

**MACQUARIE UNIVERSITY**



**POSTGRADUATE DIPLOMA  
IN ACCOUNTING  
and  
MASTER OF ACCOUNTING**

**UNIT OUTLINE**

**ACCG854 COMPANY LAW**

**Trimester 3, 2008**

**ACCG854 - COMPANY LAW  
UNIT OUTLINE AND READING MATERIALS  
TRIMESTER 3, 2008**

**Unit Description**

The aim of this course is to introduce students to corporate regulation in Australia and to create an awareness of corporate issues.

Lectures will focus on relevant issues, cases and sections. Issues such as how to prepare for exams and how to maximise grades will be addressed.

There is no web page for this unit.

**Teaching Staff**

**Lecturer in Charge:**

Michael Quilter - tel: 98508456 – email: [michael.quilter@law.mq.edu.au](mailto:michael.quilter@law.mq.edu.au)

**Lecturers:**

Nilhara Perumal – email: [nperumal@efs.mq.edu.au](mailto:nperumal@efs.mq.edu.au)

**Classes**

Classes begin in the week commencing 18th August and finish in the week ending 7th November. The following is a public holiday during teaching time: Monday 6<sup>th</sup> October. Students will be advised regarding any alternative class arrangements for this day.

Classes will progress through the various Lecture Areas referred to in this Outline. There may be some reorganisation, overlapping, and/or integration of areas to accommodate assessment and course structure.

**Assessment**

**Assessment** will comprise a mid trimester examination (30% of total assessment), class presentation (10% of total assessment) and a final examination (60% of total assessment).

**Mid Trimester Examination (30%)**

The mid trimester examination will be held on either the 27<sup>th</sup> September or 4<sup>th</sup> October (these are the dates set aside for the mid trimester exams). Further details of the timing and format of the mid-trimester exam will be provided closer to the date of the exam.

**Final Examination (60%)**

The final exam for this unit will be held during the final examination period for Trimester 3 2008 which is from Monday 10<sup>th</sup> November to Saturday 15<sup>th</sup> November. In order to attain a passing grade overall for the unit, and subject to the Lecturer-in-Charge's discretion, students must pass the final examination.

## Examinations

You are expected to present yourself at the mid trimester and final examination at a time and place designated in the University Examination Timetable. It is expected that the Examination Timetable will be available on the Master of Accounting website in week 10.

<http://www.accg.mq.edu.au/macc/admin/timetables.htm>

The only exception to not sitting an examination at the designated time is because of documented illness or unavoidable disruption. In these circumstances you may wish to consider applying for **Special Consideration**. Students should refer to [Special Consideration Procedures \(PDF download instructions\)](#). Please note that both the Special Consideration Application Form and the Professional Authority Form must be completed. A medical certificate alone is considered inadequate. Forms must be submitted to the MAcc office, E4A Level 2, Reception **within 2 days** of the original examination.

You are advised that it is a Macquarie University policy not to set early examinations for individuals or groups of students. All students are expected to ensure that they are available until the end of the teaching trimester which is the final day of the official examination period.

### **Further matters relating to Special Consideration:**

1. University rules as apply to requests for special consideration must be strictly followed.
2. An application for special consideration will be relevant where a student suffers severe disruption or has a serious medical condition.

Whilst there is always room to consider a student's special needs in exceptional circumstances note that **supplementary exams will only be granted in cases where the student suffers severe disruption or has a serious medical condition and does not sit the exam. Please note that even though a medical certificate may be provided the issue of whether a supplementary exam is warranted (and the issue of special consideration generally) remains within the discretion of the convenor of the course.** There is no automatic right to a supplementary exam merely because an application for special consideration has been lodged.

## University Policy on Grading

Academic Senate has a set of guidelines on the distribution of grades across the range from fail to high distinction. Your raw mark for a unit (ie. the total of your marks for each assessment item) may not be the same as the standardised numerical grade (SNG) which you receive.

The policy does not require that a minimum number of students are to be failed in any unit.

For an explanation of the policy see:

<http://www.mq.edu.au/senate/MQUonly/Issues/Guidelines2003.doc> or  
<http://www.mq.edu.au/senate/MQUonly/Issues/detailedguidelines.doc>

## **Macquarie University Rules and Regulations**

All assessment is subject to the University's rules and information to students set out in the Handbook of Postgraduate Studies. You are particularly referred to rules of the various postgraduate awards; and with the Student Information regarding Plagiarism and Assessment.

## **Cheating, Plagiarism and Copyright Infringement**

To cheat in the context of university assignments, tests and examinations is to attempt to gain an unfair advantage by violating the principles of intellectual and scholarly integrity. Cheating also encompasses plagiarism, which the University defines in its rules: "Plagiarism involves using the work of another person and presenting it as one's own." Plagiarism is a serious breach of the University's rules and carries significant penalties. You must read the University's practices and procedures on plagiarism. These can be found in the Handbook of Postgraduate Studies noted above, or on the web at:

<http://www.student.mq.edu.au/plagiarism/>

The policies and procedures explain what plagiarism is, how to avoid it, the procedures that will be taken in cases of suspected plagiarism, and the penalties if you are found guilty. Penalties may include a deduction of marks, failure in the unit, and/or referral to the University Discipline Committee.

Whereas **restricted photocopying** of books and articles is permissible for the purposes of study it is a breach of the publishers and/or authors **copyright** (and of the Copyright Act) to photocopy (or to arrange the photocopying of) substantial parts of works without the copyright owners permission. There are notices in the Library photocopy areas to this effect.

## **Student Support Services**

Macquarie University provides a range of Academic Student Support Services. Details can be accessed at: <http://www.student.mq.edu.au>

Further, NCELTR provides Study Skills workshops for MAcc students. For the timetable, see <http://www.accg.mq.edu.au/macc> .

## **What is expected of students**

Students should take responsibility for their own learning and this will incorporate reading as required, attendance at lectures and reflection on their abilities. The capacity of each student to digest material will vary and accordingly self assessment is necessary. The amount of focussed and effective effort a student puts in to preparation and study will generally be reflected in their performance.

## **Attendance**

Whilst there are no marks given specifically for attendance where any issue arises as to a students performance it may be necessary to consider whether the issue of attendance is relevant. In a simple economic sense students pay for instruction and should attend classes to get the benefit and help of their lecturer.

## **Class Presentation**

Students should regard the class presentation as an opportunity to develop an important workplace skill as well as an opportunity to prepare a particular area of the course in more detail. Marks for class presentations will be determined by the lecturer based simply upon their perception of the presentation as achieving, or otherwise, its purpose. Examples of the type of matters that may be comprised in any discretionary assessment of a presentation include: clarity, content, use of resources or aids, interest, timing, currency, originality.

## **Submission of work**

There are no take home assignments in ACCG854 however whenever a student presents any work for assessment (mid and final exams and the class presentation) they should ensure that any applicable conditions are satisfied and that the work is done to the best of their ability. Assessment is an opportunity for students to show that they are interested in the material and that they have successfully developed a method of study and can apply the content studied.

## **Learning Outcomes**

Lectures will focus on relevant issues, cases and sections. Issues such as how to prepare for exams and how to maximise grades will be addressed.

Students will be alerted to the importance of skills that will assist learning and basic generic (workplace) skills that will assist in the development of a successful professional career. Examples include:

- responding and communicating in class (teamwork, cooperation and the ability to build and maintain professional relations)
- the ability to comprehend and digest material (setting effective and attainable goals, gathering material and exploring new ideas and viewpoints)
- effective note-taking in lectures (client interviews and peer meetings)

Overall the aim of this course is to introduce students to corporate regulation in Australia and to create an awareness of corporate issues.

Further, the course aims to assist students to:

- Understand the nature of, and distinguish between, the various forms of business organisations.
- Understand the past and present legislative framework in relation to the creation and regulation of companies.
- Understand how companies are formed and be able to identify the distinctions between different types of companies.
- Understand the nature of a company's constitution and how it affects the company's activities.
- Understand the ways in which a company may raise finance.
- Understand issues concerning corporate management, in particular the role and obligations of directors.
- Be aware in a general way of corporate governance matters including the impact of relevant ethical issues.
- Understand how shareholders rights are protected.
- Understand how the Corporations Act regulates acquisition and disposal of shares.
- Understand the impact of insolvency on a company and the different ways it may be addressed and dealt with in the current regulatory environment.
- Apply the law in an ordered manner for the purposes of analysing and solving problems relating to company law.
- Develop an interest in, and an understanding of, current corporate issues.

## **Strategies for Learning**

Students are encouraged to ask questions in class to ensure that they are clear in relation to the material presented. The unit outline contains practice questions that allow students to apply the content delivered in lectures and contained in texts. Certain practice questions will be considered in class. The requirement for all students to present on a specific matter enables them to test their communication skills and their ability to be both concise and clear.

