

LECTURE 1: OVERVIEW

- A company is formed by registration under Part 2A.2 of the Corporations Act 2001 or under corresponding earlier legislation.

Legal Personality:

- The main distinguishing feature of a company from other business structures (sole traders, partnerships, etc.) is that a company has a legal personality quite separate from its members.
- It is capable of holding assets and incurring liabilities in its own name and may also enter into legal contracts and other legal relationships with third parties in its own right.
- For example, a company rather than its members or membership can hold title to property and it can take legal action separate from the particular individuals who happen to make up the group at any time. Similarly, the company can take on legal duties and obligations in its own right.

Historical Development:

- Most sophisticated societies have seen it necessary to create artificial legal persons which operate quite separately from natural persons or groups of individuals. That may have been because of the need for perpetual succession or it may have been because a particular office or position needs to be distinguished from the particular person who holds it from time to time.
- For example under canon law, the position of bishop in the church was treated as separate from the natural person who was bishop at any one time. In this sense the position of bishop was recognised as a corporation (which we now refer to as a "corporation sole"). This meant that when church property was said to be owned by the bishop this did not refer to the particular individual who happened to be bishop at any one time but in effect to the office or position of bishop. That meant that when the individual bishop died there was no need to transfer property to the next individual who held that title. This feature of canon law was adopted by the common law because of its convenience.
- It is only in the mid 19th century that the notion of "**limited liability**" was accepted. While the separate existence and personality of companies was long established, the notion that members and shareholders would themselves not be liable for the debts and liabilities of the company took

some time to be recognised and was not finally established until *Salomon v Salomon & Co Ltd* [1897].

Role and Function of ASIC:

- The Australian Securities and Investments Commission (generally known as ASIC) is the main body responsible for the administration of company law in Australia.
- ASIC's functions and powers are set out in the Australian Securities and Investments Commission Act 2001 (also referred to as the ASIC Act) which was enacted at the same time as the Corporations Act 2001, as part of an overall reform package.
- ASIC has many functions but the main functions for our purposes are as follows:
 - Acting as a registry (companies are registered with ASIC, part of the process of incorporation).
 - Company auditors and liquidators must also be registered with ASIC.
 - Any documents which are required by the Corporations Act to be lodged are lodged with ASIC.
 - Receiving and providing information about companies. One important aspect of company law is the ability of the public to access many documents that have been lodged with ASIC.
 - Administering the Corporations Act and investigating and prosecuting breaches of the legislation. (Criminal proceedings are pursued in collaboration with the Director of Public Prosecutions (DPP) and civil proceedings by ASIC alone.)
 - Regulating financial markets and financial services (any person who wishes to carry on the business of providing financial services is required to hold an AFS licence, unless otherwise exempted by the Minister). ASIC is responsible for licensing and supervising all financial service professionals including operators of financial markets and clearing and settlement facilities as well as market participants.
 - Regulating trading in futures contracts in commodities.
- ASIC is responsible to the Commonwealth Treasurer and therefore ultimately to the Commonwealth Parliament.
- In the case of companies whose shares are listed on the Australian Securities Exchange, the Australian Securities Exchange Limited (the ASX) has an important role in corporate governance.

Powers of ASIC:

- ASIC has very wide powers in administering and enforcing corporations legislation.
- One significant discretion available is that ASIC has the power to exempt any person from the operation of the Corporations Act. Matters in respect of which ASIC may exercise powers of exemption are:
 - Financial reporting (ss 340-341)
 - Managed investment schemes (s 601QA)
 - Takeovers (s 655A)
 - Fundraising (s 741)
 - Product disclosure statements (s 1020F)
- In addition, ASIC can modify the operation of these provisions. In the usual case ASIC only exercises its exemption or modification powers if the cost of compliance is likely significantly to outweigh the overall benefit.
- **ASIC has broad investigative powers**, including powers to examine any person of interest on oath, to hold hearings and to subpoena relevant documents, if on reasonable grounds it suspects a contravention of the Corporations Act.
- Criminal Proceedings: ASIC can also initiate criminal proceedings but in the usual case it prosecutes only minor regulatory offences. If its investigations reveal the commission of a serious breach the matter is generally referred to the Commonwealth DPP for further action.
- Civil Proceedings: ASIC also has power to pursue civil remedies (including civil penalties and damages).
- Other powers include obtaining protective orders for the preservation of corporate property under section 1323 (so-called **asset “freezing” orders**), and applying for **injunctions to restrain conduct** in breach of the Corporations Act (see section 1324).

