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A. CONCEPTS

Types of Business Structures

A. <u>Sole Trader</u>	
Definition	An individual conducting a business alone.
Size	1 owner.
Applicable Law	Not covered by CA – only need to follow general law rules re tax, employment etc. No employees, so not access to superannuation, workers comp etc.
Separation/ Liability	There is no separation between the business and the individual. Individual has <u>unlimited liability</u> for business debts.
Finance	No access to public equity. Financing is limited to retained earnings or debt.
Formation	No formality requirements – minimal costs to establish.
Disclosures	No auditing or reporting requirements – significant privacy.
Taxation	Personal tax rates apply
Control	Complete

B. <u>Partnership</u>	
Definition	An agreement between more than one person to carry on business with a common goal of profits. Requires mutual understanding and ‘meeting of minds.’
Size	Up to 20 partners (s 115 CA)
Applicable Law	Relationship between partners is governed by equity – fiduciary obligations and mutual trust/confidence
Separation/ Liability	There is no separation between the business and the partners. Partners have <u>unlimited liability</u> . Can be either: a. General partnership = partners are jointly liable for the businesses/ each other’s debts b. Limited partnership = only one partner has general liability. All other partners are only liable for their own debt (but lose right to participate in management)
Finance	No access to public equity. Financing is limited to retained earnings or debt (though burden is shared unlike in sole trader).
Formation	No formality requirements – minimal costs to establish.
Disclosures	No auditing or reporting requirements – significant privacy.
Taxation	Personal tax rates generally apply.
Control	Will be shared in general partnership. Partners can participate in management decisions.

C. <u>Trading Trusts</u>	
Definition	Where a trust is used to conduct the trading behaviour of a business. Assets/properties are held in the trust for the benefit of its members.
Size	No limit to number of beneficiaries.
Applicable Law	Law of equity applies – creates equitable rights/duties.
Separation/ Liability	No separation – trustee is personally liable for trust’s debts.

A. Associated Parties → s 708(12)

- **S 708(12):** Disclosure not required for offers made to:
 - a. A senior manager of the body or related body or their spouse, parent, child, brother or sister, or
 - b. A body corporate controlled by the person referred to in paragraph (a)
- **S 9: 'Senior Manager'** = A person other than a director who:
 - i. Makes or participates in decisions that affect the whole or substantial part of the business of the corporation, **or**
 - ii. Has the capacity to affect significantly the corporation's financial standing

B. Financial Services Licensee → s 708(10)

S 708(10): Disclosure not required for offers which meet following requirements:

1. Offer made through Financial Services License holder
 - (a) The offer must have been made through a holder of a financial services license
2. Licensee believed investor had experience
 - (b) The license holder had reasonable grounds for believing that the investor has personal experience in investing securities which allows them to assess:
 - i. The merits of the offer,
 - ii. The value of the securities,
 - iii. The risk involved in accepting the offer,
 - iv. Their own information needs, and
 - v. The adequacy of the information given by the person making the offer
 - **Rule:** Reasonable grounds requires that the license holder actively inquired about all matters relevant to forming their opinion → *ASIC v Maxwell 2006*
 - Must be able to show that actually assessed the investor individually and exercised care and diligence in coming to determination
3. Licensee makes written statement
 - (c) Before or when the offer was made, the holder must have provided a written statement to the offeree of their reasons for being satisfied of the matters in (b)
4. Investor makes signed statement
 - (d) Before or when the offer was made, the offeree must have signed a written statement acknowledging that they have not been given a disclosure document

