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INTRODUCTION

Forms of Legal Association

There are 3 broad categories of companies:

- Sole Trader;
- Unincorporated Association; and
- A Corporation: there are a number of ways to structure and type of company. They can be Proprietary (Pty) or Public.

Administrative and Legislative Structure of Australian Corporations Law

The regulation of Australian Corporations law has a long and controversial history which has lead to the point to the current regime of uniform corporations laws throughout all Australian states under the Corporations Act 2001 (Cth) (referred to as the Act).

Corporations law is regulated by:

1. Legislation: The Australian Constitution provides that the states have jurisdiction over corporations but the current arrangement has seen uniformity throughout the states;

   - New South Wales v Commonwealth (1990):
     
     - Reaffirmed states control over Corporations as there was found to be no constitutional power for Cth control over corps;
     
     - Cth can pass legislation that regulates the trading of corporations if incorporated by states;
CORPORATIONS LAW SUMMARY

- Cth test case since split system between states. Cth passed the Corporations Law 1990, and the States challenge and found law unconstitutional. The current legislative arrangement has since been agreed to by the states (2001).

2. Administration: law applied or enforced in different ways in states as a result of administrative structures but the Act is uniformly applied;

- R v Hughes (2000):
  - Doubts about uniformity of administration between the states: problems that Cth bodies cannot undertake functions conferred upon them by state law unless in s.51 Constitution. This has since been eased because of the State referral of power over corporations to the Cth.

3. Court jurisdiction: there are no differences in interpretations to law throughout the states: there is the same jurisdiction between the states.

- Re Wakim (1999):
  - Parts of scheme invalid: state judicial power in Federal Court invalid exercise of power. Corporations cases are all heard in Supreme Courts of states because of striking down of cross vesting scheme. But see now that Federal and State Courts can exercise federal judicial power as a result of corporations now being an area of Cth control.
SEPARATE LEGAL ENTITY

Classifying Companies:

There are two questions to ask when addressing any situation involving a corporation:

1. Is the company a public company? Or is it

2. A Proprietary Company (Pty).

In order to determine this status there are five specific areas to look for in information about the company in question. These are contained in the Corporations Act 2001 (Cth).

5 Features in Corps Act of Proprietary not Public Company:

i. Share Capital (s.112(1)): where a person becomes a member of Pty company by obtaining shares in the company, this is said to be a Pty company; and

ii. A Pty company has btw 1-50 members (but no more than 50): s113(1) and s114(1) – this limitation does not apply to members who are employee shareholders; and

iii. There is at least one director of the company (s.201A(1)): not employees of company; then a Pty company is

iv. Forbidden from offering shares for public subscription (s113(3)); and

v. A Pty company can be distinguished from a public company because it has Pty as part of name (s148(2)) and s149 – family companies are usually Pty companies. cos).
Features of a Public Company:

A public company is defined in s9 as a company other than a Pty company. That is, if the company does not meet the five criteria outlined above then the company by definition is a public one. Therefore:

A public Company must have:

i. A minimum of one member (s.114); there is no maximum number of members; and a

ii. Minimum of three directors (s201A(2)); most companies have a large board in any case (7-9 directors is the norm in Australia); and

iii. No Pty in name; and

iv. Seek funds from the public; chapter 6D of the Act contains rules concerning fund raising and prospectus rules for corporations offering shares; and

v. The option to list on a stock exchange.

A Pty company may transit from being a Pty to Ltd (public company): s162 Act gives procedures for this conversion to occur.

A Large Pty Company:

- A Pty company meets any 2 of additional criteria in s45A(3).

A Small Pty Company:

- Any 2 criteria in s45A(3) and is reevaluated each financial year.

How is the Liability of Companies members Structured?
There are 2 significant ways:

i. Limited by shares: s516 Act- “member need not contribute more than the amount (if any) unpaid on the shares in respect of which the member is liable as a present or past member.”; and

ii. Limited by guarantees: s.517Act- “member need not contribute more than the amount the member has undertaken to contribute to the company’s property if the company is wound up.”

**Separate Legal Entity**

Section 119 of the Act provides that a company comes into existence as a body corporate at the beginning of the day of its registration.

This basic doctrine, codified in the Act as stated above, was first espoused in English Common Law: Saloman’s Case (1897) AC 22 and then again in Lee v Lee’s Air Farming Ltd [1961] AC 12.

The following discussion concentrates on the Common Law rules on the doctrine of company’s having a *separate legal identity*, independent of individuals and managers.

If you have any queries regarding the administrative law summary please email us - lawskool@lawskool.com.au