

Topic 1: Concept of a Company

(Chapter 1, page 1)

A **company** is an artificial entity recognised by the law as a legal person with its own rights and liabilities.

Important characteristics

- Separate legal entity distinct from its shareholders, its directors, managers (officers) and employees.
- May own property, enter contracts and sue or be sued in its own name
- Potentially unlimited lifespan
- Same legal capacity & powers as a human being even though it is artificial
- Limited liability – shareholders are not personally liable for their company's debts but it is limited to paying the issue price of the shares that they own.
- Ability to raise capital by issuing shares to investors
- Transferability of shares

Sources of Regulation

1. Legislation – Corporations Act 2001 and Australian Securities & Investment Commission Act
2. Case law
3. Company Constitution

Distinction between ownership and management control

All companies are required to have:

1. **Shareholders (members)** – regarded as the owners of the company
 - Contribute capital by paying the issue price of their shares and may receive dividends if the company generates profits
 - Corporations Act and company constitutions give shareholders significant rights
For example
 1. They have the right to receive the company's audited financial reports
 2. In the case of public companies they right to attend, speak and vote at the company's annual general meetings.
2. **Directors** – collectively referred to as a 'board of directors'
 - Have exclusive power to control management of the company's business
 - Subject to strict fiduciary and statutory duties to the company and its shareholders

Companies operate businesses ranging from micro to very large

Large businesses often operate in a company group structure

All companies must either be:

1. **Proprietary** – [s 113 pg 104](#)

- More prevalent than public companies
- Regulation is designed to suit the needs of companies with small numbers of shareholders
- One person proprietary companies are permitted
- Divided into 2 subcategories: small and large, distinction is based on scale of their business
- Small proprietary companies are subject to minimum financial disclosure requirements

2. **Public**

- Legislation imposes more onerous obligations and greater public transparency on public companies because they are permitted to raise capital from the public and usually operate large scale business with large numbers of shareholders
- Largest public companies can choose to list their shares on the ASX
- Listed companies must comply with detailed disclosure obligations imposed by the ASX listing rules and the Corporations Act

Topic 2: Characteristics of a Company

(Chapter 2, pg 25)

- [s 119](#): A company comes into existence as a body corporate at the beginning of the day on which it is registered with the name specified in its certificate of registration.
- [s 124](#): The legal capacity and powers of a company include the capacity and powers of an individual and a body corporate.
 - Powers of a company as a body corporate are listed in [s124\(1\) Pg 110](#)
- [S 57A pg 73](#): a body corporate is regarded as one type of corporation
- **Separate Legal Entity** – veil of incorporation
 - Company may own property distinct from the property of its shareholders or members. Shareholders do not have a proprietary interest in the property of the company
 - Illustrated by [Macaure v Northern Assurance Co Ltd \[1925\] AC 619 Pg 30](#)
 - A company may enforce rights by suing and conversely it may incur liabilities and be sued by others.
 - [Pt 2F.1A \(ss 236-22\) Pg 220](#) now permits a member or officer to bring legal proceedings in the company's name with prior leave of the court.
 - Continual existence
 - [S 601AD\(1\) Pg 724](#): a company continues to exist until it is deregistered by ASIC

- Shareholders may come and go but this does not affect the continuing legal existence
- **S 126 (pg 113):** provides that the power of a company to enter into a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company.
 - Validity of exercise of power determined by law of agency and assumptions in **s 129**.
- Optional for companies to have a common seal: **s 123(1) (pg 108)**
- Limited Liability of Shareholders
 - Shareholders of a company are not personally liable for their company's debts
 - Extent of shareholders liability depends on type of company, as provided by **s 112 pg 103**
 - Only when company has insufficient assets to pay its debts that the issue of whether shareholders may be liable arises.
 - Company limited by shares: liability of shareholders of such a company is limited to the amount, if any, unpaid on the issue price of their shares: **s 516 (pg 613)**
 - Risk of business failure is transferred from the company's shareholders to its creditors.
- Limited liability and contract creditors (pg 26)
 - Banks and other financial institutions have strong bargaining power; can receive security and guarantees for loans.
 - Trade creditors rarely insist on security and thus bear a large part of the risk of the debt company's insolvency.
 - Reduce risk by:
 - Charging a higher price for goods/services supplied
 - Take out insurance
 - Provide credit to more than one company thus diversifying risk.
- Limited Liability and tort creditors
 - Generally involuntary creditors
 - Victims of torts bear an uncompensated and involuntary risk in the event of a company's insolvency and are in a poor position to protect themselves against the risk of harm
- Various economic goals achieved by limited liability pg 26

