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Public company - Removal of auditor by shareholder action

Corporations Act 2001

Can a shareholder or member of a public company, either listed or unlisted, compel the Directors to include on the agenda of an Annual General Meeting, already called but still two months away, a resolution to remove an auditor?

An auditor of a company may be removed from office by resolution of the company at a general meeting of which notice under subsection 1A has been given, **but not otherwise**: s329 (1). S329 (1A) says:

"Notice by the shareholder or member must be given to the company at least two months before the meeting is to be held."

(Author emphasis).

It is clear from the section that the notice to be given refers to notice given by the person intending to move the resolution, not to the notice convening the meeting.

There is a permissive proviso allowing a company to call a special meeting after it receives notice of a special resolution to remove an auditor. There does not appear to be anything in the proviso that could be used to compel a company to call a meeting or to put a special resolution on the agenda of a meeting already called.

S329 is a provision designed to afford auditors an opportunity to defend their position and to afford all members as well as ASIC an opportunity to fully consider the issues and for ASIC to intervene. It is the only way in which an auditor can be removed: Law Book Company, *Laws of Australia*, 04 Business Organisations, 4.2 Company Management, Chapter 2 [56] and Butterworths, *Halsbury's Laws of Australia*, [120-10455].

The other provisions of s329 concerning notice to the auditor, representations by the auditor, and notice to ASIC must also be complied with.

Other sections of the Corporations Act stand alongside but do derogate from the essential requirements of s329.

It should be noted that s329 is a protective section, not an empowering section. Members' rights to put resolutions at meetings lie elsewhere in the Act; it is not found in s329 – see generally *Pedley v Inland Waterways Association Ltd* [1977] 1 All ER 209.

Of relevance is s249N which should be considered. That section does give Members the right to put resolutions at meetings. It provides:

1) The following members may give a company notice of a resolution that they propose to move at a general meeting:
   a) members with at least 5% of the votes that may be cast on the resolution; or
   b) at least 100 members who are entitled to vote at a general meeting.

1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
   a) a particular company; or
   b) a particular class of company.

   Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.

2) The notice must:
   a) be in writing; and:
   b) set out the wording of the proposed resolution; and
   c) be signed by the members proposing to move the resolution.

3) Separate copies of a document setting out the notice may be used for signing by members if the wording of the notice is identical in each copy.

4) The percentage of votes that members have is to be worked out as at the midnight before the members give the notice.

There is nothing in the section that derogates from the two months notice to the company required by s329 (1A) – and the very next section (s249O(1)) provides:

> If a company has been given notice of a resolution under section 249N, the resolution is to be considered at the next general meeting that occurs more than 2 months after the notice is given.

S 249N requires that the members who wish a resolution be placed on an agenda meet the threshold voting requirements and conform to the procedural requirements as to the form of the notice, in addition to the requirements of two months notice. The interplay between the sections does provide some difficulty, not the least because of the special auditor notice provisions (including the notice to ASIC) if it cannot be ascertained until the night prior to the meeting whether the voting threshold is reached.

In *Pedley v Inland Waterways Association Ltd* the court had to consider the interplay between similar sections in the UK Act. In that case the plaintiff gave notice to the council (the company) that he wished a resolution to remove the directors be placed on the agenda of the annual general meeting. S184 of the Act required that "special notice" be given of any resolution to remove a director (as for auditors) and on receipt of the notice the company was to immediately notify the director who was then entitled to be heard at the meeting (similar to s329). S142 of the Act provided that where special notice is required of a resolution the resolution shall not be effective unless notice of the intention to move it has been given to the company 28 days before the meeting at which it was intended to be moved. S 140 of the Act provided that members with not less than one-twentieth of the total voting rights could, provided they complied with the conditions as to time and form, compel the company to include in the notices of agenda for an annual general meeting an intended resolution (similar to s249N).

The plaintiff was not in a position to comply with s140 – he had merely written directly to the company on his own behalf requesting that the motion be included on the agenda. He was within the time constraints required by the special notice provisions of the Act. The essence of his argument was:

1) In view of section 184 of the Act the company may by ordinary resolution remove a member of the council.
2) He gave notice to the council of his intention to move the motion at the annual general meeting in the correct form (the specific words of the resolution).
3) Notice of the intention to move the resolution was duly given to the council not less than 28 days before the meeting at which it was to be moved, within the requirements of s142.
4) Since it was not practicable for the company to give its members notice of the resolution at the same time and in the same manner as it gave notice of the annual general meeting (they had already gone out), the company, on receipt of the notice was bound to give its members notice of the intended resolution by advertisement or as otherwise provided for.
5) If the company had carried out its duty of giving notice to members of the intended resolution the business to be dealt with at the AGM could and should properly have included the plaintiff's resolution.

The plaintiff's action was dismissed. In finding against the plaintiff Slade J said:

> First there appears to me no sensible reason why the legislature should have intended by s142 to confer on an individual member rights to compel the inclusion of a resolution in the agenda for a company meeting, being rights much more extensive than those conferred by

s140, merely because the resolution happens to be a resolution for the removal of a director, falling within s184.....or for the supersession of an auditor falling within s160. On the contrary, I can see powerful reasons why this would not have been the intention of the legislature.....Resolutions for the ...supersession of auditors, are regarded by the legislature as being of such importance both to the members of the company as a body and to the...auditors concerned that special machinery must be provided so as to ensure (i) that a director or auditor whose removal or supersession is required shall have both adequate notice of the intended resolution and the opportunity to have his representations circulated among members of the company and shall also have the right to be heard at the relevant meeting .....

I can find nothing in the context of s142 which would justify the conclusion that it is intended to confer on a single member the right to compel the inclusion of such a resolution in the agenda for a meeting, when such member could not himself have effectively convened a meeting for consideration of the resolution. While from the point of view of a member of a company s140 may be regarded as an enabling provision, s142 is merely a protective, not an enabling, provision. If a single member is successfully to claim such a right it must, in my judgment be in reliance of s140 of the Act or on a particular provision of the articles of association...

From the judgment it appears that at a minimum a shareholder must comply with the notice requirements of s329(1A) as well as meet the requirements of s249N – in other words he must combine with sufficient other shareholders to compel the calling of a special general meeting.

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