

GENERAL

1. **Why Incorporate?** Limited liability, Perpetual succession (**s 124**: legal capacity and powers of a person), transferability, flexible financing, taxation, prohibitions on outside associations – limited to 20 partners (**s 115**); Medical (50); Legal (400); ACCT (1000) BUT there are cost and formality burdens.
2. **Creating a Company – s 119** - comes into existence as a body corporate the day it is registered. **Legal capacity same as person s 124**
 - a. From 1 July 1998, incorporation is effected by written application (**s 114**). It only needs one member and a C* is not necessary (**s 114(1)**). The application (**FORM201**) lodged w ASIC specifying (**s 117(2)**) the type of company, proposed name (can be reserved prior to registration (**s 152**) if not already reserved/registered by another or unacceptable (**s 147**)), member, director and secretary details [consented], proposed registered office, details of proposed share capital + register of members. After registration fees (**INFO30**), ASIC will issue a certificate of registration (**s 118**).
 - b. A company may ratify a contract made on its behalf prior to registration within an agreed or reasonable time. If the company is not registered or does not ratify, the person who made the contract is personally liable
3. **Corporation Act Companies s 112**
 - a. **Proprietary**
 - i. Name: A proprietary limited company must have “Pty Ltd” or “Proprietary Limited” **s148(2)**
 1. Proprietary ONLY = unlimited **s148(3)**
 - ii. Types: Limited by shares – limited to the amount unpaid on the shares (**s 9**). Calls can be made by directors (**254M**) or on winding up (**516**)
 1. **Unlimited** – members’ may have unlimited liability to discharge the company’s liabilities if called upon but it can reduce SC as per **s 258A**
 - iii. Requirements
 1. **< 50 non-employee SHs**,
 2. **1 SH & 1 D ss 114(1), 201A**
 3. Companies must keep written financial records that enable true & fair FS to be prepared & audited **s 286**
 - a. COs other than small PTY COs must prepare audited FSs & lodge with ASIC **s295**
 - b. Small COs only have send to members if SH directs (5%) (**s293**), foreign (**s292**), ASIC directs (**s294**) but they are not lodged w ASIC publicly.
 - c. Small PTY CO if (2/3) R < \$25m, gross assets <12.5m and/or <50 employees (s 45A(2))
 - iv. Exempt from public disclosure of FSs
 - v. Features
 1. Pass resolution w/o holding a meeting **s 249A**
 2. Cannot engage in activity requiring lodgement of a prospectus or other disclosure document (cannot raise money from the public) (NB crowd-funding not allowed 99.7% of businesses – exemptions targeting less than 20 investors or no more than \$2m)
 - b. **Public** - those companies that are not proprietary (**s 9**)
 - i. Name – does not have PTY (s 148(2))
 1. A limited company must include “Ltd” or “Limited” **s148(2)**
 2. A NL must have No Liability **s148(4)**
 3. Unlimited has nothing after its name
 - ii. Types: Limited by shares
 1. Unlimited w SC
 2. Limited by guarantee (liable for what is guaranteed) - used for NFPs. Member guarantees are only enforceable on winding up (515, 520-3). No SC.
 3. No liability - Only if the company has share capital and the constitution states its sole objects are mining purposes. The company has no contractual right under its constitution to recover calls made on shares (s112(2))
 - iii. Requirements: AGM s 250N, 3 D’s (2 AUS) 201A, 1 S (204A(2)), prepare audited FSs & lodge with ASIC s295
4. **Other**
 - a. Liquidation Surplus goes to ordinary SH after secured creditors, creditors (preferential **s556**, rest), SH (preference, ord)

SEPARATE LEGAL PERSONALITY AND PIERCING THE CORPORATE VEIL

1. **Company Personality:** As per **Salomon, ss 119, 124**, Once registered, a company is a SLE with LL invested with the legal capacity and powers of an individual. It perpetually exists, unaffected by changes to its membership. Because of LL, SHs & BOD not liable for debts of CO (i.e. claims by creditors) ...UNLESS CV pierced.

