985* (WA), s 50A(4).

The provision disqualifying an interested person from voting as a proxy on a management contract will not apply if the following requirements are observed. The notice of the meeting must include notice of the motion to approve the management contract together with the specified details (the name of the person with whom the strata company proposes to contract, the duration of the proposed contract and the remuneration that is payable under it[34]). The instrument appointing the proxy must expressly authorise the proxy to vote on the motion and must specify how the proxy is to vote.[35]

34 *Strata Titles Act 1985* (WA), s 50A(3).
35 *Strata Titles Act 1985* (WA), s 50A(2).

Chapter 35

Voting procedures

[35.05] Provisions as to voting procedures are incorporated in the legislation of all Australian jurisdictions except Victoria. The general rule is that a matter will be decided on a show of hands unless a poll is demanded or the statute requires some special voting procedure. This general rule is spelt out in the Western Australian legislation and applies in other jurisdictions by reason of the general law of meetings.

All seven jurisdictions make provision for the demand for a poll vote or ballot. Six jurisdictions stipulate that a special resolution will be necessary for some purposes. The Tasmanian legislation contains no reference to special resolutions. In several jurisdictions a special resolution is defined by the requirement that fewer than the specified number of votes is cast against it. This contrasts with the requirement of the *Corporations Act 2001* (Cth), which is expressed in positive terms: see [22.15] above.

In six jurisdictions there are matters which require approval by unanimous resolution. In several jurisdictions a "unanimous resolution" is defined as a resolution against which no dissenting vote is cast. In Queensland and Western Australia the legislation distinguishes between resolutions without dissent and unanimous resolutions. In these jurisdictions a unanimous resolution requires positive assent from every person entitled to vote.

Three jurisdictions, the Australian Capital Territory, the Northern Territory and South Australia, allow absentee voting; Queensland allows a procedure for passing resolutions of all types without the need for a meeting. In South Australia the legislation provides that if a secondary or tertiary corporation holds voting rights, the members of that corporation must authorise their representative to vote. In South Australia and Western Australia there are specific provisions governing voting procedures in schemes that have a very limited number of lots. In Western Australia, there is provision to allow dissenters to object to the implementation of special resolutions.

AUSTRALIAN CAPITAL TERRITORY

[35.10] On an ordinary resolution or an election, every vote is of equal value unless a poll is demanded and held. On a poll the value of each vote corresponds to the unit entitlement of the unit in respect of which it is exercised.[1] A poll may be demanded by any person present and entitled to vote; the demand may also be withdrawn.[2] A poll shall be taken in the manner that the presiding officer decides. The result of the poll is to be announced as soon as it is ascertained. The result determines whether or not the resolution has been carried.[3]

The *Unit Titles Act 2001* (ACT) requires a special resolution in relation to a number of matters.[4] The definition of the term "special resolution" differentiates between situations where the total number of units in the body corporate is more or less than two. If more than two units constitute the body corporate, a special resolution is a resolution that is passed, at a duly convened general meeting, by reason of the fact that more votes are cast in favour of it than against it, and the votes against it are less than one-third of the total number of votes that can be cast by persons present at the meeting.[5] If the body corporate only contains one or two units then a special resolution is defined as a resolution against which no votes are cast and in favour of which at least one vote is cast.[6]

A unanimous resolution is required under the legislation to authorise the body corporate to amend the development statement, or to exempt itself in certain circumstances from the requirement to take out building insurance,[7] and may also be required by the regulations. The definition of "unanimous resolution" also varies according to the number of persons entitled to vote. Where the body corporate has more than two members, a unanimous resolution must be passed at a meeting where all persons entitled to vote are present or represented or have cast an absentee vote. At least one vote must be cast in favour of the resolution, with no votes being cast against it.[8]

1 *Unit Titles Act 2001* (ACT), s 116.
2 *Unit Titles Act 2001* (ACT), s 117.
3 *Unit Titles Act 2001* (ACT), s 117(4)(b).
4 For example *Unit Titles Act 2001* (ACT), s 36(5) to Revoke an easement; s 48 Acquisition and alienation of property; s 52 Agreement with proprietor regarding repair, maintenance, amenities or services; s 56(3) to give Directions as to investments; s 59 Establish special purpose funds; s 64 Increase percentage contribution to sinking fund; s 84 Remove a member from the executive committee; s 128 Alteration of articles.
5 *Unit Titles Act 2001* (ACT), s 106(1).
6 *Unit Titles Act 2001* (ACT), s 106(2).
7 *Unit Titles Act 2001* (ACT), s 30(4) (Amending development statement); s 133 (Exemption from insurance requirements).
8 *Unit Titles Act 2001* (ACT), s 108(1).

Where the body corporate has two members or less, the requirements for a unanimous resolution are that no votes be cast against the resolution and at least one vote be cast in favour of it. If the body corporate has two members, both must be present or represented at the meeting.[9]

There are provisions in the legislation for absentee votes to be cast when a unanimous or unopposed resolution is required.[10] If it is proposed to move at a general meeting a matter requiring a unanimous resolution, the committee shall deliver an absentee voting paper, with the notice of the meeting given to each person.[11] A person may cast an absentee vote by recording his or her vote on the voting paper and causing it to be delivered to the corporation before the commencement of the meeting. A vote so recorded and delivered shall be accepted as a valid vote. The person exercising the vote shall, except for the purposes of determining the quorum, be deemed to be present at the meeting and to have exercised his or her power of voting on that resolution.[12]

NEW SOUTH WALES

[35.15] A person is not entitled to move a motion at a meeting or to nominate a candidate for election as a member of the executive committee unless the person is entitled to vote on the motion or at the election.[13] An owner may move a motion or nominate a candidate even if the lot is subject to a mortgage or a charge.[14] An election of members of council,[15] or the fate of an ordinary motion,[16] is to be decided by a majority in number of the votes cast. Each person entitled to vote has one vote in respect of each lot, unless a poll is demanded.[17]

Where business is entrusted to the general meeting of the body corporate it may normally be decided by ordinary resolution. If the body corporate wishes to amend the bylaws, a special resolution is required.[18] A special resolution will also be required in some other cases.[19] A "special resolution" is defined as a resolution passed at a duly convened meeting against which votes of not more than one-quarter in value are cast.[20]

9 *Unit Titles Act 2001* (ACT), s 108(2).
10 *Unit Titles Act 2001* (ACT), s 120.
11 *Unit Titles Act 2001* (ACT), s 97(4)(b).
12 *Unit Titles Act 2001* (ACT), s 120.
13 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 9(1).
14 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 9(2).
15 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 17.
16 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 18.
17 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 17(1), 18(2).
18 *Strata Schemes Management Act 1996* (NSW), ss 47, 52.
19 See *Strata Schemes Management Act 1996* (NSW), ss 62, 79, 87.
20 See Chs 10 and 22.

A special resolution must be decided by a poll vote.[21] In the case of an election or an ordinary motion, a poll may be demanded by any person present and entitled to vote at the meeting.[22] As noted above, proxies have the right to demand a poll. If a poll is demanded, the election is to be determined according to the value of the votes cast. The value of a vote is equal to the unit entitlement of the lot in respect of which the vote is cast.[23] A unanimous resolution is required for a number of purposes.[24] If a unanimous or special resolution has been passed, it may not be amended or revoked except by a similar resolution.

A poll may be demanded either before or after a vote decided by a majority in number has been taken.[25] Once made, such a demand may be withdrawn by the person who made it.[26] If the demand is not withdrawn, a poll must be held in the manner determined by the presiding officer.[27]

NORTHERN TERRITORY

[35.20] On an ordinary resolution or an election, every vote is of equal value unless a poll is demanded and held. On a poll the value of each vote corresponds to the unit entitlement in respect of which it is exercised.[28] A poll may be demanded by any person present and entitled to vote.[29] A demand for a poll may also be withdrawn.[30] A poll shall be taken in the manner decided by the presiding officer. The result of the poll is to be announced as soon as it is ascertained. The result determines whether or not the resolution has been carried.[31]

The *Unit Titles Act 1976* (NT) requires a special resolution in relation to a number of matters.[32] The definition of "special resolution" differentiates between situations where the total number of units in the body corporate is more or less than two. If there are more than two units, a special resolution

21 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 18(2).
22 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 17(1), 18(2).
23 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cll 17(3), 18(2).
24 *Strata Schemes Management Act 1996* (NSW), s 69 (To waive requirement to establish a sinking fund); s 86 (To approve decision not to insure a building); s 208 (To vary an Adjudicator's order).
25 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 19(2).
26 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 19(3).
27 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 19(1).
28 *Unit Titles Act 1976* (NT) s 69.
29 *Unit Titles Act 1976* (NT) s 67(1).
30 *Unit Titles Act 1976* (NT) s 67(2).
31 *Unit Titles Act 1976* (NT), s 67(3).
32 *Unit Titles Act 1976* (NT), s 42 (Acquisition and alienation of property); s 43 (Agreement with proprietor regarding repair, maintenance, amenities or services); s 78 (Alteration of articles).

is a resolution that is passed, at a duly convened general meeting, by votes representing not less than two-thirds of the total number of units and not less than half of the aggregate unit entitlement of the units.

