

Corporations Law Summaries

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Formation

(a) Business Structures

- Types:
 - Sole trader – not a separate legal entity; unlimited personal liability; individual tax losses and tax rate
 - Partnership – not a separate legal entity (unless limited or incorporated limited) and maximum 20 partners who cannot act in own interests (s 115)
 - Joint Venture – not a specific entity but a vehicle; includes separate liability

- Associations – not run for pecuniary gain of members (s 40); not separate legal entity (unless limited or incorporated limited)
- Cooperatives – farmers joining together to form and negotiate with retailers as a separate legal entity, and every member has right to participate in management.
- Trading trusts – not separate legal entity
- **Corporations:** Includes a company, any body corporate, certain unincorporated bodies, and ATSI corporations (s 57A).
 - Does not include (s 57A(2)):
 - Exempt public authorities – public authority or instrument of Government (s 9)
 - Set up to exercise control or execute function in public interests and perform traditional or inalienable function of government (*FCT v Bank of WA*).
 - Corporation sole – occupant of particular office given corporate status e.g. King, bishop (*Blackstone's Commentaries*)
 - Determination requires analysis of substance, not form (*QLD Rail*).
 - E.g., *QLD Rail* – statute expressly stated that QLD rail was not a body corporate, but still had profits [41] and operated as labour hire company, and therefore was trading and a corporation.
- **Company:** is a company registered under the Corporations act Pt 2A.2 (s 9)
 - Does not include foreign company as they are not set up under CA (*Re Featherstone*)
 - Must be registered as a proprietary, public or corporate collective investment vehicle (s 112(1)).

Proprietary Companies:

- Requirements (if company breaches s 113, ASIC may require it to change to a public company):
 - Have share capital (s 112(1));
 - Have at least one member (s 114) but not more than 50 non-employee shareholders as members (s 113(1))
 - Employee includes employee of company or subsidiary (s 113(2))
 - Joint holders of particular parcel of shares count as one person
 - Count does not include CSF shareholder
 - Have at least one director + ordinarily reside in Australia (s 201A(1)) OR minimum 3 for crowd sourced funded company
 - Director must be at least 18 years old (s 201B).
 - Not engage in fundraising activity that would require disclosure under Ch 6D (s 113(3))
 - Exception: offer of shares to existing shareholders or employees of company or subsidiary
 - Must include the words 'pty ltd' or 'proprietary limited' at end of name (ss 148; 149)
 - Unlimited proprietary companies can just have 'pty' (s 148(3))
- Not a disclosing entity so continuous disclosure requirements do not apply (Pt 1.2A)
- Small or large proprietary companies:
 - Test: a proprietary company is small if it satisfies two of the following (s 45A(2)):
 - Consolidated revenue for the FY is less than \$25 million including subsidiaries;
 - Value of consolidated gross assets is less than \$12.5 million including subsidiaries;
 - Less than 50 employees including at subsidiaries and at end of FY.
 - Otherwise, it is large (s 45A(3)).
 - Small proprietary companies do not have to prepare financial and directors' reports
 - Exceptions: shareholders with at least 5% of vote can direct company or ASIC can direct company to prepare same (ss 293; s 294)

Public Companies

- Any other company than a proprietary or CCIV (s 9)
- Requirements
 - Have at least one member (s 114)
 - Have at least three directors with two ordinarily residents in Australia (s 201A(2)).
 - Have at least one company secretary ordinarily resident in Australia (s 204A(2))
 - Must hold an AGM (s 250N)

