

- **Continue trading?**
  - The Court will not allow an insolvent company to continue trading (*Re Data Homes Pty Ltd*)

### **Liquidators:**

#### **a. Qualifications:**

- A person cannot act as a liquidator of a company unless they are a registered liquidator on the register recorded by ASIC (*s 532(1)*)
- The liquidator must have a base level of qualifications and experience, must take out professional insurance and be a fit and proper person (*s 20-1, IPRC*)

#### **b. Disqualification**

- Unless with the leave of the Court, a person cannot be appointed as a liquidator of the company if any of the provisions under *s 532(2)* applies.

#### **c. Duties of the liquidator**

- **Fiduciary duties**
  - The liquidator is a fiduciary and owes the following fiduciary duties:
    - To act honestly and exercise the power bona fide (*s 181 CA*)
    - Avoid conflict of interest (*s 60-20, IPRC; s 182 CA*)
      - A liquidator who becomes aware of a potential conflict should apply to the Court for leave to resign (*Commissioner for Corporate Affairs v Harvey*)
    - To act impartially (*Bovis Lend Lease v Wily*)
- **Reasonable skill and care**
  - A liquidator is required to act with a reasonable degree of care skill analogous to that of a director (*Grau v Bridgestone*)
- **Officer of the Court**
  - A liquidator is considered an officer of the Court and must act with integrity and fairness in accordance with *ASIC v Edge*
- **Statutory duties**
  - Some of the statutory duties include:
    - Collect the property of the company and apply it to pay liabilities (*s 478(1)*)
    - Report possible offences to ASIC (*s 533*)
    - Keep proper books (*s 70-10 IPS*)
- **Where there are insufficient assets to recoup expense**
  - Except lodging documents (*s 545(3) CA*), a liquidator is not required to take action and incur expense if the company has no sufficiently available assets to recoup their expenses (*s 545(1)*)
    - The section applies to all contractual and statutory expenses incurred in a liquidation (*EPA v Australian Sawmilling Co Pty Ltd (in liq)*)
    - An indemnity in the liquidator's favour is prima facie considered a "sufficiently available property" (*Re CuDeco Limited (Receivers and Managers Appointed) (in liq)*)
  - The Court may, on application of a creditor or a shareholder, direct a liquidator to incur an expense on condition that the applicant indemnifies the liquidator and give security as the Court considers appropriate (*s 545(2)*)

#### **d. Liquidator's powers**

- **Limits**
  - A liquidator cannot compromise a debt owed to the company if the debt owed is more than \$100,000 without the creditors' or the Court's approval (*s 477(2A), reg 5.4.02*)
  - A liquidator cannot enter into an agreement that can run for more than 3 months (*s 477(2B)*)
- **General powers – s477(1)**
  - All (general) duties that apply to the company officer apply to the liquidator
  - Carry on business so far as is necessary for beneficial disposal or winding up of the business (*s 477(1)(a)*)
  - A liquidator's general powers include carrying on the company's business, taking legal proceedings, compromising claims, and selling property (*s 477(1), 477(2)*)
  - The power to carry on the company's business after it was gone into liquidation exists only in so far as it would benefit the disposal or winding up of the business (*s 477(1)(a)*)
- **Specific powers – s477(2)**
  - All things necessary for winding up affairs of the company and distributing its property in proper exercise of liquidators own discretion (*s 477(2)(m)*)

## Winding Up → s461

- Last resort option (*Catalano v Managing Australia Destinations*)
- Note that this is different from winding up due to insolvency. However, most of the time there will be an argument for both.
- Pursuant to **s462(4)** a court will not hear an application for winding up unless and until security for costs has been given as the court thinks reasonable and a prima facie case for winding up the company has been established in the Court's satisfaction.