Implications of the separate legal entity concept

- Recognised in **Salomon v Salomon & Co Ltd [1897] AC 22 Pg 27**
 - One person company
 - Decision – a de facto one-person company was fully recognised as being a separate legal entity.
- 2. Application of Salomon's case
 - **S 114 pg 104**– formation of a public or proprietary company with a single shareholder
 - **Lee v Lee's Air Farming Ltd [1961] AC 12 (pg 30)**
 - A company is a separate legal entity, distinct from its shareholders and thus can also enter into a contract of employment with them.
 - **Macaura v Northern Assurance Co Ltd [1925] AC 916 Pg 30**

- **MacLeod v The Queen [2003] HCA 24**
 - High Court held that a person who was the sole director and shareholder could be convicted under **s 173** of the *Crimes Act* for fraudulently applying property owned by the company for their own use

3. Corporate Groups

- Reasons for existence pg 31
- Application of Salomon's principle – each company in a group is a separate legal entity distinct from other companies in the group.
- **Walker v Wimborne (1976) 137 CLR 1 Pg 32**
 - Held that each company in a group was a separate legal entity
- **Industrial Equity Ltd v Blackburn (1977) 137 CLR 567 Pg 33**
 - Group accounting requirements did not mean corporate veil can be lifted for other purposes.
- **Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1987) 5 ACLC 467 (pg 33)**
- Advantages
 - Easy to sell parts of business, more tax efficient to sell share holding
 - Able to protect shareholders of parent company when setting up hazardous business use a wholly owned subsidiary – James Hardy Industries

Other Advantages of companies

- The company as a separate legal entity is not liable for debts owed by its shareholders
 - Referred to as entity shielding
 - Facilitates company borrowing money for business purposes
- 2. Once shareholders contribute capital, company law makes it difficult to get their capital back from their company
 - Facilitates investment in long term projects
 - Shareholders can only get capital back in exceptional circumstances
 - Businesses are easy to set-up because of this feature.

Lifting the veil of incorporation pg 33

When lifting, they lift in relation to specific transaction and disregard that company operates as a sep legal entity. Purpose of lifting- decide if person OTHER than comp. **may** (not must) be liable.

- By Statute
 - 1. Directors' liability for insolvent trading
 - Directors may become personally liable for debts incurred by their company.
 - **S 588G (pg 689) of Corporations Act**
 - Liability arises when directors breach the duty contained in **s 588G** by failing to prevent the company incurring debts when there are reasonable grounds for suspecting that it is insolvent.
- MUST MENTION 588G(1) and 588G(2) TOGETHER!**

.Section 588G(1) applies where:

- a person is a director of a company at the time when the company incurs a debt; and*
- the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and*

- (c.) *at that time there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent.*

Section 588G(2)

A director is in breach of s588G (1) where he/she fails to prevent a company from incurring a debt. According to section 588G(2) a director is in breach of the section subsection (1) if:

- (a) the director is aware, at the time when a company incurs a debt, that there are grounds to suspect the company of being or becoming insolvent, **OR**
(b) a reasonable person in a like position in the company's circumstances would have been so aware. Further, a director commits an offence if his/her failure to prevent the company incurring the debt was dishonest: s588G (3)(d)

2. Uncommercial transactions

- For the purpose of treating corporate insiders such as directors and other related entities of the company differently from others who have dealings with the company.
- [S 588FB \(pg 34\)](#)

3. Company Officer charges – not reviewed in this unit

- [S 267 \(pg 313\)](#)

4. Financial Assistance

- [S 260A \(Pg 294\)](#)
- Render officers liable for civil penalties if they were involved in their company's contraventions of the Corporations Act

5. Taxation Legislation

- *Income tax assessment Act 1997* provides that directors may be liable to pay the company's remitted group tax and other similar liabilities

▪ At Common Law – through the courts

1. **Fraud** – courts have lifted the corporate veil where a company is used as a vehicle for fraud

- [Re Darby \[1911\] 1 KB 95 \(pg 35\)](#)

2. **Avoidance of legal obligations (improper conduct- when directors breach fiduciary duties)** – the courts will also lift the corporate veil if a company has been used as a sham so as to avoid a legal obligation under contract or statute.

1. Service Agreements - [Gilford Motor Co Ltd v Horne \[1933\] Ch 935 Pg 35](#)
2. Obligations to creditors – [Creasey v Breachwood Motors Ltd \(pg 36\)](#)
 - Also considers breach of duties to the company
 - [Jeffrey v NCSC \(pg 334\)](#)
3. Company was a mere puppet of its controller – [Ascot Investments Pty Ltd v Harper](#)
4. Knowingly involving in directors' breach of duty – [Green v Bestobell Industries Ltd \(pg 36\)](#)
5. Attributing mind and will of a company (pg 38) – [Tesco Supermarkets Ltd v Nattrass \(pg 105\)](#)

Lifting the Corporate Veil of Group Companies

Under the Corporations Act

1. *Holding company's liability for insolvent trading by subsidiary*

- Salomon principle prevents creditors of an insolvent company from gaining access to the funds of the other companies in the group for payment of their debts
- This may not be appropriate where the business activity of a subsidiary has been directed or controlled by the holding company.

