

## **Company Law: Back to Basics: Optional Provisions under the Companies Act 2014**

### **[00:00:01.250] - Suzanne Kearney, Of Counsel**

The inclusion of optional provisions was one of the key innovations introduced by the Companies Act 2014. In today's episode, we are going to focus on these statutory default provisions which apply and which govern a company's internal administration unless its constitution provides otherwise.

### **[00:00:19.010] - Suzanne Kearney, Of Counsel**

But firstly, to reintroduce ourselves, I'm Suzanne Kearney, Of Counsel in the Corporate and M&A Department in Arthur Cox.

### **[00:00:26.050] - Tom Courtney, Partner**

And I'm Tom Courtney, Partner here at Arthur Cox.

### **[00:00:28.690] - Suzanne Kearney, Of Counsel**

Tom, we might start by giving our listeners a brief overview on the origins of the optional provisions.

### **[00:00:33.550] - Tom Courtney, Partner**

Well, Suzanne, in company law it does not get any more basic than the internal rules and regulations by which companies are governed. Prior to the Companies Act 2014, all company's Articles of Association were either bespoke or were by reference to Table A of the first schedule to the Companies Act 1963. Table A itself was split, with part two applying to private companies and part one applying to public companies. Indeed, this typified the old model whereby "the tail wagged the dog". Since part two, which governed over 90% of companies, was presented as a legislative afterthought which varied part one, although part one applied to less than 1% of companies. Table A was in effect a table of standard regulations that could be adopted by companies. Over the decades, much of what was contained in Table A became adopted as standard by many companies. It is this fact which impelled the Company Law Review Group to recommend that the Companies Act 2014 should abandon the concept of tables and instead introduce a new approach, the optional provision. The idea was that because the provisions in Table A had become so standard, they should be set out in the Act.

### **[00:01:42.820] - Tom Courtney, Partner**

But in recognition of the fact that some companies might want to make alternative arrangements, they should be optional.

### **[00:01:49.420] - Suzanne Kearney, Of Counsel**

So, as we've mentioned, the optional provisions are a series of statutory default provisions. This means that these provisions will apply to the company unless its constitution expressly provides otherwise but our listeners may ask "How do we identify these optional provisions and distinguish them from the mandatory provisions of the Act?" Tom, is there any statutory definition of optional provision?

**[00:02:09.470] - Tom Courtney, Partner**

There is, Suzanne. Section 54 of the Act defines optional provision as a provision that either quote "contains a statement to the effect or is governed by a provision elsewhere to the effect that the provision applies, save to the extent that the constitution provides otherwise or unless the constitution states otherwise or is otherwise of such import."

**[00:02:33.100] - Tom Courtney, Partner**

In identifying whether or not a provision is an optional provision, there are a number of attributes to keep in mind. Firstly, the optional provision should be capable of being disapplied in its entirety. To give a practical example, Section 161, one of the Act is an optional provision because Section 157 provides that it applies save to the extent that the company's constitution provides otherwise. Section 161(1) states a resolution in writing signed by all the directors of a company or by all the members of a committee of them and who are for the time being entitled to receive notice of a meeting of the directors, or as the case may be, of such a committee, shall be as valid as if it had been passed at a meeting of the directors or such a committee duly convened and held.

**[00:03:21.240] - Tom Courtney, Partner**

However, a company's constitution may disapply this provision.

**[00:03:25.010] - Suzanne Kearney, Of Counsel**

So in those circumstances, Section 161(1) in relation to the passing of director's written resolutions will not apply to the company but this does not necessarily mean that the directors of that company are prohibited from passing written resolutions.

**[00:03:39.370] - Tom Courtney, Partner**

That's correct, Suzanne, and it's something we both come across a lot in practice. Many companies will disapply the optional provisions under the Act and restate them or modifications of them as regulations in their constitution. So while the company may have disapplied the optional provision in Section 161(1), it may have adopted an express regulation in its constitution which permits the passing of director's written resolutions.

**[00:04:07.330] - Suzanne Kearney, Of Counsel**

Of course, the company may have disapplied Section 161(1) and not restated the ability to pass director's written resolutions in its constitution because it is expressly intended that all decisions of that company must be taken at board meetings and that director's written resolutions are not to be permitted. This is an example of why it is so important to always check the constitution of each company.

**[00:04:28.710] - Tom Courtney, Partner**

Absolutely, Suzanne. Like another potential trap for the unwary is where a company has not disapplied the optional provisions, but still sets out extensive bespoke regulations on the same matters. This can lead to conflicts of interpretation or even import provisions which the company or its advisors did not wish to import. For example, our standard constitution seeks to avoid this potential conflict by providing Sections 83 (1) and (3) and 84 of the Act shall apply to the company but subject to that, the provisions set out in this constitution shall constitute the whole of the regulations applicable to the company and no other optional provisions as defined by Section 54 (1) of the Act shall apply to the company unless expressly incorporated by reference in any regulations set out in this constitution.

**[00:05:17.550] - Tom Courtney, Partner**

The reasons why we carve out Sections 83 (1) and (3) and 84 is because both provisions deal with the reduction of share capital, and there's an apprehension that Section 84 (4), which provides that a company shall not reduce its share capital otherwise than is provided for by this section, inhibits the restatement of the provisions in Section 84 and, by implication, Section 83 (1) and (3).

