## Table of Contents

| | **Sole trader** | **Partnership** | **Joint Venture** | **Trust** | **Co-operative** | **Incorporated Association** | **Company (proprietary/public)** |
|---|---|---|---|---|---|---|---|
| **SLE?** | No | | | | Yes | | Yes s119 |
| **Liability** | Unlimited personal liability for debt | Liable for both partners unless limited partnership | Liability according to agreement, separate | Trustee fiduciary obligations | Limited liability | Unincorporated (personal liable) Incorporated (limited liability) | Limited liability |
| **Regulation to establish** | No formality | No, can be verbal | JV agreement | Trust deed | Registration | Registration | Governed by CA |
| **Transferability of interest** | Difficult, need new K with creditor | Requires all parties' consent | Governed by JV agreement | Governed by trust deed, generally not transferable | Restricted by co-operative rules | Good | Shares transferable (public: freely; proprietary: restrictions apply) |
| **Fundraising** | Cannot raise from public, only contributed from ST/by loan | | Limited to JV parties | Cannot, trustee can borrow | Can from members, limited from public | Limited fundradsing, usually from members | Pty – cannot<br>Public – can fundraising from public with disclosure s706 |
| **Size/ duration/ formation** | 1 owner<br>No formality | Limited to 20 partners (s115) | Flexible, according to agreement | Flexible | Min. 5 members | Usually non-profit, size varies | Pty – 50 non employee shareholders<br>Public – no limit |
| **Disclosure requirement** | No public disclosure | | No, unless incorporated JV (as a company) | Trustee's duty to beneficiary, no public disclosure | Lodge annual returns. Disclosure to members | Lodge annual report | Pty – minimal disclosure<br>Public – heavy disclosure |
| **Taxation** | Personal rate | Personal rate unless limited partnership (taxed as a company) | Each venturer taxed separately | Depending on distribution | Taxed as company | Taxed as company | Taxed as company |
| **Management &control (MC)** | Absolute | Both unless limited partnership | Governed by JV agreement | Trustee MC | Board elected by members | Committee | Directors, members cannot interfere |

## Types of company

| | | | Description | Liability | Capital raising |
|---|---|---|---|---|---|
| Public | Limited by shares | -Can public fundraising<br>-Min. 3 directors & 2/3 must be AU residents s201A(2)<br>-Heavy disclosure requirement<br>-Must be 'Ltd'<br>-Co secretary required s204A<br>-Can be listed/unlisted<br>-External Audit required s292<br>-AGM required s250N | Most common | SH's liability limited to unpaid shares s516(1) | Issuing shares |
| | Limited by guarantee | | Non-profit | No share capital, each member agrees to contribute capital up to a guaranteed amount s517 | Difficult to raise funds as can't issue shares |
| | Unlimited with shares | | Less likely | Members have no limits placed on their liability to the company | Issuing shares |
| | No liability | | Mining co only | No liability | Difficult to raise funds as can't issue shares |
| Proprietary | Limited by shares 股东责任仅限于他们购买股份的金额 | -Max. 50 non-employee shareholders s45A(1a); s113(1)<br>-Can NOT public fundraising or any activity that requires a disclosure document s45A(1b); s113(3)<br>-Can offer shares to existing SH/employees of Co s113(3ai)<br>-Min. 1 director & must be AU resident s201A(1)<br>-Less disclosure requirement<br>-Must be 'Pty Ltd'<br>-Can NOT be listed/unlisted<br>-External Audit required (unless small Pty s292(2))<br>-AGM NOT required | Most common | SH's liability limited to unpaid shares s516(1) | Issuing shares |
| | Unlimited with shares 股东对公司承担无限责任，不仅限于股份 | | Less likely | Members have no limits placed on their liability to the company | Issuing shares |

