Week ONE

Corporate Social Responsibility (CSR)

- The traditional view is that the company's primary goal is profit-maximisation - **Dodge v Ford Motor Co** (1919) at 684 - "A business corporation is organised and carried on primarily for the profit of stockholders".
- Arguably, if corporations take a long term perspective, they must consider all stakeholders and the environment if they want to maximise profits in the future

  Stakeholders = creditors, employees, suppliers, consumers, minority groups and the public interest in the environment.

Dodge v Ford Motor Co (1919) – H wanted to use the company's money to build a health facility for workers and increase workers wages, court held that the goal of the company was simply to maximise the profit for shareholders

Defining "corporate social responsibility" (CSR).

- Also called corporate citizenship and responsible business. It is 'enforced' by self-regulation by companies. The 'corporates' become aware of the impact of the company's activities on employees, consumers, communities, the environment, as well as on the traditional stakeholders (the members and the creditors).
- Question – can firms maximise social welfare and profits for shareholders at the same time?

- **Teck Corporation Ltd v Miller** (1972) - Berger J: Directors can observe a "decent respect for other interests lying beyond those of the company's shareholders in the strict sense ... and they will not have failed in their fiduciary duty to the company"

- "We have seen a trend in companies looking to CSR and cause marketing as a way to really drive the bottom line. ... I recommend ... thinking about what your core competencies are as a company and how those competencies could translate to furthering society in a way that also creates market opportunities, differentiation and potential consumers for years to come."

- One way to enforce CSR would be to enshrine it in statute and perhaps make directors personally liable for breaches of these CSR regulations.

- UK Companies Act 2006 – **s 172** – (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so **have regard** (amongst other matters) to:
  (a) the likely consequences of any decision in the **long term**,
  (b) the interests of the **company's employees**,
  (c) the need to foster the company's **business relationships with suppliers, customers and others**,
  (d) the impact of the company's operations on the community and the **environment**,
  (e) the desirability of the company maintaining a reputation for **high standards of business conduct**, and
  (f) the need to **act fairly as between members** of the company.
  NOTE – the term 'have regard' makes this a bit of a toothless tiger

Globalisation:

- The 'corporate social responsibility' debate revolves around the conduct of multinational and transnational corporations (MNEs) and large private "firms" which, because of their size, can significantly influence domestic and international policy and the communities where they operate.
- There is a perceived deficiency of national and international law remedies on corporate accountability. No successful action has been brought against a TNC under international law. Supporters of CSR argue that the efficient functioning of global markets depends on socially responsible business conduct.
- **Note** – some nations are more stakeholder focused (for example, Japan and the EU)

- Companies limited by shares (e.g., News Ltd): defined in **s 9**
- public companies - defined in **s 9**
- proprietary companies - defined in **s 45A(1)**
- Companies limited by guarantee (such as Bond University Ltd; Cricket Australia) - Do not have share capital.
- Unlimited companies - defined in **s 9**
- No-liability companies - see **s 254M**

s 124(1) – company can issue shares
s 254A(1) – can issue partly paid shares as well as preference shares
Note – **s 254A(2)** – company can only issue preference shares if the rights attached are set out in the Constitution or approved by a special resolution
Webb v Earle – presumption is that preference shares are cumulative

Foundation principles of corporate law

1. The separate legal entity doctrine

- **Salomon v Salomon** (1897) –held company was a separate legal entity - members had limited liability, therefore S was allowed to be a secured creditor and have preference
- **Importance** - Once the formalities of registration are observed, company obtains: (1) separate legal personality (2) limited liability

Application of *Salomon's* Case:

- **Lee v Lee's Air Farming [1961]** - L established a company of which he was an employee (he was a pilot), L died whilst flying and wife made a claim for workers comp. - court held L was separate from company and was employee so wife could claim compensation
- **Macaura v Northern Assurance Co Ltd [1925]** - Shareholders have no legal or equitable interest in the company's property

2. Limited liability

- In a company limited by shares, a member's liability is limited to the amount, if any, remaining unpaid on their shares – **s 516**

COMPANY DIRECTORS AND OFFICERS

The role of director

- Lord Denning in **H L Bolton Engineering Co Ltd** [1957] - referred to directors as the brain or nerve centre of the corporation
- **Lennard's Carrying Co Ltd v Asiatic Petroleum** [1915] at 713 - Viscount Haldane 'the directing mind and will of the corp., the very ego and centre of the personality of the corp'.

