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Topic 1: Development of Corporate Law in Australia; Contextual Issues and Business Structures

Types of Companies and The Corporate Life Cycle

- **Public (XYZ Ltd)**
 - Larger-scale companies; Greater ability to raise funds
 - May apply to be listed (or “floated”) on financial markets (e.g. ASX) – the company’s shares may then be traded
 - Listed companies have more disclosure, reporting and compliance obligations
 - Other examples of public companies – Not-for-Profits; Registered clubs.
- **Proprietary (XYZ Pty Ltd)**
 - Smaller scale companies; May be classified as Small or Large.
- **Corporate Groups**
 - Parent (holding) company and subsidiary companies.

Internal Management of Companies

- **Directors may be classified as:**
 - **Executive** – Employment contract with company (e.g. MD/CEO - employed).
 - **Non-executive** – No employment contract with company – only association through role as director.

- Board of Directors – Chair of board.
- Chief Executive Officer / Managing Director: accountable to the board.
- Company Secretary: public companies must have a designated company secretary – usually called Chief Administrative Officer of a company.
- Larger companies and organisations: In-house / corporate counsel.
- **Constitution (of companies)** – Sets out rules for the governance of company – e.g.:
 - Issue and transfer of shares
 - Powers of directors
 - Authority of agents and corporate contracting
 - Meetings of directors and members
 - Changes to company structure and activities.
- **Constitution has the effect of an enforceable contract between company and its members.**

Topic 2: Managing Companies I – Formation, Life Cycle and Corporate Liability

Introduction

Types of Companies Under the *Corporations Act 2001*

- **Two main types:** Public (Ltd) and Proprietary (Pty Ltd)

Public Companies

- **Public companies** – usually for **larger** businesses
 - **Must** have at least **one member**: **s 114**, but no statutory maximums
 - **Must** have at least **three directors** (at least 2 of the 3 directors need to be ordinarily resident in Australia): **s 201A**
 - **Must** have at least **one secretary** who will take care of the administrative affairs of the company (CAO): **s 204A**
 - **May** raise funds from the public – possibly through applying for listing on a financial market (e.g. ASX)
 - Not all public companies are listed
 - **More extensive requirements**
 - Meetings and financial reporting
 - Managing conflicts of interest / related party transactions
- **Public Companies may be classified in one of two categories:**

- **Limited by shares:** Capital is divided into shares (also dividends) and member is only liable to pay to the company the amount which is unpaid on their shares (**ss 9 and 516**)
- **Limited by guarantee:** Cannot issue shares (**s 124(1)**); cannot pay dividends to members (**s 254SA**) – examples? RSL Clubs. Members undertake that, should the company be wound up, they will contribute a specified amount to the property of the company (**ss 9 and 517**). Rely on outside sources for funds (e.g. membership subscriptions, donation, government grants)

Proprietary Companies

- **Proprietary companies must:**
 - **(1) Have share capital:** **s 112(1)** – i.e. limited by shares – A person becomes a member of a proprietary company by acquiring ownership of one or more shares in the company
 - **(2) Have at least one member:** **s 114**; but must **not have any more than 50 non-employee shareholders as members:** **s 113**
 - **(3) Have at least one director:** **s 201A(1)**
 - **(4) Not engage in any fundraising activity** that would activate the operation of the fundraising provisions in **Ch 6D** – i.e. must not offer its shares for public subscription; nor invite offers for subscription → can only offer shares to existing members / employees: **s 113(3)**
 - **(5) Include words “Proprietary Limited” (or abbreviation) “Pty Ltd” at end of name:** **ss 148(2), 149**
- **Proprietary companies** – will be classified as **Large Pty companies if they meet any two of the following criteria for a financial year:**
 - Consolidated revenue of **\$25m or more**;
 - Value of consolidated **gross assets of \$12.5m or more**
 - It has **at least 50 employees:** **s 45A(3)**
- Large proprietary companies – subject to **financial reporting obligations**
- Proprietary companies that fall **below two of these three criteria will be classified as Small proprietary companies (s 45A(2))** → **Not subject to financial reporting obligations**

One-Person Companies

- Possible to incorporate a proprietary company with one person as the sole director and the sole shareholder
- Generally subject to same general rules and principles that apply to other companies under the **CA**, although it does receive specialised treatment in some matters – see **s 201F(2),(3); s 198E; s 248B; s 249B; s 202C; s 201F(1)**