### (1) Could "X" apply to have the company wound up under s461? (standing)

- **s 461** is the nuclear option for dealing with oppressive or unfair conduct, or poor management practices. The Court is very hesitant to make orders. This is regarded as an extreme step (*Kokotovich v Wallinton*).
- As per **s462(2)** the following parties can apply for an order to wind up a company
  - Note that as per **s462(5)** a person is not entitled to apply for an order to wind up a company
  - **s 462(2)(c)** – a 'contributory' under **s 9** includes shareholders (and 'past member', which is if they were a member 12 months before the winding up (**s 521**))

#### Section 462 - Standing to apply for winding up

- (1) A reference in this section to an order to wind up a company is a reference to an order to wind up the company on a ground provided for by section 461.
- (2) Subject to this section, any one or more of the following may apply for an order to wind up a company:
- (a) the company; or
  - (b) a creditor (including a contingent or prospective creditor) of the company; or
  - (c) a contributory; or
  - (d) the liquidator of the company; or
  - (e) ASIC pursuant to section 464; or
  - (f) ASIC (in the circumstances set out in subsection (2A)); or
  - (g) APRA.
- (2A) ASIC may apply for an order to wind up a company under paragraph (2)(f) only if:
- (a) the company has no members; and
  - (b) ASIC has given the company at least 1 month's written notice of its intention to apply for the order.
- (4) The Court must not hear an application by a person being, or persons including, a contingent or prospective creditor of a company for an order to wind up the company unless and until:
- (a) such security for costs has been given as the Court thinks reasonable; and
  - (b) a prima facie case for winding up the company has been established to the Court's satisfaction.
- (5) Except as permitted by this section, a person is not entitled to apply for an order to wind up a company.

### (2) Grounds on which a company can be wound up

- Under **s 461(1)**, court can order company be wound up if a ground is established
  - These are all discretionary by the court

#### Section 461 - General grounds on which company may be wound up by Court

- (1) The Court may order the winding up of a company if:
- (a) the company has by special resolution resolved that it be wound up by the Court; or
  - (b) Repealed.
  - (c) the company does not commence business within one year from its incorporation or suspends its business for a whole year; or
  - (d) the company has no members; or
  - (e) directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members; or
  - (f) affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole; or
  - (g) an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or
  - (h) ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:
    - (i) the company cannot pay its debts and should be wound up; or
    - (ii) it is in the interests of the public, of the members, or of the creditors, that the company should be wound up; or
  - (j) if the application was made by APRA - the Court is of opinion that it is in the interests of the public, of the members or of the creditors that the company should be wound up; or
  - (k) the Court is of opinion that it is just and equitable that the company be wound up.
- (2) A company must lodge a copy of a special resolution referred to in paragraph (1)(a) with ASIC within 14 days after the resolution is passed.

a. Step 1: Is another remedy available? → if yes, cannot use wind-up remedy as it is unreasonable (**s 437(4)**)

b. Step 2: Grounds for wind-up

- Directors act in their own interests (**s 461(1)(e)**).
  - Own interest instead of best interest of the company

a. **Safe Harbour – s588GA**

- Objective=protect directors who take reasonable risks to facilitate coy's recovery (eg appointing administrator)
- Exception rather than a defence
- s 588GA contains the 'safe harbour' for directors from civil liability for insolvent trading:
  - It provides that s 588G(2) does not apply to a person and a debt if:
    - (a) at a particular time after the person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and
    - (b) the debt is incurred, or the disposition is made, directly or indirectly in connection with any such course of action during the period starting at that time, and ending at the earliest of any of the following times:
      - (i) if the person fails to take any such course of action within a reasonable period after that time--the end of that reasonable period;
      - (ii) when the person ceases to take any such course of action;
      - (iii) when any such course of action ceases to be reasonably likely to lead to a better outcome for the company;
      - (iv) the appointment of an administrator, or liquidator, of the company.
- s 588GA(2) → contains a list of factors that will be considered to decide whether a course of action is reasonably likely to lead to a better outcome for the company:
  - For the purposes of (but without limiting) subsection (1), in working out whether a course of action is reasonably likely to lead to a better outcome for the company, regard may be had to whether the person:
    - (a) is properly informing himself or herself of the company's financial position; or
    - (b) is taking appropriate steps to prevent any misconduct by officers or employees of the company that could adversely affect the company's ability to pay all its debts; or
    - (c) is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company; or
    - (d) is obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or
    - (e) is developing or implementing a plan for restructuring the company to improve its fin. position.
- **Holding Company's reliance on safe harbour defence → look below re s588WA**

