CORPORATIONS LAW

1. Introduction

S 124 – A company is an artificial entity recognised by law as a legal person with its own rights and liabilities, treated like a person

S57A – A corporation includes a company, any body corporate and an unincorporated body that may sue or be sued, or hold property

Re Wakim
- The cross vesting of jurisdiction was unconstitutional

ASIC is the primary body responsible for the administration of company law

2. Registration and its effects

a. Creating the separate legal entity
- Process of registration involves lodging an application with ASIC using ASIC Form 201 (s117) which must include the information listed in 117(2) (e.g. type of company, proposed name, name and address of each proposed member etc.)
- ASIC may then register the company, give the company an ACN and issue a certificate of registration (s118(1))
- A company comes into existence at the beginning of the day it is registered (s119)
- A company continues to exist until deregistered by ASIC (s601AD(1))

b. The separate legal entity doctrine
- S124 – legal capacity and powers are given to a company when it is registered
  - S124(h) – can enter into contract in its own name/sue/own property
  - S124(1)(a) - body corporate's have the power to issue/cancel shares, grant charges

Salomon v Salomon
- Establishes the separate legal personality and the corporate veil and the birth of the one many company

Lee v Lee's Air Farming Limited
- Lord Morris – 'it is a logical consequence of the decision in Salomon's case that one person may function in dual capacities'

Macaura v Northern Assurance Company Limited
- Lord Buckmaster – 'no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest'

Consequences of the separate legal entity doctrine
- A company is treated as a separate legal entity (Saloman v Saloman)
- A company can contract with controlling members and members can act in a number of capacities (Lee's Air Farming)
  EG) Shareholders and directors can also be secured creditors (Salomon) or employees (Lee's)
- The separate legal entity principle is not diminished by the fact the company is controlled by one shareholder
- The separate legal entity principle allows one person to, on behalf of the company, negotiate and enter into:
- A contract of employment with themselves (Lee)

- A debenture granting to themselves security over the assets of the company (Salomon)

- The separate legal entity principles creates what is referred to as the **corporate veil**

c. Lifting the corporate veil

- The corporate veil can be pierced in limited circumstances. Aust. Courts are reluctant to do so
- Needs to be evidence that strict application of Salomon should not apply
  → There is no common principle to pierce the corporate veil (Briggs)
  → Categories are non-exhaustive (Pioneer Concrete)

Piercing the corporate veil by statute – insolvent trading

- Once a company becomes insolvent, the company's directors and any holding company are to prevent the company from incurring further debts
- It is when the company is insolvent that controllers will most wish to rely on the separate legal personality of the company
- Three key elements must be met:

1. **The company was insolvent**
    - S588G(1)(b) requires the company to be insolvent at the time the relevant debt was incurred
    - S588G(1)(c) requires that there were 'reasonable grounds for suspecting' insolvency
    - S588G(2) requires that directors be aware of the grounds for suspecting insolvency, or a 'reasonable person in a like position in the company's circumstances would be so aware'
    - If the director can establish that they had reasonable grounds to expect insolvent, liability is avoided

2. **The company 'incurs a debt'**
    - S588G(2) it is the directors duty to prevent the company from incurring a debt
    - Such debts must be incurred not imposed
    - Standard Chartered Bank – 'a company incurs a debt when it's by choice or omits something'

3. **A person was a director**
    - s9 includes 'a person who is not validly appointed as a director if (i) they act in the position of director; or (ii) the directors of the company…are accustomed to act in accordance with the person's instructions or wishes other advice given in a professional or other business relationship'

4. **Defences**
    - S588H provides four defences against liability for insolvent trading:
        a. That the director had 'reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent'
        b. That the director 'had reasonable grounds to believe, and did believe, that a competent and reliable person…was responsible for providing… adequate information about whether the company was solvent'
        c. That because of illness or 'other good reason' the director did not take part in the management of the company
        d. That the director took all reasonable steps to prevent the company incurring the debt

5. **Consequences of a breach**
    a. May be ordered to compensate for loss or damage caused by the breach.
    Such an order is likely to be made under s588M

b. A director is guilty of an offence if it can be shown that they suspected the company's insolvency when the debt was incurred and acted dishonestly. Maximum 2000 penalty units/5 years imprisonment
c. A 'civil penalty order' may be made against the director. May be ordered to pay a pecuniary penalty.
   This is a civil action, the corporation may apply for compensation
   Court can excuse breach if director acted honestly