



## Shareholder disputes – the fight for control

Disputes between directors and shareholders of Australian proprietary limited companies (**Shareholder Dispute**) are unfortunately common. The rights and obligations of directors and shareholders of a company are regulated by the *Corporations Act 2001* (Cth) (**Act**) and the standard form “vanilla” constitution (**Constitution**) based on the Act. The unhappy reality is that the Act and the Constitution are often insufficiently prescriptive to protect the parties from the conduct of a Director or Director(s) behaving badly.

### What is a Shareholders Dispute?

Broadly speaking, a Shareholder Dispute can be a dispute between:



- Directors and shareholders of a proprietary limited company;
- Directors and shareholders of a unlisted public company;
- Directors of a Corporate Trustee of a Unit Trust and Unit Holders of a Unit Trust;
- Partners in a partnership;
- Partners in a partnership of Trusts; and
- potentially any other disagreement about the management of an entity between its controllers.

Most common however is the dispute between directors and shareholders of a proprietary limited company (**Enterprise**). In this context what is commonly referred to as a partnership dispute, may actually be a Shareholders Dispute.

### The fight for control

At the core of a Shareholders Dispute (regardless of its precise type) is a fight for control and the benefits that control may provide. Another way of examining the consequent legal problem is to consider how to limit control of the Enterprise. The fight for control is often characterised by one party attempting to limit access to information about the performance of the Enterprise, because they perceive that the value that they bring is greater than what was initially agreed.

### The background law

In the case of a proprietary limited company there are a variety of contractual and statutory obligations governing the rights and obligations of the parties to the dispute. These include but are not limited to:



- Contract(s) of employment;
- Contracts for services;
- Directors duties (both statutory as provided in the [Act](#) and at common law);
- The Constitution or the replaceable rules of the company;
- Shareholders Agreement (if any).

The documents mentioned above are generally the ‘sword or shield’ each party has at their disposal. Those documents define the parties’ rights and obligations and should provide a mechanism to resolve a dispute.

### What are the options for resolving a Shareholders Dispute?

Like any litigious matter, the tactics available to the parties depend on the facts of the matter and the application of the law to the facts. Once the legal position is established a prudent legal practitioner will, in conjunction with the client, formulate a strategy to resolve the dispute, considering the value of the Enterprise.

Some of the options available to assist to resolve a Shareholders Dispute may involve:

-  offering to buy out a party;
-  offering to buy a controlling stake;
-  attending a mediation of the parties to attempt to resolve the dispute;
-  appointing an auditor;
-  obtaining the accounts of the Company;
-  winding up on just and equitable grounds section [461\(k\) Corporations Act 2001](#) (Cth);
-  making an application for oppression pursuant to [section 232 of the Corporations Act 2001](#) (Cth); and
-  appointing an administrator or liquidator.

The list above is not exhaustive. The strategy employed to resolve a dispute will depend on the specific circumstances. Recently, the Victorian Supreme Court introduced a streamlined dispute resolution procedure for oppression claims made under section 232 of the Act. See our commentary on the streamlined procedure introduced in September 2014 [here](#).

## Common legal remedies to Shareholders Disputes

In considering the strategy to resolve a Shareholders Dispute, an aggrieved party may consider the remedies provided in section 461(k) and section 232 of the Act:

### Winding up on just and equitable grounds – section 461(k)

In cases where the relationship between the parties has completely broken down, a party may apply to the Supreme Court under section [461\(k\) of the Corporations Act 2001 \(Cth\)](#) to wind the company up on just and equitable grounds.

Section [461\(1\)\(k\)](#) of the [Corporations Act 2001 \(Cth\)](#) provides that:

*‘The Court may order the winding up of a company if:*

*....*

*The Court is of the opinion that it is just and equitable that the company be wound up.’*

Appointing a liquidator is seen as a drastic step. The Court will need to be satisfied that the relationship between the parties has broken down. Because of this often times where negotiations have taken place for one party to buy out another, the [section 461\(k\)](#) remedy may force the parties to a settlement, often “on the steps of the Court”.

### Shareholder Oppression – section 232

Section 232 of the Act sets out the grounds on which a Court may make an order under section 233 if the conduct of the Company’s affairs, an actual or proposed act or omission by or on behalf of a Company or a resolution or proposed resolution is either:

-  contrary to the interests of the members as a whole; or
-  oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members.

See further commentary on [shareholder oppression here](#).

Of course, the steps taken in each Shareholder Dispute will depend on the specific circumstances and the contractual obligations of the parties. Often time when taking a client’s statement we discover that one of the parties to the dispute has engaged in conduct which may be prejudicial or is a clear breach of their

duties as a Director. Disputants need to take care to ensure that the steps taken to resolve the dispute do not actually act against them in breach of their obligations.

## Links and further references

### Related articles by Dundas Lawyers

[Shareholder Oppression – Victorian Supreme Court adopts pilot program to resolve oppression claims](#)  
[Shareholder Oppression](#)  
[Shareholders' Agreements and Inconsistency clauses](#)  
[Drag Along Rights Enforceable](#)  
[Top 7 Mistakes in Shareholders' Agreements](#)  
[What do shareholders agreements protect against](#)

### Legislation

[Corporations Act 2001 \(Cth\)](#)  
[Corporations Regulations 2001 \(Cth\)](#)

### Further information

If you are involved in a Shareholders Dispute, please contact us for an obligation free and confidential discussion.



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