

Chapter 8 Meetings of scheme members

Template for submissions

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8.1 Requisitioning scheme meetings

Question 8.1.1

Should the 100 member test for requisitioning scheme meetings be retained?

Submission

Yes, because for entities with a very large number of unit holders it is often difficult to get the support of 5% for a notice of meeting.

Question 8.1.2

If so, should the method for determining who is to be included as a member be clarified:

- by specifying how members who hold interests on behalf of the same beneficial owner are to be counted
- by specifying how a member who holds an interest on behalf of several beneficial owners is to be counted
- in some other manner and, if so, how?

Submission

It is not practicable to try and count beneficial members. One of our schemes has one unit holder holding their units for 100 members under a wrap arrangement. We have no idea how many beneficial holders they are or who they are, and they would not tell us even if we wanted to know. The information is highly confidential. Hence any requirement to go beyond the registered unit holders is going to involve time and cost and will result in uncertainty.

8.2 Meeting quorum requirements in scheme constitutions

Question 8.2.1

How common is it for scheme constitutions to adopt restrictive quorum requirements?

Submission

Primary Securities has encountered this for schemes where the responsible entity wishes to entrench itself. For example, one of the Constitutions for the Australian Growth schemes required at least 5 scheme members holding at least 10% of the aggregate number of interests in the scheme as the quorum for an ordinary resolution and at least 25% of the aggregate number of interests in the scheme as the quorum for a special resolution. Primary Securities deleted this provision of the Constitution upon becoming RE.

Question 8.2.2

Should the Corporations Act be amended so that the statutory quorum requirements for scheme meetings cannot be overridden by a scheme constitution:

- in any circumstances or, alternatively
- only where the purpose of a meeting is to consider the replacement of the RE?

Submission

Primary Securities supports such an amendment. The second bullet point is too restrictive as, at least in our case, whenever we wish to replace another RE, the notice of meeting always includes proposed amendments to the Constitution and is not confined to retirement and replacement resolutions. In most cases, we would not wish to be appointed as the RE unless these amendments are carried. Hence, there is no point in confining the smaller quorum requirement for appointment of RE if in conjunction with any appointment, amendments or other resolutions are required for which a smaller quorum is not required.

8.3 The chair of a scheme meeting

Question 8.3.1

Should it be permissible for a scheme constitution to exclude the right to demand a poll on the election of a chair?

Submission

Yes. The Managing Director of Primary Securities was at one of the Australian Olives schemes meetings at which the incumbent RE brought along a large number of proxies for individual scheme members to oppose the appointment of the chair that most of the scheme members (if there had been a poll) would have wanted. This resulted in the appointment of a chair supported by the incumbent RE who refused to put any of the resolutions to change RE on the spurious basis that they were “not in the best interests of the scheme members”.

At meetings, scheme members have to be alert to the possibility that the incumbent RE will stack the meeting with student proxies so that the vote for chair on a show of hands can be won by the incumbent RE, who then refuses any resolutions.

Question 8.3.2

Should it be permissible for a scheme constitution to vary the finality of a chair’s decision in relation to:

- determining a challenge to a person’s right to vote at the meeting
- making a conclusive declaration of the results of a vote on a show of hands?

Submission

Yes, for the same reason.

Question 8.3.3

Should chairs of meetings be required to state the reasons for some or all of their decisions at the relevant meeting and include those reasons in the minutes? If such a requirement were to apply to some decisions only, to which types of decisions should it apply?

Submission

A little late requiring reasons to be put in the minutes if the scheme members have lost control of their meeting.

Question 8.3.4

Should the Corporations Act stipulate that the chair of a meeting of scheme members has a casting vote and, in addition, if the chair is a member of the scheme, any vote that the person may have in that capacity?

Submission

No.

8.4 Voting restrictions on resolutions at members' meetings

Question 8.4.1

Should the restriction on the entitlement of an RE and its associates to vote be clarified and, if so, in what respects and in what way? In particular, should it be made clear that the takeovers test applies when determining the meaning of 'associate' for the purpose of this voting exclusion?

Submission

Yes, the restriction should continue and be made clear as proposed.

Question 8.4.2

Should the current voting exclusion be amended so that it applies regardless of whether the scheme is listed or unlisted?

Submission

Yes.

8.5 Proxy voting

Question 8.5.1

In what respects should the provisions relating to proxy voting for schemes be further aligned with those relating to companies?

Submission

Those provisions which do not apply to schemes should be brought into alignment.

8.6 Procedures relating to adjournment of meetings

Question 8.6.1

Should a scheme constitution be permitted to vary the current requirement for giving notice of an adjourned scheme meeting?

Submission

Yes.

Question 8.6.2

Should a scheme constitution be permitted to vary the statutory rule prohibiting an adjourned scheme meeting from considering new business?

Submission

Yes. Frequently, particularly in attempts to change RE, it is necessary to introduce new resolutions.

Question 8.6.3

What details should be given in any notice of an adjourned meeting?

Submission

Sufficient to enable the scheme members to understand the proposed resolution.

Question 8.6.4

Should the rules relating to adjourned meetings for schemes be aligned with those for companies?

Submission

It is difficult to see how the rules could be aligned.

It is important for scheme members that meetings can continue to be adjourned without having to go to the cost of reconvening. In the case of a number of schemes, circumstances prevent the actual bringing of the resolutions required until everyone is ready, and in the interest of the scheme members calling the meeting, the meeting has had to be adjourned again and again.

It should also be borne in mind that a scheme is not like a company. Scheme members are mostly not in a strong position when trying to achieve anything in relation to the RE in control. Incumbent REs under attack cannot be trusted to deal honestly with proxies. Scheme members should be permitted to assemble proxies and deliver them to the incumbent RE prior to the meeting.

Question 8.6.5

Should the members of a scheme have the power to direct the chair of a meeting of scheme members to adjourn the meeting?

Submission

Yes.

8.7 Other alignment issues

Question 8.7.1

Should the law applicable to scheme meetings be brought into line with that applicable to company meetings in relation to:

- the time for determining the percentage of votes held by members
- the timing and manner of a poll?

Submission

Not completely. It is important for the protection of scheme members when a responsible entity is behaving badly, that the scheme members be able to gather proxies and then take them to the incumbent responsible entity just prior to the required time for delivery of proxies.

Other comments

Please insert any other comments you may have on the matters covered in this chapter.

Submission

There should be provision for the chair at its discretion to accept proxies after the time for delivery of proxies but prior to the vote being taken.