

Lecture 1 – Company as a separate legal person

Company is a separate legal person: **Salomon v Salomon**

- Separate person from those who participate in the company
- Can hold property or enter into contracts in its own name
- Commence or defend legal proceedings in its own name
- Liabilities are in its own and not those of its members or officers
- Has perpetual succession
- Is a separate tax payer

Lee v Lee's Air Farming Ltd: A company can contract with its controlling participants

Macaura v Northern Assurance: Its property is not the property of its participants

Equity Capital and Debt Capital:

- Equity capital is generally not repaid during life of the company
- Debt capital must be paid whether the company is profitable or not

Priority to repayment of capital or surplus upon liquidation:

1. Secured creditors
2. Priority creditors
3. Unsecured creditors
4. Shareholders

Limited liability

A member's liability to pay the debts of the company is limited to the amount (if any) unpaid on their shares: **s 516**

Lecture 2 – Companies and Disclosure Requirements

Incorporated entities are separate legal persons; companies incorporated under Corporations Act 2001 (Cth).

Names – **s 148**

Public companies – LTD

Proprietary companies – PTY LTD

Proprietary Companies – **s 113**

- No more than 50 non-employee members – **s 113(1)**
- No fundraising activity requiring a disclosure under **Chapter 6D**
- Must have at least one director – **s 201A**

Public companies

- Allowed to have an unlimited number of shareholders
- Can raise fund from the general public: **Chapter 6D**
- Must have at least three directors – **s 201A (2)**
- Subject to stricter rules

The decision to issue shares is generally a decision of the board: **s 198A**, as they figure out how to finance the business. However, some restrictions on directors' and companies' powers exist, where members approval might be required. For PTY LTD, there are share issue limits.

Members approval for share issue may be required in special circumstances:

- Variation of class rights – **s 246B**
- Related party transaction – **Ch 2E**
- Amendments to constitution – **s 136(2) ***
- Issuing preference shares – **s 254A (2)**

Pre-Emption clause: **s 254D** [RR for PTY LTD]

Before issuing shares of a particular class, the directors of a proprietary company must offer them to the existing holders of shares of that class.

As far as practicable, the number of shares offered to each shareholder must be in proportion to the number of shares of that class that they already hold.

Disclosure under **Chapter 6D**

Unless **s 708** applies, a PDS must be prepared and lodged with ASIC.

List of exemptions under **s 708**.

- Personal offers to <20 investors and <\$2 million in 12 months – **s 708(1)**
- Sophisticated investors (those investing at least \$500k in the company) – **s 708(8)**
- Rich investors (those controlling at least \$10 million gross assets) – **s 708(11)**

Lecture 3 – Decision Making in Companies

Power to make decisions is divided between THE company's two organs:

- The members VOTING together – 'the company in general meeting'
- The board of directors – 'the Board/the directors'

Internal governance rules include

- The replaceable rules is listed in **s 141** and scattered in the Act
- The company's own constitution – **s 140**
- A combination of the two

Adopting a constitution

--- Can be done when the company is registered with member consent: **s 136(1)(a)**; or later: **s 136(1)(b)**

--- Amending or repealing a constitution after registration requires a special resolution of members: **s 136(2)**

- A special resolution – s 9, requires 75% of those PRESENT who are entitled to vote to be passed *

--- Entrenching a rule: constitution can contain EXTRA requirements for changing its rules: **s 136(3)**

Not all RRs apply to all companies

Act	LTD	PTY LTD
S 294X (Proxies)	Mandatory	RR
S 203C (Removal of directors by members)	Mandatory	RR
S 254D (Pre-emption)	Mandatory	RR
S 194 (Directors may vote on matters that relate to their personal interest)	Does not apply	RR

S 140: Statutory Contract: A company's constitution and RRs that apply to it have effect as a CONTRACT between:

- The company and each member
- The company and each director and secretary
- A member and other member(s)

It is NOT A BREACH OF the Act – **s 135(3)**

Eley v Positive Govt Security Life: Mr. Eley sued in the capacity of a solicitor (not a party referred to in the section).

Houldsworth v City of Glasgow Bank: Damages are not available where the claim is brought by a member against the company.

Hickman; Bailey; Smolarek: Enforcement of **s 140** as a member

Single director/shareholder companies

- Only allowed for PTY Ltd
- The only MEMBER is also the only DIRECTOR
- RRs do not apply – **s 135(1)**

S 198A [RR]: The board have the general power of management. The board can make all decision EXCEPT for those expressly given to the members in general meeting by the Act or by the internal governance rules. *

Corporate groups

Wholly owned subsidiary is a company in which all issued shares are held by a holding company or its nominee.

