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CLOSELY HELD BUSINESSES: LIMITED LIABILITY COMPANIES AND THE COMPANIES ACT 1993

Submitted for the LLB (Honours) Degree at Victoria University of Wellington

01/09/1995

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I INTRODUCTION

A closely held business has a range of business associations to chose from when considering an operating vehicle for its operations. In exercising this choice participants of closely held businesses have two main concerns. They wish to avoid costly and unnecessary procedural regulation by Statute, and they wish to limit their personal liability.

A relatively new business association in the United States called the Limited Liability Company has been developed which meets these concerns of closely held businesses. The limited liability company, more commonly known as a LLC, does so by combining the operational flexibility of a partnership with the limited personal liability of a corporation. This development has been tax driven, the adoption of a partnership-like structure being in an effort to avoid characterisation as a corporation for federal tax purposes.[1]

There is no equivalent LLC legislation in New Zealand. In New Zealand participants in closely held businesses must incorporate under the Companies Act 1993 to achieve limited personal liability. This paper compares the efficacy of the Companies Act in meeting the particular concerns of closely held businesses with that of the LLC. After a brief history part III outlines the general features of the LLC. Part IV undertakes a

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[1] In the US a business association may be taxed as a corporation if it possesses certain corporate characteristics, in particular continuity of life, free transferability of interests, centralised management, and limited liability. Having adopted limited liability states avoided the other three characteristics to try and ensure the benefits of taxation as a pass through entity (ie members are taxed directly on business profits - there is no taxation at the entity level). In New Zealand taxation is not a major concern. The qualifying company regime enables companies with five or fewer shareholders to qualify for taxation as a pass through entity. See Dr S Glazebrook "The Qualifying Company Regime" (1992) New Zealand Law Society Seminar for a discussion of qualifying companies.

comparative transactional analysis of the Companies Act 1993 and the Wyoming LLC, drawing conclusions as to their commercial practicability for closely held businesses.

II HISTORY OF THE LLC

The first LLC Act was passed in Wyoming in 1977 as special interest legislation for an oil company. Florida followed with its own Act in 1982. But it was not until uncertainty about the federal tax treatment of an LLC was finally clarified in 1988 that other states began to seriously consider enacting their own LLC Acts.[2] In a rush to attract investment all states have, since 1990, either adopted or are considering their own LLC legislation.

The original Wyoming Act served as the basis for many of the early LLC Acts. However, State LLC legislation has become increasingly diversified. States have largely mixed and matched provisions of preceding LLC Acts, combining them with variations drawn from their own state corporation and partnership laws as well as the Uniform Partnership Act, the Uniform Limited Partnership Act, the Revised Uniform Limited Partnership Act, the Model Business Corporation Act, and the Revised Model Business Corporation Act.

In late 1994, in response to the increasing diversity in state LLC legislation, the National Conference of Commissioners on Uniform State Laws finally approved and recommended for enactment in all states a Uniform Limited Liability Company Act (ULLCA). The ULLCA will serve to guide states towards much needed cohesion and 'uniformity' in LLC legislation.

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[2] In Revenue Ruling 88-76 the United States Inland Revenue Service stated that limited liability wouldn't of itself preclude the treatment of the LLC as a 'pass through' entity for tax purposes.

III GENERAL LLC STRUCTURE

States have taken differing approaches to legislating for LLCs. Some like Wyoming have taken a minimalist approach, providing only the most rudimentary basics of regulation. Other states, for example Colorado, have provided more default procedural guidance. All states, to varying degrees, have placed a premium on freedom of contract, leaving members with considerable freedom to regulate their own affairs in an 'operating agreement', with most Acts containing few non-displaceable rules. The Delaware Act expressly states as a policy objective the aim to give maximum effect to this principle[3].

The ULLCA follows those states that have provided a set default provisions to govern LLC operations. In drafting the Act the Drafting Committee was guided by a single policy vision, "... to draft a flexible act with a comprehensive set of default rules designed to substitute as the essence of the bargain for small entrepreneurs and others."[4]

Despite the current diversity of state LLC legislation a general LLC structure is discernible. This structure is outlined below with particular reference to the Colorado, Delaware, Idaho, and Wyoming Acts, as well as the ULLCA.

A *Nature of the LLC*

The LLC is a legal entity distinct from its members, who are not liable for LLC debts or obligations. The LLC can sue and be sued, it can hold property and it has all the powers to carry on business in its own name. However, unlike a corporation there is no requirement for separation of ownership and control in a board of directors.

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[3] Delaware LLC Act art 18-1101(b).

[4] ULLCA prefatory note, page 2.

Members have a choice to manage the LLC directly themselves or to vest management in appointed managers.

B *Organisational Formalities*

Members of a LLC must file articles of organisation with the relevant state authority and await the issue of a certificate of organisation, which serves as evidence that the LLC is legally formed. The required contents of the articles of organisation vary among states but typically include the LLC name, the name and address of its registered agent for service of process, its term of duration, the names and addresses of original organisers, and a vesting statement if management is to be vested in managers.

Most states, and the ULLCA, permit single member LLCs. Wyoming still requires at least two. Members are generally free to determine the duration of the LLC, either for a fixed period determinable by an event or date, or perpetuity. Some states impose a default limit, commonly 30 years, for example Wyoming.

C *Management*

In default LLC management is vested in members in proportion either to their capital contributions, or their interest in LLC profits, or on a per capita basis, depending on the state. Members may vest management in professional managers (or particular members) provided it is pursuant to a vesting statement contained in the articles of organisation.

Whether management is retained by the members or is vested in managers, members are able to contract for their own regulation of internal affairs in an operating agreement, which may usually be written or oral. Any restrictions imposed on the scope of the operating agreement vary between states but are generally limited to

unreasonably restricting a members right of access to LLC information, or eliminating or unreasonably restricting any general duties of care and loyalty imposed between members, managers and the LLC. The requirement of the ULLCA under article 403 that certain actions only be undertaken with the unanimous consent of members is itself subject to the operating agreement by virtue of article 103. Written operating agreements may be required by some states for certain actions.[5]

Management action is free of the recurrent documentation and certification requirements found in the Companies Act 1993, as well as the extensive procedural regulation. Those States that do require the LLC to keep certain records typically limit those records to names and addresses of managers, copies of the articles of organisation and any written operating agreements, copies of any financial statements of the LLC, and statements detailing the agreed value and nature of members' contributions. But often even these minimal requirements may be negated by members in an operating agreement.[6]

This lack of documentary and procedural formality reflects the often informal nature of a closely held business. The greater convergence of ownership and control makes such requirements, designed to ensure the accountability of management to shareholders, unnecessary and simply a source of increased transaction costs and liability exposure for managers. The permission by many states, as well as the ULLCA, of oral operating agreements also reflects the probable informal nature of a closely held business.

