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Topic 1: Intro to Advanced Corporate Law

Functions of Corporate Law

1. Facilitative function → provides legal framework for people to deal with each other
- 1.1 Regulatory function → Controls behaviour to achieve social ends (rules of the game)

Purposes of Corporate Law

2. Investor protection → through disclosure obligations, variation of class rights, etc.
- 2.1 Commercial stability and consumer confidence
- 2.2 Certainty → standard form rules

Framework of Rules Regulating Corporations

3. Corporations Act 2001
- 3.1 Corporations Regulations 2001
- 3.2 Case Law interpreting the Corporations Act 2001
- 3.3 Listing Rules for Listed corporations
- 3.4 Takeovers Panel Guides and Rulings
- 3.5 Common law and equity

What is a Corporation & what are its Capacities?

4. A corporation is an artificial legal entity created by a process of registration
5. **s.124:** A company has the legal capacity and powers of an individual AND a body corporate, meaning it can:
 - (a) Issue and cancel shares in the company
 - (b) Issue debentures
 - (c) Grant options over unissued shares in the company
 - (d) Distribute company property among the members
 - (e) Give security by charging uncalled capital
 - (f) Granting a floating charge (circulating interest) over the company's property
- 5.2 **s.125:** If a company has a © it may contain a **restriction or prohibition** on use of power under **s.124**. However, the exercise of that power **WILL NOT be invalid** because it is contrary to an express restriction or prohibition in ©.

Difference between Small and Large PROPRIETARY Companies: s.45A

6. Small Proprietary Ltd Company – s.45A(2)
- (a) Consolidated gross revenue < \$25 million
 - (b) Consolidated gross assets < \$12.5 million
 - (c) Consolidated numbers of full-time employees < 50
 - (d) *Need at least 2 of 3

- 6.2 Large Proprietary Ltd Company - s.45A(3)
- (a) Consolidated gross revenue > \$25 million
 - (b) Consolidated gross assets > \$12.5 million
 - (c) At least 50 employees
 - (d) *Need at least 2 of 3

Consequences of Incorporation

7. Company is a legal person SEPARATE from its directors and shareholders (**Saloman**)
- (a) There is a corporate veil between the company directors and shareholders
- 7.2 Company acts on its own, not those of the directors (**ss.126-129**)
- (a) Sometimes the company is acting directly itself, sometimes the company directors are acting on its behalf

Corporate Groups

8. Often different aspects of the business are owned or carried out by different companies in a group (ready and economical exchange)
- 8.1 Holding Company: a body corporate of which the first body corporate is a subsidiary (**s.9**)
- 8.2 Wholly-owned subsidiary: a body corporate whose members are ALL held by the Holding company, or another subsidiary of the Holding Company (**s.9**)
- 8.3 Subsidiary: A company will be a subsidiary of another company if and only if
- (a) The other body
 - (i) Controls the composition of the subsidiary's board; **or**
 - (ii) Is in a position to cast, or control the casting of, more than ½ of the maximum number of votes that might be cast at a GM of the subsidiary; **or**
 - (iii) Holds more than ½ of the issued share capital of the subsidiary
 - (b) The company is a subsidiary of another company who themselves are a subsidiary

Piercing the Corporate Veil @ CL

- 9. Fraud → where the whole purpose of the corporation is to avoid an EXISTING (not future) legal duty that would otherwise fall on its controllers personally (*Gilford Motor Co v Horne*)
- 9.1 Agency → If the company is the principal's agent, the principal itself will be liable (*SSK*)
- 9.2 Corporate Groups → Position in Australia is contested as seen in *Briggs v James Hardie*
- 9.3 HOWEVER: There is NO common unifying principle, which underlies the occasional decision of courts to pierce the corporate veil (*Roger AJA in Briggs v James Hardie*)