[Sections 588V – 588X \(pg 37\):](#)

- Company fails to prevent subsidiary from incurring a debt
- Reasonable grounds to suspect that the subsidiary was insolvent
- Subsidiary's liquidator may recover from the holding company equal amounts of the loss suffered by the subsidiary's unsecured creditors

Sections 588X(2) to (5) provide the holding company and its directors with certain defences to section 588V(1).

ii. **Section 588W(1)** enables the liquidator of the insolvent subsidiary company to recover from the holding company amounts equalling the loss or damage suffered by the subsidiary's unsecured creditors.

NOTE: A holding company may become liable for the debts of its subsidiary, however a holding company does not commit an offence by contravening s588V (1): **s588V (3)**

2. *Consolidated financial statements:* AASB 127, combining financial reports of all group members and preparing financial reports where the group is treated as a single entity
3. *Taxation consolidation* – corporate groups controlled by an Australian company may elect to lodge a single consolidated tax return for the entire group

At Common Law (Rare in practice)

4. *The benefit of the group as a whole* – **Equiticorp Finance Ltd v Bank of New Zealand (pg 38)**
5. *Moving targets:* difficult to determine actual legal entity they are dealing with
 - **Quintex Australia Finance Ltd v Schroders Australia Ltd**
6. *Subsidiary as an agent or partner of the holding company*
 - **Smith Stone & Knight Ltd v Birmingham Corporation (pg 39)**
 - 6 special circumstances
 - **Pioneer Concrete Services Ltd v Yelnah Pty Ltd (pg 33)**
 - Mere existence of a group does not mean each company in the group is an agent/partner of other group members
7. *Tort Liability: Holding company liability for its subsidiary's negligence*
 - **Briggs v James Hardie & Co Pty Ltd (pg 40)**
 - Controlling company itself owed a duty of care to the employee under the law of negligence
 - Controlling company exercises a high degree of control over the day-to-day activities of its subsidiary out of which the tort claim arose.
 - **CSR Ltd v Young (pg 41)**
 - Dominance and control exercised by holding company

Comparison between a company, partnership and trust – pg 43

Topic 3: Company Registration

(Chapter 2, page 25)

Corporations Act prohibits the formation of certain partnerships or associations unless they are incorporated. Refer to **s 115 (pg 105)**

A new company is formed by filling an application for registration with ASIC.

- Company details are entered into ASCOT
- Once registered ASIC issues a Certificate of Registration and gives company an Australian Company Number (ACN)

Company Name

- Can use ACN as name – [s 148\(1\) – pg 127](#)
- Rules for certain types of companies [s 148\(2\) – \(6\)](#) and accepted abbreviations [s 149](#)
- Availability of name: [s 147\(1\)](#)
- Reservation of a name – [s 152 pg 129](#)
- Change of company name – [s 157\(1\)-\(3\) pg 131](#)
- Omission of 'Limited' from name: [pg 49 LH and s 150\(1\)](#)
- Publication and display of company name: [LH pg 49](#)
 - A company is required to set out its name followed by its ACN on its common seal and on all its public documents – [ss 123\(1\) and 153\(1\)](#)
 - Definition of 'public document' in [s 88A](#) – “a business letter, statement of account, invoice, receipt, order for goods order for services or official notice” of the company.
 - Public doc does not include documents of a non-contractual nature – [National Education Advancement Programs Pty Ltd v Ashton](#)
 - [S 144\(1\) \(pg 125\)](#): a company name must be predominantly displayed at every place at which the company carries on business and that is open to the public.
 - [S 144\(2\)](#) – a public company must also display its name at its registered office.
- Misuse of identical or similar name: [LH pg 50](#)
 - Common law 'passing off' – if purpose of using similar name is to create the impression that the business is that of another and is thereby taking advantage of the reputation of an established business to its detriment.
 - Existing business may bring an action in the **tort of passing off**, and
 - Seek damages for the loss of profits and loss of goodwill.
 - Obtain an injunction to stop defendant from continuing with its business or company name.
 - Not necessary to prove defendant intended to deceive but defendant must carry on same kind of business as plaintiff
 - [Cameron Real Estate Pty Ltd v Cameron](#)
 - May use similar or identical name to someone else if person is using their own name and does so honestly.
 - [S 52 of Trade Practices Act – misleading or deceptive conduct](#)
 - See LH pg 50 [2.260]
 - [Aerospatiale Societe Nationale Industrielle v Aerospatiale Helicopters Pty Ltd](#)