1 *Distributions*

The freedom of members to regulate their own affairs in an operating agreement is necessarily tempered in some circumstances in the interests of creditors. As members enjoy limited personal liability creditors will be concerned to ensure that LLC value is

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[5] For example see art 7-80-108 of the Colorado LLC Act.

[6] For example see art 53-625 of the Idaho LLC Act.

not diminished by excessive distributions. Distributions pose a particularly large risk to creditors of closely held businesses given the tendency of members to use the business as a 'private bank' to meet their liquidity needs. Non-displaceable provisions providing capital maintenance rules are therefore warranted.

The circumstances and terms of distributions to members of cash or other assets, or profits are left to members to determine in an operating agreement, subject to the applicable capital maintenance rules. In default any allocation may be proportional to received contributions[7], or on a per capita basis.[8]

Often the legislation contains no definition of a distribution. The ULLCA defines a distribution as a "transfer of money, property, or other benefit from a limited liability company to a member in the member's capacity as a member or to a transferee of the members distributional interest."[9]

The applicable capital maintenance rules often require the 'fair' value of LLC assets to exceed its liabilities (excluding the members' contributions) before any distribution can be made.[10] Members who knowingly receive a distribution in breach of the capital maintenance rule are typically liable for the amount of wrongful distribution. The ULLCA's capital maintenance rule adds a trading limb and is more akin to the two limbed solvency test under the Companies Act.[11]

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[7] As is the case in Delaware and Wyoming.

[8] As is the case for Idaho and the ULLCA.

[9] ULLCA s 101(5).

[10] For example art 7-80-606 of the Colorado LLC Act provides that:

> A member may not receive a distribution from a limited liability company to the extent that, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their membership interests, would exceed the fair value of the limited liability company assets.

[11] Contrast the Companies Act solvency test under s 4 with that under s 406(a) of the ULLCA, which provides:

> A distribution may not be made if:
> (1) the limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or

A 'fair' basis to valuations recognises that due to the size and informal nature a closely held business it is unlikely to incur the expense of maintaining financial records prepared by professionals. The ULLCA goes further by providing that any valuations required for its solvency test may also be made on any other method that is reasonable in the circumstances.[12]

Once a member becomes entitled to a distribution normally that member will expressly acquire the status of, and be entitled to all remedies available to, a creditor of the LLC with respect to the distribution.

2 *General duties of managers and members*

What duties should be owed by managers and members of a LLC, and to what extent these duties should be displaceable is a controversial and difficult issue[13]. Not all states have attempted to codify these duties, and those that have have adopted differing standards and have placed varying limits on displaceability, whether that displaceablity is direct or by way of indemnification of members and managers.

Colorado, for example, requires managers to perform their duties in good faith, in a manner that they reasonably believe to be in the best interests of the LLC, and with such care as an ordinarily prudent person in a like position would use under similar

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(2) the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of distribution, to satisfy the preferential rights upon dissolution, winding up, an termination of members whose preferential rights are superior to those receiving the distribution.

[12] ULLCA s 406(b).

[13] See S.K.Miller "What Standards of Conduct Should Apply to Members and Managers of Limited Liability Companies?" 68 St. John's L.Rev. The opposing rationales of freedom of contact and mandatory rules, with respect to indemnification, are discussed in Part IV of this paper.

circumstances.[14] In doing so managers may rely on the reports, opinions and statements of certain experts and employees that they reasonably believe to be reliable and competent in the relative matters, unless they have knowledge that that reliance is unwarranted. Article 7-80-108 prohibits the operating agreement from unreasonably reducing the duty of care or eliminating the good faith obligation (although parties may determine reasonable standards for the measure of that obligation). The LLC is free to seek insurance cover for managers under art 7-80-410.

In contrast to Colorado's duty of care the Idaho Act only imposes liability for gross negligence or wilful misconduct, unless the operating agreement specifies a higher standard.[15] The duty against unauthorised self-dealing under art 53-622(2) is displaceable by the operating agreement. The duties don't apply to members who aren't managers in a manager managed LLC and are simply acting in their capacity of a member.[16] Under art 53-624 the operating agreement may limit or eliminate the personal liability of a member or manager for monetary damages for breach of any duty in art 53-622, and may indemnify a member or manager for any judgments, settlements, penalties, fines or expenses incurred in a proceeding to which a person is party because the person was a member or manager.

Delaware gives complete freedom of contract to the members. Under art 18-108 the LLC has the power to indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever. To complement this provision article 18-1101(c) provides for the restriction of duties owed at law or equity by the operating agreement. Article 18-406 provides for reliance on reports and information by a member or manager.

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[14] Colorado LLC Act art 7-8-406(1).

[15] Idaho LLC Act art 53-622.

[16] Idaho LLC Act art 53-622(3).

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The ULLCA provides for a duty of loyalty and a duty of care owed by the LLC management, whether by members or managers, to the LLC and members. The duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. The duty of loyalty includes refraining from acting in competition with the LLC, and holding as trustee any property, benefit or profit derived from a use of the LLC's property, including the appropriation of a company's opportunity. Any operating agreement may not unreasonably reduce the duty of care, and it may not eliminate the duty of loyalty, although it may identify categories of activities that do not violate it, if not manifestly unreasonable.[17]

D *Derivative Actions*

Some states include provision for derivative actions. For example Delaware entitles a member to bring a derivative action on behalf of LLC if members or managers with authority to do so have or are likely to refuse to bring the action themselves. The plaintiff must be a member at the time of the transaction or have received their membership interest from a person who was, and must set out efforts to secure initiation of the action by members or managers, or reasons for not doing so. If the derivative action is successful the court may award plaintiff reasonable expenses.[18] The ULLCA also codifies a right of derivative action, adopting the Delaware provisions almost verbatim.[19]

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[17] ULLCA ss 103 and 409.

[18] Delaware LLC Act ss 18-1001 to 18-1004.

[19] ULLCA ss 1101 to 1104.

