

TOPIC 1: INTRODUCTION TO CORPORATIONS LAW

WHAT IS A COMPANY?

- *A company is an artificially created and inanimate entity recognised by the law as having a separate legal personality with the capacity and powers of a natural person both in and outside Australia*

• S57A – MEANING OF CORPORATION

- A corporation includes:
 - a) A company
 - b) Any body corporate; and
 - c) An unincorporated body that may sue or be sued to hold property in the name of an office holder appointed for that purpose

• S9 – DEFINITION OF COMPANY

- A company means a company registered under this Act
- Key characteristics
 - Separate legal entity
 - Company is distinct and separate from:
 - Its shareholders (who own the capital in it)
 - Its directors (who manage its affairs)
 - Its employees
 - Company can
 - Own property
 - Ability to enter into contracts – acquire rights and assume liabilities/obligations
 - Sue and be sued
 - Offers limited liability to shareholders
 - Efficient vehicle for pooling resources for a common enterprise
- Important practical categories
 - Listed (or widely held) companies
 - Public can hold shares
 - Have a board of directors
 - Wholly-owned/single person companies
 - One individual who is the only shareholder and owner and only director
 - One individual fulfils all the roles
 - But also have a separate legal personality

- Quasi partnership (or closely held) companies
 - 2-3 members
 - Relationships between shareholders can be governed by contract (shareholders agreement) – this does not occur in a listed company setting

COMPANIES COMPARED WITH OTHER BUSINESS STRUCTURES

- Advantages and disadvantages of the corporate vehicle

Advantages	Disadvantages
Mechanism for group of individuals to do what one person couldn't do alone <ul style="list-style-type: none"> • Raise more funds – pool resources from wide range of investors • Increase range of expertise/skills • Spread risks of failure 	Cost and complexity of regulation/compliance
Limited liability	Cost of registration
Perpetual existence	Annual fee to ASIC
Flexibility for future expansion	Ongoing regulatory requirements/compliance with Corps Act
Tax advantages	

- Distinction between companies and other organisation form
 - Separate legal personality
 - Company is treated as a legal person, separate from individual who and control it
 - Can enter into contracts, own property, incur liabilities
 - *Perpetual existence*
 - Do not die and will continue to exist unless action is brought to end it
 - *Level of regulation*
 - Highly regulated
 - Increases the complexity and costs of understanding, establishing and maintaining a company
 - Significant legal duties to those who manage companies
 - *Limited liability*
 - Liability of company's shareholders is limited to the amount they agreed to pay the company for their shares

- Other forms of conducting business

Sole trader	Usually an owner operator of a business
Partnership	Involves 2 or more individuals who work together for a commercial purpose
Trust	Vehicle by which a trustee who owns the property acts for and

	on behalf of beneficiaries – people who stand to gain a benefit by the way the trustee administers the property
Unincorporated association	State Associations Incorporation Acts provide for the incorporation of not-for-profit groups such as clubs and sporting associations

- Choice of business form
 - Common choices
 - Corporation
 - Partnership
 - Trust
 - Joint venture
 - Factors that influence the decision of which organisational form to choose
 - Number of people involved
 - Control and management issues
 - Profit motives
 - Capital requirements (both at the time of starting up and on an ongoing basis)
 - Taxation issues
 - Risk profile/appetite of investors
 - Potential liability of investors

HISTORICAL DEVELOPMENT OF CORPORATE LAW

- First companies
 - Medieval England – monasteries, local government, trade guilds
 - 17th century England – overseas trade, infrastructure
 - Established by Royal Charter or Act of Parliament
- 18th century England
 - Development of private joint stock companies
 - Unregulated
 - Busting of the South Sea Company “bubble”
 - Development of the first company regulation – Bubble Act 1720
- 19th century United Kingdom
 - First UK legislation permitting general incorporation 1844
 - Limited liability 1855
 - Consolidated laws 1862
- Australia
 - Colonial laws based on British laws
 - Company law remained a state responsibility after federation
 - Calls for uniform company laws grew

