

- It did not matter if an Act labelled an entity not as a corporation, if it had the characteristics of one it was a corporation under corporate law
 - E.g. The Act provided that Qld rail was a separate entity, it could own property, enter contracts, sue and be sued in its own name etc.
- The Authority is created as a separate right and duty bearing entity, which has rights to own, possess and deal with property – “perpetual succession” (at [38]).
- The Act was constituted with a strong view of generating profits (at [41]) and the Authority was obliged to provide ministers with estimations of profits.
- The Authority operated as a labour hire company to provide labour used by Queensland Rail to operate services in Queensland which is regarded as a trading activity (at [42]).

Company = a company registered, or taken to be registered, under the Corp Law of this jurisdiction: **s 9**

- a type of corporation that is brought into existence via process of registration (cannot just declare yourself as a company) (see Pt 2A.2 for registration)
- Importance: e.g. s 236 for bringing proceedings on behalf of a company

‘Company’ does not include a foreign company

Re Featherston Resources Ltd; Tetley v Weston [2014] NSWSC 1139

- Mining company registered in NZ with management and shareholders mostly in NZ
- In AU it was registered as a foreign company. Shareholders wanted to use a statutory derivative action to sue directors of the company (which did not exist in NZ)
 - *Right to sue is derivative from company’s right to sue of defend against a lawsuit*
- Issue: court had to determine whether proceedings could be brought on behalf of a company under Corp Act (and whether a NZ based foreign company was a company)
- **Held**:
- s 9 defines a ‘company’ as a company registered under Corp Act
- **Registering a company in AU must be done under Ch 2A and all its all its steps**
- Brereton J drew a distinction between the concepts of “a company registered under THIS Act” and “a foreign company registered under Division 2 of Part 5B.2”, being the relevant part of the Australian Act dealing with registration of foreign companies.
- *The Corp Act lays out a detailed process for registration with many steps. those steps must be followed. foreign registered companies do not have to do any of those steps*

Foreign companies

- Foreign companies may only carry on a business in this jurisdiction if registered under Pt 5B.2 Div 2 or if it has its registration transferred to Australia under Pt 5B.1
- **Note**: because **foreign companies** are ‘corporations’ under s 57A and **not ‘companies’** under s9, they **cannot be subject to provisions that only apply to ‘companies’** such as insolvency provisions, minority oppression etc (Re Featherstone)

Registration process for a company

1. Reserve company name (before company is made): s 152
2. Select type of company
 - s 112 sets out different kinds of companies you can register in AU: proprietary companies and public companies

3. Select name, directors and members (with their consent): s 120
4. Establishing constitution or using replaceable rules
 - This relates to setting out the rules that govern internal management and capital structure
 - Companies can set up their own constitution or use the replaceable rules (default set of rules – the replaceable rules – found in s 141)
5. Select registered office
 - Home address, or business agent address
6. Establish registers (members and options and debentures if needed)
7. Register company with Australian Business Register (formerly with ASIC)
 - Or use a ready-made 'shelf company' (e.g. go off to business agent, who sells you a pre registered company to avoid setting up and fees)
 - Registration confers (ss119, 124):
 - Perpetual existence
 - Ability to own property, to contract and to litigate in own name
 - s 124 a company has the legal capacity and powers of a individual e.g. sign contract
 - s 119 company is birth date as beginning of day of which it is registered

Types of companies under the Corporations Act

- **Limited by shares (Ltd)**
 - Capital is divided into shares
 - Members are only liable to pay the company the amount which is unpaid on their shares (s 516)
 - Creditors can only have their loans satisfied out of company assets not members
- **Limited by guarantee**
 - A company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up (s 517)
 - *Like a contractual agreement to pay X if company winds up*
 - No share capital and no power to issues shares (s 124(1))
 - Cannot pay dividends to members (s 254SA)
 - Can switch to public company limited by shares (s 167)
- **No liability company (cf unlimited liability)**
 - Full legal responsibility that business owners and partners assume for all business debt
 - Cannot recover unpaid amounts on shares from members

A. Proprietary companies

- a. Cannot raise money from public (more smaller group of investors) (cf public company)
- b. Must have Proprietary Limited or Pty Ltd after name (ss148, 149)
- c. Must have at least 1 member and 1 director (ordinarily resident in Aust s201A(1))
- d. Must not have >50 non-employee shareholders (s113)

- **Cf Equity** Dividend payments are not tax deductible
- g. Message of solvency
 - Debt sends a message to the market that insiders believe the company's future cash flows will be sufficient to discharge the debt obligations
 - **Cf Equity** which may signal that they had no other choice

