SAMUEL JOHN SHIRES

AN EMPIRICAL STUDY OF CLOSELY HELD COMPANY CONSTITUTIONS UNDER THE COMPANIES ACT 1993

LLB (HONS) RESEARCH PAPER
CORPORATE AND BUSINESS LAW (LAWS 531)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1997

VUW Law Research Papers:

There is no PAGE 1, 2, 4, 6, 8, 76 in this document

CONTENTS

This paper presents the author's research into the constitutional practices of closely held companies under the Companies Act 1993.

The objective of the study is to analyse the appropriateness of constitutions being registered by closely held companies.

By way of background, the applicability of the Act to closely held companies, and in particular section 107 agreements, which were provided to reduce the statutory burden on such companies are examined.

It is argued that while at first instance section 107 appears to reduce the burden of formalities on closely held companies, there are certain features which reduce its effectiveness, such as its limited scope, the termination right, and the uncertain effect on the common law doctrine of unanimous shareholder assent.

The body of the paper is devoted to presenting the findings of the author's research into the constitutional practices of closely held companies.

It is argued that the findings reveal that the constitution is being used only with limited success to meet the needs of these companies. A proliferation of standard form constitutions means that the statutory regime is not being altered to properly protect the interests of the members of closely held companies, or to reduce unnecessary statutory formalities for them.

Similarly, it is argued that the drafting style of many of the constitutions is inappropriate for closely held companies, being overly long and confusing.

It is concluded that a move towards more concise and tailor-made constitutions is needed by closely held companies and their advisors, in order to protect their interests and reduce the formalities of operation under the Act.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 13500 words.

I INTRODUCTION

The place of the closely held company in the traditional company law framework has received increasing academic and legislative attention over the last century. As their title suggests, closely held companies are characterised by their small and intimate size. For much of its history, both in terms of the common law and legislation, company law has been founded on the large public company model. The result is that closely held companies sit uneasily within this framework. Many of the rules and formalities imposed upon them are inapplicable to their situation.

In New Zealand, like the rest of the world, for many small businesses the advantages of incorporation are seen to outweigh the disadvantages of the cumbersome regulatory rules. As a result, the majority of New Zealand's registered companies are closely held ones, which in essence are just incorporated partnerships and sole proprietorships.[1]

In the company law reforms of 1993 the New Zealand Law Commission declined to make separate statutory provision for closely held companies, as has been the case in many overseas jurisdictions. Instead it proposed an Act still framed in terms of traditional company law rules, based upon the widely held public company model, but with what it considered to be an element of flexibility for

---

[1] Estimated to be around 90%, see R Dugan *The Companies Act 1993: Governance Issues for Closely Held Companies* (Victoria University of Wellington Law Review, Wellington, 1997) 1. It should be noted that many small companies are not closely held in the true sense. Subsidiary and joint venture companies would also be reflected in this figure.

closely held companies.[2] The mechanisms for achieving this flexibility included the constitution, which can be used to vary many of the rules under the Act, and section 107 agreements, which allow many of the formality requirements of the Act to be avoided.

With regard to the constitution, the Commission considered that if there was a demand for standard constitutions for closely held companies, they would be readily available. However, it also thought that the diversity of many closely held companies would necessitate many tailor-made constitutions.[3]

The objective of this paper is to analyse the position of the closely held company under the Companies Act 1993 ("the new Act"), and in particular to follow up the Law Commission's statements in regard to constitutions for closely held companies.

The three year transitional period between Companies Acts is now over. All companies in New Zealand are now governed by the new Act. The concept of the company constitution is a novel one for closely held companies and their advisors, and it raises many questions. Are closely held companies using constitutions ? Are standard form constitutions readily available as the Law Commission predicted ? If so, what are the contents of these constitutions, and are they appropriate for closely held companies ? Are tailor-made constitutions that meet the needs of particular companies also being used ? What drafting styles are being adopted and what are the consequences of these ? This paper attempts to find some preliminary answers to these questions.

---

2 New Zealand Law Commission *Company Law Reform: Transition and Revision - Report No 16* (Wellington, 1990) 56.

3 Above n 2, 57.

By way of background Part II of the paper outlines the concept of the closely held company and its main characteristics, while Part III examines its treatment in other jurisdictions. Part IV examines the new Act and its application to closely held companies. In particular, section 107 agreements are critiqued as a device for providing for closely held companies. The concept of the constitution and its anticipated role are then outlined. Parts V and VI outline the study and its results. The results are then analysed in Parts VII and VIII, with concluding remarks in Part IX.

II THE CLOSELY HELD COMPANY

Closely held companies have been described by various titles, including incorporated partnerships, closed companies and private companies. These all allude to different characteristics, and indicate that it is hard to give them a precise definition.[4] However, the general characteristics of the closely held company can be described as follows.[5]

First, as the shareholders are few in number they will usually take an active part in the management of the company. There is a lack of the separation of ownership and control that characterises more widely held companies, and which is the basis of much traditional company regulation. This means that statutory rules which seek to hold management accountable to shareholders are not applicable, and

---

4 F O'Neal and R Thompson *O'Neals Close Corporations* (3ed, Clark Boardman & Callaghan, New York, 1996) 15.

5 See generally above n 1 and 4; WH Painter *Painter on Close Corporations* (Little Brown & Co, Boston, 1991).

therefore unnecessary. Such rules typically take the form of requirements such as meetings, disclosure and certification. For a closely held company these formalities impose unnecessary compliance costs. Further, the liability that often accompanies infringement of these rules is particularly unwarranted.[6]

Secondly, personal identities are important in companies of such a size. The members will usually wish to depart from the traditional company law framework in which shares are freely transferable. Instead they will be anxious to have a degree of control over the transfer of shares in the company, to ensure that they are in the hands of people that they are happy working with.[7]

As investing in a closely held company often represents the livelihoods of the members, they will also want to protect their interests by departing from the traditional company law management regime of majority rules. All the members will usually wish to have a say in the running of the business. The decision making in such companies therefore often follows a partnership style, requiring the agreement of all the members.[8]

Further to this, the members will also wish to protect their interests in the company by ensuring that they have security in their positions as officers or employees.[9]

However, the expectations of members of closely held companies can differ in respect to management, as well as holdings and returns. Some may wish to have a passive role, leaving the running of the

---

6 Above n 1, 3.

7 Above n 4, 16.

8 Above n 4, 16.

9 Above n 4, 16.

business to the other members. As a result many closely held companies have unique capital structures, with differing rights attaching to shares, to cater for these varying interests.[10]

Overall, while preferring their internal affairs and relationships to be conducted more like a partnership than a company, the members seek the benefits of incorporation. Incorporation offers the benefit of limited liability. While limited liability is something of a fiction in such small companies, where creditors invariably contract around it by way of personal guarantees and security, it is still beneficial as against small creditors and legal action.[11]

Incorporation also has other benefits, like the peculiarity of the common law that only a company can grant a floating charge, something that a small business starting up will invariably have to do.[12]

Now that small companies can gain the beneficial treatment of the qualifying company regime, there is less distinction between the taxation treatment of companies and partnerships.[13]

These factors all combine to make the company structure a popular choice for many small businesses. However, the traditional company law framework, which provides for features such as the free transferability of shares and decisions by majority, is inappropriate, and will need alteration if possible.

---

10 R Dugan *Company Law: A Transactional Approach* (Butterworths, Wellington, 1994) 66.

11 New Zealand Law Commission *Company Law: A Discussion Paper - Preliminary Paper No 5* (Wellington, 1987) 11.

12 Above n 10, 36.

13 The Income Tax Act 1994, subpart HG.

A One Person Companies

A significant proportion of closely held companies are one person ones. Traditionally, the contractual nature of a company has always meant that at least two members are required. However, incorporation has always been attractive to sole proprietors, for the benefit of combining sole control with limited liability.[14] To get around the requirement of having at least two shareholders, a notional second shareholder with a minimal holding was normally used.

Even in these circumstances the courts have recognised the separate legal existence of the company, and the "veil of incorporation" which protects the member.[15] This has made the one person company a popular business entity. Some academic commentators have suggested that the veil should be disregarded in these circumstances as a sham.[16] However, in New Zealand there is now express recognition in the new Act of one person companies.[17]

The one person company avoids many of the problems associated with a multi-person company as described above. As one person has fundamental control over the business and decisions therein, there are no problems over the allocation of control and the protection of interests, security in office and employment, and restrictions

---

14 Above n 4, 16; W Fuller "The Incorporated Individual: A Study of the One Man Company" [1938] HLR 1373.

15 *Lee* v *Lee's Air Farming Ltd* [1961] NZLR 325.

16 BF Cataldo "Limited Liability with One Person Companies and Subsidiaries" [1953] Law and Contemporary Problems 473.

17 Section 10(c).

on the transfer of shares.[18] Therefore the company can usually operate satisfactorily under the traditional company law framework.

But like a multi-person company, as there is a common identity between the ownership and management of a one person company, traditional company law formalities predicated on the separation of these two facets are unnecessary, and impose unwarranted costs on such a company.[19]

III OVERSEAS TREATMENT OF CLOSELY HELD COMPANIES

As outlined, the nature of closely held companies means that they sit uneasily within traditional company law statutes, which are based on the widely held company model. Judicial and legislative recognition of the closely held company and its particular needs have been steadily gaining momentum over the last century. The following discussion provides an overview of the treatment of closely held companies overseas.

A The English Private Company

England was one of the first jurisdictions to give legislative recognition to the particular needs of closely held companies, with its private company distinction.[20] The private company is defined as one in which the shares are held by a restricted group of

---

18 Above n 4, 16.

19 Above n 1, 12.

20 The Companies Act 1907 (UK).

persons, and can not be freely acquired by members of the public.[21] Certain benefits are conferred upon private companies, in recognition of the their excessive operational costs. These include less formalities in their incorporation, and exemption from certain reporting requirements.[22]

In its tradition of copying English company law statutes, New Zealand also adopted the private company distinction under the Companies Act 1955 ("the old Act"). Like its English counterpart, the New Zealand private company was also defined in terms of limited numbers of members, and restrictions on share transfers. Similarly, preferential treatment was received by private companies in terms of reporting requirements and disclosure, and also the ability to pass resolutions in lieu of meetings.[23]

The distinctive features of the private company have also received judicial recognition. In *Ebrahimi* v *Westbourne Galleries Ltd*[24] the House of Lords recognised the quasi-partnership nature of private companies. *Ebrahimi* involved a typical closely held company situation, with three members who had an equal say in the running of the business, and shared equally in the profits. In the face of a dispute, a classical "freeze-out" scenario ensued, whereby two of the members combined to gang up on the third, removing him from his office as director, excluding him from participation in the management of the business, and discontinuing his share of the profits.

