

# ***BUSINESS ORGANISATIONS LAW GUIDEBOOK***

## ***SECOND EDITION***

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### **CHAPTER 8**

#### **PROBLEM QUESTION**

Bernadette and Jim are the two directors of 'Insured Pty Ltd'. They are also two of the members of the company, and each holds 40% of the shares. The rest of the shares are divided between Jane and Dominique, who each hold 10%.

Jane wishes to call for a members' meeting to:

- remove Bernadette from her position, because Jane had a dispute with her; and
- force the board of directors to sell certain assets that are causing the company to lose money.

The directors would like to call for a meeting to pass a resolution to change the company's constitution to allow shareholders holding more than 30% of the shares of the company to expropriate the shares of minority shareholders.

- 1 Can Jane call for a members' meeting?
- 2 What two remedies will be available to Jane and Dominique to invalidate a change of the constitution to expropriate their shares?

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#### **ANSWER**

1 Section 249D provides that the directors must call for a members' meeting at the request of shareholders holding 5% of the voting shares in a company, or of at least 100 members who are entitled to vote at the general meeting. Jane has 10% of the votes. Accordingly she can call for a meeting as long as the meeting is for a proper purpose (s 249Q).

In this case she wants to pass two motions:

- Remove Bernadette from her position because Jane had a dispute with her. This is a proper reason to call for a meeting, irrespective of Jane's motivation, because under s 203C members can remove directors from their position by passing an ordinary resolution. Further, the directors have to call for this meeting even though it is unlikely for the resolution to pass (*Humes Ltd v Unity APA Ltd* (1987) 5 ACLC 15).
- Force the board of directors to sell certain assets that are causing the company to lose money. Members cannot be involved in the management of the company except if the company's constitution states otherwise (s 198A and *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113).

Selling certain assets of the company is a management decision; accordingly it is in the hand of the board of directors and not the members. The facts of the problem do not mention that the company's constitution limits the power of the board of directors. Accordingly, it would be improper purpose for Jane to call for a meeting to force the directors to sell the assets of the company.

Jane can call for a meeting to remove the directors using s 249D.

2 The two remedies that are available to protect the shareholders in this situation are:

- Under the common law, a change of the constitution to expropriate shares of members is invalid if it is not for proper purpose or if it is unfair (*Gambotto v WCP Ltd* (1995) 182 CLR 432). In this question, a change of the constitution of Insured Pty Ltd is unlikely to be for a proper purpose since it is not apparent that the minority is causing harm to the company and the interests of the existing shareholders in general. The fact that the expropriation would benefit the company, or certain members of the company, is not enough to consider that there is a proper purpose. Accordingly, the change of constitution is likely to be invalid.
- Statute s 232 may apply. As members, Jane and Dominique can apply for the court to stop an oppressive conduct (s 234). In this case, the proposed resolution to change the constitution appears to be 'unfairly prejudicial or unfairly discriminatory'. When looking at the unfairness of a decision, the High Court has noted in *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459 that the test to determine if there is unfairness is an objective test. Applying an objective test would illustrate that in this case the proposed resolution to change the constitution is oppressive because the decision of the directors does not seem to be justified.