

LAWS2014

Exam Scaffold

Lecture 2: Fundraising

Fund Raising [Chapter 6]

Issuing security

- ☐ Is the company a public or a private company?
- ☐ Is there a 'offer' or 'invitation' for a 'security'?
- ☐ If there is a security, it must have a disclosure agreement
- ☐ Failure to comply is a civil penalty provision

Disclosure

- ☐ Is there an exemption to disclosure?
- ☐ Has there been a disclosure?
 - ☐ Does the disclosure comply with chapter 6?
- ☐ Consequences for failure to lodge
- ☐ Defective Disclosures
 - ☐ Deceptive and Misleading
 - ☐ Omission
 - ☐ New Circumstances
- ☐ Defences

Chapter 6D requires disclosure whenever a company makes an offer of securities for issue **s706**, unless the offer falls within one of the exempted categories.

[1] Is it a public (ltd) or a private company (pty ltd)?

- 1) Public: companies are subject to chapter 6 disclosures
- 2) Private: company may issue securities through activities that are exempt from chapter 6 disclosures **CA 113(3)**

[2] Is there an offer for securities for issue?

[a] Is there an offer or invitation?

- 1) Prima facie, if there is an offer for securities, there must be a corresponding disclosure statement **s706** which is provided with the offer **s721** unless an exemption applies.
 - a. An offer of securities is defined in **s9** as
 - i. an invitation for applicants for the issue of the security and **s9(a)(i)**
 - ii. invitation of offers to purchase the security **s9(a)(ii)**
 - b. It includes distributing material to encourage a person to enter into a course of negotiations calculated to result in the issue of securities **AG v Aus Fixed Trust**.
 - c. Chapter 6D does not apply to crowd sourced funding **s703B**

[b] Is it a security? **s92(5)** and **s700**

- 1) Securities are defined in **s92(5)** for the purposes of chapter 6D **s700**, which include.
 - a. shares **s92(5)(a)**

- b. debentures [s92\(5\)\(b\)](#)
 - c. legal or equitable right or interest in shares or debentures [s92\(5\)\(c\)](#)
 - d. an option to acquire, by way of issue, a security covered of the above [s92\(5\)\(d\)](#)
- 2) Chapter 6D does not recognise the following as securities per [s700](#)
- a. a right (whether existing or future and whether contingent or not) to acquire, by way of issue, the following under a rights issue: [s92\(5\)\(e\) excluded through s700\(1\)\(a\)](#)
 - i. a security covered by paragraph (a), (b), (c) or (d);
 - ii. a managed investment product;
 - iii. a foreign passport fund product;
 - iv. an interest or right covered by paragraph 764A(ba); or
 - b. a CGS depository interest; or [s92\(5\)\(f\) excluded through s700\(1\)\(a\)](#)
 - b. a simple corporate bonds depository interest; [s92\(5\)\(e\) excluded through s700\(1\)\(b\)](#)
- f. If it is a stock, bond, or debenture issued by the government then it is not a security for the purpose of this chapter [s92\(3\)](#)

[3] If there is a security on offer, then there must be a disclosure document issued in the content of Ch 6D

[4] Failure to comply is a civil penalty [s727](#)

Exemptions from disclosure [s708](#)

Prima facie, [person] must lodge a disclosure document with ASIC [s718](#) as there is a offer for securities [s706](#) it must be determined if [person] has satisfied the disclosure requirements.

However, there are exceptions in [s708](#) which have the effect of not requiring a disclosure document to be lodged.

MUST STATE: The company bears the onus of proving that their offer falls within [s708](#); *Cyclone*

Is it a small scale offering? [s708\(1\)](#)

- 1) Small scale offerings are exempt from the disclosure requirements set out in chapter 6 if they satisfy certain criteria [s708\(1\)](#)

[a] It must be a personal offer [s708\(2\)](#)

- a. Must only be able to be accepted to whom the offer is made. [s708\(2\)\(a\)](#) or
- b. A offer to a person who is likely to be interested [s708\(2\)\(b\)](#) considering
 - i. Previous contact between offeror and offeree,
 - ii. some professional or other connection between the offeror and offeree
 - iii. Statements or actions that indicate they are interested

Lecture 3: Corporate Personality

- ☐ Separate Legal Personality
 - ☐ Is it a corporate group? If yes state that.
- ☐ Can you attribute liability?
 - ☐ Accessorial Liability?
 - ☐ Statute?
 - ☐ Equitable?
 - ☐ Agency?
 - ☐ Duty of care in tort?
- ☐ Piercing the corporate veil
 - ☐ Evasion principle

Principle: A company is a separate legal entity from its members (*s 124; Salomon*), and has all the powers of a natural person and powers of a body corporate (e.g., issue shares, debentures) (*s 124(1)*) – from the day of registration (*s 119*)

State the separate legal personality doctrine?

- 1) A company is a separate legal entity from its members *s 124; Salomon*, and has all the powers of a natural person and powers of a body corporate (e.g., issue shares, debentures) *s 124(1)* from the day of registration *s 119*
 - a. A company's property is separate from the property of its members *Macaura*
 - b. A company is separate from its controllers *Lee's Air Farming*
 - i. You can act as an employee and a director *Lee's Air Farming*
 - c. The fact a company is properly formed according to the required formalities, and is controlled by one person does not establish agency *Salomon*

[Members]

- 2) This means that for a company limited by shares, liability is limited to the nominal value of their shares *s516*

[Corporate Groups]

- 3) Prima facie, each corporate group, is a separate legal entity *Smith Stone and Knight*
 - a. However, per *s46* a body corporate can be a subsidiary of another body corporate if;
 - i. The other body controls
 1. The composition of the board; or
 - a. A body corporate controls another's board if it can appoint or remove a majority of its directors. *s47*
 2. Can or does control the casting of more than 50% of the maximum number of votes that might be cast at a general meeting of the first body; or *Blue Bird*