---

21 LCB Gower et al *Gower's Principles of Modern Company Law* (8ed, Sweet and Maxwell, London, 1992) 108.

22 Above n 21, 109.

23 See generally A Beck and A Borrowdale *Guidebook to New Zealand Companies and Securities Law* (5ed, CCH New Zealand Ltd, Auckland, 1994) 10.

24 [1972] 2 All ER 492; [1973] AC 360.

The House held that the majority had acted inequitably, and that in light of the partnership nature of the business and the subsequent collapse of trust and confidence therein, it was just and equitable to liquidate the company to release the minority member.[25]

B The United States

While the United States was slower to recognise the nature of closely held companies, in the last fifty years it has led the way in catering for their needs and expanding their possibilities.

First, the courts have recognised the vulnerability of minority shareholders in closely held companies to "freeze-out" tactics like those in *Ebrahimi*. Their response has been to impose fiduciary duties of good faith and loyalty on the shareholders of closely held companies.[26]

Secondly, the United States has been the primary mover in terms of legislation designed to cater for closely held companies. Many states have created provisions in their general company law statutes to provide flexibilities and exemptions for closely held companies.[27] Others have created special separate statutes for

---

25 Above n 23, 340.

26 *Donahue* v *Rodd Electrotype Co* 328 NE 2d 505 (1975); *Crosby* v *Beam* 548 NE 2d 217 (1989); see generally WL Cary et al *Cases and Materials on Corporations* (6ed, Foundation Press, New York, 1988) 240; A Chernichaw "Oppressed Shareholders in Close Corporations: A Market Oriented Remedy" (1994) 16 Cardozo Law Review 501; B Nicholson "The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation" (1992) 30 American Business Law Journal 513.

27 See for example New York Business Corporations Law sections 609 and 620; California Corporations Code sections 158, 705 and 706.

closely held companies to elect to operate under.[28] Underlying most of these statutes is a company similar to the private company concept, with limited numbers of shareholders and restrictions on share transfers. Such companies can avoid almost all formalities associated with the company form, except capital maintenance and certain fiduciary and reporting duties.[29]

The most significant concession allowed by these statutes is that by way of shareholder agreement in the articles of association, the board of directors can be dissolved, and the affairs of the company managed by the shareholders.[30] If such an agreement is entered into, the shareholders generally assume the duties of a director. This flexibility recognises the identity between shareholders and management, and the desired informality of proceedings in closely held companies. It allows the business to be run in an informal partnership manner, yet with the associated benefits of incorporation.

However, it is interesting to note that to date studies in the United States have indicated that where some form of election is needed for a closely held company to gain the special benefits of close company legislation, few companies elect such treatment.[31] This is particularly interesting in light of the current study, which as will be explained, found that in New Zealand few closely held companies seem to be electing the constitutional variations to

---

28 See for example subchapter XIV of Delaware General Corporations Law; Model Statutory Close Corporations Supplement 1982.

29 Above n 4, 104; Cary above n 26, 262.

30 Delaware sections 350 and 351; New York section 620; California section 300; Model Statutory Close Corporations Supplement section 20.

31 Above n 4, 107; Cary above n 26, 268.

the new Act that would be expected.

The latest trend in close company legislation in the United States has been the conception of the Limited Liability Company.

Between 1988 and 1997 some thirty states have enacted Limited Liability Company statutes. These allow for a new form of business entity, which is a hybrid of the company and partnership forms, offering limited liability, as well as partnership taxation treatment. The business can also be managed in an informal partnership style, by agreement among the members, without a board of directors. Again however, studies show the popularity of the Limited Liability Company to be limited, although recent trends suggest that its popularity is increasing as people become more familiar with its obvious benefits.[32]

C Australia

Australia has enacted separate legislation for closely held companies in the form of the Close Corporations Act 1989. In a similar vein to the legislation in the United States, this allows a predefined company, similar to the private company, to operate without a board of directors under the agreement of its members. Many administrative and reporting formalities usually associated with companies can also be avoided.[33]

---

32 RW Hamilton *Cases and Materials on Corporations* (5ed, West Publishing Co, Minnesota, 1994) 183; WM Gazur "The Limited Liability Experiment: Unlimited Flexibility, Uncertain Role" [1995] Law and Contemporary Problems 135.

33 R Tomaise et al *Corporation Law* (Butterworths, Sydney, 1990) 150.

D Canada

In Canada, the approach has not been to make specific statutory provision for closely held companies. Rather, the Canadian Business Corporations Act 1975 is designed as a flexible statute to cater for the needs of all companies. It is from this approach that the drafters of the new Act in New Zealand drew most heavily.

As in the United States, the flexibility for closely held companies comes from specific statutory recognition of shareholder agreements. These can be used to displace the management of the company from the directors to the shareholders.[34]

E Separate Provision for Closely Held Companies ?

The flood of special statutes providing for closely held companies around the world has not been without its critiques. It is argued that the closely held company is a very arbitrary concept, and difficult to define for legislative purposes.[35]

Further, the need to specifically incorporate as a closely held company is seen as imposing more complex formalities upon the members of such companies. This is where statutes like the Canadian Business Corporations Act, which are flexible enough to cater for closely held companies, but do not require such companies to specifically elect to receive special treatment are seen as having

---

34 Section 102 of the Canadian Business Corporations Act 1975. See JS Ziegel et al *Cases and Materials on Partnerships and Canadian Business Corporations* (2ed, The Carswell Company, Toronto, 1989) 987; B Welling *Corporate Law in Canada* (2ed, Butterworths, Toronto, 1991) 481.

35 Above n 4, 118; I Ayres "Judging Close Corporations in the Age of Statutes" (1992) 70 Washington University Law Quarterly 365.

benefits.[36]

Special closely held company statutes typically require complex arrangements to be completed, such as shareholder agreements for the management of the business. Few of the current statutes provide standardised forms for such arrangements. The result is that many companies incorporate without these crucial control arrangements in place.[37]

It is also argued that the spartan nature of closely held company statutes can be off-putting to potential incorporators. The members of closely held companies will generally want at least some rules to which they can have reference to in their operations, particularly in situations where there is doubt, or debate arises.

Finally, few of the current specialist statutes provide protection for minority shareholders in the absence of special contractual arrangements.[38]

The above points are said to be underlined by the current low rate of incorporations under special closely held company statutes.[39]

It was against this background that the Law Commission decided not to provide separate statutory provision for closely held companies.

The Commission considered that the fundamental problem with such legislation was defining exactly what a closely held company is.[40]

---

36 Cary above n 26, 266.

37 Above n 4, 119.

38 Above n 4, 119.

39 Above n 4, 119.

40 Above n 2.

The Commission also pointed to low public support for such legislation. Instead, the Commission proposed legislation similar to that in Canada, one flexible Act for all companies. The two main mechanisms for this flexibility are the constitution and section 107 agreements.

IV THE COMPANIES ACT 1993

The new Act is different from its predecessor in two major aspects. First, the new Act purports to establish a complete regulatory framework for corporate governance. The old Act contained no governance rules for the internal workings of a company. These were contained in a company's articles of association, a mandatory document for each company. The majority of companies adopted the Table A articles contained in the Third Schedule to the Act. These were designed to meet the needs of small private companies, although how well they achieved this is debatable.[41] The new Act contains a set of "off the rack" governance rules, which are presumed to apply unless displaced by the constitution.[42]

This leads to the second difference. The Act is a mixture of regulating and enabling legislation.[43] Instead of just specifying how a company can operate, the Act has many provisions enabling a company a choice of operating style if the "off the rack" rules are

---

41 See RJ Bates *Closely Held Companies and the Companies Bill: Too Close For Comfort ?* (LLM Research Paper, Victoria University of Wellington, 1991) 7.

42 Above n 2, 19.

43 Above n 1, 17.

not seen as appropriate. However, there are still certain mandatory regulatory provisions. These generally provide for the protection of creditors and minority shareholders, and include the duties imposed on directors, the solvency test and restrictions on altering shareholder rights.[44]

At first, the constitution was to be the only means by which to vary the statutory regime. This was subjected to criticism, as the constitution did not allow many of the formality rules which have no application to closely held companies to be avoided.[45]

The Commission was wary of extending the scope of the constitution to allow it to be used to opt out of statutory formalities for two reasons. First, there would be no way to stop widely held companies, at whom these rules are primarily aimed, from also opting out. Secondly, as the constitution could be altered by a 75% majority, it could be used as a means of prejudicial conduct against minority shareholders.[46]

The Commission found the solution in the shareholder agreement. As discussed above, the shareholder agreement is commonly used in North America to allow closely held companies to obviate unnecessary formalities, and run the company in a manner agreed amongst themselves.[47]

---

44 Above n 2, 20.

45 R Dugan "Closely Held Companies under the draft Companies Act" [1990] VUWLR 161.

46 Above n 1, 26.

47 Above n 1, 29; Ziegel above n 34, 1004; above n 4, 86. See also G McCarthy "Shareholder Agreements" in *Meridith Memorial Lectures: Canadian Business Corporations Act 1975* (Richard De Boo Ltd, Toronto, 1975) 405; V

A Section 107 Agreements

Section 107 makes express provision for certain shareholder agreements, in an attempt to reduce the transactional formalities of the Act for closely held companies.[48] It provides that where all entitled persons agree, a company can carry out certain specified transactions without regard to the normal statutory formalities. The transactions specified in section 107 include authorising dividends, purchase of own shares, share redemptions, providing financial assistance, issuing shares and authorising self-interested transactions and directors remuneration.