a. A person can function in dual capacities – SH, D, Employee. **Lee**

2. Piercing the Corporate Veil

- a. Piercing the veil to expose personal assets of SHs/Ds to creditors or to relieve CO of legal consequences of its SLE status
- b. CTs reluctant to lift the veil because of **Salomon** SLE principle (**JH v Desmond Putt; JH v Briggs**) even if there are injustices
- c. **Fraud or Improper Conduct** – at creation of the company what was the dominant purpose?

i. If the company was created to avoid legal obligations, to be a mere cloak or a sham, the veil can be lifted **Gilford; Jones v Lipman** (about creation – 2010 case)

- 1. Factors – timing, stealing of customers, control, purpose is to defeat the law
- 2. Company and person seen as one if you pierce CV

d. **Agency**

i. **SSK**: mixed approval because control is not enough...it's a common situation **Salomon; JH v Briggs** criticism that it did not give proper effect to **Salomon**. Should only apply in ghost company situations – no assets/bank, employees, everything done by parent (like department) etc. **Spreag**

- 1. (1) Were the profits treated as profits of the parent or individual company? Did P take all profits?
 - a. **Bird Cameron** – payment of dividends is not enough...must illegally take money of S directly
- 2. (2) Were the persons conducting the business appointed by the parent company?
- 3. (3) Was the parent the head and the brain of the venture?
- 4. (4) Did the parent govern the adventure, decide what should be done and what capital should be embarked on the venture?
- 5. (5) Did the parent make the profits by its skill and direction?
- 6. (6) Was the parent in effectual and constant control?

ii. Control not enough for non-ghost COs **JH v Hall**

e. **Statute**

- i. **s 588G** debts incurred by company when it is insolvent or its solvency (see s95A) is impaired by incurring that debt – exposes BOD if they knew or ought to have known of the insolvency
- ii. **ss 588V-X** holding company may be liable for debts of subsidiary where it knew or ought to have known of the state of its financial affairs **Qintex**
 - 1. **s 9** defines holding company – If it has a subsidiary
 - 2. **s 46** defines subsidiary – Where another body controls (a) the composition of the first body's board, (b) is able to cast more than 50% of votes at a GM, (c) holds more than 50% of the issued share capital has over 50% of the company
- iii. The use of a phoenix company to avoid taxes or liability has been met with legislation allowing ASIC to order the winding-up of companies that have been abandoned by their directors (**s 489EA(1)**)

f. **General**

- i. No unifying principle **Briggs** but general categories of fraud, improper conduct, agency where Salomon principle is too flagrantly opposed to justice, convenience of the interests of the Revenue **Gower**
- ii. Undercapitalization? No **James Hardie v Briggs; Quintex**?
- iii. Unity of enterprise theory? No **Walker; James Hardie v Briggs**;
- iv. Negligence? There is a potential **James Hardie v Briggs; JH v Putt** – need to prove elements of negligence.

g. **Corporate Groups**: Group of companies with interlocking shareholdings and directors

- i. SLE applies **Walker** – need to act in best interests of the individual CO
- ii. **Qintex**: when P & S appear to operate together (forex trading ACCT) assets may be aggregated together

THE CONSTITUTION AND DECISION MAKING BY THE BOD

1. Constitution and RRs - Internal rules of company to be found in C* or RR or both **s 134**. RRs are found in **s 141**.