b. **Other Defences → s588H**

- **Reasonable grounds to expect solvency (s 588H(2))**
  - The director had reasonable grounds to expect and did expect the company was solvent and would remain solvent (**s 588H(2)**).
    - "expect" = higher standard than suspect
    - Need to show there is more than a mere hope or possibility (*Tourprint International v Bott*)
    - The expectation must be that the debts will be paid when due, not that funds will become available at some indefinite time in the future (*Hall v Poolman*)
    - The grounds relied on must be objectively reasonable as a basis to expect solvency (*Metropolitan Fire Systems Pty Ltd v Miller*)
  - Optimism doesn't satisfy reasonable grounds to expect (*Metropolitan Fire Systems v Miller*)
  - Defence not established if director was completely unaware of the company's fin position (*Tourprint*)
- **Delegation and reliance on others (s 588H(3))**
  - (a) Reasonable grounds to believe, and actual belief:
    - (i) that a competent person was responsible for providing adequate information regarding insolvency; and
    - (ii) that the other person was fulfilling that responsibility; and
  - (b) Expected, on the basis of information provided by that person, that the company was solvent.
    - Does not negate a director's duty to keep themselves informed and form their own judgment (*Iso Lilodw' Aliphumeledi v Commissioner of Taxation*)
    - The other person must be in fact responsible for providing information as to solvency of the company (*ASIC v Plymin*)
    - If the director is put on notice about the reliability of the information but did not do anything, the defence is not available (*ASIC v Plymin*)
- **Absence from management (s 588H(4))**
  - (4) Not participating in the management of the company because of illness or "some other good reason" at the time the debt was incurred.
  - Total reliance on a fellow director and lack of knowledge or skills are not good reasons to not participate in management (*Deputy Commissioner of Taxation v Clark*)
- **Taking all reasonable steps to prevent the incurring of the debt (s 588H(5))**
  - (5) It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt or making the disposition of its property.

# Director's Duty of Care, Skill and Diligence – CL + Statute

## Outline:

- (1) Is the person a valid director/officer?
- (2) Does the party seeking advice have standing? ASIC, Company
- (3) Standard → what would the reasonable person do + acting as director, in the circumstances, occupying the office, having the same responsibilities of the current director → *Daniels v Anderson* minimum standard reinforced in *ASIC v Healey*
- (4) Defences → Business Judgement Rule, Delegation, Reliance
- (5) Remedies → ASIC, company, the court itself
- (6) Remedies – S1317S

## (1) Statutory Duty of Care and Diligence

“Directors” & “other officers” are under a duty to exercise a reasonable degree of care & diligence. These duties are imposed by s 180(1) as well as the CL tort of negligence and the equitable duty of care.

- The company's interests include its reputation, its ability to continue operations its business, compliance with the law, and potential exposure to civil penalties or other liability (*Cassimatis v ASIC*)
- **The substance of the fiduciary and statutory duties is the same (*Vines v ASIC*)**

### a. Section 180

- As per s180, directors and officers are under an obligation to act with reasonable care, skill and diligence in the running of their companies.

s180(1) – Care and diligence – civil obligation only

Requires a **director or other officer** of a corporation must exercise their **powers** and discharge their **duties** with the degree of care and diligence that a **reasonable person** would exercise if they:

- (a) were a director/officer of a corporation in the **corporation's circumstances** and
- (b) **occupied the office** held by, and had the same **responsibilities** within the corporation as, the director/officer.

Under s 180(1) a director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if that person was a director or officer of a corporation in the corporation's circumstances (par (a)) and occupied the office held by and had the same responsibilities within the corporation (par (b)).

- **s180(1)(a):** “corporation's circumstances” includes factors such as the type of company, its size, the nature of its business, the relationship between its board and other officers, the state of the company's financial position and the urgency of dealing with particular problems (*ASIC v Rich*).
- **s180(1)(b):** A director's “responsibilities” involves a consideration of the specific tasks delegated to the director by the CC or the board, and the way in which work is actually distributed within the company as well as the particular director's experience and skills (*ASIC v Rich*)
  - Includes whatever responsibilities they have with the company regardless of how or why those responsibilities came to be imposed on them (*Shafron v ASIC*)

### b. Is the person a valid director/officer?

- See law above

### c. Does “X” have standing?

- **ASIC** – ASIC has standing under s1317J(1), to seek a Declaration of Contravention, Pecuniary Penalty Order, or a Disqualification Order. Under s1317GAB(2) they may also seek a Relinquishment Order for a breach of duties under s180.
- **Company** – The company itself may take action for a breach
  - Per s1317J(2) the company itself could seek a compensation order under s1317H for losses resulting from a breach of s180(1).
  - The company can also seek to intervene in any proceedings commenced by the ASIC under s1317J(3) but cannot be heard on all matters (e.g. such as whether a declaration or order should be made).