Students are encouraged to have a perspective on assessment, to think strategically about their goal of a successful result in the unit. Study and examination techniques are important if students are to maximise their potential.

## **Ways to enhance your chance of success in this unit**

During 2007 the Master of Accounting program engaged in a significant research project that was designed to investigate and find ways to enhance student participation in the classroom.

**Students** who were interviewed during the research project stated that participating in classroom discussions, answering lecturer's questions and engaging in meaningful discussion with colleagues when directed by the lecturer:

- assists them in retaining information and maintaining interest and concentration
- allows them to clarify or check their understanding
- provides opportunities to enhance and reinforce knowledge and learn from other students
- improves their English proficiency
- supports their development of communication skills
- develops skills needed in professional practice

**Lecturers** expect students to participate in class as it:

- provides opportunities for students to review or clarify lecture content and benefit from the experience of other students
- assists students to think about concepts and test whether their understanding is correct
- develops confidence in speaking
- provides opportunities to think in a different way

The research concluded that the benefits of participation include:

- enhancing the learning process
- meeting lecturers' expectations of students
- helping to increase communication skills.

**LECTURE PROGRAMME      2008**

	<b>LECTURE AREA</b>	<b>PRACTICE QUESTION AREA</b>
<b>1</b>	<b>Non Corporate Business Organisations (Lecture Area 1)</b>	<b>1</b>
<b>2</b>	<b>History and Legislative Framework, Registration and Types of Companies (Lecture Area 2)</b>	<b>2</b>
<b>3</b>	<b>The Company Constitution and the Relationship between the Company and Outsiders (Lecture Area 3)</b>	<b>3</b>
<b>4</b>	<b>Corporate Financing (Lecture Area 4)</b>	<b>4</b>
<b>5</b>	<b>Dividends Financial Obligations Audit ASIC Investigation (Lecture Area 5)</b>	<b>5</b>
<b>6</b>	<b>Directors and Management (Lecture Area 6)</b>	<b>6</b>
<b>7</b>	<b>Directors Duties (Lecture Area 7)</b>	<b>7</b>
<b>8</b>	<b>Directors Duties and Corporate Governance (Lecture Area 8)</b>	<b>8</b>
<b>9</b>	<b>Members Rights and Meetings (Lecture Area 9)</b>	<b>9</b>
<b>10</b>	<b>Takeovers Financial Services and Markets (Lecture Area 10)</b>	<b>10</b>
<b>11</b>	<b>Restructuring and Liquidation (Lecture Area 11)</b>	<b>11</b>
<b>12</b>	<b>Restructuring and Liquidation (Lecture Area 12)</b>	<b>12</b>

The following **ARE REQUIRED** for the purposes of the course:

Michael Quilter, The Company Law Notes, Thomson Lawbook Co. 3<sup>rd</sup> ed. 2008.  
This is referred to as Q herein.

Lipton and Herzberg, Understanding Company Law, Thomson Lawbook Co. 14<sup>th</sup> ed.  
2008. This is referred to as L&H herein.

---

\*\*\*\*\*

Included in this outline is a substantial part of the Partnership Act. After considering the law of partnership the course will focus on corporate issues and the relevance and effect of the Corporations Act. **Note that certain relevant sections of the Corporations Act are set out in The Company Law Notes 3rd edition 2008.** Both statutes (the Partnership Act and the Corporations Act) may be viewed in full at [www.austlii.edu.au](http://www.austlii.edu.au) (for the Partnership Act go to “NSW”, then “Consolidated Acts”. For the Corporations Act, go to “Commonwealth”, then “Consolidated Acts”).

The course focuses on company law and accordingly the Corporations Act is the most relevant statute. Note that if students wish, they can purchase a copy of the current **Corporations Act** at the Co-op Bookshop.

\*\*\*\*\*

The following are NOT required but are relevant to the areas addressed in the course (always use current editions where possible).

Woodward, Bird, Sievers, Corporations Law in Principle, Lawbook Co. This contains various practice questions (some of which are included in this outline as practice questions) and is referred to as WBS herein.

Graw, An Outline of the Law of Partnership, Lawbook Co.

Key, The Law of Company Liquidation, Lawbook Co.

Crutchfield, Corporate Voluntary Administration Law, Lawbook Co.

Hanrahan, Ramsey, Stapledon, Commercial Applications of Company Law, CCH.

Ford, Austin, Ramsey, Principles of Corporations Law, Butterworths.

Fisher (ed) The Law of Commercial and Professional Relationships FT Law & Tax

Berns and Baron, Company Law and Governance, Oxford University Press.

### **Legislation**

Corporations Legislation, annotated by Jason Harris, Thomson Lawbook Co.

### **Websites**

[www.lipton-herzberg.com.au](http://www.lipton-herzberg.com.au)

[www.asic.gov.au](http://www.asic.gov.au)

[www.austlii.edu.au](http://www.austlii.edu.au)

[www.asx.com.au](http://www.asx.com.au)

[www.takeovers.gov.au](http://www.takeovers.gov.au)

[www.cclsr.law.unimelb.edu.au](http://www.cclsr.law.unimelb.edu.au)

[www.asa.asn.au](http://www.asa.asn.au)

[www.companydirectors.com.au](http://www.companydirectors.com.au)



Case citations will only be given on the first occasion a case is referred to. Cases referred in this outline can be found in: Quilter (Q) or Lipton & Herzberg (L&H).

**There are short summaries of each of the Lecture Areas in this Unit at the end of the related Topic in The Company Law Notes (Q).**

**Practice questions relating to each of the Lecture Areas are located at the back of this Outline.**

## **LECTURE AREA 1**

### **NON-CORPORATE BUSINESS ORGANISATIONS**

#### **Reading**

**Q Topics 1 and 2**      **L&H Ch.2**      WBS Topic 24

#### **Partnership Act**

[www.austlii.edu.au/au/legis/nsw/consol\\_act/pa1892154/](http://www.austlii.edu.au/au/legis/nsw/consol_act/pa1892154/)

#### **Cases concerning partnership:**

*Polkinghorne v Holland* (1934) 51 CLR 143.

*National Commercial Banking Corp of Australia Ltd. v Batty* (1986) 160 CLR 251.

*United Dominions Corporation Ltd. v Brian Pty Ltd.* (1985) 157 CLR 1.

.....

## **LECTURE AREA 2**

### **HISTORY AND LEGISLATIVE FRAMEWORK, REGISTRATION AND TYPES OF COMPANIES**

#### **Reading**

Evolution of modern company and Australian developments.

**Q Topic 3**                      **L & H Ch.1**                      WBS Topic 1

Applying for registration and the consequences of incorporation.

**Q Topic 5**                      **L & H Ch.2**                      WBS Topics 3 and 4

Types of Companies.

**Q Topic 4**      **L & H Ch.3**                      WBS Topic 2

#### **Corporations Act**

[www.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/)

Relevant cases regarding the development of companies legislation in Australia

Huddart Parker v Moorehead (1909) 8 CLR 330

Strickland v. Rocla Concrete Pipes Ltd (1971) 45 ALJR 485

NSW v Commonwealth (1990) 169 CLR 482

Re Wakim (1999) ACLC 1055

R v Hughes (2000) 171 ALR 155

### The company as a separate legal entity

- (a) Generally:  
*Corporations Act* Chapter 2A and 2B  
Salomon v Salomon [1897] AC 22  
Lee v Lee's Air Farming [1961] AC 12  
Macaura v. Northern Assurance Co Ltd. [1925] AC 619
- (b) Trustee companies:  
Hurley v BGH Nominees Pty Ltd (No 2) (1984) 2 ACLC 497  
Broomhead (JW) (Vic) Pty Ltd v JW Broomhead Pty Ltd (1985) 3 ACLC 355  
Edwards v Attorney-General (NSW) (2004) 50 ACSR 122
- (c) Corporate Veil:  
Smith Stone & Knight Ltd v Birmingham Corporation [1939] 4 All ER 116  
Industrial Equity v Blackburn (1977) 137 CLR 567  
Briggs v James Hardie & Co Pty Ltd (1989) 7 ACLC 841 (NSW(CA))  
James Hardie and Co Pty Ltd v Hall (1998) 43 NSWLR 554
- (d) Lifting of the Corporate Veil:  
*Corporations Act* ss. 267, 592, 593 and ss.588G – 588Z  
Gilford Motor Co Ltd v Horne [1933] Ch 935  
Creasey v Breachwood Motors Ltd (1992) 10 ACLC 3,052

### Registration

- (a) Minimum or maximum membership numbers *Corporations Act* s.114, s.115
- (b) Classes of company *Corporations Act* s.112
- (c) Small and large proprietary company - criteria *Corporations Act* s.45A
- (d) Permissible changes of company status *Corporations Act* s.162-167
- (e) Legal capacity of a company *Corporations Act* s.124
- (f) Restrictions on company powers *Corporations Act* s.125
- (g) Related companies *Corporations Act* ss.46, 48, 588V

.....

