

LAW5011

COMPANY LAW

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INTRODUCTION TO COMPANY LAW

COMPANY

Artificial entity recognized by law as a legal person with rights and liabilities. The corporation is not just a “legal fiction,” an instrument for consolidating and protecting capital and limiting liability. In the flesh, corporations are organizations of people, people with (more or less) shared assets and interests. Legally, a corporation may exist apart from its people, but in any meaningful or practical sense a corporation is its people.

It is a separate legal entity, and is an artificial entity recognised by law as a legal person with rights and liabilities.

| FEATURE | DETAIL |
|-----------------------|---|
| Separate Legal Person | <ul style="list-style-type: none">A company is distinct from owners, operators, and employees. As a result, can own property, enter contracts, employee people, sue & be sued. It has the rights of a legal person |
| Limited Liability | <ul style="list-style-type: none">Concerned with the liability of shareholders/members. Generally speaking, liabilities of the company are not liabilities of its owners. Owner liability limited to price of shares (see s 516 of the Corporations Act 2001 (Cth) (CA)). Note: the “veil” can at times be lifted (topic 2). |
| Perpetual Succession | <ul style="list-style-type: none">Corporations can go on forever, despite changes in shareholders and directors. Because of (1), lifespan is potentially unlimited. Directors/shareholders can change but doesn’t affect company existence |
| Transferring Shares | <ul style="list-style-type: none">Follows on from (3) & (4), that shares can be transferred.Free transferability is a requirement for listing on the stock market.Most private companies restrict share transfers in the Constitution. See RR s 1072G for example. |

CORPORATE GROUPS

Companies who owe shares with each other. The parent/holding company has shares in the subsidiary, who may have shares in another subsidiary.

A corporate group or group of companies is a collection of parent and subsidiary corporations that function as a single economic entity through a common source of control.

PARTNERSHIP

Purpose of a partnership: A partnership must be formed in order to carry on a business with a view of profit. Corporations are not restricted in this way. Partnerships are cheaper to maintain, simpler and less regulated than cos.

Separate legal entity: Unlike corporations, partnerships are NOT separate legal entities distinct from its members.

Liability: The liability of a company's members will depend on the type (see later topic). Generally in a partnership all partners will be **joint and severally liable** for partnership's debts.

- c.f. companies – have limited liability - the company has its own legal entity so the liability of members or shareholders is limited and generally they will not be personally liable for the debts of the company. Limited liability is another important characteristic of nearly all companies and is often one of the main reasons why people choose to form a company to conduct their businesses. Limited liability means that shareholders are not personally liable for their company's debts. The shareholders' liability is limited to paying the issue price of the shares that they own which includes any unpaid amount on partly paid shares.

Existence: Absent an agreement to the contrary, partnerships will end when a partner leaves/dies, etc.

Formalities: Partnerships generally require a partnership agreement to be drafted which can be quite a complicated document. They are also governed by the ***Partnership Act 1958***.

Limitations:

- ***Section 115(1):*** A person must not participate in the formation of a partnership or association that:
 - (a) has an object gain for itself or for any of its members; and
 - (b) has more than 20 members; unless the partnership or association is incorporated...
- ***Section 115(2):*** The regulations may specify a higher number...
- Corporations Regulations, Reg 2A.1:
 - 50 for actuaries, medical practitioners, patent attorneys, sharebrokers, stockbrokers or trade mark attorneys
 - 100 for architects, pharmaceutical chemists or veterinary surgeons
 - 400 for legal practitioners
 - 1,000 for accountants

