

The University of Sydney

LAWS2014: Corporations Law

LAWS2014
Semester 2, 2024

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0: Generally

Opening Sentences

- Provisions referred to are provisions of the *Corporations Act* ('CA') unless otherwise stated.
- This analysis advises **X**.
 - *What are the things X will be worried about?*
- Signpost
- *IF ADVISING MEMBERS – TALK MAINLY ABOUT MEMBERS REMEDIES (SDA) AND ONLY THEN TALK ABOUT BREACH OF DIRECTORS DUTIES*

1: Formation of a company

0: WAYS OF DOING BUSINESS

Sole trader

- *Advantages*
 - *Easy to set up; very little regulation; high degree of privacy; can offset taxable income with business losses; full control of business*
- *Disadvantages*
 - *Unlimited liability; fundraising limited to debt; tax may be higher depending on personal tax rate*

Partnership

- *Advantages*
 - *Easy to set up; little regulation (unless limited partnership); income splitting for tax; sharing of losses*
- *Disadvantages*
 - *Unlimited liability (unless limited partnership); fundraising limited to debt; fiduciary duties; 20 partner limit for many partnerships*

Trust

- *Advantages*
 - *High degree of privacy; income splitting for tax; flexible;*
- *Disadvantages*
 - *Complex tax regulations; Trustee incurs personal liability*

Cooperative

- *Advantages*
 - *Limited liability; equal voting rights; shared responsibility*
- *Disadvantages*
 - *High level of regulation*

Incorporated association (generally not-for-profits)

- *Advantages*
 - *Easy to set up; little regulation*
- *Disadvantages*
 - *Must not be run for profit; [Unincorporated] Problems with liability*

Company

- *Advantages*
 - *Limited liability; flat income tax rate; proprietary companies have a high degree of privacy*
- *Disadvantages*
 - *Members do not benefit from tax losses; may be subject to high levels of regulation; dilution of control*

Characteristics of a Company

- Separate Legal Entity: Once registered with ASIC, an entity is separate from its members and incorporators (see s 124 Corporations Act)
- Limited liability: For members (s 516 Corporations Act)
- Types of companies: Public ('Ltd') or proprietary ('Pty Ltd')
- Managed: By the board of directors (s 198A Corporations Act) or their delegates
- Decision Making: Board of directors; members in general meeting

2: BUSINESS STRUCTURES

Company

- S9: A company one **registered** under the CA pt 2A.2 (see below).
- Does not include: **Foreign corporations**
 - As a foreign company is not one set up under CA pt 2A.2, it is not a 'company' for the purposes of the CA: s9.
 - **Application:** In *Re Featherston Resources*, it was held that shareholders could not bring a statutory derivative suit against the company as it was not registered under CA pt 2A.2.
 - **Key question - weather a NZ registered company with the following chars, was a "company registered under the Act".**
 - **Reg. foreign company in aus**
 - **Board directors resdied in aus**
 - **Shareholders and everything else in aus**
 - **Brereton J rejected the submission that this included a foreign company registered under the Corporations Act (i.e. FRL). "company registered under this Act" vs "a foreign company registered under Division 2 of Part 5B.2"**

Corporation

- (1) 'Corporation': Includes a
 - (a) a **company**; and
 - (b) any **body corporate** (whether incorporated in this jurisdiction or elsewhere); and
 - (c) an **unincorporated body** that under the law of its **place of origin, may sue or be sued, or may hold property** in the name of its secretary or of an office holder of the body duly appointed for that purpose.
- (2) Neither of the following is a corporation :
 - (a) an **exempt public authority**;
 - An exempt public authority is excluded as a corporation: s57A. This requires it to be an instrument of government set up to execute a public function and perform a function of government: *FCT v Bank of WA*.
 - Compare statutory corporations (see also Public Governance, Performance and Accountability Act 2013 (Cth); State Owned Corporations Act 1989 (NSW))
 - (b) a **corporation sole**.
 - *Corporations sole consist of one person only and successors, e.g., the King, a bishop: Blackstone's Commentaries.*
- (3) To avoid doubt, an **Aboriginal and Torres Strait Islander corporation** is taken to be a corporation for the purposes of this Act.

- *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*

Registrable body: a registrable Australian body or foreign company (s9)

- Registrable Australian body: a body corporate or certain unincorporated bodies (s9)-but not a foreign company
- Foreign company: a body corporate formed outside of Australia or certain unincorporated bodies (s9)

This jurisdiction:

- geographical area that consists of:
 - (a) each referring State (including its coastal sea); and
 - (b) each Territory (including its coastal sea, if any); and
 - (d) also, for the purposes of the application of a provision of Chapter 7 or an associated provision (as defined in section 5)--any external Territory in which the provision applies because of subsection 5(9) (but only to the extent provided for in that subsection).