## LECTURE AREA 3

### THE COMPANY CONSTITUTION AND THE RELATIONSHIP BETWEEN THE COMPANY AND OUTSIDERS

#### Reading

The company constitution and the replaceable rules.

**Q Topic 6**                      **L&H Ch 4**                      WBS Topic 5

Company liability in contract, tort and crime.

**Q Topics 7 and 8**              **L&H Ch 5**                      WBS Topic 7

Promoters and pre-registration contracts

**Q Topic 9**                      **L&H Ch 6**                      WBS Topic 8

#### The constitution

Replaceable rules - *Corporations Act* s.135

Modification of constitution - *Corporations Act* s.136

Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656

Gambotto v WCP Ltd (1995) 13 ACLC 342

Grey Eisdell Timms v Combined Auctions Pty Ltd (1995) 13 ACLC 965  
Effect of Company constitution - *Corporations Act* s.140  
Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd [2006] FCAFC 144

**Tortious, statutory and criminal liability of a company**

Tesco Supermarkets v Natrass [1971] 2 All ER 127  
Issue concerning the **directing mind and will** of the company.  
The **Criminal Code**.

**The capacity of company officers to bind a company in contract and the exercise of company powers**

*Corporations Act* ss.124-130  
Royal British Bank v Turquand (1856) 119 ER 886  
Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 1 All ER 630  
Hely-Hutchinson v Brayhead Ltd [1967] 3 All ER 98  
Crabtree-Vickers Pty Ltd v Australian Direct Mail etc. Pty Ltd (1975) 7 ALR 527  
Northside Developments Pty Ltd v Registrar-General (1990) 8 ACLC 611  
Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd (1992) 10 ACLC 253  
Advance Bank Australia Ltd v Fleetwood Star Pty Ltd (1992) 10 ACLC 703  
Bank of New Zealand (BNZ) v Fibern Pty Ltd (1994) 12 ACLC 48  
Pacific Carriers v BNP Paribas [2004] HCA 35  
Soyfer v Earlmaze Pty Ltd [2000] NSWSC 1068

**The status of the company secretary**

Panorama Development (Guildford) Ltd v Fidelis Furnish Fabrics Ltd [1971] 3 All ER 16  
Northside Developments Pty Ltd v Registrar-General (1990) 8 ACLC 611

**Pre-registration contracts**

Kelner v Baxter (1866) LR 2 CP 174  
Black v Smallwood (1966) ALR 744  
*Corporations Act* ss.131-133

**Promoters**

*Corporations Act* ss.728 and 1041H (non-disclosures, misleading conduct).  
Tracy v Mandalay Pty Ltd (1953) 88 CLR 215  
Gluckstein v Barnes [1900] AC 240  
Erlanger v New Sombrero Phosphate Co (1878) App Cas 1218

.....

**LECTURE AREA 4**

**CORPORATE FINANCING**

**Reading**

Disclosure to Investors – fundraising  
**Q Topic 11**                      **L&H Ch 7**                      WBS Topic 7  
Share capital  
**Q Topic 12**                      **L&H Ch 8**                      WBS Topic 20  
Membership  
**Q Topic 10**                      **L&H Ch 9**                      WBS Topic 9

Debentures and Loan Capital

**Q Topic 14**

**L&H Ch 11**

WBS Topic 19

**Disclosure to investors**

Corporations Act, Chapter 6D

Fraser v NRMA Holdings Ltd (1995) 13 ACLC 132

**Share Capital**

*Corporations Act* Chapter 2J

(a) Maintenance of Capital:

Trevor v Whitworth [1886-90] All ER 46; (1887) 12 App Cas 409

(b) Types of Shares: ordinary and preference

Equity and loan capital – shareholders rights

Sons of Gwalia Limited v Margaretic [2007] HCA 1

(c) Preference Shares:

*Corporations Act* s. 254A, Chapter 2H

Will v United Larkat (1914) Ac 11

Variation of class rights s.246B

Greenhalgh v Aderne Cinemas (1915) Ch 286

(d) Capital Reduction: For permitted means of reduction of capital see s.256B and s.257A.

The issue of the company providing financial assistance in relation to the acquisition of its shares is dealt with in s.260A and s.260B. Note s.260D.

.....

**LECTURE AREA 5**

**DIVIDENDS; FINANCIAL OBLIGATIONS; AUDIT and ASIC INVESTIGATION**

**Reading**

Dividends

**Q Topic 13**

**L&H Ch 10**

WBS Topic 18

Financial and Reporting Obligations of Directors.

**Q Topic 19**

**L&H Ch 15**

WBS Topic 14

The Role of Auditors and issues of Audit liability.

**Q Topic 20**

**L&H Ch 16**

WBS Topic 14

ASIC Investigation

**Q Topic 21**

**L&H Ch 21**

**Dividends**

Issues concerning discretion to pay dividends:

Burland v Earle [1902] AC 83

Sanford v Sanford Courier Service Pty Ltd (1986) 5 ACLC 394

Meaning of "profit":

Re Spanish Prospecting Co Ltd [1908 -10] All ER 573

QBE Insurance Group Ltd v ASC (1992) 10 ACLC 1490

**The basic requirement for the payment of dividends out of profit in the Corporations Act (s.254T) may be interpreted in the light of certain cases, including:**

Lee v Neuchatel Asphalt Co (1889) 41 Ch.D. 1

Ammonia Soda Co Ltd v Chamberlain (1918) 1 Ch.266  
Re Hoare & Co Ltd (1904) Ch.208  
Dimbula Valley (Ceylon) Tea Co Ltd v Laurie (1961) 1 Ch.353  
Australasian Oil Exploration v Lachberg 101 (1958) 101 CLR 119 at 129

**Financial obligations (including continuous disclosure)**

Sons of Gwalia Limited v Margaretic  
ASIC V Chemeq Ltd (2006) 58 ACSR 169

**Audit**

Duties of the Auditor to the company:

See generally Daniels v Anderson.

The relevance of the duty to use due care and skill:

Pacific Acceptance Corp Ltd v Forsyth (1970) 92 WN (NSW) 29

Duties of the Auditor to outsiders:

In tort (negligence). Duty of care and issues of reasonable foreseeability:

Shaddock and Assoc Pty Ltd v Parramatta City Council (1981) 150 CLR 225.

Esanda Finance Corp Ltd v Peat Marwick Hungerfords (1997) ACLC 483

**LECTURE AREA 6**

**DIRECTORS and MANAGEMENT**

**Reading**

Management of companies

**Q Topic 15**                      **L&H Ch 12**      **WBS Topic 6**

**Directors, officers and the management of companies**

- (a) Definitions:  
*Corporations Act*, s.9.  
DFC of T v Austin (1998) 16 ACLC 1555  
AWA v Daniels (1992) 10 ACLC 933  
Whitlam v ASIC (2003) 46 ACSR 1
- (b) Minimum number of directors:  
*Corporations Act* s.201A
- (c) Defective appointments of directors and secretaries:  
*Corporations Act* ss.201M, 204E, 1322
- (d) Removal of directors:  
*Corporations Act* ss.203D, 203E  
Claremont Petroleum NL v Indosuez Nominees Pty Ltd (1986) 4 ACLC 315
- (e) Disqualification from management: Part 2D.6

.....

**LECTURE AREA 7**

**DIRECTORS DUTIES and CORPORATE GOVERNANCE**

**Reading**

Management of companies (continued).

**Q Topic 15**                      **L&H Ch 12**                      **WBS Topic 6**

Duties of Directors and other officers.

**Q Topics 16, 17 and 18**      **L&H Ch 13**      WBS Topics 11 and 12

### **Directors and Officers**

#### **Statutory Duties and Liabilities:**

*Corporations Act* Chapter 2D 'Officers and employees' particularly Part 2D.1 and; Chapter 5 'External administration' Part 5.7B (s.588G).

#### **Fiduciary Duties:**

Relevance of the general law to statute (s.185). The rights co-exist.

