

# CORPORATE LAW

Topic Notes

BLAW20001

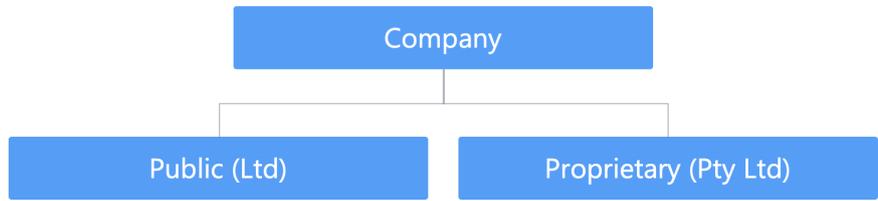
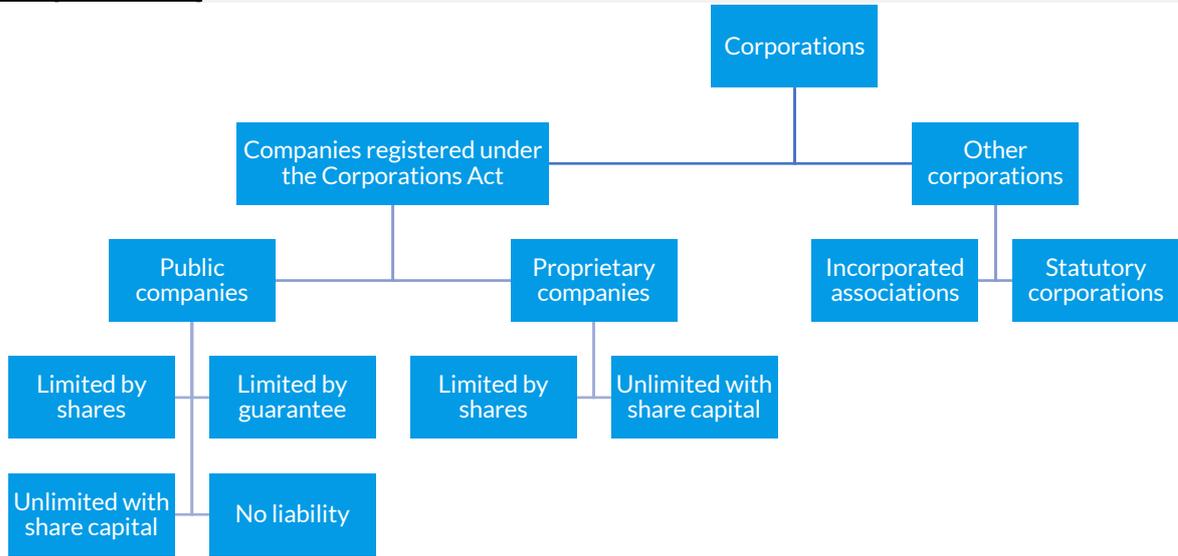
Semester 1, 2020

## Table of Contents

<b>CASE SUMMARIES</b> .....	<b>4</b>
<b>COMPANIES</b> .....	<b>11</b>
Company case law: [2-300 – 2-310].....	11
Introduction to companies: [1-001 – 1-260].....	11
Legal nature of companies: [3-001 – 3-140].....	11
Shares (equity capital): [18-300 – 18-340].....	11
Debt vs Equity.....	12
Limited liability: [3-300 – 3-340].....	12
Some key terms [1-500].....	12
Types of companies: [4-300 – 4-360].....	13
Corporate groups: [4-400 – 4-460].....	14
Constituting companies: [5-001 – 5-140].....	14
<b>INTERNAL MANAGEMENT</b> .....	<b>15</b>
<i>Replaceable Rules</i> .....	15
<i>The Constitution</i> .....	16
Modifying/Repealing the constitution Section 136(2).....	16
Entrenchment section 136(3).....	16
<i>Legal effects and ramifications of Internal Governance Rules</i> .....	17
Failure to comply with Internal Governance Rules.....	17
<b>TRANSACTING BY COMPANIES</b> .....	<b>18</b>
<i>Direct contracting</i> .....	18
<i>s126 Indirectly - agent</i> .....	19
<b>DIRECTORS</b> .....	<b>21</b>
<i>Director’s authority to make decision</i> .....	21
What is a director?.....	21
Special types of directors.....	21
<i>Appointment and Removal of Directors</i> .....	22
<b>DECISION MAKING</b> .....	<b>23</b>
<i>Director meetings</i> .....	23
<i>Member’s decision-making powers</i> .....	24
What can members vote on?.....	24
If members disagree with the board.....	24
Decision-making without a meeting.....	24
Variations of Class Rights.....	25
<i>Member’s Meetings</i> .....	26
Annual General Meeting.....	26
Rules for members meeting.....	26
Calling a member’s meeting.....	26
Meeting Agenda.....	26
Notice.....	26
Conduct of meeting.....	27
Voting.....	27
GAMBOTTO Restrictions on member’s decision making.....	28
<i>Procedural Irregularities</i> .....	29
<b>DUTIES</b> .....	<b>30</b>
<i>Duties Summary</i> .....	30
Statutory Duties.....	30

