

CORPORATE LAW EXAM NOTES - T1 2019

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TOPIC 1: Regulatory Framework

Overview

- **What is a company**
- **History of company law**
- **Development of Australian Company Law**
 - The Constitutional Crisis for Australian Corporations Law
 - Corporations Act 2001
- **Australian Securities and Investments Commission (ASIC) as the primary regulator**
- **Characteristics of a company**
 - Effects of registration
 - Limited liability
 - Separate legal entity
 - Lifting the corporate veil
 - The company compared with other forms of business organisations
- **Company registration**
- **Revision questions**

“... the limited liability corporation is the greatest single discovery of modern times ... Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it.”

- *Nicholas Murray Butler, President of Columbia University, 1911*

What is a Company?

Separate Legal Entity –

- Perpetual Succession: continuance of business despite an owner's death.
- Limited Liability: shareholders are not personally liable for their company's debts.

Traditional Company Law Model:

The Shareholder Primacy Model

- Board of Directors
 - Company (A Separate Legal Entity)
 - S1, S2, S3, S4

A Stakeholder View of the Company:

The Stakeholder Model

- Company
 - Board of Directors
 - Government
 - Community
 - Consumers
 - Customers
 - Employees

- Stakeholders

What is a Company?

- A refined and more limited stakeholder or pluralistic corporate law model
- Co. (Separate Legal Entity)
 - Customers/Clients
 - Employees
 - The Environment
 - Shareholders
 - Creditors
 - The Community/Society
 - Board of Directors
 - Government

In Summary, what is a Company?

An artificial entity recognised by the law as a legal person with rights and liabilities

- Distinct from its shareholders, directors, officers and employees
- Perpetual succession
- Limited liability
- Issuing of shares and transferability of shares

Shareholders – regarded as “the owners” of the company

- Or NOT ?!?! What do shareholders actually “own”?

Directors / Board of director – usually given the power to control the management of the company’s business

S9 of the ***Corporations Act 2001 (Cth)*** defines a company to also include a company registered under the Act or its predecessors.

What are Companies used for?

- Usually used as a vehicle to run a business
- Provides tax advantages
- Advantage of limited liability to shareholders

What Type of Companies?

- Nearly 2 m registered
- The majority operate small businesses
- There are significantly more proprietary companies than public companies
- More than 2000 companies are listed on ASX
- Company groups – common for large-scale businesses

History of Company Law

The British ‘Joint Stock Company’ as the Origin of the Modern Company

- **17th Century**
 - Joint Stock Companies
 - Unincorporated entities
 - Basis of the modern day company:

- Shares transferable
 - Voting rights attached to shares
 - Profits distributed through dividends
- **Bubble Act 1720 (UK)**
 - Speculation in joint stock shares
 - South Sea Company
 - Bubble Act – confines trading to the sale of shares in formally incorporated bodies
- **1825**
 - Bubble Act repealed
- **Joint Stock Companies Act 1844 (UK):** Incorporation by registration
 - i.e. not by Royal Charter or Act of Parliament
 - Distinct legal entity with perpetual succession **BUT** shareholders did not have limited liability
 - "... legislative ancestor of modern company law."
- **Limited Liability Act 1855**
 - **Liability of investors 'limited' to the amount they agreed to invest**
 - Large amount of capital required to finance railways
 - "Limited" at end of company's name warned of shareholder's diminished liability

The Joint Stock Companies Act 1856 (UK)

- Consolidation of prior two Acts (1844 Act and 1855 Act)
- Features:
 - Incorporation by registration;
 - Limited liability;
 - Introduced memorandum of association and articles of association
- **First example of a "modern" companies Act!**
 - Influenced company law in Australia
 - *Note:* Until Federation, UK company law was in effect in Australia

