

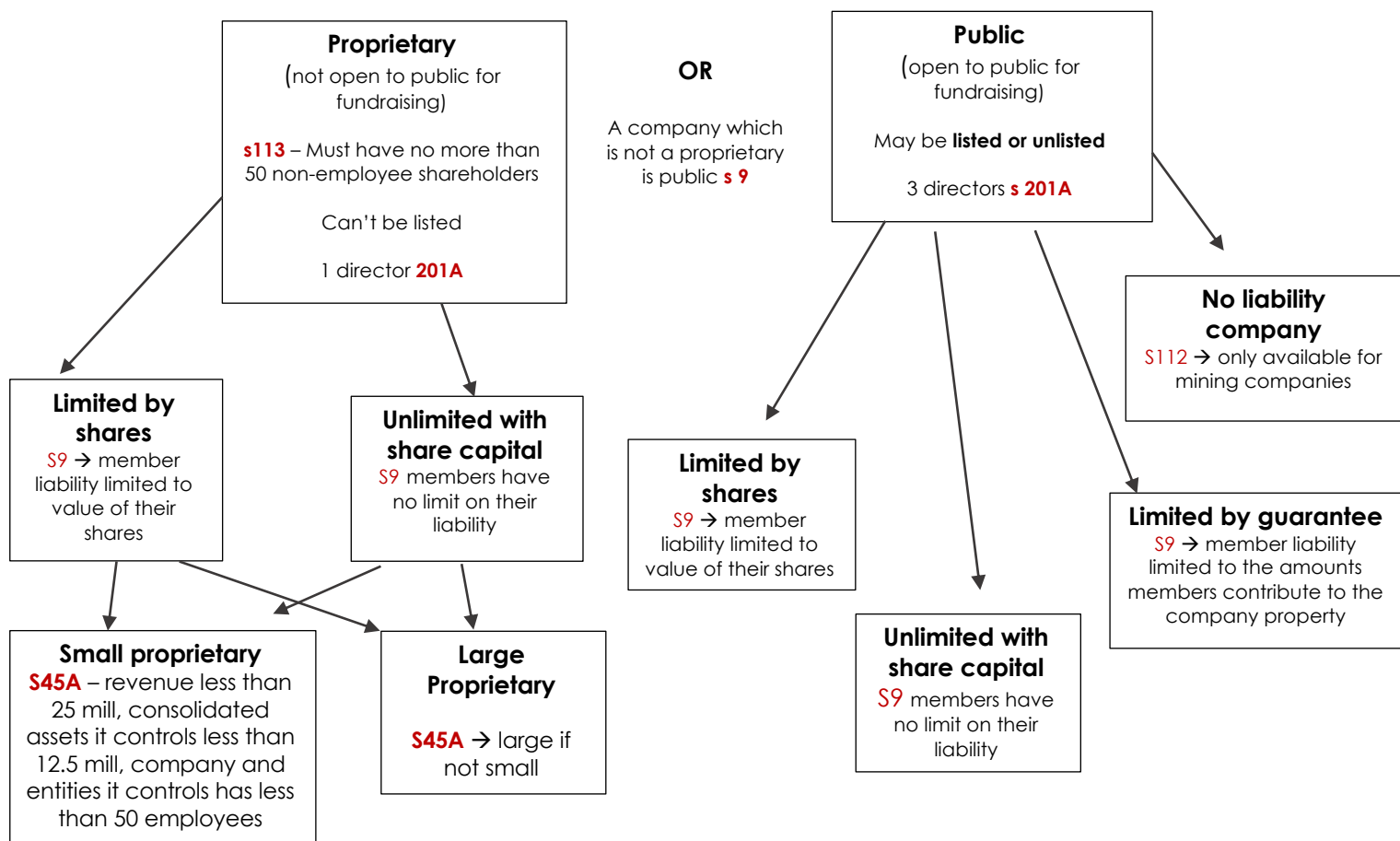
This is a sample summary guide for LAWS2014 and contains snippets of a few topics. The full guide contains all cases and every topic in complete form.

## COMPANY FORMATION

### 1. How to form a company?

- a. Under **s 117**, to register a company you **must lodge an application** with **ASIC** by completing **Form 201** including details of the type of company, its name, contacts of persons who are members, directors and secretary, proposed office, share capital or guarantee obligation.
- b. A company must have a minimum of 1 member (**s 114**).
- c. After lodging an application, **ASIC may register the company**, supply with an ACN and issue a certificate with its details under **s 118**.
- d. The company exists as a body corporate from the day it is registered (**s119**).