Piercing the Corporate Veil @ Statute

- 10. Sometimes under the Corps Act, a director will be personally liable for their actions (hence piercing the Corporate veil but under statute).
- 10.1 Issue: Who is a director? 3 definitions
- 10.2 1. **Validly appointed director** (s.9(a))
- 10.3 2. **Shadow director (puppet master who sits next to the BOD) (High bar)** → Shadow director is a person/entity who exercises certain influence over the BOD that must extend to the BOD as a whole (vast majority)...the directors are accustomed to act in accordance with the person's/entity's instructions or wishes (s.9(b)(ii))
 - (a) Need to prove BOD's lack of free mind and will ALWAYS (*Antico*), not generally (*Buzzle*)
 - (b) Ability to control, but most importantly actuality of control
 - (c) Prove causation (influence caused the behaviour)
 - (d) Vast majority of the BOD
- 10.4 3. **De-factor director (gunner)** → if a person acts as if a director but is not formally appointed, then considered a director. It's a question of substance, not form. Very fact specific, are you acting like a director or high level management? (s.9(b)(i))
 - (a) (*Drysdale per Mason J at [242]*) → a de-facto director is a person who acts in the position of a director (or high-level management) with or without lawful authority
- 10.5 Issue 2: what can they be liable for under the Corps Act?
- 10.6 s.588G → director's liability for insolvent trading of company
- 10.7 s.588V → Holding company liability for insolvent trading of subsidiary (in the shadow director context if the holding company is deemed to be a shadow director)

Management Structure

- 11. s.198A (RR) → BOD has the right to manage the company. It's a broad power to manage the company. Directors can exercise ANY of the powers of the company found in s.124
 - (a) Members in GM have the right to vote on certain things, but NOT on general management issues

- (b) Members have qualified powers to call meetings and to remove directors
(ss.203C-203D)

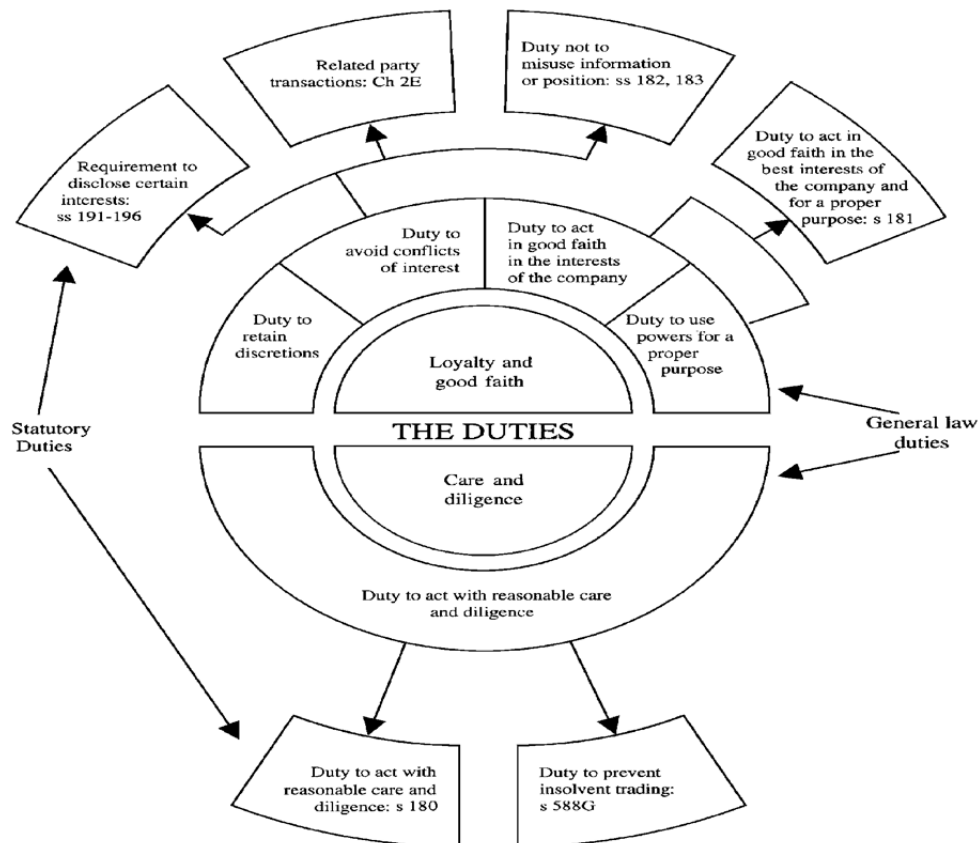
Legal Effect of Internal Governance Rules

12. s.140 → the company ©/RR have effect as a statutory contract between:

- (a) The company and each member
- (b) The company and each director/secretary
- (c) Between a member and other members
- (d) *NOT between director and members

12.2 The statutory contract can ONLY be enforced by parties to the contract

Director Duties (Statutory/CL/Equity)



Becoming and Ceasing to be a Member of a Corporation

- 13. s.231 deals with membership
- 13.1 Person becomes a member by acquiring shares and ceases to be a member when they transfer their shares (note some corporations have transfer restrictions) or have them cancelled under a reduction of capital. Being on the register of members is key to evidence your membership.

Shareholders' Rights & Remedies

- 14. Equitable limitation on voting power of the majority (*Gambotto*)
- 15. 1. Shareholder Suits:
 - (a) Statutory injunctions (s.1324)
 - (b) Statutory derivative action (Part 2F.1A)
- 15.2 2. Statutory Protection for Minorities:
 - (a) Application to wind up company (*Ebrahimi*)
 - (i) Just and equitable grounds
 - (ii) Directors acting in own interests
 - (iii) Quasi-partnership
 - (b) Oppression (ss.232-234)
 - (i) Standing (s.234)
 - (ii) Oppression defined (s.232)
 - (iii) Orders (s.233)
 - (c) Protection of class rights from variation s.246B-s.246G

Topic 1: Corporate Finance – Disclosure

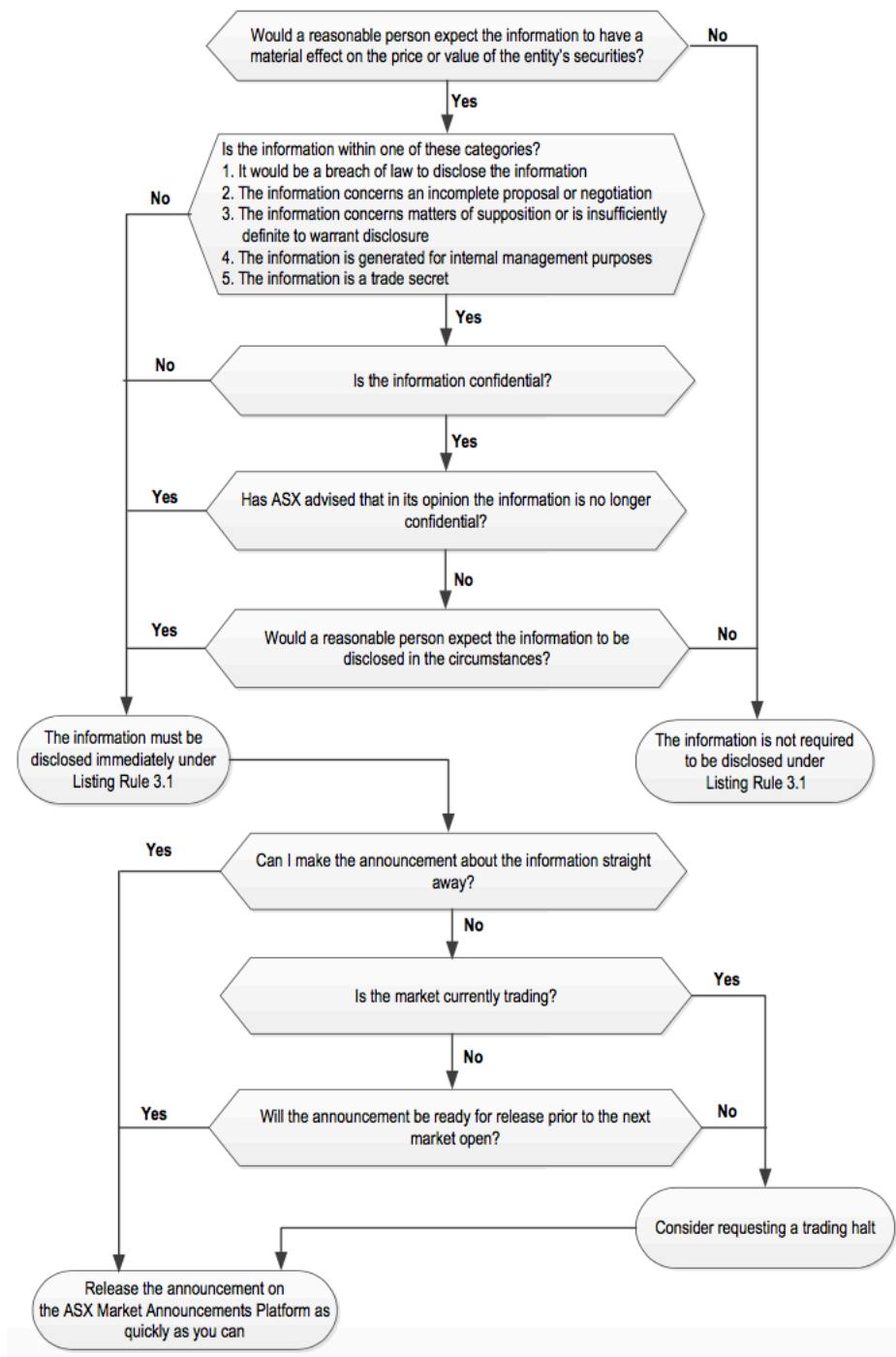
Information & Disclosure under Corporations Act