Company Law in Colonial Australia: Overview

- **Companies Act 1862 (UK)**
 - Adopted by Australian colonies as their company law
- **Late 19th C Victorian Developments**
 - Need for capital to fund gold mining prompted unique Victorian company law developments
 - 1871 – no liability mining company
 - 1896 – failures in the 'land boom' lead to restrictions on 'proprietary companies' – compulsory audit and annual presentation of financial statements
- **1901 - Federation**
 - s.51(xx) Constitution
 - The Parliament shall ... have power to make laws ... with respect to: - ...
 - Foreign corporations, and trading or financial corporations **formed** within the limits of the Commonwealth
 - Each State retained its own company legislation

- **1961 – 62 cooperative regime**
 - States enacted uniform companies legislation
 - But the State Acts were not uniform and variations increased with time
- **Companies Act 1981 (Cth)**
 - Cth Parl enacted Companies Act 1981 (Cth) (law in ACT and NT per s.122 of Constitution)
 - Each State enacted a Companies Code that was uniform with the Cth Companies Act
- **Corporations Act 1989 (Cth)**
 - Cth legislated independently of the States to introduce a national scheme
- **NSW v. Cth (1990)**
 - HC held that the Cth lacked power under the Constitution to make laws about the incorporation of companies

Constitutional Crisis of Australia's Corporations Laws: Section 51(xx) of the Australian Constitution

- s.51(xx) empowers the Commonwealth Parliament (i.e. not the States) to:
 - **“make laws ... with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”**
- Question:
 - Why would this section of the Australian Constitution prevent the Commonwealth Parliament from making legislation in relation to companies for the whole of Australia?

New South Wales v Commonwealth (1989) 169 CLR 482

- In 1989 Commonwealth Parliament passed new legislation (**Close Corporations Act (1989) (Cth)**) to deal with non-public companies in a single piece of legislation - “proprietary companies” would have been called “close corporations” after the legislation.
- Powers of Commonwealth, under s 51(xx) of the Constitution, to pass such legislation challenged in **New South Wales v Commonwealth (1989) 169 CLR 482**:
 - **NSW argued that the Commonwealth Parliament has no power under s 51(xx) to form new companies only laws in respect of companies already formed**
 - Commonwealth argued ‘formed’ serves to distinguish local trading or financial corporations from foreign corporations

NSW v Cth (1990)

Majority of the High Court (6:1) held that:

- The word ‘*formed*’ is used in the past tense to refer to companies that have already been incorporated.
- This means the Commonwealth can not rely on s.51(xx) to make laws about bringing new companies into existence (i.e. the process of incorporating companies)
- Therefore the Commonwealth did not have the power to take over corporate regulation in Australia.
- The High Court held that the Commonwealth did not have the power under s51(xx) of the Constitution to pass laws providing for the incorporation of trading and

financial corporations and therefore the Commonwealth did not have the power to take over corporate regulation in Australia.

Company Law in Australia: Overview

Because of crisis created by s 51(xx) of the Constitution several artificial schemes have been developed to standardise and harmonise Company Laws in Australia

Constitutionality of all them were challenged on several occasions!

- **1991 Cooperative scheme – Corporations Law**
 - Cth amended the unconstitutional Corporations Act 1989 – called the ‘Corporations Law’
 - Each State enacted legislation which adopted the Corporations Law to be its Corporations Law
 - Cth authorised the ASC (now ASIC) to exercise powers conferred by state legislation
 - Cross-vesting of jurisdiction in corporations law matters in the Fed Ct and state Supreme Courts
- **Re Wakim (1999)**
 - HC held the cross vesting of jurisdiction was unconstitutional to the extent it conferred jurisdiction on the Federal Court with respect to matters under state law (i.e. the Corporations Law of each state)
- **R v. Hughes (2000)**
 - HC cast doubt on the constitutionality of a scheme because it involved the states (under their respective Corporations Laws) conferring powers on Commonwealth officers

Corporations Act 2001 (Cth)

Referral of state powers to the Parliament of the Commonwealth

- **Referral affected under s 51(xxxvii) of the Constitution 1900 (Imp):**
 - “The Parliament shall, subject to this Constitution, **have power to make laws** for the peace, order, and good government of the Commonwealth with respect to:
 - “(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, **but so that the law shall extend only to States by whose Parliaments the matter is referred**, or which afterwards adopt the law;”
- **In 2001 States and Territories unanimously agreed for 5 years**
- Passed this along with the Australian Securities and Investments Commission Act 2001 (Cth).