Characterisation

- Whether a corporation is a corporation depends on the body's substance and not label: *Queensland Rail*.
 - **Application:** In *Queensland Rail*,
 - although statute stated that Queensland Rail was not a body corporate,
 - the court found that it was because it
 - (a) had perpetual succession; (b) with a view to engaging in trading and to profit; (c) and operates as a labour hire company.

Re Featherston Resources Ltd [2014] NSWSC 1139 at [1]-[31]

- Facts: NZ company registered as a foreign company in Australia under CA chapter 5B. They attempted to use certain powers granted to companies under CA which did not at that time, exist in NZ CA, against NZ shareholders.
- Issue: Did the Supreme Court of NSW have jurisdiction to grant leave to bring a derivative action in respect of a foreign registered company subject to a foreign DOCA?
- Held: Section 236 and 237 permit the Court to grant leave on behalf of a “**company registered under the Act**”. Brereton J rejected the submission that this included a foreign company registered under the Corporations Act (i.e. FRL). “**company registered under this Act**” vs “**a foreign company registered under Division 2 of Part 5B.2**”
- No jurisdiction to grant leave to proceed.

3: REGISTRATION OF COMPANIES (CHAPTER 2A)

Process

- (1) Reservation of the company name: **CA s 152.**
- (2) Preparation of internal management rules and obtaining consents: **CA s 136(1).**
 - Decide whether the company will rely on the replaceable rules (**CA s 141**) or a constitution that replaces those rules in whole or in part.
 - If there is to be a constitution, then each member must agree to the terms: **CA s 136(1).**
 - Each person who is to be a member, director, or company secretary at the time of registration must give consent to act in that capacity: **CA s 120.**
 - Proprietary company: At least one director ordinarily resident: **CA s 201A; CA s 204A(1).**
 - Public company: At least three directors, two of which are ordinarily resident, and at least one secretary ordinarily resident: **CA s 201A; CA s 204A(2).**

- (3) Lodgement of the application for registration with the Registrar (i.e., the Australian Business Register): **CA s 117(2)**.

- Requires:

- (a) The type of company to be registered;
- (b) The company's proposed name;
- (c) The name and address of each person who has consented to become a member;
- (d)-(e) The present name, former names, place and date of birth of each person who has consented to become a director or company secretary;
- (g) The address of the company's proposed registered office;
- (k) 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;
- (m) If the company is limited by guarantee—the amount of the guarantee that each member has agreed to; and
- ~~If the company is to be a public company—a copy of its constitution (if any).~~

- (4) Registration by the Australian Business Register: **CA s 118**.

- The registrar 'may' give the company an ACN, register the company, and issue a certificate of registration: **CA s 118**.

- A certificate of registration is conclusive evidence that (**CA s 127(7A)**):
 - All requirements under the Corporations Act for registration have been complied with; and
 - The company was registered on the date specified in the certificate.

Foreign companies

- [As above] Foreign companies may only carry on a business if registered under **CA pt 5B.2 div 2** or has its registration transferred under **CA pt 5B.1**.
 - Must appoint a local agent who is liable for the responsibilities of the foreign company: **CA s 601CF**.
 - Must disclose annual financial statements: **CA s 601CK**.

4: POWERS OF A COMPANY

s 124(1)

- A **company** has the legal capacity and **powers** of an **individual both in and outside this jurisdiction**. A **company** also has all the **powers of a body corporate**, including the **power** to:
 - (a) **issue and cancel shares** in the company;
 - (b) **issue debentures** (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long);
 - (c) **grant options over unissued shares** in the company;
 - (d) **distribute** any of the company's **property** among the members, in kind or otherwise;
 - (e) grant a **security interest** in uncalled capital;
 - (f) grant a **circulating security interest** over the company's property;
 - (g) arrange for the company to be **registered or recognised as a body corporate** in any place outside this jurisdiction;
 - (h) do anything that it is **authorised** to do by any other law (including a law of a foreign country).
 - Own property, contract, litigate