16. Corps Act requires these types of disclosure obligations: (depends on the type of company and what you're doing):
- (a) Annual and periodic reports
 - (b) Continuous disclosure for **listed companies** (**Chapter 6CA**)
 - (c) Issue of shares (**Chapter 6D**) unless an exception applies
 - (d) Other share capital transactions (there will be requirements under the Corps Act to allow for informed decision making by shareholders)
- 16.2 NOTE:
- (a) **S.286(1)** → all companies must keep written financial records that correctly record and explain its transactions and financial performance AND would enable true and fair financial statements to be prepared and audited
 - (i) **Breach of this is a strict liability offense**
 - (b) **S.588E(4)** → failure to keep financial records as required under **s.286(1)** means a company is **presumed to be insolvent**

Continuous Disclosure (also see Topic 4)

17. Relevant Legislation: **ASX Listing Rule 3.1** + Corps Act Chapter 6CA (**ss.674-678**)
18. **S.674** relies upon **ASX Listing Rule 3.1**:
- (a) **ONLY PUBLICLY LISTED → ASX LR 3.1**: Once an entity is or becomes aware of ANY information concerning it that a **reasonable person** would expect to have a **material effect** on the price or value of the entity's securities, the entity **MUST IMMEDIATELY** tell ASX that information
 - (b) **S.677 CA** (materially affect): For the purposes of **s.674**, a **reasonable person** would be taken to expect information to have a **material effect** on the price or value of ED securities of a disclosing entity IF the information **would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.**

An overview of the continuous disclosure decision process



SEE s.710 Corps Act have all disclosures there

Disclosure for Share Offerings:

19. Share Issues for Large Scale Public Companies:

Types of share issues – large scale public offerings

Types of share issues	Description	How regulated
Initial public offering (IPO) or new float	Issue of new shares to members of the public	ASX Listing Rule 1.1 Chapter 6D For new float (company is already listed but offering new shares to members of the public): ASX Listing Rule 7.1 and note ASX LR 7.1A for companies outside ASX 300 (additional capacity)
Private placement	Issue of shares to professional investors without offer to members of the public	Chapter 6D, note the exceptions Also check constitution
Rights issues Can be renounceable (can renounce your right to buy but sell to others) Or non-renounceable	Right to buy new shares in proportion to shares currently held (eg 1 for 4 – buy 1 for each 4 held)	Chapter 6D ASX Listing Rule 7.7 (pro-rata issues) ASX Listing Rule 7.11 ASX Listing Rule 7.12 (entitlement issue that is not pro-rata)
Dividend reinvestment plans (DRPs)	In lieu of cash dividends, shareholder can choose instead be issued new shares	ASX Listing Rule 7.8
Bonus issues	Issue of shares at no cost based on current shares (eg 1 for 1)	Chapter 2H.2 ASX Listing Rule

19.1

20. As a general rule, if you are a public company offering securities for sale (for example, shares or debentures) then you must provide a disclosure document to potential investors.

20.1 A disclosure document is the broad term used to describe all regulated fundraising documents for the issue of securities.

Which companies can raise funds in Australia?

Public companies (ie those with more than 50 non-employee shareholders) can raise funds from the general public by issuing securities.

Private companies (ie 'proprietary limited' companies that have no more than 50 non-employee shareholders) can raise funds:

- from existing shareholders and employees of the company or a subsidiary company, and
- from the general public if the fundraising does not require a disclosure document.

21. Share Issues for Pty Ltd Companies:

- (a) Must not have more than 50 non-employee shareholders (s.113(1))
- (b) Must not engage in any activity that would require disclosure to investors under Ch 6D except for an offer of shares to:
 - (i) Existing shareholders of the company; or
 - (ii) Employees of the company or a subsidiary of the company (s.113(3))
- (c) **NB:** Different disclosure requirements depending on whether you're a small or large Pty Ltd (see s.45A)
- (d) Pty Ltd cannot make offers requiring disclosure under Ch 6D → so if they want to make sure an offering, they need to become public + give a disclosure doc

Topic 2: Corporate Finance – Generally

Principal sources of Corporate Finance

22. **Share capital:** money or assets given to the company in exchange for a share in the company

22.1 **Debt capital:** money lent to the company in the expectation of interest payments throughout the term, and repayment of the principal by the end of the term. Examples include:

(a) Bank Loan

(b) Debentures (loans given to non-banks, but technically, could be given to a bank too)

22.2 **Key Distinctions:**

Characteristics of debt and equity

DEBT

- Company is required to pay interest at the agreed rate
- Company is required to repay the principal by the end of the term of the loan
- Lender has priority over shareholders for repayment of principal on a winding up (but may be competing for other lenders in the order of priority)
- Lender is not a member of the company and has no membership rights
- Lender has no right to share in surplus assets of a solvent company on a winding up after all other claims have been paid out
- Capital provided is for a short or finite term

EQUITY

- Company is able to pay a distribution of capital in the form of dividends throughout the life of the company
- No expectation of dividends: at board's discretion
- Shareholders have membership rights
- Shareholders only repaid principal on a winding up after all other claims satisfied
- Shareholders entitled to share in surplus assets of a solvent company on a winding up (after all other claims paid)
- Capital is long term: no repayment is expected prior to winding up

22.3

22.4 **Key Directors' Duties in Relation to Corporate Finance Decisions:**

Directors' duties in relation to corporate finance decisions

- Duty to act in the best interests of the company and for a proper purpose: s 181
 - *Ampol* re proper purpose test (step 1: for what purposes can the board's power to issue shares be legitimately used; step 2: for what purposes was the board's power actually used)
- Duty to act with reasonable care and diligence: s 180(1) and consider BJR in s 180(2); reliance under s 189
- Duties under ss 182 (not misuse position) and 183 (not misuse information)
- Duty to disclose a material personal interest in a matter that relates to the affairs of the company: s 191 (all companies) and not participate in decisions: s 195 (for proprietary companies s 194 is the RR)
- Present insolvent trading: s 588G(2) and note voidable transactions ss 588FE
- Also consider any board policy documents: eg BHP Billiton Risk and Audit Committee terms of reference at [43]-[45] on capital management
- Executive management make the initial decision and take it to the Board for approval!

