LAWS5014: CORPORATIONS LAW

Sydney Law School (Semester 2, 2021)

CONTENTS

1. CIVIL PENALTIES REGIME: Pt 9.4B

(i) Civil penalty provisions

- The civil penalty provisions are listed in **s 1317E(3).**
- There are three categories of civil penalty provisions:
    - Corporation/scheme civil penalty provisions:
        - **s 180(1)**: duty of care and diligence;
        - **ss 181(1), (2)**: duty to act in good faith and for a proper purpose;
        - **ss 182(1), (2)**: duty to not improperly use position;
        - **ss 183(1), (2)**: duty to not improperly use information;
        - **s 188(1), (2)**: secretary responsibilities [can also be dealt with via infringement notice];
        - **s 209(2)**: related party transaction rules;
        - **s 588G(2)**: insolvent trading;
    - Financial services civil penalty provisions; and
        - **s 674A(2), (3)**; **s 675A(2), (3)**: continuous disclosure;
    - Uncategorised civil penalty provisions:
        - **s 727(6)**: offering securities without a disclosure document;
        - **s 728(4)**: misstatement in, or omission from, disclosure document.
- All civil penalty provisions carry accessorial liability (ie. for involvement in contraventions (see **s 79**) and liability for attempted breach (**s 1317E(4)**).

(ii) Standing

ASIC

- ASIC can apply for (**s 1317J(1)**):
    - A declaration of contravention (which a court must make if it is satisfied that a person has contravened a civil penalty provision (**s 1317E**));
    - A pecuniary penalty order (which a court may order under **s 1317G**);
    - A relinquishment order (which a court may order under **s 1317GAB**);
    - A disqualification order (which a court may order under **s 206C**);
    - A compensation order (which a court may make under **ss 1317H(1)** or **1317HA(1)**).

Corporation

- A corporation can apply for a compensation order, whether or not a declaration of contravention has been made under **s 1317E** (**s 1317J(2)**):
    - Such an order may be made by a court if a person has contravened a corporation/scheme civil penalty provision and damage to the co resulted from the contravention (**s 1317H(1)**);
    - Such an order may be made by a court if a person has contravened a financial services civil penalty provision and damage to the co resulted from the contravention (**s 1317HA(1)**).

Individual

- An individual who suffers damage in relation to a contravention or alleged contravention of a financial services civil penalty provision may apply for a compensation order under **s 1317HA**, whether or not a declaration of contravention has been made under **s 1317E** (**s 1317J(3A)**).

- Such an order may be made by a court if a person has contravened a financial services civil penalty provision and damage to the individual resulted from the contravention (**s 1317HA(1)**).

Criminal and civil proceedings

- **Civil after criminal [NO]**: a court must not make a declaration of contravention, a pecuniary penalty order or a relinquishment order against a person for a contravention if the person has been convicted of an offence for substantially the same conduct (**s 1317M**).

- **Criminal during civil [STAYED]**: proceedings for a declaration of contravention, a pecuniary penalty order or a relinquishment order against a person are stayed if criminal proceedings are started or have already started against the person for substantially the same conduct (**s 1317N(1)**); the civil proceedings may be resumed if the person is not convicted, but are dismissed if the person is convicted (**s 1317N(2)**).

- **Criminal after civil [YES]**: criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a declaration of contravention, a pecuniary penalty order, a relinquishment order, a compensation order or a disqualification order has been made against them (**s 1317P(1)**) [unless an infringement notice is issued under **s 1317DAC** for an alleged contravention of **ss 674(2)** or **675(2)** (**s 1317P(2)**)].

2. TYPES OF COMPANIES; COMPANY FORMATION; BUSINESS STRUCTURES

A. Types of companies

- A 'company' is a co registered under the CA (**s 9**); the types of co's that can be registered are set out in **s 112**:

Proprietary companies	Limited by shares
	~~Unlimited with share capital [not used]~~
Public companies	Limited by shares
	Limited by guarantee
	~~Unlimited with share capital [not used]~~
	No liability company

- All co's can be classified as either <u>proprietary or public</u>:

(i) Proprietary companies

- A proprietary co:
  - Must have <u>share capital</u> (**s 112(1)**);
  - Must have <u>at least 1 member</u> (**s 114**) but must have <u>no more than 50 non-employee shareholders</u> (**s 113(1)**);
  - Must have <u>at least 1 director</u> who must ordinarily reside in Australia (**s 201A(1)**);
  - Must <u>not engage in fundraising that would require disclosure under Ch 6D</u>, but may offer shares to <u>existing shareholders or employees</u> (**s 133(3)**);
  - Must include '<u>Pty Ltd</u>' at the end of its name (**s 148(2)**).

