

GLOSSARY

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(1) INTRODUCTION

A company is an organisational structure with distinct legal personality, created by people and recognised by law

- Alternative structures include partnerships, sole traders, cooperatives, incorporated associations and trusts

(1) British historical development of corporations

1. Early middle ages
2. Circa 13-14th centuries
3. 16th century
4. 18th century
5. South Sea Bubble
6. Repeal of *Bubble Act*
7. *Limited Liability Act 1855*
8. *Companies Act 1862*

(2) Australian development and current legal frameworks

Key issue has been the limitations placed on the Cth by s 51(xx), which limited development of federal corporate system from federation through to 2001

1. s 51(xx) restrictively interpreted in *Moorehead*, holding that it did not permit Cth to regulate the incorporation of corporations; from 1901-1950 totally separate state acts restricting national business operations
2. *Concrete Pipes Case* affirmed restrictive *Moorehead* interpretation
3. Hawke attempted to pass Cth corps act in 1989; struck down in *NSW v Cth* (1990) as Cth did not have power to legislate over 'incorporation'
4. *Corporations Act* (1991): cooperative arrangement created whereby states adopted Cth model law and cross-vest power in Commonwealth courts to create pseudo uniform corporations act
5. *Corporations Act* (2001): states cross-vest power over incorporations, allowing true Cth corporations act; initially referred for 5 year period, extended to 2016

(3) Forming a corporation

- A company registered under CA taken to be incorporated in 'this jurisdiction', defined as the geographical area of each State and Territory: s 119A(1)). However, the company's legal powers and capacity are not affected by choice of place of registration: s 119A (Note 2). However, does mean that company amenable to regulation by State or Territory in which they are registered, ie stamp duty and requirements protect against the possibility that one or more States might withdraw their referral of powers to the Cth.

process

- Reservation of company's name on application to ASIC: s 152
- Preparation of internal management rules and obtaining consents including, where relevant, the constitution: s 136(1)
- Lodge form 201 with ASIC outlining type, name, address, name of directors, registered office, principal place of business: s 117
- Registration by ASIC: ASIC provides ACN and certificate: s 118
- Company then comes into existence once this is done: s 119
- Considered incorporated in the particular state specified: s 119A
- Members/directors/secretary then take upon positions upon registration: s 120
- Registered office is that specified in application: s 121

Consequences of registration

1. Company can sue and be sued in own right

2. Company has perpetual succession: company continues as same legal entity regardless of changes in members and management; legal existence is 'perpetual' and can only be dissolved of by winding up/cancelled registration
3. Company has power to acquire, hold and dispose of property, independent of owners and managers

(4) Regulation

Sources of regulation:

- ASIC (general corps regulator);
- Australian Prudential Regulation Authority (financial institutions); and
- ASX (via listing rules and corporate governance principles for publicly traded companies)

(5) Theories and conceptions

1. Concession or privilege theory: a reflection of royal charter conception of corporation as enjoying government authorisation; essentially being a gift from governed; corporations in public sphere and close state regulation and control
2. Aggregate/contractual theory: corporations are natural aggregates of individuals; associated with laissez faire thinking of 19th century; corporations exist in private space and gov purely to enforce contract between private parties
3. Real entity/social entity/stakeholder approach: interests beyond shareholders important; environment, community, employees arising with growth of corporate social responsibility movement in late 20th century and following scandals like James Hardie; management is responsible for success of entity, not just producing shareholder returns; distinction btw shareholder approach (maximise profit) and stakeholder approach (respect broader interests)

(6) types of corporations and business structures:

definitions

1. company is a 'a company registered under this Act': s 9; a company is a *type* of corporation
2. corporation: a company, body corporate and certain unincorporated bodies: s 57A
 - **excludes** corporate sole or 'exempt public authority': s 9
 - **includes** Aboriginal and Torres Strait Islander corporations
3. registrable body: a registrable AU body or foreign company: s
 - **registrable AU body**: body corporate or certain unincorporated bodies excl foreign company
 - **foreign company**: body corporate formed outside AU or certain unincorporated bodies: s 9

business structure

- sole trader: not a separate legal entity; unlimited personal liability; little to no regulation
- partnership: not a separate legal entity unless incorporated limited partner; companies can act as partners; unlimited liability unless limited partnership or incorporated limited partnership
- joint venture: not a specific legal entity; liability should be separate unless it is a partnership
- statutory corporation: corporation created by government by special Acts of Parliament
- co-operatives: autonomous, self-help organisations controlled by members: become corporation once registered: *Co-operatives National Law* s 28
- incorporated associations: typically a NFP that is operated as a company
- unincorporated: does not exist as separate legal entity
- incorporated: treated as separate legal entity once incorporated under *Association's Incorporation Act* 2009 (NSW)

