

Topic 1: Introduction to Corporations Law

1. Introduction

- As [Co] is a public company limited by shares, [Co] is a registered company under **s112(1) of the Corporations Act 2001 (Cth)** and thus must comply with its requirements. From here on, every section mentioned is assumed to be under this Act unless mentioned otherwise).
- As per **s9**, [X] is a director / officer of [Co] and thus must act in accordance with their duties under the Act.
- A company is an artificial entity recognised by law as a legal person with its own rights and liabilities, treated like a person (**s124**)
- A corporation = a co, anybody corporate & an unincorporated body that may be sued /hold property (**s57A**)
- Some **key legal features** of a company are:
 - Separate legal person;
 - Perpetual existence;
 - Limited liability (for most, but not all);
 - Transferability of ownership; and
 - Level of regulation.

2. Organisational Forms

- [Co] may choose one of the following **organizational forms**:
 - Corporation;
 - Partnership;
 - Trust (not strictly org form) - relationship b/n trustee and beneficiary;
 - Joint venture (not strictly org form) - distinguish from an ongoing business;
 - Syndicate - either contract, partnership or a company; and
 - Business
 - May be conducted by **individual**
 - Advantage of **group**
 - **Funding** –one funds & other provides the know-how
 - **Risk** – spread the risks
 - **Expertise** –number of areas of expertise – a lot of people involved
- Parties have **freedom in their choice of business form**
 - Exception: **s115** –partnership or association formed for **profit** that **exceeds a specified number** of individuals **must form a co**:
 - Specified **max** number is generally **20**
 - Regulations may specify a higher number
 - 50 for actuaries, medical practitioners, patent attorneys, sharebrokers, stockbrokers or trade mark attorneys, 100 for architects, pharmaceutical chemists or vets, 400 for legal practitioners, 1,000 for accountants
- Ultimately for **court to determine a group's legal status**
 - fact that agreement has entered into stating parties are not in a partnership, does not itself mean a partnership not formed
 - look at **substance & form** (*UDC v Brian*)

Topic 2: Registration and its effects

Terminology

- 'Corporation' - defined in **s 57A(1)** - Includes 'companies' and 'body corporates'
- A 'company' means a company registered under **the Act**
 - distinguish broader & less used "corporation"

1. Registration

- A company comes into **existence** on the **day it is registered** with ASIC(**s119**)
 - Must lodge an application with ASIC (**s117(1)**)
 - **Part 2 A.2, ASIC Form 201** and payment of fee (\$463)
 - A company **continues to exist** until **deregistered by ASIC (s 601AD(1))**
- Can have just one member (**s 114**)
- Necessary information (**s 117**):
 - **Type** of company
 - Proposed **name** (or ACN)
 - **Details and consents of individuals** who are to be members, directors and secretary of the company
 - **Address** of company's registered office and principal place of business
 - **Details of shares** (or guarantees)
 - The **state or territory** in which the company is registered in
 - **Opening hours** for a public company
 - If **limited by shares** or **unlimited**, other share requirements
- On registration, **ASIC allots co an ACN**, registers the co and issues it with a **certificate of incorporation (s118(1))**
 - Certificate of incorporation is **conclusive evidence of registration (s1274(7))**
- If company is public & has a constitution, a **copy of the constitution** must be lodged with the registration application (**s117(3)**)
- A person becomes a **member, director or company secretary** on registration if **specified in the application** with their **consent (s120)**
- Address in application = **registered office(s121)** open in **specified hours (Pt 2B.5)**
- Expenses incurred in setting up can be paid out of companies assets (**s122**)
- Businesses register shelf companies, and then people buy a company off them (instead of paying a solicitor to go through the registration process)
- Once registered, co can conduct business throughout Australia **without needing to register in individual state and territory jurisdictions.**
- A company is not required to be formed for any specific purpose (cf no liability)

2. Capacity and powers

- **S119**: a co comes into existence as a body corporate at the **beginning of the day on which it is registered.** Name is the name specified in the certificate of registration
- **S124(1)**: **Legal capacity & powers** of an **individual** both in and outside of this jurisdiction – powers of a natural person (**s124(h)**) e.g. enter into contracts, sue, owns property etc.
- Co also has all powers of a **body corporate (s124(1)(a))**