For example, a closely held company can issue shares to its members under a section 107 agreement and avoid the regulatory provisions of doing so under sections 42, 44 or 45. If the shares are issued under one of the latter sections, various requirements have to be met. These include the directors deciding the consideration for the shares, resolving that it is fair and reasonable to the company and all existing shareholders, and then certifying so. Failure to meet these requirements is an offence and carries a penalty (up to $5000). In a closely held company, where shares are often issued unpaid in return for such consideration as future services, the requirements are troublesome.[49]

Section 107 allows the company to issue the shares without regard to these formalities, and the accompanying liability. The only requirements are that all entitled persons agree in writing, and

---

Goldwasser "Shareholder Agreements; Potent Protection for Minorities in Close Corporations" (1994) 22 American Business Law Review 265.

48 Above n 2, para 45.

49 Above n 10, 61.

that the solvency test be satisfied.[50]

Section 107 agreements can be either transaction specific or general (ongoing).[51] Under a general agreement, an entitled person may withdraw their consent at any time by giving notice in writing.[52] Where a transaction is authorised under a general agreement, notice must be given to all entitled persons within 10 working days.[53]

Therefore the initial impression is that section 107 agreements provide a useful tool for closely held companies to operate without regard to the formalities of the Act. While this is true to a large extent, there are some problems with the section 107 agreement mechanism which prevent it from being totally effective in providing for the needs of closely held companies

1 Approval requirement

Section 107 requires that all "entitled persons" agree to the transaction. "Entitled persons" is wider than shareholders, being defined in section 2 as shareholders, and any persons upon whom the constitution confers any of the rights and powers of a shareholder. This is a considerable difference from the North American shareholder agreement, which as its name suggests requires only the actual shareholders of the company to agree.[54] The effect of the extension in the approval requirement could mean that a party outside of the company is required to give its approval to all

---

50 Sections 107(4) and 108.

51 Section 107(5).

52 Section 107(6).

53 Section 107(7).

54 Above n 1, 33.

section 107 agreements. This effectively defeats the purpose of the section itself, as it increases the transactional formalities. Further, it is strange that a party outside of the company should virtually have a veto power over all transactions, particularly those in which it has no real interest.[55]

2 Focus

Another problem is the focus of section 107. As noted, North American shareholder agreements are typically used to allow the shareholders to choose their own management structure, by removing the board of directors and placing the management of the affairs of the company in their own hands.[56]

In contrast, section 107 is limited in its focus to reducing the formalities associated with certain transactions. It cannot be used to dissolve the board of directors and vest the management of the company in the shareholders.[57] Rather, section 10 states that having at least one director is an essential requirement of a company. This means that many of the obligations that are imposed on the directors of a company, but serve no utility in a closely held company situation, cannot be avoided.[58]

3 Termination Right

The termination right contained in section 107(6) also raises problems. This allows an entitled person to withdraw their consent

---

55 Above n 1, 34.

56 Above n 47.

57 Although as discussed further below constitutional variations to the management regime can be made under section 128.

58 Above n 1, 34.

from a general agreement at any time by giving notice in writing. This right of withdrawal is not found in North American shareholder agreements. This has lead to some uncertainty over how such agreements can be undone.[59]

Presumably the drafters of the New Zealand statute sought to clarify this issue, and also ensure that the members of companies did not become locked into agreements that became disagreeable to them. However, the termination right seems to be totally contrary to the principles of contract law, and in particular the sanctity of contract.[60]

The major problem caused by the termination right is that it deprives a section 107 agreement of any certainty. This means that a section 107 agreement cannot be used to support a buy-out agreement.[61] A specific requirement of the closely held company is that some mechanism be put in place to make the investment realisable upon a member's desire to exit the business.

Under the new Act, there are several mechanisms for a dissenting shareholder to be bought out from the company. But as one would expect, they are designed for use in more widely held companies.[62] This means that the members of closely held companies will have to put in place their own mechanism, in the form of a buy-out agreement. Such agreements, stating that in the event that a member wishes to be released from the business, the company will purchase

---

59 Welling above n 34, 481; McCarthy above n 47, 407.

60 Above n 1, 36.

61 Above n 10, 68; P Foley et al *New Zealand Law Society Seminar: Company Law - Practical Experience One Year On* (NZLS, Wellington, 1995) 22.

62 Sections 110, 118 and 174. See above n 10, 68.

her shares, are common in North American company law, and have long been a feature of partnership practice.[63] They are generally put in place at the time of incorporation, therefore giving the member the necessary assurance they need before investing. The agreement gives the investment the liquidity it would otherwise not possess, provides a form of dispute resolution, and prevents the investor from being locked into an oppressive situation.[64] It also provides the remaining members with an element of control over the holdings in the company.

Under the old Act, the prohibition on a company purchasing its own shares prevented a buy-out agreement being put in place, unless the agreement provided that the other members bought the exiting member out personally. The obvious utility of buy-out agreements was one of the driving forces behind the reversal of the prohibition on purchase of own shares in the new Act. It is therefore ironic that the new Act does not include a statutory mechanism for purchase of own shares suitable for supporting a buy-out agreement, including section 107 agreements.[65]

The agreement cannot be structured through any of the modes for repurchase in sections 58 to 65. All require certain resolutions and certifications which cannot be made with certainty at the time the agreement is put in place. If they are left to be carried out at the time of the buy-out, the agreement loses the certainty which the investor requires.[66]

---

63 Above n 4, 86; Ziegel above n 34, 1002. See also JH Choper et al *Cases and Materials on Corporations* (3ed, Little Brown & Co, Boston, 1989) 684.

64 Above n 10, 68.

65 Above n 10, 68.

66 Above n 10, 68.

Nor can a section 107 agreement be used to support the buy-out. Although it allows a company to purchase its own shares otherwise than in accordance with sections 58 to 65, the section 107(6) termination right allows any of the members to withdraw at any time, bringing the agreement down. Again, this deprives the agreement of the certainty that it requires, especially when one considers that the right of withdrawal is most likely to be exercised in the event of a dispute among the members. This is the very situation that the buy-out agreement tries to deal with.[67]

To effectively put in place a buy-out agreement under the Act, members of a closely held company will have to resort to tactics such as redeemable shares, shareholder agreements outside the Act, or drafting such agreements as specific ones under section 105(5)(a) which cannot be withdrawn from. All of these increase the paperwork and formalities for members.

The Act, and in particular section 107 agreements, which purports to make life easier for closely held companies, is seriously flawed in the fact that it cannot provide for this common facet of closely held business practice.[68]

4 Notice requirement

Where a power is exercised under a general assent, section 107(7) requires that notice in writing be given to all entitled persons. Again, this feature of shareholder agreements is not found in North America, and is arguably an unnecessary formality.[69] The

---

67 Above n 10, 69.

68 Above n 1, 30.

69 Above n 1, 39; Ziegel above n 34, 1002.

requirement is also strange in that the notice follows the event.[70] It is not clear whether an entitled person upon receiving notice can withdraw their consent after the power has been exercised and the transaction completed, and what the consequences of this would be.

5 New members

The effect of a change in membership in a closely held company with general section 107 agreements in place is not clear . In North America, this issue has been resolved by statutory provisions which make the transferee of shares which are subject to shareholder agreements a party to such agreements if they have actual or constructive notice of them.[71] No such provision exists under the section 107 regime.

From a contractual point of view, the departure of a member would seem to indicate an end to any agreements, meaning that they would have to be reconstituted to include the new member.[72] This would also be consistent with partnership law, which is based on the principles of contract, and requires all agreements to be reconstituted upon the departure of a member, unless provision for continuation is made.

6 Formalities

It is arguable that in certain instances, section 107 agreements can actually defeat their own purpose, and impose increased

---

70 Above n 1, 39.

71 Ziegel above n 34, 1002.

72 Above n 1, 40.

transactional formalities than would otherwise be experienced.[73] An example of this can be seen with director's remuneration.

If remuneration is authorised under the standard provision of section 161, the only formalities required are a resolution and certification that the remuneration is fair to the company, and an entry into the interests register.[74]

In comparison, if the remuneration is authorised by agreement under section 107(1)(f), the consent of all entitled persons, which might include a party outside of the company is needed. The solvency test must also be resolved and certified under section 108. If the remuneration is to be recurring, specific assent is required each time, or if a general assent is used, notice must be given to all entitled persons each time.

Contrary to policy, the formalities of using section 107 seem to far outweigh those of section 161.

7 Scope

It is unclear why section 107 is limited in its scope to the transactions contained therein. There are other rules contained in the Act that would also seem to be appropriate for authorisation by agreement. Examples are section 145 pertaining to the use of company information, and indemnification and insurance under section 162. Both of these provisions aim to protect shareholders from director mismanagement. But in a closely held company where there is no separation of ownership and control they are unnecessary, and should be susceptible to avoidance by a section

---

[73] Above n 10, 183.

[74] Sections 161(2) and (4).

107 agreement.[75]

The foregoing discussion presupposes that those transactions that can be authorised by agreement are limited to those contained in section 107. However, this is far from clear.

At common law, the doctrine of unanimous shareholder assent allowed a court to accord validity to something which had been agreed to by all the shareholders, even though the proper formalities had not been complied with.[76]

In comparison with section 107, the common law doctrine is clearly more informal and permissive. Unlike section 107, no writing is required, and assent can be inferred from silence in the face of an irregularity.[77] Further, unanimity requires only the assent of those members entitled to vote on the matter, not all entitled persons as under section 107, which is much wider.[78]

Clearly section 107 excludes the use of the more informal common law assent doctrine for the transactions specified therein.[79] However, the question which arises is whether the doctrine continues to exist outside of those transactions. The effect of a

---

75 Above n 1, 40.

76 *Salomon* v *Salomon & Co* [1897] AC 22; *Re Duomatic Ltd* [1969] 1 All ER 161; *Westpac Securities Ltd* v *Kensington* [1994] 2 NZLR 555. See above n 23, 217; LS Sealy *Cases and Materials in Company Law* (Butterworths, London, 1992) 166; R Grantham "The Unanimous Consent Rule in Company Law" [1993] CLJ 245.