ASIC Database:

- You will find publicly accessible information on all Australian companies in ASIC's corporate database, ASCOT. That database contains public information about:
 - corporations including their names, registered offices, particulars of shareholders and directors;

- principal activities of a corporation;
- (until recently), registered charges granted by a corporation (that information is now found on the Personal Property Securities Register administered under the Personal Property Securities Act 2009 (Cth)); and
- licensed financial service providers (eg stock brokers, investment advisers, registered auditors and liquidators).

Functions and Powers (ASIC):

- ASIC is also the main authority responsible for regulating financial products, financial services and markets; for example, a body such as the Australian Securities Exchange Limited (ASX) must be licensed by ASIC.
- ASIC also has powers to regulate fundraising by the issue of shares and other securities.
- In August 2010 the Commonwealth Government transferred the supervisory responsibility for Australia's financial and equity markets (including the ASX) from the ASX to ASIC.

Bringing Companies into Existence:

First Steps:

- A company is brought into existence when it is registered by ASIC.
- Before registration, however, it is necessary (as a practitioner or other professional) to undertake a number of steps including:
 - **bringing together the parties** who wish to form the company;
 - **identifying sources of capital** (equity or debt);
 - deciding on the **internal rules** for running the company;
 - **entering into arrangements** (even agreements) before the company is registered (such as pre-incorporation contracts);
 - if little time is available, **a shelf company can be purchased. A shelf company is a company which has been registered in the usual way by organisations** (and sometimes by law firms and accounting firms) **but is held “on the shelf” until it is needed for a specific and usually urgent purpose.** Whether purchasing a company off the shelf or registering a company from the outset one must have regard to many of the same matters.

Registration of a Company:

- The next step in registering a company (if you have not acquired a shelf company) is lodgment of an application with ASIC.
- The procedure nowadays is fairly simple and can be done electronically.
- A one off fee of \$479 applies (for a proprietary company having share capital) and there is only one form needed for registration (ASIC Form 201)
- That form provides for the following information:
 - the type of company proposed (see below);
 - the company's proposed name (unless an Australian Company Number (ACN) is to be used in the name) (Note too that if a name is highly sought after or valuable it can be "reserved" beforehand);
 - the name and address of each person who consents to become a member;
 - the names, birth dates and addresses of those consenting in writing to become directors and company secretaries;
 - the address of the company's proposed registered office (and proposed opening hours in the case of a public company);
 - the address of the company's principal place of business (which may be different to its registered office, which is often an accountant's or solicitor's office);
 - the number and class of shares (if applicable);
 - the amount agreed to be paid for each share and, if not fully paid, the amount agreed to be unpaid on each share;
 - details of the issue of shares other than for money (in the case of a public company limited by shares); and
 - the proposed amount of the guarantee by each member (in the case of a company limited by guarantee) case of a company limited by guarantee).
- When ASIC is satisfied that an application has been made in accordance with section 117(2) it registers the company and issues it with a certificate (section 118).
- That certificate records the company's name, ACN, type of company, statement that it is registered and the date of registration. It is evidence of its incorporation and the company comes into existence on receiving that certificate.

After Registration:

- Once the company is registered:
 - the persons consenting to become members, directors and company secretaries on the application are deemed to take on their roles;
 - the company can choose to have a seal (but it is no longer necessary for it to do so);
 - the company must establish registers of members, option holders and debenture holders; and
 - the company must issue shares (unless it is a company limited by guarantee).