

Nature of Companies and ASIC Summary

What is a Company?

- A company is a corporation.
 - o A *corporation* (or *body corporate*) in the common law sense is a legal device by which:
 - Legal rights, powers, privileges, immunities; and
 - Duties, liabilities and disabilities;
 - May be attributed to a fictional entity equated for many purposes to a natural person
 - ☞ Natural Person: A real human being, as opposed to a legal person, which may be a private (i.e., business entity or non-governmental organization) or public (i.e., government) organization.
- Acquires rights and liabilities by the acts of persons behind it
- Persons behind a company include:
 - o Directors: Its immediate controllers (Board, CEO)
 - o Members: Its ultimate controllers (Shareholders)
 - Can have a single member company.
- A company comes into being when the Australian Securities and Investments Commission (**ASIC**) responds to an application for the registration of a proposed company
 - o When ASIC registers a proposed company the company comes into existence as a body corporate at the beginning of the day on which it is registered – **S119 Corporations Act**
 - o The company remains in existence until it is deregistered.
- A company can be a member of another company.

- Entity: Includes a natural person, a body corporate (other than an exempt public authority), a partnership or a trust.
- Body: A body corporate or an unincorporated body and includes, for example, a society or association.
- Body corporate: Vehicles to which the legal system, by the process of incorporation, has given the capacity to have legal rights and duties as a fictional legal person.
 - o A company is a type of body corporate.

- Functions:
 - o Used to conduct various types of lawful activity.
 - This includes running a business for a profit.
 - One major exception is that trade unions cannot be registered as Corporations Act companies - **S116 Corporations Act**.
 - o Limiting the liability of members.
 - Individual members are not responsible for the company's debts (generally).
 - Sometimes loans take a personal guarantee from a member/s, which then makes them liable for the debt.
 - o Co-ordinating participants in a large enterprise.
 - o A nominee to hold legal title to assets.
 - Companies can function as trustees for family or trading trusts.
 - Companies, rather than trusts, can be used to hold family assets.
 - ☞ Trust: Relationship whereby property is held by one party for the benefit of another. A trust is created by a settlor, who transfers some or all of his or her property to a trustee. The trustee holds that property for the trust's beneficiaries.
 - o A structure for a joint venture - companies may be formed for a particular project.
 - o A structure for a fund management - companies may be used as structure for a collective investment scheme, similar to other managed investment schemes.

- A structure for a corporatised government enterprise.
 - Government enterprises can be corporatised as it is believed that they will run more efficiently if structured like a private business.
 - This allows the government to privatise the enterprise by selling all the shares that it holds to the public.
- Providing a regime for the co-ownership of property
- Disadvantages:
 - The company's directors and management are regulated under the Corporations Act (and directors may still face personal liability in certain circumstances).
 - The company is required to disclose certain information to ASIC.
 - Registration involves paying initial and ongoing fees.
 - The company sometimes must consider the interests of creditors.

Types of Business Organisations:

- Company
- Sole Proprietorship: An individual personally conducting their own business (also known as a sole trader).
- Trading Trust: A trust exists where a party/parties (trustee) hold property on behalf of another party/parties (beneficiary).
 - Beneficial ownership in the property of the business (legally held by the trustee) is divided into units and each beneficiary holds a number of units.
 - Members of the public can be invited to invest in units.
- Partnership: The relation which subsists between persons carrying on a business in common with a view of profit.
 - General partnership - all partners are liable for all the partnerships debts.
 - General partners manage the business and are subject to unlimited liability.
 - Limited partnership - has general and limited partners.
 - Limited partners do not take part in management and are only liable to the extent of their contribution.
- Joint venture: Parties participating in a single project together.
 - These are used in the mining and petroleum industry when companies work together in the operation of a mine or a well
 - There is a risk that a joint venture may be held to be a partnership and so sometimes a company is used as a joint venture vehicle
- Non-Profit Organisations:
 - Association's incorporation legislation in each of the States and Territories allows non-profit organisations to limit the liability of their members by incorporation.

Types of Corporations:

- Corporation Sole: Incorporated series of successive persons.
 - EG: Crown and Bishop of the church.
- Corporation Aggregate: An incorporated *group* of co-existing persons or an incorporated single person with whom others could associate.

Australian Regulatory Framework:

- Features of regulation of companies:
 - Prescription by the commonwealth legislature of the conditions for the formation, operation and winding up of companies.