A unanimous resolution is required to authorise the body corporate to borrow; confer a special privilege with regard to the common property on a proprietor; and support a decision not to insure against a specified risk.[33] The definition of "unanimous resolution" depends upon the number of persons entitled to vote. Where only one person is entitled to vote at a general meeting, a resolution made by that person and recorded by him or her as a unanimous resolution in the minute book of the corporation kept under this Act will satisfy the requirement. Where more than one person is entitled to vote, a unanimous resolution must be unanimously passed, at a duly convened general meeting, by all the members of the corporation and recorded as a unanimous resolution in the minute book of the corporation kept under this Act.[34] The Act specifies that where a unanimous resolution is called for, the mortgagee votes to the exclusion of the proprietor whose estate or interest is subject to the mortgage.[35]

The legislation provides for absentee votes to be cast when a unanimous resolution is required. If it is proposed to move, at a general meeting, a matter requiring a unanimous resolution, the committee shall deliver a voting paper along with the notice of the meeting given to each person. This provision does not apply if only one person is entitled to vote on the resolution.[36] A person may cast an absentee vote by recording his or her vote on the voting paper and causing it to be delivered to the corporation before the commencement of the meeting.[37] A vote so recorded and delivered shall be accepted as a valid vote. The person exercising the vote shall, except for the purposes of determining the quorum, be deemed to be present at the meeting and to have exercised his or her power of voting on that resolution.[38]

QUEENSLAND

[35.25] The *Body Corporate and Community Management Act 1997* (Qld) contains an elaborate set of provisions governing the manner in which votes may be cast. These distinguish between resolutions without dissent, special resolutions, ordinary resolutions where a poll is requested and ordinary

33 *Unit Titles Act 1976* (NT), s 40 (Borrowing); s 44 (Special privileges); s 80(3) (Decisions not to insure); see also s 42(2) (Acquisition and alienation of easements); s 42A (Acquisition of additional common property).
34 *Unit Titles Act 1976* (NT), s 8(1).
35 *Unit Titles Act 1976* (NT), s 8(2).
36 *Unit Titles Act 1976* (NT), s 72.
37 *Unit Titles Act 1976* (NT), s 72(1)(b).
38 *Unit Titles Act 1976* (NT), s 72(2).

resolutions where no poll is requested. There are provisions as to how a poll is to be requested. Finally, there are provisions allowing a resolution to be adopted without the need for a meeting. In each of these cases the legislation stipulates that only one vote may be cast for each lot included in the scheme, whether personally, by proxy or in writing.[39]

If a resolution must be passed without dissent, the resolution is passed only if no vote is counted against the motion.[40] The provision as to the method of determining whether a special resolution has been adopted places the major focus on the negative votes. It provides that the motion is passed only if the votes counted for the motion are more than the votes counted against the motion. If the motion attains a majority, it becomes a question of whether the number of votes counted against the motion are sufficient to defeat it. If the number of votes against the resolution is not more than 25 per cent of the number of lots included in the scheme, and the total of the contribution schedule lot entitlements supporting negative votes is not more than 25 per cent of the total of the contribution schedule lot entitlements for all lots included in the scheme, then the motion will be passed.[41]

Where a motion is to be decided by ordinary resolution at a general meeting of the body corporate and no poll has been requested, the motion is passed by ordinary resolution if the votes counted for the motion are more than the votes counted against the motion.[42] If a motion is to be decided by ordinary resolution and a poll has been requested, the motion is passed if the total of the contribution schedule lot entitlements supporting the motion is more than the total of the contribution schedule lot entitlements for the lots for which votes are counted against the motion.[43]

A person entitled to vote at a general meeting of the body corporate for a community titles scheme may ask for a poll for the counting of the vote on a motion to be decided by ordinary resolution. Such a request may be made in person at the meeting or, alternatively, it may be made on the voting paper on which the person votes in respect of the motion, whether or not the person is personally present at the meeting. The request may be made whether or not the meeting has already voted on the motion in another way. It may be withdrawn up until the time when the poll is completed.[44]

The legislation makes provision for "majority resolutions". In this context the term means a resolution for which an absolute majority is required. In such

39 *Body Corporate and Community Management Act 1997* (Qld), ss 105(2), 106(2), 107(2), s 108(2), 110(2).
40 *Body Corporate and Community Management Act 1997* (Qld), s 105(3).
41 *Body Corporate and Community Management Act 1997* (Qld), s 106(3).
42 *Body Corporate and Community Management Act 1997* (Qld), s 108(3).
43 *Body Corporate and Community Management Act 1997* (Qld), s 110(3).
44 *Body Corporate and Community Management Act 1997* (Qld), s 109.

a case, again, only one vote may be exercised for each lot.[45] In this case s 107(3) stipulates that the vote must be written and cannot be by proxy. It appears that it is envisaged that such a motion must be passed by the procedure for motions other than at general meeting. The resolution will be passed only if the number of votes in favour of the motion is more than half the number of units in the scheme.[46]

The legislation permits the inclusion of provision in the regulation module to allow a resolution to be passed without the need for a general meeting. The provision applies to all types of motions, from ordinary resolutions to resolutions without dissent. Such a motion will only be effective if the following four conditions are met:

- a vote on the motion must be exercised for each lot included in the scheme;
- a proxy cannot exercise the vote;
- the decision must be unanimous; and
- each vote must be given or confirmed in writing.[47]

SOUTH AUSTRALIA

[35.30] There is a miscellany of provisions governing voting procedures in the *Community Titles Act 1996* (SA). The basic rule, which applies to determine whether an ordinary resolution has been adopted, is that if the number of votes supporting a resolution is equal to the number of votes against the resolution, the resolution is lost.[48] A member attending a meeting of the corporation may demand a written ballot on any question.[49] If a written ballot is demanded, it is to be taken in the manner determined by the person presiding at the meeting. An owner of a lot may exercise an absentee vote on a proposed resolution by giving the secretary written notice of the proposed vote at least six hours before the time of the meeting.[50]

There are provisions in the legislation governing the procedures that must be employed before a secondary corporation may vote at a meeting of a community corporation of which it is a member. A secondary corporation may only vote at a meeting of a primary corporation if it has been authorised to do so by a resolution of its members. Indeed, if a tertiary corporation controls the secondary corporation, a resolution of the members of the tertiary corporation is also necessary. It is not clear whether such an authorisation can be in general

45 *Body Corporate and Community Management Act 1997* (Qld) s 107.
46 *Body Corporate and Community Management Act 1997* (Qld) s 107(4).
47 *Body Corporate and Community Management Act 1997* (Qld), s 111.
48 *Community Titles Act 1996* (SA), s 84(15).
49 *Community Titles Act 1996* (SA), s 84(12).
50 *Community Titles Act 1996* (SA), s 84(11).

terms. In the absence of a requirement that the members of the secondary or tertiary corporations must have notice of the contents of the resolutions to be passed, it is suggested here that the view that the authorisation may be in general terms is acceptable. It is noted, however, that if the resolution to be considered by the primary corporation is a unanimous or special resolution, the authorisation must be by the same type of resolution.[51]

The *Community Titles Act 1996* (SA) defines a "special resolution" as a resolution which requires 14 days' notice in which the text of the resolution is set out. A special resolution must be passed by the meeting. No special majority is required in positive terms, but the number of votes cast against a special resolution must be 25 per cent or less of the total number of votes that could be cast at a meeting at which all members are present and entitled to vote. If the scheme contains 80 lots, 20 votes must be cast against the resolution for it to fail.[52] In addition the legislation provides a special procedure that must be used in the case where a special resolution is necessary in a three-lot scheme. If there are three lots in the scheme and the owner of each lot is entitled to one vote in respect of that lot, a resolution will be a special resolution of that community corporation if two conditions are met. The first is that at least 14 days' notice setting out the text of the proposed resolution must be served on all the owners of the community lots. The second is that the resolution must be passed with no votes cast against it or with only one vote cast against it.[53]

Passage of a unanimous resolution also requires at least 14 days' notice setting out the text of the proposed resolution to have been served on all the owners of the community lots. It does not require positive assent from every owner but it must be passed at a properly convened meeting of the corporation without any vote being cast against it.[54]

Finally, the *Community Titles Act 1996* (SA) spells out the fact that decisions in resolutions of community corporations may be varied or revoked. If a special or unanimous resolution was necessary to effect the decision, such a resolution is also necessary to vary or revoke the resolution. All other decisions of a corporation may be varied or revoked by an ordinary resolution of the corporation.[55] As the question of whether a resolution can be varied or revoked is, under the rules of procedure generally governing meetings, quite complex, this provision is welcomed.

51 *Community Titles Act 1996* (SA), s 86.
52 *Community Titles Act 1996* (SA), s 3.
53 *Community Titles Act 1996* (SA), s 88.
54 *Community Titles Act 1996* (SA), s 3.
55 *Community Titles Act 1996* (SA), s 89.

TASMANIA

[35.35] Decisions in general meeting may be by show of hands. The legislation does not, however, impose any restrictions on the occasions on which a poll may be demanded. If a poll is demanded "in the case of a strata scheme", voting is proportionate to the unit entitlement of the member's lot. In any other case it is in accordance with the constituent documents.[56] It is suggested that this provision will be interpreted in the light of s 74(1) of the *Strata Titles Act 1998* (Tas) to mean that in the case of a strata scheme for which a single body corporate is constituted, the voting is proportionate to the unit entitlement of the lot — but if two bodies corporate are constituted, the documents would prevail. This is in line with the general presumption that specific provisions will displace general provisions.