3. Company names

- **s 147**: Name must not be **identical or unacceptable**
 - e.g. offensive, connection to gov, misleading (schedule 6 royalty, university)
- **s 148**: Company can have an **available name** or its **ACN** as its name.
 - requirements re indication of type of company
 - must reflect its status, e.g. limited public company must have word 'limited'
- **s 149**: Acceptable **abbreviations** e.g. Proprietary = property
- **s 150 & s 151**: Reasons a company can't have **'limited'** at the end
- **s 156**: Carrying on business using "Limited", "No Liability" or "Proprietary" in name

3. Members (GM)

3.1. Who are members?

- **A person is a member if (s231):**
 - a. Member on company **registration (s120)**;
 - b. **Agree** to become a member **after registration** & name on register (s231); or
 - c. Member of co under **s167 (conversion)** of co from ltd **guarantee** to ltd **shares**
- **Company needs (s168):**
 - **Register of members (s169):**
 - Members name and address
 - Date of entry
 - Index of members names (if >50)
 - If share capital, additional requirements
 - **Register of option holders/** copy of option docs, if co grants options over unissued shares
 - **Register of debenture holders**, if co issues debentures
- **Evidentiary value of registers** – register is **proof** of matters shown in register (s176)

3.2. Ceasing to be a member

- **Member dies (RR s1072A)**
- Shares are **transferred** and **name of new owner is registered (RR s1072F(1))**
 - Share is transferable because its personal property (s1070A)
- Cessation due to **capital reduction** and **cancellation of shares**
 - e.g. co is compulsorily acquired in winding up (s556(1)(b)) or administration (s556(1)(c)) or forfeiture due to non-payment
 - Co can **reduce its share capital** in an unlawful way if (s256B)
 - it is fair & reasonable to SH
 - doesn't materially prejudice company's ability to pay its creditors
 - approved by SH under s256C
 - **Shareholder approval** for capital reduction (s256C)
 - Ordinary resolution for equal reduction
 - Special SH approval for a selective reduction
 - For cancellation of shares, special resolution
 - Company must lodge with ASIC a copy of resolution within 14 days
 - Information to accompany notice of meeting
 - → *Molopo* said SH don't have power to call for a resolution & reduce shares, can only be done by D's then go to SH for approval

3.3. Meetings, voting and shareholder resolutions and statements

- 1) **AGM (article 7.1 = must be held in accordance with Act & LR)**
 - Pty - need not hold AGM unless required to under its const
 - Public – must hold its first AGM within 18 months after registration (s250N(1))
 - At least once /year & within 2 months of end of financial year (s250N(2))
 - AFR & directors & auditors reports must be laid before the AGM
 - No AGM for public company with 1 member
 - May include (s250R):
 - Consideration of AFR, directors reports and auditors reports, Election of director, Appointment of auditor, Fixing of auditor's remuneration, Vote on resolution
 - **Chair** must allow a **reasonable opportunity** for the **members to ask questions:**
 - about management of company (s250S)
 - about remuneration report (s250SA)
- 2) **Extraordinary GM**
 - Any general meeting other than an AGM
- 3) **Class meeting**
 - Called when class members decide to vote in favour of as variation
 - Rights attaching to **class of shares** can **only be varied by special resolution of company AND special resolution of members of class (s246B(2))**
 - **Varying and cancelling class rights (s246B)**

General Meetings

1. Who can call a meeting?

- **Article 7.2** = D's can convene & arrange to call GM whenever they think fit and when required to do so under the Act & LR
- **Directors** (RR s249C) & if **listed** despite anything in const (s249CA)
- **Directors, on request of members** (M's have at least 5% of voting shares) (s249D)
 - **Failure to call GM** (s249E)
- **Members** (at least 5% voting power) but **must pay expenses involved** (s249F)
- **Courts** make an order (where impractical for meeting in other way) (s249G(1)) if D or member entitled to vote make application (s249G(2))
 - **Beck v Tuckey**, Austin J:
 - must be **impracticable** to call the meeting in **any other way**.
 - court has **discretion** to **make or refuse** order.