#### **Corporate Governance and Corporate Social Responsibility:**

- ASX Principles of Good Corporate Governance and Best Practice Recommendations
- CAMAC Discussion Paper – Corporate Social Responsibility: Nov 2005 and Dec 2006

### **Issues in relation to duties and obligations of directors**

1. *Duty to act bona fide (good faith) in the interests of the company.*

#### **Sections 181,182,183.**

##### **Interests of Shareholders**

Greenhalgh v Arderne Cinemas

Percival v Wright [1902] 2 Ch 421

Coleman v Myers [1977] 2 NZLR 255

Hurley v BGH Nominees Pty Ltd No.2 (1984) 2 ACLC 497

Brunninghausen v Glavanics (1999) 17 ACLC 1247

Peskin v Anderson (2001) 19 ACLC 3001

##### **Nominee Directors**

Scottish Co-operative Wholesale Soc Ltd v Meyer (1958) 3 All ER 66

##### **Interests of a Group of Companies – s.187**

Walker v Wimbourne (1976) 137 CLR 1

Equiticorp Financial Services Ltd v Equiticorp Financial Services (NZ) (1993) 11 ACLC 84

##### **Interests of Employees**

Parke v Daily News Ltd [1962] Ch 927

##### **Interests of Creditors**

Walker v Wimborne

Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722

Jeffree v NCSC (1989) 7 ACLC 556

Castrisious v McManus (1991) 9 ACLC 287

**Issue of ratification:** Angas Law Services Pty Ltd (in liquidation) v Carabelas [2005] HCA 23

2. *Duty to Exercise Powers for Proper Purposes – ss.181, 182, 183.*

Howard Smith v Ampol Petroleum [1974] AC 821

Ngurli v McCann (1953) 90 CLR 421

Hannes v MJH Pty Ltd (1992) 10 ACLC 287

ASIC v Adler [2002] NSWSC 171; [2003] NSWCA 131

ASIC v Vizard [2005] FCA 1037

3. *Duty to Retain Discretion – ss.182, 183*

Thorby v Goldberg (1964) 112 CLR 547

4. *Duty to Avoid Conflict of Interest - ss.181, 182, 183, 1318 (exoneration)*

Transvaal Lands Co v New Belgium Development Co [1914] 2 Ch 488

Paul A. Davies (Aust) Pty Ltd v Davies [1983] 1 ACLC 1091  
Advance Bank of Aust v FAI Insurance Ltd (1987) 5 ACLC 725  
Cook v Deeks [1916] 1 AC 554

5. *Duty not to use company information*  
**Corporations Act s.183**  
Grove v Flavel (1986) 4 ACLC 654  
McNamara v. Flavel (1986) 6 ACLC 802  
ASIC v Vizard
6. *Disclosures – ss.191-194*  
Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378  
Furs Ltd v Tomkies (1936) 54 CLR 583  
Old Mines v Hudson 1978 52 ALJR 399  
Peso Silver Mines v Cropper (1966) 58 DLR 2d 1  
Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2005] QSC 233
7. *Duty to act with care and diligence.*  
**Corporations Act Chapter 2D, s.180.**  
Re City Equitable Fire Insurance Co (1925) Ch 407  
Daniels v Anderson (1995) 13 ACLC 614  
ASIC v Adler [2002] NSWSC 171, (2002) 41 ACSR 72; Adler v ASIC [2003] NSWCA 113, 46 ACSR 504; Adler v DPP (2004) 22 ACLC 1460  
ASIC v Vines [2005] NSWSC 738  
**Business Judgment Rule – s.180(2)**
8. Issues of Honesty:  
**Corporations Act s.184** (Criminal Offence), 1317s.
9. Financial benefits to public company directors:  
**Corporations Act, Chapter 2E.**
10. *Duty to Prevent Insolvent Trading – s.588G* (See **Lecture Area 12** for cases)
11. Remedies for breach of duty:
  - (i) Note that remedies are available under both the General Law and the Corporations Act.
  - (ii) *Civil Penalties* - Part 9.4B, s.1317E, s.1317G (enforced by ASIC). These include orders for compensation – s.1317H.  
ASIC v Vizard
  - (iii) *Criminal Penalties* - **Section 184**, s.1317P.
  - (iv) *Company remedies* - General Law (fiduciary duties).
  - (v) *Creditors' remedies* - Following a winding up the Liquidator acts on the creditors' behalf.
  - (vi) *Insolvent trading provisions* - **s.588G**. Directors are liable to civil penalties under this section.  
John David Rich v ASIC (2004) 22 ACLC 1198
  - (vii) Issue of Exoneration and Relief for Breach of Duty:  
**Corporations Act, ss.199A, 1317s, 1318**

.....

## LECTURE AREA 8

### DIRECTORS DUTIES and CORPORATE GOVERNANCE,

#### Reading

Duties of directors and other officers (continued)

**Q Topics 16, 17 and 18**      **L&H Ch 13**      WBS Topics 11 and 12

**\*For references regarding directors' duties see previous lecture**

.....

## LECTURE AREA 9

### MEETINGS AND MEMBERS RIGHTS

#### Reading

Members Meetings

**Q Topic 23**      **L&H Ch.14**      WBS Topic 10

Members Rights and the position of the Minority

**Q Topic 22**      **L&H Ch.17**      WBS Topic 13

#### Issues concerning meetings:

Calling of meetings; notice to members; quorum requirements; resolutions

The effect of irregularities - s.1322.

NRMA v Parker (1986) 4 ACLC 609

Humes Ltd v Unity APA Ltd (1987) 5 ACLC 15

Whitlam v ASIC [2003] NSWCA 183

Turnbull v NRMA (2004) 50 ACSR 44

#### Issues concerning the rights of members:

Generally:

*Corporations Act* Chapter 2F and ss.461 (e), (f), (g), (k), 1324.

Foss v Harbottle (1843) 2 Hare 461; 67 ER 189 [note the effect of s.236(3)]

#### Alteration of rights:

Greenhalgh v Arderne Cinemas Ltd

Gambotto v WCP Ltd

Grey Eisdell Timms v. Combined Auctions Pty Ltd. (1995) 13 ACLC 965

#### Oppression:

Section 232 Corporations Act

Wayde v. NSW Rugby League Ltd. (1985) 3 ACLC 799

Morgan v. 45 Flers Avenue Pty Ltd. (1987) 5 ACLC 222

Scottish Co-Operative Wholesale Soc Ltd v Meyer [1959] AC 324

Re H W Thomas Ltd (1984) 2 ACLC 610

Sanford v Sanford Courier Service Pty Ltd (1987) 5 ACLC 394

Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd [2001] NSWCA 97

#### Proceedings on behalf of the company (Statutory Derivative Actions)

Sections 236 and 237 Corporations Act.



.....

## **LECTURE AREA 10**

### **TAKEOVERS** **FINANCIAL SERVICES AND MARKETS**

#### **Reading**

Takeovers

**Q Topic 24**      **L&H Ch. 18**      WBS Topic 22

Financial Services and Markets

**Q Topic 25**      **L&H Ch. 19**      WBS Topic 21

#### **Corporations Act Chapter 6, Chapter 6A and Chapter 7 (particularly Part 7.10)**

Glencore International AG v Takeovers Panel [2006] FCA 274

Australian Pipeline Limited v Alinta Ltd [2007] FCAFC 55

Attorney-General (Cth) v Alinta Limited [2008] HCA 2

R v Rivkin [2003] NSWSC 447

Hannes v Director of Public Prosecutions (Cth) (No. 2) [2006] NSWCCA 373

ASIC v Citigroup Global Markets Australia Pty Limited (No. 4) [2007] FCA 963

.....

## **LECTURE AREA 11**

### **RESTRUCTURING & LIQUIDATION (PART 1)**

#### **Reading**

The concept of insolvency

Arrangements and Reconstructions

Receivership.

Voluntary Administration.

**Q Topics 26, 27, 28 and 29**      **L&H Chs.22, 23, and 24**      WBS Topic 23.

#### **Insolvency**

Radisson Maine Property (Australia) Pty Ltd and Anor [2004] NSWSC 949

#### **Receivership**

Statutory powers – ss.420, 429, 430, 431

#### **Voluntary Administration**

Appointment of an administrator

Creditors' Meetings – Re Ansett Australia Ltd and Mentha (No 2) [2002] FCA 2

Effect of Administration – stay of proceedings

Outcomes of Administration

Downey v Aira Pty Ltd (1996) 14 ACLC 1068

Lewis v Doran (2004) 50 ACSR 175

Osborne Computer Corp Pty Ltd v Airroad Distribution Pty Ltd (1995) 37 NSWLR 382

Re Pan Pharmaceuticals (2003) 46 ACSR 77, [2003] FCA 598

Sons of Gwalia Limited v Margaretic

Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270

\*\*\*\*\*

## **LECTURE AREA 12**

### **RESTRUCTURING AND LIQUIDATION (PART 2)**

#### **Reading**

Liquidation  
Insolvent trading

**Q Topic 30**                      **L&H Ch 25 (for insolvent trading Ch.13)**      **WBS Topic 23**

#### **Liquidation**

Voluntary or compulsorily  
Statutory Demand – Graywinter Properties Pty Ltd v Gas and Fuel Corp Superannuation Fund  
(1996) 70 FCR 452

#### **Duties of liquidators**

ASIC v Edge [2007] VSC 170

Recovery of Assets  
Priorities

#### **Voidable transactions**

Airservices Australia v Ferrier (1996) 14 ACLC 1403  
Lewis v Cook (2000) 18 ACLC 490

#### **Directors' Liability for Insolvent Trading:**

*Corporations Act* s 588G, 588H, 588J, 588K, 588M, 588R  
Morley v Statewide Tobacco Services Ltd [1993] 8 ACSR 305  
Metropolitan Fire Systems Pty Ltd. v. Miller (1997) 23 ACSR 699  
Hawkins v Bank of China (1992) 10 ACLC 588  
Powell and Duncan v. Fryer (2000) 18 ACLC 480  
Tourprint International Pty Ltd v Bott (1999) 17 ACLC 1543  
Southern Cross Interiors Pty Ltd v Deputy Comm of Taxation [2001] NSWSC 621.  
Byron v Southern Star Group Pty Ltd (1997) 15 ACLC 191  
Hamilton v BHP Steel Pty Ltd (1995) 13 ACLC 1548  
ASIC v Plymin [No 1] (2003) FLR 124, 46 ACSR 126  
Elliot v ASIC (2004) 48 ACSR 621

\*\*\*\*\*

All material extracted for the purposes of this outline is copied pursuant to part VB Copyright Act on behalf of Macquarie University.