General Law Duties .....	30
<i>s180 - Duty to act with reasonable care and diligence</i> .....	31
<i>s588G – Duty to prevent insolvent trading</i> .....	33
<i>s181 – Duty to act in good faith in the best interest of the company</i> .....	35
<i>GL Duty to Avoid Conflicts of Interest</i> .....	37
<i>s191 - s196 Duty to Disclose Material Personal Interests</i> .....	38
<i>s182 – Duty to not make improper use of position</i> .....	39
<i>s183 – Duty to not make improper use of information</i> .....	39
<i>s208 – Related party transactions (Ch 2E)</i> .....	40
<b>DIVIDENDS, SHARES &amp; CAPITAL MAINTENANCE .....</b>	<b>41</b>
<i>Dividends</i> .....	41
<i>Share Issues</i> .....	42
On formation .....	42
Issuing new shares .....	42
<i>Capital Maintenance</i> .....	43
<b>REMEDIES .....</b>	<b>46</b>
<i>ASIC’s Enforcement of duties</i> .....	46
<i>Company’s civil remedies</i> .....	48
<i>Relief from breach of duty</i> .....	48
Court granted relief .....	48
Company ratification .....	48
<i>Member’s remedies</i> .....	49
Member’s statutory remedies .....	49
Member’s personal action .....	51
Statutory derivative action .....	52
<b>REPORTING AND DISCLOSURE .....</b>	<b>53</b>
<i>Record-keeping and lodgements</i> .....	53
Record-keeping by companies: 17-001 – 17-140 .....	53
Information to be lodged: 17-200 – 17-260 .....	53
<i>Financial reporting</i> .....	54
Periodic financial reporting: 17-300 – 17-380 .....	54
Audit: s 17-400 .....	54
Continuous disclosure: 17-500 – 17-520 .....	54