22.5

Topic 2: Corporate Finance – Equity Capital: Share Issues

What is a share?

23. It's a CIA (intangible property). A share is a right to a specified proportion of the company's share capital.
- 23.1 "Once issued, a share comprises a **collection of rights and obligations** relating to an **interest in a company of an economic and proprietary character, but NOT constituting a debt**" (*Pilmer v The Duke Group* [19])
- (a) **RIGHTS** → will depend upon the offer of shares made by the company:
- (i) Right to vote
 - (ii) Control rights
 - (iii) Right to dividends
 - (iv) Right to distribution of surplus assets on winding up
- (b) **OBLIGATIONS** → will depend on the offer made by the company:
- (i) Fully paid share then you have no obligations
 - (ii) Partly-paid shares have an obligation to pay calls when made by the company
- 23.2 **Definition of securities are found in s.92, they include:**
- (a) **S.92(1)(b)** → **Shares** in, or **debentures** of a body
- (b) Therefore, shares come within the definition of securities (**s.92**)
24. **What's share capital?**
- 24.1 Share capital is the total amount that investors provide to the company in consideration for the shares issued to them. Directors usually have the power to issue shares and raise equity capital for a company (**s.198A or s.124(1)(a)**).

Issuing New Shares:

25. Regulation of Share Issues:

- (a) Share issues are regulated by:
- (i) Fiduciary duty on directors to exercise their powers for a proper purpose
 - (ii) Company Constitution
 - (iii) Corps Act and Replaceable Rules
 - (iv) Listing Rules (if you're a listed company)

26. Power to Issue Shares:

26.1 s.124(1)(a) → company has the power to issue shares (ordinary shares)

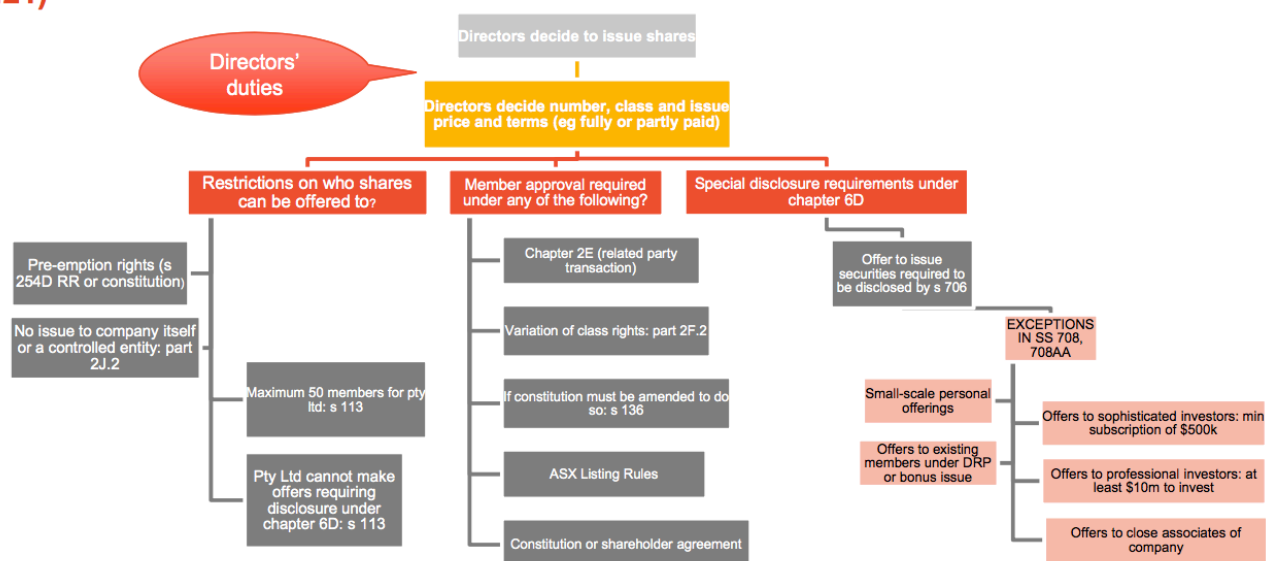
(a) s.254A → ALSO gives company the POWER TO ISSUE (Examined below):