77 *Re Bailey, Hay & Co Ltd* [1971] 3 All ER 693.

78 *Re Duomatic* above n 76.

79 A Beck et al *Morison's Company and Securities Law* (Butterworths, Wellington, 1994) 25-10.

positive answer would be to greatly facilitate the operations of closely held companies, as the doctrine suits their informal nature.

It has been argued that section 104, which requires powers reserved to shareholders to be exercised at a meeting properly called, or by a resolution in lieu under section 122, leaves little room for the common law position to continue.[80]

Further, the fact that the drafters consciously defined the transactions that can be authorised by agreement under section 107 is also said to weigh against the continuance of the common law.[81]

Added to this, section 128 clearly vests the management of the company in the board.[82]

Those who argue in favour of the continuance of the common law point to section 177(4). This preserves the common law relating to ratification and approval of shareholders. Alongside this, section 128(3) was amended at the same time that section 177(4) was included, to make the rule of management by the board subject to other provisions of the Act.[83]

It is also notable that even though section 128(1) does confer management upon the board, so too did article 80 of the old Table A articles, and yet the common law doctrine was still seen to apply to companies operating under these.[84]

---

80 Above n 23, 217.

81 Above n 23, 217.

82 PG Watts "Company Law" [1994] NZRLR 233, 234.

83 Above n 82.

84 Above n 79.

Overall, the issue remains unresolved until judicial or legislative clarification is received. However, it is clear that the continuation of the common law position would be of assistance for closely held companies by helping to widen the limited scope of section 107.

8 Summary

At first instance, section 107 appears as a beneficial device for closely held companies to obviate unnecessary statutory formalities. However, closer inspection reveals that the uplifting a facet of North American law and implanting it into the foreign surrounds of New Zealand's Companies Act has raised some difficulties. In particular, the glosses that have been added make it far more restrictive than its North American counterpart. There is also the question of its impact on the common law doctrine of unanimous shareholder assent, which is quite unclear. The net effect is that section 107 provides for the needs of closely held companies with limited success.

B The Constitution

The second, and primary mechanism for varying the statutory regime is the constitution. As stated earlier, the new Act contains two major changes in approach. It provides a complete set of governance rules for the internal workings of a company, and it contains a significant amount of enabling legislation, which allows a company a choice of varying these rules. The result of these changes is that the constitution has a very different role to play compared to the articles of association.[85] A constitution is not mandatory.[86]

---

[85] Above n 1, 18.

As the Act itself contains all the rules which are necessary for a company to function, a company can operate without a constitution using the presumptive provisions of the Act as its governance regime.[87] However, as many companies, in particular closely held ones, will find the presumptive provisions of the Act undesirable, a constitution can be used to negate or modify them.[88] The provisions of the Act can be classified into three categories in terms of their relationship with the constitution:

1 Presumptive provisions

The presumptive provisions of the Act are those that expressly anticipate negation or modification by the constitution. They are presumed to apply unless the constitution specifies otherwise. An example is section 36, which presumes all shares to be equal and carry standard rights, unless varied by the constitution.

2 Optional provisions

The Act contains certain provisions which require constitutional authorisation before a company can proceed under them. Such provisions include the purchase of own shares under section 59, and the indemnifying and insuring of directors and employees under section 162.

---

86 Section 26.

87 Section 28.

88 Section 27.

3 Mandatory provisions

Certain provisions of the Act expressly state that they cannot be altered by the constitution. An example is section 106, which lists the powers reserved for shareholders which are required to be exercised by special resolution.

A significant number of provisions in the Act are silent and make no reference to the constitution. Most commentators have stated that these are also mandatory provisions and cannot be altered.[89] They argue that section 31 would invalidate any change to these provisions, as they would invariably be inconsistent with, or in contravention of the Act.

It has also been argued that these provisions are susceptible to alteration.[90] The reason for this is that there is a presumption that you may contract out of any legislation, unless it expressly prohibits you from doing so. However, the problem with this argument is that section 31 leaves little room for any changes. It was the experience of the study that the drafters of constitutions treated these provisions as mandatory, with few deliberate attempts made to vary them.

The foregoing discussion illustrates a point of much debate since the inception of the new Act; the uncertainty of the mandatory core. The Act is clearly meant to have a set of unalterable regulatory rules, focusing around the protection of creditors and

---

89 A Beck et al *New Zealand Company Law and Practice* (CCH NZ Ltd, Auckland, 1997) Rg 8-320; Above n 23, 31; P Radich et al *New Zealand Law Society Seminar: Reregistration of Companies - Doing the job properly* (NZLS, Wellington, 1997) 44.

90 Above n 1, 24.

minority shareholders.[91] However the inconsistent drafting techniques employed in the Act, and the uncertainty of the scope of the constitution and other variance tools like section 107, make defining the core rules very hard.[92]

With this regulatory framework in mind, the constitution was deliberately left as an "empty set", with no prescribed model or form.[93] Companies are free to fill them as they wish in order to alter the statutory framework to suit their particular needs. The contents of the constitution are anticipated as containing:[94]

(i) Alterations to presumptive provisions; and
(ii) Adoption of optional provisions; and
(iii) Adoption of supplementary provisions dealing with matters upon which the Act is silent.

The scope of the constitution is defined by sections 16 and 31. Section 16 provides that the constitution may only limit (not extend) the capacity, rights and powers of the company. Section 31 provides that the constitution has no effect to the extent that it contravenes or is inconsistent with the Act.

The change in approach in the new Act, and the novel concept of the constitution, led to much anticipation and comment on the form that

---

91 Above n 2, 20.

92 Above n 1, 178.

93 Above n 1, 20.

94 Section 30.

company constitutions should take.[95] The remainder of this paper examines what is taking place with the constitutions of closely held companies in New Zealand.

V THE OBJECTIVES OF THE STUDY

The objectives of the study are:

(i) To ascertain the incidence of closely held companies registering constitutions.

(ii) To ascertain whether there are any trends towards standard form or tailor-made constitutions.

(iii) To identify the presumptive provisions of the Act being displaced by the constitutions.

(iv) To identify the optional provisions of the Act being adopted.

(v) To identify the supplementary provisions being included to provide for matters on which the Act is silent.

(vi) To see if the constitutions are

---

[95] See for example MA O'Regan et al *New Zealand Law Society Seminar: Company Constitutions* (NZLS, Wellington, 1995); Phillips Fox *New Company Law - How it Affects You* (CCH NZ Ltd, Auckland, 1993); New Zealand Department of Justice *The 1993 Companies Package: How it Affects Your Company* (Wellington, 1994); Ernst & Young *Guide to the Companies Act 1993* (The Law Book Company, Sydney, 1994).

appropriate for closely held companies in terms of both their contents and drafting styles.

VI METHODOLOGY AND SUMMARY OF RESULTS

A sample of 100 closely held companies was obtained.[96] This was achieved by randomly selecting public files of registered companies held by the companies office on 27 and 28 July 1997. The file of each company was analysed, and the details of the constitution recorded if one was registered.

The companies were then categorised into:

(i) One person companies.
(ii) Multi-person companies.

This distinction is made for two reasons.

First, the results indicated that the one person company is a popular entity, accounting for roughly half of the sample.

Secondly, as outlined earlier, the centralisation of control in a one person company removes many of the problems encountered in a company with several members. A one person company can operate satisfactorily under the presumptive provisions of the Act without

---

96 Closely held company being defined as a company comprising of six or fewer members, including one person companies.

a constitution.[97]

In fact, many of the presumptive provisions of the Act suit a one person company, such as the rule in section 144 that an interested director may partake in a transaction, and the ability of the board to remunerate a director under section 161.[98] Section 107 allows a one person company to opt out of many of the formalities of the Act, and enter into transactions that would otherwise require constitutional authorisation, such as the purchase of own shares.

As a result, it was considered that the constitutional practices of one person companies deserved to be singled out for separate analysis.

Having distinguished between two categories of closely held companies, the analysis focused on the incidence and nature of the registered constitutions. Table 1 sets out the results. It lists the number of constitutions found to be registered in the sample, and gives an indication of the incidence of the most popular standard form constitutions.

The contents of the sample constitutions were then examined to ascertain the approaches to the different provisions in the Act. Table 2 shows the presumptive provisions of the Act, and the incidence of modifications to them found in the constitutions. Table 3 shows the adoption of the optional provisions of the Act. Finally Table 4 sets out the supplementary provisions found to be contained in the constitutions.

---

97 Above n 1, 12.

98 R Dugan "Reregistration of Closely Held Companies" [1997] NZLJ 66, 67.

TABLE 1

CONSTITUTIONAL USAGE AMONG CLOSELY HELD COMPANIES

	ONE PERSON COMPANIES	MULTI-PERSON COMPANIES	TOTAL
NUMBER (100)	51	49	100
CONSTITUTION REGISTERED	46 (90%)	37 (76%)	83 (83%)
Constitution A	11 (24%)	8 (22%)	19 (23%)
Constitution B	8 (17%)	8 (22%)	16 (19%)
Constitution C	9 (20%)	0	9 (11%)
Constitution D	1 (2%)	4 (11%)	5 (6%)
Other	14 (30%)	19 (45%)	33 (40%)

TABLE 2

CONSTITUTIONAL MODIFICATIONS OF PRESUMPTIVE PROVISIONS BY CLOSELY HELD COMPANIES

PRESUMPTIVE PROVISIONS COMPANIES ACT '93	CHANGES BY ONE PERSON COMPANIES (46)	CHANGES BY MULTI-PERSON COMPANIES (37)	TOTAL (83)
SHARES & SHAREHOLDERS			
All shares equal (s36)	23 (51%)	29 (78%)	52 (63%)
Different share classes (s37)	1 (2%)	4 (11%)	5 (6%)
Unrestricted share issues (s42)	12 (27%)	8 (22%)	20 (24%)
Pro-rata share issues (s45)	1 (2%)	3 (8%)	4 (5%)
Unrestricted distributions (s52)	20 (44%)	22 (59%)	42 (51%)
Shares in lieu (s54)	0	0	0
Shares freely transferable (s39)	34 (76%)	36 (97%)	70 (85%)
No right to refuse registration of transfers (s84)	33 (73%)	36 (97%)	69 (84%)
DIRECTORS			
Appointed by ordinary resolution (s153)	10 (22%)	8 (22%)	18 (22%)
Removed by ordinary resolution (s156)	2 (4%)	1 (3%)	3 (4%)
Appointed individually (s155)	41 (91%)	35 (95%)	76 (93%)

