

TABL2741: Business Entities

Week 1: Regulatory Framework of Company Law

Sources of Australian company law

General/case Law	Common law and equity <ul style="list-style-type: none">A case of a superior court will bind the future decisions of inferior courts
Statute Law – Corporations Act 2001	Is a single, national piece of legislation. <ul style="list-style-type: none">Sets out key rules that govern or facilitate the formation, management, operation and termination of companiesOverrides common law; common law is judge-made and statute law is made by parliament.
Other sources	<ul style="list-style-type: none">Corporations RegulationASX listing rules (is contractually binding on publicly listed companies only)Accounting standardsASIC Act 2001

History of company law statutes in Australia

- High court is the only court that can interpret the Constitution
- Up till July 2001, the interpretation of s51 of the Constitution by the High Court held that federal government had limited corporate law making power. Referendum not held to amend Constitution.
- Ultimately, the problem was resolved in 2000 by the State Governments voluntarily surrendering their corporate law making power to the Federal Government

Role and Powers of Corporate Regulator: ASIC

Aims of ASIC:

- Administers the **Corporations Act 2001** to promote fairness and honesty in companies & markets
- Responsible for **market integrity** and consumer protection across the financial system
- Protect investor and consumer **confidence**
- Facilitate international capital flows and international enforcement

Powers

Investigations and information gathering

- Under the ASIC Act, ASIC is authorised to initiate an investigation if it *suspects, on reasonable grounds*, that a contravention has been committed – s13 (1) ASIC Act
 - E.g. contravention of the corporations legislation

Power to examine persons	To require a person to give all reasonable assistance in connection with an investigation and/or to be examined on oath and answer questions
Power to inspect books	ASIC can <u>subpoena</u> for inspection any document required to be kept by the corporations legislation. Furthermore, it can require any person to re-produce the books that documents the company's affairs
Power to hold earnings	ASIC has the power to hold hearings for the purposes of performing or exercising any of its functions and powers under the corporations legislation

Enforcement actions used by ASIC after investigation

- Administrative action** **Enforceable undertakings** – appropriate for minor offences
- Remedy that allows an alleged offender to voluntarily enter into a binding agreement to undertake tasks to settle a contravention of the law and restore the harm caused
 - Not for offences involving fraud, deliberate misconduct or high level of recklessness

Infringement Notices

- If fine is paid, no further regulatory action can be taken against the recipient for the alleged breach
- If fine is not paid, ASIC is entitled to bring a civil penalty action against the recipient
- E.g. for non-compliance with continuous disclosure provisions of Corporations Act 2001 and ASX listing rules

Legal action **Civil penalties**

The Court has discretion to order the director/officer to:

- Pay a pecuniary penalty of up to \$200k (**FINES**) and/or;
- Disqualify the person from management for a period (**BANNING ORDER**) and/or;
- Order the person to compensate the company for damage suffered (**COMPENSATION**).

Types of remedies under civil action:

- To commence proceedings seeking civil remedies in the public interest – s50 ASIC Act (e.g. to recover losses suffered by investors from fraud, negligence, default or breach of duty). In these proceedings, ASIC can take legal action in the name of a company without the need for the company's consent
- Appointment of a liquidator (to dissolve the company)

Criminal prosecution

Criminal sanctions arises when director breach duties **through dishonesty or recklessness**. Accused may be charged with 5 year's jail or fine of up to \$340k.

Types of remedies – penalty notices

ASIC may serve a penalty notice where it has reason to believe a person has committed a prescribed offence (e.g. failure to lodge notice of director or secretary). Summons are issued if penalty not paid.

CASE STUDY: James Hardie Litigation

Case facts: James Hardie manufactured products containing asbestos. Company had a lot of liabilities regarding worker's health claims and decided to create a Medical Research and Compensation Foundation (MRCF) to pay out employee compensation claims for asbestos injury. The legal issue arose when James Hardie Board approved defective draft ASX media release, which said that MRCF was "fully funded" and would meet all claims. The reality was that MRCF had a shortfall of nearly \$1 billion to meet all claims. ASIC deemed that the media release was misleading.