Registered company can: Registration confers existence: ss119

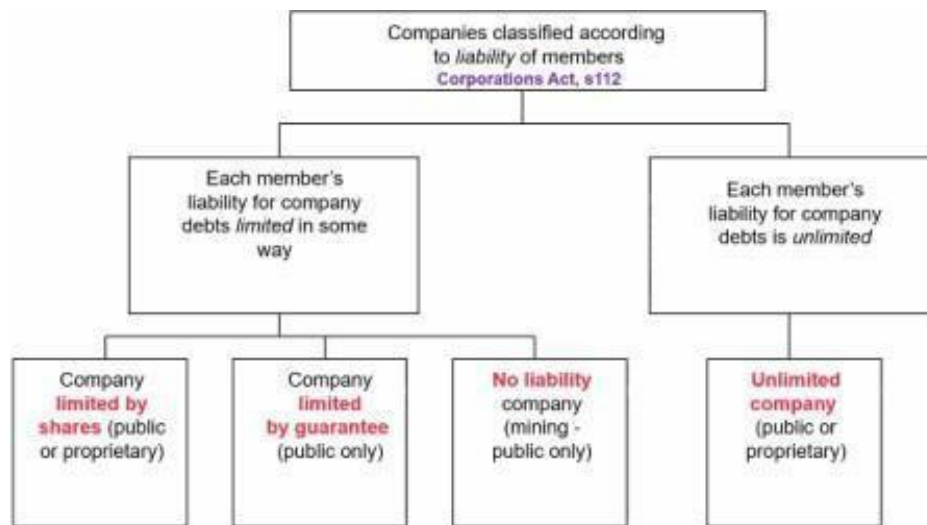
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NB: Ultra vires point

- A company enters into a K
- You cannot argue they are ultra vires – they can do anything you can do
- But what about corps that are not companies
 - Eg. Usyd, statute, but not registered
 - Thus Ultra vires does apply to Usyd – null and void???

5: TYPES OF COMPANIES

Liability of Members



[Corporations Act, s 112](#) sets out 4 different company types where liability attaches in different ways:

- Company Limited by Shares
- Company Limited by Guarantee
- Unlimited
- No liability Companies

Company Limited by Shares: [Section 9 Definitions Corporations Act](#)

- A company formed on the principle of having [liability of its members limited to the amount](#) (if any unpaid on the [shares](#) respectively held by them

Company Limited by Guarantee [Section 9 Definitions Corporations Act](#)

- A company formed on the principle of having the liability of its members [limited to the respective amounts](#) that the members undertake to contribute to the property of the company if it is wound up
 - You have not yet paid upfront in 'equity' or the money you have stated to contribute, but you are providing a [contractual agreement](#) that if it is wound you would pay.
 - Almost used exclusively for non-for-profits

Unlimited company: [Section 9 Definitions Corporations Act](#)

- A company whose members have [no limit placed on their liability](#)
 - Personal assets may be pursued

No liability Companies (mining companies): [s 112\(2\) Corporations Act](#)

- (2) A company may be registered as a no liability company only if:
 - (a) the company has a share capital; and
 - (b) the company's constitution states that its sole objects are mining purposes; and
 - (c) the company has no contractual right under its constitution to recover calls made on its shares

from a shareholder who fails to pay them.

- ~~Has a share capital~~
- ~~Constitution states sole objects are mining purpose~~
- ~~company has no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them~~
- ~~—~~
- ~~and all its members must hold shares but the members are not liable to pay any calls on their shares~~
- ~~If the directors make a call on the shares, the members can choose whether to pay or not.~~
- They also have to be **mining companies**
 - Should the shareholder choose not to pay when there is a call, the shareholder forfeits both the unpaid and paid shares.
 - This encourages investment in potential risky mining ventures, and a successful mining company usually converts to a limited liability company when advantageous.

Classifying Companies by Capital Raising Power and Size

- The 'company' structure and legislation was designed for:
 - Large companies that needed large amounts of money from an investing public and division between ownership (shareholders) and control (management)

Public Company: s 112

- **Can be**
 - Limited by shares
 - Limited by guarantee
 - Unlimited with share capital (unlimited company)
 - No liability company
- **Definition:** Any other company than a proprietary company: *CA s 9.*
- **Requirements:**
 - (1) It must have at least **one member**: *CA s 114.*
 - (2) It must have at least **three directors** with two ordinarily resident: *CA s 201A.*
 - (3) It must have at least **one company secretary** ordinarily resident: *CA s 204A(2).*
 - (4) It may raise funds by making offers or invitations to the public to purchase or subscribe for securities.
 - It may decide to apply for listing on a securities exchange.
- **Other attributes:**
 - Can convert into a public company: *CA s 162.*
 - Must hold an AGM: *CA s 250N.*
 - Independently audited financial statements are required: *CA s 292.*
 - May be a disclosing entity and subject to continuous disclosure requirements: *CA pt 1.2A.*