| Business Structure | Pros | Cons |
|---|---|---|
| **Sole Trader** | • Simple, cheap, no formalities to set up<br>• Full control by the owner<br>• All profits belong to the owner | • Unlimited personal liability for debts<br>• Difficult to raise funds (limited to own capital/loans)<br>• No continuity – depends on individual |
| **Partnership** | • Easy to form, few formalities<br>• Shared skills and resources<br>• Taxed at personal tax rates | • Joint & several liability for debts<br>• Disputes between partners can cause instability<br>• Transfer of interest requires all partners' consent<br>• Limited to 20 partners (s 115 CA) |
| **Joint Venture** | • Flexible (contractual or incorporated)<br>• Allows sharing of resources while keeping independence<br>• Liability usually several not joint (as per agreement) | • Not a separate legal entity unless incorporated<br>• Limited fundraising ability<br>• Potential conflicts if agreement poorly drafted |
| **Trust** | • Provides asset protection<br>• Tax planning advantages (income distribution flexibility)<br>• Useful for estate and business planning | • Not a separate legal entity<br>• Trustee personally liable (but indemnity from trust assets)<br>• Complex compliance and formalities |
| **Co-operative** | • Democratic control: one member one vote<br>• Limited liability for members<br>• Profits distributed to members | • Regulated under Co-operatives National Law<br>• Limited fundraising options<br>• Slower decision-making (member governance) |
| **Incorporated Association** | • Separate legal entity (if incorporated)<br>• Limited liability for members<br>• Cheaper and easier than a company<br>• Suitable for non-profits and community groups | • Restricted fundraising (mainly from members)<br>• Must comply with association legislation (annual returns, constitution)<br>• Less flexible for commercial activities |
| **Company (Proprietary/Public)** | • Separate legal entity s119<br>• Limited liability for shareholders<br>• Easier fundraising (esp. public companies via shares)<br>• Perpetual succession, independent of members | • Costly and complex to set up and maintain<br>• Heavy disclosure and reporting obligations (esp. public companies)<br>• Directors' duties strict, personal liability possible<br>• Proprietary companies restricted to 50 non-employee shareholders |

# Corporate Fundraising

1. Describe the fact - …[*who e.g., X*] is going to raise …[*amount*] funds for the company's…[*for any particular activity?*]
    a. *看清 funding 的总额是如何被分配的 – for discussing the exceptions*
2. The issue is whether X needs to disclose these fundraising activities by preparing disclosure documents under s706? [i.e., produce a disclosue document] **[*ONLY for Public Co.*]**
    a. According to s706, a disclosure document is requied to be lodged with ASIC whenever there is an offer of securities for issue unless any exemptions in s708 applies.
    b. In order to satisfy s706, there must have an 'offer' or 'invitation'.
        i. An offer is defined to included inviting applications for the issue of securties s9
            1. Including: distributing material to encourage a person to enter into a course of negotiations calculated to result in the issue of securities 包含任何旨在吸引人进入谈判，从而最终买卖或发行证券的宣传活动 AG (NSW) v Australian Fixed Trusts Ltd
            2. [*E.g., … is advertising the securities to promote the fundraising round.*]
    c. Also, the offer must deal with 'securities' as defined in s92(5)
        i. The definition for securities under s92(5) includes shares, debentures, and options to acquire shares or debentures.
        ii. Debenture: an undertaking by the body to repay as a debt money deposited with/lent to the body s9
        iii. An option to acquire shares have characteristics associated with debentures [i.e., prior to the redemption date of the conversion option, the co pay interest on the face value of the option]
    d. The securities must be offered in the primary market
        i. Secondary sales will require disclosure s707 – excluded from s706
    e. Therefore, a disclosure document is required to be lodged with ASIC, unless exemptions under s708 applies.
3. **Exceptions under s708**
    [*Every case may have multiple exceptions that may potentially apply, need to consider all and the disclosure is ONLY exempted if ALL relevant exceptions are satisfied*]
    a. **Sophisticated investors** s708(8) 有钱人
        i. An offer of securities to sophisticated investors does not need disclosure, which are:
            1. Those who has a minimum amount payable of $500k for the securities on acceptance of the offer 接受 offer 时最少买了 500k 的证券 s708(8)(a); OR
                a. 会明确说某人买了至少 500k 的证券，不是说一些人买了总共 5m 的证券
            2. Those who obtains a certificate from a qualified accountant proving that the client could afford the payment, by showing that: s708(8)(c)