- Independently audited financial statements are required (s 292)
 - May be a disclosing entity and subject to continuous disclosure requirements (Pt 1.2A).
 - May raise funds by making offers or invitations to public
- Liability of members:
 - Limited by shares (proprietary and public)
 - Liability of past and present members is limited to the amount (if any) unpaid on the shares (ss 9; 516) – shareholders liable where company makes a call on shares or where insolvent
 - Must include the word ‘limited’ or ‘ltd’ at end of name (s 148(2)) (exception if charity or directors unpaid per s 150)
 - Limited by guarantee (public)
 - Liability of members limited to the amount member has undertaken to contribute (ss 9; 517)
 - Cannot issue shares (s 124(1))
 - Must include the word ‘limited’ or ‘ltd’ at end of name (s 148(2)) (exception if charity or directors unpaid per s 150)
 - Must not pay dividends to members (s 254SA)
 - May be a small company limited by guarantee (s 45B) – reporting relief under Ch 2M.
 - Unlimited with share capital (proprietary and public)
 - Liability of members is not limited (s 9)
 - Personal assets may be pursued, must be incorporated with share capital, and must include the word proprietary at end of name if proprietary (s 148(3))
 - No liability (public)
 - Members have no liability to pay partly-paid shares (only shares themselves can be lost if shareholders do not pay calls on their shares) (s 9)
 - ONLY if company has share capital, constitution says sole object are mining purpose and company has no contractual right in constitution to recover unpaid calls (s 112(2)).
 - Must include the words ‘no liability’ or ‘NL’ at the end of its name (ss 148(4); 149)
- Managed Investment Schemes are neither companies nor corporations

(b) Registration of Companies

- Process:
 - Reservation of company name (s 152) – ASIC must reserve name if available for two months; applicant can request time extension; and ASIC must cancel if applicant asks
 - Cannot use a name already registered to another body or is unacceptable under regulations (s 147)
 - Preparation of internal management rules and obtaining consents (s 136(1))
 - Decide whether company will rely on replaceable rules (s 141) or constitution to replace in whole or part.
 - If there is to be a constitution, each member must agree to its terms in writing before registration (s 136(1)(a)).
 - Each person who is to be member, director or company secretary at time of registration must give consent to act in that capacity (s 120)
 - Lodgement of application for registration with Australian Business Register (s 117)
 - Includes the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a director or secretary (s 117(2))
 - Registration by the Australian Business Register (s 118)

- Registrar 'may' give ACN, register the company, and issue certificate of registration.
- Certificate is conclusive evidence that all CA requirements for registration have been complied with and the company was registered on the date specified in the certificate (s 1274(7A)).
- ASIC must keep record of registration.
- Consequences
 - Company come into existence as a body corporate the day it is registered (s 119)
 - Person becomes member, director or company secretary on day of registration and shares issued on day of registration (s 120)
 - Company may have common seal (s 123) – if so, seal must have ACN or company name.
 - Company has all the powers of a natural person (s 124)
 - Company can litigate, contract and own property in its own name, independently of its owners or managers (*QLD Rail*)
- Directors and secretaries changing without need for meeting:
 - Resignation of directors:
 - Directors may resign with written notice to company at registered office (s 203A RR)
 - Must register resignation with ASIC (s 205A)
 - Resignation takes effect when written notice is lodged with ASIC (s 203AA)
 - However, if resignation takes effect on different day to resignation (because written notice lodged on different day) person can apply to ASIC or court to fix it to resignation day.
 - Application to change date must be for ASIC application within 56 days after person stopping being director and in prescribed form, and for Court 12 months within stopping being director or longer as allowed by Court.
 - If ASIC or court satisfied that person stopped being director on resignation day and just and equitable to do so, ASIC or Court may change date of effect to resignation day.
 - If court changes effect of resignation day, applicant must lodge with ASIC copy of court order (strict liability offence).
 - Resignation has no effect if there are no other directors at end of resignation day (s 203AB)
 - Resignation of secretaries
 - Must register resignation with ASIC (s 205A)
 - Disqualification of directors:
 - Person ceases being director if disqualified and not giving permission to manage corporations (s 206A(2))
 - Person ceases to be managing director if disqualified as director (s 203F(1))
 - Person disqualified commits strict liability offence if: make or participate in making decisions affecting whole or substantial part of business; exercise capacity to significantly impact financial standing; or communicate instructions or wishes to company directors knowing that directors accustomed to follow instructions or intend directors to act (s 206A(1))
 - Exception: advice given by person in performance of professional role or business relationship with directors.

Fundraising

(1) Relationship to proprietary companies?

- Must not engage in regulated fundraises under Chapter 6D, unless the offer of shares or of options for shares is to existing shareholders of company or employees or company or subsidiary or a CSF offer (s 113(3)).
 - So allowed to issue disclosure document to such offers above.
 - But otherwise offer for securities falls under an exception in s 708 and not allowed to issue disclosure document.