Proprietary Company: s 112

- **Can be**
 - Limited by shares
 - Unlimited with share capital
- **Requirements:**
 - (1) It must have **share capital**: *CA s 112(1).*
 - (2) It must have at least **one member** (*CA s 114*) but **cannot have more than 50 non-employee shareholders** as members (*CA s 113*).
 - (3) It must have at **least one director** ordinarily resident: *CA s 201A.*
 - (4) It **must not engage in any activity that would require disclosure under CA ch 6D**: *CA s 113(3).*
 - Exception: Offer of shares to existing shareholders or employees of company or subsidiary or crowd-sourced funding: *CA s 113(3).*
 - (5) It must include the words 'Proprietary Limited' or **'Pty Ltd' at the end of its name**: *CA s 148; s 149.*

- *Exception: Unlimited proprietary companies: CA s 148(3).*

- **Other attributes:**

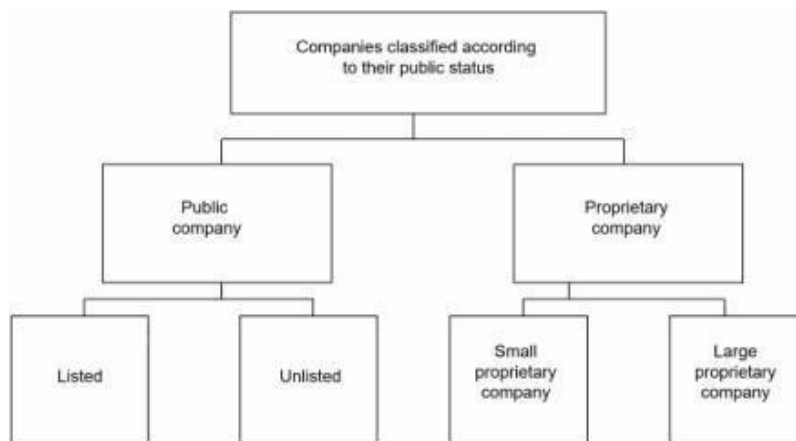
- *Can convert into a public company: CA s 162.*
- *Not a disclosing entity so continuous disclosure requirements do not apply: CA Pt 1.2A.*

Small or large proprietary companies

- **Test:**
 - *A proprietary company is small if it satisfies two of the following (CA s 45A(2)):*
 - *Consolidated revenue for the FY is <\$25m including subsidiaries;*
 - *Value of consolidated gross assets is <\$12.5m including subsidiaries; and*
 - *<50 employees including subsidiaries and the end of the FY.*
 - *Otherwise, it is large: CA s 45A(3).*
- *Small proprietary companies do not have to prepare financial reports and directors' reports.*
 - *Exceptions: Shareholders with at least 5% of vote direct the company or ASIC directs the company: CA s 293; s 294.*
 - *The financial report does not have to be audited unless the same requirements are met: CA s 293; s 294; s 301(2).*
- A proprietary company is **small** if it satisfies at least 2 of 3 criteria in s 45A(2) *Corporations Act*:
 - The consolidated gross operating **revenue** for the financial year of the company and any entities it controls is **less than \$25 million**;
 - The value of the consolidated gross **assets** at the end of the financial year of the company and the entities it controls (if any) is **less than \$12.5 million**;
 - The company and any entities it controls have **fewer than 50 employees**;
- A proprietary company is **large** if it not small: s 45A(3) *Corporations Act*

	Proprietary (Private) (Pty Ltd)	Public (Ltd)
Shareholders S 45A(1) Note 3(a); s 113(1) <i>Corporations Act</i>	Max 50 non-employee shareholders	No Maximum number
Members S 144 <i>Corporations Act</i>	1 member minimum	1 member minimum
Directors S 201A <i>Corporations Act</i>	1 director (1 resident)	3 directors (2 resident)
Finance S 45A(1) Note 3(b); s 113(3) <i>Corporations Act</i>	Difficult to get sufficient funds from the public	Can get funds from the public (with disclosure documents)
Listing S 45A(1) Note 3(b); s 113(3) <i>Corporations Act</i>	Can't be listed	Can be listed or unlisted
Type S45A(1), Note 2 <i>Corporations Act</i>	Limited by shares Unlimited with shares	