2. Meeting requirements

- Must be held at a **reasonable time & place** (s249R)
- Must be held for a **proper purpose** (s249Q)
- **Technology** giving members reasonable opportunity to participate, 2+ venues (s249S) → consequences in s1322
- **Quorum** = 2 members (RR s249T)
- **Auditor** entitled to **attend & be heard** on matters re audit even if retires or removed from office. Auditor may authorise representative in writing (s249V)
- **Body corp** may appoint individual as representative (s250D)
- When resolution passed, **resumed after adjournment** is passed on the day it was passed (s249W)
- **Disclosure** obligations
 - May authorise a member to **inspect the books of the company** (s247D)
 - Ds - obligation to ensure notices sent to SH contain **full & fair disclosure & not MDC**.

3. Notice requirements (article 7.3: must be given in accordance with act & LR)

- Generally given by **Ds**, but can be given by **SHs also** (s249N)
- **Pty** – members must be given at least **21 days'** notice (s249H(1))
- **Public** listed – members must be given at least **28 days'** notice despite anything contrary in constitution (s249HA)
- **Written notice** given individually to member & director entitled to vote (s249J)
- Notice must include **place, date, time & general nature** of the meeting's business, and the nature of any **special resolution** to be proposed (s249L)
- Regs may provide notice isn't required by s249L or other info (s249LA)
- **Auditor** entitled to notice (s249K)
- Failure to give notice → **procedural irregularity** (s1322)

4. Quorum

- 50 members present in person or by proxy or Representative and holding between them at least 50k shares are a quorum at a GM (**article 8.3**)
- Item of business may not be transacted at a GM unless a quorum present (**article 8.4**)
 - **Article 8.5** – if no quorum within 15 mins, if convened by a D or requisition of members → dissolved

5. Voting

- Question at GM decided **on the voices**, but if dissenting voice, **show of hands** taken (**Art 8.11**)
- Poll must be taken in manner, date & time as chairman directs if **properly demanded** (**Art 8.14**)
- Voting by **poll** - each member has **1 vote for each share they hold** (s250E(1)(b))
 - **Poll** may be **demanded** on any resolution unless anything contrary in const (s250K)
- **Poll may be demanded** by (s250L)
- **Challenge to a right to vote** may only be made at meeting & chair has final decision (s250G)
- Person voting poll entitled to 2+ shares - **need not cast all** votes & may cast votes in **different ways** (s250H)

6. Members rights to put resolutions

- Members must give **notice** of resolution that propose to move at GM (s249N):
- If **co** giving notice, give to **all members** & be at next GM >2 months after notice given (s249O)
- Members **statements** may be **distributed** (see s249P)

7. Proxies & body corps (s249Y- s250D)

- Who are interests owed to?