E *Protection of Third Parties*

A concern of third parties contracting with the LLC is whether the manager or member they are dealing with has the authority to enter the LLC into the proposed transaction. Operating agreements which may define the relative authority and duties of managers and members are not required to be filed with any state registrar and indeed may even be oral agreements in some states. Accordingly, third parties lack the means of independently verifying the authority of the person they are dealing with and instead require broad protection.

Idaho and Colorado are two states that provide a clear codification of this protection in agency provisions. Idaho provides that every member of a member-managed firm is an agent of the LLC and any act by him or her for apparently carrying on in the usual way the business or affairs of the LLC binds the LLC, unless that member in fact has no authority for that action and the third party has knowledge of that fact. Knowledge is defined as actual knowledge or knowledge of other facts that in the circumstances show bad faith. Managers of a manager-managed LLC are similarly construed as agents of the LLC, although members are no longer considered agents solely by reason of being a member. Third parties need simply check the articles of organisation filed with the secretary of state to confirm whether they are dealing with a member or manager managed firm. Acts of a member or manager outside the "apparently carrying on in the usual way the business or affairs of the LLC" do not bind the LLC unless authorised in accordance with an operating agreement.[20]

Colorado's agency provision similarly provides that every act of a manager (or member in a member-managed firm) for apparently carrying on in the usual way the business of the LLC binds the LLC, unless that manager in fact has no authority for

[20] Idaho LLC Act arts 53-616 and 53-667.

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that action and the third party has knowledge of that fact.[21] Again, the ULLCA agency provisions follow a similar form, but in addition to the actual knowledge proviso provides that a third party is deemed to have notice of the fact of any relevant restriction in the operating agreement where that person has "reason to know the fact exists from all of the facts known to the person at the time in question."[22]

F *Members*

1 *Capital contributions and withdrawal*

Members may contribute capital in the form of cash or other property, promissory notes, or services. Members are liable to the LLC for unreceived contributions, and any right given to other members to waive this liability may not affect the right of a creditor who extended credit or whose claim arose before the waiver.[23]

Subject to capital maintenance rules members are given a right to withdraw their capital upon the consent of all remaining members or upon the giving of notice and the following of the procedure outlined in the operating agreement.

The member may remain liable to the LLC for a period following the return, to the extent of that returned contribution, for liabilities incurred while a member. In Wyoming, for example, members remain liable for 6 years.[24] In Colorado members remain liable for 6 years, but only if the contribution was returned in violation of the Act or the operating agreement.[25] The Colorado provision makes more sense. Where

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[21] Colorado LLC Act art 7-80-406(4).

[22] ULLCA ss 102 and 301.

[23] For example see the Wyoming LLC Act art 17-15-121(c).

[24] Wyoming LLC Act art 17-15-121(d).

[25] Colorado LLC Act art 7-80-607(2).

the return is subject to capital maintenance rules it seems unnecessary to impose a continuing liability rule as well.

Failure by the LLC to return a members contribution when rightfully demanded often entitles that member to dissolve the LLC.

2 *Admission of new members*

Wyoming requires any right to admit new members to be included in the articles of organisation at formation.[26] Other states don't require the consideration of this issue at formation but protect the holdings of original members by providing for the admission of new members by the written consent of all members or in accordance with a written operating agreement.

3 *Transferability of interest*

The interest of members in the LLC constitutes personal property and may be assigned or transferred subject to any restrictions in the operating agreement. The transferee gets an interest in the transferring member's share of profits and return of contributions, but may only participate in management or be admitted as a member upon the unanimous written consent of other members, or in some states as otherwise provided in the operating agreement. This restriction on the transfer of management rights to outsiders reflects the likelihood that as a closely held business the LLC will largely depend on the inter-personal dynamic of original members.

The transferor generally remains liable to LLC for promised contributions and wrongfully received distributions. In the absence of contrary agreement the transfer of the interest may terminate the membership of the transferor[27] or the transferor may

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[26] Wyoming LLC Act art 17-15-107(vii).

[27] Delaware LLC Act art 18-702(2).

continue as a member until the transferee becomes a member or the transferor resigns.[28]

G *Dissolution*

Dissolution typically occurs upon the written consent of all members, when the period of duration expires or upon the happening of an event specified in articles of organisation or operating agreement, or upon the termination of member's continued membership unless remaining members unanimously consent to continue or there is a continuance right included in the articles of organisation or operating agreement.

Some states include provision for judicial dissolution. For example in Delaware a member or manager may apply for a judicial decree of dissolution where it is "not reasonably practicable to carry on business in conformity with a LLC agreement".[29] Members of Idaho LLCs may apply for judicial dissolution where management is deadlocked and the LLC's affairs are being irreparably harmed, or where the acts of managers or members in control of the LLC are illegal, oppressive or fraudulent and irreparable injury to LLC is being suffered or threatened.[30]

Upon dissolution LLC assets are distributed first amongst creditors (including members who happen to be creditors), then to members in satisfaction of LLC liabilities for distributions, then to members in return of their contributions and finally the remainder to members in proportion to their interest in LLC profits and distributions. Operating agreements may generally vary priority among the members.

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[28] Idaho LLC Act art 53-636(1)(d).

[29] Delaware LLC Act art 18-802.

[30] Idaho LLC Act art 53-643.

IV TRANSACTIONAL ANALYSIS

In New Zealand the Companies Act 1993 sets out detailed procedural provisions for the regulation of most aspects of operating a company, requiring recurrent documentation and certification of management actions. This is in contrast to the general nature of the LLC which leaves much of its regulation to the agreement of the members and imposes very few if any documentation requirements. The minimalist nature of the Wyoming LLC Act makes a particularly strong contrast in this regard and will be used as the LLC legislation in this transactional analysis.

The following analysis aims to highlight the comparative strengths and weaknesses of the different approaches of the two operating vehicles, in a transactional context, with the corresponding implications for their commercial practicability.

A *Formation*

A, B, and C join together to undertake a business venture.

If the business is to be structured as a company then under s 11 of the Companies Act any one of them may apply for registration of the company by delivering a s 12 application for registration to the registrar, containing the following information:

(1) consents, names and addresses of directors;

(2) consents, names and addresses of shareholders;

(3) number and class of shares to be issued;

(4) notice reserving a company name under s 22;

(5) registered office and address for service.

(6) copy of the company's constitution, if it is to have one.

