

CORPORATIONS LAW

SUMMARY



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CORPORATIONS LAW SUMMARY

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INTRODUCTION

Forms of Legal Association

There are a number of categories of legal structures:

- Sole Trader;
- Partnerships
- Unincorporated Association; and
- A Corporation: there are a number of types of companies. They can be Proprietary (Pty) or Public.

Administrative and Legislative Structure of Australian Corporations Law

The regulation of Australian Corporations law has a long and controversial history which has led to the point of the current regime of uniform corporations laws throughout all Australian states under the *Corporations Act 2001* (Cth) (referred to as the Act). Corporations law is regulated by:

1. Legislation: The Australian Constitution provides that the states have jurisdiction over corporations. The current arrangement has seen uniformity throughout the states as the states have referred corporations law power to the Commonwealth allowing full constitutional authority for the Commonwealth to pass the Act. For example, in NSW the *Corporations (Commonwealth Powers) Act 2001* (NSW) refers law making powers regarding corporations to the Commonwealth.

2. Administration: Importantly, corporations law is regulated by a federal regulator – the *Australian Securities and Investments Commission (ASIC)*. ASIC's power to administer state legislation is formally referred by the States. This formal referral is subject to re-approval by States and the Commonwealth every five years. ASIC is an independent statutory Commission, has discretionary powers and is responsible for the day-to-day administration of legislation and reports directly to the Commonwealth Minister. ASIC also has a policy role as it may advise the Minister of possible solutions to problems it finds with the legislation.

3. Court jurisdiction: there are no differences in interpretations to law throughout the states: there is the same jurisdiction between the states.

- *Re Wakim* [1999] 198 CLR 511:

The High Court held parts of scheme to be invalid. Notably, it was held that state judicial power in Federal Court is an invalid exercise of power. Corporations cases are all heard in Supreme Courts of states because of striking down of cross vesting scheme. However, Federal and State Courts can now exercise

federal judicial power as a result of corporations now being an area of Commonwealth control.

SEPARATE LEGAL ENTITY

Classifying Companies:

The critical question to ask when addressing any situation involving a corporation is whether the company is a public company or if it is a proprietary company (Pty).

In order to determine this status there are five specific areas to look for in information about the company in question. These are contained in the Act.

Five Features of a Proprietary Company:

- i. Share Capital (s.112(1)): where a person becomes a member of Pty company by obtaining shares in the company, this is said to be a Pty company; and
- ii. A Pty company has btw 1-50 members (but no more than 50): s113(1) and s114(1) – this limitation does not apply to members who are employee shareholders; and
- iii. There is at least one director of the company (s.201A(1)): not employees of company; then a Pty company is:-
- iv. Forbidden from offering shares for public subscription (s113(3)); and
- v. A Pty company can be distinguished from a public company because it has Pty as part of name (s148(2)) and family companies are usually Pty companies(s149).

Features of a Public Company:

A public company is defined in s9 as a company other than a Pty company. That is, if the company does not meet the five criteria outlined above then the company by definition is a public one.

A public Company must have:

- i. A minimum of one member (s.114); there is no maximum number of members;
- ii. Minimum of three directors (s201A(2)); most companies have a large a board in any case (7-9 directors is the norm in Australia);
- iii. No Pty in name;

- iv. Seek funds from the public: chapter 6D of the Act contains rules concerning fund raising and prospectus rules for corporations offering shares; and
- v. The option to list on a stock exchange.

A Pty company may transit from being a Pty to Ltd (public company): s162 gives procedures for this conversion to occur and lists the allowed conversions to be made.

A Large Pty Company:

- A large Pty company meets any 2 of additional criteria in s45A(3). These include that the consolidated revenue and the entities the company controls is \$25 million (s45A(3)(a)), and that the value of the consolidated gross assets and the entities the company controls is \$12.5 million (s45A(3)(b)).

A Small Pty Company:

A small Pty company meets any 2 of the criteria in s45A(2) and is reevaluated each financial year. These include that the consolidated revenue and the entities the company controls is less than \$25 million (s45A(2)(a)), and that the value of the consolidated gross assets and the entities the company controls is less than \$12.5 million (s45A(2)(b)). How is the Liability of Companies members Structured?

There are 2 significant ways:

- i. Limited by shares: s516 - "member need not contribute more than the amount (if any) unpaid on the shares in respect of which the member is liable as a present or past member."; and
- ii. Limited by guarantees: s.517- "member need not contribute more than the amount the member has undertaken to contribute to the company's property if the company is wound up."

Separate Legal Entity and legal capacity

Section 119 of the Act provides that a company comes into existence as a body corporate at the beginning of the day of its registration. In addition, section 124 provides that a company has the legal capacity and powers of an individual both within and outside the Australian jurisdiction. By extension, this means that a company as a legal person may bring actions in the courts and have actions brought against it.

This basic doctrine provides that because a company is a separate legal entity, its members are not liable for any debts incurred by the company (in excess of the amounts paid up on the shares held by the member in the company's capital). This essentially means that a company's creditors cannot recover the company's liabilities from the shareholders. The doctrine is codified

in the Act as stated above, and was first espoused in English Common Law: *Salomon v Salomon & Co Ltd* (1897) AC 22 and then again in *Lee v Lee's Air Farming Ltd* [1961] AC 12.

The following discussion concentrates on the However, there are common law exceptions to the general rule that companies have a *separate legal identity* independent of individual owners and managers.

Avoidance of Legal Obligation and Fraud:

Gilford Motor Co v Horne [1933] 1Ch 935:

- H is contractually obligated by a restrictive covenant not to solicit customers from his employer, GM Motor Co.
- H resigns after 3 years, incorporates his own Company and has the company enter K with customers of GM Motor Co.
- GM Motor Co brought an action against H for breach of contract. The Court held against H, who cannot use the separate legal personality doctrine to avoid legal obligations.

Jones v Lipman [1962] 1 WLR 832:

- L enter K to sell house to J. Before completion of transaction L sold house to Co incorporated by him; L invented Co to prevent specific performance of transferring house to J.
- The Court held against L.



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