

# **Guide to the Companies Act 1993**

Govett Quilliam  
THE LAWYERS

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## **INTRODUCTION**

This guide outlines the basic legal requirements for operating a small to medium size company in New Zealand as prescribed by the Companies Act 1993 (“the Act”).

Matters dealt with under the Act includes transactions within companies, the management of companies, Directors interests, indemnities and insurances, changes to financial reporting, Shareholders rights and remedies and the solvency test. Please consult us for further information or if you have any doubts as to your obligations under the Act.

## **THE NATURE OF A COMPANY**

A company, incorporated under the Act, is regarded as a separate legal person. It exists as a separate legal entity, independent of its shareholders. A company can enter contracts, own property, sue or be sued and be convicted of criminal offences.

A company is made up of two groups:

- The shareholders who own the shares in the company;
- The Directors who manage the affairs of the company.

The shareholders retain ultimate control of the company. They do not own the company but own shares in the company.

The directors are accountable to the shareholders for the running of the company.

The Act outlines the rules concerning the operation of a company. A company may have a Constitution which outlines further rules applying to the particular company.

It is not compulsory under the Act for a company to have a Constitution however we recommend that each company develop one.

The Act allows a company to have a Constitution which modifies certain provisions of the Act. A Constitution can reserve the right of the Company to vary the powers, duties and obligations of the Directors and Shareholders and of the Company itself in the future. The Act applies to the extent that it is not varied by the Constitution.

A constitution can include matters covered by the Act and additional matters. The Constitution cannot be inconsistent with the Act and will have no effect to the extent that it is inconsistent.

The provisions of the constitution are enforceable as between the company and each shareholder, and between each shareholder.

## **THE OPERATION OF THE COMPANY ON A DAY TO DAY BASIS**

### **THE COMPANY PRESENCE**

The company name must include the use of the word “Limited”. A Company must ensure that its full name is clearly stated in every written communication sent by or on behalf of the Company and in every document issued by the Company which creates a legal obligation for the Company. A Company must also have a registered office.

### **MAKING DECISIONS – THE SHAREHOLDERS**

Shareholders have the right to vote at a company meeting on any resolution.

Resolutions may seek to:

- Appoint or remove a director;
- Adopt a Constitution;
- Alter the company's Constitution;
- Approve a major transaction;
- Approve an amalgamation of a company;
- Place the company in liquidation.

These shareholder rights may be removed, altered or added to by the constitution or by the share issue conditions. The Act allows shares to be issued that do not give shareholders voting rights in certain circumstances.

Resolutions may be ordinary (where a simple majority is required (s.105)) or special (s.106) where the usual majority required is 75%. Special Resolutions are required to approve major transactions, to change the Constitution and other limited purposes. The proceedings at Shareholder meetings are set out in the Act. (A copy of the proceedings is adopted in our Constitution as set out on pages 12 to 24 in this guide for your information.)

## **MAKING DECISIONS - THE DIRECTORS**

The business of the Company is managed by the Directors subject to any binding direction given by the Shareholders.

The Directors are subject to a number of duties owed to the Company, its Shareholders, its creditors and others with whom it does business.

In summary these include:

- Directors must act in good faith and in the best interests of the Company.
- All Director's powers must be exercised for a proper purpose.
- All Directors must comply with the Act and the Constitution of the Company.
- A Director must not allow the Company to be involved in "reckless trading".
- A Director must not agree to a Company incurring an obligation unless he/she believes reasonably that the Company will be able to perform the obligation.
- A Director when exercising powers or performing duties as a director must exercise all reasonable care, diligence and skill.

Failure to observe these duties may result in personal liability. A copy of Proceedings for Directors Meetings as set out in our Constitution can be found at the back of this guide.