- The CA distinguishes between small and large proprietary co's:
  - A proprietary co is <u>small</u> if it satisfies at least 2 of the following (**s 45A(2)**):
    (a) It has consolidated revenue for the financial year of <u>less than $50 million</u>;
    (b) It has consolidated gross assets for the financial year of <u>less than $25 million</u>;
    (c) It controls <u>less than 100 employees</u> at the end of the financial year.
    - [Will have fewer financial reporting requirements (see **s 292(2)**)].
  - A proprietary co is <u>large</u> if it satisfies at least 2 of the following (**s 45A(3)**:
    (a) It has consolidated revenue for the financial year of <u>$50 million or more</u>;
    (b) It has consolidated gross assets for the financial year of <u>$25 million or more</u>;
    (c) It controls <u>100 or more employees</u> at the end of the financial year.

(ii) Public companies

- A public co is any co other than a proprietary co (**s 9**)
  - Must have <u>at least 1 member</u> (**s 114**);
  - Must have <u>at least 3 directors</u>, 2 of whom must ordinarily reside in Australia (**s 201A(2)**), and <u>at least 1 secretary</u> who must ordinarily reside in Australia (**s 204A(2)**);
  - May <u>raise funds by making offers or invitations to the public to purchase or subscribe for securities</u>, and may apply for <u>listing on a securities exchange</u>;
  - Will generally have higher compliance costs and disclosure requirements.

- Co’s can also be classified by reference to the <u>liability of their members</u>.

(i) Company limited by shares

  - Capital is divided into shares and members are only liable to pay to the co the amount (if any) which is unpaid on their shares (**ss 9**, **516**);
  - May be either public or proprietary (**s 112**).

(ii) Company limited by guarantee

  - Members are only liable to pay to the co the amount they have undertaken to contribute if the co is wound up (**ss 9**, **517**);
  - Does not have share capital and has no power to issue shares (**s 124(1)**) or pay dividends (**s 254SA**);
  - Can only be public (**s 112**); often used by non-profits.

(iii) Unlimited liability company

  - Members are financially liable without any limit for the debts of the co if its assets are insufficient to meet its liabilities (**s 9**);
  - May be either public or proprietary (**s 112**); generally no longer used.

(iv) No liability company

  - Co has no contractual right under its constitution to recover any amount unpaid on shares (**ss 9**, **112(2)**, **254M(2)**); members can elect to forfeit their shares rather than pay up;
  - Can only be used by mining co’s (**s 112(2)**).

B. Company formation

- For a co to come into existence there must be a conferral of that status by the state; this occurs through a process of registration under the CA.

- **Key steps**:
  1. Reservation of co name (**s 601DA**);
  2. Preparation of internal management rules and obtaining consent of office-holders; may initially rely on replaceable rules or have a constitution which replaces those rules in whole or in part (**s 134**);
  3. Lodgement of application for registration and payment of registration fees (**s 117**);
  4. Registration by ASIC; co comes into existence at the beginning of the day on which it is registered (**s 119**).

C. Different business structures

- Other than the co, there are a variety of legal structures by which individuals may pursue profit-making objectives in association with others; each have advantages and disadvantages depending on the particular purpose for which individuals wish to associate.

- Factors bearing on the decision to incorporate may include: the desired level of control; the desire for limited personal liability; differing regulatory and disclosure requirements; available methods of financing; tax considerations; and succession planning.

(i) Sole trader

- An individual conducting business alone without the benefit of any legal structure or status distinct from that of the individual.
- The sole trader is responsible for the management and financing of the business and is personally liable for its debts and other liabilities without limitation.

(ii) Partnership

- A business owned and operated by and on behalf of a group of two or more people, involving a fiduciary relationship of trust and confidence between the partners.
- The partnership is generally not a separate legal entity, meaning partners remain personally liable for the business' debts and liabilities, and each partner has a respective interest in all of the business' assets.

(iii) Joint venture

- Involves two or more parties cooperating on a particular project to create a product that is then shares between the participants; joint venturers share in the product, not the profits, and do not typically owe fiduciary duties to each other (cf. partnerships).
- JVs are not subject to certain disclosure requirements, so afford a high degree of financial privacy.

(iv) Trading trust

- An equitable relationship in which assets are legally owned and managed by a trustee, but the benefits are distributed to the beneficiaries; this involves fiduciary obligations on the part of the trustee.
- A trading trust is not a separate legal entity, meaning the trustee will incur personal liability for trust debts and obligations; there may also be high compliance costs, especially for public trusts and superannuation funds.

(v) Incorporated association

- In NSW, an association of 5 or more people formed for a lawful object may apply for incorporation; the incorporated association is a relatively simple and inexpensive model used by non-profit associations to limit members' liability.
- Incorporated associations conduct affairs to provide pecuniary gain to members (**s 40**, ***Associations Incorporation Act 2009*** **(NSW)**, but are generally subject to fewer continuing obligations than companies, and fees for incorporation and lodgement of statements are lower.

(vi) Co-operative

- An alternative incorporated form for the pursuit of business and/or non-profit goals, offering limited liability for members.
- Co-ops adhere to certain principles which govern their formation, conduct and the distribution of surpluses (eg. democratic control, limited returns on share capital).