The term "unanimous resolution" is defined in the *Strata Titles Act* as meaning a resolution passed at a duly convened meeting of the members of the body corporate, against which no member of the body corporate casts a dissenting vote.[57] According to this definition, positive consent from every member is not a requirement. Where, however, a unanimous resolution is required by the Act or the constituent documents of a body corporate, a member may vote on the resolution either at the meeting or by written notice. Where the member elects to vote by written notice, such notice must be given to the body corporate within 28 days after the date of the meeting at which the resolution was proposed. If the matter requires urgent action, the Recorder may reduce the period within which voting rights may be exercised after the conclusion of the general meeting or decide to prevent such a manner of voting altogether.[58]

VICTORIA

[35.40] The regulations define what is meant by the terms "special resolution" and "unanimous resolution" and indicate when each is required. The definitions are much closer to the normal meanings of these terms. A special resolution means a resolution passed by a vote in general meeting of at least 75 per cent of the votes for the total number of lots affected by the body corporate. If the special resolution is passed by poll or ballot, a special resolution must be supported by at least 75 per cent of the total lot entitlements.[59] There is also provision in the regulations for decisions to be reached by postal ballot. If this procedure is used, the closing date for the ballot must be at least 14 days after the ballots are sent out.[60]

56 *Strata Titles Act 1998* (Tas), s 76(2).
57 *Strata Titles Act 1998* (Tas), s 3.
58 *Strata Titles Act 1998* (Tas), s 78.
59 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 104.
60 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 408.

WESTERN AUSTRALIA

[35.45] The general rule is that a resolution by the vote of the meeting shall be decided on a show of hands unless a poll is demanded by any proprietor present in person or by proxy.[61] On a show of hands or on a poll, votes may be given either personally or by duly appointed proxy.[62] On a show of hands each proprietor or, where s 50(6) of the *Strata Titles Act 1985* (WA) applies, each mortgagee has one vote.[63] The declaration of the presiding officer that a resolution has been carried on a show of hands is conclusive evidence of the fact, without proof of the number or proportion of votes recorded in favour of or against such resolution.[64]

If a poll is demanded, it is taken in such manner as the presiding officer directs. A demand for a poll may be withdrawn before the poll has been counted. The result of the poll is deemed to be the resolution of the meeting at which the poll was demanded.[65]

If a special resolution or a resolution without dissent is required, then the requirements of s 3B or s 3AC respectively of the *Strata Titles Act 1985* (WA) must be satisfied. The requirements as to notice and quorum are noted elsewhere. In addition to voting while present at the meeting, in person or in proxy, persons entitled to vote may register their agreement or disagreement with the resolution in writing. The person entitled to vote, either personally or as a duly appointed representative, must sign this letter[66] and serve it on the strata company or on the other proprietors.[67] This must be done within 28 days after the day of the meeting.[68] Where this procedure is used, the letter is to be counted as a vote.

If the number of lots in the scheme is greater than five, a special resolution is passed if it is supported by votes having a value of not less than 50 per cent of the aggregate unit entitlement of the lots in the scheme and by proprietors of not less than 50 per cent of the lots in the scheme. Even if the motion does gain this amount of support, it will not be successful if the votes against the resolution have a value of 25 per cent or more of the aggregate unit entitlement or if proprietors of 25 per cent of the units vote against the resolution. This elaborate provision is designed to circumvent problems that could otherwise be caused by the failure to motivate all proprietors to exercise

61 *Strata Titles Act 1985* (WA), Sch 1, bylaw 12(7).
62 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(3).
63 *Strata Titles Act 1985* (WA), Sch 1, bylaw 14(1).
64 *Strata Titles Act 1985* (WA), Sch 1, bylaw 12(8).
65 *Strata Titles Act 1985* (WA), Sch 1, bylaw 12(10).
66 *Strata Titles Act 1985* (WA), ss 3B(5), 3AC(2).
67 *Strata Titles Act 1985* (WA), ss 3B(6), 3AC(3).
68 *Strata Titles Act 1985* (WA), ss 3B(5), 3AC(2).

their power to vote. In the case of a three-lot scheme, a special resolution must be supported by the proprietors of at least two lots. In the case of a four-lot scheme, support must be obtained from the proprietors of three of the lots; and in the case of a five-lot scheme from the proprietors of four of the lots. The value of these votes must be 50 per cent of the aggregate unit entitlement of the lots.[69]

A special resolution will not have effect until 28 days expire; this is the period allowed under s 103D for those who oppose the resolution to lodge an objection to it. If such an objection is lodged, the special resolution will not take effect until the objection is dismissed or withdrawn or until the time for appeal has elapsed.[70]

69 *Strata Titles Act 1985* (WA), s 3B(3).
70 *Strata Titles Act 1985* (WA), s 3B(7).

Chapter 36

Members' initiatives

[36.05] By comparison with the provisions in the *Corporations Act 2001* (Cth), the provisions that allow members who are not on the executive committee of a body corporate to take the initiative in respect of decisions of proprietors' meetings, are very rudimentary. Nevertheless, six jurisdictions enable proprietors who are not on the executive committee to take some initiative in one form or another. South Australia and Victoria are the exceptions.

The laws in Western Australia seem the most well-developed in this area. These laws allow ordinary members to cause a matter to be placed on the agenda for a meeting or to cause a meeting to be called. Further, these laws provide a way forward when members have requested a meeting and the secretary has not complied.

In the Australian Capital Territory, the Northern Territory and Tasmania, the legislation contains provisions to allow members to cause a meeting to be held. None of these jurisdictions make any specific provision for the situation in which a requisition is ignored, although it is possible that the deadlock order provisions in the Australian Capital Territory might apply.

In New South Wales, members have a statutory right to place a matter on the agenda for a meeting to be summoned.

In Queensland and the Northern Territory, the legislation contains provisions to allow the members to pre-empt or veto an executive committee decision on a matter. In theory, in these jurisdictions at least, the executive committee is a creature of the general meeting. In this these bodies are unlike business corporations: see [25.10] above.

AUSTRALIAN CAPITAL TERRITORY

[36.10] The legislation in force in the Australian Capital Territory includes very limited provision for members' initiatives. It does, however, contain a provision stipulating that the committee shall convene a general meeting upon a requisition in writing in the proper form. The requisition must:

- be in writing
- state the matters to be considered at the general meeting; and
- be signed by members with a sufficient interest.

Sufficient interest is defined as not less than 25 per cent of the aggregate unit entitlement.[1]

There are provisions in the *Unit Titles Act 2001* (ACT) to allow applications to a Magistrate's Court for a deadlock order if the owner's corporation has made an unsuccessful attempt to obtain the passage of an unanimous resolution or an unopposed resolution. Such applications may be made by a member.[2] These provisions do not expressly apply where the committee ignores a request to hold a general meeting, but they might apply if the matter stated required such a resolution.

NEW SOUTH WALES

[36.15] In New South Wales, any person entitled to vote at a general meeting of an owners corporation may require the inclusion of a motion in the agenda of the next general meeting of the owners corporation. This may be done by notice in writing served on the secretary of the executive committee. The motion to be included in the notice of general meeting must be set out in the notice served on the secretary. The secretary must comply with the notice.[3] This right can also be exercised by an owner of a lot who would be entitled to vote but for the fact that the lot is subject to a mortgage or covenant charge.[4]

NORTHERN TERRITORY

[36.20] One form of members' initiative is provided for in the legislation in force in the Northern Territory. A member or members having 25 per cent or more of the aggregate unit entitlement can cause the committee to summon a general meeting. To do so, these members must serve a written requisition on the committee. The requisition must specify the matters to be considered at a general meeting. When such a requisition is received, the committee is required to convene a general meeting by issuing notice in accordance with s 61 of the *Unit Titles Act 1976* (NT).[5]

There is also a provision in the Act which empowers the proprietors to prevent a committee decision on a particular matter from taking effect.[6] A committee decision can be forestalled by a notice in writing given to the secretary of the committee by the proprietors to the effect that proprietors, whose aggregate unit entitlement exceeds 50 per cent of the total, oppose

1 *Unit Titles Act 2001* (ACT), s 96.
2 *Unit Titles Act 2001* (ACT), s 124.
3 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 36(1), (2).
4 *Strata Schemes Management Act 1996* (NSW), Sch 2, Pt 2, cl 36(4).
5 *Unit Titles Act 1976* (NT), s 60.
6 *Unit Titles Act 1976* (NT), s 50(6).

the decision. If such a notice is received, then the decision of a committee has no force or effect.[7] A record of all such notices must be kept in the minutes of the committee.[8]

QUEENSLAND

[36.25] If, under the regulation module applying to a community titles scheme, there must be a committee for the body corporate, then the decision of the committee is a decision of the body corporate. It is possible, however, for the regulation module to stipulate that a decision on a particular matter is a restricted issue for the committee.[9] In such a case any decision on that matter will need to be made by the general meeting of the body corporate. It is also provided that the committee must put into effect the lawful decisions of the body corporate.[10]

There are provisions in the accommodation module regulations for a requested extraordinary meeting. Such a meeting must be called within 14 days and held within six weeks if a notice:

- is given to the secretary, chairperson, or in the initial period to the original owner
- proposes the motions to be considered at the general meeting; and
- is signed by members with a sufficient interest.[11]

The regulations provide that if the meeting is not called under s 59, the owners who made the original request may, in writing, ask another committee member to call the meeting and that committee member must do so within 14 days.[12] The person calling such a meeting in place of the secretary must perform all of the functions of the secretary and must be given access to all relevant information by the secretary.[13]

The Queensland regulations also provide for a member to submit motions for consideration at a general meeting at any time. Such a motion must be included on the agenda of the next general meeting for which it is practicable to include the motion. However, a motion need only be included on the agenda for the annual general meeting if it is received before the end of

7 *Unit Titles Act 1976* (NT), s 50(6).
8 *Unit Titles Act 1976* (NT), s 50(7).
9 *Body Corporate and Community Management Act 1997* (Qld), s 100(2).
10 *Body Corporate and Community Management Act 1997* (Qld), s 101(2).
11 *Body Corporate and Community Management Act 1997* (Qld), s 59.
12 *Body Corporate and Community Management Act 1997* (Qld), s 59A.
13 *Body Corporate and Community Management Act 1997* (Qld), s 59B.

the financial year, and there are certain motions that cannot be considered again within a year.[14]

TASMANIA

[36.30] Provisions for members' initiatives in the Tasmanian legislation are very limited. However, the secretary is required to call a general meeting of the body corporate if required to do so by not less than one-third of the total number of members of the body corporate.[15] There are no stipulations in the legislation as to how such an initiative is to be exercised. Perhaps the safest method of proceeding would be to serve a written request, signed by the required number of members, on the secretary. The secretary would be required to comply within a reasonable period.