## **BINDING THE COMPANY**

For contracts, obligations or agreements to be binding on a Company they must be executed in specific ways depending on the nature of the transaction involved. For example simple contracts may be entered into orally on behalf of the Company by a person acting under the Company's express or implied authority, whereas contracts which at law are required to be in writing (e.g. contracts dealing with land) must be executed in writing by a person acting on behalf of the Company. The most formal types of contract, known as deeds, can only be entered into by the Company with the signatures of two Directors or the signature of one Director duly witnessed. This latter category will almost certainly involve additional legal advice.

## **SOLVENCY TEST**

A company may not carry out certain actions, such as the payment of a distribution to shareholders, unless the directors are satisfied that the company will pass “the solvency test” after the action has been taken, and complete a duly signed certificate. Under the solvency test, the company must be able to pay its debts as they become due in the normal course of business and the value of the company’s assets must be greater than its liabilities, including contingent liabilities. Failure to consider this solvency test can result in stiff penalties for Directors of the Company.

## **RECORD KEEPING/ACCOUNTING**

The Board of the Company must ensure that sufficient accountancy records are kept. These records must:

- Correctly record and explain all transactions of the Company;
- Enable the financial position of the Company to be determined at any one time with reasonable accuracy;
- Enable the Directors to ensure that the financial statements of the Company comply with requirements under the Financial Reporting Act 1993;
- Enable the accounts of the Company to be readily and properly audited;

In particular these records must include records of:

- Entries of money received and spent each day and the matters to which such entries relate;
- The assets and liabilities of the Company;
- Goods bought and sold (except goods sold for cash in the ordinary course of carrying on a retail business) that identifies

both the goods, the buyers and the sellers and relevant invoices;

- Stock held at the end of the financial year together with records of any stock takings during the year;
- Relevant invoices of services provided if the Company's business involves the provision of services.

This is not an exhaustive list of proper accounting records but rather a statement of the minimum requirement to account to the shareholders. These records must be kept in written form and in English and must be retained by the Company for a period of seven years.

There are severe penalties for the Company and/or the Directors who fail to keep such records.

## **ANNUAL REQUIREMENTS**

### **MEETINGS**

The Directors of the Company must call an Annual General Meeting of all the Shareholders which must occur within six months (or in the case of an exempt Company if all shareholders agree, ten months) of the balance date (usually 31 March) of the Company and not later than 15 months after the previous Annual General Meeting. If however all the business to be conducted at the Annual General Meeting can be completed by way of written Special Resolution (usually 75% of the shareholders) such physical meeting is not necessary.

### **COMPANY RECORDS**

A Company must keep the following documents at its registered office:

- The Company's Constitution.

- The minutes of meetings and Resolutions of Shareholders
- Within the last seven years.
- An interests register.
- Minutes of all meetings and Resolutions of Directors and Directors committee's within the last seven years.
- Certificates given by Directors under the Act within the last seven years.
- The full names and addresses of the current Directors.
- Copies of all written communications to all Shareholders during the last seven years including annual reports.
- Copies of all financial statements and group financial statements required under the Act or under the Financial Reporting Act 1993, for the last seven completed accounting periods.
- The accounting records for the current accounting period and for the last seven accounting periods.
- The share register.

## **REPORTS**

Within five months after the balance date of the Company the Directors must prepare an annual report on the affairs of the Company. The report should contain:

- Financial statements for the accounting period completed.
- An Auditor's report (if required).

The following should be included unless all shareholders agree not to include them:

- Such information as will allow the Shareholders of the Company to have an appreciation of the state of the Company's affairs.
- A statement of the particulars of entries in the interests register made during the accounting period.
- A statement of all Directors' remunerations and benefits received by them from the Company for the accounting period.
- A statement of the number of employees other than directors of the Company or former employees who during the accounting period received remuneration or other benefits to a value over \$100,000.00.
- A statement of the donations made by the Company.
- The names of the persons holding offices as Directors of the Company during the accounting period.
- The statement of the amounts payable by the Company to the Auditor of the Company (s.211).

This annual report should be in writing and be dated and signed on behalf of the Board by two Directors of the Company or if the Company has only one Director by that Director. A copy of the annual report must be sent to all shareholders at least 20 working days before the date of the annual meeting along with a notice stating the shareholders rights to receive the report as prescribed by the Act. The Company may still be required to send the report on notice.