Forms of debt capital raising

- **Debentures** = in Australian/British law are 'debt securities' (investment instruments)
 - May be secured or unsecured
- **Bonds** = usually secured by collateral, long-term interest-bearing securities (a US term not traditionally used in Corps Act)
 - Since 2014-simple corporate bonds in Ch 6D
 - Common for large companies to raise funds by issuing bonds in foreign currency
- **Notes** = usually unsecured, promissory notes (ie. an IOU)
 - *i.e. you lent me this much I owe you this much*
- **Convertibles/hybrids** = a debt instrument that can be converted into an equity instrument or an instrument that has characteristics of both debt and equity
 - *E.g. convertible: if you have an investor concerned about risk involved in taking equity you could fundraise so it starts as debt investor (high priority ranking) but then later an option to convert it into equity, we will now issue you shares to get benefit of equity upside which is usually more than face value of debt*
 - *E.g. Hybrid: debentures with share warrants or options*

B. EQUITY

Characteristics of Shares

- 'A share is...a fractional part of the capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators, the owners of the capital — that remains the property of the corporation. But, nevertheless, the share is a property in a fractional part of the capital.' **Bradbury v English Sewing Cotton Co Ltd [1923] AC 744** at 767 per Lord Wrenbury
- **Ordinary shares:** default if only one class of shares and contain 1 vote per share
- **Preference shares:** class of share issued with special rights that the other class does not have e.g. can have more or less voting rights or dividends than ordinary shares
 - May have redeemable preference shares which convert into ordinary shares or can be bought back
- a. Right to vote at members' meeting
 - E.g. right to vote for or against directors i.e. control over board
- b. Right to receive information (eg annual reports)

- E.g. annual reports, info about meetings, option to buy more shares 'rights issues' right to participate in new fundraising (often discounted shares to just already shareholders)
- Can be redeemable effectively bought back by company or converted to ordinary shares
- c. Right to receive a dividend (if one declared/determined)
- d. Right to use members' remedies (such as minority oppression)
- e. A share is personal property:
 - it is a form of investment that confers proprietary rights on the investor' *Gambotto v WCP Ltd (1995) 185 CLR 432*
 - s1070A now if you contribute \$1000 worth of shares doesn't mean you have \$1000 of companies assets, you have rights against company not rights to assets of company, the share is the property, it is the right
- f. Added compliance
 - Compliance with listing rules and limit on how many shares can be listed
- g. Dividends paid at board's discretion
 - Dividends are within board's discretion (s254U); co must have sufficient funds (s254T)
- h. Primary market (IPO) v secondary market

REGULATED FUNDRAISING UNDER CH 6D

Regulated fundraising (fundraising using a 'disclosure document' lodged with ASIC)

Unregulated fundraising (fundraising that does not use a lodged 'disclosure document')

- Unregulated fundraisings will use an information memorandum
- Fundraising that is exempt under s708 and doesn't use a 'disclosure document'

Raising money by issuing securities under Ch 6D

- 1. Does the issue (fundraising activity) involve securities? Such that Ch 6D applies**
 - Does the issue of the instrument involve securities? Debt or equity?
- 2. Do we need a disclosure document to be lodged? Prospectus**
 - General prohibition on making an offer for securities unless accompanied by disclosure document: 706
 - Unless exemptions apply: s 708 and 708AA
- 3. Has a prospectus been prepared and lodged?**
- 4. Is there a problem with the content of the prospectus?**
 - s 728 and s 729
 - S 728 tells us when it has been misleading and s 729 for who can get sued

s 706 Issue offers that need disclosure

An offer of securities for issue, other than a CSF offer, needs disclosure to investors under

- On the facts: the finance director could affect B's financial standing but it did not have that capacity as part of the governing structure of B, was not trying to make a decision for Buzzle but to **protect their own legitimate commercial interest as a creditor**
- *E.g. RBA affects financial standing of every company in AU with debt (by changing interest rate) but RBA is not trying to make decisions for every company*

ASIC v King [2020] HCA 4

- X run by parent (MFS group). X running investment fund.
- White was the boss of the parent company and had previously been the CEO of a company running investment fund, though he resigned, directors and executives of investment fund company still saw him as the boss, he was still telling them what to do, and more than that he was entering contractual arrangements on behalf of the investment fund company.
- Investment company went insolvent and ASIC sued him for breaching directors duties arguing he was an officer and that he did not need to be occupying a particular role in the company, if he was making important decisions then he could be said to be part of that governing structure
- **Held:**

No need to hold a formal office within the company

- You will be an 'officer' of the company if you satisfy any or all of the descriptions in (b) in the definition of 'officer' you are taken to be 'within' the corporation even if you hold no actual formal office within the corporation [27]
- Being an officer 'of' the company is in the sense of being engaged, in fact, in the management of its affairs or property.'