- a. RRs are **mandatory** for PUBs but can be **modified** in PTYs **s 135(1)(b)**
- b. **s 140(1)** C*/RR a **statutory contract** between (a) CO & each SH* [not always] (b) CO + each D and each S and (c) between SHs
 - i. RRs apply to all COs registered after 1 July 1998 or those before the date who repeal their C* (**s135(1)(a)(i)&(ii)**)
- c. **Changing C*** by special resolution **s 136(2)** but can further entrench **s 136(3)-(4)**
 - i. Protections **s 140(2)** – not bound by C changes, unless agreed in writing, if it requires members to take up additional shares, increases members liability or increases restrictions on right to transfer shares
- d. **s 135(3)** A failure to comply the RRs is not of itself a contravention of this Act (civil liability + injunctions do not apply)
- e. **s 124** – CO can enter into any contract
- f. **s 125** if a company signs a contract outside power of C or RRs, contract is not necessarily invalid
- g. **Resolutions**
 - i. **Ordinary** - 50% of the votes of the members who attend & vote in the meeting **s 9** most resolution e.g. appoint D
 - ii. **Special** - 75% of the votes of the members who attend and vote in the meeting **s 9** E.g. alter C **s 136** or PTY→PUB
- h. **Other**
 - i. The RRs do not apply to PTYs where the same person is the sole SH and D (**ss 135, 198E, 201F, 202C**)
 - ii. PUB which adopts a C must lodge a copy with ASIC with a copy of any special resolutions altering its provisions **ss 117(3), 136(5)**. It is then publicly available.
 - iii. PTY companies need not lodge it but must be sent to a member on request **s 139**.

2. Directors and Officers **s 9** (go through each category)

- a. **Directors s 9**
 - i. **Validly Appointed s9(a)**
 - ii. **De Facto Directors s9(b)(i)**: not validly appointed but can be treated as a D if they “**act in the position of a D**” (e.g. attending + voting)
 1. **doing work that would reasonably be done by a D?** **Grimaldi v Chameleon; DCT v Austin** (e.g. nego TO, top lvl MGMT)
 - a. Small or large CO – more likely in small CO (EMPs needs discretion in large COs)
 - b. Reasonable perception by outsiders **DCT v Austin** (held out as D?)
 - c. Nature of their powers and functions **Grimaldi v Chameleon Mining**
 - iii. **Shadow Directors s 9(b)(ii)** – not validly appointed but the person instructs the BOD. (COs can be). Does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body
 1. **Where is the locus of DM power?** if it resides in a 3rd party and that party cannot secure advisor protection = shadow D. When W did instruct, BOD followed (not all the time but sometimes) = shadow director **ASIC v AS Nominees**
 2. Persons determined the resolutions of D (not independent) **Harris v Shepherd**
 3. **Re Hydrodam (Corby)**: Must prove a) Who are the directors + b) Defendant directed the directors how to act + c) The directors acted in accordance + d) They were accustomed so to act
 4. Does not include 3rd parties involved in commercial dealings **Buzzle Operations v Apple**
 5. **Standard Chartered Bank of Australia v Antico**: Entity must have a MGMT role in the company likened to that of a D. Must tell them what to do. Facts: Was the CO a shadow director of a company it had 42% ownership of + 3 nominee D's
- b. **Officers s 9**
 - i. **(a)(i) director or secretary**
 - ii. **(b)(i)** person who makes **decisions that effects at least a substantial part of the company**
 - iii. **(b)(ii)** capacity to significantly **affect financial standing**
 - iv. **(b)(iii) shadow and de facto officers** – a person whose instructions are followed by the BOD. position to communicate instructions to Ds with intention that they will be acted upon and are in fact acted upon. Includes those who participate at a senior level in corporate management or exercise de facto influence whatever their formal designation.
 - v. **(c)-(g)** liquidators and insolvency practitioners

3. Directors

- a. **D's have the power to manage and direct the business s 198A(1)*****. Broadly interpreted **Dome Resources** power enabling all decisions **(2)** except those that require a GM (C*/CA). Control main business + incidental activities – e.g. **litigation (Shaw)**, **borrow \$, grant security, bonuses, asset disposal, winding up but not their own remuneration** (SH do via **s 202A**)
 - i. **201J**: D's can appoint MD(s) on terms they see fit
 1. Person ceases to be MD if they cease to be a D (**s203F**)