Upon the receipt of a properly completed application the registrar issues a certificate of incorporation, which is conclusive evidence that all requirements for incorporation have been completed. Then under s 41(a) the directors must issue the shares to A, B and C as detailed in the application.

If A, B and C don't include a constitution the company will not be able to undertake certain transactions, in particular a purchase of its own shares, the issue of redeemable shares or the indemnification of directors and employees.[31] Some of these transactions may be undertaken by a s 107 unanimous agreement of all entitled persons, which would be A, B and C as shareholders in this example.[32] These agreements may be adopted at formation or immediately prior to the transaction. Such an agreement is designed to enable the shareholders of a closely held company to avoid the procedural and documentary requirements of certain transactions, and the accompanying liability exposure of directors in case of their breach.

However, any unanimous agreement to authorise a dividend, approve a discount scheme, acquire own shares, redeem shares, give financial assistance, or authorise director's remuneration or other benefits otherwise than in accordance with the provisions of the Act which would ordinarily govern those transactions, will be subject to fresh documentary and procedural requirements under the s 108 application of the solvency test. As will be seen below, the nature of the solvency test and the accompanying liability exposure of directors, combined with the s 107(6) power to withdraw from certain unanimous agreements, may ironically make a s 107 unanimous

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[31] Companies Act 1993 ss 59, 68, and 162 respectively.

[32] Section 2 defines an entitled person as:

(a) a shareholder; and
(b) a person upon whom the constitution confers any of the rights and powers of a shareholder.

For a closely held company major creditors such the overdraft providing bank will be in a strong bargaining position to require entitled person status as a condition of the extension of credit. As an entitled person the bank would have standing to bring actions against the company and its directors prior to liquidation. See sections 164 and 174.

agreement a less attractive method for closely held companies of adopting a transaction.[33]

Particular transactions will likely be of interest to A, B and C at the outset. The capacity of the company to purchase its own shares may be a handy distribution option and useful for personal liquidity purposes. The issue of redeemable shares will be necessary to implement a satisfactory back agreement (as will be seen below), and, although restricted, the indemnity provisions can be used to reduce A, B and C's liability exposure. These transactions should be authorised by the constitution or in a s 107 unanimous agreement.

Also, in the absence of a constitution the shares of A, B and C will be freely transferable to an outsider[34] and the board (which will constitute C if she is the sole director) will be able to freely issue shares, subject to a right of pre-emption given to the shareholders.[35] To the extent that the transfer of shares to an outsider would undermine any inter-personal dynamic important to the operation of the business, or the issue of shares would threaten dilution of their holdings, A, B and C should restrict these powers in the constitution, for example by requiring the consent of shareholders for both actions.

If A, B and C all want a direct say in management they should also include in the constitution a provision entrenching themselves as directors. This will prevent any two of them 'rolling' the other from the board by a s 156 ordinary resolution of shareholders.

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[33] See the following discussion on the implementation of buyout agreements and the payment of directors remuneration under s 161.

[34] See the rights that attach to a share under s 36, unless altered in the constitution.

[35] As explained in the admission of new members transaction this right of pre-emption under s 45 is of only limited value where the shareholder lacks the resources to take up the offer.

As a Wyoming LLC any one of A, B or C may form the LLC by delivering copies of the Articles of Organisation to the Secretary of State for filing.

Under s 17-15-107(a), amongst other things, the Articles of Organisation shall set forth: (1) the total capital contributions of the members and the times at which or the events upon the happening of which they shall be made;
(2) the period of LLC duration (30 years in default);
(3) any right to admit new members;
(4) a vesting statement if management is to be by managers;
(5) any continuance right upon the disassociation of a member;
and may include any other provision contracted for by the members for the regulation of the internal affairs of the LLC.

The Secretary of State then issues a certificate of organisation under s 17-15-108, which under s 17-15-109(a) is conclusive evidence that the LLC is legally organised.

If A, B and C file the bare minimum requirements they will have no right to admit new members, nor any right to vest management in managers, and the LLC will dissolve upon the disassociation of a member. No other powers or rights need authorisation in the articles of organisation.[36] By limiting the right of admission of new members, the Act automatically protects any inter-personal dynamic that is integral to the business.[37] The articles of organisation may only be amended in accordance with the operating agreement or with the consent of all members.[38]

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[36] Wyoming LLC Act art 17-15-107(b).

[37] Note also that under art 17-15-122 transferees of LLC interests may only become members upon the unanimous written consent of the remaining members.

[38] Wyoming LLC Act art 17-15-129(d).

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In default A, B and C as members are directly involved in management, in proportion to their capital contributions.[39] This recognises that the greater convergence of ownership and control in a closely held business renders superfluous an artificial separation of ownership and control in a board of directors. In the extreme, such separation under the Companies Act is totally unnecessary for a one person company, rendering the procedural and documentary requirements aimed to ensure directors are accountable to shareholders, to the extent they can't be avoided by provision in the constitution or unanimous agreement, a totally unnecessary expense.[40] Although the Wyoming Act requires at least two members it is not an a necessary feature of the LLC as many other Acts permit single member LLCs.

The bare minimum filing requirements of a Wyoming LLC are better suited to closely held companies than those of the Companies Act. Without the members doing more the LLC is given full powers to undertake any of the activities detailed in art 17-15-104 and their interests are protected against the intrusion of outsiders and involuntary dilution. In contrast the Companies Act compels members of closely held companies to incur the expense of drafting constitutional provisions and unanimous agreements to provide similar powers and protection of their interests. The Companies Act would do better to permit own share repurchases, redeemable shares, and indemnification of directors and employees except where restricted in the constitution. The utility of free transferability of shares to larger companies warrants its retention.

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[39] Wyoming LLC Act art 17-15-116. Perhaps a better default allocation of management rights would be on a per capita basis, giving A, B and C an equal say in the running of the LLC, as is seen for example in the ULLCA s 404.

[40] A company need only have one shareholder. Companies Act 1993 s 10.

B *Admission of New Members*

A and B wish to admit a fourth equal member to the business, D. C objects.

A, B, and C are all directors of the company. As a company, in the absence of any constitutional restrictions, the board has the power under s 42, subject to the Act, to issue shares to any person and in any number. A and B control the board[41] and so are able to issue shares to D in accordance with sections 45 and 47. Under s 45, as an existing shareholder, C has a pre-emptive right to the offer of shares, designed to prevent any involuntary dilution of her holdings. However, this pre-emptive right will be of no value if C lacks the resources to take up the offer. In addition, certain determinations and certifications concerning the adequacy of the consideration for the shares must be made by A and B as directors under s 47. If made carefully C won't have any recourse against A or B for breach of duty under s 47.