## PARTNERSHIP ACT 1892 55 Vic. No. 12

[Reprinted as at 21 November 1994]  
UPDATED 10 AUGUST 1999

### NEW SOUTH WALES

+

An Act to declare and amend the law of Partnership.

#### Preamble

WHEREAS it is expedient to declare and amend the law of Partnership: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

### PART 1—PRELIMINARY

#### Short title

1A. This Act may be cited as the Partnership Act 1892.

#### Definitions

1B. In this Act:

“business” includes trade, occupation and profession;

“Court” means the court having jurisdiction in the case concerned.

### PART 2—PARTNERSHIPS GENERALLY

#### Division 1—Nature of partnership

##### Definition of partnership

1. (1) Partnership is the relation which exists between persons carrying on a business in common with a view of profit.

(2) But the relation between members of any company or association which is:

- (a) incorporated under the Corporations Law; or
- (b) Formed or incorporated by or in pursuance of any other Act of Parliament or Letters Patent or Royal Charter,

is not a Partnership within the meaning of this Act.

##### Rules for determining existence of partnership

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

- (1) Joint tenancy, tenancy in common, joint property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.
- (2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.
- (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that the person is a partner in the business, but the receipt of such a share, or of a payment contingent on, or varying with the profits of a business does not of itself make the person a partner in the business; and in particular:
  - (a) The receipt by a person of a debt or other liquidated demand by instalments or otherwise out of the accruing profits of a business does not of itself make the person a partner in the business or liable as such:
  - (b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

- (c) A person being the widow, widower or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:
- (d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such: Provided that the contract is in writing and signed by or on behalf of all the parties thereto:
- (e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by the person of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

### **Postponement of rights of persons lending or selling in consideration of share of profits in case of insolvency**

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business being adjudged a bankrupt, entering into an arrangement to pay the person's creditors less than one hundred cents in the dollar, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of the loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

### **Meaning of firms**

4. Persons who have entered into partnership with one another are for the purpose of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

## **Division 2—Relationship of partners to persons dealing with them**

### **Power of partner to bind the firm**

5. Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which the partner is a member, binds the firm and the other partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner.

### **Partners bound by acts on behalf of firm**

6. An act or instrument relating to the business of the firm, and done or executed in the firm-name, or in any other manner, showing an intention to bind the firm by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners: Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

### **Partner using credit of firm for private purposes**

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound unless the partner is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

### **Effect of notice that firm will not be bound by acts of partner**

8. If it has been agreed between the partners that any restrictions shall be placed upon the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

### **Liability of partner**

9. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the partner is a partner; and after the partner's death the partner's estate is also

severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of the partner's separate debts.

### **Liability of the firm for wrongs**

**10. (1)** Subject to subsection (2), where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of the partner's co-partners, loss or injury is caused to any person not being a partner of the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act.

**(2)** For the purposes of subsection (1), a partner who commits a wrongful act or omission as a director of a body corporate, within the meaning of the Corporations Law, is not to be taken to be acting in the ordinary course of the business of the firm or with the authority of the partner's co-partners only because of any one or more of the following:

- (a) the partner obtained the agreement or authority of the partner's co-partners, or some of them, to be appointed or to act as a director of the body corporate,
- (b) remuneration that the partner receives for acting as a director of the body corporate forms part of the income of the firm,
- (c) any co-partner is also a director of that or any other body corporate.

### **Misapplication of money or property received for or in custody of the firm**

**11.** In the following cases, namely:

- (a) Where one partner acting within the scope of the partner's apparent authority receives the money or property of a third person and misapplies it; and
- (b) When a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

### **Liability for wrongs joint and several**

**12.** Every partner is liable jointly with the partner's co-partners and also severally for everything for which the firm while the partner is a partner therein becomes liable under either of the two last preceding sections.

### **Improper employment of trust property for partnership purposes**

**13.** If a partner being a trustee improperly employs trust property in the business or on account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:

Provided as follows:

- (1) This section shall not affect any liability incurred by any partner by reason of the partner's having notice of a breach of trust; and
- (2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

### **Persons liable by "holding out"**

**14. (1)** Every one who by words spoken or written, or by conduct represents himself or herself, or who knowingly suffers himself or herself to be represented as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

**(2)** Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make the partner's executors or administrators' estate or effects liable for any partnership debts contracted after the partner's death.

### **Admissions and representations of partners**

**15.** An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

### **Notice to acting partner to be notice to the firm**

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

#### **Liabilities of incoming and outgoing partners**

17. (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before the person became a partner.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debt and obligation incurred before the partner's retirement.

(3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between the partner and the members of the firm as newly constituted and the creditors, and this agreement may be either expressed or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

#### **Revocation of continuing guaranty by change of firm**

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of whose transactions, the guaranty or obligation was given.

### **Division 3—Relationship between partners**

#### **Variation by consent of terms of partnership**

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing.

#### **Partnership property**

20. (1) All property, and rights and interests in property, originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.

(2) Provided that the legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust so far as is necessary for the persons beneficially interested in the land under this section.

(3) Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other lands and estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first-mentioned at the date of the purchase.

#### **Property bought with partnership money**

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

#### **Conversion into personal estate of land held as partnership property**

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and the deceased partner's executors or administrators as personal or movable and not real or heritable estate.

#### **Procedure against partnership property for a partner's separate judgment debt**

23. (1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2) The Supreme Court may, on the application of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon and may by the same or a subsequent order appoint a receiver of

that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to the partner in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in the case of a sale being directed to purchase the same.

#### **Rules as to the interests and duty of partners subject to special agreement**

**24.** The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement expressed or implied between the partners, by the following rules:

- (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.
- (2) The firm must indemnify every partner in respect of payment made and personal liabilities incurred by the partner.
  - (a) In the ordinary and proper conduct of the business of the firm; or
  - (b) In or about anything necessarily done for the preservation of the business or property of the firm.
- (3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which the partner has agreed to subscribe is entitled to interest at the rate of seven per centum per annum from the date of the payment or advances.
- (4) A partner is not entitled before the ascertainment of profits to interest on the capital subscribed by the partner.
- (5) Every partner may take part in the management of the partnership business.
- (6) No partner shall be entitled to remuneration for acting in the partnership business.
- (7) No person may be introduced as a partner without the consent of all existing partners.
- (8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
- (9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when the partner thinks fit, have access to and inspect and copy any of them.

#### **Expulsion of partner**

**25.** No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

#### **Retirement from partnership at will**

**26. (1)** Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of the partner's intention so to do to all the other partners.

**(2)** Where the partnership has originally been constituted by deed, a notice signed by the partner giving it, shall be sufficient for this purpose.

#### **Where partnership for term is continued over, continuance on old terms presumed**

**27. (1)** Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

**(2)** A continuance of the business by the partners or such of them as habitually acted therein during the term without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

#### **Duty of partners to render accounts**

**28.** Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or the partner's legal representatives.

#### **Accountability of partners for private profits**

**29. (1)** Every partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership, or for any use by the partner of the partnership property, name, or business connexion.

**(2)** This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

#### **Duty of partner not to compete with firm**

**30.** If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by the partner in that business.

#### **Rights of assignee of share in partnership**

**31. (1)** An assignment by any partner of the partner's share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any account of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

**(2)** In case of a dissolution of the partnership, whether as respect all the partners, or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between the partner and the other partners, and for the purpose of ascertaining that share, to an account as from the date of the dissolution.

### **Division 4—Dissolution of partnership**

#### **Dissolution by expiration or otherwise**

**32.** Subject to any agreement between the partners, a partnership is dissolved:

- (a)** If entered into for a fixed term, by the expiration of that term:
- (b)** If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:
- (c)** If entered into for an undefined time, by any partner giving notice to the other or others of the partner's intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is mentioned, as from the date of the communication of the notice.

#### **Dissolution by bankruptcy, death, or change**

**33. (1)** Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

**(2)** A partnership may, at the option of the other partners, be dissolved if any partner suffers the partner's share of the partnership property to be charged under this Act for the partner's separate debt.