Pg	Case	Legal Principle	Facts	Issue	Decision
<b>Week 1</b>					
14, 48	Saloman v Saloman & Co Ltd	- Separate Legal Entity	Mr S was the sole trader of a shoe business. He set up a separate company Saloman & Co and sold his business to the company. In return, he received money, shares and a security debenture that offered him the right to priority for return of capital upon liquidation. S&Co wound up, and Mr S received priority payment.	Other shareholders (members) complained that Mr S and S&Co were the same things.	Company and controller are separate legal entities, Mr S entitled to his priority payment.
49	Industrial Equity Ltd v Blackburn				
	Walker v Wimbourne				
50	Lee v Lee's Air Farming Ltd	- Separate Legal Entity - Companies can contract with its controlling participants	Mr Lee, director and worker for LAF, died while on the job. Ms Lee claimed workers compensation from their insurer.	The insurer argued that since Mr L was the controller of the company he couldn't be an employee, and that it was impossible to enter into an employment contract with yourself.	The company and controller are separate legal entities and can enter into contracts with directors.
	Macaura v Northern Assurance Ltd	- Separate Legal Entity - Company's property is not the property of its participants	Mr M owned timber plantation, transferred ownership to the company. Mr M had the insurance policy, but the company owned the asset.	Mr M tried to claim insurance, the insurer refused to pay since the company didn't have insurance, and Mr M didn't control the asset.	Company owned the timber, not Mr M, could not claim insurance.
54	Edwards v Attorney-General of New South Wales	- Limited liability			
<b>Week 2</b>					
57	Briggs v James Hardie & Co Pty Ltd	- Piercing the Corporate Veil	B sued JH because he developed asbestosis while working for Marlew, a JH subsidiary.	M was insolvent so B tried to sue JH, which would pierce the corporate veil separating M and J.	Arguable that B could make a claim against JH (not definitive, just that an argument could be made)
60	Gilford Motor Co Ltd v Horne	- Piercing the Corporate Veil (corporate form to avoid existing legal duty)	H MD of G, had a non-compete. H left G and setup another company that solicited G's clients. New company set up with shareholders H's wife and business associate.	G argued that the person behind the new company was H and should be bound by the non-compete.	New company formed by H with sole/dominant purpose of avoiding the non-compete. Pierced corporate veil, held that company should be held to the non-compete.
	Jones v Lipman		L contracted to sell land to J. Before sale completed, L transferred land to a company he controlled, intending to keep land from J.	By transferring to the company, J was unable to compel L to transfer the land.	Corporate veil pierced – contractual obligation on L to transfer land also binding for the company. Company used as a device to avoid existing contractual obligation.
92	Ho v Akai	- Subsidiary companies	Akai entered agreement with Grande, where G would operate the business of A.	Was G a holding company of A?	Not enough to make G a holding company of A.
112	Eley v Positive Government Security Life Assurance Co Ltd	- S140 Parties to a contract	E shareholder, and also employed as PGSL solicitor. The constitution stated E would be the PGSL's solicitor for life..	PGSL then fired him, and E sued, claiming a breach of contract.	Clause affected Eley in capacity as an employee, not as a member, so not enforceable under s140. Dealt with under a different body of law
113	Smolarek v Liwzyc		Replaceable rules not followed around appointment of third director Duta.	Provision of statutory contract cannot be enforced unless it affects the member in their capacity as a member. If the wrongful act is only impacting the company, the member is not affected.	



Limited by Shares	✓S516 - Liability of shareholders is limited up to the point of the amount that is unpaid on their shares	
Limited by Guarantee	✓ typically a club. Just exists for the benefit of its members. Formed by members signing a guarantee (for a token amount of money).	
Unlimited	e.g. group of professionals. Not allowed to limit their liability because of rules, such as professional indemnity. Want a company to enter contracts, sign leases etc. No "Ltd" or "Pty Ltd" after the name	
No liability	Always public mining companies. Recognises the extreme risk involved in mining, mining shares are typically partly paid.	

By members' liability

- Unlimited
  - Some professions, such as law, prevent limited liability companies from operating.
- Limited by guarantee
  - Liability limited to the amount the member guarantees to contribute to the property of the company upon winding up
  - Typically, non-profit activities like independent schools
- No liability
  - Only available for mining
  - Section 112(2)
  - Have "NL" in their name
- Public/proprietary
  - Proprietary
    - Section 113 - Maximum 50 non-employee shareholders
    - Section 112 – limited by shares or unlimited with share capital
    - Can't offer shares to public
    - Section 249A - Can pass resolutions at general meetings just through signature
    - Types of Pty Ltd companies
      - Single director/shareholder companies
      - Small proprietary companies
        - At least two of the following three tests:
          - Consolidated annual gross operating revenue less than \$25 million
          - Consolidated gross assets under control less than \$12.5 million
          - Company and its entities have fewer than 50 employees
        - Large proprietary companies
      - Section 201A(1) –Proprietary must have 1 director
    - Public
      - Section 112 – public companies are all companies other than proprietary companies
      - Requirements
        - Section 250N - Annual general meeting
        - Section 292 – Lodge financial statements
        - Ch 2E – Restrictions on transactions with related parties

- Section 201A(2) – Public companies must have 3 directors
- Public companies
  - Section 204A – Must have a secretary
  - Section 329 – Resignation of auditor requires ASIC's consent
  - Section 300(10) – Directors' report must contain statements about qualifications of directors, attendance at meetings, and their shareholdings or contracts with the company
  - Section 201E – Special rules for appointment of directors
  - Section 203D – Restrictions apply to the removal of public company directors
- Companies can change types (go public/go private) by passing a special resolution (at least 75% of the votes on the resolution)