Remuneration (s161)	18 (40%)	8 (22%)	26 (32%)
MANAGEMENT			
Special resolution 75% (s2)	0	0	0
Powers exercised by ordinary resolution (s105)	12 (27%)	8 (22%)	20 (24%)
Shareholder meetings by 1st schedule (s124)	34 (76%)	35 (90%)	69 (84%)
Shareholder resolutions not binding on the board (s109(3))	1 (2%)	1 (2%)	2 (2%)
Management by board (s128)	1 (2%)	3 (8%)	4 (5%)
Board proceedings by 3rd schedule (s160)	41 (91%)	36 (97%)	77 (94%)
Delegation (s130)	0	0	0
Interested director can participate (s144)	0	0	0

TABLE 3

CONSTITUTIONAL ADOPTION OF OPTIONAL PROVISIONS BY CLOSELY HELD COMPANIES

OPTIONAL PROVISIONS COMPANIES ACT '93	CHANGES BY ONE PERSON COMPANIES (46)	CHANGES BY MULTI-PERSON COMPANIES (37)	TOTAL (83)
Purchase of own shares (s59)	34 (76%)	37 (100%)	71 (87%)
Hold own shares (S67A)	21 (47%)	26 (70%)	47 (57%)
Issue redeemable shares (s68)	22 (49%)	22 (59%)	44 (54%)
Person authorised to call special meeting (s121)	3 (7%)	3 (8%)	6 (7%)
Specify terms of directors' removal (s157)	18 (40%)	26 (70%)	34 (41%)
Indemnity and insurance (s162)	45 (100%)	37 (100%)	82 (100%)
Person authorised to enter deeds (s180)	3 (7%)	2 (3%)	5 (6%)
Person authorised to remove company from register (s318)	25 (56%)	21 (57%)	46 (56%)

TABLE 4

CONSTITUTIONAL ADOPTION OF SUPPLEMENTARY PROVISIONS BY CLOSELY HELD COMPANIES

SUPPLEMENTARY PROVISIONS NOT PROVIDED FOR IN THE COMPANIES ACT '93	ADOPTION BY ONE PERSON COMPANIES (46)	ADOPTION BY MULTI-PERSON COMPANIES (37)	TOTAL (83)
Pre-emptive share transfer rights	34 (76%)	36 (97%)	70 (85%)
Calls on unpaid shares	43 (96%)	36 (97%)	79 (96%)
Liens and forfeiture for unpaid shares	30 (67%)	34 (92%)	64 (78%)
Alternate and managing directors	42 (93%)	35 (95%)	77 (94%)
Dispute resolution	12 (27%)	11 (30%)	23 (28%)
Procedure for polls at shareholder meetings	30 (67%)	32 (86%)	62 (76%)
Form of proxies for shareholder meetings	27 (60%)	32 (86%)	59 (72%)
Like documents for resolutions in lieu	39 (87%)	73 (89%)	72 (88%)
Service of notices	32 (70%)	30 (81%)	62 (70%)

VII ANALYSIS OF RESULTS

A Use of Constitutions by Closely Held Companies

The study recorded a high incidence of registration of constitutions among the sample. This is attributed to a bias towards recently incorporated companies in the sample. Most of the companies without constitutions were ones incorporated under the old Act, which had been deemed to be reregistered under the new Act. This means that the company has no constitution. The old articles cease to have effect, and the presumptive provisions of the Act apply.[99]

To find that one person companies had a higher rate of constitutional usage than multi-person companies was interesting. It was anticipated that a one person company could operate sufficiently under the Act without a constitution.[100] In contrast, the nature of a multi-person company will typically necessitate a constitution, to protect the interests of the members.

It is submitted that this variance in the results to what was expected may also be attributable to deemed reregistration. As one person companies were not available under the old Act, they would either have to of been incorporated under the new Act. If they had been incorporated under the old Act with a notional second shareholder, they would have to of been reregistered under the new Act with a conversion to a single shareholder. Such action would have presented those carrying out the formalities with the

---

99 Section 13 and the Schedule of the Companies Reregistration Act 1993.

100 Above n 1, 12; see also Radich above n 89, 18.

opportunity to register a constitution, which many seem to have done.

However, with regard to multi-person companies, many have not bothered to reregister under the new Act, with the consequence of deemed reregistration.[101] The result is they have no constitution, and operate under the presumptive provisions of the Act. This is a situation which is likely to cause many companies problems in the near future, as the interests of the members will not be protected under the presumptive provisions.

B Standard Form v Tailor-Made Constitutions ?

As predicted by the Law Commission, standard form constitutions were found to be prevalent. In particular, several standard form constitutions were found to very popular, as Table 1 illustrates. Constitution A, the product of a legal publishing firm, was by far the most popular, accounting for around a quarter of the constitutions registered. Constitution B was also the product of a legal publishing firm, while constitution C belonged to a large chartered accountants firm. Constitution D, and many of the other constitutions, were precedent constitutions developed by large law firms. The similarity of the contents of these standard form constitutions was high, as will become apparent from the following analysis. Few seemed to be tailor-made for the needs of a particular company, contrary to the Law Commission's expectation that the deviance of closely held companies would lead to such practices.

---

101 M Ross "Deemed Reregistration: What Happens Next ?" (1997) 76 Chartered Accountants' Journal of New Zealand 33.

C Modifications to Presumptive Provisions

1 Share rights and classes

Under the statutory regime all shares are equal, and carry standard rights as to participation in voting and distributions.[102] This may be varied by either the constitution or the terms of issue under section 42.[103]

Alteration of the rights attaching to shares is one way for a closely held company to cater for the differing interests of its members.[104] This is an area where many companies will run into trouble with deemed reregistration, as their unique capital structures will not be preserved.[105]

The majority of the constitutions varied the section 36 presumption, by allowing differentiation between the dividend and voting rights attaching to shares. This included three quarters of the multi-person company constitutions. The number of one person company constitutions providing for the alteration of share rights was interesting, as this is unnecessary where one person holds all the shares. This is symptomatic of one person companies using constitutions designed for companies with several members, a feature which appears constantly throughout the study.

Consistent with the results under section 36 were those for section

---

102 Section 36.

103 Section 36(2).

104 E Abernethy "The Case for Constitutions" (1994) 416 Law Talk 11.

105 HE Anderson *Anderson's Company and Securities Law* (Brooker & Friend, Wellington, 1997) 4-1-04.

37. The presumption under this section is that a company may issue different types or classes of shares, unless the constitution states otherwise. Very few of the constitutions negated or varied this provision.

2 Share issues

The Act enables the board to issue shares as it sees fit, unless restricted by the constitution.[106] However, existing shareholders have a pre-emptive right to new shares. This is also subject to variation by the constitution.[107]

Depending upon the configuration of control in a multi-person company, the members may want to restrict the board's power to issue shares, or waive the pre-emptive rights on new issues. In particular, the former may be true where one member is to manage the business, while the others take more passive roles. In this case the others will invariably wish to keep a check over the manager's power to issue shares. Unless they wish to be directors, the only way to do this is to require some form of shareholder approval for share issues.[108]

Changes to these provisions were only moderately popular. Around one quarter of the constitutions restricted the board's power to issue shares, while only a few waived the pre-emptive right. Those constitutions that restricted the board's power to issue typically did so by imposing a special resolution requirement. Presumably many members of closely held companies see section 45 as an adequate safeguard to their interests, given the low incidence of

---

106 Section 42.

107 Section 45.

108 Above n 10, 66.

changes to section 42 and the even lower number to section 45.

3 Transferability of shares

Section 39 makes shares in a company freely transferable, subject to any restrictions in the company's constitution. Correspondingly, section 84(4) places a duty upon the board to register share transfers, unless the constitution permits the board to refuse or delay doing so for stated reasons.

The study confirmed the concern of closely held companies to be able to restrict the free transferability of shares. Nearly all of the constitutions negated section 39, by requiring shares to be offered first to the remaining shareholders. Again there was a high incidence of one person companies making an alteration that has no applicability to them.

Correspondingly, almost all of the constitutions gave reasons for the board to refuse or delay registration of transfers, as anticipated by section 84(4). It was interesting to note that some constitutions used wording such as "the board shall have absolute discretion to refuse or delay registration" or "the directors may decline to register the transfer of any shares to any person without giving any reason for such refusal". It has been suggested that such provisions, which are a hangover from the old Act, are invalid. Section 84(4) requires reasons for the refusal to be stated, but the implication of these sorts of provisions is that no reasons need be given.[109]

---

[109] DO Jones *Company Law in New Zealand: A Guide to the Companies Act 1993* (Butterworths, Wellington, 1993) 37.

4 Distributions

Section 52 authorises the board to make distributions at any time, of any amount, and to any persons it thinks fit. The section anticipates limitation by the constitution. Under section 53, dividends are required to be pro rata, and can be authorised on unpaid shares. Section 53 can be avoided in a closely held company situation by the use of a section 107 agreement.

In a closely held company, the internal configuration of control may mean that some restriction on the board's power to authorise distributions is desirable. Again this is most likely to occur where one party is to actively manage the business, while the others take a passive role.[110]

It is interesting to compare the regime for dividends under the new Act, with the former common law position. The latter appears to accord more with the needs of closely held companies.