VICTORIA

[36.35] The regulations in force under the *Subdivision (Body Corporate) Act 1988* (Vic) allow members whose lot entitlements total at least 25 per cent of all lot entitlements to petition the secretary, the manager or the committee to convene a special general meeting. On receipt of such a petition the officer is required to convene the meeting, and if they do not then any member may convene the general meeting.[16]

WESTERN AUSTRALIA

[36.40] The bylaws contained in the First Schedule to the *Strata Titles Act 1985* (WA) allow members to act to have a meeting called or to have a matter placed on the agenda for the meeting.

To cause a meeting to be called, a member not on the council serves a requisition on the council. The requisition must be signed by proprietors entitled to a quarter or more of the aggregate unit entitlement of the lots.[17] If the council does not act to summon a meeting within 21 days after the requisition is served on them, then the requisitionists may themselves call an extraordinary general meeting. This may be done by the requisitionists acting together or by any of them representing more than one-half of the aggregate unit entitlement of all of them. The extraordinary general meeting must be held within three months of the date of the requisition.[18]

14 *Body Corporate and Community Management Act 1997* (Qld), s 39.

15 *Strata Titles Act 1998* (Tas), s 75(3).

16 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 404.

17 *Strata Titles Act 1985* (WA), Sch 1, bylaw 11(3).

18 *Strata Titles Act 1985* (WA), Sch 1, bylaw 11(4).

A proprietor who wishes an item to be placed on the agenda for the next general meeting is to give notice in writing to the secretary. The secretary must then include that item of business on the agenda for the meeting and give notice of the item as an item of special business.[19] This implicitly requires that the notice in writing must be served on the secretary before the meeting is summoned. If the notice in writing is received after the notice convening the meeting is issued, so that notice of the item of special business cannot be circulated, the item of business cannot be dealt with until a subsequent meeting is held.

19 *Strata Titles Act 1985* (WA), Sch 1, bylaw 11(6).

Chapter 37

Dispute resolution

[37.05] Seven Australian jurisdictions make special reference in their legislation to the manner of handling disputes that arise in the course of managing the affairs of proprietor corporations. Any discussion of the full scope of these provisions lies outside the ambit of this chapter, but note will be taken of how these provisions can impact on meetings procedure. In the Australian Capital Territory the legislation merely indicates that an application can be made to "the court" for an order that a duty be performed. In the Northern Territory and South Australia, such power as exists is also to be exercised by the court. In these two jurisdictions, the provisions as to the powers and procedures of the court are more detailed.

In Tasmania, dispute resolution powers are vested in the Recorder of Titles appointed under the *Land Titles Act 1980*. In New South Wales, Queensland and Western Australia, the relevant legislation makes provision for the appointment of special officials to resolve disputes arising in proprietors' corporations.

Where a court is vested with the responsibility for dispute settlement, the court rules will apply to ensure that the defendant, whether it be the corporation or an officer of the corporation, will receive adequate notice of the application. In those jurisdictions in which dispute resolution powers are vested in a separate official, the legislation incorporates provisions to ensure adequate notice is given to interested parties.

Where jurisdiction is vested in a court, the basis for exercising such jurisdiction is typically the failure by the corporation or an officer of the corporation to perform a duty. This includes the failure to comply with a legislative provision or with a requirement of the constitution of the body corporate. It would also extend to a failure to comply with the equitable obligation to exercise powers in good faith for the purpose for which they were conferred. Such an argument is peculiarly relevant in the Australian Capital Territory. In the Northern Territory and South Australia, the power of the court to intervene in a case of oppression is spelt out. In these two jurisdictions the court is also empowered to alter the constitution of the body corporate in appropriate cases.

In the four jurisdictions in which power is conferred on a specified official, such powers include the power to invalidate or nullify a resolution or election. In Queensland an adjudicator may also declare that a meeting has been void and of no effect. In New South Wales adjudicators are given the power to alter the time of a meeting. The power to convene a meeting is set out in the Tasmanian legislation. In these jurisdictions, the time limit for lodging an application for the exercise of dispute resolution powers varies. In New South Wales the time limit is 28 days after the meeting, in Queensland it is three months. In Western Australia time limits depend on the nature of the application, while in Tasmania time limits are not specified in the legislation.

AUSTRALIAN CAPITAL TERRITORY

[37.10] There are no provisions for dispute resolution as such in the legislation; articles dealing with conciliation of disputes are found in the regulations.[1] It does contain a provision to the effect that where a corporation fails to carry out a requirement or perform a duty imposed on it by the *Unit Titles Act 2001* (ACT) a proprietor or mortgagee of a unit may apply to the court for an order requiring the corporation or the committee to carry out the requirement or perform the duty.[2]

NEW SOUTH WALES

[37.15] The provisions governing dispute resolution in the *Strata Schemes Management Act 1996* (NSW) are quite complex. These provisions are invoked when an application in writing is lodged with the Registrar.[3] The first step towards resolving the dispute is to submit it to mediation.[4]

If the dispute is not resolved through mediation, notice of the application must be given to the owners corporation and to any other person whose interests are involved.[5] The owners corporation must display the notice and serve it on the members of the body corporate. Where this has been done, a Strata Scheme Adjudicator has the power to make orders to dispose of the dispute.[6] The *Strata Schemes Management Act 1996* (NSW) authorises the Minister to appoint Adjudicators.[7]

The Adjudicator has the functions conferred by legislation. Of interest here is the fact that the Adjudicator has the power to make orders varying the time at which an annual general meeting must be held.[8]

1 *Unit Titles Regulation 2001* (ACT), Sch 2.
2 *Unit Titles Act 2001* (ACT), s 125.
3 *Strata Schemes Management Act 1996* (NSW), s 124.
4 *Strata Schemes Management Act 1996* (NSW), s 125.
5 *Strata Schemes Management Act 1996* (NSW), s 135.
6 *Strata Schemes Management Act 1996* (NSW), s 138.
7 *Strata Schemes Management Act 1996* (NSW), s 217.
8 *Strata Schemes Management Act 1996* (NSW), s 152.

The Adjudicator may order that that a resolution passed at a general meeting of an owners corporation be treated as a nullity on and from the date of the order. The Adjudicator also has the jurisdiction to invalidate any election held by the persons present at a meeting of an owners corporation.[9] The Adjudicator may exercise this power if he or she considers that the provisions of the Act have not been complied with in relation to the meeting.[10]

An owner or first mortgagee of a lot must make an application for such an order.[11] There is no explanation of why a covenant chargee who holds a priority vote is not entitled to make such an application. This appears to be an oversight that might be overcome by interpretation if the point arises in court.

An Adjudicator may refuse to make such an order upon application. Such a refusal must be justified upon two grounds:

- the adjudicator must consider that the failure to comply with the provisions of this Act did not adversely affect any person; and
- that compliance with the provisions of this Act would not have resulted in a failure to pass the resolution or have affected the result of the election.[12]

An application for an order invalidating a resolution may be made only by a person entitled to vote on the motion.[13] The order may be made if the Adjudicator is satisfied that the resolution would not have been passed but for the fact that the decision was affected by an irregularity. The irregularities that are relevant are that the applicant for the order was improperly denied a vote on the motion for the resolution or was not given due notice of the item of business.[14] Applications for such orders must be made within 28 days of the meeting at which the resolution was passed.[15]

NORTHERN TERRITORY

[37.20] Under the *Unit Titles Act 1976* (NT) the only provision about dispute resolution entrusts the function to the court. Under the terms of s 106 of the Act, an application can be made to the court in five situations:

- if a corporation, a mortgagee of a unit or a member claims that a breach of the Act or of the articles of the corporation has occurred
- if a member claims to have been prejudiced by the wrongful act

9 *Strata Schemes Management Act 1996* (NSW), s 153.
10 *Strata Schemes Management Act 1996* (NSW), s 153(1).
11 *Strata Schemes Management Act 1996* (NSW), s 153(3).
12 *Strata Schemes Management Act 1996* (NSW), s 153(2).
13 *Strata Schemes Management Act 1996* (NSW), s 153(5).
14 *Strata Schemes Management Act 1996* (NSW), s 154(1).
15 *Strata Schemes Management Act 1996* (NSW), s 154(2).