### d. Standard of Proof

The director must execute their duties with the care and diligence that a reasonable person acting as a director in the same circumstances and holding the same office and responsibilities would (*ASIC v GetSwift Limited*).

- In determining how the RP would exercise their duties, courts consider foreseeable risk of harm + balance any possible risks of harm against any potential benefits to be accrued by the coy (*Vrisakis v ASIC*).
  - What constitutes a breach depends on a wide variety of circumstances. However, there is a **core irreducible requirement of involvement in the management of the company**. This requires directors to take **reasonable steps** to place themselves in a position to guide and monitor company's management (*ASIC v Healey*)
- **Directors, whether exec or non-exec, have a continuing obligation to familiarise themselves with the coy's financial position by regular review and understanding of its financial statement (*Daniels v Anderson*).**

# Directors' Duties

## (1) Types of Directors Duties

- **Care and diligence**
  - General law duty to act with reasonable care and diligence
  - Statutory duty to act with reasonable care and diligence (s180)
  - Duty to prevent insolvent trading (s588G)
- **Loyalty and Good Faith**
  - General law duty to use powers for a proper purpose
  - General law duty to acting in good faith in the interest of the company
  - Statutory duty to act in good faith in the best interests of the company and for a proper purpose (s181)
- **Fiduciary Duties**
  - No conflicts rule
  - No profits rule
- **Statutory duty to not misuse**
  - Position (s183)
  - Information (s182)
- **Requirement to disclose certain interests** (ss191 – 196)

## (2) Is the “X” a valid director?

### a. Section 9 Definition

Director → s9AC: Meaning of Director

(1) A director of a company or other body is:

- (a) a person who:
  - (i) is appointed to the position of a director; or
  - (ii) is appointed to the position of an **alternate director** and is acting in that capacity; **regardless of the name that is given to their position**; and
- (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
  - (i) they act in the position of a director (**“de facto director”**); or
  - (ii) the directors are accustomed to act in accordance with the person’s instructions or wishes (**“shadow director”**)

Officer → s9AD

Officer is defined in s 9AD & includes directors, company secretaries & other persons such as receivers, administrators & liquidators.

### b. De Jure Directors

- They are validly appointed under s 9AB(1)(a)(i)

If not validly appointed, then go to de facto or shadow

### c. Both De Facto & Shadow Director:

- Australian courts → **broad approach** → A person may fall under both categories (*Grimaldi*)
  - Includes person who is the “driving force” behind the company (e.g. former MD (*ASIC v King*); sole director’s husband (*Yeo v Sklenovskij*); or those with non-director titles acting like director (*Harris v S*)

### d. De Facto Directors

Per s 9AC(1)(b)(i), unless a contrary intention is provided, a person who is not validly appointed as a director may also be regarded as a director if they act in the position of a director.

- **Necessary element:** Necessary to consider the duties performed by the person in the context of the company’s operations and circumstances [evidence that a person has exercised top level management functions] (*DFC of T v Austin*)
  - Focus is upon “the way the person operates within the particular corporate governance context, the degree of autonomy exercised and the appearance (and reality) of authoritative operation as a primary level decision-maker for the company” (*Re ACN 092 745 330*)
  - Small company: if person acted as company on important matters → may indicate acting in capacity of director (*DFC of T v Austin*)

## Dividends:

### General Information:

- Dividends are a distribution of a company's earnings to its shareholders. they represent a return on the shareholders' investment in the company.
  - They are payable to those entered on the company's share register as members at the time the dividend is payable or is declared.
- A company has the legal capacity to distribute dividends in cash or kind (*s 124(1)(d)*).