Historically companies were established by deed of settlement. The directors were regarded as trustees of the funds and property under the deed. Consent of the shareholders was therefore required before any distributions of the property could be made.[111]

This position has been carried by way of analogy into company law under general incorporation. Most of the articles of companies provided for the declaration of dividends by the shareholders in general meeting, subject to the proviso that the dividend could not exceed an amount recommended by the directors.[112] This was also the

---

110 Above n 10, 66.

111 Above n 21, 268; LS Sealy "The Director as Trustee" [1967] CLJ 83.

112 Above n 23, 96.

position under the Table A articles of the old Act in New Zealand, adopted by most private companies.[113] The presumptive regime of the new Act therefore represents an about turn in focus, placing the control of dividends with the board.

A mixed approach to altering the regime for distributions was found among the constitutions. About one half limited the board's power to authorise distributions, by imposing some form of shareholder approval requirement.

It was surprising to find that a number of the constitutions imposed a stricter dividend regime than that under the Act, limiting dividends proportionately to amounts paid on shares. This is not in the interests of members of closely held companies, where shares are often issued unpaid.[114]

The only other presumptive provision in the statutory regime for distributions is that shares may be issued in lieu of dividends.[115] None of the constitutions negated this rule.

5 Appointment and removal of directors

Under the Act directors are appointed and removed by way of ordinary resolution.[116]

Surprisingly few constitutions changed these provisions. Security of tenure in management is important to the members of closely held companies, to protect their interests and avoid a "freeze-out"

---

113 Article 114.

114 Above n 10, 61.

115 Section 54.

116 Sections 153 and 156.

scenario. An ordinary resolution requirement will not normally be an adequate safeguard.[117]

Those that did alter the regime did so by imposing a special resolution requirement, or creating special classes of shares, each with the right to appoint and remove one director.

Almost all of the constitutions allowed the directors to be elected as a panel, negating the statutory presumption that they be elected one at a time.[118]

6 Directors' remuneration

Section 161 permits the board to authorise the payment of remuneration, and the giving of other benefits to directors. This provision is subject to restrictions in the constitution.

Around one third of the constitutions negated or limited the presumption. This is consistent with closely held companies where one member is to actively manage the business. It was surprising to find a number of the one person companies making such an alteration, as this presumption would appear to be in their interests. Director remuneration can be a convenient way for the member to withdraw a salary from the business.[119]

Constitution B, the second most popular constitution, had an interesting provision in relation to directors' remuneration. Section 161 sets out the types of remuneration and benefits that may be authorised, and states that the constitution may only

---

117 Above n 10, 66.

118 Section 155.

119 Above n 98.

restrict these. Constitution B purported to allow remuneration to be made to a dead director's spouse and children, which would appear to be an extension rather than a restriction of section 161. As such, it would appear to be ineffective.[120]

7 Shareholder resolutions

Under the statutory regime, powers reserved for shareholders are exercised by ordinary resolution (simple majority), except certain specified transactions which require special resolution approval (75%).[121] The latter include adopting and altering a constitution, and approving major transactions.

Certain changes can be made to the statutory regime. Powers otherwise exercisable by ordinary resolution can be made subject to a higher threshold, such as a special resolution. However, section 106 expressly states that the powers subject to special resolution cannot be altered by the constitution. The only change that can be made in respect of these is that the special resolution percentage may be raised (not lowered).[122]

Few of the constitutions altered this regime. Of those that did, the most common change was to make transactions normally subject to ordinary resolutions, subject to special resolutions. Not one of the constitutions raised the special resolution requirement above 75% for any transaction.

In this regard the constitutions were clearly inappropriate for closely held companies. Without alteration, the statutory regime

---

120 Above n 23, 62.

121 Sections 105 and 106.

122 Section 2, definition of "special resolution".

will typically not give the members, particularly those in the minority, a say in fundamental decisions, which they will want to protect their interests.[123]

8 Shareholder meetings

Powers reserved to be exercised by shareholders can be exercised either at a meeting, or by resolution in lieu of a meeting.[124] Shareholder meetings, subject to variation by the constitution, are governed by the First Schedule to the Act.[125]

The majority of the constitutions made some change to the provisions of the First Schedule. The most common were raising the requirement for a quorum, entitling the chairperson to have a casting vote, and adding supplementary provisions on the conducting of polls and the form of proxies.

These changes are consistent with the nature of a closely held company. Although resolutions in lieu of meetings will generally be used as they are easier, meetings will still sometimes be necessary. One person companies on the other hand can always use resolutions in lieu. It was therefore surprising to find many of them making these changes.

Interestingly, few of the constitutions negated the presumption that shares with unpaid calls could not be voted on. As shares in closely held companies are often issued unpaid, this might cause some problems.[126]

---

123 Above n 10, 67.

124 Section 104.

125 Section 124.

126 Above n 1, 147.

9 Management

The Act presumes that the management of a company rests with the board.[127] Shareholders may pass resolutions pertaining to the management of the company, but they are not binding on the board.[128] The principle of director management can be displaced by the constitution. Management powers can be vested in the shareholders, and shareholder resolutions can be made binding upon the board.[129]

Few of the constitutions took the opportunity to displace the presumption of director management. This is strange as the ability to do so is directly aimed at closely held companies, based on similar provisions overseas. It recognises the unity between ownership and management in closely held companies, and the desired informality of proceedings.[130]

This result is similar to studies in the United States, which have found that the number of closely held companies actually electing to receive the special statutory benefits conferred upon them is low.[131] It is hard to explain why this is so. Perhaps the members of closely held companies are more familiar and comfortable with the traditional company structure, where the directors manage the business. Also, as the Act requires a company to have at least one director, many companies probably see it as easier to leave the management in the hands of the directors.

---

127 Section 128.

128 Section 109.

129 Section 128(3) and 109(3).

130 Above n 2.

131 Above n 31.

10 Proceedings of the board

Under the Act, the proceedings of the board are governed by the Third Schedule. This is subject to variation by the constitution.[132]

As with shareholder meetings, nearly all of the constitutions made changes to the proceedings for directors' meetings. The most common changes were extending the period of notice, raising the quorum, and enabling the chairperson to have a casting vote.

11 Delegation

Section 130 allows the board to delegate its powers, other than those specified in the Second Schedule, subject to any restrictions in the constitution.

None of the constitutions took the opportunity to restrict this power of the board. In a closely held company it might be appropriate to limit the power of delegation, in order to protect the interests of members.[133]

Many of the constitutions made a basic error by providing that the board could delegate any of its powers. Clearly this is in contravention of section 130, which by way of the Second Schedule specifies certain powers which cannot be delegated. These include the powers to issue shares and authorise distributions.

---

[132] Section 160.

[133] Above n 10, 71.

12 Interested directors

The presumption under the Act is that a director who is interested in a certain transaction may vote, and otherwise act in relation to that transaction.[134]

Interestingly, none of the constitutions negated the statutory presumption. While it is in the interests of a one person company, it may not be so in one with several members, where one is to actively manage the business, while the others take passive roles.[135]

D Adoption of Optional Provisions

1 Purchase of own shares

A company cannot purchase or otherwise acquire its own shares unless it has constitutional authorisation.[136] For a closely held company, the ability to purchase its own shares can provide a tax effective method for distributions.[137] Also as discussed above, it can be used to buy out a dissenting or departing shareholder.[138]

Constitutional authorisation for the purchase of own shares can be circumvented in a closely held company situation by a section 107 agreement. This also has the attraction of avoiding many of the transactional formalities and liabilities contained in sections 58 through to 65. Therefore, for a closely held company,

---

134 Section 144.

135 Above n 10, 71.

136 Section 59.

137 Above n 7, 71.

138 Radich above n 89, 35.

constitutional authorisation for the purchase of own shares is only needed as a back up procedure, in the event that the necessary agreement under section 107 cannot be obtained.

Almost all of the constitutions authorised the purchase of own shares. The majority of the one person company constitutions also contained such authorisation. This is unnecessary, as section 107 is always available and preferable for such a company.

Many of the constitutions authorised the purchase of own shares by methods that are not applicable to closely held companies, namely the sections 63 and 65 "on market" acquisitions. This is totally inappropriate and makes little sense in a constitution designed for such a company.

Around one half of the constitutions authorised the companies to hold shares that they had acquired as treasury stock, as contemplated by section 67A. Again this is unnecessary in a closely held company situation.

2 Redeemable shares

With the problems associated with using the purchase of own shares for a buy-out agreement, redeemable shares may be the best way for a closely held company to implement such an arrangement under the Act. Section 68 requires constitutional authorisation for the issue of redeemable shares. Unlike many of the other transactions under the Act, this cannot be circumvented through a section 107 agreement.

It can be argued that redeemable shares can be issued without constitutional authorisation. There is a tension in the Act between section 68 and sections 36(2) and 42. The latter two suggest that shares can be issued as redeemable simply on their terms, without

the need for provision in the constitution.

Policy also suggests that constitutional authorisation is not needed. Other transactions such as the purchase of own shares can be implemented without constitutional authority. It would be strange if redeemable shares were different.

These questions aside, only around one half of the constitutions made provision for the issue of redeemable shares. Many of these replicated the tensions in the Act on the matter, a product of the drafting style of copying large segments of the Act into constitutions, a topic that is discussed in greater detail in Part VIII. While it is debatable whether constitutional authorisation is needed to issue redeemable shares, they are a useful device, and to provide for them in the constitution would be a wise precautionary step.

3 Indemnity and insurance

If a company wishes to indemnify or insure its directors or employees, it must have constitutional authorisation.[139] All of the constitutions gave this authorisation.

The need for such a provision in a one person company is debatable.[140] For a company with several persons, it will usually be desirable, especially given the heightened anxieties over the directors' duties contained in the new Act.[141]

---

139 Section 162.

140 Compare Dugan above n 98 with Abernethy above n 104.

141 Above n 34.

E Adoption of Supplementary Provisions

1 Pre-emptive rights upon transfer of shares

The Table A articles of the old Act contained pre-emptive rights on the transfer of shares. These required that shares first be offered to the other shareholders before they were transferred. This is consistent with the interests of the members of closely held companies.[142]

The majority of the constitutions supplemented the Act with such provisions. However, it was again surprising to find a large number of one person companies containing a provision which is unnecessary for them.