#### **Dissolution by illegality of partnership**

**34.** A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.

#### **Dissolution by the Court**

**35.** On application by a partner the Court may order a dissolution of the partnership in any of the following cases:

- (a)** When a partner has been declared in accordance with law to be of unsound mind and incapable of managing the partner's affairs, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by the partner's committee or next friend or person having title to intervene as by any other partner.
- (b)** When a partner, other than the partner suing, becomes in any other way permanently incapable of performing the partner's part of the partnership contract.



- (c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business.
- (d) When a partner, other than the party suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise conducts himself or herself in matters relating to the partnership business so that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with the partner.
- (e) When the business of the partnership can only be carried on at a loss.
- (f) Whenever in any case circumstances have arisen, which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

**Rights of persons dealing with firm against apparent members of firm**

**36. (1)** When a person deals with a firm after a change in its constitution, the person is entitled to treat all apparent members of the old firm as still being members of the firm until the person has notice of the change.

(2) An advertisement in the *Gazette* and in at least one newspaper circulating in Sydney and one newspaper circulating in the district in which the firm carries on business shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

**Right of partners to notify dissolution**

**37.** On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary and proper acts, if any, which cannot be done without the partner's or their concurrence.

**Continuing authority of partners for purposes of winding-up**

**38.** After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise: Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has, after the bankruptcy, represented himself or herself or knowingly suffered himself or herself to be represented as a partner of the bankrupt.

**Rights of partners to application of partnership property**

**39.** On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or the partner's representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.

**Apportionment of premium when partnership prematurely dissolved**

**40.** Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part as it thinks just, having regard to the terms of the partnership contract, and to the length of time during which the partnership has continued; unless:

- (a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or
- (b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

**Rights where partnership dissolved for fraud or misrepresentation**

**41.** Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled:

- (a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by the party for the purchase of a share in the partnership and for any capital contributed by the party; and is
- (b) to stand in the place of the creditors of the firm for any payments made by the party in respect of the partnership liabilities; and
- (c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

**Right of outgoing partner in certain cases to share profits made after dissolution**

**42. (1)** Where any member of a firm has died, or otherwise ceased to be a partner, and the surviving and continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner, or the partner's estate, then, in the absence of any agreement to the contrary, the outgoing partner or the partner's estate is entitled, at the option of the partner or the partner's representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of the partner's share of the partnership assets, or to interest at the rate of six per centum per annum on the amount of the partner's share of the partnership assets.

**(2)** Provided that where, by the partnership contract, an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or the partner's estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, the partner is liable to account under the foregoing provisions of this section.

**Retiring or deceased partner's share to be a debt**

**43.** Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner, or the representatives of a deceased partner, in respect of the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death.

**Rule for distribution of assets on final settlement of accounts**

**44.** In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

- (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.
- (b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:
  1. In paying the debts and liabilities of the firm to persons who are not partners therein.
  2. In paying to each partner rateably what is due by the firm to the partner for advances as distinguished from capital.
  3. In paying to each partner rateably what is due from the firm to the partner in respect of capital.
  4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

**45.** \* \* \* \* \*

**Division 5—Miscellaneous provisions**

**Saving for rules of equity and common law**

**46.** The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

**Repeal of 30 Vic. No. 14**

**47.** The Act thirtieth Victoria number fourteen is hereby repealed.

**48.** \* \* \* \* \*

**PART 3—LIMITED PARTNERSHIPS**

**This part is not reproduced in full**

**Composition of limited partnership**

- 51. (1)** A limited partnership is a partnership consisting of:
- (a) at least one general partner; and
  - (b) at least one limited partner.
- (2)** A corporation may be a general partner or a limited partner.

**Size of limited partnership**

- 52. (1)** A limited partnership may have any number of limited partners.
- (2)** The number of general partners must not (if the partnership consisted only of those general partners) result in the partnership being an outside partnership for the purposes of section 112 of the Corporations Law.

**How formed**

- 53.** A limited partnership is formed on the registration of the partnership under this Part as a limited partnership.

**Business Names Act 1962 not to apply**

- 59.** The Business Names Act 1962 does not apply so as to require the partners in a limited partnership to register a business name if that name is the firm-name registered under this Part.

**Liability of limited partner limited to amount shown in Register**

- 60. (1)** The liability of a limited partner to contribute to the debts or obligations of the limited partnership is (subject to this Part) not to exceed the amount shown in relation to the limited partner in the Register as the extent to which the limited partner is liable to contribute.
- (2)** If a limited partner makes a contribution towards the debts or obligations of the limited partnership, the liability of the limited partner is reduced to such part of the amount shown in the Register as remains unpaid.

**Limited partner not to take part in management of partnership**

- 67. (1)** A limited partner must not take part in the management of the business of the limited partnership and does not have power to bind the limited partnership.
- (2)** If a limited partner takes part in the management of the business of the limited partnership, the limited partner is liable, as if the partner were a general partner, for the debts and obligations of the partnership incurred while the limited partner takes part in the management of that business.

\*\*\*\*\*

## PRACTICE QUESTIONS

1
---

- (1) Why would you choose to run a business as a partnership?
- (2). A and B are in partnership as accountants. Without B's knowledge, A, in the name of the partnership, entered the following transactions, although he had no express authority to do so:
- (i) purchased new office stationery and equipment for the firm.
  - (ii) purchased shares to the value of \$15,000 in the partnership name in an exploration company soon to be floated on the ASX.
- (a) Discuss the liability of the partnership.
- (b) Can B be personally liable for either of the transactions?
- (3) Andy, Bob and Chris were old school friends. Bob and Chris were running a surf shop together. The business was having financial difficulties. Andy had recently inherited a lot of money and Bob and Chris asked him to lend the business \$100,000 to enable them to buy sufficient stock for the summer season. Andy wanted to help his friends but also wanted to ensure that he would get his money back. He agreed to lend Bob and Chris the money in return for a payment of \$10,000 per year out of the gross returns of the shop. The terms of the loan also provided that Bob and Chris would consult Andy about any major contracts entered into by the business and gave him a right to inspect the accounts at regular intervals.
- (a) Discuss whether or not a partnership exists between Andy, Chris and Bob.
- (b) Would it make any difference if the terms of the loan provided for Andy to be paid \$10,000 per year out of the profits of the business?

2
---

1. Discuss the extent to which the *Corporations Act* successfully addresses issues relating to the national regulation of companies in Australia. What were the main problems of earlier schemes.
2. Ryan is an ambitious amateur theatrical director who sees a future in commercial promotion of small-scale amateur dramatic productions. The actors will be paid a small fee but there is a profit to the promoters. In case the show is successful there is the chance of an extended season, country tours or even television broadcast.

Ryan has been told of the various forms of business organisation, and he asks your advice about the formation of a company. He envisages that a number of his friends would be prepared to invest substantial sums of money, and that 40 or more theatrical acquaintances will be prepared to make a nominal investment as a gesture of support.

- (i) What kind of company would best suit the needs of these investors?
- (ii) (a) who will manage the affairs of the company?  
(b) how will they be appointed?  
(c) how will they be replaced or removed  
(d) will the company have a common seal?

- (iii) Ryan wants the company to be a public company and perhaps in the future list the company on the Australian Stock Exchange (ASX). Can he arrange it so that he can never be removed from his position as a director.
- (3) Nicola and May are partners in a business which operates a second-hand book shop. They have two employees working for the business. The shop is located in leased premises. The business is doing well and has been profitable for them. An opportunity has arisen to purchase two second-hand bookshops in nearby suburbs. Nicola and May are keen to expand their business. They will need a large injection of funds to purchase the additional businesses. They will need to appoint a manager to at least one of the shops, as they will be fully occupied by the other two. Nicola is concerned about her potential liability for the debts and liabilities of the partnership. Also, she is concerned about the future of the business if one of them should decide to leave, as the lease is in both of their names.

Advise Nicola on the advantages and disadvantages of incorporating. If you recommend incorporation, what form of incorporation would be the most appropriate? Why?

- (4). Indri runs a soil testing business. He decides to form a company to take over the business. He is the sole shareholder and sole director. Indri sells his business to the company at an inflated price and lends the company \$90,000 to help meet the cost of purchase. As security for the loan, Indri arranges a mortgage over a vacant block of land, which he transferred to the company as part of the business sale. In the first year of operation, the business makes a small profit (after paying both Indri and his daughter's wages), but by the end of 2004 it is clear that the building industry is going through a major slump. Indri becomes desperate and works even harder. While working late into the night, Indri badly lacerates his hand and needs micro-surgery. His efforts to keep the business afloat are in vain and the company is forced into liquidation. On realization of the assets, it is found that the company has approximately \$95,000 to go towards meeting creditors' claims of \$210,000:
- (i) If Indri is the only secured creditor, will he get his \$90,000 back?
- (ii) Can Indri claim workers' compensation, assuming that he is otherwise entitled to it?