- if there is a default of the corporation, the committee or another member
- if a member claims that a decision of the corporation or the committee is unreasonable, oppressive or unjust; or
- if a dispute arises between a corporation or the committee and a member as to any aspect of the occupation or use of a unit or the common property.[16]

When such an application is made, the court is empowered to require a party to provide reports or other information for the purposes of the proceedings.[17] The court is empowered to "attempt to settle" the proceedings by mediation or arbitration or to make orders compelling a party to take action to remedy a breach or default or resolve a dispute or to refrain from further action of a kind specified in the order.[18] The court may confirm, vary or reverse a decision of the corporation or the committee, give judgment on a monetary claim, or order that a corporation refund money to a member.[19]

The court may also make an order altering the articles of a corporation,[20] but this type of order can only be made if the corporation is a party to the proceedings or the court is satisfied that the corporation has been given a reasonable opportunity to become a party to the proceedings. Before making an order altering the articles of a corporation, the court must also be satisfied that any member who might be adversely affected by such an order is either a party to the proceedings or has been notified that such an order might be made and had a reasonable opportunity to present views to the court in relation to the matter.[21]

QUEENSLAND

[37.25] The *Body Corporate and Community Management Act 1997* (Qld) contains, in Chapter 6, a very complete set of provisions for dispute resolution. Primary responsibility for administering these provisions is entrusted to the Commissioner for Body Corporate and Community Management. The Commissioner may appoint adjudicators and refer cases for mediation or specialist adjudication.

The purpose of the Chapter is to establish arrangements for resolving disputes about contraventions of the Act or community management statements. Under the provisions of Chapter 6, application can be made for an order declaring void:

16 *Unit Titles Act 1976* (NT), s 106(1).
17 *Unit Titles Act 1976* (NT), s 106(4)(b).
18 *Unit Titles Act 1976* (NT), s 106(4)(a), (c), (d).
19 *Unit Titles Act 1976* (NT), s 106(4)(f), (g), (h).
20 *Unit Titles Act 1976* (NT), s 106(4)(e).
21 *Unit Titles Act 1976* (NT), s 106(5).

- a meeting of the committee for the body corporate
- a general meeting of the body corporate
- a resolution of the committee or body corporate; or
- the election of an executive or other member of the committee.

Such an application must normally be made within three months after the relevant meeting, although an adjudicator has the power to waive compliance with this condition.[22]

If an application for an order declaring a meeting, election or resolution void is received, the commissioner must give written notice (the "original notice") of the application to each affected person and to the body corporate. The original notice must include a copy of the application and invite the affected person, the body corporate and members of the body corporate to make submissions to the commissioner about the matter.

When it receives the original notice, the body corporate must give a copy of it to each person whose name appears on the roll as the owner of a lot included in the scheme. Again, the commissioner has power to dispense with this requirement, or to dispense with it on the basis of conditions.[23]

The applicant for such an order has the power to change the application before the commissioner makes an initial case management recommendation, although the commissioner may withhold permission to allow such a change and may impose conditions before accepting a change. In addition, the applicant may withdraw the application at any time before its final disposition.[24]

Where an application is made for an order in circumstances of urgency, the commissioner may refer it to an adjudicator even if there has not been time to give notice or receive submissions from every interested person. In these circumstances the adjudicator has the power to make an interim order that may, for example, stop a general meeting deciding or acting on a particular issue until it has been investigated and resolved.[25]

SOUTH AUSTRALIA

[37.30] The *Community Titles Act 1996* (SA) allows a community corporation, the owner or occupier of a community or development lot or any other person bound by the bylaws of a community scheme to apply for relief under Part 14 dealing with the resolution of disputes.[26]

22 *Body Corporate and Community Management Act 1997* (Qld), s 242.
23 *Body Corporate and Community Management Act 1997* (Qld), s 243.
24 *Body Corporate and Community Management Act 1997* (Qld), s 245.
25 *Body Corporate and Community Management Act 1997* (Qld), s 247.
26 *Community Titles Act 1996* (SA), s 141.

Such an application may be made in five situations. Two of these may have direct relevance to meetings of the community corporation. An application may be made if the applicant claims that a breach of the *Community Titles Act 1996* (SA) or of the bylaws of the community scheme has occurred. A member of a community corporation who claims that a decision of the corporation or a delegate or the management committee of the corporation is unreasonable, oppressive or unjust may also apply for relief under Part 14.[27]

The application is ordinarily made to the Magistrate's Court. Leave may, however, be obtained to have the proceedings dealt with by the District Court if this is considered appropriate because of the significance or complexity of the matter. If the application raises a matter of general importance, a court may, either of its own motion or on application, transfer the proceedings to the Supreme Court.[28]

In hearing and determining an application, the court is to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms. It is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit. The court's powers in dealing with such an application are extensive. It may, in the first place, attempt to achieve settlement of the proceedings by agreement between the parties. Failing such an agreement, it may order that a party take such action as is, in the opinion of the court, necessary to remedy any default or to resolve any dispute. It may order that a party refrain from any further action of a kind specified. Alternatively, the court may alter the bylaws of the community scheme, or vary or reverse any decision of the corporation or of the management committee of the corporation or of a delegate of the corporation.[29]

There are some restrictions on the power to alter the bylaws of a community scheme. The corporation must either be a party to the proceedings, or the court must be satisfied that it had a reasonable opportunity to be a party to these proceedings. Any member of the corporation whose interests could be adversely affected must also have been notified of the possibility of such an order being made and have a reasonable opportunity to make submissions to the court about the matter.[30]

TASMANIA

[37.35] To apply for relief under Part 9 of the *Strata Titles Act 1998* (Tas), a person must lodge an application with the Recorder of Titles, an officer of the government appointed under the *Land Titles Act 1980* (Tas). The application must be in writing and must set out in detail the grounds on which the applicant claims relief and the general nature of the relief sought. The prescribed fee must be paid upon lodgment.[31]

After receiving such an application, the Recorder must give written notice of the contents of the application to the body corporate and to any other person whose interests are liable, in the Recorder's view, to be affected. The body corporate, in its turn, must give notice of the application to each owner, every mortgagee of whose interest it has notice and any other occupiers of the units who might be affected if the order sought were made.[32] The Recorder has the power to make a wide range of orders in response to such an application. Of relevance to the law of meetings, the Recorder may invalidate an election or resolution of a general meeting, or convene a general meeting.

The Recorder's power to convene a general meeting may be exercised if the Recorder is satisfied that the body corporate has failed to hold a general meeting of its members as required under the legislation or the bylaws. In such a case the Recorder may appoint a person to convene the meeting and may provide for the fashion in which notice is to be given and for the business that is to be placed before the meeting. The order may appoint a person to preside at the meeting and if appropriate provide that the meeting is to be considered as the first general meeting even though the time for holding such a meeting might have expired.[33]

The Recorder's power to invalidate proceedings at a general meeting may be exercised if the Recorder is satisfied that the provisions of the legislation or the bylaws have not been complied with in relation to the calling or conduct of a meeting of the members of the body corporate. An application for an order invalidating proceedings must be made within 30 days after the date of the meeting. Note also that the Recorder need not grant such an order if satisfied that the failure to comply with the relevant provision did not prejudicially affect any person or that the resolution would have been passed, or the election would have had the same result, even if the relevant provisions had been followed.[34]

WESTERN AUSTRALIA

[37.40] The provisions for the appointment of Strata Title Referees which were contained under Part VI of the *Strata Titles Act 1985* (WA) were repealed in 2004.[35] An application for relief may be made to the State Administrative

27 *Community Titles Act 1996* (SA), s 142(1).
28 *Community Titles Act 1996* (SA), s 142(2), (6).
29 *Community Titles Act 1996* (SA), s 142(8).
30 *Community Titles Act 1996* (SA), s 142(9).

31 *Strata Titles Act 1998* (Tas), s 105.
32 *Strata Titles Act 1998* (Tas), s 106.
33 *Strata Titles Act 1998* (Tas), s 128.
34 *Strata Titles Act 1998* (Tas), s 123.
35 *Strata Titles Act 1985* (WA), s 71.

Tribunal, if there are no provisions for dispute resolution in the by-laws or those provisions have been complied with.[36]

A strata company that receives notice of an application to the State Administrative Tribunal is required to serve a copy of the notice on each proprietor, each mortgagee of whom the strata company has notice, and each occupier who would be affected if the order sought was made.[37]

Orders may be made under Part VI for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred by the legislation or the bylaws on the applicant or on the council or the chairman, secretary or treasurer of the strata company.[38] However, no orders may be made with respect to a function that can only be performed pursuant to a unanimous resolution, resolution without dissent or special resolution.[39]

Specifically, the State Administrative Tribunal has the power, in response to an application by a proprietor or first mortgagee of a unit, to invalidate or refuse to invalidate a resolution or election of a meeting of the strata title company. Such an order may be made when the Tribunal considers that the provisions of this Act have not been complied with in relation to a meeting of the strata company. The Tribunal may only make an order refusing to invalidate the proceeding if it considers that the failure to comply with the provisions of the Act did not prejudicially affect any person and that compliance with the provisions of the Act would not have resulted in a failure to pass the resolution, or have affected the result of an election.[40]

The Tribunal has power to make orders that a resolution purportedly passed in general meeting is a nullity. Such power may be exercised where an attempt to exercise voting rights is improperly denied or where due notice of an item of business is not given. An application for such an order must be made within 30 days of the meeting at which the resolution was passed. The order takes effect from the date on which it is made.[41]

In the context of a two-lot scheme, the Tribunal is given power to deal with the situation where a proprietor has refused or failed to attend a meeting unreasonably.[42] In the same context, where a resolution has been proposed by a proprietor but defeated, the Tribunal has the power to make an order declaring that the resolution is deemed to have been passed.[43]

36 *Strata Titles Act 1985* (WA), s 77B.
37 *Strata Titles Act 1985* (WA), s 79.
38 *Strata Titles Act 1985* (WA), s 83.
39 *Strata Titles Act 1985* (WA), s 83(4).
40 *Strata Titles Act 1985* (WA), s 97.
41 *Strata Titles Act 1985* (WA), s 100.
42 *Strata Titles Act 1985* (WA), s 103B.
43 *Strata Titles Act 1985* (WA), s 103C.