(7) categorising companies:

questions to ask when categorising:

1. is the company proprietary or public?

proprietary company must have:

- 98% of companies at Pty Ltd
- Share capital: s 112(1);

- min 1 member (s 114) but no more than 50 non-employee shareholders as members: s 113;
- at least one director: s 201A(1);
- must not engage in activity that would activate operation of fundraising provisions in ch 6D meaning proprietary company not able to offer shares for public subscription; can only offer shares to existing company members or employees: s 113(3)
- must have Pty Ltd at end of name: ss 148(2), 149

public company is a residual category; any other company that is not proprietary:

- at least one member but no statutory maximum: s 114
- at least three directors: s 201A(2)
- may raise funds by making offers or invitations to public to purchase or subscribe for securities (so ASX listed are public companies)

→ company may convert company status: s 162(1)

2. how is liability of the members structured?

(i) limited by guarantee

- no share capital and no power to issue shares: s 124(1)
- members undertake that, should company be wound up, they will contribute specified amount to the property of company: ss 9 and 517
- liability only arises if company wound up/cannot meet liabilities
- company prohibited from paying dividend to members: s 254SA
- without share capital, rely on outside sources of funds
- must be incorporated as public company and must include Ltd at end of name: s 148(2)

(ii) limited by share capital:

- capital divided into shares and member are only liable to pay to company that amount which is unpaid on their shares: ss 9 and 516
- company limited by shares required to have LTD at end of name: s 148(2)

(iii) unlimited liability company:

- public or proprietary company can be registered
- members are financially liable without any limits for debts of company : s 9

(iv) no liability company

- no contractual right under constitution to recover any amount unpaid on shares from current shareholders: ss 9, 112(2) and 254M(2)
- shareholder may elect to forfeit shares rather than pay unpaid amount
- company must have 'No Liability' or NL at end of the name: s 148(2)
- must be incorporated as public company: s 112(1)

3. what is the relationship of the company to other corporations?

Can be categories as either (a) holding company or (b) subsidiary company:

a. Subsidiary company: s 46

- First company controls the composition of the subsidiary's board of directors; ie power to remove all, or majority of directors; or
- First company can cast or control the casting of more than half of maximum votes that might be cast a general meeting of subsidiary; or
- First company holds more than half of subsidiary company's issued share capital

b. Holding company

- Defined as body corporate that has a subsidiary: s 9
- CA permits creation of wholly owned subsidiary, which is company that has no members, other than its holding company or a nominee or other wholly owned subsidiary of the ultimate holding company: s 9
- not limited to two-company situation: if C is subsidiary of B and B is a subsidiary of A then C is also a subsidiary of A: s 46(b)

type of company	description	Public/private
companies limited by share capital	2. must have Ltd at end of name: s 148(2) 3. members only liable to pay company amount which is unpaid on their shares: ss 9 and 516	Public or proprietary
companies limited by guarantee	4. Ltd at end of name: s 148(2) 5. No share capital; each member agrees to contribute guaranteed amount of capital Difficult to fundraise	Public only: s 112
companies with unlimited liability	1. Members are financially liable without any limits for the debts of the company if assets insufficient to meet liabilities: s 9 2. No requirement that corporations have indication in name	Public or proprietary
no liability companies	3. Will have 'No Liability' or 'NL' in name: s 148(4) 4. No contractual right under constitution to recover any unpaid amounts from shareholders: ss 9, 112(2), 254M(2)	Must be incorporated as public company: s 112(1)

Re Featherstone Resources Ltd

- Featherstone resources incorporated in NZ as unlisted public company
- Plaintiff's (12 shareholders, combined 10% ownership of issued share capital) sought leave to bring derivative action on behalf of FRI

