THE COMPANIES ACT 1943-1947

Amending Articles of Association to Comply with the Act

The new Companies Act of Western Australia has now been in operation for the best part of a year. Most of the immediate urgencies incidental to the new order have been complied with, and practitioners are now settling down to the arduous job of overhauling Articles of Association to bring them into line with the new Act.

It is perhaps well to realize at the outset that company secretaries and other administrative officers for the most part find the new Act bewildering, and just a little intimidating. They need, and appreciate, the assistance of full and explicit Articles. Consequently it may be wise to incorporate provisions dealing with matters frequently not covered by Articles, such as the keeping of minute books, and the various registers which are required.

The nature and extent of the necessary amendments will, of course, vary with the individual needs of the particular company and its Articles. What is attempted here is therefore neither exhaustive nor of universal application. It is merely intended to draw attention to specific provisions in the new Act which may necessitate amendment of Articles.

Application of Table "A": Where, prior to the commencement of the new Act, a company had expressly or impliedly adopted Table "A" of the 1893 Act, either wholly or partly, these provisions will still apply, unless and until expressly excluded. [1] And Table "A" of the new Act will have no application. [2] But the effect of the continuing provisions in the new Act is, it appears, only to continue the application of Table "A" of the old Act in so far as applicable at the commencement of the new Act. Once expressly excluded these provisions could only be revived by express adoption, and not (as under the old Act) by implication, wherever there is no contrary provision in the Articles.

Replacement of Share Scrip: The right to issue new certificates to replace lost, destroyed, or worn-out certificates is now subject to statutory restrictions, as set out in section 414 of the Act. These include advertising of notice of intention to issue such scrip, and filing with the Registrar a copy of the advertisement and details of the substitute scrip. It is further provided that the substituted

[1] See section 4 (i) (b).
[2] See section 20 (ii).

scrip must be endorsed as such and issued at the cost in all respects of the applicant. These provisions are quite new to company procedure in this State, and the relevant Article governing the issue of new scrip should be amended, either by providing that such scrip shall be issued only subject to the provisions of section 414, or by expressly incorporating the relevant provisions of this section.

Transfers and Transmission of Shares: Most Articles contain some provision restricting the right of transfer of shares, even if only in cases where the company has a lien. [3] Under section 85 of the Act, it is necessary, within twenty-eight days of lodgment of a transfer, to give notice to the transferee of refusal to register a transfer. Amendment of Articles to incorporate the provisions of this section is desirable.

New Share Scrip must be ready for delivery within two months of lodgment of any transfer of shares. In case of a first allotment, the scrip must be ready for delivery within twenty-eight days after allotment. [4] This is a departure from previous practice. Under the Imperial Act (on which many Articles, following English precedents, are based) the relevant period is in both cases two months.

Commissions: The payment of underwriting commissions (held to be ultra vires in the case of *Australian Investment Trust Ltd. v. Strand and Pitt Street Properties Limited,* [5] is now lawful if authorised by the Articles and otherwise in compliance with the requirements of section 57. It may be noted that Table "A" contains no such authorisation.

Share Registers: The method of keeping share registers is not always covered by Articles. But the statutory requirements have been varied by the new Act in the following particulars, in respect of which amendment of Articles may be necessary or desirable:

(i) The Register must now show the class or kind of shares.

(ii) Specimen share certificates in respect of each class of share must be included in the Share Register.

(iii) An alphabetical index of share-holders must be kept, except where the Register is itself in alphabetical order, or in the case of small companies with membership of not more than fifty members. [6]

Branch Registers may be kept in any country, State or colony, where the company is so authorised by its Articles.

The provisions of the Articles as to closure of transfer books will in almost all cases require amendment. The maximum period

[3] Cf. Article 19, Table 'A'.
[4] See section 87.
[5] (1932) A.C. 735.
[6] See sections 103-104.

during which the Register may be closed in any one year is now twenty-eight days, as against thirty days under the old Act. The maximum period of closure at any one time has been extended from seven to fourteen consecutive days. It is now necessary to give not less than fourteen clear days' notice by advertisement in a Perth or local paper of such closure. [7]

A further innovation with regard to the keeping of Share Registers is contained in section 108, sub-section (2). This provides, by way of exception to the general rule that no trust may be entered on the Register, that any trustee, executor, or administrator of the estate of a deceased person who was registered as the holder of a share in any company may become registered as the holder of that share as such trustee, executor, or administrator. It is expressly provided that such trustee, executor, or administrator shall be under no greater liability in respect of such share than he would have been subject to if the share had remained registered in the name of the deceased. This protects a person so registered from personal liability in the case of shares in respect of which there is still a liability for uncalled capital. The company, on the other hand, is expressly exonerated from liability in respect of notice of any trust.

Somewhat similar power is conferred by sub-section 3 of section 108 in respect of a deceased person who was equitably entitled.

It is submitted that these provisions are permissive only, and not mandatory, and that they merely authorise an entry in the Register which would otherwise have been improper. The trustee, executor, or administrator has, it would appear, no absolute right to be registered as such, and it is still open to a company, by its Articles, to require that a personal representative shall become registered as a member (i.e. personally, and without limitation of liability to the estate assets, and not merely in a representative capacity) before becoming entitled to exercise full membership rights.

The question is not particularly material where Articles contain provisions similar to Articles 74 of Palmer's Company Precedents, [8] i.e. that a person entitled under the transmission clauses to transfer shares may vote in the same manner as if he were the registered holder of the shares. But many companies prefer to exclude executors and administrators from full membership rights, particularly voting rights, in view of the danger of block-voting on the part of trustee companies. [9]

Capital: Reduction of capital (except in the case of a No-Liability Company) must now be authorised by the Articles. [10] So also must increase of capital, consolidation or subdivision of shares,

[7] Section 107.
[8] 15th edition.
[9] Cf. Article 22, Table 'A'.
[10] See section 71.

conversion of shares into stock, re-conversion from stock to shares, and the cancellation of unissued share capital. [11] Under the provisions of the old Act, all these matters could be effected by special resolution (subject to any necessary sanction by the Court) irrespective of any enabling provision in the Articles.

Other matters which may now be authorised either by the Articles or by special resolution, and which were previously exercisable only by special resolution, are:

(i) power to arrange for a difference between share-holders in amounts and time of payment of calls; to accept share capital in advance of calls; and to pay dividends according to the amount paid up on each share; [12]

(ii) the creation of a reserve liability. [13]

Meetings: The provisions of the Articles with regard to meetings will in most cases require considerable amendment. General meetings must, as hitherto, be held at least once a year, but the requirement that such meeting shall be held not more than fifteen months after the holding of the last preceding general meeting is a new provision. [14] As to the place at which such meetings shall be held, the provisions of section 114 (1)(a) and (b) should be noted. These provisions were inserted to meet the case of companies which, though incorporated in Western Australia, have their management and hold their meetings outside this State. In such cases it was felt that local share-holders should have some right to be heard at general meetings. It is accordingly provided that, if the majority of members are resident in this State, then the annual general meeting must be held within this State. Where the majority of members are resident outside this State, then the majority of the local share-holders (being not less than ten members) may require a meeting to be held at least once a year in this State. This is a requirement which may easily be overlooked by the company where the relevant Article is in the form of Article 39 of Table "A," that the meeting shall be held "at such time . . . . and at such place as the directors shall appoint."

The provisions of section 116 as to requisitioning meetings will in most cases call for amendment of Articles, which will probably be found to conflict with the Act in regard to the number of members entitled to requisition a meeting, and also as to the time within which such meeting shall be convened and held.

The Articles dealing with proxies may require amending to comply with section 118. This section confers the right on a corporation, being a member of a company, to authorise such person

[11] See section 64.
[12] See section 62.
[13] See section 63 (i)
[14] See section 114 (1).

as it thinks fit to act as its representative at any meeting of the company. The person so appointed need not be a member of the company, or of the corporation appointing him. Under sub-section (2) of section 118 such person is entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual share-holder of the company. His rights are thus wider than those of a proxy-holder. He would for instance be a "share-holder personally present" for the purpose of determining a quorum, and he would be entitled to vote on a show of hands. It appears preferable therefore to retain the usual articles dealing with proxies, and to insert a separate article in terms of section 118 dealing with representatives appointed by corporations pursuant to this section. [15]

With regard to notices convening meetings, there is no statutory provision as to what notice must be given in the case of ordinary resolutions, and many companies provide for, and will wish to adhere to, seven days' notice. But in case it is intended to propose any resolution as a special resolution, at least fourteen days' notice is required, and the Articles should be amended accordingly. [16]

An apparent discrepancy between Articles 42 and 49 of Table "A" may perhaps be pointed out. Under the former, it is provided that "subject to the provisions of section 119 (1) of the Act relating to special resolutions," fourteen days' notice of meetings must be given. There is no apparent reason why this Article should be expressed to be subject to section 119, as the notice required by that section for a special resolution is likewise fourteen days. Under Article 49, when a meeting is adjourned for fourteen days or more, notice of the adjourned meeting must be given as in the case of an original meeting. If, in the case of a company operating under Table " A," a meeting should be adjourned for fourteen days, it would, of course, be impossible to give the prescribed notice.

With regard to the Articles dealing with the right to demand a poll, it may be mentioned that Article 50 of Table "A" conflicts with section 22 (3), which requires that in the case of a special resolution to amend the Articles a poll may be demanded by at least five members. Article 50 of Table "A," following section 119 (3)(b), provides that a poll may be demanded by any three members, or by two, together holding not less than 15% of the paid-up capital of the company, or even by one member with a similar holding.

Directors: The chief matters for consideration here are: The number of directors (which should, except in the case of proprietary companies, be not less than two); directors' remuneration; and the duty of disclosure and right to vote where directors are personally interested.

[15] Cf. Article 63 of Table 'A'.
[16] Section 119 (1).

The remuneration of the directors must be determined by the company in general meeting. Any provision in the Articles fixing such remuneration is absolutely null and void. [17] Even the provision in Article 65 of Table "A," that the remuneration of the directors shall from time to time be determined by the company in general meeting, takes effect, not by virtue of its inclusion in the Articles, but by virtue of section 151 of the Act.

These provisions are unique in company legislation, and their operation will be watched with interest. Unfortunately, there is room for considerable difference of opinion as to the scope of the relevant section. The question is one which may be material when amendments to Articles are under consideration.

Section 151 provides that "the remuneration and emoluments of directors to be paid for their services in whatsoever capacity and under whatsoever designation they may serve and be entitled to such remuneration and emoluments, shall from time to time be determined by the company in general meeting . . . ."

It may, on the one hand, be contended that the effect of this section is that any person who is or becomes a director, is incapable of receiving from the company any remuneration for any services whatsoever—whether as director, manager, secretary, or even solicitor—unless such remuneration is determined by the company in general meeting.

A narrower interpretation is that the intention of the legislature is merely to ensure that directors do not evade the obligations of the Act by hiding their real capacity under some other designation, or by serving ostensibly in some other capacity. On this view, it is only "directors' remuneration" which must be fixed by the company in general meeting, though it will be necessary to look beyond the mere designation, or ostensible capacity, to see whether or not remuneration and emoluments are "remuneration and emoluments of directors" within the meaning of the section.

It is not possible here to deal fully with these divergent views. In the absence of judicial authority, however, the cautious conveyancer will, no doubt, prefer the former view.