A feature of the pre-emptive rights contained in the constitutions was how onerously some of the transfer provisions treated the intending transferor. In one case, if after an independent valuation of the shares, the transferor refused to sell at that value, they had to pay for the valuation, and also to the company "a reasonable amount as determined by the directors, having regard to the time spent by them and any other officer of the company relying on the transfer notice, and any out of pocket expenses incurred by the company". This is hardly in the interests of the members of a closely held company, and does nothing to facilitate an easy exit from the company. Such a provision is ripe for abuse during a dispute, the very time that a member will want to leave the company.

---

142 Radich above n 89, 49.

2 Calls on unpaid shares

A further provision of the old Table A articles not carried forward into the new Act is the procedure for making calls on unpaid shares. Section 97(2) specifies the types of liability that may be associated with holding shares in a company, including the liability for unpaid calls. However, the Act is silent on how and when calls may be made. In a closely held company where shares are often issued either partly paid or unpaid, the subsequent payment will be a concern, especially for the members who have paid fully. The problem can either be addressed in the terms of issue, or in general constitutional provisions.[143]

Nearly all of the constitutions made provision for the making of calls, typically in a manner identical to the old Table A provisions. Again there was a high incidence of one person companies including this provision, which has no application to their situation.

3 Liens and forfeiture

To enforce calls made on unpaid shares, the old Table A articles also included provisions on liens over and forfeiture of shares with unpaid calls.

Most of the constitutions contained these supplementary provisions. However, from this a common problem arose. Several of the constitutions in adding these enforcement procedures from the old Act failed to recognise the new liability regime under the new Act. In particular, several constitutions provided that liability for unpaid calls followed the shares through transfers to third parties, and attached to the new holder. This is inconsistent with

---

[143] Radich above n 89, 34.

the Act. Section 97(2) distinguishes between two types of liability: liability in respect of amounts unpaid on shares, and liability imposed by the constitution. Under section 100(1) the former, liability for amounts unpaid on shares, remains with the transferor upon the transfer of shares. The provisions in the constitutions which purported to transfer the liability to the transferee are clearly inconsistent with this. Applying section 31(1) they would have no effect.[144]

4 Alternate and managing directors

Again following the old Table A articles, many of the constitutions allowed for the appointment of alternate and managing directors. Such provisions obviously have utility in a closely held company situation should the need arise.

5 Dispute resolution

In a closely held company the members will often have competing interests, which can lead to a potential deadlock position.[145] The Act is silent on how these disputes should be resolved.

Around a third of the constitutions supplemented the Act with provisions for the resolution of disputes, typically through arbitration. This is a useful provision for the constitution of a closely held company, and one that more should utilise. There is obvious utility in having the methods for resolving disputes set out in advance, as they could easily provide fertile ground for further disputes if they are left to be resolved at the time.

---

144 Above n 1, 147.

145 Radich above n 89, 40.

6 Polls and proxies

The First Schedule to the Act is silent on the method for conducting polls, and the form of proxies for shareholder meetings. Most of the constitutions supplemented the Act with provisions similar to those contained in the old Table A articles.

7 Like documents for resolutions in lieu

Most of the constitutions allowed resolutions in lieu of meetings under section 122 to consist of several like documents. Resolutions in lieu are a useful tool for closely held companies to avoid the formalities and procedures of meetings. The ability of the members to pass such resolutions while they are in different places adds to this utility.[146]

F Summary

The most popular alterations and additions to the statutory framework contained in the constitutions included restricting the transferability of shares by providing for pre-emptive rights, changing the proceedings for shareholder and board meetings, providing for calls on unpaid shares, and the authorisation of purchases of own shares, and indemnification and insurance. While these all have utility for closely held companies, the constitutions studied were inappropriate for such companies because of the changes that they failed to make to the statutory regime.

The constitutions failed to recognise the lack of separation of ownership and control in closely held companies, by not displacing the presumption of director management. Similarly, there was a failure to alter the statutory regime to protect the interests of

---

146 Radich above n 89, 41.

members of closely held companies, predominantly in terms of the regime for shareholder resolutions, and the appointment and removal of directors. Left unaltered, the statutory regime will not give all the members a say in the running of the business, and will not provide security of tenure in office or employment.[147]

This failure can be attributed to the high incidence of standard form constitutions. By their very nature, standard form constitutions do not meet the needs of particular closely held companies. They are drafted in a wide presumptive way, much like the Act itself, to cover the wide deviance among closely held companies. They do not alter the statutory regime to meet the needs of particular companies. They are therefore inappropriate for many closely held companies, and will not adequately protect the interests of their members.

1 One person companies

A recurring feature of the study was the inappropriateness of the constitutions being employed by one person companies. Typically these were constitutions designed for companies with several members. Such a constitution adds nothing to a one person company situation, except confusion. As stated, a one person company can operate satisfactorily under the statutory framework without a constitution. None of the constitutions improved the regulatory framework for one person companies.

While a constitution may be valid as a safeguard for expansion in the future, it is not necessary while the company remains in the hands of one person. A constitution can be adopted at a later date if expansion occurs.[148] This is actually the better time to adopt

---

147 Above n 10, 66-67.

148 Section 32.

one, as the particular control configurations and interests of each member that need to be provided for in the constitution will not be known before that point in time.

VIII CONSTITUTIONAL DRAFTING STYLES

Distinct from the appropriateness of the contents of the constitutions studied, is the question of whether the drafting styles adopted are suitable for closely held companies. The members of such companies are typically legally unsophisticated. Therefore a constitution should as far as possible be a simple and user friendly document.

The constitutions studied fell into two distinct drafting categories. First, long form constitutions, which contained many of the provisions of the Act even if unaltered.

Secondly, short form constitutions, which took a minimalist approach of including only provisions which altered the statutory regime in some way.

A Long Form Constitutions

The study revealed a roughly even split between long and short form constitutions. The single most popular standard form constitution, constitution A, was an extremely long form one, running to over 30 pages of very small print. Constitutions B and D were also long form ones. The long form constitutions were employed by both one and multi-person companies.

The argument in favour of long form constitutions is that they provide a complete working document for the members of a closely held company, who are usually unfamiliar with the provisions of the Act. They remove the need to have reference to the Act as well as the constitution.[149]

It is submitted that this approach is flawed. First, a constitution can never be totally comprehensive. Unless it copies all 400 sections and associated schedules of the Act, there will always be some circumstances when reference to the Act itself is necessary. The question then becomes what provisions of the Act should be selectively copied. This leads to a dangerous situation where a member may not realise that there are further relevant provisions in the Act that are not contained in the constitution.

By way of example, all of the long form constitutions considered in the study copied the provisions of the Act pertaining to the purchase of own shares, and the giving of financial assistance.[150] All consistently omitted the parts of these provisions which state the rules for the application of the solvency test, require directors' certification, and state the liability associated with these transactions.

Constitution D copied section 83 pertaining to statements of shareholder rights. However, the details of the contents required to be given in such a statement, and the associated liability for failing to provide these details were missing.

Constitution B copied section 162 authorising indemnification and insurance, but omitted the section 162(6) duty to certify, and the section 162(7) duty to enter the transaction in the interests

---

149 Radich above n 89, 19; Beck above n 88, 8-290.

150 Sections 58-65 and 76-81.

register.

Finally, Constitution D repeated section 107 pertaining to unanimous assents, but failed to include the section 107(5) distinction between specific and general assents, the section 107(6) right of withdrawal, the section 107(7) notice requirement, and the application of the solvency test as provided for in section 108.

For constitutions which purport to be comprehensive "one stop" points of reference these are serious omissions, which could have serious consequences for companies operating under them if the members neglect these provisions.

Secondly, in any event the cross referencing approach of the long form constitutions made it necessary to refer backwards and forwards between the constitution and the Act. This was an exercise that often resulted in incomprehensibility and confusion.

An example of this is constitution A, which copied the provisions on financial assistance contained in sections 76 to 81 of the Act. These sections contain numerous cross references. The constitution took the inconsistent approach of in some instances replacing these with cross references to the clauses of the constitution that copied the relevant provisions of the Act, and in others using cross references back to the Act.

The drafting style of copying provisions straight from the Act also often led to mistakes and inconsistencies. Constitution A in copying the provisions for purchase of own shares substituted the word "hold" for the word "acquire" as used in the Act. Arguably this means that companies operating under this constitution do not have the necessary authorisation to "otherwise acquire" their own shares.

Constitution D copied the section 107 unanimous assent provision, but substituted the word "shareholders" for "entitled persons". This is a serious mistake. Entitled persons is deliberately wider than shareholders, and can include persons outside of the company.[151] If the members do not acquire the consent of an outside party for a section 107 agreement, because they are under the mistaken belief that only the shareholders need consent, the agreement and the associated transaction are arguably invalid.[152]

Constitution D, also through its drafting style, makes the application of the solvency test upon section 107 agreements more stringent than the Act. Under section 108, only transactions assented to under section 107(1) are subject to the solvency test. This excludes share issues and self interested transactions which are contained in sections 107(2) and 107(3). However, the constitution listed all the transactions that could be authorised through a unanimous assent, including share issues and self interested transactions, and stated that they are all subject to the solvency test.

Changes and omissions in punctuation and words from the original text of the Act were also noticeable in many of the long form constitutions. While this may seem trivial, the effect can sometimes be significant. For example section 84 requires the board to register share transfers unless three criteria are met. The inclusion of the word "and" between each of them makes it clear that all three must be satisfied. One constitution copied section 84, but omitted the word "and" from between each of the three requirements. This gives the misguided impression that only one of the three need be satisfied.

---

151 Section 2, definition of "entitled person".

152 Above n 1, 143.

Another constitution repeated the types of directors' remuneration and benefits that may be authorised under section 161. However, the constitution inadvertently changed "the giving of guarantees by the company for debts incurred by a director" in subsection (1)(d) to the totally opposite situation of "guarantee any loan *given* by a director". Arguably companies operating under this constitution cannot guarantee indebtedness incurred by a director because that power is not authorised in the constitution.