The Road to Company Law Harmony in Australia

- **In the beginning**, company law was regulated by each State
- Attempts to cooperate to harmonise law ultimately unsuccessful
- Cth tried to take control and legislate for all States in 1989
- HC said the Commonwealth did not have the power under s.51(xx)
- States referred powers to the Cth

- Today: Corporations Act (2001) Cth

The Road to Company Law Harmony in Australia

- Today, companies are regulated by Commonwealth legislation, the Corporations Act 2001 (Cth)
- Originally, company law was regulated by each State (and the Commonwealth on behalf of the Territories)
- This fragmented ‘federal’ system resulted in 7 separate sets of legislation that regulated company law in Australia
- Throughout the 20C, attempts were made to cooperate between the States and Commonwealth to achieve a uniform companies law
- These attempts were not very successful, so in 1989 the Commonwealth tried to take control and legislate for all States (so there would be just one piece of legislation)
- Problem: s.51(xx) of the Australian Constitution
- HC in NSW v Cth (1990) said the Commonwealth did not have the power under s.51(xx) of the Constitution to legislate in relation to the ‘incorporation’ of companies
- After this, the States all agreed to refer their powers in respect of companies to the Commonwealth
- Commonwealth then passed the *Corporations Act 2001* (Cth)

Regulators

- **Australian Securities and Investments Commission**
- **Australian Securities Exchange**
- **Takeovers Panel**

The Australian Securities & Investments Commission (ASIC)

- Primary corporate Regulator for administering the Corporations Act and regulating Australia’s companies, financial markets and financial services, as well as service providers who deal and advise in investments and financial products.
 - Ensures Corporations Act is complied with
- ASIC Act 2001 (Cth)
 - Commonwealth Agency (b/c referral of State power)
- **Role and functions**
 - Registers new companies (and Business Names), Grant Australian Financial Services Licences
 - Register Auditors and Liquidators
 - Regulation of financial services and markets (ban users)
 - Powers of investigation to ensure compliance with of the Corporations Act 2001 (Cth) – ASIC Act 2001 provides wide powers to do so
 - Power to bring legal proceedings: ASIC Act s50, in the public interest
 - Promote investor and financial trust and confidence ensuring fair, orderly and transparent markets.
- **Powers include:**
 - Investigate breaches of the Corps Act: ensuring compliance with provisions

- Instigate civil proceedings and criminal prosecutions (concurrent with DPP)
- Advises ministers on necessary changes to the Corps Act
- Educational role

The Australian Securities and Investments Commission (ASIC)

- **Australian Stock Exchange (ASX)**
 - **Takeovers Panel**
 - Financial Reporting Council (FRC)
 - Australian Accounting Standards Board (AASB)
 - Parliamentary Joint Committee on Corporations and Financial Services
 - **Auditing and Assurance Standards Board (AuSB)**

Australian Stock Exchange

- Private Company
- Public companies that 'list' on the stock exchange 'contract' with the ASX that they will comply with the Listing Rules

Takeovers Panel

- A peer review body with at least 5 members
- Important part of the machinery for the control of company takeovers (formerly, these powers were held by the Courts)
- Has power to declare 'unacceptable circumstances'
- Resolves disputes about takeovers.

Recent Reforms

- ***Insolvency Law Reform Act 2016 (Cth)***
- ***Corporations Amendment (Crowd-sourced Funding) Act 2017 (Cth)***
- ***Professional Standards of Financial Advisers) Act 2017 (Cth)***

TOPIC 1: Registration and its Effect

Concepts

- Registration
- Perpetual succession
- Limited liability
- Separate legal entity (Separate from shareholders, directors, employees, creditors, etc.)
- Corporate veil

Effects of Registration

- Company comes into existence on registration (**s119**)
- Powers of a company as a body corporate are listed in **s124(1)** and includes legal capacity to:
 - Own property
 - Contract
 - Sue and be sued
 - Issue shares