The question has already been raised in several quarters as to whether section 151 invalidates the fairly widespread practice of directors dividing fees amongst themselves by agreement. It seems clear that any provision in the Articles authorising any such allocation would be null and void under sub-section (2) of section 151. It would also be contrary to the manifest intention of the section, as it would preclude the company in general meeting, by a simple majority, from determining the remuneration of a particular director. Whether the directors, without sanction from the company, can re-allocate amongst themselves remuneration determined by the com-

[17] Section 151.

pany in general meeting, is extremely doubtful. It is submitted, however, that this result can be effected by a resolution passed by the company in general meeting to the effect that the remuneration of the directors shall be at the rate of so much per director, to be allocated amongst the directors as they shall agree, and failing agreement to be equally divided. It can hardly be said, in such case, that the remuneration is not "determined' by the company in general meeting." [18] The opinion is held, however, by some that the provisions of section 152, which give minority share-holders a right of appeal against the rate or amount of remuneration of any director, indicate an intention that the remuneration should in each case be individually determined.

Where the Articles provide for special remuneration or other emoluments for a managing director, or for special services, such remuneration or emoluments must also be fixed by the company in general meeting. Article 68 of Table "A" apparently errs in this regard. Copied from the provisions of other Acts where no such restriction applies, it provides that the directors may appoint one of their number to be a managing director and fix his remuneration.

Most Articles contain express provisions as to the duty of directors to disclose personal interest in contracts with the company. However, the provisions of section 154 in relation to such disclosure are both new and stringent. It seems desirable, therefore, to incorporate in the Articles the express provisions of sub-sections 1-3 of section 154. It may be noted that our Act goes further than the English Act in making it obligatory upon a director to see that an entry is made in the minutes of his declaration of interest.

Except in the case of proprietary and co-operative companies (which are specifically exempted) the Articles should also embody the provisions of sub-section (6) of section 154, that a director who is in any way interested shall not vote. This provision operates extremely harshly in practice where several companies, not being proprietary companies, have identical directorates, and by reason of the directors' share-holdings in these companies, find it impossible to obtain a quorum of disinterested directors to adopt contracts between the companies. It is understood that an amendment to this section is under consideration, with a view to alleviating such hardships, and it may be advisable for such companies to defer amendment of Articles in this respect pending legislative consideration of the suggested amendment.

Other matters which may require amendment in relation to directors are:

(i) Share qualifications (if any) must be taken up within twenty-eight days. [19]

[18] See *Calhoun and others v. Green and others,* (1919) V.L.R. 196, at 204.
[19] Section 147.

(ii) Assignments of office pursuant to power in the Articles are of no effect unless and until approved by special resolution. [20]

(iii) The usual indemnity clause in favour of directors and other officers is wider than is permissible under section 157, and void except to the very limited extent permitted by that section. To preserve the indemnity to the fullest extent allowed by law, the Articles may be amended by inserting at the commencement:

"Except insofar as otherwise expressly provided by statute . . . ."

Attention is drawn also to Article 70 of Table "A" dealing with the requirement for directors to keep minutes of their proceedings. It contains a provision that "every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose." This is not a statutory requirement, nor is it a usual provision. Companies operating under Table "A" of the new Act may find the requirement irksome, and may wish to exclude it.

Accounts and Audit: These provisions are the most comprehensive and exacting of all the amending provisions of the new Act. In the great majority of cases, however, companies will (compulsorily) have the assistance of qualified auditors to guide them, and it may, therefore, be considered unnecessary to set out the statutory requirements at any great length. Articles 98 to 103 of Table "A" cover the position briefly but adequately by reference to the relevant sections.

In many cases the Articles provide for balance sheets to be circulated at least seven days prior to the meeting at which the accounts are to be presented. Under section 134 (1)(a) they must be circulated at least fourteen days prior to the meeting.

In the case of a proprietary company, there is no obligation to circulate balance sheets. But any member is entitled to be furnished with a copy within fourteen days of making request. [21] It is wise to incorporate this provision in the Articles of proprietary companies. The right to demand a balance sheet at any time on fourteen days' notice and payment of the prescribed fee, is apparently absolute, and would apply even where the balance sheet had been circulated amongst members.