### 2. What type of Company will be formed? → classified according to liability (**s 112**)



## COMPANY FUNDRAISING

### a. What are the obligations of a company who raise capital? → disclosure

#### i. Is the Company public?

1. As a general rule a private (proprietary) company can only raise funds from existing shareholders and employees of the company and not the general public.
2. **BUT** → A private company may be able to raise funds from the general public if the fundraising does not require a disclosure document (satisfies an exemption → go to 4).

#### ii. Is the company required to produce a disclosure document?

1. **Is there an offer or invitation of securities for issue?**
  - a. An offer is inviting applications for the issue of securities **s 700(2)**

- i. Distributing material to encourage someone to enter negotiations to result in the issue of securities is sufficient. **AG v Australian Fixed Trusts**

## 2. Does the offer deal with 'securities'?

- a. Includes shares, debentures or options to securities **s 700**
- b. *N.B the word security or debenture might not be used but instead look at the features of them.*

## 3. Is it relating to primary offerings or secondary trading?

- a. Issue of shares refers to the primary (initial) offering.
- b. However, secondary trading may require a disclosure under **s 707**
  - i. E.g. the offeror controls the company and they are not quoted or quoted and not on the stock exchange. **s 707(2).**

## 4. Are there any exceptions so that a disclosure is not required? **s 708**

N.B. The company bears the onus of proof that they satisfy an exception.

### a. Small scale personal offerings

- i. **2/20/12** rule → under 2 million, raised by no more than 20 investors over 12 months.
- ii. Personal → parties with whom your business has had former connection and have interest in the offer. Can only be accepted by person to whom it was made.

### b. Sophisticated investors.....

## CORPORATE PERSONALITY

- 1. A company may be registered under **s 177** by lodging an application with ASIC by completing Form 201.

a. Under **s 112**, a company may be registered as (see *company formation for more details*)

#### i. Public

- 1. Limited by shares
- 2. Limited by guarantee
- 3. Unlimited with share capital
- 4. No liability

#### ii. Proprietary

- 1. Limited by shares
- 2. Unlimited with share capital

b. A company must have a minimum of 1 member (**s 114**).

- 2. A company comes into existence on the day which it is registered (**s 119**).

- 3. **As a general rule from Salomon, once incorporated a company is a separate legal entity which is separate from its members and separate from its directors.** Also reflected in **s 124**.

a. As a result from this:

- i. Creditors of an insolvent company can not sue the company's shareholders for outstanding debts – agency is not an exception to separate legal personality. **Salomon**.
- ii. A person can operate in a dual capacity in a company (As an employee and managing director) – a company is separate from its controllers. **Lee v Lee's Air Farming**
  - 1. Confirmed by HCA in **Hamilton v Whitehead** → two capacities for the director, one as an individual and one as a corporation. Accessorial liability will depend on operation in a personal/separate capacity for the company.
- iii. A company's property is not the property of its members. A member can't insure the property of the company – they have an interest in the company but not an interest in their property. **Macaura**

- iv. Even if a company is ultimately controlled and owned by one person, this does not impact its status as a legal entity separate and distinct from members. **Andar Transport HCA**

- 1. It is possible to distinguish between the duties owed by an employer and those owed by an employee in their personal capacity as director or employee.

#### 4. Does this extend to Corporate Groups? YES

See company formation above for corporate group definition.

- a. Even in a corporate group, each company is a separate and independent legal entity. **Walker v Wimborne**
  - b. However, there is an exception where all.....
5. Does the case present a circumstance where courts would be **more or less inclined to lift the corporate veil** and hold the **members or directors personally liable** for the organisation's activities or debts?

##### a. Common Law

##### i. Fraud

- 1. The **whole purpose** of incorporation is to evade an **existing legal obligation** that otherwise falls personally on the controller. **Gilford Motor; Jones v Lipman; Prest**.....

- ii. **Agency** → If company is found to be the Agent of the principle (director/actor), then liability forms on the principle rather than the company.

- 1. In **Soloman**, an agency relationship was completely dismissed even with a sole director. This idea was upheld in **James Hardi** that expressly states complete dominance by one person is not enough to pierce the veil on agency grounds.
- 2. *English case: highly criticised and not likely to be applied in Aus* → **Smith Stone and Knight**

a. Facts:.....

a.