- Involves the expropriation of minority's right/shares 对 Con 修改来强制征收少数股东的权利
    - The decision is presume to be invalid, and the majority SH bears the onus to show that: Gambotto [if sufficient, the decision is valid]
        - The decision is exercisable for a proper purpose; AND
            - Proper purpose if it is reasonably apprehended that the continued shareholding of the minority is detrimental to the company and expropriation is a reasonable means of eliminating or mitigating that detriment: Gambotto
                - E.g., a SH who is competing with the company or where it is necessary to comply with a regulatory regime.
            - Not justified purpose:
                - Advancing the interests of company as a legal or commercial entity, or gaining for majority SH Gambotto
                - Personal gain Gambotto
                - An expropriation to secure tax, administrative or commercial advantages for the majority SH
        - Its exercise will not operate oppressively in relation to minority SH.
            - Must be both procedurally AND substantively fair
                - Procedurally fair Gambotto
                    - Majority SH must disclosure ALL relevant info leading up to the alteration
                    - Value of shares must be valued by an independent expert
                - Substantive fair [i.e., whether the price offered is fair]
                    - An expropriation at less than market value is prima facie unfair Gambotto
                    - Must take into account other relevant factors such as the assets of the company, any dividend payments, the nature of the company and its likely future activities.
                - E.g., *Whether the members were given a meaningful opportunity to consider and vote on the proposal, and whether the resulting deprivation of rights is proportionate and non-discriminatory.*
- Under statute, if the members considered there is oppressive to him, he may also asked for court order as remedy under s232(e)

# Company Meetings – Drectors' Meetings

## Form

1. In this case, … called for directors' meeting.
2. **Power to call a meeting & Notice**: Any director can call a directors' meeting by giving a reasonable notice individually to every other directors (no need to be in writing) s248C
    a. Whether the notice was sent with reasonable time? [Check whether the Co is in urgent]
        i. Sufficient
            1. Short notice just prior to the meeting where the director indicated she would not attend such a meeting anyways Mcmaster
            2. 2 days' notice when the company was insolvent is sufficient as the company is in urgent. Sliteris
        ii. Insuffucient
            1. Less than 2h' notice due to director impending private travel plans is insufficient Re Keneally
            2. 20 minutes notice by phone Re Deposit Power Pty Ltd
            3. 5 days before meeting to remove director Eastone
            4. 25 hours' notice where resolutions had significant consequences for directors who refused to attend, and who wanted to seek legal advice Shepley.
        iii. If reasonable notice is not given/fail to give reasonable notice, the meeting and its outcome is null. Barron; Bentley Capital Ltd
3. **Content of notice**: Notice need not provide matters to be covered in meeting. However, if the meeting is called for a stated purpose, then the meeting is limited to that purpose Dhami
4. **Appropriate time & place**: A directors' meeting must be convened at a reasonable time and place, ensuring all directors have a fair opportunity to attend; an arrangement made for the purpose of excluding or disadvantaging certain directors will be invalid. Eastone
    a. Eastone: the meeting was scheduled at 4am in Sydney (9am in Perth), which was considered unreasonable and suggestive of an unfair purpose, thereby undermining the validity of the meeting.
5. **Quorum**: min. 2 directors must be presented in a meeting for the business to be affected s248F
    a. If all the directors except 1 director resigned where there is concerns about insolvency, a co can include an emergency clause where a quorum of less than 2 directors is sufficient in such circ.
6. **Venue**: Board meetings can be held in an informal venue, but everyone should know that this is a board meeting and the purpose of the board meeting is the conduct business s248C
7. **Meeting may be held using technology s248D**
    a. Consent required
        i. Eastone: meeting over WeChat rejected by 1 director and this invalidated the meeting