Executive and non-executive directors and chief executive officer - Daniels v Anderson (1995) - There is no lower standard of care for non-executive directors.

- Executive directors are referred to as inside directors and they are both directors and employees of the company (e.g. CEO or CFO)
- Non-executive directors are called outside directors - appointed for their independence and industry knowledge – they are not employees

Sub-committees of the board:
Audit committee (analyse integrity of the company's reporting)
Nominating committee (nominates the board of directors)
Compensation committee (balance between fixed and incentive based pay)

Managing Directors (the directors may appoint one or more of themselves to the office of MD for the period and on the terms the directors see fit) – **s 201J** (this is one of the replaceable rules))

- Dual capacities (employees and directors)
- **s 198C** – directors may confer (or revoke) powers on the managing director (the directors can remove an MD)
- **Harold Holdsworth v Caddies** [1955] – MD argued board of directors couldn't limit his power but court held they could and they could also remove him if they so wished

S 9 CA - **Definition of a Director**
S 9(a) a person who:
(i) is appointed to the position of a director; or
(ii) is appointed to the **position of an alternate director** and is acting in that capacity; regardless of the name that is given to their position; and
(b) unless the contrary intention appears, a person who is not validly appointed is a director if:
(i) they act in the position of a director; or
(ii) the **directors of the company or body are accustomed to act in accordance with the person's instructions or wishes** – this is referring to a shadow director
Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

"De facto" and "shadow" directors

- De facto director describes someone who acts in the position of a director even though their appointment isn't valid, whereas a shadow director is a person "in accordance with whose instructions or wishes the directors are accustomed to act" – **s 9(b)(ii)**
- **CAC v Drysdale** [1979] –D's 3 year term expired, he wasn't reappointed but he continued to act as a director, board held liable for something and D tried to escape liability by saying he was no longer a director – HC held D was a de facto director as he continued to act as a director so he was held liable
- **NOTE** - De facto directors can bind the company – **s 201M** "an act done by director is effective even if their appointment is invalid…"
- **Venture Acceptance Corporation Ltd v Kirton** (1985) – K (a director) didn't hold the required number of qualification shares he was required to hold – directors tried to argue this meant the actions of all the board were invalid – court held decisions of board were still binding despite K's appointment not being valid – this case would now fall under **s 201M**
- **Who may be at risk of being caught up as de facto directors?** Directors whose appointments were invalid; directors who continued after their appointment lapsed or after an invalid resignation; consultants and business advisors; senior management; banks and major creditors; and appointers of puppet nominee directors. If you effectively run the company & make strategic decisions, even though you are not properly appointed, you may be swept up into liability for any breaches of directors' duties, because you fall within the statutory definition of de facto director.

Power within the company

- **S 198A** (assuming it has not been replaced by the company) says that the business of the company "is to be managed by … the directors".
- **Deputy Commissioner of Taxation v Clark** - Spigelman CJ - "subject only to express provision to the contrary, directors will participate in the management of company." [54].

  Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame (1906) - the directors of the company were ordered by members at an AGM to sell the company's property – the shareholders argued that the provision in the company's constitution which resembled s 198A was subject to the overriding rule that the directors, as agents of the company were obliged to follow the instructions of their principal, the company (the will of the company being a resolution of members at the AGM) – held if powers of management are vested in the directors, then only they can wield those powers. **The general meeting cannot usurp the board's role.**
- **John Shaw and Sons v Shaw** (1935) - members attempted to override decision of the board at the AGM to bring legal actions against some of directors – held directors were properly exercising their powers of management and **members could not usurp the board's management power**

- **NRMA v Parker** (1986) – 200 members signed a petition arguing there should be a GM – at meeting members proposed to pass resolutions requiring the directors to do certain things – directors said to the members that they didn't have to comply with their resolutions and the directors didn't even call a GM, court agreed with the directors and said board could refuse to call a meeting as they manage the business (**s 198A**)
- **NOTE** - What the members could have done was change the constitution so that it no longer contained a provision similar to s 198A (but that would require a special resolution of members – 75%) or members could call an GM and vote out the directors under **s 203D(1)** which allows shareholders to remove directors regardless of what their contracts say – however **Special notice** required of sacking motion – 2 months. Director has right to be heard and to circulate his views.
- **Queensland Press Ltd v Academy Instruments No 3 Pty Ltd** (1987) – supports view in **NRMA v Parker**
- NOTE - **Australian Innovation Ltd v Petrovsky** (1996) – cannot bring AGM to harass director
- **The cases uniformly show the shareholders in general meeting cannot usurp the directors' management powers**. The leading authorities are **Cunninghame** and **John Shaw and Sons**
- **NRMA v Parker**, **Queensland Press** and **Stanham** repeat this point.