- Registration of companies by ASIC.
- Maintenance by ASIC of registers open to the public containing significant information about companies and persons connected with them.
- Policing by ASIC of the legislative prescriptions.
- Exercise by ASIC of discretions conferred on it by the legislature to grant exemptions from prescriptions or to vary them.
- Publication by ASIC of information about the exercise of its discretions and its policies and procedures.
- Supervision of the winding up of companies by the superior courts.
- Why Regulate?
 - To provide information.
 - People dealing with a company need to know that they are dealing with people authorised to act on its behalf.
 - They also need to know how to sue a company that breaches its legal obligations.
 - To set standards for corporate governance.
 - The community has an interest in excluding people with records of dishonesty from the management of companies.
 - Checks and balances on corporate management are also needed particularly in listed companies.
 - To regulate capital markets.
 - Offerees need to be informed about the risks associated with investing in certain companies.
 - Requiring disclosure of relevant information for listed companies helps keep the market efficient and fair.
 - To regulate the market for corporate control.
 - These protect shareholders who are less informed and help to prevent them from disposing of shares without adequate information or a chance to share in a premium for control of the company.
 - To regulate the securities industry
 - Regulation of the trade in company securities (e.g. Shares) sets standards of honest dealing and prevent market manipulation and insider trading
 - Requiring those who provide investment advice to be licensed helps to protect the public from unscrupulous advisers promoting the sale of shares in companies of dubious value
- Who Regulates?
 - The Commonwealth Parliament.
 - The Parliaments of the States, through their referral of powers.
 - The Executive acting through a Commonwealth Minister and regulatory authorities e.g. the Australian Securities and Investments Commission (ASIC).
 - The Judiciary, through the common law and interpretation of relevant legislation.
 - The ASX Ltd, which prescribes standards for companies admitted to the Official List of the Exchange. EG: The ASX Listing Rules.
 - The Financial Reporting Council, the Australian Accounting Standards Board and the Auditing and Assurance Standards Board in relation to company accounting and auditing.
 - The Governance Institute of Australia and the Australian Institute of Company Directors, which play a part in setting standards for corporate behaviour.
- Criminal and Civil Liability:
 - Some contraventions are also *offences* - an *offence* is a contravention punishable by the criminal sanctions of imprisonment or fine (pecuniary penalty).
 - Civil penalty provisions were recommended by reformers who thought that directors and others who contravene the Corporations Act should not be branded as criminals unless they act dishonestly.

ASIC: Australian Securities and Investments Commission

- What is it?
 - Australia's corporate, markets and financial services regulator.
 - An Independent Commonwealth Government body.
 - Accountable to Parliament.
- Role: **S2 ASIC Act**
 - Contributes to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are:
 - Fair and transparent; and
 - Supported by confident and informed investors and consumers
 - Maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy.
 - Promote the confident and informed participation of investors and consumers in the financial system.
 - Administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements.
 - Receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it.
 - Ensure that information is available as soon as practicable for access by the public.
 - Take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.
- Priorities:
 - Promoting investor and financial consumer trust and confidence:
 - Education – investor responsibility for investment decisions remains core to ASIC's system. ASIC empowers investors and financial consumers through its financial literacy work.
 - ☞ Financial Literacy: Understanding the debts and profits of the company.
 - Gatekeepers – ASIC holds gatekeepers to account.
 - ☞ Have access to information or stop you from getting access to information.
 - Consumer behaviour – ASIC recognises how investors and consumers make decisions.
 - Ensuring fair, orderly and transparent markets; achieved through ASIC's role in market supervision and competition, and corporate governance.
 - Providing efficient and accessible registration with a focus on small business and deregulation.
- Company Registration Process:
 - Step 1 – Confirm a company structure is required
 - Applicants must consider if a company or other type of business structure is required
 - Registration of a business name does not:
 - ☞ Create a separate legal identity
 - ☞ Bring about privileges to which a company is entitled, such as a corporate tax rate or limited liability
 - Different classes of companies:
 - ☞ Limited by shares.
 - ☞ Limited by guarantee.
 - ☞ Limited by shares and guarantee.
 - ☞ Unlimited = no limited liability.
 - ☞ No liability (mining ventures).
 - Step 2 – Choose a company name
 - A company name must:
 - ☞ Show the company's legal status (e.g. Pty, Ltd).
 - ☞ Be unique (check name availability available).