## **FILING REQUIREMENTS**

An annual return must be filed with the Registrar of Companies in a particular allocated month each year in the prescribed form.

The Company must also, file a return of income in accordance with the Income Tax Act 2004 and there are additional financial reporting requirements under the Financial Reporting Act 1993.

There are also GST returns to be filed if the company is registered for GST.

The Company must notify the Registrar if it changes its name, changes its registered office, changes its Directors or issues further shares or if it grants or satisfies any security over its assets. The annual return will also disclose any changes of shareholder.

## **SHAREHOLDERS**

### **SHARES**

A share in a Company is the personal property of the Shareholder and, subject to the requirements of the Companies Act and the Constitution, may be dealt with like any personal property. However, transfers of shares are generally subject to the pre-emptive rights provisions contained in its Constitution. Shares generally entitle the Shareholder to various rights in relation to the Company. These rights include:

- The right to one vote on a poll at a meeting of the Company on any Resolution.
- The right to an equal share in dividends authorised by the Board.
- The right to an equal share in the distribution of the surplus assets of the Company.

### **DIVIDENDS**

One of the most important rights attached to shares is the right to receive dividends. The actual decision to declare dividends is made by the Directors who may authorise a distribution, if satisfied

on reasonable grounds that the Company will satisfy the solvency test.

## **LIABILITY OF SHAREHOLDERS**

Shareholders enjoy limited liability under the Act. No Shareholder is liable for an obligation of the Company by reason alone of being a Shareholder.

The liability of shareholders is limited to:

- Any amount unpaid on a share held by the shareholder;
- Any liability imposed by the constitution;
- Any liability under the Act.

## **OTHER MATTERS**

A Company must keep a register that records all shares issued by the Company and states:

- Whether under the Constitution of the Company or the terms of issue of the shares there are any restrictions or limitations on the transfer.
- Where any document that contains the restrictions or limitations may be inspected.

With respect to each class of shares the register must also state:

- The names alphabetically arranged and the last known address of each person who is or has within the last ten years been a Shareholder; and
- The number of shares of that class held by each Shareholder within the last ten years; and
- The date of any issue, re-purchase or transfer of shares to or from any Shareholder within the last ten years and, in relation

to the transfer, the name of the person to or from whom the shares were transferred.

Such records kept in the share register of the Company are evidence of the legal title to shares issued by the Company.

## **PROCEEDINGS AT MEETINGS OF SHAREHOLDERS**

*(As adopted in the Constitution prepared by Govett Quilliam)*

### **CHAIRPERSON**

- If the Directors have elected a Chairperson of the Board and such Chairperson is present at a meeting of Shareholders, he or she must chair the meeting.
- If no Chairperson of the Board has been elected, or if at any meeting of Shareholders the Chairperson of the Board is not present within 15 minutes of the time appointed for the commencement of the meeting, the Directors present shall elect one of their number to be Chairperson of the meeting. If at any meeting no Director is willing to act as Chairperson, or if no Director is present within 15 minutes of the time appointed for holding the meeting, the Shareholders present shall choose one of their number to be Chairperson of the meeting.

### **NOTICE OF MEETINGS**

Written notice of the time and place of a meeting of Shareholders must be sent to every Shareholder entitled to receive notice of the meeting and to every Director and an Auditor of the Company not less than 10 working days before the meeting.

The notice must state:

- The nature of the business to be transacted at the meeting in sufficient detail to enable a Shareholder to form a reasoned judgment in relation to it; and

- The text of any special Resolution to be submitted to the meeting.
- An irregularity in a Notice of a meeting is waived if all the Shareholders entitled to attend and vote at the meeting
- attend the meeting without protest as to the irregularity, or if all such Shareholders agree to the waiver.
- The Chairperson may, and if so directed by the meeting shall, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.
- The accidental omission to give a notice of a meeting to, or the non-receipt of a notice of a meeting by, any person entitled to receive notice thereof shall not invalidate the proceedings at that meeting.

