

HYPERLINK NOT EFFECTIVE NOTICE TO MEMBERS!

Written by Victor Hamit

In the case of [Clarke v Australian Computer Society Incorporated \[2019\] FCA 2175](#), the judgement delivered on 23 December 2019 has proved to be a very interesting one for meeting and special resolution procedures.

The Australian Computer Society Incorporated (“the Society”) is a not-for-profit organisation having objects which include “the promotion and further development of study and application of information and communications technology in Australia”.

The Society is registered as an incorporated association under the Associations Incorporation Act 1991 (ACT) with approximately 41,000 members of which just over 10,000 were voting members.

The Society commenced a process to transfer its registration to a company limited by guarantee under the Corporations Act 2001 (Cth). That process culminated in a general meeting of members at which a special resolution to apply for such registration was put to members. That resolution, which was required to be passed by 75% of the voting members present or by proxy was passed effectively by one vote i.e 75.1%. Mr Roger Clarke is a member of the Society and a vocal opponent of the resolution that was put to the members at the general meeting. Mr Clarke challenged the special resolution passed at the general meeting on 25 October 2019 based on 5 grounds.

The first ground was that the Society did not “send” a notice to each member as required by the Constitution detailing the proposed alterations to the rules and objects of the Society’s Constitution. The Society had not sent the required notice to those members who did not have an email address nor those who had an email address but requested that there be no “marketing material” sent to them. The Constitution clearly contemplated email as one of the means of communication to members.

Mr Clarke's second ground of challenge was a similar argument in that the Society failed to send the notice of general meeting complying with its Constitution to "each member" for the same reasons.

The third ground was that the information required in the notice with an explanatory memorandum were not contained in the notice but were hyperlinked to the explanatory memorandum. Further, Mr Clarke contended that the explanatory memorandum was misleading because it referred to "only minor changes" were to be made when in fact a new constitution was to be adopted with different provisions related to corporate governance.

The fourth ground relied upon by Mr Clarke was that there had been deficiencies in the exercise of the official dealing with proxy votes which denied a vote by proxy to some members.

The fifth ground was that the conduct of the President of the Society in determining the procedures to be followed at the general meeting was incorrect and in breach of his duties as Chair of the meeting. Mr Clarke claimed that the President failed to take steps to ensure a reasonable opportunity for argument was allowed, the President curtailed debate by members by imposing strict time limits and the President refused to permit questions from members present at the meeting.

The Court found in Mr Clarke's favour on all 5 grounds. The decision is comprehensive and well worth careful consideration by those responsible for preparing relevant notices for general meetings, exercising power on determining the validity of proxies, and finally in the conduct of the meeting itself.

Marketing material

We do not consider it surprising that the Court decided that notices dealing with constitutional requirements did not constitute "marketing material". Therefore, the Society had failed to comply with the notice requirements of its Constitution by failing to provide the requisite notices to those eligible members even though those members had ticked the "no marketing material" box.

Sent

One of the more interesting aspects of the case was that the Court determined that on a proper construction of the Society's Constitution, the requirement to send documents with the Notice of the Annual General Meeting (such as an Explanatory Memorandum to the Special Resolution) meant that those documents be sent directly. That could have been achieved by either incorporating that mandatory information in the Notice or by way of attachment. A hyperlink to the information did not constitute the mandatory information being "sent" to the Members. Rather, the Court indicated that the hyperlink was merely a "direction" or "pointer" of where to obtain the mandatory information.

Conduct of meeting

The Court made it clear that the President of the Society, in his capacity as Chair of the Annual General Meeting, had a duty to conduct the meeting fairly by allowing opponents of the Special Resolution (which had been endorsed by the Committee) to have a reasonable opportunity to express their views. This did not mean that the Chair could not impose limits on the speakers, but those limitations had to be reasonable in the circumstances.

The matter can be put simply. That is, ensure that you comply with the requirements of your constitution fully and in the conduct of the general meeting the Chair should ensure fairness to opposing view-points, particularly where the matter may be contentious or, as was the case in this situation, that the Special Resolution was passed by effectively 1 vote.

Date Published: 16 January 2020

Victor Hamit

Wentworth Lawyers Pty Ltd

Level 40
140 William Street
MELBOURNE VIC 3000

Tel: +61 3 9607 8380
Mobile +61 408 590 706

Email: vhamit@wentworthlawyers.com.au

Website: www.wentworthlawyers.com.au

Disclaimer:

These materials are provided as a general guide on the subject only, not as specific advice on any particular matter or to any particular person. Please seek specific advice on your own particular circumstances as situations and facts vary.

Liability limited by a scheme approved under the Professional Standards Legislation