<p>Shareholders</p>	<ul style="list-style-type: none"> • Collective group (<i>Mills v Mills</i>) • Duty not owed to individual members (<i>Percival v Wright</i>) <ul style="list-style-type: none"> ○ Exception: direct & close relationship of trust, confidence and specific dependence (<i>Coleman v Myers; Brunninghausen v Glavanics</i>) ○ Special fiduciary relationship – matter of fact ○ Most likely small family company ○ In cases, D's buying shares off SH's (personal relationship), SH's reliant on D's for information – D has information that SH's haven't...D's know aren't offering enough money to SH's, typically takeover in the wings, SH's don't know about takeover that is coming, sell shares, and later find out • If different classes of SH's or divergent interests, act fairly between members (<i>Mills v Mills</i>) <ul style="list-style-type: none"> ○ E.g. long term vs short term investors ○ bonus shares to class A and not B if no collateral purpose • If SH's & other conflict → SH's = paramount (<i>Darvall v North Sydney</i>, Mahoney J)
<p>Creditors</p>	<ul style="list-style-type: none"> • Generally, D's do not owe duties, would be inconsistent with their risk taking role. However, where co is insolvent or near insolvency, duty not to prejudice creditors interests (<i>Walker v Wimborne; Kinsella</i>) • Not a duty to creditors, just duty to consider creditors interests • BUT creditors cannot bring action, generally liquidator (<i>Spies</i>) • Consequence → members cannot release D's from breach in an insolvency context, even if acting unanimously (<i>Kinsella</i> per Street CJ) • → D's breach duty if near insolvency & prioritise group over interests of creditors (<i>Bell Group v Westpac</i>) • Co need not be insolvent at the time & D's must consider the creditors interest if there is a real and not remote risk that they will be prejudiced (<i>Kalls Enterprises</i> per Giles JA, Ipp & Basten JJA) • Nexus of contracts theory - stakeholders e.g. employees & creditors can protect themselves in the terms of their contract
<p>Employee</p>	<ul style="list-style-type: none"> • No duty, except where employee's interest is consistent with co's interests as a whole cf to redundant employees (<i>Parke v Daily News</i>) • Ok if reasonably incidental to carrying on of business of co (<i>Hutton</i>, Bowen LJ) • Laws must be complied with –not in best interests of co for co to be in breach of law (e.g. employment & OHS) • Go to oppressive conduct
<p>Corporate groups</p>	<ul style="list-style-type: none"> • Each co treated as having own separate legal personality → D must consider interests of individual co, separate and alone from the interests of the group (<i>Walker v Wimborne</i> per Mason J) <ul style="list-style-type: none"> ○ Consistency in interests: transaction undertaken for benefit of group may have collateral or derivative benefits for individual co (Mason J in <i>Walker v Wimborne; Equiticorp Finance</i>) ○ Where co's are not a group in the strict sense (i.e. no interlocking shareholdings, no security no interest) may each have their own creditors who may be prejudiced by shuffling of funds (Mason J in <i>Walker</i>) • If D's don't even turn their minds to interests of co but just the group <ul style="list-style-type: none"> ○ objective test – what would a reasonable/intelligent D apply in this sense (<i>Charterbridge – obiter English case</i>) ○ HOWEVER... test is a subjective test, when D's exercise power they are meant to turn their mind to it - <i>Equiticorp Finance</i> maj express preference for Mason J test in Walker ○ If objectively reasonable, although breach, no consequences - would have done same thing even if you turned your mind to it • D's of a wholly owned SS may act in the interests of the HC if (s187) <ul style="list-style-type: none"> ○ (a) constitution expressly allows; (LIMIT) ○ (b) they act in good faith in the interests of the HC; ○ (c) subsidiary is not insolvent

5. Duty of care, skill and diligence (s180(1) = CL) ** do this last

1) The duty (s180(1))

- [D's/officers of a corporation] must exercise the **degree of care, skill and diligence** that a **reasonable person** would exercise if they were **in the corporation's circumstances, occupied the office & held the same responsibilities** as the [D/officer] (s180(1)). No meaningful difference between the duty at statute/ general law (*Vines*), so we will consider them together.
- Also includes **SKILL** even though no reference to the word (*ASIC v Vines; ASIC v Rich*)
- Become **stricter** and used a more **objective** approach – cf *Re Cardiff Savings Bank*
 - **Contract**: contract of employment with co (explicit or implied skill)
 - **Equity**: apply even if no contract, job as a D - careful in exercising powers.
 - Non-executive D's caught, as well as executive directors
 - No implied provision dealing with skill
 - Duty at equity has become **stricter**
 - **Tort**: negligence
 - AWA–negligence applies for D's
 - Will apply even if no contract, non-executive D's
 - **s180** – codifying the equitable position / tort/ CL provision