- Not contain certain words or phrases (misleading, offensive, etc.) e.g. Sir Donald Bradman unless there is a connection.
 - A company's Australian Company Number can be used as its name.
- Step 3 – Decide how the company will operate
 - **S140 Corporations Act** provides that a company's internal governance can operate under:
 - The replaceable rules.
 - Its own constitution.
 - A combination of both.
- Step 4 – Understand officeholder obligations
 - Company officeholders are ultimately responsible for the company's compliance with the Corporations Act.
 - They must ensure that:
 - The company pays its debts on time.
 - The company keeps proper financial records.
 - They act honestly, carefully and in the best interests of the company.
 - Directors have duties to the company which can be split into three categories:
 - General duties:
 - ⊕ Exercise care and diligence;
 - ⊕ Exercise good faith;
 - ⊕ Not to improperly use position to gain advantage; and
 - ⊕ Not to improperly use information;
 - Duty to not trade while insolvent; and
 - Duty to keep books and records
- Step 5 – Obtain relevant consents
 - Written consent must be obtained from all who agree to fill the roles of:
 - Director;
 - Secretary; and
 - Member
 - Directors and secretaries must be over 18 years old
 - Written consent from the occupier of the registered office is also required
 - Registered office can be a home, but must have a sign out the front.
- Step 6 – Register the company with ASIC
 - An application for registration must be lodged with ASIC.
 - A Certificate of Registration is issued by ASIC at the point of registration.
 - It displays details such as the company name, its unique Australian Company Number (ACN) and the date of registration.
 - It is conclusive evidence that a company has met relevant requirements and was registered (however, a current company search is most reliable for company status).
- Step 7 – Understand the legal obligations
 - The company name must be displayed prominently at all places of public business.
 - Company name and ACN/ABN must appear on public documents, negotiable instruments and documents lodged with ASIC.
 - The company may, but is not required to, have a company seal.
 - Companies are obliged to:
 - Undertake the annual review process
 - Notify ASIC of changes to company information such as officeholder details, addresses, company name and share details
 - Pay fees that are incurred by some document lodgements, and
 - In some cases, lodge financial reports

- An annual statement is issued at the company review date, and the company must:
 - ☞ Review the company details and notify changes;
 - ☞ Pay the annual review fee (due two months from the review date); and
 - ☞ Pass a solvency resolution and notify as required
- Companies have an obligation to ensure the company register is up to date
 - ☞ Changes to information such as company name, officeholder appointments or cessations, and changes to share structure must be notified to ASIC
 - ☞ Most changes must be notified within 28 days and involve no lodgement fees
 - ☞ Late fees apply for changes that are notified after the required time frame
- Certain companies are required to lodge financial statements and accounts:
 - ☞ Disclosing entities
 - ☞ Public companies
 - ☞ Large proprietary companies
 - ☞ Small proprietary foreign-controlled
 - ☞ Managed investment schemes
- Changing Company Type:
 - To make the change, companies must:
 - Pass a special resolution; and
 - ☞ Special Resolution: Resolve to amend the company constitution if it exists.
 - ⊕ Passed by 75%
 - ☞ Resolution: Recorded decision of the company.
 - ⊕ ...We resolve that we will do this...
 - ⊕ Passed by 50% + 1
 - ☞ Every share has one vote attached.
 - Lodge relevant documents with ASIC
- Fundraising:
 - Companies fundraise to increase cash flow and grow company by being able to invest those funds.
 - Proprietary Limited companies can raise funds:
 - From existing shareholders and employees of the company or a subsidiary company, and
 - From the general public if the fundraising does not require a disclosure document
 - Potential investors must be provided with a disclosure document:
 - A prospectus; or
 - ☞ Prospectus: Disclosure document everything that will be material for someone to buy shares in your company.
 - An offer information statement; or
 - A profile statement
 - A disclosure document must be lodged with ASIC before it can be used to raise funds
 - A 'stop order' can be used by ASIC to prevent offers being made under a disclosure document (if ASIC suspects misleading information or omission of information)
- Company Deregistration:
 - Voluntary deregistration: Shareholders are tired of running the company so deregister.
 - ASIC initiated deregistration: ASIC forces you to close if shareholders have done something dodgy.
 - Winding up of a solvent company: Can pay debts, but don't want to run the company anymore.
 - Winding up of an insolvent company: Can't pay debt and are forced to close.
 - If nothing happens with the company, no communication is occurring, ASIC will inquire and deregister the company if need be.

Registration of Business Names:

- A business name is simply a name or title under which a person or entity conducts a business.
- You must register a business name if you conduct business or trade within Australia under a name other than your own.
- Must renew business name every 1 or 3 years.
- How to Register:
 - Sign up to the ASIC Connect online service
 - Have an ABN, or be in the process of applying for one
 - Provide details such as the proposed business name, addresses and business name holder information
 - Pay the registration fee by credit card, BPAY or invoice