

BTX2000: CORPORATIONS LAW

Semester 1, 2017

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CHAPTER 1: REGULATORY FRAMEWORK

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What is a Company?

A company is an artificial or fictitious entity recognised by the law as a legal person with its own rights and liabilities. The *Corporations Act 2001 (Cth)* s 9 defines a company as being registered under the Act or its predecessors.

- It is one type of a corporation – s 57A
- A company has its own corporate personality and is a separate entity distinct from its shareholders, its directors, and its officers and employees,
- A company has limited liability – shareholders are not personally liable for their company's debts.

The transferability of shares is a feature that distinguishes a company from a partnership. As a general rule, shareholders are able to transfer or sell their shares free of any restrictions and free transferability of shares is a requirement for listing on the stock exchange.

The Corporations Act makes a formal distinction between ownership and control of companies. Companies are required to have shareholders and a board of directors. If they choose to list their shares on the ASX, they must comply with detailed disclosure obligations imposed by the ASX Listing Rules as well as the Corporations Act.

There are three main sources of rules that regulate companies:

1. Legislation, particularly the Corporations Act. Others include the *Australian Securities and Investments Commission Act 2001 (Cth)*
2. Case law; and
3. The Constitution of each company, which sets out the rules that regulate their internal management.

Corporations Act 2001

As a result of the enactment of the referral legislation by the States, the Commonwealth passed the *Corporations Act 2001 (Cth)* and the *Australian Securities and Investments Commission Act 2001 (Cth)*.

- Became operative on 1 July 2001. It is administered and enforced on a national basis by ASIC and other commonwealth bodies.

Australian Securities and Investments Commission

ASIC is the main Commonwealth authority responsible for administering the Corporations Act. In performing its functions and exercising its powers, s 1(2) of the ASIC Act directs ASIC to strive to:

- Maintain, facilitate and improve the performance of the financial system and the entities within the 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

The Application of Salomon's Case

There were also a number of applications of Salomon's case:

- Lee v Lee's Air-Farming Ltd [1961] AC 12: A one-person company is a separate entity from its controller who may also be its sole employee.
- Macaura v Northern Assurance Co Ltd [1925] AC 619: The shareholder of a one-person company does not have a legal or equitable interest in the company's property.

A consequence of the conclusion in Macaura's case is that it is theoretically possible for a shareholder to be found guilty of stealing company property, even in the case of a one-person company.

- Macleod v The Queen (2003) 214 CLR 203 – a person could be convicted under s 173 of the Crimes Act 1914 (Cth) of fraudulently applying property owned by the company for his own use.

Salomon's Principle and Corporate Groups

The application of the principle in Salomon's case to corporate groups means that each company in a group is regarded as a separate legal entity distinct from other companies in the group.

- Creditors can only enforce their right against that company.

The following cases provide instances of situations where the court applied Salomon's principle:

- Walker v Wimborne (1976) 137 CLR 1: Directors of a company that is a member of a group cannot act in the best interests of the group and disregard the interests of that company's shareholders and creditors.
- Industrial Equity Ltd v Blackburn (1977) 137 CLR 567: A subsidiary's profits could not be regarded as the profits of its holding company available for payment of the holding company's dividend.
- Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1987) 5 ACLC 467: It is possible to infer an agency relationship between the holding and subsidiary companies in some circumstances.
- Adams v Cape Industries plc (1990) 1 Ch 433: The parent company who was not a resident of the foreign country, was not subject to the courts where the subsidiary carried on business.

Piercing the Veil of Incorporation

Piercing or lifting the corporate veil means that the separate legal personality of the company is disregarded in carefully defined situations.

By statute:

- Directors' Liability for Insolvent Trading (s 588G)
- Uncommercial Transactions – s 588B is specifically aimed at preventing insolvent companies from disposing of assets prior to liquidation through uncommercial transactions.
- Security Interests Granted to Officers – s 588FP, a security interest granted by a company is void if the secured party is an officer, former officer or person associated with an officer and the secured party purports to take a step to enforce the security interest within 6 months after it is made without the leave of the court.
- Financial Assistance – the veil may be pierced so as to render officers liable for civil penalties if they were involved in their company's contravention of the Corporations Act.
- Taxation Legislation – the Income Tax Assessment Act 1997 (Cth) provides that directors may be liable to pay the company's unremitted PAYG tax instalments and other similar liabilities.

Consequences of Conviction

A person who is guilty of an offence under the Corporations Act is punishable on conviction by a penalty not exceeding the penalty applicable to the offence – s 1311(2). If the section that creates the offence is included in Sch 3 list then the maximum penalty is the penalty mentioned in that schedule - s 1311(3).

- If a provision sets out its own penalty, then that is the maximum penalty on convictions – s 1311(4)
- Where a penalty is not otherwise provided, then the applicable penalty is 5 penalty units (\$900) – s 1311(5)

Penalty Notices

ASIC is able to serve a penalty notice if it has reason to believe that a person has committed a prescribed offence. Minor offences under the Corporations Act incur an “on the spot” fine under section 1313. Payment of the penalty and remedying the contravention precludes further criminal proceedings.

CHAPTER 14: SHAREHOLDERS’ MEETINGS

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Shareholders make decisions by passing resolutions at general meetings. Shareholder meetings enable shareholders to express their will and acquire significant information.

- Calling and conduct is governed by the replaceable rules and the company’s constitution.
- A meeting of a company’s shareholders must be held for a proper purpose – section 249Q
- A meeting of shareholders must be held at a reasonable time and place – section 249R

Types of Meetings

Annual General Meetings:

Public companies must hold an annual general meeting. The first of which must be held within 18 months after its registration – s 250N(1).

- Thereafter, they must be held at least once in every calendar year and within 5 months after the end of a company’s financial year – s 250N(2)
- Default in holding an AGM is an offence of strict liability – s 250N(2A)
- Not required to hold an AGM if there is only one shareholder – s 250N(4)
- Proprietary companies do not need to hold an AGM unless required by their constitution.
- Can apply to ASIC for an extension for which the AGM must be held – s 250P(1)

A director or shareholder entitled to vote may apply to the court for an order that a general meeting, including an AGM, be called if it is otherwise impracticable to call the meeting in any other way – s 249G

- Eg. management deadlock in *Skliros v Lefcadian Brotherhood Pty Ltd* [2003] FCA 865

The AGM is a forum for:

1. Reporting: to inform shareholders about various financial and other matters concerning the company, principally through consideration of the annual report
2. Questioning: to provide an opportunity for shareholders to ask questions or make comments on various matters, including the management of the company, the