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Separate legal entity

Separate legal personality: law treats company as being separate person from its members and those who manage its operations. The right it holds and the obligations it incurs are the company's own and NOT its managers nor people who invest nor its employees.

This means that the company will be unchanged even if the identity of the participants in it changes also means the company can enter into legal relationship with its participants (as debtor creditor or employee employer) – if company and its participants were not separate legal person, this won't be possible + company treated as separate entities liable for income tax under *Income Tax Assessment Act 1936*

Case: ***Salomon v Salomon & Co Ltd, Industrial Equity Ltd v Blackburn, Walker v Wimbourne***

Consequences of treating company as separate legal entity:

- Company's obligation and liabilities are its own and not for those its participants
- Company can sue and be sued in its own name
- Company has perpetual succession which means that the company is a continuing entity in law with its own identity regardless changes in its membership
- Company's property is not the property of its participants means that the participants in a company have no proprietary (legal or equitable) interest in the company's property so they have "no ownership" to company's property

Case: ***Macaura v Northern Assurance Co Ltd*** (Macaura transfer his timber property to company but forgot to transfer the insurance, get burn, insurance won't pay for the timber burned as Macaura doesn't have ownership anymore to the timber; timber belonged to company)

- Company can contract with its controlling participants as they are separate legal entities so company and its participant can enter into contracts with each other as debtor creditor which can be seen in Salomon's case where a company can lend or borrow money from its controlling shareholder

Case: ***Lee v Lee's Air Farming Ltd*** (wife ask for worker compensation for husband's death even though her husband is a managing director and controlling shareholder of the company (husband enter into contract with company as employee so can get worker compensation))

Holding and subsidiary company

Division 6 of Pt 1.2 of Corporations Act states that a company is a subsidiary of another company which called its holding company if only if (can satisfy one of the test):

- The holding company controls the composition of the subsidiary's board (which means that one company is taken control the composition of another board if by exercising their power (with or without another company consent) can appoint or remove all or majority of the board)
- Holding company is in a position to cast or control the casting of more than 1/2 of the votes at the subsidiary general meeting
- Holding company hold more than 1/2 of the issued share capital (exclude the non-voting share) of the subsidiary

- The subsidiary is the subsidiary of another subsidiary of the holding company: s 46 and 47

Case: *Ho v Akai Pty Ltd* states about the meaning of subsidiary

The concept of control is defined in s 50AA which said that an entity controls a second entity if the first entity has the capacity to determine the outcome of the decisions about second entity's financial or operating policies

uncommercial transactions – when the coy already want to crash then the coy sell the assets to other coy in lower price than it should be so this rip off the company and give advantage to other coy

Large proprietary company: s 45A

- ▶ Meets two of the following three tests on a consolidated basis:
 - gross operating revenue \$25 million or more
 - gross assets \$12.5 million or more
 - 50 or more employees
- ▶ Otherwise the company is treated as large Pty Ltd
- ▶ Small company are not required to prepare financial statements or lodge them with ASIC or to appoint an auditor
- ▶ Large company are subject more extensive disclosure and reporting obligations

PROPRIETARY COMPANY (PTY LTD) V PUBLIC COMPANY

Proprietary company (Pty Ltd)		Public company (Ltd)
NOT permitted to have more than 50 shareholders (not including shareholders who are employee) s 113(1)	Number of members	Can have more than 50 members
NOT allowed to issue share to the public generally NOT allow to undertake certain fundraising activity that require to issue prospectus	Issuing shares	Allow to issue share to public
Only need 1 directors s 210A(1)	Number of directors	Must have 3 directors s 210A(2)
Don't have to hold AGM; can hold EGM as much as they like	General meeting	Required to hold annual general meeting s 250N ; other meetings held is extraordinary general meeting EGM
It is RR for Pty Ltd s 249X	Having proxy	It is mandatory for public to have proxy s 249X
S 254W(2) RR where director can allocate dividend as they see fit	Dividend right	S 254W(1) in a class of share has the same dividend right unless the Cn told otherwise or provided by special resolution
NOT ALLOWED	Related party transactions	Special restrictions on transactions with related party Ch 2E
<ul style="list-style-type: none"> May have a company secretary but it not required to appoint one 204A(1) 	Having secretary	<ul style="list-style-type: none"> Must have at least 1 secretary s 204A (2)
<ul style="list-style-type: none"> Resolutions that must be passed at general meetings may deemed to have been passed even though no meeting was held, provided all s/h sign document stating that they support the resolution s 249A – ‘on paper meeting’ – cannot be 		<ul style="list-style-type: none"> Required to lodge financial reports regardless of the size of coy's operations s 292 Resignation of auditor of public coy requires consent of ASIC s 329 Director's reports of a public coy must contain

used to remove auditor of coy		statements about the qualifications of directors, their attendance at meetings of directors, their shareholdings or their contracts with the company s 300(10)
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Proprietary company limited by shares must always include *Proprietary Limited (Pty Ltd)* in its name: **s 148(2)**

MEMBER

*Member cannot interfere with powers of the board: *Automatic Self-Cleansing Filter Syndicate v Cunninghame*; *John Shaw & Sons Ltd v Shaw* (where members cannot tell the board how to exercise their power)

*Director within their management power may take action against wishes of majority shareholders, majority shareholder cannot control it while director is in their office: *Howard Smith Ltd v Ampol Petroleum Ltd*

*Member cannot use their power to ask or call a meeting of members to pass a resolution relating to the power of the board: *NRMA v Parker* and *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia*

Members vote

- Special resolution is required in each case
 - adopt, modify or repeal the constitution: **s 136**
- adopt constitution on registration: **s 136(1)(a)**
- adopt constitution after registration: **s 136(1)(b)**
- modify/repeal constitution with special resolution: **s 136(2)**
- further amendment and additional requirement must be met: **ss 136(3)&(4)**
 - veto certain reduction of capital
 - change the company's name: **s 157**
 - change type of coy require special resolution: **s 162(1)(a)**
 - variation of class right
 - share buy-backs or reductions of capital
- certain parts of director remuneration and benefits
- appointment or removal of auditor
- related party transaction by public coy
- certain significant commercial transaction by listed company
- takeovers and reconstruction of coy
- to initiate a members' voluntary winding up
- under general law, to pass resolution where board unable to act or to ratify director breach of duty
- Appoint or remove the director board

	Proprietary Company	Unlisted public company	Listed public company
How are directors appointed?	Check constitution or RR. If RR apply: <ul style="list-style-type: none"> - Board may appoint but members must confirm appointment 	Check constitution or RR. If RR apply: <ul style="list-style-type: none"> - Board may appoint but members must confirm appointment 	Check constitution. <ul style="list-style-type: none"> - If board may appoint, members must confirm at the next AGM: ASX Listing Rule

	<p>later: RR s 201H</p> <ul style="list-style-type: none"> - Members may appoint by ordinary resolution: RR s 201G 	<p>later: RR s 201H</p> <ul style="list-style-type: none"> - Members may appoint by ordinary resolution: RR s 201G <p>Separate resolution required for each director unless all members agree: s 201E</p>	<p>Separate resolution required for each director unless all members agree: s 201E</p> <p>All directors (other than CEO) must stand for re-election every 3 years: ASX Listing Rule</p>
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