## **METHODS OF HOLDING MEETINGS**

A meeting of Shareholders may be held either:

- By a number of Shareholders, who constitute a quorum, being assembled together at the place, date, and time appointed for the meeting; or
- By means of audio, or audio and visual, communication by which all Shareholders participating and constituting a quorum, can simultaneously hear each other throughout the meeting.

## QUORUM

- Subject to subclause three of this clause, no business may be transacted at a meeting of Shareholders if a quorum is not present.
- A quorum for a meeting of Shareholders is present if Shareholders or their proxies are present who are between them able to exercise a majority of the votes to be cast on the business to be transacted at the meeting.
- If a quorum is not present within 30 minutes after the time appointed for the meeting –
  - In the case of a meeting called under section 121(b) of the Act the meeting is dissolved;
  - In the case of any other meeting, the meeting is adjourned to the same day in the following week at the same time and place, or to such other date, time, and place as the Directors may appoint, and, subject to the Constitution of the Company, if, at the adjourned meeting a quorum is not present within 30 minutes after the time appointed for the meeting, the Shareholders or their proxies present are a quorum.

## VOTING

- In the case of a meeting of Shareholders held [by a quorum assembling together] unless a poll is demanded, voting at the meeting shall be by whichever of the following methods is determined by the Chairperson of the meeting:
  - Voting by voice; or
  - Voting by show of hands.
- In the case of a meeting of Shareholders held [by audio-visual communication] unless a poll is demanded, voting at the

meeting shall be by the Shareholders signifying individually their assent or dissent by voice.

- A declaration by the Chairperson of the meeting that a Resolution is carried by the requisite majority is conclusive evidence of that fact unless a poll is demanded in accordance with this clause.
- At a meeting of Shareholders a poll may be demanded by:
  - Not less than five Shareholders having the right to vote at the meeting; or
  - A Shareholder or Shareholders representing not less than 10% of the total voting rights of all Shareholders having the right to vote at the meeting; or
  - A Shareholder or Shareholders holding shares in the Company that confer a right to vote at the meeting and on which the aggregate amount paid up is not less than 10 percent of the total amount paid up on all shares that confer that right; or
  - The Chairperson.
- A poll may be demanded either before or after the vote is taken on a Resolution.
- If a poll is taken, votes must be counted according to the votes attached to the shares of each Shareholder present in person or by proxy and voting.
- In the case of equality of votes, whether voting is by voice or by show of hands or poll, the Chairperson of the meeting shall be entitled to a second or casting vote.
- For the purposes of this clause, the instrument appointing a Proxy to vote at a meeting of a Company confers authority to demand or join in demanding a poll and a demand by a person

as Proxy for a Shareholder has the same effect as a demand by the Shareholder.

- Subject to any rights or restrictions for the time-being attached to any class of shares, every Shareholder present in person or by proxy in voting by voice or on a show of hands shall have one vote.
- The demand for a poll may be withdrawn.
- Except as provided in the following subclause, if a poll is duly demanded it shall be taken in such matter as the Chairperson directs, and the result of the poll shall be deemed to be the Resolution of the meeting at which the poll was demanded.
- A poll demanded on the election of a Chairperson or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time and place as the Chairperson of the meeting directs and any business other than that upon which a poll has been demanded may be proceeded with pending the taking of the poll.

## **PROXIES**

- A Shareholder may exercise the right to vote either by being present in person or by proxy.
- A proxy for a Shareholder is entitled to attend and be heard at a meeting of Shareholders as if the Proxy were the Shareholder.
- A Proxy must be appointed by notice in writing signed by the Shareholder and the notice must state whether the appointment is for a particular meeting or a specified term not exceeding 12 months.
- A proxy is not effective unless it is produced before the start of the meeting.

