

1. Incorporation

1.1. Types of incorporation

Few restrictions operate with respect to the type of incorporation a business chooses. Partnerships cannot be larger than 20 members (s 115). This is varied for particular kinds of partnerships (*Corporations Regulations* reg 2A.1.01: Medical practitioners (50 members), legal practitioners (400 members), accountants (1000 members).

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) provides a means through which the specific character and requirements of Indigenous associations and activities can be recognised.

Co-operatives provide a means to pursue business as well as non-profit goals.

Incorporated associations are governed by the *Associations Incorporations Act 2009* (NSW). Associations which five or more people formed for a lawful object can apply for incorporation, which may be denied by the FTC if it could be inappropriate or inconvenient by reason of the likely scale or nature of the association's activities or property or the nature of the extent of its dealings with the public (s 7(2)). **More on page 7-8 of class notes.**

1.2. The process of incorporation

From 1 July 1998, incorporation is effected by written application of a single person, natural or corporate. Only one member is needed, and no constitution (s 114).

ASIC requires several pieces of information under s 117(2) to effect incorporation.

Restrictions on corporation name are found in s 147. **Page 9**

A name will be of a kind declared by regulation to be unacceptable (s 147(1)(c)) if it is likely to offend a section of the community (*Little*), if it uses protected terms, or if it suggests a connection with the Crown, a government or the Royal family (reg 2B.6.02 and Schedule 6).

ASIC may register and issue certificate of registration (s 118). Directors and shareholders must consent to operating as such (s 120), and the corporation has the legal capacity and power of an individual, as well as distinctive powers of a body corporate (s 124). The issue of a certificate of incorporation is conclusive evidence that all requirements for incorporation have been complied with (s 127(7A)), and a

person dealing with such a body need not inquire further (*H A Stephenson*). ASIC may not correct a defective document, but they may make an winding up order (*SIB Resources NL*).

1.3. Types of companies (s 112)

If a company is not registered as a proprietary company, it is a public company (s 9). Shares are a proportionate interest in the net worth of the business or undertaking of the company. Shares are a chose in action, and may be issued on submission to the board of a form of application for a specific number of shares.

Companies limited by shares distribute liability onto the members limited to the amount (if any) unpaid on the shares respectively held by them (s 9). The outstanding sum may be enforced during the life of the company and by calls made by the directors (s 254M(1)) or liquidators (s 516).

Companies limited by guarantee are formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up (s 9): no amount exceeding that value will be taken on winding up (s 517). From 2010, companies limited by guarantee are prohibited from paying dividends to members (s 254SA). Companies cannot be limited by both shares and guarantee (s 1378).

Unlimited companies have no limit placed on the individual liability of the members (s 9). They are exempt from prohibition on unsanctioned capital reduction (s 258A).

No liability companies must have a share capital, the company constitution must state that its sole objects are mining purposes, and the company cannot have contractual rights under its constitution to recover calls made on its shares from a shareholder who fails to pay them (s 112(2), 148(4)).

Company type may be changed under Pt 2B.7.

1.4. Proprietary companies

Proprietary companies are exempt from public disclosure of financial statements. Only a company limited by shares, or an unlimited company, may be incorporated as a proprietary company. Proprietary companies must have no more than 50 members excluding employees of the company and its subsidiaries (s 112(1)), and proprietary companies must not engage in any activity that would require the lodgement of a prospectus (s 113).

A company is a small proprietary company for a financial year if it satisfies two of the three criteria in s 45A(2):

- (a) Consolidated revenue for the financial year of the company and the entities it controls is less than \$25 million
- (b) The value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than \$12.5 million
- (c) The company and the entities it controls have fewer than 50 employees

Private companies may register with a single shareholder, and trade with a single director (ss 114(1), 221(1)). They do not need to hold an annual general meeting (s 250N). Shareholder resolutions do not require a meeting (s 249A). Proprietary companies are also exempt from the prohibition on deliberations of the board where members have a material personal interest in Ch 2E.

2. Limited Liability

Corporations can commit crime and tort. Injury to reputation can be responded to in defamation (*Jones*), but not for damage to feelings (*Lewis*). Corporations may be in contempt of court (*R v J G Hammond*). Corporations cannot personally appear (*Tanamerah Estates*). Corporations are not entitled to invoke the common law privilege against self-incrimination (*Environmental Protection Authority*). Generally, if a statute includes the word 'person', this includes corporations (although s 75(iv) 'resident' does not, *Australasian Temperance and General Life Assurance Society*). Corporations may be an enemy alien (*Daimler Co Ltd*).

The company attains maturity at its birth (ie. Registration, s 119), and receives the benefits of limited liability on incorporation (*Saloman v Saloman*, s 124). As the company has separate legal personality, the directors and executive are employees of that company (*Lee v Lee's Air Farming*).

3. Rights relating to shares

Limited liability shares bring with them rights to vote at AGMs, the right to a dividend if declared, the right to freely transfer (s 140), the right to receive notice of meeting, the right to vote on the composition of the board of director, the rights to financial writing and disclosure, the right to be on the share register, and the right to sue for breach. Shares limited by guarantee do not receive rights to be paid dividends (s 254SA), and tend not to pay initial capital.

Rights on partly paid shares bring with them an obligation to pay call. Rights are not to pay more than their full value. Other rights might be precluded until fully paid.

Rights on (redeemable) preference shares, which are a form of hybrid share, require an individual to put money down and give up your right to vote in return for a definite rate of return.

A debenture is a secured loan. A floating charge is a personal property security interest.

In a proprietary company, replaceable rules require directors to offer new shares to existing shareholders in proportion to their holdings (s 254D(1)-(3)). Ordinary resolutions may authorise directors to make a particular issue of shares free of this pre-emptive right (s 245D(4)).

Unless a member of a company agrees in writing to be bound, they are not bound by a modification of the constitution made after the date on which they became a member so far as the modification (s 140(2)):

- (a) Requires the member to take up additional shares, or
- (b) Increases the members liability to contribute to the share capital of, or otherwise pay money to, the company, or
- (c) Imposes or increases restrictions on the right to transfer the shares already held by the member, unless the modification is made:
 - (i) In connection with change from public to proprietary company, or
 - (ii) To insert proportional takeover approval