- (i) **Bonus Shares:** shares for whose issue no consideration is payable to the issuing company
- (ii) **Preference shares (including redeemable):** note that issuing preference shares can be a DEEMED variation of class rights under s.264C(5)-(6)
- (iii) **Partly-paid shares:** shareholder liable to calls

(b) s.254B → gives company right to determine the TERMS of ISSUE and RIGHTS and RESTRICTIONS attached to the shares

26.2 s.198A → BOD has the right to manage the company. It's a broad power to manage the company. Directors can exercise ANY of the powers of the company found in s.124

Issuing new shares (adapted from Hanrahan, Ramsay & Stapledon 2015, p. 421)



3. **Related party transactions:** ONLY APPLIES TO PUBLIC. Cannot be overridden by constitutional provisions (unlike above approaches) Ch 2E, s 208(1):
- i. Prohibits public company/entity public company controls
 - o Entitles include corporations, partnerships, trusts, individuals etc: s 9
 - o Company controls it if it has capacity to influence outcome of decisions: s 50AA
 - ii. From giving financial benefits to related parties
 - o Financial benefit broadly defined, includes just about anything that could confer a financial advantage on it (e.g., contracts, all the stuff that activates secret profits, property, etc): s 229
 - o Related party includes directors, directors' family, parent company etc: s 228
 - iii. Unless benefits fall in exception OR are disclosed + approved by GM
 - o Exceptions: benefit given on arm's length (commercially reasonable) terms; benefit was reasonable remuneration for the directors; small sums.
 - o For GM approval to be valid, must give full disclosure with ASIC commentary.
 - iv. Consequences: Contravention does NOT invalidate the transaction (thus if you want invalidity need to use directors' duty to avoid interest in contracts/secret profits); public company/entities not guilty of offence. However, does result in civil penalty for individuals involved; CRL if dishonest: s 208, 9
-

27. What to do if issuance of shares was invalid for some reason? COURT VALIDATION

27.1 **s.254E** → The court has wide powers to **validate or confirm** a purported issue of shares which is **invalid for any reason** or in which the terms of the issue are **not authorized by law or against the company constitution**

27.2 Look to ALL the circumstances (how long have they proceeded that it was valid)? Is it just and equitable to order a court validation in these circumstances? Would it cause financial hardship if no court validation is ordered?

27.3 It's like a way of **curing** an improper share issuance, similar to **s.1322**

(a) Standing: Company, shareholder, creditor, any other person whose interests have been or may be affected

27.4 Example: **Kokotovich Constructions Pty Ltd v Wellington**

(a) Facts: An allotment of shares was validated because the parties had proceeded for **20 years on the basis that shares had been properly issued** and an order validating the issue was just and equitable.

(b) Rules:

(i) Validation powers can be exercised in contentious and non-contentious circumstances (**at 488**)

(ii) The **legitimate expectation** of innocent parties who have been allotted shares in the company is a DOMINANT CONSIDERATION (**at 489**)

Conversion of ordinary shares into preference shares (and vice versa)

28. A company may convert an ordinary share into a preference share or vice-versa (**s.254G(1)**) → **May amount to a variation of class rights (see below)**

28.1 A non-redeemable preference share when issued cannot afterwards be converted into a redeemable preference share (**s.254G(3)**).

28.2 A company can convert ordinary shares to preference shares ONLY if the holder's rights with respect to certain matters are set out in the CC or have been approved by Special resolution (**s.254G(2)**).