8. **Directors must have the board papers with sufficient time**
    a. Healey: particular director only got the 1200 page board pack a day before the meeting is considered as insufficient
9. **Minutes of meeting within 1 month must be kept and signed by the chair** s251A
    a. Members don't have access to minutes of directors' meeting

## Substance

- BOD may exercise all the powers of the company except any powers CA or the company's constitution requires the company to exercise in general meeting s198A(2)
    - E.g., the directors may issue shares, borrow money and issue debentures
- A resolution of the directors must be passed by a majority of the votes cast (50%) by directors entitled to vote on the resolution. s248G(1)
    - Chair may have an additional casting vote s248G(2)
- Removal of director
    - Public co: Directors cannot remove other directors s203E (i.e., removal of director can only been done in a members' meeting, NOT director's meeting)
    - Proprietary co: directors generally can be removed by ordinary resolution in a members' meeting, s203C but can be removed in a directors' meeting if specified in their Cons. Eastone

## Challenge the Outcome

- A company can only make a decision through a valid decision-making organ. Therefore, if the requirements for a directors' meeting are not satisfied then prima facie, the meeting is void and any resolution passed is invalid. However…
    - Under s1322(2), mere procedural irregularities will not invalidate a directors' meeting or resolution. However, where the irregularity amounts to substantial injustice, the meeting will be invalid notwithstanding s1322.
    - Assess whether this is purely procedural and only cause negligible harm?
        - Can apply:
            - Short notice, but urgent context
            - Notice given very short, but director already said they won't come
            - Minutes kept late
            - Informal venue

# Tips for Directors' Duties + Duty of Care + Insolvency + Remedies

- 这几个课题的内容可能会融在一道题里，有可能一个 breach 就会 trigger 几个 issues，先考虑 civil liability。注意除了 DoC，其他的都有可能会变成 criminal liabilities，需要多考虑一步。
- Step 1: 搞清楚人物关系
  - 有几家公司
  - 公司之间的关系是什么 [e.g., parent vs. subsidiary]
  - 公司下的人有哪几个，职务分别是什么
- Step 2: 文中一共有几个 breach，各自是谁做的，做的时候这个人物的职位是什么
  - 如果有比如像 General Manager 要讨论是否是 officer
  - 如果有比如像 someone resigned but still operating the business 要讨论是否是 de facto director
- Step 3: 每个 breach 可能 argue 什么责任
- Step 4: 分看每个 breach 中的每个责任，apply general law 还是 statute 还是 both
- Step 5: 结论是什么
- Step 6: Who is your client? What they want? Remedies?
  - If advising co → They want the money back?
  - If advising liquidator → They want the money back to pay the creditor?
  - If advising SH → Check are they concerning themselves, or the co's operation? Do they want a remedy for themselves, or for the benefit of the co as a whole?
    - E.g., if concerning the co, then SH may want to e.g., stop proceeding the acquisition, replacing the current BOD etc. → If the co is unlikely to do this, then apply SDA
    - Sometimes even if the SH wants to 'fix the co', but for a century-old family-controlled enterprise, it is practically hard to remove the entire BOD by SDA. Thus, the more effective personal remedy would be oppression remedies, if available.
    - Alternatively, for a class of SH, if they want to rescind a decision and reverse any unfair duty imposed solely on them, preventing the threatened forfeiture of their shares, stopping the introduction of additional shares that would dilute their dividend rights, the best remedy is SDA.
  - [*SDA targeted harm to the co as a whole; oppression remedies allow individual SH to obtain personal relief gtom unfair prejudice or discrimination*]