Companies Classified by Public Status



Corporate Groups — Holding Company & Subsidiary

- **Holding Company:** In relation to a body corporate, a holding company means a body corporate of which the *first body* corporate is a subsidiary ([Sections 9 and 46, Corporations Act](#))
 - A holding company is a company whose primary business is holding a controlling interest in the securities of other companies. A holding company usually does not produce goods or services itself. Its purpose is to own shares of other companies to form a corporate group.
- **Subsidiary:** A body corporate (in this section called the *first body*) is a [subsidiary](#) of another body corporate **if, and ONLY IF:**
- The other body:
 - [Controls](#) the composition of the first body's [board](#); **OR** (s 46(a)(i) *Corporations Act*)
 - Is in a position to [cast](#), or [control](#) the casting of, [more than one half](#) of the maximum number of
 - [votes](#) that might be cast at a general meeting of the first body; **OR** (s 46(a)(ii) *Corporations Act*)
 - [Holds more than one-half](#) of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital) **OR** (s 46(a)(iii) *Corporations Act*)
- The first body is a subsidiary of a subsidiary of the other body (s 46(b) *Corporations Act*)
- **Definition of Control:** 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 and operating policies](#) (s 50AA(1) *Corporations Act*)

● Holding company

- *Definition: A body corporate that has a subsidiary: CA s 9.*

● Subsidiary company

- *Test (CA s 46):*
 - The first company [controls the composition of the subsidiary's board](#) of directors; **or**
 - This must be a legal capacity, and not merely practical or de facto control, i.e., in the company's constitution or separate shareholder agreement: *Mount Edon Gold Mines Ltd v Burmine Ltd*.
 - The first company [can cast, or control the casting of, more than half of the maximum votes that might be cast at a general meeting](#) of the subsidiary; **or**
 - The first company [holds more than half of the subsidiary's issued share capital](#).
- *Exceptions (CA s 48):*
 - Full list
 - Where shares are held in a fiduciary capacity: *CA s 48(2)*.

Proprietary and public companies

● [Proprietary and public] Limited by shares

- *Definition: A company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares: CA s 9.*

- Liability: **Amount (if any) unpaid on the shares**: CA s 516.
 - Shareholders will be liable where the company makes a call on the shares.
- Attributes:
 - Must include the word 'Limited' or 'Ltd' at the end of its name: CA s 148(2).

● [Public] Limited by guarantee

- Definition: A company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up: CA s 9.
 - Usually used for non-profits.
- Liability: **Amount the member has undertaken to contribute to the company's property**: CA s 517.
- Attributes:
 - Cannot issue shares: CA s 124(1).
 - This means that it is difficult to raise capital.
 - Must include the word 'Limited' or 'Ltd' at the end of its name: CA s 148(2).
 - Exception: Not-for-profit registered under the Australian Charities and Not-for-profits Commission Act that prohibits the payment of fees to directors and requires the directors to approve all other payments to directors: CA s 150(1).
 - Must not pay a dividend to members: CA s 254SA.
- Must not pay dividends: CA s 254SA.

● [Proprietary and public] Unlimited with share capital

- Definition/Liability: A company whose **members have no limit placed on their liability**: CA s 9.
- Attributes:
 - Personal assets may be pursued.
 - Must be incorporated with share capital.
 - Must include the word 'Proprietary' at the end of its name: CA s 148(2).

● [Public] No liability company

- Definition: Must be a mining company with share capital: CA s 9.
 - Liability: None (i.e., only the shares themselves can be lost if shareholders do not pay calls on their shares). **Shareholders do not have liability to pay part-paid shares.**
- Attributes:
 - Usually highly speculative.
 - Must include the words 'No Liability' at the end of its name: CA s 148(4).
 - Must not engage in activities outside its mining purposes: CA s 112(2).

1: Consequences

1.1: WHAT COURTS HAVE JURISDICTION

What Courts have jurisdiction? (s58AA)

- (1) Subject to subsection (2), in this Act:
 - "court" means any court.
 - (Little C court) court – any court
 - Would include the Federal Circuit and Family Court of Australia Div 2; local court, district court etc, NCAT
 - "Court" means any of the following courts:
 - (big C court) Court – Federal Court, Supreme Court, Federal Circuit and Family Court of Australia Div 1 (i.e. Family Court)
 - Does not include the Federal Circuit and Family Court of Australia Div 2 (i.e. non family matters)
- (2) Except where there is a clear expression of a contrary intention (for example, by use of the expression "the Court"), proceedings in relation to a matter under this Act may, subject to Part 9.6A, be brought in any court.