i. Timing of Notice	a. Unlisted Companies ○ Starting Rule: At least <u>21 days</u> of notice must be given → S 249H(1) ○ Exceptions: ▪ <u>AGM</u>: Shorter notice may be given for the calling of an AGM if <u>all</u> members agree beforehand ▪ <u>GM</u>: Shorter notice may be given if member's with at least <u>95%</u> of the votes agree beforehand → S 249H(2) ▪ <u>HOWEVER</u>: There can be no shorter notice period if the resolution relates to the appointment or removal of a director → S 249H(3) b. Listed Companies ○ Rule: At least <u>28 days</u> of notice must be given → S 249HA ○ This is <u>not replaceable</u> – applies even if a shorter notice period is provided in the constitution → S 249HA(3) ● Note: Notice of meeting is taken to be given to a member → S 249J(4) ○ <u>If sent by post</u> → 3 days after it is posted ○ <u>If sent by electronic communication</u> → on the day it is sent ● Consequence: A failure to give reasonable notice will render the meeting and its outcome void → <i>Bell v Burton 1993</i>
ii. Who must receive notice?	● Rule: Written notice must be given individual to: → S 249J(1) a. <u>Each member</u> entitled to vote at the meeting, and - *note: if joint members, notice only needs to be given to one member of the joint membership b. <u>Each director</u>
iii. How must notice be given?	● Rule: Notice can be given to a member: → S 249J(2) a. Personally, b. Via post to their postal address, c. By any other means that the constitution permits ● Note: Defective notice does not invalidate a meeting → S 249J, s 1322
iv. Content of Notice	● Rule: Notice must fully and fairly inform members of what is to be considered at the meeting → <i>Fraser v NRMA</i> i. Generally: Notice must → S 249L(1) a. Set out the <u>date, time and place</u> of the meeting (and if held with technology info re how to access it), and b. State the general <u>nature</u> of the meetings business ii. Special Resolutions c. If a special resolution is to be proposed, the notice must set out the intention to propose the special resolution and state the resolution (ie include a copy of it) → s 249L(c)

1.1. Resolutions to Approve Related Party Transactions

A. Related Party Transactions

- **Only applies to Public Companies*****
- If there is a conflict for a public company, there will likely be a RPT. This will need to be approved by shareholders.

1. Rule

- **S 208(1):** If a public company is to give a financial benefit to a related party, the company must:
 - a. Obtain approval of the members in a general meeting, and
 - b. Give the benefit within 15 months after the approval is given

2. Does the transaction fall within s 208?

i. Does the transaction grant a financial benefit?

- **S 229(1):** Financial benefit is to be construed **broadly** by reference to the commercial substance of the conduct. Disregard any consideration given, even if the consideration is adequate.
- **S 229(2):** Can include:
 - a. Giving a financial benefit indirectly (ie giving benefit to a company which they have shares in, causing share price to increase)
 - b. Giving a financial benefit by making an informal agreement that has no binding force
 - c. Giving a financial benefit that does not involve paying money
- Will cover most contracts, property dealings, profits etc

ii. Is the party a related party?

- **S 228(2):** Related party includes:
 - a. **Directors** of the company
 - b. Directors of an entity that controls the company (**holding company**)
 - c. Persons making up an **unincorporated body** which controls the company
 - d. **Spouses** of persons referred to in (a) – (c)
- **S 228(3):** Includes the **parents** or **children** of any person referred to in s 228(2)
- **Past/Future Related Parties**
 - **S 228(5):** Includes any party who **was** a related party within the previous 6 months
 - **S 228(6):** Includes any party who the entity believes/ has reasonable grounds to believe is likely to become a related party at any time in the future

- For State-Based Crimes: General law rules of attribution apply (Criminal Code not applicable)
- **Rules of Attribution** → *Meridian Case 1995*
3 ways that the actions of an individual can be attributed to Company. Try to apply primary and secondary, and then if fail go to special.
 - a. Primary Rules: Where the Company's Constitution provides that a certain person has the power to act on behalf of the company → *directing mind/will*
 - b. Secondary Rules: Ordinary rules of agency – makes the actions of employees or agents (within authority) attributable to the Company → *vicarious liability*
 - Note assumption against vicarious liability – dealt with above first
 - c. Special Rules: When neither the primary or secondary rules apply, the Court will consider whether the *purpose of the statute* (that creates the tort or crime) was to make the company liable for the acts of a person in that position → *special rules*