HELD

- s 236(1) provides that a person may bring proceedings on behalf of company, or intervene in any proceedings to which company is a party to take responsibility on behalf of the company for proceedings if:
 - the person is:
 - members, former member or person entitled to registration as member of company; or
 - officer or former office of the company
 - person is acting with leave granted under s 237
- [27] concept of 'company registered under this act' and 'foreign company registered under Division 2' are two distinct concepts that do not overlap; a foreign company does not become a foreign company registered under this act once registered under Div 2

Queensland Rail [2015]

- Qld Rail operates as labour hire company and provides labour for operation of rail services
- Established under Qld Act and by that act, Qr 'not a body corporate' but has all powers of individual to create and be made subject to legal rights and duties and may sue and be sued

HELD – HCA unanimously held that Qld rail was trading corporation under s 51(xx)

- Labelling/specification in statute did not prevent it from being a corporation; had all features of corporation
- Thus, Qld rail and employees governed by federal industrial relations law NOT Qld industrial relations law

SCAFFOLD:

1. *Is there an offer of securities for issue: s 706*
 - a. *Offer or invitation: s 700(2)*
 - b. *Securities: ss 92(4); 700(1); 761A*
 - c. *Issue: primary issue, not secondary market except s 707*
2. *Exemptions: s 708, 708a, 708AA*
 - a. *Exemptions governed by Chapter 7, not Chapter 6D*
 - b. *Information memorandum still required*
 - c. *Liability for misstatements/misleading statements: ss 1041H*
 - i. *Compensation orders: s 1041I*
3. *Otherwise: disclosure documents required: s 706*
 - a. *Types of documents: s 705*
 - b. *Comparison required between what has been prepared and requirements*
4. *Advertising restrictions: s 734*
5. *Liability for misstatements/misleading statements/omissions and defences: ss 728 - 733*

A. EXTERNAL FINANCING

1. Borrowing (debt financing)
 5. must be **repaid** – fixed claim regardless of how profitable company is
 - before equity claims; shareholders are the residuals meaning come last
 6. does not confer voting rights
 7. does not dilute equity
 8. interest on debt for business purposes may be tax deductible
 9. debt sometimes sends message to market that company expects cashflow sufficient to service debt
 - (a) loans and secured finance
 - (b) trade credit
 - (c) debentures (bonds)
 - broadly defined as written acknowledgement of a debt owed by a company; defined by s9 as chose in action that includes an undertaking by a body to repay as debt money deposited with or lent to body
 - excludes: certain trade credit (s 9(a)); bank deposits (s 9(b)); undertakings to pay under negotiable instruments (s 9(c)); undertakings by body corporate to pay money to related body corporate (s 9(e))
 - may be issued as a series where company wishes to raise a large sum of money by borrowing small amounts from a number of different lenders
 - as debenture holders within a series may be a diverse group, trustee appointed to act for them to allow borrowing company to deal directly with trustee rather than large group of lenders: s 283AA
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1. shares (equity financing) → power to issue shares: ss 124; 254A
 10. Share is a bundle of rights; 'a fractional part of the capital...confers upon the holder a certain right to a proportionate part of the assets...separate right of property': *Bradbury v English Sewing*
 - a. characteristics of shares
 11. right to vote at members' meeting
 12. right to receive information
 13. right to receive dividend
 14. right to use members' remedies
 15. a share is personal property: s 1070A
 16. share is usually transferable
 - b. classes of shares
 - power to issue shares with different rights: s 254B(1)
 - notify ASIC when dividing shares into different classes if not previously so divided: s 246
 - company may convert ordinary share into preference, or vice versa: s 254G
 - i. ordinary shares
 - residual category covering all shares that are not classified as another category of shares; starting point where all shares classified as ordinary shares
 - ii. preference shares
 - given priority over ordinary shares on matters such as repayment of capital, participation in surplus assets and profits and dividend entitlement: s 254A(2)
 - usually have limited voting rights as less risk
 - constitution must set out the rights of preference shares re repayment of capital, participation in surplus assets and priority in relation to other shares: s 254A(2)

- one where constitution provides that shares of an identified class carried some right re "repayment of capital, participation in surplus assets/profits, cumulative or non-cumulative dividends, voting or priority of payment of capital/dividend" which preferred the holder of a share of that class over holder of other class as per constitution: *Beck v Weinstock*
- c. fundraising under Ch 6D: power to issue shares: ss 124, 254A
 - i. does Ch 6D apply?
 - Marked out by definition of securities: defined as a share, debenture, legal or equitable right or interest in either, or option to acquire, by way of issue, one of these interests: ss 761A; 700; 92(4)
 - **Excludes** offers of financial products such as warrants/options over already issued shares
 - Cannot waive or contract out prescriptive requirements: s 703
 - Apply to offers received in AU, regardless of where resulting issue, sale or transfer occurs: s 700(4)
 - ii. public v proprietary companies
 - Under s 113(3), proprietary company CANNOT engage in share issued requiring disclosure document EXCEPT for: (a) offer to existing employee shareholders or employees of subsidiary
 - THUS proprietary company can only make share issue to employees but NOT beyond
 - iii. disclosure obligations?
 - Where company seeks to list through initial public offering (IPO) made under a prospectus, ASIC's primary role is that of disclosure regulator; reviews the prospectus to assess whether info sufficient and there are no material omissions or inaccuracies
 - Offer of securities for issue needs disclosure unless exempted by s 708: s 706
 - Offer of securities for sale requires disclosure to investors only if disclosure is required by s 707(2), (3) or (5): s 707(1)
 - Offering securities for issue or sale includes inviting applications for the issue of or to purchase the securities: s 700(2)
 - Issue refers to creation of rights and the term sale to dealings with the security after its issue; creation versus transfer from one holder to another
 - iv. disclosure obligations apply to:
 - s 700: fundraising rules includes shares which are defined as issue of securities
 - s 704: when disclosure to investors is needed
 - ss 706, 707, 708, 708AA and 708A say when offer of securities need disclosure to investors
 - s 706: offer of securities for *issue* needs disclosure to investors unless exempt
 - s 707(2): off-market sale by controller where:
 - a. person offering controls the body making securities available; and
 - b. securities not quoted or not offered in ordinary course of stock trading
 - s 707(3) sale amounting to indirect issue where offer for sale within 12 months after their issue needs disclosure if:
 - a. body issued the securities without disclosure; and
 - b. either the bodies issued the securities without purpose of the person to whom they were issued selling or transferring the securities, or granting, issuing or transferring interest in or options over them OR person to whom securities were issued acquired them with purpose of selling or transferring the securities, granting, issuing or transferring interest in them
 - s 707(5): sale amounting to indirect off-market sale by controller – offer for sale within 12 months after their sale by a person who controlled the body at time of sale needs disclosure if :
 - a. at time of the sale by controller either securities not quoted or not offered for sale in ordinary court of trading on which they were quoted; and
 - b. controller sold securities without disclosure; and
 - c. either (i) controller sold with purpose of the purchaser selling or transferring securities or granting options over them; or (ii) purchaser acquired them with purpose of selling or transferring them or granting options over them

exemptions under s 708

'unregulated fundraising' where information memorandum issued instead of disclosure doc

- a. Exemptions for personal offers: s 708(1) – (7)
 - Personal offer that does not exceed 2 million or 20 investor ceiling within 12 month rolling period: 708(1)
 - In counting issues/amount, disregard those that do not need disclosure, are not received in AU and are made under disclosure document: s 708(5) → if unsure whether other fundraising complied, consider both situations
 - In calculating total include any amount payable at issue; in future; on exercise of option; or upon exercising right: s 708(7)
- b. Exemptions for sophisticated, professional, and experienced investors: s 708(8) –
 - Sophisticated investors: s 708(8) – (9C)
 - minimum amount payable for securities is at least \$500,000; or accountant's certificate of minimum assets (2.5m including trust assets); or gross income (250k) for past 2 financial years; or offer made to company/trust controlled with above net assets/income
 - accountant has independently verified assets
 - through AFSL holder: s 708(10)
 - offer made through financial services licensee
 - *ASIC v Maxwell*
 - professional investors: s 708(11)
 - Person who falls within definition of s 9: Australian Financial Services license holder; APRA regulated body; trustee of super fund (>10m); or
 - Person who has or controls gross assets of at least 10m (including assets held by associate or under a trust that person manages)
- c. Miscellaneous exemptions
 - offers made to senior managers of the issuer or related company, or spouse, parent, child, sibling or to company controlled by one of these persons: s 708(12)
 - (a) senior manager = (other than director or secretary) who (i) makes or participates in decision making that affects whole or substantial part of business; or (ii) capacity to affect significant corporations' financial standing: s 9
 - (b) ASIC Corporation (Disclosure Relief) Instrument 2017/737 extends to include directors and offices within definition in s 9
 - offers issue of fully paid shares to existing shareholders under dividends reinvestment plan or bonus share plan: s 708(13)
 - offers for issue or sale for no consideration: s 708(15)
 - Offers made by takeover bid under Ch 6 + schemes of arrangement: s 708(17) – (18)
 - Offers made by an exempt body or public authority: s 708(19) - (21)
- d. statutory liability for misleading and deceptive conduct in information memorandum: s 1041H must NOT engage in conduct, in relation to a financial product, that is misleading or deceptive or is likely to mislead or deceive
 - i. application of s 1041H CA [does NOT apply where s 728 applies)
 - where unregulated finance and NO disclosure document required ie misleading statement in information memorandum, on company website/media release etc
 - s 1041H(3) expressly excludes s 728 breach (misleading and deceptive fundraising doc)
 - Issuing financial product like shares is conduct re financial product: s 1041H(2)(b)(i)
 - Classic definition where 'lead into error': *Parkdale*
 - Literally true statement can still be misleading: *National Exchange Pty Ltd v ASIC*
 - Making representations re future matters which you don't have reasonable grounds for making is taken to be misleading: s 796C

