OLIVIA'S PQ ADVICE

Orientating Questions for each PQ:

1. What kind of company am I dealing with?
   a. Proprietary = ABC Pty Ltd/ABC Proprietary Limited
   b. Public Company = ABC Ltd/ABC Limited
   c. Corporate Groups = if there is a 'holding company' or 'parent company' and 'subsidiaries'

2. What is the internal governance structure? [Replaceable rules only or constitutional amendments]

3. Who are the directors/officers? [Roles, executive vs. non-executive, special skills] Any employees – specifically noting how 'conflict' duty can extend to employees/former employees for improper use of information.

4. Is my company solvent?

5. Who is my client; what do they want to know; what do they want? [ATQ!]

Structure for Director's Duties Question

Structure by duty:

1. State the duty briefly – both its statutory and common law basis.

2. Prove the breach from each of the potential breaching parties [can sometimes group people together e.g. if there are a couple of non-executive directors]

3. Defences to breach? E.g. reliance and delegation for duty of care, or insolvent trading defences under s588H.

4. Any other ways to get out of breach? E.g. GM ratification (however then check for blocks to GM approval like fraud on the minority, inadequate notice or insolvency), constitutional provision (authorizing conflicts for example).

Admin Points

1. Remember the first time you reference a section in the Corporations Act, note "all references to statutory sections hereafter will be to the *Corporations Act*, unless otherwise specified."

ALTERING THE CORPORATE CONSTITUTION (S136) [SCAFFOLD]

1. **What is a constitution?** Per s9 of the Corporations Act, a 'constitution' is an instrument that constitutes or defines the construction of a body or governs the activities of that body and its members.

2. **Prima Facie Alterable:** The Constitution is prima facie alterable and the power to alter is mandatory, meaning that a company cannot agree or resolve to never amend the constitution or not amend it for a period of time: *Peter's American Delicacy v Heath* (1939) 61 CLR 457.

3. **By Special Resolution:** Per s136(2), a company may modify or repeal its constitution, or a provision of its constitution, by special resolution.

   - Under s9 of the *Corporations Act*, 'special resolution' means a resolution that has been passed by at least **75%** of the votes cast by members entitled to vote on the resolution.

4. **Entrenchment?** However, while the golden rule is that the power to alter is mandatory, note that per s136(3), the company's constitution may provide that the special resolution has no effect unless a further requirement specified in the constitution relating to that modification or repeal has been complied with.

- Entrenchment by further requirements: S136(3) says the company's constitution may provide that a special resolution has no effect unless a further requirement relating to that modification has been complied with. Examples include:
    - Heightened voting requirements e.g. 80% (super majority)
    - Might need a specific person to agree or
    - Require that some other condition be fulfilled.

- Entrenchment through weighted voting: augmentation of voting powers of particular shareholders is allowed, either generally or in special resolutions. In *Bushell v Faith*, court found that an article giving a director 3 votes per share in their attempted dismissal was valid → parliament would not intend to fetter a company's right to issue a share with such rights or restrictions as it sees fit.

- Statutory Entrenchment (s140): s140 finds some issues so fundamental that to be able to interfere with them by special resolution would be to breach fundamentals of corporation's law. S140 specifically says that unless a member agrees in writing, they aren't bound by a modification of the constitution made after they become a member if:
    - (a) it requires the member to take up additional shares;
    - (b) it in any way increases a member's liability to contribute or pay money; or
    - (c) it increases or imposes restrictions on the right to transfer shares.

5. **Other limitations on alteration?**

- Fraud on the Minority + Oppression: Amendment could be invalid if it amounts to fraud on the minority/oppression under s232. S232 derives from general law, namely *Gambotto*, which said that for amendments that:
    - A) don't involve an expropriation of shares → fraud on the minority requires proof that the amendment is beyond the purpose contemplated by constitution + oppressive
    - B) do involve expropriations of shares, majority has to prove amendment is for i) proper purpose and ii) fair in all the circumstances.