### a. Does the Shareholder have Dividend Right? → s254W

- **Public Company → s254W(1)**
  - Each share in a class of shares in a public company has the same dividend rights unless:
    - (a) the company has a constitution and it provides for the shares to have different dividend rights; **OR**
    - (b) different dividend rights are provided for by special resolution
- **Proprietary Company → s254W(2) [RR]**
  - Subject to the terms on which shares in a proprietary company are on issue the directors may pay the dividend as they see fit
- **Company Limited by Guarantee → s254SA**
  - Must not pay dividend to its members

### b. Power of Directors to Determine Dividend Payment

- **s 254U(1) Determination of directors**
  - (1) The directors may determine that a dividend is payable and fix:
    - (a) the amount,
    - (b) the time for payment, and
    - (c) the method of payment.
  - The method of payment may include payment of cash, the issue of shares, the grant of options and the transfer of assets
  - (2) Interest is not payable on a dividend
- May be displaced by Company Constitution

### c. When can a Dividend be Paid?

- A company must **not** pay a dividend unless **three requirements** are met under *s 254T*
  - (1) **Balance Sheet Test** → The company's assets must exceed its liabilities immediately before the dividend is declared, and the excess is sufficient for the payment of the dividend (*s 254T(1)(a)*)
    - The company's assets and liabilities are calculated in accordance with applicable accounting standards in particular *AASB 111* (*s 254T(2)*).
    - *Fitz Jersey v Atlas Construction*: Company declared dividend despite uncertainty about recognised revenue → went into liquidation → breach of *s 254T(1)(a)*.
  - (2) **Fair and Reasonable Test** → The payment of a dividend must be fair and reasonable to the company's shareholders as a whole (*s 254T(1)(b)*).
    - A proposed payment of a dividend may be fair and reasonable to the shareholders as a whole if it is commercially justifiable and makes due allowance for risk, even though it involves the adoption of a higher risk strategy by the company's directors than was previously the case (*KGD Investments v Placard Holdings*)
  - (3) **Material Prejudice Test** → The payment of a dividend must not materially prejudice the company's ability to pay its creditors (*s 254T(1)(c)*).
    - The payment of a dividend would materially prejudice the company's ability to pay its creditors if the company would become insolvent as a result of the payment (*s254T(1) - note*)
- Method of payment:
  - Directors may pay in cash, shares, options, or other property (*s 254U(1)*)
  - Cannot discriminate unless authorised by constitution (*Wood v Odessa Waterworks*)
  - Constitution should address resolution of dividend inequalities

### d. When does the company incur debt? → s254V

- When the company fixes the amount for dividend (*s 254V(1)*)
  - The debt is incurred not by merely fixing the amount or time for payment of a dividend
  - The debt arises only when the time fixed for payment arrives and the decision to pay the dividend may be revoked at any time before then

- And provide a quarterly report to trustees and AIO
- **Duties of guarantor (s 283CA-CE)**
  - E.g. to conduct its business in a proper & efficient manner; make its financial records available
  - E.g. duty to exercise reasonable diligence in assessing the company's ability to meet its obligations and whether any breaches of the trustee have occurred.
- **Trustee's duties (s 283DA-DC)**
  - E.g. to exercise reasonable diligence in assessing company's ability to meet its obligations
- **Meetings of debenture holders (s 283EA-EC)**
  - Borrowers must convene a meeting if holders of 10% or more of the nominal value of the debenture request a meeting OR if a meeting is required by the trustee or by a court.
- Civil recovery for a person suffering loss or damage due to a breach (s 283F)
- **ASIC (s 283GA-GB)**
  - ASIC has the power to exempt from compliance with the debenture rules or displace or modify the provisions applicable to that person
- **Court (s 283HA-HB)**
  - Court also has powers in this area. For example, can give trustees directions on the performance of the trustee's duties. Also have specific powers (e.g. to initiate legal proceedings against the borrowing company or guarantor or appoint receiver to secure property in relation to debenture etc).