- 1961 – Uniform Companies Act – state differences emerged over time
- 1981 – Companies Code – inconsistent application and ongoing reform problematic
- 1989 – Corporations Act 1989 – Cth take over
- 1990 – Corporations Law scheme
 - Corporations Act 1988 applied as state legislation
- 2001 – Corporations Act – product of Cth exercising its own constitutional powers under S51 (xx) and States referring powers to the Cth under S51 (xxvii)

THE DEVELOPMENT OF AUSTRALIAN COMPANY LEGISLATION AND ITS CONSTITUTIONAL BASIS

• NSW V COMMONWEALTH 1989

- Cth introduced the Corporations Act 1989 – which was done independently of the States
- Legislation challenged
- HC held
 - Cth didn't have power under S51 (xx) to pass laws providing for the incorporation of trading and financial corporations
 - Cth therefore didn't have power to take over corporate regulation in Aus.
 - **No constitutional power over incorporation**
 - Only have constitutional jurisdiction over companies that have already been incorporated

• RE WAKIM 1999

- Held that the state legislation that purported to confer jurisdiction on the Federal Court to hear matters arising under Corps law was invalid
- Corps matters should be heard in State courts unless they were an insolvency matter where it involves a corporation registered in the territories or in relation to a federal matters
- Cross vesting of jurisdiction was unconstitutional to the extent that it purported to confer jurisdiction on the Federal Court of Australia with respect to matters under the Corporations Law of a State

REGULATORY BODIES AND WEBSITES

Australian Securities and Investments	ASIC	<ul style="list-style-type: none"> • Principal administrator and enforcer • Australian Securities and Investments
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Commission		Commission Act 2011 <ul style="list-style-type: none"> ○ Objects, powers and functions (S1, 11 and 12) ○ Registers and keeps records of companies ○ Investigates/prosecutes breaches of the Corps Act ○ Provides education and guidance to shareholders, directors, consumers; policy advice to government
Australian Stock Exchange	ASX	<ul style="list-style-type: none"> • Operates Australian financial markets • Important role in corporate governance regulation for a public company listed on the stock market
Corporations and Markets Advisory Committee	CAMAC	<ul style="list-style-type: none"> • Key advisory bodies on law reform proposals

TOPIC 2: REGISTRATION AND ITS EFFECTS

REGISTERING A COMPANY

- **S119 – COMPANY COMES INTO EXISTENCE ON REGISTRATION**

- Company comes into existence as a body corporate at the beginning of the day on which it is registered

- **S117 – APPLYING FOR REGISTRATION**

- Lodging application – to register a company, a person must lodge an application with ASIC
- Contents of the application
 - a) Type of company that is proposed to be registered
 - b) Company's proposed name
 - c) Name and address of each person who consents to being a member
 - g) Address of the company's proposed registered office
 - h) For public company – proposed opening hours of its registered office (if not standard)
 - j) Address of company's proposed principal place of business (if not registered office)

COMPANY NAMES

- **S147 – WHEN A NAME IS AVAILABLE**

- Name is available unless identical or unacceptable

- 2) Minister may consent in writing to a name being available to a company even if the name is:
 - a) Identical to a name that is reserved or registered under Act for another body
 - b) Unacceptable for registration under the regulations

• S148 – A COMPANY’S NAME

- Company may use available name or ACN
- Limited companies
 - 2) A limited public company must have the word “limited” at the end of its name unless S150 or S151 applies
- Unlimited proprietary companies
 - Unlimited proprietary company must have the word “proprietary” at the end of its name
- No liability companies
 - No liability company must have the words “no liability” at the end of its name
- Public companies with proprietary included in their name
 - 5) A public company must not include the word “proprietary” in its name unless:
 - a) It was a public company before 1 July 1998
 - b) The word “proprietary” was included in its name before 1 July 1998