Clearly C's protection under s 45 is limited. Not only must C have sufficient funds to make use of the pre-emptive right but also she will lack the protection of the s 117 minority buy-out right, which doesn't apply to issues of shares in accordance with s 45.

To avoid these problems C should have insisted at formation that the constitution prohibit the issuing of shares. Then under s 44(1) 75% shareholder approval would be required before any issue could be made. In a three person company C would have

[41] Under s 160 the proceedings of the board are governed by the 3rd schedule. Under clause 5 a board resolution is passed by the majority vote of directors present at the meeting, provided a quorum exists (majority of directors). Under clause 7 in the absence of a meeting resolutions may be passed by the unanimous written agreement of directors.

negative control over the issue, controlling one third of the vote.[42] However, if there were more than three shareholders C would be wise to insist on the constitution requiring unanimous shareholder approval for any share issue. Such unanimous agreements could then be adopted under s 107(2) of the Act, avoiding the expense and liability exposure of directors presented by the determinations and certifications required under s 47.

In contrast, as members of a Wyoming LLC, A, B and C, are required to consider the admission of new members at formation. If they wish to include such a right then they must contract as to its terms and include it in the Articles of Organisation. It is likely that A, B and C will require their unanimous consent before the admission of a new member. By requiring the members consideration at formation the Wyoming LLC ensures that C is not surprised later by any dilution in her shareholding.[43] If a right to admit new members is not included in the articles of organisation there is no right and C need not worry about her interest being involuntarily diluted by A and B in the future. Accordingly the Wyoming Act provides more effective and more direct protection for members against involuntary dilution of holdings.

C Buyout Agreements

A disagrees with the management policies pursued by B and C. A wishes to retire from the business.

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[42] In a four person company C would lose this negative control. However she would still have available the minority buy-out right of s 117, which is preserved in the application of s 44 by s 44(4), providing some incentive for shareholders to reach agreement on any issue.

[43] As a corollary to the admission of new members, under art 17-15-122 the Wyoming Act also requires the unanimous written consent of members before any transferee of a LLC interest can participate in management. To achieve a similar result for a 1993 Act company A, B and C could in the company constitution provide that voting rights attached to transferred shares remain inoperative without the approval of other shareholders.

Under the Companies Act, without prior provision for a buyout agreement, A has limited options for retiring and withdrawing his capital. In the absence of any minority buy-out right arising under s 110[44] or under s 117[45], A cannot compel the company to repurchase his shares.[46] The only certain way A can retire from the business is by transferring his shares to a third party. Even then the constitution of a closely held company is likely to restrict share transfers to outsiders. To ensure he has a guaranteed exit mechanism with the required ex ante certainty A should contract for a buyout agreement at the time of formation, before any disagreement arises.

Attempts to implement a buyout agreement via a company purchase of own shares, either pursuant to a right in the constitution and in accordance with sections 59 to 67 or pursuant to a s 107(1) unanimous agreement, will be complicated by problems in achieving the desired ex ante certainty.

Before the company can offer to purchase its own shares sections 59 to 67 require resolutions as to the best interests of the company, and the fairness to the company of the consideration and terms of the offer.[47] The statute anticipates the passing of these

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[44] Section 110 provides a buy-out right for those shareholders who voted against a special resolution passed in the exercise of shareholder powers under s 106(1)(a), (b), or (c).

[45] Section 117 provides a buy-out right for those shareholders who voted against a special resolution passed to authorise the company to take an action altering that class of shareholder rights.

[46] Assuming here that they aren't shares redeemable at the option of the shareholder.

[47] Under s 59(1), subject to the s 52 solvency test, the company may purchase its own shares if expressly permitted by its constitution. That share repurchase must then be made in accordance with sections 60, or 63, or 65. At first glance s 60(1)(b)(ii) is the most likely means of implementing a buyout agreement. It provides for an offer to one or more shareholders with express permission in the constitution and in accordance with s 61.

Under s 60(3) the board must, before the offer, resolve with reasons that:

(a) the acquisition is in the best interests of the company;

(b) terms and consideration for the offer are fair and reasonable to the company;

resolutions immediately before making any offer to A for his shares.[48] Consequently, although A may contract for the buyout right at the time of formation it may be years before its performance and the making of the offer, which is when the resolutions will have to be made, and A will have no guarantee that the board will at that time resolve the offer to be in the best interests of the company. To achieve the desired ex ante certainty any buyout agreement should only be dependent the satisfaction of the solvency test at the time of the shareholder's retirement, not any resolution as to the best interests of the company.

Although A, B and C may avoid the resolution difficulties of sections 59 to 67 by adopting a buyout agreement under a s 107 unanimous agreement, new difficulties in achieving ex ante certainty arise. The buyout agreement, by giving shareholders the option to require the company to repurchase their shares a some time in the future, makes it unlikely that the buyout agreement will be considered a particular exercise of power under s 107(5)(a). It is instead likely to fall within a s 107(b) general agreement to exercise a power from time to time, in which case ex ante certainty is undermined by the subsection 107(6) power of shareholders to withdraw from such an agreement at any time. Subsection 107(6) is an extensive deviation from the normal law of contract.

The best option of A, B and C is to make provision in the constitution for the issuance of shares redeemable at the option of the shareholder, which will achieve a similar

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(c) it is not aware of any material information undisclosed to shareholders.

Additional resolutions and reasons are required under s 61, that:

(a) the acquisition is of benefit to remaining shareholders;

(b) terms and consideration of the offer are fair to remaining shareholders.

Under s 66 A's shares will be deemed cancelled immediately upon repurchase.

[48] A change in circumstances between the making of the resolutions and the acceptance of the offer requires fresh resolutions to be made.

result to a buyout agreement.[49] Upon disagreement A may give the company the 'proper notice' under s 74 requiring it to redeem his shares at a price that may be specified, calculated by a formula, or fixed by a qualified disinterested third party.[50] A's shares are then deemed cancelled on the date of redemption.[51] To avoid the entry of an outsider who may inherit the shares in the event of a shareholders death A, B and C should make the shares redeemable at the option of the shareholder or upon the shareholder's death.

