

COMPANY ORGANS

- Relationship between board & GM is not hierarchical. Each may act as company as an organ
- Power of board of directors – to manage company **s198A**
 - Enter into contract, commence action behalf of company, sell assets, issue shares, debentures, borrow money
 - Delegate powers – **s198D**
 - Pay dividends – **s254U**
 - Decision prevails over shareholders (GM) – *[automatic self-cleansing v Cunningham]* & *[John v Shaw]*
 - GM have to remove directors and appoint new ones
- Appointment of directors (**s9**) – can also be defacto (not validly appointed) or shadow (liable as director but not known as one)
 - By GM – **s201G** (RR) ordinary resolution
 - By BOD – **s201H** (RR) – GM must confirm within 2 months for Pty, or by next AGM if public
 - Representative of a director needs to be approved by BOD – **s201K**
- Director must be natural person (**s201B**), over 18 (**s201B(1)**), subject to disqualifications
 - Convicted of fraud or serious offences with jail > 1yr – **s206B(1)**
 - Undischarged bankrupt – **s203B(3)**
 - Order by court – **s206C, D, E**
 - ASIC can disqualify – **s206F**
- Resignation of directors need to be in writing **s203A** (RR)
 - Need not be accepted by company to be valid *[Marks v Cth]*
 - Resignation is not breach of duties even if averse to company *[CMS Dolphin]*
- Removal of directors:
 - In Pty – **s203C** – ordinary resolution with 21 days' notice
 - Entrenched provisions may be there...breaching **s140(1)(b)**
 - But injunction not available or it would be enforcing contract on unwilling parties (shareholders)
 - Damages may be available
 - In public company – **s203D** with 2 months notice
 - Statement from that director must be circulated and read out GM, why he should remain as director
 - Other directors have no power to remove director, even if there's a clause - **s203E**
 - Can also remove director regardless of constitution (entrenched provisions), damages may be available
- Disqualification of directors:

- S203B – person ceases to be a director if disqualified under Part 2D.6
- S206C, E – Court can disqualify (permanent – *[ASIC v Elm Financial]*)
- S232 – By Court order as oppression remedy
- S206D, E – on application by ASIC, Court can disqualify
- S206F – ASIC to disqualify for up to 5 years for ...
- Secretary – s204A(1)
 - Public company is required to have at least one
 - Responsible for record-keeping within company, notice of meetings of directors & members
 - Signing documents or affixing seal s127
 - Ensure company performs its statutory obligations & to provide info about company for benefit of public
 - Responsible for breaches of administrative provisions s188
- Managing director – s201J
 - S198C – can have any powers directors collectively can exercise
- Chairperson – exercise procedural control at meeting (who can talk first, for how long)
 - Elected by directors – s248E
 - Has casting vote when tie – s248G(2)
 - Chair of board and GM – s249U

COMPANY CONSTITUTION

Mandatory Rules:

- CANNOT BE REPLACED regardless of the CC
- S191 – Directors with material personal interest in issue must disclose to other directors
- S199A – Prohibits certain indemnities to officers and auditors – i.e. you can't create rules to provide insurance for auditors of the company when they are negligent
- S200B – Limits on retirement benefits: Retirement benefits generally need membership approval
- S203D: Removal of director resolution:
 - Public company may by resolution remove director from office despite anything in:
 - The CC (if any) or
 - Agreement between the company and a director or
 - Agreement between any or all members of the company and director
- S249H – Directors of a company must call & arrange to hold GM on request of (a) members with at least 5% of votes that may be case at GM
- Chapter 2M – framework for financial reporting and auditing

Replaceable rules – s141

- Can be displaced or modified by company – s135(2), company can change rules unilaterally
- Amendment of constitution
 - GM need to pass special resolution – s136(2)

- Take effect on date resolution is passed – s137(1)
- Public company need to lodge copy with ASIC – s136(5)
- Allow for entrenched provisions – s136(3) – more than 75% majority, consent of named person
- S140(2) restrictions of amendment of constitution. Not binding unless member agrees in writing
 - (a) Member to take up additional shares
 - (b) Increase liability to contribute to share capital/pay more money
 - (c) Restrict right to transfer shares held (NOT expropriation)
- [Gambotto]
- Need to have 2 meetings if it's variation of class rights (second meeting with holders of affected class) – s246B
- Can seek for oppression remedy [Gambotto]

Voting:

- Resolutions require 50% of votes + 1 (or special, 75%; s9 – with notice; s249L)
- Procedure set out in constitution, or RR applies – show of hands; s250E, J
 - 5 Members/5%/Chair may demand a poll; 250L
- One vote per share unless class rights; s250E (RR)
- Proxy may vote for member; s249X-Y, s250A-B

DIRECTORS' DUTIES

- Board make strategic decisions concerning future direction of company, declare dividends, appoint officers and managers, oversee and manage the affairs of corporation
- Law impose additional duties to board because:
 - Separation between management of company through directors and shareholders (owners)
 - S198A – management of company properly vest with board of directors
 - Directors or other officers (senior) are given extensive powers for company's operations, given access to information through their rules. In position of trust and confidence
 - Need to ensure management doesn't act in their own interest against shareholder's interest (taking profits for themselves thru remuneration or mismanagement or failure to take due care)
 - Shareholders are often vulnerable and passive. Don't have access to same information as readily as board of senior management
- Commercial and legal tension between shareholders and managers
 - Commercial – improving financial position of company requires taking entrepreneurial and business risk. Acting as trustee of assets of company
 - Legal – meeting a standard of care expected of directors
 - Balance between supporting enterprise and holding director's conduct

Source of directors' duties

- General Law:

- Equity [*PBS v Wheeler*]
- Common Law
 - Negligence [*AWA v Daniels*] [*Daniels v Anderson*]
 - Contract
- Statute – Corporations Act
 - Increased scope of duties. Statutory duties applying to officers of company (not just directors). Fiduciary duties only apply to those in fiduciary relationships (directors)
 - Codified CL duty
 - Create obligations that cannot be contracted out by directors' contract or company constitution
 - Provide basis of obtaining statutory relief
 - Enables ASIC as corporate regulator to take action against alleged breaches
 - Impose criminal liabilities where appropriate on directors and officers
- s185 – statutory have effect in addition to and not in derogation of duties arising in CL

Duty is owed by:

- Directors (s9)
 - (a)(i) & (ii) – person appointed as a director, or alternate director, or who is acting in that capacity
 - (b)(i) – acting in position of director (de facto, not properly appointed)
 - [*Mistmorn v Yasseen*] controlled decisions of company as driving force. Described himself as consultant. Held: director of company
 - (b)(ii) – directors of the company or body are accustomed to act in accordance with the person's instructions or wishes (shadow, not appointed but control is unconscious, contested or carefully disguised...directors are accustomed to act in accordance with their instructions)
 - [*ASC v AS Nominees*] locus of decision making, exercising strategic character, not merely acting on his advice, but without due deliberation and entered into transactions directed by the shadow director -> director
- Officer (s9) – person who