3
---

- (1) What is the relationship between the decision in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co. Pty Ltd* (1975) 133 CLR 72 and s.129(3) of the Corporations Act.
- (2) X is the promoter of X Pty Ltd, a company to which X proposes to sell some land for high-rise development. (Assume the present zoning of this land does not permit such development). What would you advise X to do, and why?
- (3) Ryan signs a lease for a theatre to be used by Astor Theatre Group Pty Ltd, a company that has not yet been registered. How can the company be bound (and have rights) under such a lease? Can Ryan avoid personal liability if the lease with the company doesn't proceed?

- (4) Alan and Bill are the only shareholders and directors of Sailaway Pty Ltd (Sailaway) which distributes and sells yachting clothing and equipment. As well as a warehouse and attached shop, Sailaway owns a large block of waterfront land which it uses for storage. Alan is also the chairman and majority shareholder of Broadacres Pty Ltd (Broadacres) which buys rural land for subdivision into hobby farms. Broadacres needs to borrow \$1.5 million to fund its latest purchase. It already has a large overdraft and has no unencumbered assets to use as security for another loan. Alan organized a loan of \$1.5 million to Broadacres from ABC Bank on the basis that Sailaway would guarantee the loan by executing a mortgage over its waterfront land. Alan signed the mortgage documents as a director of Sailaway and forged Bill's signature as the other signatory. Tom, the local manager of ABC Bank, had been involved in earlier dealings with Sailaway and knew that its business did not include property development. However, Tom was away at the time the documents and the transactions were organized by a relieving manager who did not ask any questions about Sailaway's involvement.

Broadacres is now in financial difficulties and has defaulted on the loan from ABC Bank. ABC Bank is now seeking to enforce its rights under the mortgage against Sailaway.

Advise Sailaway whether it is bound by the mortgage.

4
---

- (1) What are some differences between ordinary shares and preference shares?
- (2) When should directors cancel a dividend that has been declared? Are there any time limitations?
- (3) Fresh Ltd (Fresh) needs to raise finance for the expansion of its fresh food business. It is considering two options.
- a public issue of redeemable preference shares; and
  - a loan from Strategic Finance Ltd (Strategic).

If it proceeds with option (b), Strategic requires Fresh to provide security for the loan. Fresh owns land, buildings, plant and equipment and trading stock (food for resale).

- What are the advantages and disadvantages of Fresh proceeding with option (b) rather than option (a)?
- Should Strategic take a fixed or floating charge by way of security for its loan to Fresh? Which form of security would you recommend and why would you recommend it?
- If Strategic takes a floating charge over the company's assets, would the charge be a legally effective security if:
  - Fresh did not register the charge under the Corporations Act?
  - Strategic, rather than Fresh, registered the charge under the Corporations Act? What would Strategic have to do in order to register the charge?
  - The charge was registered 50 days after it was created and four months later the company is put into voluntary administration?

- (d) The charge was registered 50 days after it was created and in the meantime a fixed charge in favour of another finance company was executed and registered?
- (4) Larry Large started a business in the early 1990's involving direct marketing of a range of garden products. He operated through a proprietary company, Large Larry Pty Ltd. The business was quite successful, aided apparently by a media campaign featuring Larry himself. In 2001 he decided to dramatically expand the business and to change the operation from direct marketing to distribution of products through various retail outlets. In that year he converted the proprietary company into a public company (Large Larry Ltd). He now wants to raise \$5 million in additional funds to assist with the expansion and also to retire some debt. One option that is being considered is to offer shares in Large Larry Ltd to a number of institutional investors. An alternative option is to float the business, that is offer the shares to the public and apply for listing on the Australian Stock Exchange (ASX). Larry is very upbeat about the company's prospects. He believes that with favorable economic conditions the company will double in size within a year. He approaches you and asks you to advise him on the following matters:
- a) What are the implications under Chapter 6D of the Corporations Act of the two fundraising options being considered?
  - b) If a decision is made to carry out a float, what type of disclosure document will be required and what type of information must it contain?
  - c) Can Larry continue with, or upgrade, his current media campaign (he believes it will help generate public interest in any offering)?
  - d) If the offer document includes forecasts consistent with Larry's view concerning the prospects of the company, what consequences could follow if the forecasts are not met? Are there any precautions in relation to disclosure that Larry, the board of directors and the advisers should take?

5
---

Nikki is interested in investing in a listed mining company and requests a copy of the last annual report of several mining companies. She finds that Toyo Mining Ltd is the best prospect. She is particularly impressed with the audit statement contained in the annual report. As a result Nikki acquires 5000 shares of Toyo at \$10 per share. In 6 months the company the company is placed into Voluntary Administration. It now seems the audit was misleading indicating that the company was profitable when it was not. Can Nikki sue the auditors for any loss that she suffers as a result of a fall in the value of her shares?

6
---

- (1) What powers does the board of directors have? What is the source of their powers?
- (2) What is the role of the Chair of the board?

- (3). Mr. Shifty, Ms. Avoider and Mr. Marginal call to make an appointment with your firm, Fess Ruthless, solicitors. You have been asked to establish their new company (No-Tax Agents Pty Ltd). You advise them not to bother with their own constitution, but instead to rely on the replaceable rules in the Corporations Act. Advise who should be appointed as directors of their company in view of the following information:
- (a) Mr. Shifty states that he does not want to be appointed a director or secretary. He suggests instead that his family company be appointed as a director; and that the company not have a company secretary;
  - (b) Ms. Avoider is currently unavailable for meetings as she has five months still to serve for her last conviction for falsifying company accounts;
  - (c) Mr. Marginal is 80 years old.
- (4) Assume that Mr. Shifty's family company subsequently goes into liquidation. In her report to ASIC, the liquidator states that the secured creditors have been repaid in full, but the unsecured creditors will not receive more than 20 cents in the dollar. The liquidator does not find any evidence of wrongdoing on the part of Mr. Shifty or any of his fellow directors.

What (if any) ramifications does this have for Mr. Shifty, assuming that ASIC's records show that Mr. Shifty has, over the last nine months, had a similar track record with two other small, proprietary companies?

7
---

- (1) What role is played by the general law in respect of the duties of directors?
- (2) When can shareholders ratify a director's breach of duty?
- (3) Roberta is the managing director of Eternal Youth Pty Ltd (EY), a profitable company specializing in buying and selling anti-aging cosmetics and shampoos for sensitive hair. The market for EY's products is women between the ages of 40 and 70 years.

While at the hairdresser's having a power perm, Roberta chats to her hairdresser, Leonardo. Leonardo asks Roberta whether her company would be interested in helping him to market a new organic hair soap called "Wonder Bar". Leonardo claims that the soap prevents male hair loss.

Roberta tells Leonardo that her company would not be interested because it sells women's products only. She offers to help Leonardo herself. Leonardo agrees. Roberta and Leonardo set up a company called Wonder Hair Soap Pty Ltd (WHS) and become its directors and members. Roberta is the majority member. The business of the company is an overnight success.

At a board meeting of EY six months later, Roberta proposes that EY enters into a long-term contract with WHS to buy supplies of the organic hair soap for re-sale. The board agrees and as part of the contract Roberta negotiates with the board that she will be paid a small commission on each sale because she drew the board's attention to this new product opportunity. EY makes large profits from selling the soap overseas.



EY learns that Roberta is the majority member in WHS. They seek advice on the following points:

- (a) Has Roberta breached any of her directors' duties owed to EY? Which (if any) has she breached and why has she breached them?
- (b) Should Roberta have been present at the board meeting when the contract with WHS was discussed and voted on?
- (c) Should the contract also have been disclosed to the general meeting for approval before EY went ahead?
- (d) What general law or statutory remedies (if any) should EY seek against Roberta?
- (e) What statutory penalties (if any) can be imposed against her? Who can impose them?

8
---

- (1) Growfast Pty Ltd (Growfast) operates a wholesale nursery growing and selling garden plants. Sam, Peter and Rose are the only shareholders and directors. Sam manages the company's day-to-day operations. Peter, who left school at 14 and has no tertiary qualifications, is in charge of the nursery. Rose is a non-executive director who does not take an active part in the management or operations of the company.

Until recently, Growfast has been very profitable. However, six months ago, a competing business opened nearby and since then Growfast's profits have dropped considerably. Sam thinks that Growfast should move to larger premises in a different area. Without consulting Peter or Rose he starts looking for new premises and he decides the first place he inspects is perfect, although the price is more than Growfast can comfortably afford. Sam does not think this will be a problem, because there is no competition nearby and he expects that profits will recover immediately. Sam calls a board meeting and tells Peter and Rose that moving will solve all the company's problems and that this property he has seen is absolutely perfect for Growfast. He says they will have to act quickly as there is another interested purchaser. Sam does not tell Peter and Rose that he only looked at this one property. He is so enthusiastic that both Peter and Rose agree to the proposal even though Rose is doubtful, feeling that they are being rushed into making a decision without being given time to consider other alternatives. Peter agrees to Sam's proposal without really understanding the financial implications.