Unlike a purchase of own shares under sections 59 to 67, or 107, payments made to A under such a redemption are not directly subject to the solvency test. However, if they are made when its requirements are not satisfied and A doesn't receive the payments in good faith and without knowledge of the breach, or hasn't altered his position in reliance on them, then he will be liable under s 56 for the payments.[52] As an active shareholder in a closely held business A is likely to have knowledge of any breach of the solvency test. So although the expense of directors resolutions and certifications under the solvency test are avoided A still faces a very real liability risk if it is ignored.

If the value of the redeemed share is payable by instalments, as is likely for a small business with limited cash, the Act accords A the status of an unsecured creditor. Although this priority is higher than that received as a creditor under a purchase of own shares transaction there is no reason why A should not have the freedom to seek security for moneys owing on any redemption.[53]

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[49] Shares redeemable at the option of the company are subject to similar resolution requirements as a purchase of own share, undermining ex ante certainty in any buyout agreement. See s 69.

[50] Companies Act 1993 s 68.

[51] Companies Act 1993 s 74(1)(b).

[52] Companies Act 1993 s 74(2)(b).

[53] Compare ss 74(1)(c) and 67.

The Wyoming LLC Act addresses the buyout concerns of A more directly. In default the Act gives A the right to withdraw his capital contribution without the consent of B and C, provided he gives 6 months notice[54], and all liabilities of the LLC, except liabilities to members on account of their contributions to capital, have been paid or there remains property of the LLC sufficient to pay them.[55] The value of A's capital contribution will be that recorded in the articles of organisation, and in default will be returned in cash. For A to have the right to demand the return of specific property a statement to that effect must be included in the articles of organisation.[56] However, A must still resign as a member, which will dissolve the LLC under s 17-15-123 unless there is right of continuance for B and C under the Articles of Organisation.[57] A will remain liable to the LLC for 6 years for the amount of his returned contribution, to cover any liabilities incurred while a member, if required.[58]

Despite this right to withdraw capital under art 17-15-120 A, B and C may still wish to include a buyout scheme in the articles or organisation, although the LLC is not expressly given the power to purchase its own interests.[59] Under such a scheme they could provide for a more elaborate price mechanism than simply the recorded value of their contributions, taking into account the profitability of the business. They may also

[54] Or other notice as specified in the operating agreement, art 17-15-120(b)(ii).

[55] Wyoming LLC Act art 17-15-120.

[56] Wyoming LLC Act arts 17-15-107 and 17-15-120(c).

[57] Wyoming LLC Act art 17-15-123.

[58] Wyoming LLC Act art 17-15-121(d).

[59] Under art 17-15-104(v) the LLC has the power to deal in interests of 'other LLCs', but under art 17-15-104(xiii) it also has ' all powers necessary or convenient to effect any or all of the purposes for which the LLC is organised', and under art 17-15-104(ii) the LLC may deal in and with personal property (a member's interest being part of his personal property under art 17-15-122). Arguably the LLC has the power to enter a buyout agreement with A, B and C to purchase their interests upon the giving of a specified notice.

avoid the capital maintenance and continuing liability rules. No provision is made for the cancellation of the interest.[60]

The continuing liability for 6 years under the withdrawal of capital provision of the Wyoming Act makes that provision less commercially practicable to A, B and C than the redeemable shares option under the Companies Act. This continuing liability rule is unnecessary given the capital maintenance rule of art 17-15-120(a)(i) which adequately protects the interests of creditors. Any buyout agreements A, B and C may adopt in addition to this withdrawal right should also be subject to capital maintenance rules, as are own share repurchases under the Companies Act. The Wyoming Act possibly hasn't anticipated the possibility of own interest purhases by a LLC as it makes no provision for the cancellation of such interests once acquired. Other states, for example Delaware, make express provision for an the cancellation of an own interest purchased by an LLC.[61]

Simple changes to both Acts would render more commercially practicable options for the implementation of buyout agreements. Under the Companies Act the s 107(6) power to withdraw should be removed. If parties want this power they can contract for it. Also retiring shareholders should be given the freedom to seek security for any redemption price owing. The continuing liability rule of the Wyoming Act should be removed, and express provision made for own interest repurchases by the LLC, subject to a capital maintenance rule.

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[60] However, under art 17-15-122 a purchase of A's interest by the LLC won't confer any management rights on the LLC without the unanimous written consent of B and C. Presumably the LLC would simply hold any pro rata distributions on A's old interest for the benefit of B and C. There is no provision for the cancellation of the interest in this situation, besides the withdrawal of capital provisions under art 17-15-120.

[61] Delaware LLC Act art 18-702.

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D *Management*

A, B and C decide that management of the business should be by C. C is concerned about matters such as remuneration, limits upon her authority, potential interference from A and B, and risk exposure for negligence liability.

As a company C may gain control over management of the business either by being appointed the sole director or by being appointed the managing director with certain of the boards powers delegated to her under s 130.[62] In the absence of a constitution it is then left to the Act to regulate the relationship between C as director and the shareholders.

The Act reserves to A, B and C as shareholders certain powers. For example, under s 106 C will have to seek the special resolution approval of shareholders for the adoption or alteration of a constitution, the approval of a major transaction, and the amalgamation or liquidation of the company. Also, as director C may not cause the company to purchase its own shares, issue redeemable shares or indemnify or insure herself or any employee without express authorisation in the constitution, again requiring a special resolution of shareholders to adopt any constitution. A and B as shareholders effectively have negative control over these transactions and may to this extent frustrate the management of C. More directly A and B as shareholders are able remove C and elect new directors by ordinary resolution.

Many of these provisions empowering shareholders appear non-displaceable. For example, during the start up phase C as manager will be making numerous decisions which will likely involve major transactions, for example securing bank loans, leasing premises, and buying equipment. A and B may be happy to give C a free hand to do this, but the s 129 major transaction rule requiring special resolution approval is

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[62] Under s 128 management is to be by the board subject to any limitations of the Act or constitution.

technically non-displaceable.[63] However, A and B may accept shares with limited voting rights with respect to major transactions, effectively displacing s 129. The company will still have to go through the inconvenience and expense of calling a shareholders meeting or of adopting a written resolution in lieu of such meeting under s 122.