Note: The matters dealt with in Part 9.6A include the applicability of limits on the jurisdictional competence of courts.

1.2: CIVIL AND CRIMINAL SANCTIONS UNDER CORPORATIONS ACT

Civil sanctions and orders

- Civil penalties (Pt 9.4B)
 - See Below
- Infringement notices (Pt 9.4AA)
 -
- Injunctions (s1324)
 -
- damages (eg ss1317H, HA)
- Accessorial liability ('involved in the contravention': s79; see eg s1317E(4))

Criminal sanctions (to be discussed further in Lecture 7)

- All contraventions of the Corps Act may be an offence (**s1311**) – summary, but also MOU of serious indictable offence
- See Sch 3 for specific penalties (otherwise see s1311A-F; default is 20 penalty units [1 penalty unit=\$313])
- Higher penalties for co, compared with individual
- Ch 2 Criminal Code Act 1995 (Cth) assists in determining criminal liability (s1308A)
- Note: restriction on civil penalty proceedings if criminal case started or if defendant convicted of offence based on conduct that is substantially the same as the conduct constituting the contravention
- Stay of civil proceedings where criminal case is possible
- Criminal proceedings may still be brought after civil penalty proceedings

1.3: CIVIL PENALTIES

What is it

- **Civil penalty - hybrid beast - somewhere in the middle of criminal and civil - sits in the middle**
 - **Characteristics similar to criminal nature**
 - **Purpose is punitive - similar criminal system**
 - **But process of imposing is civil in nature - enables regulator to bring the action**

What is a civil penalty?

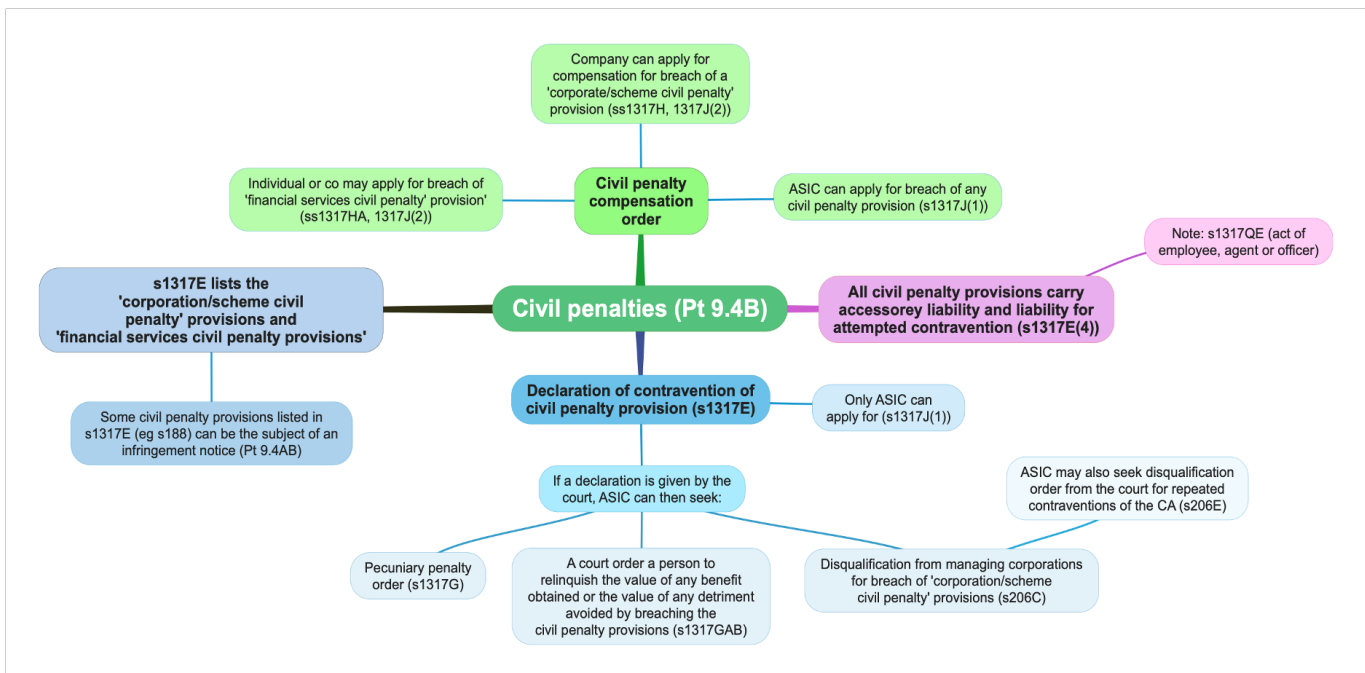
- Anything in s1317E(3)
- NB: some civil penalties listed in s 1317E can also be subject of infringement notices

Who is responsible?