** BALANCE between encouraging D's to take risks, and avoiding negligence

** NOTE: standard is higher where there is a conflict of interest (*Adler*)

- *The specific elements will be explored below:*

2) Standard of Care

- **Objective reasonable person** standard applied to [X] in light of the **'context'** (*AWA*)
 - **Reasonable person** – objective test (*Vines*)
 - Magnitude of risk & harm and probability of harm occurring
 - Seriousness of loss & consequences if harm occurs; and
 - Expense, difficulty & inconvenience of taking alleviating action
 - Cannot apply a 'reasonable director' test as D's vary so much – look at **skill, ability to delegate** – more about was it appropriate to delegate, should you taken this into account → want D's to be able to take risks
 - **[Corporations] circumstances (s180(1)(a))**
 - Type of company (higher standard for **public** co.'s)
 - **Size** & nature of its business (higher standard for larger)
 - **State of co. finances/urgency** (more urgent requires urgent response (*Rich*))
 - **Office occupied (s180(1)(b))**
 - **Special skills**: A RP in D's position would exercise a degree of care that encompasses the [skills/qualifications/expertise] that D brings to his position (*AWA; ASIC v Rich; Vines*)
 - **Non-executive directors** (*ASIC v Hellicar & Ors*)
 - delegation, committee membership, special skills or expertise
 - **Chairperson** (*Rich; Healey*)
 - More than ceremonial or procedural
 - Selecting matters & docs to be brought to boards attention
 - Control of flow of info to the board
 - Formulation of board policy & promoting position of co
 - **Non-executive chair**: standard higher than other non-executive D's (*AWA*)
 - **Executive D's and Officers**:
 - standard higher than non-executive D's (*AWA; Vines*)
 - greater knowledge of co's operations
 - **Conflict of interest**: standard higher (*Adler*)
 - **CFO**: standard higher (*Hardie; Vines*)
 - **Managing Director (CEO)** (*AWA; Adler; Macdonald*)
 - **Many roles** – must meet the responsibilities that attach to both roles e.g.
 - **Company Secretary & General Counsel** (*Shaffron*)
 - Company Secretary = officer (s. 9)

- General Counsel may be an officer – person who makes, or participates in making, decisions that affect the whole, or substantial part, of the business of the company
- Combined role - cannot divide duties and responsibilities
- **Minimum standards (AWA)**
 - Be familiar with co's business when join board
 - Keep themselves informed about all aspects of co's business
 - Be familiar with co's financial position by regularly reviewing financial statements
 - Prevent insolvent trading – ignorance is no excuse
 - Sign off financial statements (s 295(4)); *ASIC v Healy*)
 - Monitor management to satisfy themselves the co is being properly run
 - meet as often as necessary
 - attend meetings (*Vrisakis*)
 - read (and understand) papers (*ASIC v Healy*)
 - **NON-EXECUTIVE DIRECTORS (AWA):**
 - Not directly involved in management of company
 - Duties are of an intermittent nature (periodic meetings)
 - Not expected to be across the minute details
 - Court of appeal not clear regarding whether any distinction should be drawn between the exec and non-exec directors → **all D's should perform minimum function**
 - Defective disclosure (*ASIC v Hellicar & Ors*):
 - Continuous disclosure & prohibition against MDC
 - breach of duty of care, skill and diligence where reasonable person in director's position would not have allowed company to have engaged in MDC

3) Has there been a breach of duty / have they met the standard?

- *By [act], when [D] knew or ought to have known [...] (Centro), there is a prima facie breach given [D/officer] did not exercise the degree of care of a reasonable director/officer*

4) DEFENCE: Reliance on info provided by others (s189)

- D may argue that he **relied on the advice of whom he had reasonable grounds to believe was a competent** [employee, professional advisor or expert, another director or officer, or a committee of directors ((1)(a))] **in good faith**, after making an **independent assessment of the information or advice** having regard to the **D's knowledge of the corporation & complexity of structure & operations** of the corporation (not blindly follow it) (s189)
- the director's reliance on info or advice is **taken to be reasonable** the contrary is proved (s189) – **REASONABLENESS** BELOW
 - D or officer cannot be a blind trust (AWA) → must independently turn their mind to it and look at it with a critical eye
 - D or officer must take all reasonable steps and make inquiries (McDonald)
 - Person alleging reasonable reliance has burden of proof (i.e. ASIC)
 - Relevant for **non-executive director's**
 - Liable for 2 mistakes in 1000 pgs – basic mistakes, fundamental defects – however just declaration of breach for non-executive D without monetary penalty (*ASIC v Healy*)