- A proxy form shall be sent with each notice calling a meeting of the Company.
- An instrument appointing a Proxy shall be in the following form or a form as near as the circumstances may admit:

**[Name] Limited**  
**Instrument Appointing A Proxy**

I/We \_\_\_\_\_ of \_\_\_\_\_  
being a member of \_\_\_\_\_ Limited hereby  
appoint \_\_\_\_\_ [*print name of proxy*]  
of \_\_\_\_\_ or failing him/her \_\_\_\_\_  
of \_\_\_\_\_ as my/our proxy to vote for me/us on  
my/our behalf at the Annual/Special Meeting of the Company to be  
held at \_\_\_\_\_ on \_\_\_\_\_  
commencing at \_\_\_\_\_ am/pm [or all meetings of the Company  
held within 12 months of the date hereof] and at any adjournment of  
any such meeting.

Signed this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_

[*Usual signature/s*]

- Where it is desired to afford Shareholders an opportunity of voting for or against a Resolution, the instrument appointing a Proxy shall be in the following form or a form as near thereto as circumstances admit:

**[Name] Limited  
Instrument Appointing A Proxy**

I/We \_\_\_\_\_ of \_\_\_\_\_  
being a member of \_\_\_\_\_ Limited hereby  
appoint \_\_\_\_\_ [*print name of proxy*] \_\_\_\_\_ of \_\_\_\_\_ or  
failing him/her \_\_\_\_\_ of \_\_\_\_\_  
as my/our proxy to vote for me/us on my/our behalf at the Annual/  
Special Meeting of the Company to be held at  
\_\_\_\_\_ on \_\_\_\_\_ commencing at  
\_\_\_\_\_ am/pm [or all meetings of the Company held within 12 months  
of the date hereof] and at any adjournment thereof

	Vote with a tick	
Resolution	<i>For</i>	<i>Against</i>
1. ....	.....	.....
2. ....	.....	.....

Signed this                      day of                      20

[Usual signature/s]

- A vote given in accordance with the terms of an instrument of Proxy shall be valid notwithstanding the previous death or insanity of the appointor or revocation of the proxy or revocation of the authority under which the proxy was executed, or the transfer of any share in respect of which the proxy is given, if no intimation in writing of such death, insanity, revocation or transfer as aforesaid has been received by the Company before the start of the meeting or adjourned meeting at which the proxy is used.

## **POSTAL VOTING**

Postal voting is not permitted (under the Govett Quilliam model constitution).

## **MINUTES**

- The Board must ensure that minutes are kept of all proceedings at meetings of Shareholders.
- Minutes which have been signed correct by the Chairperson of the meeting are prima facie evidence of the proceedings.

## **SHAREHOLDER PROPOSALS**

- A Shareholder may give written notice to the Board of a matter the Shareholder proposes to raise for discussion or Resolution at the next meeting of Shareholders at which the Shareholder is entitled to vote.
- If the notice is received by the Board not less than 20 working days before the last day on which Notice of the relevant meeting of Shareholders is required to be given by the Board, the Board must, at the expense of the Company, give notice of the Shareholder proposal and the text of any proposed Resolution to all Shareholders entitled to receive notice of the meeting.

- If the notice is received by the Board not less than five working days and not more than 20 working days before the last day on which Notice of the relevant meeting of Shareholders is required to be given by the Board, the Board must, at the expense of the Shareholder, give notice of the Shareholder proposal and the text of any proposed Resolution to all Shareholders entitled to receive Notice of the meeting.
- If the Notice is received by the Board less than five working days before the last day on which notice of the relevant meeting of Shareholders is required to be given by the Board, the Board may, if practicable, and at the expense of the Shareholder, give notice of the Shareholder proposal and the text of any proposed Resolution to all Shareholders entitled to receive notice of the meeting.
- If the Directors intend that Shareholders may vote on the proposal by proxy they must give the proposing Shareholder the right to include in or with the notice given by the Board a statement of not more than 1000 words prepared by the proposing Shareholder in support of the proposal, together with the name and address of the proposing Shareholder.
- The Board is not required to include in or with the notice given by the Board a statement prepared by a Shareholder which the Board considers to be defamatory, frivolous, or vexatious.
- Where the costs of giving Notice of the Shareholder proposal and the text of any proposed Resolution are required to be met by the proposing Shareholder, the proposing Shareholder must, on giving notice to the Board, deposit with the Company or tender to the Company a sum sufficient to meet those costs.