#### **Corporate groups: [4-400 - 4-460]**

Corporate group -> one company controls one or more other companies

Reasons for corporate groups

- Separating out management of different aspects
- Limited liability – quarantining risk

Subsidiary companies

- Division 6 of Pt 1.2
- Subsidiary if the holding company
  - Controls the composition of the subsidiary's board
    - Can exercise the power to appoint or remove all or the majority of the directors of the subsidiary company
  - Is in the position to cast/control more than half the votes of the subsidiary
  - Holds more than half of the issued share capital
  - Or if the subsidiary is a subsidiary of another subsidiary of the holding company
    - Section 46 and section 47
- Ho v Akai Pty Ltd

Control – section 50AA “an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial or operating policies”

#### **Constituting companies: [5-001 - 5-140]**

Corporations created through registration with ASIC – can also purchase a pre-registered *shelf company*.

Application process

- Section 117 complete application form, which contents are prescribed by the section
  - Detailed on page 99
- Section 148 names
  - Public companies
    - Ltd
  - Proprietary companies
    - Pty Ltd
  - No liability
    - NL

## S126 INDIRECTLY - AGENT

Can Y enforce the contract with X?

Companies have the legal capacity to

1. Does agent have actual authority (express or implied)
  - a. Yes - contract valid
  - b. No - go to step 2
2. Company objects - X doesn't want to go-ahead with contract
3. Outsider, Y entitled to rely on assumption
  - a. Common law
    - i. Apparent authority (holding out, by someone with actual authority, reliance)
      1. Freeman, Crabtree, Pacific
    - ii. Indoor management rule
      1. Turquand
  - b. Statutory assumptions
    - i. s128 entitles reliance on s129
4. Does outsider lose right to rely on assumptions
  - a. Common law
    - i. Put on inquiry (objective)
  - b. Statute
    - i. Knew or suspected (subjective) s128(4)
5. Conclude - enforceable or not

### 1. Does the agent have actual authority to enter into the contract?

#### Actual authority

Actual = Express + Implied - Carve out

- **Express actual authority**
  - From provision in CA2001 or company's constitution
    - E.g. s198A
  - Board of directors delegating their power
    - E.g. to CEO
- **Implied actual authority**
  - s129(2) Appointing someone to a position
    - CEO
      - *Hely-Hutchinson v Brayhead Ltd*
      - *Green & Anor v Meltzer & Anor*
    - Director acting alone
      - **No implied actual authority**
      - *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd*
    - Company secretary
      - Administrative matters
  - Express restrictions limit implied actual authority
    - **Carve out**
  - Acquiescence - acting in a way that gives someone authority
    - Ratifying past exceeding of authority

#### Apparent/ostensible authority (fake authority)

- s192(3)
- Principal hasn't agreed that the agent can act on their behalf
- Common law requirements
  1. A holding out
    - Representation made to 3<sup>rd</sup> party that the agent had authority
      - *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*
  2. By someone with actual authority
    - *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd*
  3. On which the other person relied
    - *Pacific Carriers v BNP Paribas*

### 2. Identify the defect

Defect arises if outsider still wants to enforce the contract, but the agent has:

- No express actual authority
- Express authority that is too narrow for this contract
- No implied actual authority

#### 3a. Common law rules

Outsider 3<sup>rd</sup> party demonstrates the agent had implied actual authority or apparent authority

- Consider the 3-step apparent authority test (holding out, by someone with actual authority, reliance)

#### 3b. Indoor management rule

Outsider can assume that

- There are no procedural defects in the appointment of directors
- Board meetings are properly called and held
- Any board or general meeting approval required under constitution/replaceable rules has been obtained

- *Royal British Bank v Turquand*

Cannot rely on this rule if:

- Actual knowledge of lack of authority
- Outsider was “put on inquiry”
  - If they hadn’t made inquiries that a reasonable person would make in the circumstances
    - *Northside Developments Pty Ltd v Registrar General*
      - No benefit to company, reasonable person would realise it was weird
    - *Story v Advance Bank Australia Ltd*
      - Some benefit to company, not put on inquiry, Advance Bank able to rely on indoor management rule

#### 4. If outsider can't use common law to enforce defective contract, will the statute help?

Doesn't overrule the common law, extends the enforcement to help outsiders

**Even if the common law says not enforceable, it may be enforceable under statute**

- **s128** - Entitlements to make assumptions
  - s128(1) Entitlement
    - Person entitled to make assumptions under **s129**, company **cannot assert the assumptions are incorrect**
  - s128(3) Fraud or Forgery
    - Assumptions can be made even if an officer or agent acts fraudulently or forges documents
  - s128(4) Knowledge or Suspicion *narrower than put on inquiry*
    - Can't make assumptions under **s129** if they **knew or suspected** that the assumption was incorrect
      - Actual suspicion, not just turning a blind eye (put on inquiry is broader)
- **s129**
  - s129(1) Compliance with constitution and RRs *indoor management rule*
  - s129(2) Assumption about officers named with ASIC *authority of officers*
    - Properly appointed
    - Customary powers
    - E.g. named company secretary can execute documents
  - s129(3) Assumption about officers of a 'kind' where company holding out *apparent authority*
    - Properly appointed
    - Assume customary powers of that kind of officer in that kind of company
    - Then ask, is this contract within those customary powers?
    - E.g. Marketing manager of small company can make small advertising contracts – does it ‘look right’?
  - s129(4) Assumption that officers properly perform their duties *proper performance of duties*
  - s129(5) Assumption of due execution without seal
    - ‘document appears to have been signed’
    - Two signatures in accordance with **s127(1)**
    - *Caratti v Mammoth Investments Pty Ltd*
      - One forged signature, other was not a director and not listed in ASIC’s database
        - Forgeries? Don’t matter see **s128(3)**
      - On the face, appeared to be signed by two directors. Not necessary to use s129(2) and s129(3)
  - s129(6) Assumption of due execution with seal
    - ‘document appears to have been signed’
    - Two signatures in accordance with **s127(2)**
    - Forgeries? Don’t matter see **s128(3)**
    - *Soyfer & Anor v Earlmaze & Ors*
      - Illegible signatures, appears to have been witnessed in accordance with **s127(2)**, **s129(6)** applies as there was also no knowledge or suspicion **s128(4)**

## S588G – DUTY TO PREVENT INSOLVENT TRADING

Section	Title	Civil/Criminal	Applicable to	Tests	Defences
<a href="#">s588G</a>	Insolvent Trading	Civil, possible s588G(3) criminal	- Directors	Insolvent: <a href="#">s95A</a>	<a href="#">s588H (2)</a> Reasonable grounds to expect solvency, or (3) reasonable grounds to believe other person would tell them info otherwise, or (4) ill/other good reason could not take part in management or (5) took all reasonable steps to prevent the debt

Under s 588G, directors have a duty to prevent their company incurring debts when the company is insolvent or would become insolvent upon taking on the debt.

There was a breach by X of s588G because

- 1) X was a director s9 under s588G(1)
- 2) A debt was incurred, debt was Y s588G(1)(a)
  - a. Deemed – Under s588G(1A) Y is deemed to be a debt
  - b. Undeemed – Specific amount, incurred voluntarily (Hawkins v Bank of China), hence Y constitutes a debt.
- 3) Company was insolvent at that time, or become insolvent from incurring debt s588G(1)(b)
  - a. Insolvent s95A, unable to pay all debts when due and payable
- 4) There were reasonable grounds for suspecting that the company is/will be insolvent s588G(1)(c)

As these subsections all apply, the company has engaged in insolvent trading

Imposing liability for insolvent trading (was the director aware)

- 5) Person aware of, or reasonably suspects insolvency s588G(2)(a)
  - 6) OR reasonable person in same circumstances would be aware s588G(2)(b)
- Therefore, X has contravened this subsection

Directors may rely on defences under s588H to escape liability. Discuss why they do/don't apply.

### Consequences

### Step 1 – Director

What has the director done?

- o Statutory only: [s588G](#)
- o Applies to de facto and shadow directors
  - o [Standard Chartered Bank of Australia Ltd v Antico](#)
  - o Company can be a shadow director of another company, therefore subject to s588G duty

### Step 2 – Elements of the duty

Follow [s588G\(1\)](#)

(1) This section applies if:

- (a) a person is a director of a company at the time when the company incurs a debt; and
- (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
- (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
- (d) that time is at or after the commencement of this Act.

### Incurring a debt

- Is it a debt?
  - o Debt must be for a specific amount
  - o Incurred voluntarily by the company
  - o Includes contingent debts
    - [Hawkins v Bank of China](#)
    - Occurs when the guarantee is given, not when payment is required
- When is it incurred?
  - o Buys something but doesn't pay yet
  - o Receives services but doesn't pay yet
- Some deemed debts are not true debts
  - o [s588G\(1A\)](#)
  - o Declaring a dividend
  - o Share capital transactions

### Deemed Debts

[s588F](#) certain taxation liabilities taken to be debts

[s588G\(1A\)](#) Reduces money available for existing creditors

When debts are incurred		
	Action of company	When debt is incurred
1	Paying a dividend	When the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared
2	Making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration)	When the reduction takes effect
3	Buying back shares (even if the consideration is not a sum certain in money)	When the buy-back agreement is entered into
4	Redeeming redeemable preference shares that are redeemable at its option	When the company exercises the option

5	Issuing redeemable preference shares that are redeemable otherwise than at its option	When the shares are issued
6	Financially assisting a person to acquire shares (or units of shares) in itself or a holding company	When the agreement to provide the assistance is entered into or, if there is no agreement, when the assistance is provided
7	Entering into an uncommercial transaction (within the meaning of s588FB) other than one that a court orders, or a prescribed agency directs, the company to enter into	When the transaction is entered into

#### Insolvent

##### o S95A

- (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
- (2) A person who is not solvent is insolvent.

#### Reasonable Grounds for suspecting insolvency

- **Credit Corporation Australia Pty Ltd v Atkins**
  - o Judged according to a director of ordinary competence who is capable of having a basic understanding of the company's finances
- **Queensland Bacon v Rees**
  - o Positive feeling of actual apprehension of insolvency

#### Step 3 – Establish awareness of insolvency

- s588G (2) By failing to prevent the **company** from incurring the debt, the **person contravenes** this section if:
  - o (a) the **person** is aware at that time that there are such grounds for so suspecting; or
    - The person is the director
    - The time is s588G(1)(a) time, when the company incurs the debt
    - Reasonable grounds
      - Subjective test
  - o (b) a reasonable **person** in a like position in a **company** in the **company's** circumstances would be so aware.
    - Objective test

#### Step 4 – Defences s588H

##### s588H(2)

- Reasonable ground to **expect** solvency
  - o Harder to prove than “suspect”
  - o **Metropolitan Fire Systems Pty Ltd v Miller**
    - Expect solvency implies a measure of confidence in the solvency of the company

##### s588H(3)

- Reasonable reliance on information provided by a competent and reliable person that the company was solvent

##### s588H(4)

- Absence from management due to illness or other good reason
  - o **Deputy Commissioner of Taxation v Clark**
    - Every director is expected to participate in the management of the company

##### s588H(5)

- Took all reasonable steps to prevent incurring the debt
  - o E.g. administrator, audit

#### Safe Harbour

- **s588GA**
- applies if director is taking action that is reasonably likely to lead to a better outcome for the company than proceeding to voluntary administration or winding up

#### Step 5 – Consequences

- Civil penalty provision
  - o **Pt 9.4B**
  - o After declaring a contravention, courts can impose
    - **s1317G**
      - Pecuniary penalty, greater of
        - o 5,000 penalty units
        - o Benefit or detriment avoided by breach x3
    - **s206C**
      - Disqualification (banning) order
    - **s1317H**
      - Compensation to company for loss/damages
  - o Also, liquidator can seek compensation: **s 588M**
  - o Also, an unsecured creditor can seek compensation: **s588S & s588T**
- Criminal liability: **s588G(3)**
  - o If director's failure to prevent the debt was **dishonest**
  - o Director liable
    - 2,000 penalty units
    - Imprisonment up to 5 years

ASIC can apply to the court to make a declaration of contravention s1317E, and seek remedies such as a pecuniary penalty order (s1317G), disqualify the director from managing companies for an appropriate period (s206C), relinquishment order, or a compensation order for the director to pay damages to the company s1317H.

