

CORPORATIONS LAW

SUMMARY

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Contents

INTRODUCTION	3
<i>Forms of Legal Association</i>	3
<i>Administrative and Legislative Structure of Australian Corporations Law</i>	3
SEPARATE LEGAL ENTITY	5
<i>Classifying Companies</i>	5
<i>Separate Legal Entity</i>	6
CORPORATE CONSTITUTION	9
CORPORATE GOVERNANCE	11
<i>Definition</i>	11
<i>The Formal Legal Model</i>	11
CORPORATE FINANCE CONTROL	13
CORPORATE FINANCE: DEBT CAPITAL	19
<i>Charges</i>	22
CORPORATE FINANCE: SHARE CAPITAL	26
<i>Preference Shares</i>	26

CORPORATIONS LAW SUMMARY

<i>Redeemable preference shares</i>	26
<i>Employee shares</i>	27
<i>Bonus shares</i>	27
CORPORATE FINANCE: DIVIDENDS AND FUNDRAISING	32
<i>Source of dividend payments</i>	33
<i>Limitations</i>	34
<i>Payment of dividends</i>	34
CORPORATE CONTRACTING	36
<i>Corporate Capacity</i>	36
<i>Policy Problems</i>	37
<i>Authority of People to enter K on Co's behalf</i>	38
<i>Agency</i>	38
<i>Direct Corporate Contracting</i>	42
MEMBERS' RIGHTS AND REMEDIES	44
<i>The Common Law Position</i>	44
<i>The Statutory Remedies for Shareholders</i>	45

DIRECTOR'S DUTIES	55
<i>Appointment and Numbers of Directors</i>	55
<i>General Duties of Director</i>	55
<i>Duties owed to the Company</i>	55
<i>Directors not to act for an improper purpose</i>	56
<i>Directors to act with unfettered discretion</i>	56
<i>Duty to act in good faith and avoid conflicts of interest</i>	56
<i>Disclosure of Interests</i>	56
<i>Abuse of Corporate Opportunity</i>	57
<i>The Common Law Duty of Care and Skill</i>	57
<i>Statutory Duties of Care – business judgment rule</i>	58
<i>Breach of Duty</i>	58
INSOLVENCY, CORPORATE RESCUES & WINDING UP	60
<i>Receivers and Voluntary Administration</i>	60
SOURCES CONSULTED	73

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 to 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 but the current arrangement has seen uniformity throughout the states;

- New South Wales v Commonwealth (1990):
 - Reaffirmed states control over Corporations as there was found to be no constitutional power for Cth control over corps;
 - Cth can pass legislation that regulates the trading of corporations if incorporated by states;
 - Cth test case since split system between states. Cth passed the Corporations Law 1990, and the States challenge and found law unconstitutional. The current legislative arrangement has since been agreed to by the states (2001).

2. Administration: law applied or enforced in different ways in states as a result of administrative structures but the Act is uniformly applied;

- R v Hughes (2000):
 - Doubts about uniformity of administration between the states: problems that Cth bodies cannot undertake functions conferred upon them by state law unless in s.51 Constitution. This has since been eased because of the State referral of power over corporations to the Cth.

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):
 - Parts of scheme invalid: state judicial power in Federal Court invalid exercise of power. Corporations cases are all heard in Supreme Courts of states because of striking down of cross vesting scheme. But see now that Federal and State Courts can exercise federal judicial power as a result of corporations now being an area of Cth 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 *Corporations Act 2001 (Cth)*.

Five Features in Corps Act of Proprietary not Public 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 s149 – family companies are usually Pty companies. cos).

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. Therefore:

A public Company must have:

CORPORATIONS LAW SUMMARY

- 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 Act gives procedures for this conversion to occur.

A Large Pty Company:

- A Pty company meets any 2 of additional criteria in s45A(3).

A Small Pty Company:

- Any 2 criteria in s45A(3) and is reevaluated each financial year.

How is the Liability of Companies members Structured?

There are 2 significant ways:

- i. Limited by shares: s516 Act- “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.517Act- “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.”



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