TYPES OF COMPANIES

| TYPES OF COMPANIES | |
|---|--|
| CLASSIFICATION ACCORDING TO LIABILITY OF MEMBERS | |
| 1. Company Limited by Shares <i>(Most common proprietary or public)</i> | <p>TEST: This is a company formed on the principle of having the liability of its members limited to the amount, if any, unpaid on the shares (s 516).</p> <ul style="list-style-type: none"> • A company limited by shares is one of the most popular commercial vehicles used in Australia today. It refers to a company in which the liability of its members is limited to the amount (if any) unpaid on the shares held by them. |
| 2. Company limited by guarantee (public company only) | <p>TEST: This is a company whose members have their liability limited to the amounts they have undertaken to contribute to the property of the company if it is wound up (s 517).</p> <ul style="list-style-type: none"> • Note: Has no share capital and no power to issue shares (s 124(1)). <p style="text-align: center;">2 TYPES</p> <ol style="list-style-type: none"> 1. S 45B: small company limited by guarantee is one with revenue of less than \$250,000 per annum with some exclusions. 2. ss 292, 294 and 294B - Lower reporting obligations than large companies limited by guarantee |
| 3. Company unlimited with share capital (proprietary or public) | <p>TEST: This is a company whose members have no limits placed on their liability to the company (s 9) with past and present shareholders possibly liable (s 515).</p> <ul style="list-style-type: none"> • During the winding up, company assets will be applied to satisfy outstanding liabilities. However, if the assets are not sufficient, members must make financial contributions to meet any shortfall (see s 515). • The main (if not only) benefit of an unlimited liability company is that per section 258A of the Corporations Act you can reduce your share capital in any way. • N/B: Very rarely used by trading ventures – for some professionals, it may be the only option permitted under professional regulations (mainly accounting and legal firms). |
| 4. No liability (mining companies only) | <p>TEST: A public company which conducts mining may be registered as a no liability company and members are therefore not liable beyond the paid amount of shares, not even on unpaid amounts (s 254M).</p> <p>Restrictions: A NL co must not engage in activities outside its mining purpose objects (s112(3)).</p> <ul style="list-style-type: none"> • Note: The Must have “No Liability” in its name (s148(4)). |
| CLASSIFICATION ACCORDING TO PUBLIC VS. PROPRIETARY | |

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| <p>Proprietary / Private Company (small and large company)</p> | <p>TEST: Proprietary companies must be either limited by shares or be unlimited companies with share capital and must have no more than 50 non-employee shareholders nor offer shares to the general public (s 113).</p> <ul style="list-style-type: none"> Under Australian law, a proprietary limited company (abbreviated as 'Pty Ltd') is a business structure that has at least one shareholder and no more than 50 non-employee shareholders, where the liability of shareholders is limited to the value of shares. RED FLAG: Private companies will have PTY, but public companies will not contain this. |
| <p>LESSER REPORTING REQUIREMENTS</p> | <ul style="list-style-type: none"> Only need to have one director (who ordinarily resides in Australia). S 249A - Members may pass circulating resolutions (no formal meeting held) S 1072G - Directors have broad discretion to refuse to allow a transfer of shares S 250N - No requirement to have an annual general meeting. Outnumber public companies by a ratio of approximately 50:1 |
| <p>SMALL VS. LARGE PTY COMPANIES</p> | <ul style="list-style-type: none"> Proprietary companies can be classified as either small or large. Only a large Pty company will have to make financial reports and directors reports (s 292). |
| <p>TEST: To be small, must satisfy two of the following three criteria (see section 45A(2)):</p> | <ul style="list-style-type: none"> Consolidated gross operating revenue is less than \$50m for the financial year; Value of consolidated assets is less than \$25m; or The company (and the entities it controls) has fewer than 100 employees [N/B: These changes were made under CR 1.0.02B] <ul style="list-style-type: none"> Generally, it means fewer reporting requirements which means a higher degree of commercial privacy. S 45A(3): Pty is large if exceeds the figures provided for a small pty in s 45A(2) |
| <p>OBLIGATIONS</p> | <ul style="list-style-type: none"> s194 - Self-interested directors of private companies are still allowed to vote on a matter notwithstanding the fact that they have a conflict <ul style="list-style-type: none"> BUT: s 191 S 203C - Directors of proprietary companies can be removed by ordinary resolution but depending on constitution, they can also be removed by fellow directors S 249A - Resolution passed without formal meeting, members sign statement that they are in favour of resolution. For proprietary companies they are permitted S 1072G - Directors of proprietary companies have a broad discretion to refuse to allow a transfer of shares by a member to another person Not mandatory for proprietary companies to have AGMs. |