- **Stanham v The National Trust of Australia** (1989) at 632 - "if persons requisition a meeting for the purpose of dealing with a matter that is ultra vires the meeting, there is no obligation on those responsible for calling the meeting to include the matter in the notice of meeting"

Foreign cases - Fiduciary duties extend to people in senior management

- **Canadian Aero Services Ltd v O'Malley** (1973) - SC of Canada case – held that anyone in a supervisory or controlling role of a company has a fiduciary duty towards the company which includes the duties of "loyalty, good faith and avoidance of a conflict of duty and self-interest".
- **Pacifica Shipping Co Ltd v Anderson** (1985) – NZ case - confirmed that fiduciary duties that apply to directors also apply to people in senior management

Corporate litigation

- Where the interests of justice demand it, the power to initiate a suit on the company's behalf is not confined to the board, even though it is, strictly-speaking, a management power falling within **s 198A(1)** - **Kraus v JG Lloyd Pty Ltd** [1965]
- **Marshall's Valve Gear Co Ltd** [1909] – shows members can 'interfere' and initiate legal actions in certain limited circumstances – **FACTS** - the company had a patent over production of white goods and directors were going to let it expire and start a rival company, generally shareholders cannot bring a legal action on behalf of the company as this is a management decision (s 198A) – it was held that because directors had acted in their own self interest and fraudulently, the shareholders were able to usurp the directors powers

Ratification power:

- The members in general meeting can, within limits, ratify past acts and prospectively approve future actions of the directors.
- **North-West Transportation Co Ltd v Beatty** (1887) – company needed to buy a vessel – MD of company sold his vessel to the company at a reas. price without getting authorisation from the board, some shareholders objected and argued this was a breach of duty to loyalty, the director asked for forgiveness for his breach of duty (ratification), this director was a majority shareholder and he voted in favour of him being forgiven, issue was whether director could vote, PC said he can vote as he is both a shareholder and a director and these are separate
- **Bamford v Bamford** [1969] – proposed takeover, directors issue new shares to existing shareholders to block the takeover (it is usually a breach of duty to issue shares for control purposes), directors sought ratification, court held shareholders can ratify actions of directors

- The limits to ratification by the general meeting were not clear cut. Some breaches of duty committed in bad faith and acts which are ultra vires could not be ratified:
- **Forge v ASIC** (2004) – said shareholders cannot ratify breaches of statutory duties which constitute civil penalty provisions as this is a matter that should be left to parliament (but court have allowed shareholders to ratify breaches of the corresponding CL in earlier cases)

Appointment of directors

- Requires resolution of GM (an ordinary resolution - 50%) – **s 201G**
- Directors must be appointed one by one – **s 201G**
- Casual vacancies on boards can be filled by the board itself until the next AGM
- You must be 18.
- In voting for directors, usually it is one share one vote – but constitution can say something different - Alternatively, can have cumulative voting (this is where minority shareholders can collect their votes and cast them all on one candidate for director and class voting (certain class of shareholders might be able to vote in director)
- Usually, directors retire in rotation. 1/3 of board will normally retire each year - Retiring directors eligible to stand for re-election.

Remuneration of directors

- Directors have no inherent right to be paid (**Re George Newman & Co** – not employees) - Directors typically enter contracts to get paid – referred to as extrinsic contracts as they are external to the company
- Contrary to good corporate governance but not in breach of the law to provide in the constitution that directors may fix their own remuneration – **Sali v SPC Ltd**

- **s 202A(1)** - "The directors of a company are to be paid the remuneration that the company determines by resolution" – this suggests that directors pay is determined by shareholders at the AGM
- In practise (as is the case with BHP), members just determine the max amount that is allocated for remuneration at the GM – management determine the specific amounts so shareholders don't really have much say over remuneration

Controversy over excessive pay: US study found CEO pay has risen at a compound rate of 15% p.a in last decade despite changes in economic climate

- **Guinness P/L v Saunders** – English case - 5.2 million pounds paid to a director, this payment was triggered as another company proposed to takeover Guinness (referred to as a golden handshake or a golden parachute) – payment was authorised by a member of a board committee, court held this was unauthorised as not approved by the board and therefore had to be repaid
- In **Re Viacom Inc Shareholders Litigation 2005**: $150 mill granted in compensation to Chair and 2 executives.