The irony is that the intended legal effect could be achieved by not saying anything in the constitution, as section 161 is presumptive, and applies unless restricted in the constitution. This is true for the majority of the provisions contained in the long form constitutions. They have no legal significance, and merely restate the Act without modification. The overall legal significance is no different from a short form constitution that contains only alterations to the statutory regime.[153]

For those provisions which do have legal effect, such as the adoption of optional provisions like the purchase of own shares, the intended legal effect could be achieved with a simple authorising sentence, rather than copying the provision in full. This also reduces the room for error.[154]

Several of the long form constitutions contained lengthy definitional sections. Again these added to the general confusion by way of their inconsistency. Typically they defined words not in the Act, but then went on to define words already defined in the Act. The latter was often done in an inconsistent manner, with a mixture of copying the definition contained in the Act, and

---

153 Above n 1, 146.

154 Above n 1, 140.

referring the user to section 2 of the Act. One constitution changed several definitions given in the Act, including that for a major transaction. It then went on in a to state that "where there is a conflict between a word or expression defined or explained in the Act and a word or expression defined or explained in this constitution, the constitution shall prevail". Presumably the drafter had not been referred to section 31 of the Act.

B Short Form Constitutions

Around one half of the constitutions sampled were in the short form category. Constitution C was the most popular standard short form constitution. It is the product of a large firm of chartered accountants, and was found to be predominantly used by one person companies (see Table 1). It takes a minimalist approach, including only provisions that have legal significance by altering the statutory regime, and not repeating unaltered provisions from the Act.

The short form approach is the preferable approach for drafting constitutions for closely held companies. While the legal significance of long and short form constitutions is the same, the short form constitutions avoid the length, complexity and confusion that comes with the long form of repeating unaltered provisions of the Act. For most lay people who are the members of closely held companies, the long form constitutions would not be understandable.

The minimalist short form approach avoids this confusion. It recognises that no matter how comprehensive a constitution is, reference to the Act will still be required. The Act is the primary instrument for the regulation of the company structure, and as such has to be consulted. Short form constitutions also avoid the risk of inconsistencies and errors that come with the long form

approach.[155]

IX CONCLUSIONS

The nature of closely held companies means that they sit uneasily within the traditional company law regulatory framework, which is predominantly designed for more widely held companies. The Law Commission recognised this in drafting the Companies Act 1993, and provided the ability for closely held companies to obviate and vary the statutory regime to meet their needs.

Section 107 allows closely held companies to avoid many of the unnecessary regulatory provisions of the Act. However, its ability to be effective is reduced by the inclusion of certain features not found in North American shareholder agreements, upon which it is based. These include the extended approval requirement, the termination right, and the uncertainty of its scope. In particular, its impact on the common law doctrine of unanimous shareholder assent is far from clear.

The constitution provides the means for a closely held company to vary the otherwise inappropriate provisions of the Act. However, the results of this study have revealed that to date it is being used with limited effect.

A Incidence of Constitutions

Most closely held companies are registering constitutions. This includes one person companies, for whom the merits of a

---

[155] Radich above n 18, 19.

constitution are debatable. The study found no constitutional provisions that greatly improved the statutory regime for one person companies.

B Standard Form v Tailor-Made Constitutions

Standard form constitutions are prevalent, leading to the registration of constitutions that are inappropriate for many closely held company situations.

C Modifications to Presumptive Provisions

The most popular changes to the presumptive provisions of the Act were to restrict the free transferability of shares, and change the proceedings for shareholder and board meetings. Few constitutions altered the statutory control regime or displaced the presumption of director management. These changes would be appropriate for closely held companies, to provide for and protect the interests of members, and to reduce the formalities involved in operating the business.

D Adoption of Optional Provisions

Almost all of the constitutions adopted the optional provisions of the Act. The most popular were the ability to indemnify and insure officers, and to purchase own shares. These are useful provisions for closely held companies to have.

E Adoption of Supplementary Provisions

Most of the constitutions contained supplementary provisions on matters on which the Act is silent. These generally followed the provisions of the old Table A articles, with pre-emptive rights on share transfers and calls on unpaid shares. Again, these are useful

provisions in a closely held company situation.

F Drafting Style

The constitutions were either long or short form documents. The short form constitutions were far more appropriate for closely held companies. They achieved the same legal significance as the long form variety, but with greater brevity, less confusion and inconsistencies.

G Conclusion

While this study represents only a limited examination of an important issue, it is hoped that it has highlighted some concerning trends for many of New Zealand's small businesses. So far it appears as if they are still coming to terms with the Act, and its applicability to closely held companies.

The constitution represents an opportunity for a company to devise a regulatory document that meets its particular needs. To date few appear to have done this. Instead they are operating either under the Act or a standard form constitution, both of which are usually inappropriate for them.

Until there is a recognition of both the unique features of the closely held company, and the need for tailor-made constitutions to suit particular company situations, the saturation of unsatisfactory standard form constitutions seems set to continue.

It is acknowledged that cost and convenience makes a standard form constitution more viable for such small companies. The expense and time in seeking legal and business advice to have a tailor-made constitution drawn up will often be prohibitive to these types of businesses. However, when one considers just how inappropriate the

standard form constitutions are, and the problems that could flow from them, the cost of a tailor-made constitution would be money well spent to protect the interests and investment of the members.

It is not easy to see how the trend can be reversed. The short term attractions of standard form constitutions will always make them popular, and ensure that they are available. However, advisors to closely held companies need to ensure that the members take a long term view, and adopt a constitution that protects their interests, rather than just being cheap and convenient.

X BIBLIOGRAPHY

TEXTS

HE Anderson et al *Anderson's Company and Securities Law* (Brooker & Friend, Wellington, 1991).

A Beck and A Borrowdale *Guidebook to New Zealand Companies and Securities Law* (5ed, CCH New Zealand Ltd, Auckland, 1994).

A Beck et al *Morison's Company and Securities Law* (Butterworths, Wellington, 1994).

A Beck et al *New Zealand Company Law and Practice* (CCH New Zealand Ltd, Auckland, 1989).

WL Cary et al *Cases and Materials on Corporations* (6ed, Foundation Press, New York, 1988).

JH Choper et al *Cases and Materials on Corporations* (3ed, Little Brown & Co, Boston, 1989).

R Dugan *The Companies Act 1993: Governance Issues for Closely Held Companies* (Victoria University of Wellington Law Review, Wellington, 1997).

R Dugan *Company Law: A Transactional Approach* (Butterworths, Wellington, 1994).

Ernst & Young *Guide to the Companies Act 1993* (The Law Book Co, Sydney, 1994).

EL Folk et al *Folk on the Delaware General Corporations Law: A Commentary and Analysis* (Little Brown & Co, Boston, 1992).

HAJ Ford et al *Ford and Austin's Principles of Corporations Law* (7ed, Butterworths, Sydney, 1995).

LCB Gower et al *Gower's Principles of Modern Company Law* (8ed, Sweet & Maxwell, London, 1992).

RW Hamilton *Cases and Materials on Corporations* (5ed, West Publishing Co, Minnesota, 1994).

DO Jones *Company Law in New Zealand: A Guide to the Companies Act 1993* (Butterworths, Wellington, 1993).

WH Painter et al *Painter on Close Corporations* (Little Brown & Co,

Boston, 1991).

Phillips Fox *New Company Law - How it Affects You* (CCH New Zealand Ltd, Auckland, 1993).

F O'Neal and R Thompson *O'Neal's Close Corporations* (3ed, Clark Boardman & Callahgan, New York, 1996).

LS Sealy *Cases and Materials in Company Law* (Butterworths, London, 1992).

R Tomaise et al *Corporation Law* (Butterworths, Sydney, 1990).

B Welling *Corporate Law in Canada* (2ed, Butterworths, Toronto, 1989).

JS Ziegel et al *Case and Materials on Partnerships and Canadian Business Corporations* (2ed, The Carswell Co Ltd, Toronto, 1989).

Meridith Memorial Lectures: Canadian Business Corporations Act 1975 (Richard De Boo Ltd, Toronto, 1975).

JOURNAL ARTICLES

E Abernethy "The Case for Constitutions" (1994) 416 Law Talk 11.

I Ayres "Judging Close Corporations in the Age of Statutes" (1992) 70 Washington University Law Quarterly 365.

BF Cataldo "Limited Liability With One Person Companies and Subsidiaries" [1953] Law and Contemporary Problems 473.

A Chernichaw "Oppressed Shareholders in Close Corporations: A Market Oriented Remedy" (1994) 16 Cardozo Law Review 501.

R Dugan "Closely Held Companies Under the draft Companies Act" [1990] VUWLR 161.

R Dugan "Reregistration of Closely Held Companies" [1997] NZLJ 66.

W Fuller "The Incorporated Individual: A Study of the One Man Company" [1938] Harvard Law Review 1373.

WM Gazur "The Limited Liability Company Experiment: Unlimited Flexibility, Uncertain Role" [1995] Law and Contemporary Problems 135.

V Goldwasser "Shareholder Agreements: Potent Protection for

Minority Shareholders in Close Corporations" (1994) 22 American Business Law Review 265.

R Grantham "The Unanimous Consent Rule in Company Law" [1993] CLJ 245.

B Nicholson "The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation" (1992) 30 American Business Law Journal 513.

M Ross "Deemed Reregistration: What Happens Next ?" (1997) 76 Chartered Accountants' Journal of New Zealand 33.

LS Sealy "The Director as Trustee" [1967] CLJ 83.

PG Watts "Company Law" [1994] NZRLR 233.

CURRENT AWARENESS PUBLICATIONS

P Foley et al *New Zealand Law Society Seminar: Company Law - Practical Experience One Year On* (NZLS, Wellington, 1995).

New Zealand Department of Justice *The 1993 Companies Package - How it Affects Your Company* (Wellington, 1994).

New Zealand Law Commission *Company Law: A Discussion Paper - Preliminary Paper No 5* (Wellington 1987).

New Zealand Law Commission *Company Law: Transition and Revision - Report No 16* (Wellington, 1990).

MA O'Regan et al *New Zealand Law Society Seminar: Company Constitutions* (NZLS, Wellington, 1995).

P Radich et al *New Zealand Law Society Seminar: Reregistration of Companies - Doing the job properly* (NZLS, Wellington, 1997).