1. Primary Rules: Was the person the 'directing mind and will' of the company?

- **Rule**: The knowledge and conduct of an individual cannot be attributed to the company itself unless the individual can be identified as the '*directing mind and will*' of the company regarding that conduct → *Tesco Supermarkets 1972*
- **Consider: Discretion & Authority**
 - **Principle**: The more discretion/authority the person had over the relevant conduct, the more likely that they were the *directing mind/will* of the company in making that decision (making their conduct attributable)
- **Positions**:
 - i. Sole Directors: The knowledge and intention of a sole director will be attributed to the Company → *Bernard Elsey v FCT 1969*
 - ii. Managing Directors: Conduct will usually be attributable to company → *Lennard's Carrying Co 1915*
 - iii. Directors Generally: A company will be imputed with the conduct and knowledge of a director *only if* the director is acting within the scope of their actual or apparent authority (ie must have been done in their *capacity* as a director → *Beach Petroleum v Johnson 1993*
 - iv. General Staff/Officers:
 - Conduct will be attributed to company to the extent that the staff exercised control over *that aspect* of the companies' operations → *Nationwide News 2007*
 - Depends on *where* the decision making is made.

- a. At the executive level: If employees follow directions from higher-up executives, then those individual staff are less likely to be directing mind/will of company (so less likely to be attributable) → *Tesco 1972*
- b. At individual level: If it is a type of decision/conduct that can *only* be made by individual employees, they may be the directing mind/will for that decision (so attributable) → *ABC Developmental Learning Centres 2006*

- **Examples**

- *Lennard's Carrying Co 1915* (Tort): Mr Lennard was managing director of shipping company. He was aware of defect in ship. When ship broke down and cargo was destroyed, shipping company was primarily liable – Mr Lennard was a *directing mind and will* of the company and therefore his knowledge/fault was attributable to company.
- *Nationwide News 2007* (Tort): NN was sued after its employee, Mr Chanelor, had racially abused security guard Mr Naidu (causing him to develop PTSD). While Mr Chanelor was a general employee/officer of NN, he was a senior employee and had complete control/discretion over the security management. He was therefore the mind/will of NN in the sphere of security – actions were attributable to NN.
- *Tesco Supermarkets 1972* (Crime): Store managers could not be the 'directing mind/will' over pricing decisions, because these decisions were all made at the executive level. Store managers had no discretion – they followed directions made at executive level. Conduct of manager not attributable.
- *ABC Developmental Learning Centres 2006* (Crime): Child escaped from childcare centre due to fault of a centre employee. The person responsible for making the decision of how much supervision to give each child was the individual employee – was not a decision which could be made by Board etc. Therefore, the individual employee was the directing mind/will (making conduct attributable).

iii. Ostensible (Apparent) Authority

*More about what was reasonably perceived by 3rd party rather than knowledge of Board etc

- **Rule:** If a company presents/ allows a person to present that they have authority to enter into contracts on their behalf, and an innocent third party enters into a contract on this assumption, the company is estopped from denying the validity of the contract → *Freeman and Lockyer 1964*
- **Consider:** Did the actions of the company lead a 3rd party to have the perception that the individual was authorised to enter into the contract?
- **3 requirements:** → *Freeman and Lockyer 1964*

1. The individual is 'held out' as having authority to enter into contracts for company

- Representation can be through either words or conduct
- **Can include:**
 - i. Appointing to position: If the company appoints the person a particular title, this may be representing that the person is entitled to enter into certain contracts related to that position. E.g. 'Director of Marketing' – represents that they can enter into contracts regarding marketing
 - ii. Providing documents: If the company provides a person with signed documents, this is a representation that they had authority to execute documents on behalf of company → *Crabtree 1975*
 - iii. Express words: Verbal or written statement that the agent has authority
 - iv. Failure to implement safeguards: If company gives employee offices, title etc without limits, may be deemed to have represented their authority → *Pacific Carriers 2004*