Under s588G(3), ASIC may be able to bring criminal penalties, if the director's failure to prevent the debt was dishonest. If granted and a criminal penalty applies, the directors can face up to 2,000 penalty units, or imprisonment up to 5 years.

#### Company -

Under s1317J, company can seek a compensation order (s1317H) for a civil penalty breach, regardless of whether ASIC obtains a declaration of contravention under s1317E.

## S208 – RELATED PARTY TRANSACTIONS (CH 2E)

(1) For a public company, or an entity that the public company controls, to give a financial benefit to a related party of the public company:

- (a) the public company or entity must:
- (i) obtain the approval of the public company's members in the way set out in sections 217 to 227; and
  - (ii) give the benefit within 15 months after the approval; or
- (b) the giving of the benefit must fall within an exception set out in sections 210 to 216.

Section	Title	Civil/Criminal	Applicable to	Tests	Defences
S208	Related party transactions	- Civil S209(2) - possibly criminal s209(3)	- Directors	N/A	N/A

Have the directors been involved in a breach of s208 related party transactions?

- 1) Public company (Ltd) or entity controlled by a public company S208
- 2) Financial benefit s229 – reference specific subsection
- 3) Related party s228 – reference specific subsection
- 4) Defences
  - a. Member's approval s217 – s227
  - b. Benefit is exempt s210 – s216
- 5) Consequences s209(2) or s209(3)

### Step 1. Public company, or entity controlled by a public company

- Public company
  - Ltd at end of name
- Entity controlled by a public company
  - Can be another company (public or proprietary)
  - s9 entity definition
  - s50AA control definition
    - Control if public company has capacity to determine outcome of decisions relating to financial and operating policies

### Step 2. Financial benefit

#### s229

- Very broad - s 229(1)
- s229(2a) Can include interposed entities (i.e. indirectly providing the benefit through subsidiaries)
- s229(3) - including buying, selling or leasing assets or services, provide finance or issuing shares

### Step 3. Related party

#### s228

- 1) Entities that control (s50AA) the public company
- (2a) Directors of the public company
- (2b) Directors of the controlling entity
- (2d) Spouses of directors mentioned above
- (3) Parents or children of the above
- (4) entities controlled by any of the above

### Step 4a. Defences - Members approval

#### s217 - 227

- If approval obtained - no contravention

### Step 4b. Defences - Exempt transactions

#### s210-216

- s210 Arm's length terms
  - Member approval is not needed to give a financial benefit on terms that:
    - (a) would be reasonable in the circumstances if the public company or entity and the related party were dealing at arm's length; or
    - (b) are less favourable to the related party than the terms referred to in paragraph (a).
- S211 Remuneration and reimbursement for officer or employee
- S212 Indemnities, exemptions, insurance premiums and payment for legal costs for officers
- S213 Small amounts given to related entity
- S214 Benefit to or by closely held subsidiary
- S215 Benefits to members that do not discriminate unfairly
- S216 Court order
  - Member approval is not needed to give a financial benefit under an order of a court.

### Step 5 - Consequences

#### Contravention of s208

- Not a director's duty
- Company contravenes statute but has **no penalty**
  - penalty would hurt SHs who are meant to be protected

#### Persons involved in the company's contravention face:

#### Civil penalty breach s209(2)

- Enforceable by ASIC under s1317E
- After declaring a contravention, courts can impose
  - s1317G
    - Pecuniary penalty, greater of
      - 5,000 penalty units
      - Benefit or detriment avoided by breach x3
  - s206C
    - Disqualification (banning) order
  - s1317Hs
    - Compensation to company for loss/damages

#### Criminal

- S209(3) if intentionally dishonest
  - (a) for an individual--5 years imprisonment, 2,000 penalty units, or both; and
  - (b) for a body corporate--20,000 penalty units

# REPORTING AND DISCLOSURE

## RECORD-KEEPING AND LODGEMENTS

### Record-keeping by companies: 17-001 – 17-140

#### Registered Offices

- On company formation, must nominate a *registered office* in Australia [s121](#)
- Rules around registered offices in [Pt 2B.5](#)
- [s109X](#) sets out that a document can be served by leaving/posting it to the company's office

#### Financial Records

- defined in [s9](#)
- [s286\(1\)](#) A company, registered scheme or disclosing entity must keep written financial records that:
  - (a) correctly record and explain its transactions and financial position and performance; and
  - (b) would enable true and fair financial statements to be prepared and audited.
- If a company does not meet the [s286](#) requirements, presumed to be insolvent, per [s588E\(4\)](#)
  - Establish insolvency through [s588G](#)

#### Minute Books

- Governed by [Pt 2G.3](#)
- [s251A](#) company must keep minute books which record within 1 month:
  - Proceedings and resolutions of member & director meetings
  - Resolutions passed by members or directors without a meeting
  - If the company has a single director/shareholder, declarations by the director
  - [s251A\(6\)](#) a minute recorded within a month and signed "is evidence of the proceeding, resolution or declaration to which it relates unless the contrary is proven"
    - [ASIC v Hellicar](#)
      - Minutes were evidence of the James Hardie directors' decisions
- [s251B](#) members entitled to request and inspect copies of the minutes

#### Registers

[Chapter 2C](#) requires companies to maintain registers of:

- [s169](#) Members
- [s170](#) Option Holders
- [s171](#) Debenture Holders

#### Inspecting the register

- [s173\(1\)](#) any person is allowed to inspect the register
  - enforceable under [s1303](#)
  - company can charge a fee, up to \$250 to those who aren't themselves on the register, but must then provide a copy within 7 days
    - [s173\(3\)](#)
    - \$250 deemed reasonable by the court [Axa Asia Pacific Holdings Ltd v Direct Share Purchasing Corporation Pty Ltd](#)

#### Restrictions on use of the register

- [s177](#) spells out restrictions – e.g. unsolicited off-market offers to acquire shares
- [O'Brien v Sporting Shooters Association of Australia \(Victoria\)](#)
  - Cannot canvass votes
- [Westgold Resource NL v Precious Metals Australia Ltd](#)
  - Cannot canvass for class action unless sufficient arguable case is present
- [IMF \(Australia\) Ltd v Sons of Gwalia](#)
  - Registered used to invite shareholders for class action, but arose from misleading and deceptive conduct – not allowed

#### Correcting the register [s175](#)

### Information to be lodged: 17-200 – 17-260

#### Annual review - [Chapter 2N](#)

- [s346A](#) ASIC sends each company extract of particulars and an invoice within 14 days of company's review date
  - Review date - anniversary of company formation
  - Extract contains company's details as known by ASIC
  - Company must review the changes. If no changes are required, no further action required.
- [s348A](#) Return of particulars
  - issued by ASIC if the details in the register are inaccurate, company hasn't paid its annual review fee, or ASIC hasn't received documentation from the company in the last 12 months
  - company then confirms the information under [s348D](#)
- [s347A](#) Solvency resolution

#### Events that trigger obligation to notify ASIC – [Schedule 2](#)

Event	Must be notified to ASIC within	Relevant Section number of Corporations Act
Change of address of registered office or principal place of business	28 days after the change	142, 146
Change of director or secretary	28 days after the change	205B
Change of name or address of director or secretary	28 days after the change	205B
Public company adopting, modifying or repealing a constitution	14 days after special resolution is passed	136(5)
Change of name of company	14 days after special resolution is passed	157(2)
Change of type of company (for example, from public to proprietary)	14 days after special resolution is passed	162(3)
Public company members approving a financial benefit to a RP	14 days after special resolution is passed	226
New share issue	28 days after the date of issue	254X
Division or conversion of shares into classes	14 days after division or conversion	246F(2)
Conversion of shares into larger or smaller number	1 month after the resolution is passed	254H
Share cancellation (for example, following a buy-back)	1 month of cancellation	254Y