- ii. They can **delegate** the powers that directors can exercise to the MD **s 198C**, a committee of Ds, D, employee or any other person but this delegation must be recorded in the minute book **198D**
- iii. **198E**: sole SH/D – all powers
- b. **Requirements**: 3 directors for PUBs, 1 for PTY **201A**; Person must be over 18 and not disqualified **201B + C***
- c. **Appoint director by**:
 - i. **Resolution in GM 201G***
 - 1. PUB: motion to appoint 2+ persons as Ds by a single resolution may not be made unless the meeting resolves without any dissenting vote to do so (**201E(1)**)
 - ii. **PTY**: may remove + appoint by ordinary resolution **203C***
 - iii. Creation of company **s 120**
 - iv. Directors can appoint another D but must be confirmed by a later GM or AGM **201H** (otherwise cease)
- d. **Removal**
 - i. **Public**: ordinary resolution at members meeting s203D (able to put their case)
 - 1. Directors of PUB cannot be removed by director resolution (**203E**) but can expel under C*
 - ii. **PTY**: may remove + appoint by ordinary resolution 203C*
 - iii. **S 203A**: resign by giving written notice
 - iv. **S 203B**: DQ from managing corporations (see notes)
 - v. → termination of MD but may be breach of contract. Whether there is a right to terminate depends on the mode of removal, the power that is being invoked under RR or C, and the terms of the service contract **Read; Nelson; Schindler**
- e. **Rights**
 - i. Each director can attend and vote and meetings, cannot contract individually unless delegation of power by BOD **Wright Enterprises v Port Ballidu; Brick and Pipe Industries**
 - ii. Right to access company books **s 198F** right to financial records at all reasonable times **s290**
 - iii. Directors can appoint another D but must be confirmed by a later GM (PTY 2m) or (PUB next) AGM **201H**
 - iv. Appoint alternate D (need other Ds approval) **201K**
- f. Other
 - i. Public company must have at least 1 S (**s 204A(2)** [AU], PTY may elect **s 204A(1)**
 - 1. S appointed by Ds (**204D**) and must be >18 (**204B(1)**)
 - ii. Board powers revert to the GM when BOD is deadlocked or unable to act

4. Cases

- a. **Automatic Self Cleansing**: SH wanted to sell certain assets. *Called GM and passed a resolution to force BOD to sell assets.*
 - i. **Resolution was not binding on the board. BOD oversees management** – only BOD can make decide to sell assets
 - ii. A SH resolution cannot affect MGMT decisions of BOD
- b. **John Shaw v Shaw**: SHs tried to stop Ds litigating against other Ds. Res. not binding. BOD had this power unless C* changed

5. Directors Meetings **248A-248G**

- a. **248A**: Ds may **pass resolution** without a meeting of all Ds if all entitled to vote sign a document in favour of resolution
- b. **248B: 1D companies** – pass resolution by recording and signing it
- c. **248C: call D meeting** giving reasonable notice to each director
- d. **248D**: can use **technology** if all directors consent
- e. **248E**: Ds may elect a **chair**
- f. **248F: Quorum** of 2Ds (RR)
- g. **248G: resolutions passed by majority**, chair has casting vote if necessary.