Registration Process – pg 52: figure 2.1

- To register a company, a person must lodge an application with ASIC: [s 117\(1\)](#)
- Information to be specified in application – [s 117\(2\)](#)
- **Registered Office**

- **S 142(1) – pg 125**
- **S 109X(1)** – a document is validly served on a company by posting it to or leaving it at the registered office
- If registered premises not occupied by company, company must obtain consent of occupier – **s 143(1)**
- Change of address – **s 142(2)**
- Display of name – **s 144**
- Opening hours – **s 145**
- Address of principal place of business must be notified to ASIC (if not registered office) – **s 146**
- **Constitution and Replaceable rules**
 - Replaceable rules – set of basic rules in *Corporations Act* that regulate the internal management of companies.
 - **S 134 (pg 118)** – new companies may choose to be governed by the replaceable rules, their constitution or by a combination of both.
- **Shareholders and Officers**
 - **S 120(1) Pg 107** – persons named with consent in application become members/directors/officers from time of registration
 - **S 120(2)** – shares are taken to be issued on registration
 - **S 1071H(1)** - share certificate must be issued within 2 months
- **Fees**
 - Application for registration if a company with share capital - \$800
 - Application for reservation of name - \$40
- **Certificate of Registration – s 118 pg 106**

Post-registration requirements – LH pg 54, figure 2.2

Appointment of directors and secretary

- Initial directors and secretary are those persons named with their consent in the application for registration.
- Subsequent appointments of directors
 - **S 201G (RR) Pg 182** – company may appoint a person as a director by resolution passed in general meeting.
 - **S 201H (RR)** – directors of a company may appoint a person as a director
 - **S 201H(1) and (2)** – Proprietary/Public company confirmation
- **S 204A(2)** – Public company must have at least one secretary
- **S 204A(1)** – Proprietary company not required to have a secretary
- **S 204D** – the directors appoint company secretaries.
- Under **s 205B(1)** – company must lodge notice of personal details of director or secretary appointed after registration. Details required are name, date and place of birth and address.

Common Seal

- Optional
- If chosen to have one, company's name and ACN or ABN must be set out on the seal – s 123(1)

- Common seal is affixed to certain formal documents – share certificates and finance documentation.
- Note [s 127](#) – execution of documents

Registers

[S 168 \(pg 140\)](#) requires company to set up and maintain registers of:

- A register of members – [s 169](#)
- Register of option holders and copies of option documents – [s 170](#)
- Register of debenture holders – [s 171](#)
- [S 173 \(page 144\)](#) – a company must allow anyone to inspect its registers
 - [S 173\(2\)](#) – member, option holder or debenture holder can inspect free of charge but other people may inspect only on payment of a fee (up to the prescribed amount).

Minute Books

- [S 251\(A\) \(pg 184\)](#) – all companies must keep minute books in which are recorded within one month of the proceedings, resolutions of meetings of the company's members and directors
- [S 1306](#) – deals with manner in which minute books are kept or prepared.

Issue of Shares

After registration, a company has the power to issue shares.

This power will generally be exercised by directors – [s 198A](#)

- A share certificate must be issued within 2 months of allotment – [s 1071\(H\)](#)
- Company must update register of members – [s 169](#)
- Company must lodge a notice with ASIC setting out details of the share issue – [s 254X](#).

Financial Records

- [S 286\(1\) \(pg 339\)](#) requires all companies to keep written financial records that:
 - Correctly record and explain its transactions and financial position and performance and
 - Would enable true and fair financial statements to be prepared and audited.
 - [S 9](#) (pg 20) defines financial records as including invoices, receipts etc, documents of prime entry and working papers and other docs needed to explain the methods by which financial statements are made up of and adjustments to be made in preparing financial statements.

Appointment of an Auditor

- [S 325 \(pg 402\)](#) – directors of a proprietary company may appoint an auditor for the company if an auditor has not been appointed by the company in the general meeting.
- [S 327A\(1\)](#) – the directors of a public company must appoint an auditor of the company within 1 month after the day on which the company was registered unless the company at a general meeting has appointed an auditor. Also applicable to large proprietary companies.

Use of name:

- Section 144 obliged a company to display its name in a prominent position outside its registered office as well as outside the premises where its business is being carried on and open to the public.

Public Officer:

- Every company is required to have a public officer within 3 months of commencing to carry on the business