BUT external advisers ≠ officer as they are only ever giving advice which the board then employs at their discretion

- **External counterparties:** A person with legal rights against a corporation as a counterparty may have persuasion into the decision making processes of a corporation but ultimately decision depends on corporations management not the counterparty's legal rights [41]
- **External advisers or consultants:** Just because an adviser/consultant who gives advice which, if implemented, can significantly affect the financial standing of the corporation, does not mean that they actually have the capacity to affect the financial standing (that lies with person to whom the advice is given and decides whether to act on it) [42]
- Cf CEO of a parent company who is allowed to act in relation to other companies and hence can actually determine the company's financial affairs [46]

Shafron v ASIC [2012] HCA 18

- James Hardie: corporate group with huge potential liability from decades of victims of exposure asbestos and so restructured and created a compensation fund that was supposed to last 50 years, but ran out in 2 years.

- Shafron is the co-company secretary and general counsel (he is chief lawyer) but he barely did his role as a secretary (did not take minutes, did not give board packs, AGM notices, but he still had this role)
- He was a key member of the restructuring team and had sign off authority on asbestos related disclosure, and trained the board re continuous disclosure requirements
- He argued this related to his role as general counsel, not as secretary, and hence was not a breach of officer duties.
- **Held:**
- If you are **appointed** as secretary, **you are** the secretary even if you don't carry out the actual functions of a secretary – you **cannot differentiate your role into different functions** e.g. secretary for one thing, but lawyer for another.
- Courts must assess the **whole of their role and conduct** (not just the conduct related to the breach) [23]
- **Participants need not be actual decision makers:** 'People may participate in making a decision even where they are not the final decision maker [25]-[26]. The notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed.' at [26]
 - On the facts: He played a large and active part in formulating the proposal that he and others chose to put to the board as one that should be approved even though it was the board that ultimately decided whether to adopt proposals
- **Should be “more than the administrative carrying out of the orders of others responsible for a company’s management”**
 - On the facts: Shafron’s role included giving advice to protect the company from ‘legal risk’ which no doubt included ensuring that purely administrative functions were performed like transmitting necessary material to the ASX and maintaining appropriate records but extended to providing advice about how duties of disclosure should be met. He could also make decision on third party advice [15]-[16]
 - Secret profits occur when you hear transaction because you a member of this company, you enter transaction, make profit, cannot do that, not corporate opportunity, not taking something from company itself

6. CORPORATE ATTRIBUTION AND LIABILITY (TORT, CRIMINAL LAW, CONTRACT)

LIABILITY IN TORT

- **Cassimatis v ASIC [2020]**, the directors possessed vast responsibilities and exercised a high degree of control within the corporation, as opposed to devolving functions and responsibilities to suitably experienced and qualified staff, meaning that they increased their level of exposure to a potential breach.

CEO higher standard: **ASIC v Rich**

CFO elevated duty: **ASIC v Vines**

DIRECTORS WITH CONFLICT OF INTERESTS require special vigilance

- Transactions involving potential conflicts of duty required special vigilance: Where there is a transaction involving the potential for conflict between interest and duty, duty of care and diligence requires special vigilance (e.g. ensure necessary approvals and safeguards are in place): **ASIC v Adler**
- If directors are in a position of conflict of interest it may be that special or particular diligence may be needed: **PBS v Wheeler**

No reduced standard for NON-EXECUTIVE DIRECTORS (still subject to irreducible duty to monitor)

- All directors (executive and non-executive) have a non delegable primary responsibility to monitor the company, which includes the responsibility read and understand the company's financial report and director's report: **ASIC v Healey**
- Mr Greaves argued as non-executive chair he had no special duties and that his responsibilities were limited to those in the company's constitution. **Held:** non-executive chair cannot claim that a lesser standard of care exists solely on the basis of their non-executive status, they are still subject to an irreducible requirement of monitoring the performance of a company: **ASIC v Rich**

DIRECTORS WITH SPECIAL SKILL SETS imposes a greater standard of care

- **ASIC v Rich:**
- If a director has specialist skills (e.g. accountancy expertise) that director will be held to a higher standard of care for decisions within the scope of their expertise.
- a non-executive chair who was also the chairman of the finance and audit committee, had a CA qualification, held other senior executive roles at a number of large public companies prior to coming to Onetel. **Held:** My Greave's particular background, expertise and appointment to the finance and audit committees contributed to the standard of care he owed to the company

VOLUNTARILY ASSUMING A TASK

Role can be enhanced based on the role actually undertaken by the director (not simply their job title)

Cassimatis v ASIC [2020] FCAFC 52: