

TOPIC 1: Introduction and Overview

Company

- An abstract/fictitious entity recognised by the law as a legal person with its own rights and responsibilities
- Company = corporation (can have different meaning in certain context)
- S9: Company that is registered under the act or its predecessors
- S 57A: A company is only 1 type of corporation
- Has its own corporate personality and is a separate entity from its shareholders, directors, officers and employees
 - Can own property, make contracts, sue, be sued, engage in business/activity and have legal rights
 - Same legal capacity and powers as a human
 - Have unlimited lifespan as a legal person even if the directors and shareholders change over time

Shares

- Shares can be transferred/sold without any restrictions and free transferability is a requirement to be listed on stock exchange
 - Makes company different from partnership
 - Shares of public company can be sold without approval of other shareholders and directors
- Most unlisted and closely held companies with few shareholders have restriction on transfer and need the approval of directors

Corporate group structure

- Holding company control 1/more subsidiary company, including shares
- Each company in the group is a separate legal entity
- Company becomes a legal entity after filling application with ASIC, pay fee and registered by ASIC (registration/incorporation)

Shareholders	<ul style="list-style-type: none">- Members of company who are regarded as owners of company- Contribute capital by paying the issue price on their shares and receive dividends when company makes sufficient profit so that its asset exceeds its liabilities and the excess is sufficient for payment of the dividend- Have rights from corporation act and company constitutions<ul style="list-style-type: none">• Right to receive company's audited financial report• Right to attend, speak and vote at annual general meeting- Have limited liability<ul style="list-style-type: none">• Shareholders are not liable for the company's debt• Shareholders' liability is limited to paying the price of the shares they own, including unpaid amount part of the partly paid shares
Directors	<ul style="list-style-type: none">- Collectively known as the board- Have exclusive power to control management- Subjected to strict fiduciary and statutory duties<ul style="list-style-type: none">• Eg. Required to exercise powers in the best interest of company and shareholders instead of own interest

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AU Securities and Investment Commission (ASIC)

- Main Cth authority for administering Corporation act and regulating AU companies, financial markets and financial services and service providers who deal and advise in investment and financial products
- Deals with consumer protection and market integrity aspect of insurance and superannuation regulation
- S1(2) ASIC Act: ASIC's statutory role
- Ss8-10: ASIC is a body corporate with 3-8 government-appointed commissioners headed by a chairperson
- S11(1): ASIC's functions and powers conferred by s 11(1) of the ASIC Act
- Ss95,96: ASIC has offices headed by a Regional Commissioner in each referring state and territory
 - Help better serve the need of business communities in the state and territory
- Specific powers
 - Investigations: ss 13, 14, 16, 17
 - Examinations: ss 19, 20
 - Inspection of books: ss 30, 33
 - Proceedings after investigation: ss 49, 50
 - Hearings: ss 51(1), 52, 58, 64, 66

ASX

- Operates Australia's main financial markets for equities (shares)
- Formed 1987 when independent exchanges amalgamated and in 1988 became a public company that listed on its own market
- Aim: ensure integrity of financial markets so they operate in fair, orderly and transparent
- responsibilities include:
 - Having adequate arrangements for operating markets
 - Admitting entities to official list
 - Supervising listed companies
 - Monitoring and enforcing compliance with operating rules (i.e. listing rules)

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Topic 2: Incorporation and its Effects

Company as a separate legal entity

- A separate entity from its directors and shareholders form when the required formalities of incorporation are met even when 1 person controls it

- S 114 Corporation Act: public/proprietary companies can be formed with 1 shareholder

Salomon v A Salomon & Co Ltd	
Facts	<ul style="list-style-type: none"> - Salomon formed a company to give its shares to his sons - Company bought Salomon business for 39000 (excessive price) - The company faced financial trouble, so Salomon loaned it more money and secured the loan with a debenture over all company assets (use as security) <ul style="list-style-type: none"> • He became a secured creditor - The company also borrowed £5,000 from Broderip, giving him a mortgage over the debentures as security - When the business failed, the liquidator found £6,000 in assets, meaning Broderip could be repaid his £5,000, and Salomon could claim the remaining £1,000 as the holder of the debentures—leaving nothing for unsecured creditors. - Liquidator resisted Broderip demand and ask salomon to have original sale of business contract rescinded and debentures cancelled, argued salomon being the company promoter, breach his fiduciary duties by selling company for excessive price and formation of company was a fraud on its unsecured creditors
Held	<ul style="list-style-type: none"> - A person can sell a business to a limited liability company even if the person is the only shareholder and director as it's a separate legal entity <ul style="list-style-type: none"> • 1-person company can borrow money on a secured basis from its controlling shareholder, allowing the shareholder to rank as a creditor ahead of the company's other unsecured creditors

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Insolvency

- S 95A: Company is insolvent when
 - (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
 - (2) A person who is not solvent is insolvent
- *cash flow* test (pay debts as and when due and payable rather than balance sheet test)
- Case law definition
 - *Powell v Fryer*: look at commercial reality. Don't just consider cash resources but other assets or borrowing capabilities.
 - *International Cat Manufacturing (in liq) v Rodrick*: Company not insolvent because receiving loans by de facto director

Indication of insolvency

ASIC v Plymin	<ul style="list-style-type: none"> - Incurring of substantial trading losses; - Suppliers being paid well outside trading terms despite ongoing complaints; - Suppliers asking to be paid in cash on delivery terms; - Company issuing post-dated cheques, some of which are dishonored; - Threatened legal proceedings in relation to non payment of debts; - Overdue taxes; - Inability to obtain further loan finance; - Inability to raise further equity capital; - Transfer by bank of company's facilities to another
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ASIC Regulatory Guideline 217	<ul style="list-style-type: none"> - Ongoing losses; - Poor cash flow; - Problems selling stock or collecting debts; - Solicitors' letters, warrants, demands; and - Creditors being paid outside usual trading terms
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Rebuttable presumptions

- S 588E(3): Presumption of continuing insolvency
 - if a company is being wound up and it is proved that the company was insolvent at a particular time during the 12 months ending on the relation-back day, then it must be presumed that the company was insolvent throughout the period beginning at that time and ending on that day.
- S 588E(4): Presumption arising from absence of financial records
 - if it is proved that the company has failed to keep financial records for relevant periods.
- Section 588E(8): Presumption from proof of insolvency from previous recovery proceedings
- Reasonable grounds
 - *ASIC v Plymin*: Don't need to show that *actually* suspected – look at someone who is reasonably competent and diligent
- Suspicion
 - Suspecting likely to require more than mere idle wondering whether it exists or not – positive feeling amounting to slight opinion but without sufficient evidence

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Consequence of breach

- S 588W(1): company's liquidator may recover from the corporation, as a debt due to the company, an amount equal to the amount of the loss or damage where
 - (a) a corporation has contravened s 588V in relation to the incurring of a debt by a company; and
 - (b) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
 - (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
 - (d) the company is being wound up

Piercing the veil of incorporation/ corporation veil

- Company is a separate legal entity refers as the corporate veil between the company and its shareholders as court is not concern why company form or who controls it
 - Ensures limited liability so shareholders are not personally liable to the company's creditors for their debt
 - S516: shareholders liability is limited to the amount of unpaid on the nominal value of their shares

Limited liability

Benefit	<ul style="list-style-type: none"> - Facilitates Enterprise: <ul style="list-style-type: none"> • Encourages investment and entrepreneurial activity - Reduces Need for Monitoring: <ul style="list-style-type: none"> • Decreases need for shareholders to monitor managers of companies in which they invest
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	<ul style="list-style-type: none"> - Promotes Market Efficiency <ul style="list-style-type: none"> • Shares can be freely traded and their value is not dependent on their owners' wealth. • May, in turn, promote efficient management, as inefficient companies may have a reduction in share value - Encourages Equity Diversification <ul style="list-style-type: none"> • Investors can purchase shares in a number of companies • Wouldn't be possible if they had unlimited liability as they could lose all or some of their personal wealth through the failure of a single company
Challenges	<ul style="list-style-type: none"> - Closely Held (i.e. Private) Corporations: <ul style="list-style-type: none"> • May try to use corporate form to avoid creditors • Roles in these companies not always clearly separate • Efficiency principles don't really apply - Contract Creditors: <ul style="list-style-type: none"> • Need to look at type of creditor – Some (financial creditors) attempt to obtain security to overcome limited liability. Others (trade creditors) may charge additional to compensate for risk or take out insurance • Employees don't often know about limited liability of a corporation. Some protection via s 556 – pay employees before other creditors in insolvency - Tort Creditors: <ul style="list-style-type: none"> • Particularly vulnerable – promotes excessive risk taking • Parent companies paid outside usual trading terms

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Statute	
Directors' liability for insolvent trading	<ul style="list-style-type: none"> - S588G: Directors are liable for failing to prevent the company from incurring debt (add more debt) when there are reasonable grounds for suspecting that it is already insolvent – insolvent trading - Ss588J, 588K, 588M: Directors breaching s588G need to compensate an amount equal to the loss/damage suffered by unsecured creditors in relation to debt incurred by company's insolvency <ul style="list-style-type: none"> • Usually paid to liquidator who then distribute to unsecured creditors - Pt 9.4B: Get civil penalty order if breach s 588G - S588G(3): Offence when failure to prevent company incurring the debt was dishonest - S197(1): Corporate director is personally liable for the trustee debt where its rights of indemnity as trustee was lost in specified circumstances
Uncommercial transaction	<ul style="list-style-type: none"> - Corporate veil can be lifted to treat corporate insiders like directors/other related entities of company differently from others who have dealing with the company <ul style="list-style-type: none"> • Ensure that insiders do not obtain preferential treatment from the company at the expense of the company's external creditors - S 588FB: Prevent insolvent companies from disposing assets before liquidation through uncommercial transaction (recipient receive gift/unusually good bargain that could not be explained by normal commercial practice) - S 588FE(3): Liquidator can set aside (cancel) any uncommercial transaction entered into within 2 years of winding up commencement <ul style="list-style-type: none"> • 4 years before winding up commencement when the recipient of the uncommercial transaction is the director/related entity of company
Security interest granted to officers	<ul style="list-style-type: none"> - S 588FP: Disregards corporate veil when officer lend money to their company secured by a security interest over its property

	<ul style="list-style-type: none"> - S 588FP(1): security interest granted by a company is void if the secured party is an officer/former officer or person associated with an officer/former officer and the secured party purport to take a step to enforce the security interest within 6 months after it is made without the permission of the court - S 588FP(3): a secured party is regarded as taking step to enforce a security interest if the secured party <ul style="list-style-type: none"> • Appoints a receiver/receiver and manager • Enters possession or assumes control of the company's property for the purpose of enforcing the security interest • Seizes the property for the purpose of enforcing the security interest - S 588FP(4): Court can allow the security interest to be enforced if it is satisfied that the company was solvent at the time the security interest was granted and it is just and equitable for the court to do so
Financial assistance	<ul style="list-style-type: none"> - Corporate veil is pierced to make officers liable for civil penalties if they were involved in their company's contraventions of the Corporation Act - S 260A: Any person involved when a company provides financial assistance for the acquisition of its own shares is liable for civil penalties - S260D: Company is not guilty of an offence
Taxation legislation (revenue legislation)	<ul style="list-style-type: none"> - Income Tax Assessment Act 1997 <ul style="list-style-type: none"> • Directors are liable if they did not make the company pay the PAYG tax instalments owing/initiated an insolvency administration after receiving notice <ul style="list-style-type: none"> ○ Need to pay the company's unremitted PAYG tax instalments and other similar liabilities

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Topic 7: Directors' Duties

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Who owes Corporation Act duties?

- ss 180-184: impose duties on directors and other "officers of a corporation"
- Employees of a corporation are subject to the duties
 - s 182: improper use of position
 - s 183: improper use of information

- The definition of "director"
 - s 9 : term "director" include a person who has been appointed to the position of director
 - includes a person who has not been validly appointed but acts in the position of director (a de facto director) and person on whose instructions or wishes the directors of a company are accustomed to act (a shadow director)

- The definition of "officer".
 - S9 part (a): Officer includes persons who hold certain specified positions including the directors or secretary of the corporation
 - Includes other persons involved in managing a company in an insolvency context - receiver, administrator, restructuring practitioner and liquidator
 - S9 part (b): "officer of a corporation" include those who do not occupy a named position but act as directors or company executives who hold senior positions and have significant roles in the corporation or who work behind the scenes in controlling the board's decision-making
 - To be classified as an "officer of a corporation", the executive must be a person:
 - who makes or participates in making decisions that affect the whole or a substantial part of a company's business; or
 - who has the capacity to affect significantly the company's financial standing; or
 - in accordance with whose instructions or wishes the directors are accustomed to act (a "shadow" officer)