- Offending party
- Accessorial liability
 - s 1317E(4) A person who:
 - (a) **attempts** to contravene a civil penalty provision; or
 - (b) **is involved** in a contravention of a civil penalty provision;
 - s 9(a) → Defined in s 79
 - **is taken to have contravened** the provision.
 - Involvement in contraventions: s 79
 - A person is involved in a contravention if, and only if, the person:
 - (a) has **aided, abetted, counselled or procured** the contravention; or
 - (b) has **induced**, whether by threats or promises or otherwise, the contravention; or

- (c) has been in any way, by act or omission, directly or indirectly, **knowingly concerned** in, or party to, the contravention; or
- (d) has **conspired** with others to effect the contravention.
- Agency/attribution: s 1317QE
 - If an element of a civil penalty provision is done by an employee, agent or officer of a body corporate acting:
 - (a) within the actual or apparent scope of the employee's, agent's, or officer's employment; or
 - (b) within the employee's, agent's, or officer's actual or apparent authority;
 - the element must also be **attributed to the body corporate**.

1.4: ASIC/WRONGED PARTIES' POWERS WRT TO CIVIL PENALTIES



Declaration of contravention of a civil penalty provision (s 1317E)

- Only ASIC can apply to a court for a declaration of contravention: s1317J(1).
- If declaration given by court, ASIC can then seek:
 - pecuniary penalty order to deter in the future: s1317G.
 - relinquishment order: a court order a person to relinquish the value of any benefit obtained or benefit avoided by breaching the civil penalty provisions: s1317GAB.
 - disqualification order to prevent [person] from managing corporations for a period.
 - This is available because X has
 - **breached a corporation/scheme civil provision: s206C.**
 - **repeatedly contravened the CA: s 206E.**

Civil Penalty Compensation orders

- **ASIC - any breaches of any civil penalty provision**
 - ASIC can apply for a compensation order under s1317J(1) and s1317H??.
 - Note that this does not just include traditional damages but can include any profits.
- **For companies – corporate/scheme civil penalty provisions**
 - [provision] is a corporate/scheme civil penalty: s1317E. Therefore, [company] can apply for a compensation order under s1317J(2) and s1317H.
 - Note that this does not just include traditional damages but can include any profits.
- **For companies – also financial services civil penalty provisions**

- For individuals - only financial services civil penalty provisions

- [provision] is a financial services civil penalty provision: s1317E. Therefore, [individual] can apply for a compensation order under s1317(3A) (any other person) and s1317HA.

Pecuniary penalty order

- Only ASIC
- See s 1317G

Concurrent criminal proceedings

- Criminal proceeds have already happened

- However, as there is already a conviction for substantially the same conduct, a court cannot make a declaration of contravention: s1317M.

- Criminal proceedings are happening

- However, as criminal proceedings have started for substantially the same conduct, proceedings for a declaration of contravention will be stayed: s1317N.

1.5: ASIC POWERS

Corporations Act

- Intervene in any proceedings relating to the Corps Act (s 1330)
- Parties may be required to give ASIC notice of proceedings in some cases
- Exemption or modification powers (see ASIC RG 51 Applications for relief)
- May issue stop order in relation to fund raising (s739)
- Civil penalties (Pt 9.4B); injunctions (s1324) – any breach or purported breach of the act; other orders (ss1323, 1325)
- Certain ASIC decisions are excluded from review by AAT (see s1317C)

ASIC Act

- Consumer protection in relation to financial services (Pt 2)
- Part 3 investigations and information gathering
 - s13 investigation
 - s19 examination
 - Inspect books (s29)
 - Notice to produce books (ss30-33); warrant to seize books (ss35,36)
- Cause prosecution to be begun (s49) or civil proceedings to recover \$ or property (s50), accept enforceable undertakings (s93AA)
- Representative proceedings (s50) – but if investors can sue, leave to shareholders