### **Personal Property Securities Act 2009 (Cth) (PPSA) → ('Secured Debentures')**

- The *Personal Property Securities Act 2009* (Cth) regulates borrowing on security of personal property (e.g. vehicles, machineries, furniture, inventories, etc.).
- The PPS reforms regulate security interests in personal property.
- Since 2012, the PPS Register is the single national source of registered security interests in personal property.
- **Prior to the enactment of the PPSA**
  - Fixed charge: security granted to a creditor over a particular, identifiable asset
    - A Fixed charge attaches to specific property (which may include future property).
    - The company cannot dispose of the fixed charged assets without the lender's consent. (the acquirer is not free of the charge)
  - Floating charge: e.g. 'over all the assets and undertakings of the company'
    - Crystallises to become a fixed charge upon a particular event (determined by contract)
    - *Illingworth v Houldsworth*: A Floating charge floats above a class of property, and does not attach to specific property within the class ("crystallise") until some future event occurs.
    - *Reynolds Bros v Esanda*: Until the charge crystallises, the company may create legal interests in floating charge assets by dealing in the ordinary course of business.
    - *Hart v Barnes*: A charge labelled as "fixed" is nevertheless floating if the parties intended the company to continue dealing with the charged assets without the lender's consent.
      - Courts will look at the substance, not labels
    - Ordinary course of business
      - Transactions are within the ordinary course of business if they are made for the purpose of maintaining the company as a going concern (even if it is exceptional in nature) (*Reynolds Bros v Esanda*)
    - Not ordinary course of business (*Torzillu v Brynac*):
      - A scheme to favour particular persons over other creditors; and
      - A disposal of a company's business as a preliminary step in ceasing business
    - Crystallisation:
      - A floating charge crystallises (ie. attaches to specific property; becomes a fixed charge) when: (*Govt Stock Investment Co v Manila Railway Co*)
        - the company ceases to be a going concern; or
        - the charge holder intervenes by enforcing the charge (e.g. when company defaults).
      - Automatic crystallisation may occur on any event that the company and chargee had agreed on. It's a matter of contract between chargor & chargee (*Fire Nymph Products v The Heating Centre*)
- **NOW → the PPSA replaced the concepts of fixed and floating charges.**
  - **Floating charges** are included within the definition of **circulating security interests (s51C)**. A circulating security interest provides a grantor with the means to use constantly changing circulating assets (e.g. inventory, book debts and negotiable instruments).

# Company Finance: Share Capital and Debt

## Fundraising:

ONLY applies to offers of securities of **public companies**. A **proprietary company** must not engage in any activity that would require disclosure to investors under Ch 6D except for an offer of shares to existing s/h's or employees (s 113(3)). If proprietary company in breach, ASIC may require coy to convert to public company (s 165)

- 2 types: Issue offers of securities (primary issues), and sale offers of securities (secondary trading)

### Definitions of Securities:

- Securities are defined as **shares, debentures**, a legal or equitable interest in shares or debentures, options to acquire shares or debentures. (ss700(1); 92(5)(a))

### Definition of Disclosure Document:

- **Section 9** defines a disclosure document for an offer of securities as:
  - Prospectus (full or short form).
  - Profile statement.
  - Offer Information Statement ("OIS")

### When is disclosure required?

**s706: an offer of securities "needs disclosure to investors" unless an exemption under s708 or s708AA applies.**

- "Offer" includes both contractual offers and invitation to treat (s700(2)(a))
  - The person who offers securities will be treated as the person who has the capacity or who agrees, to issue or transfer securities if the offer is accepted (*ASIC v Axis International Management*)
- ASIC v Australian Investors Forum (No 2) - Palmer J → **indicia** of an offer:
  - Identification of the company in which the securities are offered;
  - What is the general nature of the securities offered;
  - Price for which the securities may be acquired;
  - Suggestion that the securities are available for acquisition by the person to whom the info is conveyed;
  - Suggestion that the securities may be acquired now or at some specified future time, by the requisite payment.

### Offers that do not need disclosure (ss708 & 708AA):

- **Small-scale personal offers: 20 members - \$ 2 m - 12-month period (s708(1))**
  - Under s 708(1)-(7), to come within the small-scale exception an offer of securities must be "**personal**" offers of securities where none of the offers results in a breach of the "**20 investors ceiling**" (s708(1)(a)) and the "**\$2 million ceiling**" (s708(1)(b)).
    - **Personal Offers:** Offers which are made directly to a particular person who has some connection with the offeror or has indicated an interest in offers of that kind (s 708(2)).
    - **20 investors ceiling:** The 20 investors ceiling is breached if an offer to issue securities results in the number of people to whom securities have been issued exceeding 20 in any 12-month period (s708(3)(a)).
    - **\$2 million ceiling:** The ceiling is breached if an offer to issue securities results in the amount raised by the issuing body exceeding \$2 million in any 12-month period (s708(3)(b)).
  - **PENALTY:** It is an offence to issue securities without disclosure to investors if the issue results in a breach of either of these ceilings (s 727(4)).
  - **EXCEPTION:** Securities issued and amounts raised as a result of offers that come under other s708 exemptions are disregarded in counting the 20 investors ceiling and the \$2 million ceiling (s 708(5)). Issues made under a disclosure document are also not counted.
- **Sophisticated investors (s708(8)) (CR 6D 2.03)**
  - **Large offers:**
    - s 708(8)(a): an offer of securities does not need disclosure to investors if the minimum amount payable for the securities on acceptance of the offer is at least \$500,000.
    - s 708(8)(b): the amount payable for the securities on acceptance by the person to whom the offer is made and the amounts previously paid by the person for the body's securities of the same class that are held by the person add up to at least \$500,000.
      - In calculating the amount payable/paid for securities under s708(8)(a)/(b), any amount lent by person offering securities or their associate is disregarded (s708(9)).
  - **Offers to wealthy investors**
    - s 708(8)(c): Offers of securities made to "wealthy" investors do not need disclosure to investors. An offer comes within this exemption if a "qualified accountant" certifies that the