No Liability Companies and Changing Status

- **No liability companies** (e.g. XYZ **NL** or 'No 'Liability') – not entitled to recover any amount unpaid on shares from shareholders: **s 112(2)**
 - **Restricted to companies whose sole object is “mining purposes”** (see **s 9** definition): **s 112(2)**
 - Must be incorporated as public companies (**s 112(1)**)
- **Unlimited liability companies** – **members are financially liable without limits for the debts** of such companies if its assets are insufficient to meet its liabilities (**s 9**)
 - Public or proprietary company can be registered as an unlimited liability company
 - Must be incorporated with a share capital – on winding up of company, each member will be liable to pay to the company any unpaid amounts on their shares; if this is insufficient to meet the liabilities of the company, members will be asked to make further contributions to discharge the company's debts
 - Advantage: not subject to the limitations on share capital that are imposed on a company limited by shares (**s 258A**) so shareholders can have their capital returned to them and be released from further liability to the company while it is still an operating entity
- **Changing status** - (**ss 162-167**) - companies can grow / downsize over their corporate life cycle. Procedures:
 - **(1)** Pass special resolution: **s 162**
 - **(2)** Lodge application with ASIC: **s 163**
 - **(3)** The change of status will be effected once ASIC publishes a notice in the ASIC Gazette that the company's status is changed: **s 164**
 - Change of status does not create a new entity, nor change rights of members, or company's role in legal proceedings: **s 166**

Registration Process and the Corporate Life Cycle

Registration Process

- **S 9 Corporations Act**, a company is defined as 'a company registered under this Act'
- Determine **business objectives** of proposed company
- Determine company's **name** (check ASIC website re name availability)
 - Restrictions on certain names: **s 147(1); Corps Regs 2001 Sch 6**
- **(1) Reserve** company's name: an application may be made to ASIC to reserve a specified name – **s 152**
 - **Part 2B.6 Corporations Act** deals with the availability and restrictions on the use of company names

- **(2) Preparation of internal management rules and obtaining consents:**
(**constitution** or replaceable rules (Sem 3); obtain **consents** of members and directors)
 - Each company has rules that govern its internal management and its capital structure
 - Company's original incorporators must decide whether the company will rely initially on the **replaceable rules** in the **Corporations Act**, or whether the company will have a **constitution** which replaces those rules in whole or in part
 - If there is to be a constitution, each person who is to be a member when the company is registered must agree in writing to the terms of the constitution (**s 136(1)**)
 - Each person who is to be a member, director or company secretary (not required for proprietary company (**s 204A(1)**) of the company at that time it is registered must give their **consent** to act in that capacity (**s 120**).
- **(3) Lodge application for registration (and payment of registration fees) with ASIC: s 117 → Form 201** and must contain the information set out in **s 117(2)**:
 - Company type
 - Proposed name
 - Details of directors, secretary and members
 - Details of share structure – if the company has a share capital, the number of shares which each member agrees to take up, and the amount which each member agrees to pay
 - If the company is limited by guarantee – the amount of the guarantee that each member has agreed to
 - Address of company's registered office (see e.g. **s 109X**)
 - If the company is to be a public company, the application must be accompanied by a copy of its constitution (if any)
- **(4) Registration by ASIC** - designation of Australian Company Number (**A.C.N.**), register the company and issue a **certificate of registration: s 118**
- A company comes into existence at the beginning of the day on which it is registered

The Consequences of Registration

- From the day of registration, the directors, members and company officers are subject to legal rights, duties, regulatory requirements and liabilities
- These consequences stem from the fact that, upon registration, a company comes into existence as a body corporate (**s 119**)
- **Key consequences** of a company's status as a body corporate:
 - Company can sue and be sued in its own right
 - Company has perpetual succession
 - Company has the power to acquire, hold and dispose of property, independently of the owners or managers of the company

The Corporate Life Cycle

- **Must set out name and A.C.N. on all public documents:** **ss 123, 153**
- **ASIC register** – Important information resource for stakeholders
- Hence - companies must **notify ASIC of changes** (including name, company type, registered office location, details of officeholders) within prescribed **timeframes**: See **Chapter 2N**
- Companies must **pay annual review fees to ASIC** and **check annual statement** sent yearly by ASIC on anniversary of registration
- **Winding up**: (process of winding down company's operations and selling assets)
 - Voluntarily (i.e. resolution of members): **Part 5.5**
 - Insolvency – can't pay debts
 - Order of court (e.g. **s 461**) – Seminar 11
- **Deregistration**: May be initiated by: Voluntary application; ASIC-initiated; Order of court – advertised in ASIC Gazette
- **Reinstatement**: **s 601AH**; see also **s 601AG** (enables injured party to make insurance claims)

Separate Legal Entity and Its Implications

The Separate Legal Entity Doctrine

- One of the most fundamental principles of corporate law is that a **corporation is regarded as a separate legal entity** from founders, members and directors.
- Once the **requirements of incorporation** have been met, and the company is **registered**, it is taken to **exist as its own legal person**.
 - **s 119 Corporations Act**: a company comes into existence at the beginning of the day on which it is registered.
- This means, e.g., that a company can sue and be sued, enter contracts in its own name, employ staff, borrow money, own property, and engage in most other legal acts that a natural person can do.
- Whilst companies must clearly act through people (most often directors, managers, and sometimes shareholders), the legal **obligations** that arise from such actions are usually those of the company and **do not attach to the individuals**.
- The separate legal entity doctrine confirmed and applied by HOL in **Salomon**.

Salomon v Salomon & Co Ltd [1897] AC 22

- Mr S had operated a successful boot-making business for 30 years. Later set up S & Co Ltd to enable his children to gain an interest in the business and to obtain limited