

## **Introduction to Company Law – Lecture One**

### Section 51 (xx) Australian Constitution

- **"The Parliament shall ... have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-**
- **(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth . . .**
- The word **formed** was interpreted to mean that the Commonwealth could only make law **after** the company is formed. It cannot make law in relation to the formation of the company.
- However when a company is formed, every single state can have different rules and laws with regards to the formation of a company
- Rules of the formation of a company include – how many directors a company may have, the entitlements employees may have.
- However, since this would lead to inconsistency, in 2000 the Commonwealth made a deal with the states, where every state in Australia including the territories, gave all the power on the formation of a company to the Commonwealth. When the states grant the power to the Commonwealth the process is known as referral. Therefore from 2000 the Commonwealth has the power over entire company law.
- As a result the statute used The Corporations Act 2001 (Cth) is a Commonwealth statute since the states referred the power to the Commonwealth

### The role of ASIC

- ★ Enforce the law; outsider or shareholder who makes a claim against the company of directors through ASIC, who will then investigate the issue
  - Claims could be criminal or civil
- ★ Ensure compliance: companies provide proper disclosure
  - Accurate and up to date information is provided to the public
- ★ Investigate
  - Since the Act is a Cth one, the federal police are in charge if ASIC finds that a crime has been committed
- ★ Law reform:
  - Since ASIC is the body in contact with companies i.e. companies lodge application with ASIC upon formation and closure. As a result ASIC has the ability to identify gaps with the legislation that are not addressed, and hence provide recommendations to the Treasurer to reform the law.
- ★ Public access

## Types of Company Liabilities

- Limited → This means that the shareholders or member's liability is limited to the amount they promise to invest in the company – this is the most common type of company liability
  - Company can be limited by shares
    - People by a portion of the company by buying shares
  - Limited by guarantee
  - This means that if the company is wound up, and it is in debt, the liability of members is guaranteed to be a nominal amount (often in the range of \$20 - \$100). This means that members will guarantee to pay a certain amount towards the debts of the company but no more than that.
  - Hence in the case of a company being wound up, members will only be required to pay their guaranteed amount.
- Unlimited → I know it
- No Liability → Such a company can **only** be involved in **mining**.
  - The member promises a certain amount of investment e.g. \$10000 but will only pay a small portion of it initially e.g. \$2000
  - However, after the initial investment and the member is sceptical about the success of the company, then the member can refuse to commit to the rest of his promised investment e.g. \$8000 and hence is no longer liable.

## Types of companies

	Public	Proprietary
Definition	Public company is defined in <b>s9</b> to mean a company other than a proprietary company.	Proprietary company is defined in <b>ss.113, 45A</b> so that: <ul style="list-style-type: none"> <li>• It may have no more than 50 non-employee shareholders.</li> <li>• It cannot engage in any activity that would require issue of a disclosure document under <b>Chapter 6D</b>, that is, subject to some exceptions in <b>s.708</b>, a proprietary company may not issue invitations to subscribe for shares in the company.</li> <li>• Must be limited by shares or unlimited company with share capital.</li> </ul> There is a distinction between small and large proprietary companies: <b>s45A</b> If any of these provisions are offended, ASIC can order the company to convert to a public company <b>{s 165 Corporations Act}</b>
Classes of company by member liability	Under <b>{s 112(1) Corporations Act}</b> public companies can be: <ul style="list-style-type: none"> <li>• Companies limited by shares</li> <li>• Companies limited by guarantee</li> <li>• Unlimited companies</li> <li>• No liability companies</li> </ul>	Must be: <ul style="list-style-type: none"> <li>• limited by shares</li> <li>• unlimited company with share capital <b>{s 112 Corporations Act}</b></li> </ul>
Number of members	All companies need have only one member, <b>s.114</b> . Member is defined in <b>s.231</b> . Companies are required by <b>ss.168 &amp; 169</b> to maintain a register of members.	All companies need have only one member, <b>s.114</b> . Member is defined in <b>s.231</b> . Companies are required by <b>ss.168 &amp; 169</b> to maintain a register of members.
Number of directors	Public companies must have a minimum of 3 directors and at least 2 must reside in Australia <b>{s 201A(2) Corporations Act}</b>	Pty Companies have a minimum of 1 director who must reside in Australia <b>{s 201A(1) Corporations Act}</b>
ASX listing	Only public companies that are limited by shares may be listed on the ASX. However only a minority of public companies are listed on ASX.	A proprietary company cannot be listed on ASX.

## Small Vs Large Pty Companies

### **Small Pty CO – s45A (2)**

*A proprietary company is a small proprietary company for a financial year if it satisfies **at least 2** of the following paragraphs:*

- *The consolidate revenue is less than **\$25m**, or any other amount prescribed by the regulations*
- *The value of the consolidated gross assets at the end of the financial year is less than **12.5m***
- *The company has fewer than **50 employees** at the end of the financial year*

### **Large Pty Co – s45A (3)**

*A proprietary company is a large proprietary company for a financial year if it satisfies **at least 2** of the following paragraphs:*

- *The consolidate **revenue is \$25m or more**, or any other amount prescribed by the regulations*
- *The value of the consolidated gross assets at the end of the financial year **is 12.5m or more***
- *The company has **50 employees or more** at the end of the financial year*

## Incorporation Process

### **The incorporation process s117, s118**

*s117 (1) Lodging an application: to register a company, a person must lodge an application with ASIC*

*The types of companies are in s112*

*s117 (2) contents of the application*

- *The type of Co*
- *Propose name or ACN*
- *Details of member(s) who consent in writing – minimum number of 1*
- *Details of DIR(s) and Co secy who consent in writing. Pty Co does not need Co secy*
- *Registered office address*

*S118: ASIC gives company CAN, Registers Company and issues certificate*

*S119: Company comes into existence on registration*

### **On-going requirements:**

- *Keep financial records – source documents*
- *Minute books – summary of **decisions** made with regards of GM and board*
- *Registers of members/option and debenture holders*

### **Changing company type - S162 – 167**

- *s162 gives a description of the conversions that are permitted*

- e.g. Pty to Ltd to NL

Method:

- Pass a **special** resolution resolving to change its type ; s162(1)(a)
  - s9; resolution, in relation to creditors or contributories means a resolution passed at a meeting of the creditors or contributories
  - The word special implies the resolution is made at the GM
  - Ordinary resolution – 50% of votes need to be passed
  - Special resolution – 75% of votes need to be passed
- Lodge application with ASIC s163(1) with copy of special resolution and other applicable documents
- ASIC gives notice on ASIC database and in Gazette s164(4)
- After one month, ASIC alters details to reflect change s164(4)
- Gives company new certificate s164(6)

*NB does not create a new company s166*

*A change of type does not:*

- Create a new legal entity