S 187 – A director of a wholly owned subsidiary is to be taken to act in good faith in the best interests the company (subsidiary) if:

- The subsidiary constitution expressly authorises it, and
- They act in good faith in the best interest of the holding company, and
- The subsidiary is not insolvent and is not made insolvent because of the director's act

If the subsidiary is not wholly owned, or the wholly owned subsidiary's constitution does not expressly authorise the directors of the subsidiary to act in the best interests of the parent company:

- Each company in a corporate group is to be treated as having its own interests even if the question is a wholly owned subsidiary: **Walker v Wimborne**.

If **s 187** does not apply, the directors of the subsidiary must act in the best interests of the subsidiary and not the parent company or another company (related bodies) in the corporate group because it has its own creditors and members other than the parent company.

The directors of the subsidiary will not breach their duty to act in the interests of the company even if they make decision that benefit other companies in the group, AS LONG AS the benefit flows back to the subsidiary: **Equiticorp Finance v Bank of New Zealand**. The test of a standard of objective applies: whether an intelligent and honest person in the position of the director could have reasonably believed the decision would benefit the company. In the case, the directors of the two companies in the corporate group did not breach their duty to act in the interests of their companies because their decision to allow the \$50 million to be used to repay part of the loan of another company in the group was for the benefit of the companies they were managing.

Piercing the Corporate Evil

- Making shareholders/directors liable for corporate debts

The court will pierce the corporate evil where the corporate form is used to avoid an existing legal duty/a company is formed for the 'sole purpose of or for the dominant purpose' of doing something that one of the participants is prevented from doing in its personal capacity through an existing legal obligation:

Gilford Motor Company v Horne: Mr Horne had agreed to a 'non-compete' clause but after he resigned as the managing director of Gilford Motor, he set up a business in competition to it.

Jones v Lipman: Mr Lipman entered into a contract to sell land to the plaintiffs. However, he set up a company to transfer the land to the company so that the purchasers cannot buy the land.

S 588V – Holding company insolvent trading liability

The parent company is under a statutory duty not to have its subsidiary trade while it is insolvent. If the company breaches **s 588V**, the liquidator of the subsidiary which is being wound up can sue the parent company in order to have the parent company contribute to paying the debts of the subsidiary. [S588W - Just a recovery, s 588V(2) not a civil penalty breach or a criminal breach].

Usual insolvent trading requirement applies:

- Subsidiary was insolvent or became insolvent from incurring the debt,
- There were reasonable grounds to suspect insolvency at the time the debt was incurred, then

- (d) one or both of the following subparagraphs applies:
- (i) the corporation, or one or more of its directors, is or are aware at that time that there are such grounds for so suspecting;
- ii) having regard to the nature and extent of the corporation's control over the company's affairs and to any other relevant circumstances, it is reasonable to expect that:
- (A) a holding company in the corporation's circumstances would be so aware; or (B) one or more of such a holding company's directors would be so aware; and ...

Lecture 8 – Duty to Avoid Conflicts of Interest, Accessory Liability, Related Party Transactions

Duty to avoid conflicts of interest under the general law

--- Director must avoid an actual or substantial possibility of conflict between a personal interest and the director's duty to act in the interests of the company unless the permission of the company is obtained: **Phipps v Boardman**. It is usually permitted when it is beneficial for the company.

Statute has extra provisions to the general law rules.

S 191 – Duty to disclose their material personal interest at board meetings.

- Directors must do so unless exempt under **s 191(c)**
- Failure to disclose is a breach of duty [the position of conflict is not determined by whether or not the directors pursue their personal interests over the company nor is it necessary to cause a loss to/gain profit from the company]
- This is only a criminal breach *

S 192 – A director of a company who has an interest in a matter may give other directors a standing of notice of interest

S 193 – Disclosure requirements in addition to general law disclosure duties and any other requirements of constitution

S 194 [RR] – For PTY LTD, the directors can have material interests and vote on matters that relate to the interests. However, they must still disclose the interests.

S 195 – Imposes a restriction upon directors of public companies being present and voting at meetings that consider a matter in which they have personal interest in unless the other directors or ASIC allows

- Other directors' decision to allow must be in the best interests of the company
- Criminal breach; not a duty

S 182 & s 183 – Improper use of position or information

Duty not to improperly use their position: **s 182**, or information obtained in that position: **s 183** to gain advantage for themselves or someone else, or cause detriment to the company.