# Introduction and Partnership

## Forms of business organisations

### Sole Trader: Simplicity and Control

A person carrying on a business as an independent individual such as a plumber, electrician or accountant

- The most straightforward type of business organisation and a form of unincorporated organisation.
- Does not require any formalities apart from those related to specific industry (e.g. licences/ certificates).
- Establishment: Necessary for the individual to apply for an Australian Business Number (ABN) and register the business name if they choose to trade under a name other than their own.
- Governing Law: no specific governing law applicable to the structure of being a sole trader
- Control: ST structure provides the business owner with complete control over all aspects of the business.
- Liability: ST is subject to unlimited liability for the debts of the business. The individual's assets are indistinguishable from the business assets.
- Fundraising: ST has access to limited resources to fund their business and growth
- Continuity of Existence: benefits of perpetual succession are not applicable to ST.
- The breakdown of a marriage or de facto relationship may have implications for sole traders. Both or one of the parties may be liable for money owed to ATO.
- Privacy: apart from disclosure to the CoT, profits do not need be disclosed & financial affairs can be kept private.
- Taxation: ST is liable, according to the tax rate applicable to individual taxpayers for the payment of taxes on income earned.
  - Partnership:
    - Family Court has power to reassign a tax debt from one partner to another (*CoT v Tomaras*)
    - Courts have sometimes held that both parties should be liable if both benefit from the non-payment of tax by one party. Exceptions to this principle exist if one party has engaged in conduct designed to reduce the value of assets or has acted recklessly, negligently or wantonly with matrimonial assets, thereby reducing their value (*In Marriage of Kowaliw*).
- Implied partnership: 2 or more people work together to make money, but never officially agreed to be partners

### Agency:

A person appoints an agent who will manage the business on behalf of the principal

- An agent is simply one person who has authority to create legal relations between a principal and third parties (*ACCC v Flight Centre Travel Group* at [76]).
- 'Agency is the **fiduciary relationship** which exist between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.' (*Gooley et al, p.351*).
- Case Law:
  - The agent has the authority to affect the principal's legal relations with third parties (*Petersen v Moloney* at [94])
  - Acts by the agent that do not relate to the defined matter are beyond the scope of the agency relationship (*Bell Group v Westpac Banking Corp (No 9) (2008)* at [6167])
- A principal will only be fixed with knowledge held by the agent if:
  - The agent acquires knowledge of something material to the transaction for which he or she is responsible while acting in the course of, and within the scope of, his or her authority; and
  - the circumstances are such that there is a duty on the agent to communicate that information to the principal (*Bell Group Ltd (in liq) v Westpac Banking Corp (No 9) (2008)* at [6187])
  - In such circumstances, the principal will be deemed to have constructive knowledge from the time when the principal would have received the information had the agent acted with due diligence (*Wyllie v Pollen*)
- Types of agents:
  - Mercantile Agents: a person who sells goods entrusted to their possession or control (aka 'factor'). Common form of mercantile agents are auctioneers and persons who sell goods on consignment (see *Folkes v King [1923]*).
  - Del Credere Agents: A del credere agent sells goods and guarantees payment for those goods. If the buyer does not pay, the del credere agent must reimburse the principal (*Thomas Gabriel & Sons v Churchill [1914]*). A del credere agent receives a special commission because they undertake liability to the principal

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