DECISION MAKING BY THE GENERAL MEETING

1. Convening the GM

- a. Must be for **proper purpose s249Q**; at a reasonable time and place **s 249R** [6pm 30 Dec reasonable **Howard**] FD **Smith**
 - i. **Something that falls w/in member's powers? Is it something SH can vote on?** Cannot be about MGMT decision **Automatic Self Cleansing**
 - ii. Members may not requisition a meeting for the purpose of passing a resolution that is beyond the C power of the GM. Ds can omit such proposals without consent of requisitionists **Turner** or refuse to convene where agenda contains a significant number of items that are beyond power and cannot be severed by simple procedural amendment **Gadd**
 - iii. Cannot simply be to harass the directors, must have an objective to pass resolutions **249Q; Adams; Howard**
 - iv. Requisition can have proper and improper purposes, its enough that part of it is proper **NRMA**
 - v. Can be held at 2+ venues using technology to allow participation **s 249S**
- b. **Calling a Meeting**
 - i. **Directors acting alone 249C*/249CA** (listed)
 - ii. **Members Request 249D(1), 249E**
 1. Require 5% of votes (100 SH rule abolished). Request to be in writing, signed by members and state resolutions to be proposed **249D(2)**. Must be w/in 2 months. If director does not call w/in 21 days...
 2. **249E**: if BOD rejects, if (2.5%/half) SH still want to call GM, they can do it and bill CO which can bill D's.
 - iii. **Members 249F**: call the meeting themselves. Liable for all the expenses. Need 5% voting requirement
 - iv. **CT Order 249G** – if impracticable to call GM in any other way. App to be made by D or SH. **Re El Sombrero; Totex**
 1. only other SH would not agree to have GM to appoint directors (No quorum).
- c. **Notice**
 - i. **21 days +** (longer if C* specifies) **249H**; 28 days for listed companies **249HA**
 - ii. **Rules in 249J** – place, date, time, general nature of GM business, **special** resolutions, inform SH re proxy rights **249L**
 - iii. **All Material Information** → NEED FULL & TRUE DISCLOSURE NRMA (EFD) → informed judgment for decisions at GM
 1. A person on the run should not be misled **Re Marra** consider audience (X businessmen), gravity of decision
 - a. Was it capable of misleading? **Shears** though evidence of SH being misled usually determinative **Re Marra**
 2. Can simplify certain concepts if the message is not misleading **NRMA** (complexity of proposal matters)
 3. Directors may be required to undertake inquiries and must not refrain or turn a blind eye to relevant information in order to avoid placing information which may contradict a position taken by Ds **Fraser v NRMA**
 - a. Omissions and half-light statements can be misleading
 4. F&F disclosure must be tempered by the need to present a document that is intelligible to reasonable members of the class to whom it is directed and is likely to assist rather than confuse **Devereaux; Fraser**
 - iv. **Failure to give notice** properly does not in itself invalidate the GM but CT may declare proceedings at GM to be void if it may have caused a substantial injustice **s 1322**
- d. **Quorum** – 2 members **249T***
- e. **Chair 249U** – exercise powers for proper purpose **McKerlie**
 - i. Must give reasonable opportunity of participation to SH as a whole **250S** but no legal obligation on Ds to answer Qs
- f. **Public AGM**
 - i. A public company must hold an AGM (**250N**), The annual financial report, directors report and auditors report must be presented (**s 317**). The AGM includes consideration of these reports, election of Ds, appointment of auditor and remuneration (**250R**) – 5 highest paid company and group execs – the vote is advisory only (**250R(2)-(3)**).
 - ii. Strict liability offence **250N(2A)**. Can apply to ASIC for an extension.

2. Members Rights (PICTURE BELOW)

- a. **Appoint** and **remove** Ds (see previous section)
- b. SHs may give notice of **resolution they propose to move** at GM if 5%/100 members **249N** **Cannot be about a MGMT decision Automatic Self Cleansing**
 - i. CO to pay for distribution of the text of the proposed resolution if it is received in time to send out with the notice of meeting **ss 249O(3), 249P(7)**
- c. Reasonable participation in AGM as a whole **250S**
- d. **Voting**
 - i. **s250J(1)** Default is show of hands (1 SH = 1V) unless poll demanded (1 Share = 1V) **250E*** by 5 members or 5% of votes or the chair **250L**
 - ii. Before the vote, the chair must inform the meeting whether any proxy votes have been received **s250J(2)**
- e. **Proxy: 250A**: appointment requirements e.g. signing
 - i. **249X**: SHs can appoint proxy to cast vote at GM. Mandatory for PUB, RR PTY; **249Y** proxy = rights as SHs (s250D- interest G)

- ii. A notice of meeting must contain a statement of the member's right to vote by proxy, whether or not the proxy must be a member of the company and the members right to split votes between proxies **s249L**
- f. **Circulate a Statement**
 - i. The request must be made in writing by members with > 5% or 100 voting members **ss 249N, 249P**
 - ii. The proposed resolution will be considered at the next GM held two months after the request is served **s 249O(1)**
 - iii. statement does not have to be circulated if > 1000 words or defamatory or if the requestors are to bear costs they do not give reasonable money

