

Article Information

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Failing to ratify the appointment of an auditor appointed to fill a casual vacancy - the consequences may be bigger than you think

A recent case illustrates the importance for listed entities to remain vigilant with their regulatory compliance, or else deal with significant consequences. A company that failed to ratify by shareholder resolution the appointment of an auditor that was appointed by the directors to fill a casual vacancy, was left with its cleansing notices being defective and requiring a court order to rectify the defect.

With the many compliance burdens listed entities must satisfy in order to operate in the open markets, the recent case of *Re Kalamazoo Resources Limited* [2024] WASC 83 reminds us to stay on top of day-to-day compliance activities, as the consequences can be material and costly.

What happened?

In April 2023, Kalamazoo Resources Limited (**Company**), a public company listed on the ASX, asked its then auditors Grant Thornton to resign with the intention of appointing BDO to the role of auditor. After obtaining BDO's consent to act, the Company's board appointed BDO as its auditor to fill the 'casual vacancy'. The change of auditor was formalised on 30 May 2023, with the Company announcing that engagement and noting that it would seek shareholder approval at the upcoming AGM to ratify that appointment.

However, due to an administrative error, the Company failed to put a resolution for the ratification of the appointment of BDO to its shareholders at its AGM in November 2023, resulting in BDO's appointment lapsing on the date of the AGM (as explained below).

In early 2024, the Company undertook a capital raising and issued cleansing notices to the market to facilitate secondary trading of the shares issued on market, only then to realise that it had failed to obtain shareholder approval of the appointment of BDO at the AGM, resulting in its cleansing notice being defective.

The Company then entered into a trading halt and sought urgent court orders in order to facilitate the secondary trading of the shares issued in 2024.

What does the law say?

Under Chapter 2M of the *Corporations Act 2001* (Cth) (**Corporations Act**):

- the resignation of an auditor results in a 'casual vacancy', following which the directors have one month to appoint another auditor to fill the vacancy; and
- an auditor appointment to fill a casual vacancy stands until the company's next AGM, at which point the company should ratify the auditor's appointment (or appoint another auditor) by shareholder resolution.

Separately, under Chapter 6D of the *Corporations Act*, a company may not offer securities, or facilitate the secondary sale

of securities, to retail shareholders without a disclosure document. Relevantly, an exception to the requirement for a disclosure document in the context of the secondary sale of securities is the issue of a 'cleansing notice'.

A company may issue a cleansing notice if, amongst other things:

- it is a listed entity which has had quoted securities (as that term is defined in the Corporations Act) for the past 3 months, and those securities have not been suspended for more than 5 days in the last 12 months; and
- it has complied with the requirements of Chapter 2M of the Corporations Act.

In the case of the Company, a failure to ratify the appointment of BDO at the AGM resulted in the Company:

- not having an auditor appointed following its AGM and being non-compliant with requirements of Chapter 2M of the Corporations Act;
- issuing a cleansing notice that was defective, meaning its newly issued shares could not be traded on the ASX;
- making erroneous representations to the ASX about the tradability of its newly issued shares when seeking quotation of its newly issued shares; and
- needing a court order in order to facilitate the further trading of its shares on ASX.

Whilst the Company could have readily re-appointed BDO as its auditor (whether by board resolution, or by convening a meeting of its shareholders), more drastic steps were required to facilitate the further trading of its shares.

What corrective action was taken?

Following discovery of the error, the Company:

- entered a trading halt, followed by a voluntary suspension, until such time as it was able to receive the necessary court orders;
- sought the necessary court orders to rectify the errors that had occurred; and
- made regular ASX announcements to keep the market up to date with its progress.

Accordingly, the Company obtained court orders to the effect that:

- BDO's appointment as auditor was not invalid and that the Company is deemed to have complied with relevant requirements of Chapter 2M of the Corporations Act;
- the cleansing notices issued in early 2024 were effective when given; and
- any offer for sale, or sale of, the shares the subject of the defective cleansing notices before the date of the orders were not invalid.

Given the many items with which companies need to comply to discharge their regulatory obligations and avoid the serious consequences for compliance failures, directors, company secretaries and managers should stay on top of their actionable items. Professional advisors can be engaged to ensure matters are dealt with promptly and properly.

For any questions or for more information, please contact the authors.