## **CORPORATIONS MAY ACT BY REPRESENTATIVES**

A Body Corporate which is a Shareholder may appoint a representative to attend a meeting of Shareholders on its behalf in the same manner as that in which it could appoint a Proxy.

## **VOTES OF JOINT HOLDERS**

Where two or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on a matter must be accepted to the exclusion of the votes of the other joint holders.

## **LOSS OF VOTING RIGHTS IF CALLS UNPAID**

If a sum due to a Company in respect of a share has not been paid, that share may not be voted at a Shareholders meeting other than a meeting of an interest group.

## **OTHER PROCEEDINGS**

Except as provided in this Schedule, and subject to the Constitution of the Company, a meeting of Shareholders may regulate its own procedure.

## **PROCEEDINGS AT MEETINGS OF DIRECTORS**

*(As adopted in the Constitution prepared by Govett Quilliam)*

### **CHAIRPERSON**

- The Directors may elect a Chairperson of the Board and determine the period for which he or she is to hold office.
- If no Chairperson is elected, or if at any meeting the Chairperson is not present within five minutes after the time appointed for the meeting, the Directors present may choose one of their number to be Chairperson of the meeting.

### **REGULATION OF MEETINGS AND CONVENING**

- The Board may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit.

- A Director may, and an employee at the request of a Director shall, at any time, by any means of communication, summon a meeting of the Board. It shall not be necessary to give Notice of a meeting of the Board to any Director for the time being absent from New Zealand.

[Provision for notice of meetings are included in the Act.]

## **METHOD OF MEETING**

A meeting of the Directors may be held either:

- By a number of the Directors who constitute a quorum being assembled together at the place, date and time appointed for the meeting; or
- By means of audio, or audio and visual, communication by which all Directors participating and constituting a quorum can simultaneously hear each other throughout the meeting.

## **QUORUM**

- A quorum for a meeting of the Board is a majority of the Directors.
- No business may be transacted at a meeting of Directors if a quorum is not present.

## **VOTING**

- Every Director has one vote.
- Questions arising at any meeting of the Board shall be decided by a majority of votes. In cases of an equality of votes the Chairperson shall have a second or casting vote, provided that where two Directors form a quorum and only two Directors entitled to vote are present at a meeting, the Chairperson of such meeting shall not have a second or casting vote.

- A Director present at a meeting of the Board is presumed to have agreed to, and to have voted in favour of, a Resolution of the Board unless he or she expressly dissents from or votes against the Resolution at the meeting.

## **MINUTES**

The Directors must ensure that Minutes are kept of all proceedings at meetings of the Board.

## **RESOLUTION IN WRITING**

- A Resolution in writing, signed or assented to by all Directors then entitled to receive Notice of a Board meeting, is as valid and effective as if it had been passed at a meeting of the Board duly convened and held.
- Any such Resolution may consist of several documents (including facsimile or other similar means of communication) in like form each signed or assented to by one or more Directors.

[A copy of any such Resolution must be entered in the minute book of the proceedings under the Act.]

## **VACANCIES**

The continuing Directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number necessary for a quorum, the continuing Directors or Director may act only for the purpose of increasing the number of Directors to the number necessary for a quorum or for the purpose of summoning a special meeting of the Company.

## **PROCEDURE**

Except as provided in this Schedule the board may regulate its own procedure.

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- *Asset Protection and Residential Care Subsidies*
- *Business Grants & Assistance*
- *Buying or Setting Up a Small Business*
- *Charities*
- *Companies Act 1993*
- *Consumer Guarantees Act*
- *Credit (Repossession) Act 1997*
- *De Facto Property Rights*
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