

CORPORATE LAW NOTES

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DIVISION OF POWER

Summary:

- 2 Corporate organs of power
- Company Secretary – pivotal role in facilitating operation of 2 corporate organs
- Meetings – how 2 corporate organs operate

2 CORPORATE ORGANS OF POWER

'Organ' = action or operation, especially, a body of people by which some purpose is carried out or some function is performed

Need for corporate organs – company is an artificial legal entity

'Organ' v 'agent'

- Organ **is** the company when exercising power (eg, ¹¹board or general meeting making a decision)
- Organ may authorize agent to act on its behalf (eg, board delegate task to MD who then acts as an agent **on behalf** of company, not **as** the company)

Separation of power between 2 corporate organs

- Board – management
- GM (MEMBERS) – ownership
- Corporate governance – Principles that Company develops to follow, notion of checks and balances between members and management – **one organ tries to ensure other**

organ does not amass too much power.

Basis of separation of power between 2 corporate organs determined by:

- *Corporations Act* (eg, **ss203D; 208; 136; 256C, 461(1)(a)**)
- Company's constitution (if any)

Relationship between 2 corporate organs:

- Analogous to the division of powers between the Federal and State legislatures (GM has specific powers; Board has residual powers)
- If GM disapproves of Board's action after the event it **can alter internal rules to deprive Board of some powers**, or vote in 'acceptable' directors at next AGM
- **Board's management power cannot be nullified by GM: s198A; *Automatic Self Cleansing Filter Syndicate Co Ltd v Cunninghame [1906] 2 Ch 34; John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113***
- GM can ratify Board's improper use of power^[1]

APPOINTMENT & REMOVAL OF DIRECTORS

Appointment of Directors

Minimum number of directors: **S 201A**

Proprietary companies

- (1) A proprietary company must have at least 1 director. That director must ordinarily reside in Australia.

Public companies

- (2) A public company must have at least 3 directors (not counting alternate directors). At least 2 directors must ordinarily reside in Australia.

Who can be a director: **S 201B**

- (1) Only an individual who is **at least 18** may be appointed as a director of a company.
- (2) A person who is **disqualified from managing corporations** under Part 2D.6 may only be appointed as director of a company if the appointment is made with **permission granted by ASIC** under section 206F or **leave granted by the Court** under section 206G.

Consent to act as director: **S 201D**

- (1) A company contravenes this subsection if a person **does not give the company a signed consent to act as a director of the company before being appointed**.
- (2) The **company must keep the consent**.
- (3) An offence based on subsection (1) or (2) is an offence of **strict liability**.

Special Rules for the Appointment of public company directors: **S 201E**

- (1) A resolution passed at a general meeting of a public company appointing or

confirming the appointment of 2 or more directors is **VOID** unless:

- (a) The **meeting** has **resolved** that the appointments or confirmations may be voted on together; **AND**
 - (b) **No votes were cast against the resolution.**
- (2) This section does not affect:
- (a) A resolution to appoint directors by an amendment to the company's constitution (if any); or
 - (b) A ballot or poll to elect 2 or more directors if the ballot or poll does not require members voting for 1 candidate to vote for another candidate.
- (3) For the purposes of paragraph (2)(b), a ballot or poll does not require a member to vote for a candidate merely because the member is required to express a preference among individual candidates in order to cast a valid vote.

Special rules for the appointment of directors for single director/single shareholder proprietary companies: [S 201F](#)

- (1) The director of a proprietary company who is its only director and only shareholder may appoint another director by recording the appointment and signing the record.

Appointment of new director on death, mental incapacity or bankruptcy

- (2) If a person who is the only director and the only shareholder of a proprietary company:
 - (a) **dies**; or
 - (b) **cannot manage the company** because of the person's **mental incapacity**;

and a personal representative or trustee is appointed to administer the person's estate or property, the personal representative or **trustee may appoint a person as the director of the company.**