- (a) **Only applies when a company is trying to convert ordinary share → preference share**, meaning you can ONLY convert an ordinary share into preference if you set out what the preference shareholders rights with regards to the following 5 matters in EITHER the **Company Constitution** or in a **SPECIAL RESOLUTION**:

- (i) Repayment of capital
- (ii) Participation in surplus assets and profits
- (iii) Cumulative or non-cumulative dividends
- (iv) Voting
- (v) Priority in payment of capital

Conversion of shares into larger or smaller number: s.254H

- 28.1 Do this to allow your share price to better reflect company value
- 28.2 Procedure → ordinary resolution (unless it's a variation of class rights, then you have to follow those provisions)
-

Types of Shares & Issuances:

29. Rights Issue

- 29.1 A rights issue is made when a company offers to issue shares to existing shareholders in proportion to share held.

30. Bonus Shares:

- 30.1 Company does NOT raise any money from the issue
- 30.2 Company pays dividends by an issue of shares.

31. Preference Shares (s.254A(2)):

- 31.1 The main rights attaching to preference shares MUST be set out in the company's constitution. **s.254A(2) and s.254G(2)** require a company that issues preference shares or converts ordinary shares into preference shares to set out in its © or otherwise pass a Special resolution the rights of preference shareholders relating to:

- (a) Repayment of capital
- (b) Participation in surplus assets and profits
- (c) Cumulative or non-cumulative dividends
- (d) Voting
- (e) Priority in payment of capital

- 31.2 Preference shareholders have preferential rights to receive dividends ahead of ordinary shareholders
- 31.3 Preference shareholders usually have the right to receive dividends at a FIXED PERCENTAGE of the issue price of their shares (what they paid for that share).
- 31.4 Preference shares may be **cumulative or non-cumulative**. If a company does not pay dividends in a particular year, **cumulative preference shareholders have the right to be paid arrears of dividends** in subsequent years ahead of ordinary shareholders. Preference shares are PRESUMED to be cumulative if the © is silent on the matter.

32. **Redeemable Preference Shares:**

- 32.1 A company may issue redeemable preference shares (s.254A(1)(b)).
- 32.2 s.254A(3): preference shares liable to be redeemed:
- (a) At a fixed time OR occurrence of an event;
 - (b) At the company's option;
 - (c) At shareholder's option
- 32.3 Redeemable preference shares may only be redeemed on the terms on which they were issued for (s.254J(1))
- 32.4 Redeemable preference shares can only be redeemed back by the company if:
- (a) OUT OF PROFITS or the proceeds of a new share issue made for the purpose of the redemption (s.254K(b))
 - (b) They must be fully paid (s.254K(a))
- 32.5 BREACH →
- (a) Does NOT affect the validity of the transaction (the shares being redeemed in breach)
 - (b) Company is NOT in breach
 - (c) Persons involved in breach contravene (s.254L(2))
 - (d) Persons involve in breach + dishonest contravene (s.254L(3))

32.6 LW Furniture Consolidated

- (a) Preference shares can be preference shares even if no ordinary shares have ever been issued. As long as a share has rights over another share, that's good enough to make them preference shares [69]

33. **Partly Paid Shares:**

- 33.1 A company can issue partly paid shares (s.254A((1)(c)).
- 33.2 Reducing or **extinguishing** the liability of a shareholder of a partly paid share in respect of unpaid capital, **AMOUNTS to a reduction of capital** (this is regulated see below)
- 33.3 s.254M(1) → if shares in a company are partly-paid, the shareholder is liable to pay calls on the shares in accordance with the terms on which the shares are on issue

Types of shares

Term	Explanation
Ordinary share	The share that has no preferential rights to dividends and has voting rights and distribution rights
Preference share <ul style="list-style-type: none">• Cumulative• Redeemable• Converting	Share has preferential rights to dividends and distributions on a winding up (but no voting rights unless dividends are in arrears, resolutions to reduce company's share capital or to wind up the company, class meeting on issues affecting the class)
Partly paid shares	Share is issued but only part of the subscription price is required to be paid up front
Options <ul style="list-style-type: none">• Issued shares• Unissued shares	Not a share, but a right to purchase a share at a future time for the stated price. (contract law: requires consideration)

33.4