## 2. Members Meetings

### 1. Who can call a members' general meeting?

- a. A meeting may be the **annual general meeting** or:
  - i. **Public company** must hold an AGM every calendar year within 5 months after the end of the financial year **s 250N**.
  - ii. **Proprietary company** is not required to hold an AGM (unless constitution requires)
  - iii. The AGM has extra requirements for listed companies: auditor must be present, must provide a reasonable opportunity to ask questions relating to management, remuneration report and auditor.
  - iv. Matters considered at the AGM are listed in **s 250R**.
- b. **Extraordinary general meeting** (extra meetings that aren't the AGM)

#### i. Directors

- 1. The directors may resolve to call a meeting.
- 2. A single director may call a member general meeting **s 249C (RR)**.
  - a. But if a listed company, this can't be replaced **s 249CA**.

#### ii. Members

- 1. Members with at least 5% may request the directors to hold a meeting. **S 249D**. Their request must: be in writing, state any resolution proposed, be signed by requesting members and be given to the company.
  - a. If directors fail to convene this meeting within 21 days, those requesting may call and arrange to hold the meeting under **s 249E**.
  - b. The company must then reimburse the members for their expenses, unless they can show they took all reasonable steps to hold the meeting within time. **S 249E**.

2. Members with at least 5% of votes may call and arrange to hold a general meeting. But they have to cover the cost themselves **s 249F**.
- iii. **Court** → very rare but Court may convene under **s 49G** when it is impractical to convene in any other matter. E.g. don't have quorum because one director died and only one left.

## 2. Has the meeting been called validly?.....

### GENERAL LAW LIABILITY IN CONTRACT & TORT

*General Liability views the case from the perspective of the third party – benefits companies*

#### Contract

#### 1. Did the company have capacity enter into the transaction?

1. Since the remove of objects in the memorandum this is no longer a relevant question.
2. Further, even if a company opts to include objects and goes beyond these the validity of the act is maintained by **s 125(2)**.

#### 2. Did the agent purporting to act on the company's behalf have authority to bind the company?

##### 1. Was the contract entered into by the corporation:

##### i. **Directly** with the 3<sup>rd</sup> party; or

Authorised by **s 127** with **(2)** or without **(1)** a seal → must be signed by **(i) 2 directors, (ii) 1 director & secretary or (iii) by the single director in a single director company**.

##### ii. **Through an agent** who acts on behalf of the company

1. Authorised by **s 126(1)** to 'make, vary, ratify or discharge a contract' may be exercised by an 'individual acting with the company's express or implied authority and on behalf of the company'.

#### The Corporation will be bound by the acts of the agent with:

##### 1. **Actual Authority** (express or implied)

##### a. **Express**

##### i. A provision in the Act or in the Constitution

1. E.g. **s198ARR** → **Business of a company is to be managed by the directors**.

a. When board exercises these 'management' powers, it is acting as an agent of the company with express actual authority.

##### ii. By the board of directors delegating its power

1. E.g. delegating to managing director in **s 198CRR**

##### b. **Implied** → by implication from the things the principal says and does including: **Hely-Hutchinson GR**

##### i. **Appointing someone to a certain position**

##### 1. **What positions will count?**

- a. CEO or MD? → being appointed to this position grants implied actual authority to 'do all such things as fall within the usual scope of that office'
- b. Other executive? → there will be some implied actual authority that reflects the scope of authority usually delegated to someone doing that job
- c. A director acting alone or chairperson? → Individual directors do not usually have the power to bind the company (**Hely-Hutchinson; Brick & Pipe**). A single director can only bind with an express grant or authority flowing from the conduct of the board as a whole.
- d. Company Secretary? → Implied authority to execute contracts relating to administrative matters (**Panorama Developments**)

##### ii. **Otherwise acting to give the personal authority, including through acquiescence**.

1. If the BOD acquiesces to conduct of an agent it: **Brick & Pipe; Hely-Hutchinson**

a. Is it a similar contract entered into previously?.....

### STATUTORY CIVIL LIABILITY

*Civil Liability shifts to view the case from the perspective of the company – benefits third parties*

#### 1. What assumptions in the third party allowed to make about the company?

##### a. **S 128 – Entitlement to Make Assumptions**

- i. (1) A person is entitled to make the assumptions in section 129 in relation to **dealings with a company**. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
  1. **Dealings?** → 'purported (appearing/alleged) dealings', not just authorised. **Story v Advanced Bank**
- ii. (2) A person is entitled to make the assumptions in section 129 **in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company**. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- iii. (3) The **assumptions may be made** even if an **officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings**.

##### b. **S 129 – Assumptions that can be made under s 128**

##### i. **Constitution and Replaceable Rules Complied With**

1. (1) A person may assume that the **company's constitution** (if any), and any provisions of this Act that apply to the company as **replaceable rules, have been complied with**.
2. **Statutory equivalent of Indoor Management Rule**.