## Duty to Act in Good Faith in the Best Interest of the Co for a Proper Purpose

1. **Civil liability + Equitable duty + Statutory duty**: There is a fiduciary duty for a director/other officer of a co to exercise their powers and discharge their duties in good faith in the best interest of the co, AND for a proper purpose, this is equivalent to the civil liability under s181(1) CA
    a. Good faith
        i. This is assessed **subjectively** that the director/officer must exercise their power bona fide, acting honestly in the interests of the SH as a whole. Ure
            1. Although there have been some cases which suggest that regard should be had to the objective intentions of the directors/officers (see, eg, ASIC v Adler, [738]), the weight of authority suggests that a subjective test applies (Smith v Fawcett, ASIC v Maxwell, [109]; Holyoake, [150])
        ii. The director must exercise their discretion bona fide in what they consider, not what a Court may consider, is in the best interests of the company and not a collateral purpose: Re Smith
        iii. Example: Directors refused to have the share transfer registered as a disqualified solicitor would be on the board; this might bring the company into disrepute 名誉受损 but was made in good faith Ure
    b. In the best interest
        i. This is assessed **objectively** that, could a reasonable person have believed transaction was in the co's best interests as a whole? Bell Group
        ii. **Creditor**: If when a company is near insolvency, the "interests of the company" extend to protecting creditors, not just shareholders. Bell Group
            1. Bell Group: the directors were found not to have acted in good faith when they preferred the interests of the banks over other secured creditors by selling company assets to repay bank debts. 其董事在公司濒临破产时，把公司的资产优先出售或抵押给银行，以偿还银行债务。没有考虑其他有担保或无担保债权人的利益
    c. For a proper purpose
        i. This is assessed objectively by a two-limb test. Howard Smith
            1. **(1) Objective purpose for which a power was granted; AND**
                a. Identify the legal scope of power & why its exists (i.e., look at co Cons.)
            2. **(2) Purpose for which a power was actually exercised**
                a. Whether actual exercise of power comes within this scope
                b. Proper purpose
                    i. Raising capital Whitehouse
                    ii. Rewarding employees
                    iii. Pursuing commercial opportunities Harlowe's Nominees

c. Improper purpose
   i. Manipulating voting power Howard Smith
      1. Howard Smith: HS and Ampol were competing to takeover Miller. Miller issued shares to HS in order to dilute Ampol's shares, and turned Ampol's majority shareholding into a minority interest, making HS's bid more likely to succeed.
      2. Whitehouse: Mr Whitehouse issuing shares (diluting his divorced wife's shares) to his 2 sons to ensure his sons controlled the co after he died, such that they had the same power as his divorced wife.
   ii. Entrenching position by issuing new shares diluting existing members McCann; Whitehouse; Howard Smith
      1. **Cannot exercise for personal interest**: Directors cannot exercise their powers under the guise of acting for the company if their real purpose is to benefit certain shareholders at the expense of others.如果董事的真实目的是牺牲其他股东的利益来使某些股东受益，那么他们就不能以代表公司为幌子行使权力 McCann
         a. *如果目的是为了让 SH 不要生气从而保留他们的职务 – person interest – improper purpose*
         b. McCann: the directors issued new shares not to raise capital but to give certain shareholders control of the company, and the Court held this was an improper use of power made for an ulterior purpose rather than for the benefit of the company as a whole.
   iii. Reducing a majority of shareholding, favouring another group of SH Howard Smith
      1. Howard Smith: HS and Ampol were competing to takeover Miller. Miller issued shares to HS in order to dilute Ampol's shares, and turned Ampol's majority shareholding into a minority interest, making HS's bid more likely to succeed.

ii. If there are **dual purposes**, the whole purpose becomes improper only if the impermissible purpose is the dominant purpose. This is assessed by the <u>but-for test</u> Mills
   1. The court will consider whether the director/officer would still have acted in the same manner had the collateral purpose 附带目的 not existed.