Growfast purchases the new premises but, because of continuing dry weather, its profits remain low. Rose is becoming worried about her obligations as a director, especially if Growfast's financial position deteriorates any further.

- (a) Advise Rose about:
  - (i) her position in respect of any breaches of her general law or statutory duty of care and diligence as a director;

- (ii) whether her decision to agree to the purchase of the new premises would be protected by S.180 (2); and
  - (iii) any possible liability for insolvent trading under S. 588G if Growfast became insolvent.
- (b) Advise Peter as to his position in respect of any breaches of his duty of care and any possible liability for insolvent trading if Growfast becomes insolvent.

- (1) Laura is a minor shareholder in a public company listed on the stock exchange and develops an interest in the way that the company is being run. Discuss to what extent she can participate in the management of the company. In particular look at the following problems:
- (a) The company is profitable but Laura is convinced that this is more by good luck than good management since the directors rarely meet or show any interest in the affairs of the company. Laura believes that the directors should be sacked.
  - (b) The company is strike-free because of the generous salaries and benefits paid to its staff but Laura wants higher and more frequent dividends.
  - (c) Laura has heard that the company is purchasing considerable quantities of its office equipment from a family company of one of the directors who is also a major shareholder in Laura's company. Laura believes that any existing arrangements are unenforceable by the company and that the director needs shareholders' approval for any similar future arrangements. Laura further believes that this director would not be entitled to vote at a meeting of shareholders that decided this issue.
  - (d) Laura has heard that there are plans to change the whole direction of the company away from its current focus on producing environmentally-friendly technology to the transportation of hazardous wastes. Laura believes that the company should be wound up.
- (2) What role has been played by the general law in protecting minority shareholder interests?
- (3) Morris, John and Paul are directors and shareholders of Noosa Property Developments Pty Ltd (NPD), a property development company which owns and operates a restaurant. Morris and John are brothers. John and Paul are friends and partners in an accounting firm. Morris is an unemployed artist and sole parent of three young children. The total number of issued shares in NDP is 6,000 ordinary shares. Each shareholder has 2,000 shares. All the shares are fully paid. NPD has been very successful but has not paid any dividends to its members for the last two years. Profits have instead been invested in further development projects. Morris' wife has recently died and he is very short of money to look after his family. He approaches John and Paul and asks them to consider whether NPD could begin to pay dividends again to its members. John and Paul refuse to consider Morris' request as it would upset the "long-term goals of NPD." Morris is upset by this response and announces that he wants to sell his shares. John and Paul refuse to buy him out and demand that Morris resign as a director because he has lost his objectivity. Morris resigns reluctantly. He asks to see

NPD's most recent set of financial statements. John and Paul refuse to provide the information. Morris discovers accidentally that NPD has been paying large "management fees" to John and Paul's accounting firm. Morris consults you as his legal adviser. He wants to know:

- (i) should he bring a derivative or personal action against John and Paul? What factors should he take into account in making this decision?
- (ii) if he brings a personal action, should he bring it under the general law or make an oppression claim under S.232? What factors influence your recommendation?
- (iii) what remedies should he seek?

<b>10</b>
-----------

- (1) What is a company takeover? What interests does the Corporations Act seek to protect? Does it make any difference to the operation of the law if a takeover is conducted via the stock exchange?
- (2) What legal obligations apply to directors during a takeover? Does liability attach to other persons whose statements appear in a takeover document.
- (3) ABC Ltd wishes to acquire all of the shares in XYZ Ltd. How is the current holding of ABC in XYZ relevant to how this is done?
- (4). A Ltd has held 19.9% of B Ltd (a company listed on the Australian Stock Exchange) for two months. The directors of A Ltd wish to gain control of B Ltd and are considering making an offer to the shareholders of B Ltd. The offer they wish to make is one share in A Ltd plus \$1.00 in cash for each share in B Ltd.

What must the directors of A Ltd do to achieve their aim?

- (5) Solly is a well known investment adviser. He is selling his luxury motorboat to Mr Lock, the CEO of a large public company. Solly phones Mr Lock and threatens to sell his boat to someone else unless the deal is done soon. Mr Lock says to Solly "Don't say anything but our company is just about to be taken over by Telstrate the largest communications company in Asia, once that is done I will have the \$10 million in cash" The next day Solly buys \$100,000 worth of Telstrate shares at \$5 per share. When news of the successful takeover is publicised the shares rise to \$10 per share. Solly sells and makes \$5 profit per share. Is this insider trading? Explain your answer.

<b>11</b>
-----------

- (1) In relation to Voluntary Administration:
  - (a) Who appoints an administrator?
  - (b) What is the rationale behind administration?
  - (c) How could it be useful to directors?
  - (d) What are the possible outcomes of administration?
  - (e) Is a restructure always the best for creditors?
  - (g) Are all creditors treated the same?

- (h) What company debts is the administrator liable for during the administration?
- (2) How are receivers appointed and what are their duties?
- (3) What factors are relevant to assess whether a company is insolvent?

12
----

- (1). Mr T and Mrs T are directors of P Pty Ltd which trades as “Fluffy Donuts of Avalon”. Mrs T makes the donuts and serves while Mr T attends to financial matters. In fact Mrs T was attracted to Mr T before they were married because as an accountant he could, she believed, provide her with the financial guidance she lacked.

The business operates from premises worth \$300,000 owned by the company but mortgaged to the sum of \$275,000. The company also owns certain stock and fittings valued at \$15,000. Bad weather has slowed business, however, Mr T’s spiritual advisor says the weather will get better. Accordingly he takes out advertising to the value of \$50,000. Suppliers are owed \$40,000 but have held off enforcing their debts because they also believe the weather will get better. There is group tax outstanding for the two part time employees.

Mrs T trusts Mr T’s judgement. The rain stops but the customers do not return. The advertising company (owed \$50,000) winds P Pty Ltd up and a liquidator is appointed. Discuss the liability of Mr and Mrs T under s.588G.

- (2) Albert Side took over his father’s funeral business in the early 1980’s and soon set about updating its products and image. He changed the name of the principal operating company to “The Other Side Pty Ltd” (TOS) and, within a few years, TOS had:

- 10 funeral parlours throughout Australia, all of which are rented;
- a substantial quantity of equipment (including hearses and cremators) leased from finance companies and secured by personal guarantees from Albert and his wife and three subsidiaries as follows:  
Dearly Departed Pets Pty Ltd (Pets);  
Creative Coffins and Stonemasonry Pty Ltd (Coffins); and  
TOS Embalming and Cryogenics (Cryogenics).

In the more austere 1990’s, it was much harder to persuade people to spend money on funerals for pets so Pets has been running at a loss for several years. This is unlikely to change in the foreseeable future.

Coffins is a very profitable business and operates out of a factory in Geelong that it owns outright. However, most of the profits have been drained off to cover the losses in Pets and to fund the start-up costs in Cryogenics. Those start-up costs have been substantial so, for the time being, Cryogenics is a significant drain on the rest of the TOS group. But independent marketing consultants have reported that the future for the Cryogenics industry is very promising and, as one of the few suppliers of these services in Australia, there is a realistic prospect that in one or two years, the investment in Cryogenics will pay substantial dividends.

TOS itself is profitable but only just. It too is suffering from the drain on funds caused by Pets and Cryogenics and its 80s image is starting to pale with the customers.

The group is financed by loans totaling \$10 million from Eastpac Bank (Eastpac). Eastpac has security in the form of standard fixed and floating charges over all the assets of each company, except the Coffins' factory site. The local manager of Eastpac agreed to release this from the bank's charge when Albert told him the group was planning to enter into a sale and leaseback arrangement to raise more funds. This has not yet been implemented. The loans from Eastpac are also secured by a personal guarantee from Albert and his wife.

Albert is concerned that he may not be able to keep things afloat long enough for the profits from Cryogenics to come on stream. He is particularly worried about his personal exposure under the guarantees he and his wife have given and about the welfare of his employees who have been very loyal during difficult times. TOS has been late in the payment of rent on its flagship parlour in Sydney each month for the last seven months but has managed to find the necessary funds, usually at about the time the second threatening letter has arrived. One or two of the cheques sent to the landlord have bounced the first time they were presented. His debt of \$2,090 to the local church choir is way overdue. One of the choristers is a law student and has helped the vicar to prepare and send a statutory demand. The 21 days expired yesterday.

Albert has approached an insolvency practitioner who has in turn sought your assistance in advising Albert about what he should do. One option he is considering is selling the Geelong factory site to his family company for less than its full market value.

You are asked to advise Albert about his options and what factors might influence the ultimate outcome of any decision he takes. In particular, your advice should consider what Eastpac Bank is likely to do.