In contrast, as a Wyoming LLC management vests in default in A, B and C as members, in proportion to their capital contributions.[64] There is no further regulation of LLC management comparable to the non-displaceable s 106 requirement for shareholder special resolutions for certain transactions. A, B and C are given complete freedom to contract for particular management structures, including election procedures.[65] Management may be vested in C as manager, the relative rights and duties of C as manager and A, B and C as members being left to the members to decide in the operating agreement.[66]

As a director C's remuneration must be made in accordance with s 161.[67] That section requires disclosure in the interests register and a board resolution that the contract for remuneration payments is fair to the company. Directors who fail to disclose or to provide reasonable grounds for the resolution will be personally liable for the payments except to the extent they can prove the making of the payment was fair to the company at the time it was made.[68] They will also incur a criminal penalty under s 140

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[63] It is not possible to reduce the level required for a special resolution, see s 2.

[64] Wyoming LLC Act art 17-15-116.

[65] Article 17-15-116 provides in default for annual elections of managers in accordance with the operating agreement where management has been vested in managers.

[66] Wyoming LLC Act art 17-15-104(ix).

[67] Section 161 applies even if C as a director receives her remuneration in a capacity other than as director, for example as chief executive. To avoid s 161 C may decide not to become a director and rely on powers delegated under s 130.

[68] Subsection 161(5).

for non-disclosure, a fine of $ 10 000.[69] These disclosure and resolution requirements guard against directors of abusing their position and giving themselves inflated remuneration or other benefits. To the extent that shareholders of closely held companies are also directors the disclosure and fairness requirements are less necessary.

To avoid the unnecessary disclosure and fairness requirements, and the resultant exposure to liability for non-compliance, A, B and C may adopt a contract for C's remuneration by unanimous agreement under s 107(1). But then under s 108(1) the payments become subject to the solvency test, which exposes C and other directors to a new liability risk. All directors who voted in favour will be liable under s 56 for payments made in breach of the test to the extent they are unrecoverable from the director who received the payment.[70]

These problems are not encountered by a Wyoming LLC. The legislation is silent as to remuneration to member managers.[71] The LLC may freely contract for the payment of remuneration to C. Any potential liability C may face for self dealing is at common law only, which, as explained below, may be contractually limited. To avoid the relative uncertainty of relying on common law remedies in the case of embezzlement by C, A, B and C could contract at formation for a procedure to be followed in setting a managers remuneration. For example, the operating agreement could provide that all remuneration contracts must be approved by members.

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[69] The disclosure exemption provided by s 143 only applies to remuneration made in accordance with s 161. If s 161 is breached s 143 no longer applies and the directors will be liable for non-disclosure under s 140.

[70] Under s 108(4) if payment is made in breach of the solvency test then the provisions of s 56 for the recovery of distributions will apply making the directors personally liable to the company for the unrecovered amount. Failure to make the required certifications under s 108(2) results in a penalty of a $5000 fine.

[71] The legislation does not prohibit the appointment of a member as manager under a manager managed LLC.

As a director of a company C is exposed to extensive civil and criminal liability risk. This risk lies in the Companies Act's codification of certain specific and general duties owed by C as a director to the company and shareholders. The Act also provides accompanying enforcement mechanisms. [72]

An example of a specific duty are the s 47 requirements for C as a director to make certain determinations and certifications as to the adequacy of consideration for an issue of shares. Failure to do so is a criminal offence and carries a $ 5000 fine. General duties including those of acting in good faith, acting in what she believes are the best interests of the company, and exercising powers for proper purpose, are contained in sections 131 to 137.

The broad negligence liability of section 137 will be the most worrying for C. It requires directors, when exercising powers or performing duties, to exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances. In assessing this standard the nature of the company, the nature of the decision, and the position of the director and the nature of the responsibilities undertaken by him or her, may be taken into account, but *without limitation* of other possible factors. Given the words *without limitation* any special skills C has may possibly be taken into account in assessing that standard, even though she hasn't assumed any additional responsibilities for their use. This point has yet to be decided by the courts.

Clearly C should be very wary before accepting any directorship. Even if C were to avoid a directorship and assume management of the company as an employee with certain powers delegated to her under s 130 she may still be deemed a director for the exercise of those powers under s 126.

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[72] Companies Act 1993 ss 164, 165, 169 to 174.

The general duties of C under sections 131 to 137 are non-displaceable, although A, B and C may attempt to limit C's liability under the general duties by defining in the constitution the terms "best interests of the company" under s 131, and "proper purpose" under s 133. However, any attempt to do so will likely be in contravention of s 162 which prohibits the company providing any indemnity or insurance for a director or employee except as provided in that section. That section includes a bar on any indemnification for liability owed to the company, or liability arising in respect of a breach of s 131. Both the section 131 and 133 duties are owed to the company. Indemnity under the section includes the relief or excuse from liability, which is what A, B and C would be seeking to do by limiting the ordinary meaning of the company's best interests and proper purpose.

The cover that s 162 does provide for C is very limited. Under s 162(3) the company may, if expressly authorised by its constitution, indemnify her for any costs incurred in any proceeding that relates to liability for any act or omission in her capacity as a director and in which judgment is given in her favour, or in which she is acquitted, or which is discontinued.

Clearly this only provides limited comfort for C. She won't be covered if she loses the proceedings.

Subsection 162(4) provides that a company may, again with the express authorisation of its constitution, indemnify C in respect of liability to any person *other than the company* for any act or omission in her capacity as a director, or costs incurred by in defending or settling any claim or proceeding relating to any such liability, *not being criminal liability or liability in respect of a breach of the s 131 duty.*

Again this provides only limited comfort for C in respect of duties owed to the company and to A and B. All but one of the general duties are expressly owed directly to the company, and therefore outside the scope of permissible indemnification. Although C may be indemnified for any liability owed to A and B as shareholders,

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many of the duties owed to shareholders, for example the duties under sections 90 and 140, carry criminal penalties which are also outside the scope of permissible indemnification.

However, the subsection does enable the company to indemnify C for liability to third parties incurred while acting in good faith in pursuit of the company's interests (ie when not in breach of s 131), provided its not criminal liability.

Under subsection 162(5) the company may, with the express authorisation of the constitution and the prior approval of the board, effect insurance for C in respect of liability, not being criminal, for any act or omission in her capacity as a director, or costs incurred by her in defending or settling any claim or proceeding relating to any such liability, or costs incurred her in defending any criminal proceedings in which he or she is acquitted. Although this subsection provides C with the possibility of wide insurance coverage in reality it will be nearly impossible for C to contract liability insurance which substantially reduces her exposure. Typical liability insurance will contain exclusion clauses for liability arising in respect of a breach by C of the Act.