Where a special resolution has purportedly been passed by a strata company in which there are three, four or five lots, the Tribunal also has power to act to invalidate the resolution under s 103D of the *Strata Titles Act 1985* (WA). An application under this section must be made by a proprietor who did not vote, either personally or by proxy, in support of the resolution. The application to invalidate a special resolution must be lodged no later than the 28th day after the meeting, if all votes were cast at the meeting or not later than the 56th day after the meeting or the 28th day after service of notice of passing of the special resolution on the proprietor, whichever occurs first. In response to such an application, the Tribunal may make an order that the special resolution is deemed not to have been passed, if satisfied that the other proprietors have acted unreasonably in passing it.[44]

44 *Strata Titles Act 1985* (WA), s 103D.

Chapter 38

Executive committee meetings

[38.05] Although meetings law generally applies less strictly to meetings of executive committees, seven Australian jurisdictions do include in their legislation some provisions for such meetings.

In New South Wales these provisions are limited to providing for committee meetings to be summoned on requisition and for the right of individual proprietors to attend and observe at such meetings. In the Australian Capital Territory, the Northern Territory and South Australia, the provisions are much more detailed. They provide, among other things, for the quorum at a committee meeting and the selection of a chair.

In Western Australia there is provision for the appointment of a substitute committee member. This provision can be compared to that in the *Corporations Act 2001* (Cth) for the appointment of alternate directors.[1] In Queensland the legislation provides for the use of proxies at committee meetings, which is more unusual. It would appear that in other jurisdictions these provisions could be inserted into the constitution or, in Tasmania, authorised by the general meeting.

AUSTRALIAN CAPITAL TERRITORY

[38.10] The committee of the body of proprietors controls its own procedure. It may meet for the conduct of business as and when it determines and may adjourn and otherwise regulate its meetings as it thinks fit.[2] Any member of the committee may convene such a meeting by giving at least seven days' written notice of the meeting to each other member of the committee. The written notice must specify the business that the committee member proposes to bring before the meeting and the time and place of the meeting.[3]

1 *Corporations Act 2001* (Cth), s 201K; see Ch 25.
2 *Unit Titles Act 2001* (ACT), s 85(1).
3 *Unit Titles Act 2001* (ACT), s 85(2).

No business shall be transacted at a meeting of the committee unless a quorum is present at the relevant time.[4] A quorum of the committee is to be determined by applying a formula contained in the legislation. The formula differs according to whether the total number of committee members is an odd or an even number. The effect of the formula is that the quorum is slightly more than half the number of members of the committee. In the case of an odd number of committee members, the formula specifies that you take the number of committee members, add one and divide by two.

For example: (5 + 1)/2 = 3.

Therefore, in the case of a committee of five the quorum is three. In the case of an even number of committee members, the formula specifies that you take the number of committee members, divide by two and add one.

For example: (6 ÷ 2) + 1 = 4.

Therefore, in the case of a committee of six the quorum is four.[5] A decision of the committee requires only a simple majority. That is, a majority of the votes of the committee members present and voting. If the committee consists of two members then all decisions require a unanimous vote.[6]

At each meeting the committee members present shall elect someone to chair the meeting. If the presiding member so elected vacates the chair or is unable to act as chair during the course of the meeting, another member shall be elected to take the chair.[7] The committee member in the chair is not prevented from exercising his or her deliberative vote as committee member. In addition, if a vote has been taken and there is an equal number of affirmative and negative votes, the presiding member is entitled to a second or casting vote. This last provision does not apply if the committee consists of only two members.[8]

NEW SOUTH WALES

[38.15] Provisions in Schedule 3 of the *Strata Schemes Management Act 1996* (NSW) govern meetings of the executive committee.

Notice of executive committee meetings are to be issued three days or 72 hours before the meeting. They may be displayed on the notice board if the bylaws stipulate for a notice board to be maintained, or they may be sent electronically if provision has been made for that.[9]

4 *Unit Titles Act 2001* (ACT), s 85(1).
5 *Unit Titles Act 2001* (ACT), s 86.
6 *Unit Titles Act 2001* (ACT), s 88.
7 *Unit Titles Act 2001* (ACT), s 87.
8 *Unit Titles Act 2001* (ACT), s 87(4).
9 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 6.

A requisition requiring a council meeting to be convened may be served on the secretary of the body corporate under cl 4 of the bylaws. The requisition must be signed by at least a third of the committee members and may stipulate the period of time within which the meeting is to be held. On receiving the requisition, the secretary is obliged to call a council meeting. If the secretary is absent, the requisition may be served on any member of the council and that member must comply with it by giving notice of the meeting.[10]

The chairperson is to preside if present. If the chairperson is absent, the members of the executive committee present at the meeting appoint one of their number to act as chairperson. The chairperson does not have a casting vote but may vote as a member of the committee.[11] The quorum for an executive committee meeting where the committee consists of more than one person is at least half the members of the committee. It is also provided that if two meetings are held at once, both are invalid.[12]

The executive committee may pass a resolution without meeting if a copy of the resolution to be considered is served in writing on each member of the committee and is approved in writing by a majority of members; it will be as valid as if passed at a duly convened meeting of council, even if no such meeting is held.[13] A minute of such a resolution must be included in the minutes of council.[14] A copy of this minute and all other minutes of council must be given to each owner and executive committee member within seven days. If a notice board is required, the minutes are also to be displayed there within this period.[15]

If a quorum is present at a meeting, the decision of the majority of the executive committee is the decision of the committee. However, such a decision will have no effect if before the meeting one or more owners holding unit entitlements exceeding one-third of the aggregate unit entitlement give notice in writing to the secretary of the executive committee that they oppose the making of the decision.[16]

Where council meets in person, any proprietor is entitled to attend in person; if the proprietor is a company, it may attend through a nominee. Proprietors, as such, may not address the meeting unless authorised by resolution of the council.[17]

10 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 7.
11 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 8.
12 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 9.
13 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 10.
14 *Strata Schemes Management Act 1996* (NSW), Sch 3, cll 12, 14.
15 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 16.
16 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 11.
17 *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 11 .

NORTHERN TERRITORY

[38.20] Legislation in the Northern Territory specifies that the committee of a body of proprietors may meet for the conduct of business as and when it determines and may adjourn and otherwise regulate its meetings as it thinks fit.[18]

Overriding this are provisions designed to provide a necessary safety net. Thus, to ensure that such meetings can be convened despite any disagreements, the legislation stipulates that any member of the committee may convene a meeting by giving to each other member not less than seven days' written notice specifying the time and place of the meeting and the business which the convening member intends to bring before the committee.[19] The legislation stipulates that a majority of the members of the committee will constitute a quorum.[20] It also stipulates that, where the committee is constituted by one member, a quorum will exist if that one member is present.[21] Although there is a drafting difficulty in the relevant provision, it seems that, if a quorum is present, a decision of a majority of the committee members voting on a matter shall be the decision of the committee.[22] Thus, if the committee is constituted by one member, the decision of that member is the decision on the matter.[23]

Meetings of the committee are to be chaired by the officer elected for that purpose. If that officer is not present, the committee members present may appoint one of their number to preside over the meeting during the absence of the "chairman".[24] The person presiding over a committee meeting shall have a deliberative vote and, in the case of an equality of votes, also a casting vote.[25]

QUEENSLAND

[38.25] If there is an executive committee of the body corporate, the procedures and powers of the committee are stated in the regulation module.[26] However, the legislation does contain explicit provision authorising the regulation module to provide for the use of proxies in relation to committee meetings.[27]

18 *Unit Titles Act 1976* (NT), s 50(1).
19 *Unit Titles Act 1976* (NT), s 50(2).
20 *Unit Titles Act 1976* (NT), s 50(3).
21 *Unit Titles Act 1976* (NT), s 50(3).
22 *Unit Titles Act 1976* (NT), s 50(4).
23 *Unit Titles Act 1976* (NT), s 50(4).
24 *Unit Titles Act 1976* (NT), s 51(4).
25 *Unit Titles Act 1976* (NT), s 50(5).
26 *Body Corporate and Community Management Act 1997* (Qld), s 99(1).
27 *Body Corporate and Community Management Act 1997* (Qld), s 102.