2. This representation is made by a party with actual authority

- **Rule:** The representation must be made by someone with actual, not apparent authority to have entered the contract themselves → *Crabtree 1975*
- **Not representation by:**
 - Person with apparent authority: Not sufficient that the person who made the representation had apparent authority (ie apparent authority cannot be passed on)
 - Fraudster: Do not have actual authority and therefore cannot give someone apparent authority
 - Single Director: Do not generally have actual authority to act alone
- Will usually require that the person was given their position by the Board
- **Note:** If company only has one director and they are making the representation, this can still pass (they can be both representor and agent in this scenario) → *Oliveri*

Conflict Duties

3 layers of conflict duty:

1. **Conflict Rules**
 - a. No Profit
 - b. Conflict of Interest
2. **Obligations to Disclose** → additional disclosure requirement for directors only
3. **Related Party Transactions** → additional approval requirement for public companies only

i. Is there a Conflict?

- **2 types of conflicts** (need to identify which it is):
 - a. No Profit Rule: Where a director/officer takes an opportunity which belonged to the company and uses this to generate a profit for themselves. Usually where director hears/learns about opportunity and then uses that in personal capacity.
 - b. Direct Conflicts: Where a director/officer is on both sides of a transaction and therefore has a conflict between duties to company and personal interests

GENERAL LAW

B. No Profit Rule

- **Equitable Rule**: Directors as fiduciaries must not make personal profits through the execution of their fiduciary duties. Profits obtained though such belong to the company in equity → *Furs Ltd v Tomkies 1936*
- **Note**: It is irrelevant whether the company actually suffered a loss/injury (because will be a breach of fiduciary duty regardless) → *Parker v McKenna 1874*
- **3 limb Test** → *Regal Hastings 1967*

1. Limb One: The profit was made by reason and in course of the fiduciary relationship

- **Rule**: Must establish that the opportunity and profits rightfully belonged to the company (and is therefore subject to fiduciary constraints)
- **Two Elements**:
 - a. Opportunity related to the affairs of the company
 - Must be an opportunity which was relevant to the Company/could have been pursued by the Company → consider industry, products, business strategy
 - Did the Company reject the opportunity?
 - Where the Board has considered an opportunity and rejected it, it will not be a breach for the fiduciary to pursue the opportunity privately → *Peso Silver Mines*
 - Where the other company involved has refused to engage with the company, is not an opportunity belonging to it → *Streeter 2011*

1. Is the director liable for this?

1.1. Did the director fail to prevent company from taking on debt?

- **S 588G(2):** By failing to prevent the company from incurring the debt, the person contravenes the section if:
 - a. The director was aware that there were such grounds for suspecting that the company was/would be insolvent (subjective), **or**
 - b. A reasonable person in the position of the director in a company in the company's circumstances would have been aware of this

1.2. Do any defences apply?

a. Director reasonably believed the company was solvent

- **S 588H(2):** A director is not liable if they can prove that, at the time, they had reasonable grounds to expect (objective) and did expect (subjective) that the company was solvent at the time and would remain solvent despite all its debts incurred
- **Onus:**
 - D must lead evidence as to all the reasons they had to expect that the company was going to be solvent, and evidence that they did in fact expect this
 - Onus is on D to prove that they had reasonable grounds – must have done due diligence, assessed finances etc
- **Question:** If D turned their mind to it, how likely would it have been that the company could turn their assets into cash to pay their debts? → *Hall v Poolman 2007*

b. Director reasonably relied on information/advice

- **S 588H(3):** A director is not liable if they can prove that, at the time, they:
 - a. Had reasonable grounds to believe, and did believe:
 - i. That a competent and reliable person was responsible for providing adequate information about whether the company was solvent, and
 - ii. That person was fulfilling that responsibility, and
 - b. Expected on the basis of this information that the company was solvent and would remain solvent
- **Narrow:** Must have engaged this person for the *specific purpose* of advising on whether the company is solvent → *Re Balmz 2020*
 - Not sufficient that company had general auditors who advised directors on the company's financial situation
 - Not sufficient that they engaged general tax advisors