- Class rights: S246B provides that the alteration of a class right requires a special resolution *of class members*, or the written consent of members with at least 75% of the votes in the class.

- Shareholder's Agreements: Not discussed in AUS law yet, but English and Canadian courts (see *Russel v Northern Bank Development*) have upheld that shareholders agreements are tolerable fetters upon shareholder voting rights → basically when shareholders agree between themselves how to exercise their rights under the constitution e.g. might agree not to alter a certain provision between themselves.

6. **Calling the GM:** To engage this process of alteration, the company must call a general meeting:

- Very broad possibilities of who can convene a general meeting:
    - A director in a non-listed company may call a meeting of company members: s249C [RR]
    - A director in a listed company may call a meeting of company members: s249CA [mandatory rule]
    - A director at request of members with at least 5% of the votes that may be cast at the general meeting: s249D
        - But NB if it's the shareholders requisitioning the GM, meeting must be held for a proper purpose (S249Q), i.e. for something within their powers to affect (*NRMA v Parker*).
    - Members with at least 5% of vote can call GM themselves as their own expense: s249F.
    - In exceptional circumstances, the Court may order a meeting of the company's members if it is impracticable to call the meeting in any other way: s249G; *Re Totex-Adon*.

- S249L (c) requires that *notice proposing the resolution* be provided to members. Must state the text of the resolution, and set out a clear intention to propose it as a special resolution.
    - Written notice must be given individual to each member entitled to vote at the meeting and to each director (s249J) and to the company auditor (s249K).
    - Notice period is 21 days for non-listed companies (s249H) and 28 days for listed companies (s249HA).
    - Content of notice must set out (249L):
        - A) location, date, and time of the meeting;
        - B) the general nature of the meeting's business [NB – controversial point in case law]
        - C) any intention to propose a special resolution, including text of resolution if so; and
        - D) information regarding member's proxy rights

Resolution disclosure obligations [re: s249L(b)]

- *Fraser v NRMA:* 'the fiduciary duty is a duty to provide such material information as will fully and fairly inform members of what is to be considered at the meeting' → in that case, had to balance an intelligible document with a detailed one. Took issue with use of "business as usual" undermining significance of the proposed resolution, and also the use of "members" interchangeably despite dealing with 2 different types of members.
- *Kaye v Croyden Tramways:* resolution declared invalid as notice was 'most artfully framed to mislead' – notice didn't include half the content of what was being proposed, namely substantial sum being paid to directors for loss of office in acquisition.
- *Re Marra Developments:* Anti-director provisions were framed to seem pro-director due to document structure. Found what is required in the notice is a 'fair and reasonable intimation of what is actually proposed to be done'. Rejected 'reasonable business person' test.
- *ENT v Sunraysia Television*: Found that the information disclosed is to be assessed in a practical, realistic way having regard to the complexity of the proposal. E.g. for complex transactions, need to be discerning. Also said directors don't have to note all the alternatives/things they considered, but rather only present and final views/intentions.

- At the meeting itself:
  - 1 share, 1 vote: s250E [RR}
  - Questions to be decided by a show of hands: s250J
  - Members can demand a poll: s250K [can be demanded by at least 5 members entitled to vote on the resolution, or members with at least 5% of the vote, or the chair – s250L (2)].
  - Members of public company have right to appoint proxy at the meeting, and RR that proprietary companies have that right: s249X.
  - Chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company: s250S

7. **Comes into effect:** A special resolution making an alteration to the constitution comes into effect on the date the resolution is passed, or such later date as expressed in the resolution: s137

8. **Public company ASIC disclosure:** Note that if this is a public company adopting or amending its constitution, the company must lodge a copy of the special resolution and the constitution or amendment to the constitution with ASIC within 14 days: s136(5).

9. **Effect as a statutory contract:** Once altered, the Constitution with these new provisions will have the effect of an altered *statutory contract* between the company and each member, the company and each director and secretary, and the members themselves: s140.