Care should be taken that the Articles do not permit of the appointment to the office of auditor of any director or employee of the company, or other person who is precluded by section 138 from holding that office; and also that the appointment and remuneration of the auditors shall be fixed by the company in general meeting; and that on the nomination of any person other than the retiring

[20] Section 156.
[21] Section 135 (1).

auditor for such office, notices shall be given to the retiring auditor and to the share-holders, as required by section 137 (3).

Minute Books and Registers: Whether or not provisions are inserted in the Articles covering these requirements are matters which must be left to the discretion of the company and its solicitors. It may perhaps be felt that it is the auditor's duty to see that the company keeps the proper registers, and maintains them in the proper manner, and that such matters can well be left to him. But as the statutory requirements are now more comprehensive, it seems preferable to include such matters, so that the Articles can be made as complete a guide as possible on all procedural and administrative matters.

With regard to the minute books, these must now be kept at the registered office of the company, and must be freely available for inspection by members. [22] This requirement occasions some difficulty where meetings are held outside this State, in which case compliance with the Act can only be effected by sending signed minutes to the registered office of the company as soon as possible after each meeting, to be pasted into the minute book.

There is a rather onerous provision in section 123 (4)(a) which provides that every minute of a resolution fixing the rate or amount of remuneration of a director shall contain the name of every director respectively voting for and against the resolution and shall state how each such director voted, and if the case so requires shall contain the names of every person mentioned in sub-section (2) paragraph (b) of section 152 who votes in favour of the resolution. The persons mentioned in this provision are persons holding shares in trust for a director, the wife, husband, or child of a director, and persons holding shares acquired from a director either gratuitously or for a nominal consideration. Votes given by any such person are deemed to have been given on behalf of the director. The person in charge of the minutes will in most cases have no means of ascertaining whether a vote is, in the particular instance, deemed to have been given on behalf of the director. There is no obligation on the part of such persons to make any disclosure of the relevant facts; and it is difficult to see how the unfortunate secretary can comply with the requirement, as he is bound to do under penalty.

The Registers which must be maintained (apart from the share register which has already been mentioned) are:

(i) Register of Directors. The manner of keeping the register, the particulars which must be included, and the right of inspection are set out in section 150 of the Act. This is, of course, a new requirement.

(ii) Register of Charges. This must be maintained in the manner provided by sections 95-97. The maintenance of such register was

[22] Section 124.

necessary under the old Act, but the obligation to keep a copy of each instrument creating a charge is a new obligation.

Proprietary Companies: Where Articles are being amended to constitute a company a proprietary company, it is only necessary to incorporate the statutory prohibitions contained in section 37. There is no statutory obligation here, as elsewhere, to restrict the transferability of shares. In actual practice, however, it is desirable, if not necessary, to incorporate some such restriction in the Articles, so that the number of share-holders may be kept within the statutory maximum.

Other innovations in respect of which amendment of Articles may be considered are: Section 44, authorising the keeping of a facsimile seal outside this State; section 60, authorising the issue of redeemable preference shares; and section 68 as to power to pay interest out of capital in certain circumstances, in the case of developmental works. All the foregoing require to be authorised by the Articles.

Finally, attention is drawn to certain exceedingly wide powers which are now implied in every company, whether incorporated prior to or after the commencement of the Act, unless the Memorandum or Articles otherwise provide. These powers are set out in the Third Schedule to the Act, pursuant to section 35. Share-holders might be concerned to know that in many cases, where the exercise of these implied powers will fall within the scope of the directors' authority, the directors may now have the power, without any sanction of the company in general meeting, to sell the whole of the company's undertaking, or to borrow without limitation on the security of the company's assets, including its uncalled capital. It is, therefore, very necessary to consider whether or not any of these powers should be excluded or limited, or their exercise restricted to the company in general meeting.

ENID M. MILES.