SOUTH AUSTRALIA

[38.30] The presiding officer, treasurer or secretary of the corporation acting alone may convene a meeting of the management committee of a community corporation. Two ordinary members of the committee may also convene a meeting. This is to be done by giving written notice, setting out the agenda for the meeting and the day, time and place of the meeting, to all members of the committee. Notice must be given at least three days before the meeting. The day, time and place of the meeting must be reasonably convenient to a majority of the members of the committee.[28]

The quorum for a committee meeting is determined by dividing the number of members of the committee by two, disregarding any fraction and adding one. If a member is unable to attend a committee meeting, he or she may appoint another person to act as his or her proxy at the meeting. If each of the community lots is used or is intended to be used for residential purposes, such a proxy can only be held by another member of the community corporation.[29]

Committee meetings are normally chaired by the presiding officer, but in his or her absence the members present may appoint another member to preside.[30] Within the restrictions imposed by the *Community Titles Act 1996* (SA) and the bylaws and directions of the community corporation, a committee may regulate its procedures as it thinks fit.[31] A decision of the majority of members present at a management committee meeting is a decision of the committee.[32] Minutes recording such decisions must be kept.[33]

The legislation allows a committee to reach a decision without meeting. It requires that written notice setting out the proposed decision be served on every member of the committee and that within seven days a majority of the members give written notice to the secretary setting out the proposed decision and expressing their agreement with it.[34]

TASMANIA

[38.35] On the face of the legislation, the body corporate in general meeting may make rules to determine the quorum of the committee of management and the majority needed for that body to reach a decision. In the absence of any rules made by the general meeting, the quorum is a majority of the total

28 *Community Titles Act 1996* (SA), s 93.
29 *Community Titles Act 1996* (SA), s 94(2), (4), (5).
30 *Community Titles Act 1996* (SA), s 94(1).
31 *Community Titles Act 1996* (SA), s 94(8).
32 *Community Titles Act 1996* (SA), s 94(3).
33 *Community Titles Act 1996* (SA), s 94(7).
34 *Community Titles Act 1996* (SA), s 94(6).

number of members of the committee. Also in the absence of such rules, a decision in which a majority of members present at a meeting of the committee agree is a decision of the committee (see [25.35] above). There is company law authority to suggest that if such rules are to be made, they should be incorporated in the constitution and not made ad hoc, despite the apparent authorisation in the legislation. The *Strata Titles Act 1998* (Tas) requires only that rules made under this provision be fair and reasonable.[35]

VICTORIA

[38.40] The *Subdivision (Body Corporate) Regulations 2001* (Vic) provide that the committee must select a member to be chairperson.[36] They also provide that a quorum for a meeting of the committee is at least half the members of the committee.[37] Otherwise they permit the committee to regulate its own proceedings,[38] subject only to the requirement that it present a report on its activities to the annual general meeting.[39]

WESTERN AUSTRALIA

[38.45] The council of a strata title company established in Western Australia may meet together for the conduct of business and adjourn and otherwise regulate its meetings as it thinks fit.[40] The council must meet when any member of the council gives the other members seven days' notice, or more, of a proposed meeting. Such notice must specify the reason for calling the meeting.

All matters at council meetings are to be determined by a simple majority vote.[41] There are no provisions in the scheduled bylaws as to how a deadlock on council is to be broken if it arises. These bylaws allow a member of council to appoint a substitute to attend any meeting at which the member cannot be present.[42] The substitute may, but need not be, a member of council in his or her own right.[43] If the substitute is another member of council, that substitute votes separately in the capacity of member and also on behalf of the member in whose place he or she has been appointed to act.[44]

35 *Strata Titles Act 1998* (Tas), s 79(5).
36 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 308.
37 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 309(1).
38 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 309(2).
39 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 309(4).
40 *Strata Titles Act 1985* (WA), Sch 1, cl 8(2)(a).
41 *Strata Titles Act 1985* (WA), Sch 1, cl 8(1).
42 *Strata Titles Act 1985* (WA), Sch 1, cl 8(3).
43 *Strata Titles Act 1985* (WA), Sch 1, cl 8(4).
44 *Strata Titles Act 1985* (WA), Sch 1, cl 8(5).

Chapter 39

Minutes of meetings

[39.05] The legislation of seven Australian jurisdictions contains some stipulation as to the responsibility of the proprietor's corporation to keep minutes and other records. As strata title rolls are relevant to transactions affecting the ownership of land, the legislation puts more emphasis on the maintenance of these records; but consideration of these requirements is outside the scope of this discussion. The requirements about maintaining records of meeting vary as to the description of the records that must be kept, the length of time for which they must be kept and the consequences of default in complying with the requirements.

The legislation in New South Wales and Western Australia is particularly detailed as to the type of record that must be kept. As well as minutes and notices, the body corporate in these jurisdictions must preserve proxies and voting papers. The length of time for which records must be preserved varies from one year for proxies in New South Wales to seven years for minutes of meeting in the same jurisdiction. In the Australian Capital Territory and the Northern Territory minutes need only be kept for three years.

In the Australian Capital Territory and the Northern Territory, the legislation fixes the responsibility for keeping the records on all members of the committee. Failure to ensure that the records are kept is an offence punishable by fine. In New South Wales the responsibility rests on the body corporate, and again a fine can result from failure to discharge that responsibility. Only Queensland and Tasmania make significant legislative provisions for rights of access to the records. In this area the legislation contrasts unfavourably with the companies legislation.[1]

AUSTRALIAN CAPITAL TERRITORY

[39.10] The executive committee is charged with the duty of keeping minutes of its proceedings.[2] It must also cause minutes of proceedings to be kept at

1 *Corporations Act 2001* (Cth), s 251B(1); see Ch 26.
2 *Unit Titles Act 2001* (ACT), s 92(1)(a).

all general meetings.[3] These records may be kept in electronic form.[4] Among other things, the minutes must record every unanimous resolution, special resolution and ordinary resolution of the corporation. The minutes and the proper accounting records are to be retained for a period of five years after the completion of the transactions, acts or operations to which they relate.[5] If these records are not kept properly, every person who was a member of the committee at the time when the default occurred is guilty of an offence. The committee member will be excused if he or she can prove either that he or she took reasonable steps to ensure that the default did not occur or that he or she did not know of the default. The offence is punishable by a fine of not more than 20 penalty units.[6] The value of a penalty unit is set by the regulations and may be increased from time to time. The legislation provides that an eligible person may inspect and take a copy of the part of the minutes of any annual general meeting of the corporation that records any resolution relating to an exemption from the building insurance requirements, but the right of inspection extends no further.[7]

NEW SOUTH WALES

[39.15] The duties of the owners corporation in respect of the keeping of records and other documents are spelt out in Division 2 of Part 5 of the *Strata Schemes Management Act 1996* (NSW). The legislation specifies that the information may be recorded or stored by mechanical, electronic or other means.

The owners corporation must keep minutes of its meetings that include particulars of motions passed at those meetings. It must also keep notices of general meetings of the owners corporation and its executive committee and the proxies delivered to the owners corporation. Finally, it must keep voting papers relating to motions for resolutions and elections of office holders and the executive committee. A failure to comply with these requirements will result in a maximum penalty of five penalty units.[8]

The Act prescribes the length of time for which the records must be kept. At the time of writing, minutes of meetings are to be kept for seven years from the date of the meeting. Notices of meetings of the owners corporation and its executive committee are to be kept for six years from the date of the meeting to which the notice relates. Proxies delivered to the owners corporation are to be kept for one year from the expiration of the proxy. Finally, voting papers relating to motions for resolutions by the owners corporation and to election of office holders and executive committee are to be kept for six years from the date of the meeting at which the voting took place.[9]

3 *Unit Titles Act 2001* (ACT), s 92(1)(b).
4 *Unit Titles Act 2001* (ACT), s 92(2).
5 *Unit Titles Act 2001* (ACT), s 92(1)(f).
6 *Unit Titles Act 2001* (ACT), s 91(5) and (6).
7 *Unit Titles Act 2001* (ACT), s 74(c).
8 *Strata Schemes Management Act 1996* (NSW), s 104.

NORTHERN TERRITORY

[39.20] Legislation in the Northern Territory requires the committee to cause a record of all notices given to its secretary to be kept in the minutes of the committee.[10] It is also responsible for keeping minutes of its proceedings and of proceedings at all general meetings. Records of general meetings must be kept in a minute book, maintained for the purpose. The book is to include a record of every resolution of the corporation indicating whether that resolution was unanimous, special or ordinary. The minutes and records, together with the books of account, must be kept for three years.[11]

If the committee does not discharge its responsibility in keeping records, all individuals who were members of the committee when the default occurs are guilty of an offence and liable to a fine of $400. The individual can escape liability by proving either that he or she took reasonable steps to ensure that the default did not occur or that the default occurred without his or her knowledge.[12]

QUEENSLAND

[39.25] In Queensland the legislation does not go into detail about the records that must be kept, but it provides that the body corporate for a community titles scheme must keep rolls, registers and other documents as provided for in the regulation module applying to the scheme. Further, it requires the body corporate to give access to these records and to dispose of them in the way and to the extent provided for in the regulation module.[13]

The legislation goes further in providing for statutory rights of access to supplement the rights of access contained in the regulation module. It requires the body corporate to respond to written requests for access from an interested person. Within seven days after receiving such a request, accompanied by the prescribed fee, the body corporate must permit the person to inspect the records or give the person a copy of the record.[14] The term "interested person" is defined, for the purposes of this section, as meaning an owner or mortgagee of a lot included in the scheme, the buyer of such a lot, another person who satisfies the body corporate of a proper interest in the information, or the agent of such a person.[15]

9 *Strata Schemes Management Act 1996* (NSW), s 5.
10 *Unit Titles Act 1976* (NT), s 50(7).
11 *Unit Titles Act 1976* (NT), s 56(1).
12 *Unit Titles Act 1976* (NT), s 56(3).
13 *Body Corporate and Community Management Act 1997* (Qld), s 204.
14 *Body Corporate and Community Management Act 1997* (Qld), s 205(2).
15 *Body Corporate and Community Management Act 1997* (Qld), s 162(5).