Despite the very limited nature of the indemnification and insurance available under s 162 the practicable implications for C of her extensive liability exposure may not be as worrying as they first appear. In a closely held company the other shareholders will probably also be directors and therefore participating in the same board decisions as C, incurring substantially the same liability, and therefore removing any real threat of litigation by them.

The real threat to C arises if her mismanagement renders the company unable to pay a statutory demand and the company is put into liquidation. Under s 301 both the liquidator and creditors may apply to the court for order requiring C to pay compensation to the company where she has been guilty of negligence, default, or breach of duty or trust in relation to the company. But even then any action against C by the liquidator or the creditors themselves under s 301 will most probably be against an already insolvent C. Major creditors of the company would have sought personal

guarantees from A, B and C, the most common example being the personal guarantee for an overdraft. Thus C's personal fortunes will be linked to those of the company. Even if C is solvent the company will probably have insufficient assets to fund any litigation by the liquidator. The creditors will be unlikely to fund any litigation themselves given its uncertain outcome and the losses already suffered by them.

The Wyoming Act doesn't attempt to codify the general duties owed by C as manager to other members and the LLC, nor does it contain any enforcement provisions, leaving these things in default to determination at common law. However, wide powers to indemnify members and managers are given to the LLC under art 17-15-104(xi). That article gives the LLC the power, without more, to indemnify C against expenses actually and reasonably incurred in connection with the defence of an action, civil or criminal, in which she is made a party by reason of being or having been a member or manager, except in relation to matters as to which she shall be adjudged liable to the LLC for negligence or misconduct in the performance of duty or to have received improper personal benefit in account of her position. Any other indemnification must effectively be authorised by the members, either by provision in the articles of organisation or the operating agreement, or by their adoption of an appropriate resolution. There has been no case law in Wyoming on this provision.

In contrast to s 162, art 17-15-104(xi) clearly gives the A, B and C extensive freedom to contract for their own indemnification, overriding the public policy concerns which have historically limited the indemnification of corporate directors and employees at common law in the US[73]. In other US jurisdictions the paramountcy given to freedom

[73] The New York case of *New York Dock Co* v *McCollum*, 173 Misc. 106, 16 N.Y.S.2d 844 (N.Y Sup. Ct. 1939) is a leading early case in this area, and although widely criticised in other State jurisdictions, triggered a wave of State indemnification statutes for corporate directors and officers. See P. Walter "Statutory Indemnification and Insurance Provisions for Corporate Directors - to what end?" [1988-89] 38 Drake Law Review 241.

of contract is even clearer. For example the Delaware LLC Act provides in art 18-108:[74]

> Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.

Clearly the Wyoming and Delaware LLC Acts have taken a very different approach to directors duties and indemnification to that under the Companies Act, giving the parties extensive contractual freedom rather than imposing what are essentially mandatory duties.

Mandatory duties and the accompanying limits on indemnification may be justified by the presence of imperfect information and externalities. The small investor buying stock in a large corporation may face imperfect information as to the value of its that corporation's constitutional provisions. Investors may lack the expertise, or incentive, to judge the implications of such provisions on corporate value, and the market may be inefficient in providing that information. Mandatory corporation laws, of which directors duties are one branch, are a means of reducing the information difficulties for the investor by providing a sure base of mandatory provisions for valuation.

However, the imperfect information justification for mandatory directors duties is not strong when applied to closely held businesses due to the greater convergence of ownership and control. A, B and C are able to contract directly amongst themselves, each with the full information as to what they are getting, and they should thus be able to contract freely for any indemnification by the company whatsoever.

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[74] This provision's displacement of the common law is reinforced by art 18-1101(b) which provides:

> The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

Any potential harm to the interests of creditors is not a sufficiently strong externality of this freedom to indemnify to warrant the imposition of mandatory duties and limits on indemnifications.[75] As discussed above, the presence of personal guarantees and the expense of litigation once the company is in liquidation are likely to render any mandatory directors duties largely worthless to creditors.

Instead, the convergence of ownership and control in a closely held business, and the linking of personal and corporate fortunes through the provision of personal guarantees, will provide a stronger incentive for managers to be careful in the management of the company than mandatory duties. Creditors may still contract for their own protection, for example by the use of the debentures and romalpa clauses.

In the context of closely held companies the contractual freedom of the Delaware Act with respect to indemnification is to be preferred over the restrictive provisions of the Companies Act.

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[75] To the extent that mandatory directors' duties guard against reduction in company value through mismanagement they protect creditors interests, who of course will normally have to satisfy their debts from the company's assets given the limited liability of shareholders. The harm to these interests by indemnifying directors and removing the incentive for careful management is not something taken into account by shareholders when entering such an indemnification contract. It is therefore an externality of the freedom to do so.

V CONCLUSION

The difficulties with the Wyoming LLC Act are easily remedied, as is seen by reference to the Acts of other states. More generally, the LLC offers a promising alternative to the Companies Act for closely held businesses. By separating control and ownership in a board of the directors the Companies Act puts in place a highly regulatory regime designed to ensure the accountability of directors to shareholders. The convergence of ownership and control in a closely held company renders this accounting unnecessary. Such documentary and procedural regulation simply increases the transaction costs of doing business and expose the directors to unwarranted liability risks. By recognising the identity of ownership and control the LLC avoids the need for such regulation and provides much gggreater scope for freedom of contract.

Although the Companies Act, in s 107, does go some way in removing these documentary and procedural formalities for closely held companies, its effectiveness is clearly limited. Many are non-displaceable, for example the requirements to keep a share and interests register, to keep copies of board resolutions, minutes and directors' certifications, and the requirements to maintain and prepare certain accounting and financial records.[76]

Also the minimalist company, the one without a constitution, is somewhat unsuited as an operating vehicle for a closely held business. Shareholders will either have to adopt a constitution and or s 107 unanimous agreements to achieve the same powers and protection of their interests as are typically provided in the minimalist LLC.

Rather than further tinkering with company law the needs of closely held businesses in New Zealand should be addressed directly by the adoption of our own LLC legislation.

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[76] Companies Act 1993 ss 90, 145, 189, 194.

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