##### ii. **Director or Company Secretary**

1. (2) A person may assume that **anyone who appears**, from information provided by the company that is available to the public from ASIC, **to be a director or a company secretary of the company**:
  - a. (a) **has been duly appointed; and**
  - b. (b) **has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company**.
2. **Statutory equivalent of customary authority (actual implied authority through position)**.....

#### 2. Is the benefit of the assumption forfeited due to the fact that the person knows or suspects the assumptions are incorrect?

##### a. **S 128 – Entitlement to Make Assumptions**

- i. (4) A person is **not entitled to make an assumption** in section 129 **if at the time of the dealings they knew or suspected that the assumption was incorrect**.
  1. Burden that the third party knew or suspected falls on the company seeking to overturn the presumption. **Sunburst Properties**.
  2. **'Put on inquiry' is no longer sufficient** to prevent a person relying on assumption and has no application to the statutory provision (as set out in explanatory memorandum).
  3. Knowledge or Suspicion must be **at the time of dealings**. **Correa v Whittingham**
    - a. **Knowledge?** → .....

## DIRECTORS' AND OFFICERS' DUTIES

A fiduciary duty is to act in the best interests of someone else, not your own. **Hospital Products v US Surgical**

**One action** or parts of can **constitute a breach of multiple duties**. **Port Ballidu** → the common law negligence and equitable duty is so similar the underlying acts are treated the same.

- In this case, the limitation period on negligence carries over to the equitable claim.

### 1. Who owes the duty?

- a. Directors and officers (unless otherwise stated e.g. some employees, former directors)
  - i. **S 9 Officer** → de facto director (makes substantial decisions), has significant financial impact, or shadow director (Company acts in accordance with their wishes).

### 2. To whom is the duty owed?

- a. As a general rule, **directors owe their fiduciary duties to the company as a whole**, not to individual shareholders. **Percival v Wright** (reaffirmed in **The Bell Group v Westpac**)
  - i. **P v W**: Bought back shares for a fair price but was negotiating a company sale for a higher price. Duty owed to company, not to individual shareholders to get a better price. Note here that take over talks were in their infancy and to disclose could potentially harm the commercial interest of company. CF if no harm would be caused.
    1. NB. Difference between individual shareholders and company as a whole (group of shareholders).
- b. **As a result, the company is the proper plaintiff against the director.** **Foss v Harbottle**
  - i. **BUT → LIMITED EXCEPTIONS (very rare)**.....

## Duty to Act in Good Faith

To establish that the directors have acted improperly the onus rests on the person making the allegations.

**Australian Metropolitan**

If it is established → the transaction is voidable.

### General Law

#### 1. Act in Good Faith **s181(a)**

- a. Subjective intention → what the director honestly believed was in the company's best interests. **Re Smith & Fawcett**
  - i. Director has the utmost discretion bona fide in what they consider – not what the court may consider – is in the interests of the company.
    1. Constitution allowed for directors to use discretion in refusing to register transfer of shares. Director refused to issue share transfer of inherited shares. This is allowed- if the director doesn't believe it is for the company's best interests.
    2. Upheld by HCA in **Australian Metropolitan**: .....

## Duty to Avoid Conflicts

What type of Conflict:

#### 1. Direct **s 182**

- **A director, secretary, other officer or employee of a corporation must not improperly use their position to:**
  - (a) **gain an advantage for themselves or someone else**; or
  - (b) **cause detriment to the corporation.**

- a. **Principles from Bray v Ford** → courts will focus in on only one of two limbs.

- i. **Directors cannot make a profit** from their position (**no profit**)
    1. E.g. **Furs v Tomkies**: MD of company entered into a side deal with the purchaser of the company for his own financial benefit → this is breach of fiduciary duty.
  - ii. **Directors cannot place themselves in a position where there is a conflict between duty and interest (no conflict)**
    1. Is this only real/actual conflict or the **potential of conflict**?
      - a. Historically in **Bray v Ford** it was interpreted as only actual conflicts, this has been subsequently extended to include possible conflicts through the **'whether a reasonable man, looking at the circumstances of the case could see a real sensible possibility of conflict'** **Boardman v Phipps**; **Aberdeen**
      - b. **Aberdeen**: Shows how strict the rule is → Company contracted another for supply. Director has an interest in the other partnership. There was a conflict so the director should have given the full benefit of all the knowledge and skill he had in relation to the subject. Irrelevant if the outcome is fair. Contract was voidable.
    2. Extends to shareholdings by directors (not just director in another company) and even an indirect shareholding as trustee for others. **Transvaal**:
- b. **However, has the conflict may be attenuated:.....**

**n.b.** if the court focuses on the no profit limb then if your transaction actually makes a loss then you're not in breach.

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