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|---|--|
| Public Company <i>(Listed and unlisted)</i> | <p>TEST: A public company is defined as anything but a proprietary company (s 9)</p> <ul style="list-style-type: none"> • A public company - also called a publicly traded company - is a corporation whose shareholders have a claim to part of the company's assets and profits <p>RED FLAG: Private company will have PTY, but public company will not contain this</p> |
| | <p>CHARACTERISTICS</p> <ul style="list-style-type: none"> • Number of members – unlimited • Disclosure – more onerous reporting req. for public companies • Capital raising – a public company may raise capital through listing on the share market • If listed → Minimum 1 member (s 114) & and constitution is publicly available via ASIC. <ul style="list-style-type: none"> ◦ AGM – A public company is required to hold an AGM at least once a year unless it has only one member (s 250N). ◦ Directors – Must have a minimum of 3 directors (s 201A(2)) |
| | <p>OBLIGATIONS</p> <ul style="list-style-type: none"> • S 195 - Directors of public companies who must not be present when the matter is discussed and must not vote on the matter <ul style="list-style-type: none"> ◦ BUT: ss 195(2) & (3) • S 203D - Directors of public companies can only be removed by an ordinary resolution of members • Complex rules regarding public companies giving financial benefits to related parties. <ul style="list-style-type: none"> ◦ Governed by Chapter 2E - does not apply to pty. • Resolution passed without formal meeting, members sign statement that they are in favour of resolution. For public companies, circulating resolutions are only permitted if the constitution allows. • s1072F - Public company directors can only refuse to register transfers of shares if the shares are not fully paid or the company has security over them • s250N and 250P - Mandatory for public companies to have an annual general meeting |
| Listed vs unlisted public company | <p>TEST: Some public companies may choose to be listed on the ASX and then on top of complying with the Corporations Act must also comply with The ASX Listing Rules</p> <p>→ A public unlisted company has all the same powers as a public listed company. They can offer their shares to the public, however, they cannot offer its shares on the ASX</p> |

KEY DIFFERENCES IN OBLIGATIONS - SUMMARY TABLE

| | PROPRIETARY | PUBLIC |
|--|---|--|
| Material personal interests | Self-interested directors of private companies are still allowed to vote on a matter notwithstanding the fact that they have a conflict – s194 BUT: s 191 | Directors of public companies who must not be present when the matter is discussed and must not vote on the matter – s195 BUT: ss 195(2) & (3) |
| Removal of directors | Directors of proprietary companies can be removed by ordinary resolution but depending on constitution, they can also be removed by fellow directors – 203C | Directors of public companies can only be removed by an ordinary resolution of members – s203D . |
| Related party transactions | N/A to Pty | Complex rules regarding public companies giving financial benefits to related parties. Governed by Chapter 2E - does not apply to pty. |
| Circulating Resolutions | Resolution passed without formal meeting, members sign statement that they are in favour of resolution. For proprietary companies they are permitted under s249A . | Resolution passed without formal meeting, members sign statement that they are in favour of resolution. For public companies, circulating resolutions are only permitted if the constitution allows. |
| Restrictions on transfers of shares | Directors of proprietary companies have a broad discretion to refuse to allow a transfer of shares by a member to another person – s1072G . | Public company directors can only refuse to register transfers of shares if the shares are not fully paid or the company has security over them – s1072F . |
| Annual general meetings (AGMs) | Not mandatory for proprietary companies to have AGMs | Mandatory for public companies to have an annual general meeting – s250N and 250P . |