2A: Corporate fundraising Generally

2A.1: DEBT AND EQUITY

Sources of finance

- Trading activities
- Debt
- Equity

Debt vs equity

- Payment priority upon winding up (therefore lower risk and lower returns)
 - Ranking
 - (1) Senior secured debt
 - (2) Secured debt
 - (3) Subordinated debt
 - (4) Unsecured debt
 - (5) Preference shares
 - (6) Ordinary shares
 - To pay dividends, the company's assets must exceed its liabilities: **CA s 245T**.
- Dilution of equity
 - Issuing of debt does not dilute equity, whereas issuing equity does.
- Signalling theory
 - Corporate managers know more than outsiders, therefore, if more debt is issued, it is a signal that they think that future cash flows are high enough to cover the debt; rather, if more equity is issued, this dilutes existing shareholders' stakes, and it can be seen as not having another choice.
- Tax implications
 - Interest on debt may be tax deductible, whereas dividend payments are not.
- Voting rights
 - Debt does not confer voting rights (unless during insolvency), whereas equity usually carries voting rights.

2A.2: DEBT

Definition: Borrowing of money and paying it back with interest: Investopedia.

- Companies generally have the power to issue debt capital: **CA s 124**.

Debentures ('debt securities') (commonly called 'bonds')

- Definition: A chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body: **CA s 9**.
 - The chose in action may (but need not) include a security interest over property of the body to secure repayment of the money: **CA s 9**.
 - Excludes:
 - [Certain trade credit] An undertaking to repay money deposited with or lent to the body by a person if (**CA s 9(a)**):
 - (i) the person deposits or lends the money in the **ordinary course of a business** carried on by the person; and
 - (ii) the body receives the money in the ordinary course of carrying on a business that neither comprises nor forms part of a business of borrowing money and providing finance.
 - Bank deposits: **CA s 9(b)**.

- Policy reason: banks can protect themselves and this keeps the cost of debt low.
 - Undertakings to pay under negotiable instruments: **CA s 9(c)**.
 - Undertakings by a body corporate to pay money to a related body corporate: **CA s 9(e)**.
- Characteristics
 - Retail debenture issues require compliance with CA Ch 6D and 2L.
 - **Debentures are 'security' under CA s 761A, so are 'securities' such that CA Ch 6D is relevant: CA s 700.**
- Types (offence to misname) (**CA s 283BH**):
 - Mortgage debenture
 - Where (**CA s 283BH(2)**):
 - (c) the repayment of all money that has been, or may be, deposited or lent under the debentures is **secured by a first mortgage** given to the trustee over land vested in the borrower or in any of the guarantors; and
 - (d) the mortgage has been registered, or is a registrable mortgage that has been lodged for registration, in accordance with the law relating to the registration of mortgages of land in the place where the land is situated; **and**
 - (e) the total amount of that money and of all other liabilities (if any) secured by the mortgage of that land ranking equally with the liability to repay that money does not exceed 60% of the value of the borrower's or guarantor's interest in that land as shown in the valuation included in the disclosure document for the debentures.
 - Debenture
 - Where (**CA s 283BH(2)**):
 - (c) the repayment of all money that has been, or may be, deposited or lent under the debentures is **secured by a first mortgage** given to the trustee over land vested in the borrower or in any of the guarantors; and
 - (d) the mortgage has been registered, or is a registrable mortgage that has been lodged for registration, in accordance with the law relating to the registration of mortgages of land in the place where the land is situated; **and**
 - (e) the total amount of that money and of all other liabilities (if any) secured by the mortgage of that land ranking equally with the liability to repay that money does not exceed 60% of the value of the borrower's or guarantor's interest in that land as shown in the valuation included in the disclosure document for the debentures.
 - Or (**CA s 283BH(3)**):
 - (a) the repayment of all money that has been, or may be, deposited or lent under the debentures has been **secured by a security interest** in favour of the trustee over the whole or any part of the tangible property of the borrower or of any of the guarantors; and
 - (b) the tangible property that constitutes the security for the security interest is sufficient and is reasonably likely to be sufficient to meet the liability for the repayment of all such money and all other liabilities that:
 - (i) have been or may be incurred; and
 - (ii) rank in priority to, or equally with, that liability.
 - Unsecured note or unsecured deposit type
 - In any other case.

Convertibles/hybrids

- Definition: Debt instrument that can be converted into an equity instrument or an instrument that has characteristics of both debt and equity.

Security interests and charges

- Priority rules
 - (1) The priority between unperfected security interests in the same collateral is determined according to the order of attachment of the security interest: **PPSA s 55(1)**.
 - (2) A perfected security interest has priority over an unperfected security interest in the same collateral: **PPSA s 55(3)**.
 - (3) Where two or more security interests are perfected, priority is determined by the 'priority time' for each security interest: **PPSA s 55(4)**.