SOUTH AUSTRALIA

[39.30] A community corporation in South Australia is required to keep proper records. The emphasis is put on accounting records and records of notices and orders served on the corporation, but these are to be kept together with the minutes of the meetings of the corporation and all notices of meeting of the corporation and its management committee. A copy of all correspondence received or sent by the corporation must also be kept.[16]

TASMANIA

[39.35] The legislative requirement in Tasmania is very simple but it does provide for the right of access. The committee must keep proper minutes of its proceedings and make them available on request for inspection by any member of the body corporate.[17]

VICTORIA

[39.40] While there are no provisions in the legislation, the Victorian regulations require the body corporate to arrange for minutes of general meetings and committee meetings to be kept,[18] and stipulate the minimum information that should be recorded.[19] The regulations also require the body corporate to make these records available for inspection at a reasonable time, upon request.[20]

WESTERN AUSTRALIA

[39.45] A strata company in Western Australia is required to keep minutes of its meetings[21] including the particulars of motions passed at those meetings.[22] It must also retain these records for the prescribed period. A wide range of additional documents are required to be kept and retained along with the minutes, accounting records and orders affecting the body corporate. These include notices of meetings of the strata company and its council; proxies delivered to the strata company; voting papers relating to motions for resolutions by the strata company and to the election of office holders and the council; and records of unanimous and special resolutions passed by proprietors.[23]

16 *Community Titles Act 1996* (SA), s 136.
17 *Strata Titles Act 1998* (Tas), s 79(6).
18 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 415(1).
19 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 415(2).
20 *Subdivision (Body Corporate) Regulations 2001* (Vic), reg 313.
21 *Strata Titles Act 1985* (WA), Sch 1, cl 8(6).
22 *Strata Titles Act 1985* (WA), s 35(f).
23 *Strata Titles Act 1985* (WA), s 35(h).

Glossary of terms

absolute majority: a majority of all members, calculated without regard to the number that attend the meeting.

abstain: decline to use one's vote.

abstention: the act of declining to use one's vote; the formal recording of the failure to vote.

adjournment: (1) a postponement of a meeting to another time or to another time and place; (2) a decision to terminate a meeting.

adjudicator: an official appointed under the *Strata Schemes Management Act 1996* (NSW) whose function is to supervise the conduct of strata title corporations with a view to resolving conflict.

administrator: an official appointed by a company that has encountered financial difficulties with a view to reaching an agreement with creditors that will give the company time to recoup its losses.

amendment: when applied to a resolution for consideration by a meeting, a subsidiary resolution that would change the wording of the main motion before it is put to the vote.

article: a separate clause or provision of a constitution.

articles: used particularly under companies legislation in force until 1998 to designate a body of provisions that formed part of the constitution of a registered company, generally distinguished from the memorandum by the fact that these provisions related to the company's internal affairs.

ASIC: Australian Securities & Investments Commission, the body responsible for administering the corporations legislation.

auditor: an official appointed by a company to examine and verify the financial accounts.

bare majority: a majority of 50 per cent and one vote. The term is used to indicate that a simple majority has been obtained but that the resolution is not unanimous.

board: a committee, specifically the body of directors of a company.

body corporate: an association given legal personality by legislation.

books: includes, as defined by the *Corporations Act 2001* (Cth), (a) a register; (b) any other record of information; (c) financial reports or financial records, however compiled, recorded or stored; and (d) a document.

business day: a day that is not a Saturday, a Sunday, or a public holiday or bank holiday in the place concerned.

bylaw: (1) a regulation of a body corporate; (2) a secondary, subordinate or accessory law.

calendar month: a period commencing at the beginning of a day of one of the 12 months of the year and ending immediately before the beginning of the corresponding day of the next month or, if there is no such corresponding day, ending at the expiration of the next month.

calendar year: a period of 12 months, commencing on 1 January.

casting vote: a vote typically conferred by the constitution of a body corporate on the presiding officer when the affirmative and negative votes are equal. The constitution may stipulate how this vote is to be used.

class: a group of members or securities sharing rights in common.

closure: a decision to apply special limits to a debate on a particular motion.

company: a company registered, or taken to be registered, under the corporations legislation of Australia; includes a company which has complied with the requirements to obtain recognition.

constitution: the body's charter or memorandum and/or any instrument or law constituting or defining the constitution of the body or governing the activities of the body or its members.

contributory: a person liable as a member or past member to contribute to the property of the company if it is wound up.

convocation: the act of causing a meeting to assemble.

convoke: to call or cause a meeting to assemble.

corporation: any body corporate, whether incorporated in Australia or not; a body that has legal personality.

covenant: a formal agreement or promise of legal validity, especially a promise or contract under seal.

debenture: a sealed bond issued by a company in respect of a long-term loan; an undertaking by the body to repay as a debt money deposited with or lent to the body other than in the ordinary course of business. The agreement may include a charge over property of the body to secure repayment of the money.

deem: believe, consider, judge or count that a thing has been done or is being done.

deliberative vote: vote cast by right of the voter's membership in the body, representing the voter's views on the merits of the question. The term is used in opposition to the term casting vote because the way a casting vote may be used can be governed by the constitution.

director: a member of the board that manages the affairs of a company.

dissent: express opposition; a vote either for or against a resolution that is contrary to the decision of the majority.

extraordinary general meeting: a meeting other than an annual general meeting or a meeting otherwise required by statute; a special meeting. The term was once common but is no longer employed in the corporations legislation.

filibuster: an attempt to obstruct passage of a motion when it is anticipated that the motion will attract majority support. Specifically an attempt by a vocal minority in these circumstances to delay the vote by extending the debate.

general meeting: a meeting of all the ordinary members of the body.

injunction: a legal order that compels a person to do or refrain from doing a specific thing.

liquidation: the formal process whereby a company's existence is terminated.

liquidator: a person formally appointed by the court to control the process of liquidation.

mandamus: an order issued by a court directing that an action be carried out by an officer.

memorandum of association: a document forming part of the constitution of a company. Until 1998 a company seeking registration was required to lodge a memorandum of association that notionally contained matters of interest to those dealing with the company as outsiders.

minutes: a brief summary of the proceedings of a meeting.

motion: (1) a formal proposition or proposal put before a committee, council or general meeting by a member, which the meeting should resolve in certain terms; (2) a formal application made to a court for a ruling or order.

natural justice: procedural justice; a body of principles designed to guarantee procedural justice.

notice: (1) a document conveying some information; (2) time of specified duration for action after receipt of information.

officer: in relation to a body corporate, a person who has been elected or appointed to the executive committee of the body corporate as presiding officer, by whatever name called, or as director, secretary or treasurer of the corporation. It includes a person who, other than in general meeting, makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the body corporate or who has the capacity to significantly affect the corporation's financial standing.

ordinary resolution: a resolution passed at a duly convened meeting of members by a majority of the votes of members present and voting at the meeting.

poll: the action of voting; specifically the action of voting formally, where the number of votes available is calculated according to a register.

pre-paid post: the normal means of posting a letter: postage is paid when the article is put in the mail.

proxy: (1) a substitute, a person who is authorised to act as a substitute in exercising rights of membership, including voting, speaking and moving or seconding resolutions (also called a proxy holder); (2) a document conferring the authority to act as a substitute for another in exercising rights of membership.

quorum: a requirement that a sufficient number of members attend a duly constituted meeting when all should and might be present.

receiver: an officer of a corporation appointed under provisions in the corporations legislation to manage the corporation's affairs when it is in financial difficulty.

receivership: an administration of a company by a receiver.

recess: a short intermission in proceedings. It does not close the meeting; afterwards business will immediately resume at the exact point at which it was interrupted.

recision: the action of repealing a motion passed earlier.

register: a book or volume in which important particulars of any kind are regularly and accurately recorded.

Registrar: an official appointed to a public position; the duties of the office depend on the specific legislation but will include responsibility for keeping a register.

regulation: a rule prescribed for controlling some matter, especially delegated legislation passed by an authority appointed by the legislation for a particular purpose.

requisition: a formal request; carries connotations of rightful demand.

rescind: repeal or annul; render an earlier decision of no effect.

Schedule: a separate paper accompanying a document and containing explanatory or supplemental material, specifically an appendix to an Act.

scrutineer: a person who examines the conduct and result of voting.

seconder: the person whose support is offered to a proposal for the purpose of bringing it before the meeting.

share: any of the equal parts into which the company's capital is divided. A species of legal property which confers membership rights in relation to a company.

share transfer: the process of transferring legal ownership of a share from one person to another.

show of hands: voting in meeting by raising a hand; the expression is sometimes also used to refer to a vote by voice. The process is relatively informal and effect may be given to the impression of the chair as to the sense of the meeting without expressly counting votes.

simple majority: a majority of 50 per cent and one vote.

special resolution: a resolution requiring a majority greater than an ordinary majority. The size of majority required will be stipulated in relevant legislation or in the constitution.

standing committee: a committee established by the constitution of the organisation.

unanimous resolution: (1) a resolution which has obtained positive support from all entitled to vote; (2) a resolution passed without a dissenting vote.

Table of Cases

[References are to paragraph numbers]

Table of Statutes

[References are to paragraph numbers]

AUSTRALIAN CAPITAL TERRITORY

NEW SOUTH WALES

NORTHERN TERRITORY

QUEENSLAND

SOUTH AUSTRALIA

TASMANIA

VICTORIA

WESTERN AUSTRALIA

UNITED KINGDOM

INTERNATIONAL

Index

[References are to paragraph numbers]