5) DEFENCE: Delegation of power (s198D + s190)

- D may argue that they **delegated their power** to another person (subject to constitution) (s198D)
 - Relates only to s198D (delegation) cf. s 198C (conferral of powers on MD)
- D's are **responsible** for delegate's exercise of power (s190(1))
- However, D **not responsible** for delegate's exercise of power if D **"reasonably" believed (s190(2))**:
 - the delegate would exercise power per **statutory duties/constitution**; AND
 - in **GF**, after making **proper enquiry** if circumstances indicated the need, that the **delegate was reliable and competent** to do what he was delegated
- **'REASONABLENESS'** of delegation/reliance (ss189(c) & 190; *Adler*, per Santow J)
 - Whether function is such that **"it may properly be left to such officers"**
 - Extent to which D is **put on inquiry**

Topic 9: Members' remedies

- [SH] cannot typically bring an action regarding irregularities in management/operation of Co (IMR).
- General rule: [company] is the **proper plaintiff** to bring action in respect of wrongs done to it (*Foss v Harbottle*)
- Exceptions:
 - Statutory derivative action
 - Action for oppression
 - Statutory injunction
 - Winding up
 - Personal actions (in equity and under statutory contract)
 - OR: Members can give **notice of a resolution** to **remove a D** despite anything in const (s203D(1))
- If employee - no duty to employees except where employee's interest is **consistent with co's interests as a whole** (*Parke*) / **reasonably incidental to carrying on of business of co** (*Hutton*)

A. Statutory derivative action ('SDA') – Part 2F.1A

1. Does the person have standing?

[X] can apply for leave to bring a SDA (s237(1)), against [D] on behalf of the co. and in the co's name (s236(2)), as:

- [X] is:
 - s236(1)(a)(i) a member, former member, person entitled to be registered as a member of the co. or related body corporation; or
 - S236(1)(a) (ii) an officer or former officer of [co]
- another applicant may be substituted (s238)
- D's owe their duties to Co (not the SH's) → CAN'T BRING A PERSONAL ACTION AGAINST THE D'S, CAN ONLY BRING SDA ON BEHALF OF [Co]

2. Breaches alleged?

- Member can argue that D has **breached various directors' duties**, or
- **Breached K between co. and 3rd party**, and member feels **aggrieved**.

3. Court will grant leave if **ALL** of the factors from s 237(2) are satisfied:

(a) It is **probable** that [co] **will not bring proceedings**; and

- link with (e) – if co doesn't respond to notice, this is likely to be made out
- needn't be an exhaustive point (*Ragless*)
- E.G. CO HAS **NO FUNDS**, board made up on 3 D's who breached their duties → wouldn't sue co because essentially suing themselves

(b) [member] is acting in **good faith**; and

Per Palmer J in *Swansson*, two factors determine **good faith**:

- 1) **Honest belief** by [member] that a **good cause of action** exists with **reasonable prospects of success**;
 - E.g. on the facts, seems like [member] is annoyed, and we have established above that there is a breach → thus reasonable prospects of success
 - 2) [Member] not bringing action for **collateral purpose** amounting to an **abuse of process**.
 - where **former SH or officer** with nothing obvious to gain directly by the success of the derivative action, **court will scrutinise** the purpose for which the derivative action is said to be brought (*Swansson*).
 - action designed to **advance applicant's personal interests** rather than interests of co as a whole = sufficient, even if not amount to abuse of process e.g. when creditor also SH & bring action to recover own debt (*Chahwan*)
- examine **objective** facts & circumstances, & **subjective** assertions of applicant (*Ragless*)
 - court will try and figure out what the motivation is

(c) It is in the **best interests of [co.]** that [member] be granted leave;

- Palmer J in *Swansson*: take into account all relevant circumstances:
 - the **character and business** (if any) of the company
 - the availability of **alternative means** to achieve the redress sought
 - the **D's ability to meet the judgment**
- **Examples**:
 - Yes – resolve deadlock/allow co to recover (*Ragless*)
 - No – claim property/get more money (*Chahwan*)