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Slide Set 2



Company and Securities Law in Australia and New Zealand

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Types of Companies in Australia and New Zealand

Company and Securities Law in
Australia and New Zealand
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Statistics on Companies

- General point: although listed companies get a lot of airplay, they are statistically insignificant – less than 1% of all companies.
- The majority of companies are SMEs and these entities are a key private sector employment driver
- Listed often use small subsidiaries to carry out transactions

Preliminary Issue: Foreign Investment Consent

- If you are acquiring real estate in Australia or New Zealand you need the requisite consents as foreign investors.
- Australia: FIRB and AUSFTA.
- New Zealand: Overseas Investment Act
- Generally speaking, this is a formality.
- Familiarise yourself with the relevant websites.

Type of Company (Australia)

- We use a company limited by shares
- Defined in section 9 of the CA.
- Liability of members (shareholders) is limited to the amount unpaid (if any) on shares. So if shares are fully paid, no further liability on shareholders in event of insolvency.
- Use of “shelf” companies.

Section 113 Proprietary Company

- No more than 50 non-employee members.
- No fundraising (offer to public) but can offer to existing shareholders.
- Must have at least one member.
- Usually, have pre-emptive rights (you must offer to sell to existing shareholders before selling to third party).
- These ingredients common across the former British enclaves.

Choice of Vehicle in Australia

In Australia, the hierarchy is as follows:

- Small proprietary company.
- Large proprietary company.
- Unlisted public company.
- Listed public company.

NB: Proprietary companies have “Pty. Ltd” after their names. Public companies have “Ltd” or “Limited” after their names.

Choice of Vehicle

- Reporting and disclosure obligations increase as you go up the hierarchy.
- Another way of conceptualising this point is to say that transaction costs (think Coase) increase as you go up the hierarchy, and,
- Since we wish to minimise transaction costs, we will choose a proprietary company on Day One.

Proprietary Companies in Australia

- See section 45A, Corporations Act (in Handout).
- The three tests for distinguishing small and large proprietary companies. This is an accounting characterisation and comes after the event.
- The company we will use will end up as a “large” Pty Ltd but it could be single shareholder/single director on Day One.
- Company will be incorporated as a Pty Ltd on Day One. Could later change to public unlisted via the section 162 procedure (special resolution – 75% vote).

Section 117 Registration

- Section 117 describes the registration process. Note ultimate holding company requirement (tax implication). This impacts on shareholding.
- Registration and ACN: s. 118.
- Jurisdiction of incorporation: s. 119A.
- A Pty Ltd must have one director ordinarily resident in Australia: s. 210A. Public companies require 2 directors ordinarily resident. Contrast NZ (see below) but NZ about to change

NZ Companies

- Pre 1993 Act NZ had a private (same as Pty Ltd in Australia) versus public company distinction. This no longer exists so effectively we have non-listed and listed companies.
- The only distinction is the functional distinction: issuers and reporting entities etc.

NZ Companies

- Incorporation: see ss 10-14.
- Can be done online.
- Director not required to be resident but this may change and you may need one resident director.
- So very easy to incorporate a one director/one shareholder company.

The deal will shape the way you set up the company

- Using a lawyer in NZ and Australia: Martindale & Hubbell.
- Director(s)? Will there be someone onshore?
- Shareholders (USA parent or SPV)?
- Tax: DTA, CGT.
- Handling the money: trust accounts; bankers mandate.

Summary

- We will incorporate a Pty Ltd in Australia. We will have 2 directors. Why? The issue of whether the company is a small or large Pty Ltd is an accounting issue and arises at the next accounting period (ie, as of 30 June).
- In NZ, we will incorporate a non-listed company. It will have 2 directors and one will be resident. Again, why?
- We don't need to worry about amending the constitution of either company since we will control the share register. Do you understand this point?