**[00:05:38.300] - Tom Courtney, Partner**

But subject to that, our approach is to disapply the optional provisions.

**[00:05:43.630] - Suzanne Kearney, Of Counsel**

Returning then to the hallmarks of the optional provisions defined under Section 54. So we are clear that the optional provision must be capable of being disapplied in its entirety and we discussed earlier the example of how such a provision can be disapplied in its entirety and then potentially replicated or not as a regulation in the company's constitution but complete disapplication is not the only choice available in relation to the optional provision. The company may alternatively modify or supplement the provision in its constitution.

**[00:06:10.880] - Tom Courtney, Partner**

Exactly. The optional provisions are expressed in the Act as provisions which apply say where the constitution provides otherwise, or unless the constitution states otherwise or is otherwise of such import as we have been discussing, it's inherent in the definition that to be an optional provision, the provision in question, whether it's a full section or a subsection or a paragraph within a section, should be capable of

being disapplied in its entirety. However, the company may indeed elect to modify or supplement the provision in its constitution rather than disapplying it.

**[00:06:44.540] - Suzanne Kearney, Of Counsel**

A key point here is reference to the constitution. A provision or a part or aspect of a provision that can be disapplied in whole or in part by means other than the constitution. For example, by the passing of a resolution, is not an optional provision because its disapplication is affected by means other than the constitution.

**[00:07:03.030] - Tom Courtney, Partner**

In addition, provisions of the Act that prohibit something unless it is authorised by a constitution, or allow something where expressly allowed by a constitution, or which allow for the variation of a time period within particular parameters, or which allow a constitution to impose additional restrictions are not optional provisions proper because they cannot be disapplied by a constitution, i.e. the extent to which they apply cannot be determined solely by the constitution. Let's take an example. Section 117 (9) of the Act is not an optional provision because it cannot be disapplied by the constitution. Yet, it recognises three ways in which a reserve arising on a reduction in share capital can be treated, one being where the constitution addresses the point. It's because of this that it's not an optional provision, but a mandatory provision, albeit one that allows the treatment of a reserve on a capital reduction to be treated in the manner provided for in the constitution.

**[00:07:58.810] - Suzanne Kearney, Of Counsel**

Tom, you have, in the most recent edition of the Law of Companies, identified 149 provisions of the Act which are optional provisions and which will apply in the case of an LTD, unless its constitution provides otherwise. Unlike the old Table A, these optional provisions are scattered throughout the Act. A standalone optional provision may be easier to identify, as it will generally begin, as you've mentioned, with the wording save where the constitution provides otherwise, or wording to that effect. A practical example here is Section 43, subsection 2, regarding the affixing of the common seal. However, not all optional provisions are so immediately obvious on review and I've heard you recently warn about the umbrella optional provision.

**[00:08:39.730] - Tom Courtney, Partner**

That's right, Suzanne. An optional provision may also be expressed by reason of an umbrella, in other words, where the Act provides that each subsequent provision of this chapter applies save to the extent that the constitution provides otherwise. An example of this is the section we were looking at earlier, Section 161 (1) regarding the passing of director's written resolutions. Section 161 is not expressed as a standalone optional provision. There are no references to say the constitution otherwise provides in Section 161 (1) itself. However, Section 157 provides the umbrella. Each subsequent provision of this

chapter, other than two particular sections, Section 166 and 167, applies save to the extent that the company's constitution provides otherwise. So that's what makes 161 (1) an optional provision.

**[00:09:31.530] - Suzanne Kearney, Of Counsel**

So I suppose a question some of our listeners might have is why meddle with the optional provisions at all? It is, after all, possible to adopt a very brief constitution and rely on all the statutory default provisions.

**[00:09:42.750] - Suzanne Kearney, Of Counsel**

You're absolutely right, Suzanne. The Company Law Review Group aspire to facilitate companies having a one page constitution in those very circumstances and while many companies welcome this approach, supplementing the optional provisions in the statutory defaults with a dozen or so bespoke provisions, other companies set out in full all applicable regulations, the main reason being to avoid having to read one's constitution side by side with the Act. The approach will vary from company to company, but the approach we take in our own model constitution is to disapply all optional provisions and restate them or modifications of them.

**[00:10:20.790] - Suzanne Kearney, Of Counsel**

So before we finish up today's episode, Tom, any final advice on identifying the internal rules that apply to companies?

**[00:10:27.020] - Tom Courtney, Partner**

Well, without meaning to sound too preachy, don't make assumptions, always cheque the constitution of the company before you and if it does not contain a broad disapplication of the optional provisions of the kind we described earlier, then be conscious of the fact that you must have regard to the optional provisions set out in the act, as well as whatever provisions might be set out in the constitution.

**[00:10:49.360] - Suzanne Kearney, Of Counsel**

Thanks, Tom. That's a good tip to finish up on. If you have any questions on anything Tom and I discussed today or if there's any particular topic that you would like to hear more about, please feel free to contact either of us. Tom and I will be back with a new episode soon, focusing again on key aspects of company law. Thank you for listening.