Grove v Flavel: Misuse of position by repaying loans the company owed to him to the possible detriment of other creditors of the company

ASIC v Vizard: Misused confidential information obtained by reason of his position as a director of Telstra to buy & sell shares

R v Heilbronn: Illegal phoenix activity – breach of **s 184(2)**

R v Bymes: Fraudulent signing of documents – breach of **s 184(3)**

General law conflict rule

--- Director's interest in the transaction may be direct or indirect, for e.g., transacting through another company or partnership:

Aberdeen Railway

--- Having a personal interest and not disclosing it: **Furs Ltd**

--- Taking a corporate opportunity or property: **Cook v Deeks**

--- An example of a director not breaching his duty by taking a corporate opportunity: **Peso Silver Mines** (Copper rejected the offer for good commercial reasons).

unauthorised actions so that the company is a valid party in the transactions that have occurred so far.

Contract made through an agent may be defective because the purported agent either:

- Has no express actual authority, or
- Has express actual authority that was too narrow to make the contract
- Has no implied actual authority

In this situation, an outsider who wants to enforce the contract may be assisted by the common law rules, or the provisions of the Act.

Apparent Authority

--- Arise when the principal has not in any way agreed that the agent can act on behalf of the principal

**** Apparent authority test is under the general law rule (WHICH IMPLIES THAT WE DO NOT HAVE TO TALK ABOUT IT IF WE ARE ONLY TOLD TO USE THE ACT)**

Under the general law, there are 3 requirements for an agent to have apparent authority to act for a company:

1. A 'holding out': **Freeman & Lockyer**. A representation must be made to the outside contract party that the agent has the authority to enter on behalf of the company into a contract of the type in question. That is, the agent must be 'held out'. The representation may consist of words or conduct.
2. By someone with actual authority. The representation must be made by the company or someone with actual authority to act for the company. A representation by someone who only has apparent authority is not enough: **Crabtree-Vickers**.
3. On which the outsider relied. The outsider must be induced by the representation to enter into the contract. That is, the outsider must rely on the representation.

Pacific Carriers v BNP Paribas – The bank had made a representation about the authority of Ms Dhiri, through equipping her with a certain title, status and facilities, and also failing to establish proper safeguards to protect itself (omission).

Another general law rule – 'Indoor management rule'

The outsiders can assume:

- There have been no procedural defects in the appointment of directors
- The board meetings were properly called and held
- Any board or general meeting approval required under the constitution/replaceable rules has been obtained: **Royal British Bank v Turquand**

An outsider cannot rely on the rule if:

- They have actual knowledge of the lack of authority, or
- They were 'put on inquiry':
 - **Northside Development**: The outsider has failed to make inquiries that would usually be made by a reasonable person in their position in the circumstances. The bank would have noticed that the company was taking on a large amount of risk for no apparent benefit. Hence, they should have investigated/enquired further.
 - **Story v Advance Bank**: The taking up of loan was justifiable because it was for the benefit of the company. Hence, the bank was not put on inquiry.

Statutory Assumptions

The company is not allowed to argue that any of the statutory assumptions are incorrect: **s 128(1)**.

s 129(1) – Outsiders can assume that the constitution and RRs have been complied with.

S 129 (2) – Outsiders can assume anyone named with ASIC, to be a director or a secretary which:

- Has been properly appointed
- Has authority to exercise powers customarily exercised by a director or secretary of a similar company

S 129(3) – Outsiders can assume that officers/agents who is held out by the company:

- Has been properly appointed
- Has authority to exercise the powers customarily exercised by that kind of officer or agent of a similar company

S 129(4) – Outsiders can assume that officers properly performed their duties.

S 129(5) – Where the seal has not been used, a person may assume that the document appears to have been signed in accordance with **s 127(1)**.

S 129 (6) – Where the seal has been used, a person may assume that the documents have been signed in accordance with **s 127(2)**.

The contract is enforceable even if the signatures/documents were forged or the officer or agent of the company acts fraudulently: **s 128(3)**.

S 128(4) – A person is not allowed to make an assumption if, at the time of the dealings with the company, the person ACTUALLY knew or suspected the assumption was incorrect.

4 step process to answer question

1. Does the agent have actual authority?

- Express actual
- Implied actual
- If yes, then contract enforceable; discussion closed.

2. If no, then: what objection would the company raise?

- Eg the director breached their duty
- Eg The contract wasn't actually signed by directors per s 127(1) etc

3. And the outsider responds with assumption under s 129

- Eg I can assume director complied with their duty – s 129(4)
- Eg, contract apparently signed per s 127(1) is okay – s 129(5)

4. Contract enforceable unless outsider actually knew or actually suspected that the assumption was not true – s 128(4).