• S150 – EXCEPTION TO REQUIREMENT FOR USING “LIMITED” IN NAME

- 1) A company is not required to have the word “limited” at the end of its name if:
 - a) The company is registered under the Australian Charities and Not-for- Profits Commission Act as the type of entity mentioned
 - b) The company’s constitution
 - i) Prohibits the company paying fees to its directors
 - ii) Requires the directors to approve all other payments the company makes to directors
- 2) A company that doesn’t have “limited” at the end of its name must notify ASIC as soon as practicable if:
 - a) The company ceases to be registered
 - b) Any prohibitions or requirements are not complied with or the company’s constitution is modified to remove any of those prohibitions or requirement

- **S151 – EXCEPTION TO REQUIREMENT FOR USING “LIMITED” IN NAME—PRE-EXISTING LICENSES**

- 1) A license that
 - a) Allowed a company to omit “limited:
 - b) Was in force immediately before 1 July 1998
 - c) Was in force immediately before the commencement of this section
 - Continues in force
- 2) The company must notify ASIC as soon as practicable if it
 - a) Breaches a condition of the license
 - b) Pursues objects or purposes that would have prevented it being granted the license
 - c) Applies its profits or other income to promote objects or purposes that would have prevented it being granted the license
 - d) Pays dividends to its members
 - e) Modifies its constitution to allow it to do anything set out in a-d

- **S152 – RESERVING A NAME**

- 1) A person may lodge an application with ASIC to reserve a name for a company if available
- 2) Reservation lasts 2 months from the date when application was lodged. Application may ask ASIC in writing for an extension and ASIC may extend for 2 months

- **S153 – USING A NAME AND ACN ON DOCUMENTS**

- 1) Company must set out its name on all public documents and negotiable instruments
- 2) Subject to S154 and S155, if the company's AN is not used in its name, company must also set out with its name or with 1 of the references to its name, either
 - a) The expression “Australian Company Number” followed by the number
 - b) If the last 9 digits of the company's ABN are the same, in the same order, as the last 9 digits of its CAN – the words “Australian Business Number” followed by number
- If company's name appears on 2 or more pages, must be on first page

- **S154 – EXCEPTION TO REQUIREMENT TO HAVE CAN ON RECEIPTS**

- A company doesn't have to set out the ACN expression followed by its number on a receipt that sets out information recorded in the machine that produced the receipt

- **S155 – REGULATIONS MAY EXEMPT FROM REQUIREMENT TO SET OUT INFORMATION ON DOCUMENTS**

- The regulations may exempt a specified company, or a class of companies, from the requirement on its public documents and negotiable instruments. Exemption may relate to specified documents or instruments, or a class of documents or instruments

- **S156 – CARRYING ON BUSINESS USING “LIMITED”, “NO LIABILITY” OR “PROPRIETARY” IN NAME**

- Person must not carry on business under a name or title that:
 - a) Has the words “limited” or “no liability” at the end
 - b) Includes the word “proprietary”

EFFECT OF REGISTRATION

- **S118 - ASIC GIVES COMPANY ACN, REGISTERS COMPANY AND ISSUES CERTIFICATE**

- If an application is lodged under S117, ASIC may:
 - a) Give the company an ACN
 - b) Register the company
 - c) Issues a certificate that states:
 - i) Company’s name
 - ii) Company’s ACN
 - iii) Company’s type
 - iv) That the company is registered as a company under Act
 - v) State or Territory in this jurisdiction in which the company is taken to be registered
 - vi) Date of registration

- **S1274 (7A) – REGISTERS**

- Certificate issues by ASIC stating that a company has been registered is conclusive evidence of registration and can be used in court as proof of a company’s existence/identity

- **S124 (1) – LEGAL CAPACITY AND POWERS OF A COMPANY**

- A company has the *legal capacity and powers of an individual* both in and outside this jurisdiction. A company also has all the *powers of a body corporate*, including the power to:
 - a) Issue and cancel shares in the company
 - b) Issue debentures (this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long)
 - c) Grant options over unissued shares in the company
 - d) Distribute any of the company’s property among the members, in kind or otherwise
 - e) Grant a security interest over the company’s property

