



MEMO

To: Board of Directors
From: Company Secretary
Subject: **SPECIAL RESOLUTION**

A 'special resolution' is defined in section 9 of the Corporations Act as one that is passed by 75% (ie, at least three quarters) **of the votes cast** by shareholders entitled to vote (either on a show of hands at the meeting or by the inclusion of proxies if on a poll) being in favour of the resolution.

Requirement for Special Resolution

Items requiring a special resolution include:

- amending or changing the constitution (sec.136)
- adopting a new company name (sec.157)
- changing the company type (sec.162)
- selective share buy-back* (sec.257D)
- any changes to share capital and/or shareholders' rights

being matters where either the *Act or a company's constitution* require a special resolution for any change; and

- usually, also, any change to a formal shareholder/s agreement (even though such may not specifically relate to or be covered by provisions of the Act or the constitution).

Wording of Special Resolution

A notice of meeting which includes any special resolution must, under sec.249L(c), specifically set out the intention to propose the special resolution and state the actual words of the resolution.

However, in a recent situation where lawyers drafted the AGM Notice they included the introductory words to a resolution: "To consider and, if thought fit, pass the following Special Resolution *with or without amendments*:". I challenged the lawyers on this, suggesting it was outside the scope of sec.249L(c) and they responded ".....the introduction of the words 'with or without amendments' into the resolution is intended to provide the Company with the flexibility to make any adjustments to the resolution as may be required in the meeting, to enable it to be approved by shareholders. It will not however, as foreshadowed by you, enable the Company to



amend the substantive part of the resolution. However, we shall remove it in this instance.....”. So, am I right?

Other Matters

The resolution wording is, of course, in addition to the other information required to be provided in a notice of a meeting including the place, date and time of the meeting, the general nature of the meeting’s business and information about proxy votes where applicable – sec.249L(a), (b) & (d).

Shareholders voting ‘on a show of hands’ at a meeting may include those attending as proxy, attorney or corporate representative – unless specifically not allowed by the constitution.

In most cases, the passing of a special resolution must be lodged with ASIC on Form 205 *Notification of Resolution* or Form 2205 *Notification of Resolutions Regarding Shares*.

* excluding shareholders participating in the buy-back; otherwise requires a unanimous resolution of ALL *ordinary* shareholders

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.