3. Decision Making Without a Meeting

- a. **Single Member** - pass resolution by member recording it and signing **249B(1)**
- b. **PTY**: pass resolutions w/o GM if all members entitled to vote on resolution sign DOC stating they are in favour **249A(2)**
 - i. Except resolutions to remove an auditor under **s 329**

Meeting	Directors (248)	Members (249)
Calling for Meeting	<ul style="list-style-type: none"> Directors 248C 	<ul style="list-style-type: none"> Request 249D Convene themselves 249F Director 249C CT 249G
Chair	<ul style="list-style-type: none"> Elected by Ds 248E 	<ul style="list-style-type: none"> (Directors Elect?) 249U
Quorum	<ul style="list-style-type: none"> Min 2 Ds 248F 	<ul style="list-style-type: none"> 2 Members 249T (RR)
Resolution	<ul style="list-style-type: none"> Ordinary Majority 248G 	<ul style="list-style-type: none"> Ordinary Special – e.g. name change, C, PTY – PUB
Proxy	None	<ul style="list-style-type: none"> PTY – can ban proxies 249X is RR for pty companies. Rights of the Proxy 249A/Y??? 250A 249X 249Y
Minute	<ul style="list-style-type: none"> Yes 251A 	<ul style="list-style-type: none"> Yes 251A – evidence what is in them is true
Voting	<ul style="list-style-type: none"> 1D = 1 Vote 248G; Chair may be TB vote 	<ul style="list-style-type: none"> Default is show of hands but 5 members, 5%, chair can ask for a poll 250E 250J 250L
Notice	<ul style="list-style-type: none"> Reasonable Notice 248C (flexible) 	<ul style="list-style-type: none"> 21 Days 249H but C can move it up can push it down.

4. Irregularity/Defects in General Meetings

- a. **1322** – where there is procedural irregularity, meeting will be valid except if there is a substantial injustice & outcome of meeting would have been different if the procedure was followed properly (can take into account ability to influence)
 - i. E.g. to remove director and SH who didn't receive notice had 40%
- b. **Re Express Engineering**: When Ds are also SH, they have capacity to pass resolutions unanimously & by waiving all formalities (e.g. notice). Could have just constituted it as a GM
- c. **Duomatic** - where it can be shown that all SHs who have a right to attend and vote at a GM of the company assent to some matter which a GM could carry into effect, that assent is as binding as a resolution in GM would be
 - i. Informally received approval from all members that could attend and vote
- d. **Re Compaction**: Class B SH had no right to vote but was entitled to attend meetings. The court held he was not aware of the winding up and found the informal resolution void...still had right to notice/attend – substantial rights of influence
 - i. All the voting ones is not enough
- e. **Ho Tung**: A long course of dealings without objection can show acquiescence and agreement by special resolution
- f. **Herman**: waiver of the doctrine of formalities can only occur when there is full knowledge and consent
- g. **Kinsela**: **informal process must be done unanimously and everyone must be informed and receive full disclosure**

5. Other

- a. Minutes provide a summary of proceedings that reflect a true representation of what happened in the GM **251A**
- b. where BOD power reverts to GM due to inability or unwillingness to Act e.g. deadlock or no quorum – GM can step in to exercise MGMT powers **Barron**. BUT in AUS it seems to be constrained to reconstituting the BOD so that it might effectively exercise MGMT powers vested in it **Massey**
- c. GM power to Ratify Ds Acts that are in abuse (e.g. BFD) or excess of their powers (C/RR) vests in SH by ordinary resolution **Irvine** (see also **ss 124/5**) [but not for ASIC/Statute]
- d. Litigation: Within power of **s198A; Shaw**
- e. Other rights - Alter the company's name (s 157), Adopt a C* for the company and repeal or modify its terms (s 136), Change the company's type (s 162(1)), Convert shares (s 254H), Reduce share capital or approve buy-back of shares (s 256B, 256C, 257A, 257C, 257D), Alter rights attached to shares (Pt 2F.2), shareholder approval required for appoint and remove company auditors (ss 327A, 327B, 329), wind up the company (by special resolution – s 491, s 461 financial benefits given to related parties of a public company (s 208), approve termination payments of company officers (ss 200B, 200C)