- Can be remedied by disclaimer where it is clear: *Cycclone*
- ii. Consequences
 - Not civil penalty provisions but may lead to civil liability under s 1041H
 - Compensation orders: recovery where person suffers loss or damage: s 1041H(1)
 - Injunction: s 1324
 - Asset protection order: s 1323
 - Corrective action: s 1324B

v. Process of making disclosure

1. Disclosure document of some kind "must be prepared for the offer" and then "used" for the offer: s 709
 2. Disclosure document to be used for offer of securities must be lodged with ASIC (s 718) and offers must not be made unless the disclosure document has been lodged: s 727(1)
 3. Offers must be made in or accompanied by disclosure document (s 721(1)) and offers must not be made unless offer or form is included in or accompanied by a disclosure document: s 727(2)
 4. Securities may only be issued or transferred in response to an application form and the person issuing or transferring them must have reasonable grounds to believe that the application form was included in or accompanied by disclosure document: s 723(1)
- types:** full prospectus, prospectus prepared and lodged but only 'profile statement' given to investors; prospectus prepared/lodged but only 'short form' prospectus provided to investors; offer information statement where 10m or less raised.

vi. Defective disclosure documents [where not exempt]

- If doc is misleading, omits material information or there is no disclosure document where required, may incur criminal or civil liability; investors will seek compensation
- Captured conduct under s 728:
 1. misleading or deceptive statements made in a disclosure document;
 2. material omissions;
 3. or where offers made after new circumstances occurred and should have been disclosed;
 4. forward looking statements without reasonable basis: 769C
- breach of s 728 will render someone civilly liable under s 729:
 - a. right to compensation: s 729(1)
 - b. duty to inform offeror: s 730
 - c. supplementary or replacement prospectus: s 719(1)
 - d. stop order: s 739
- statutory liability may arise under s 1041H of CA; although this does NOT apply where s 728 does; look at s 728 where there is a disclosure doc required and s 1041H where unregulated
- defences for breach of s 728(3)
 - i. due diligence defence: s 731
 - (a) made all inquiries (if any) as were reasonable in the circumstances; AND
 - (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive
 - ii. reasonable reliance defence: s 731(1)
 - person proved that they placed reasonable reliance on information given to them by someone other than by director, employee or agent of the body
 - iii. withdrawal of consent: s 733(3)
 - person named in DD as proposed director/underwriter/making a statement incl in the doc if they proved they publicly withdrew their consent to being named
 - iv. unawareness of new matter: s 733(4)

- person isn't liable if a new circumstance has arisen since the dd was lodged if they proved they were not aware of matter

vii. prospectus documents

- prospectus to include all material important to tell investors in making decision and must NOT contain any misleading or deceptive statements
 - a. general disclosure obligations
 - all info that investors and professional advisors would reasonably require to make an informed assessment of certain matters set out in leg: s 710(1)
 - ie re rights and liabilities attaching to securities offered; assets and liabilities; financial position and performance; profits and losses and prospects of body
 - to be judged objectively from reference to material available publicly to professional advisers: *GIO v AMP*
 - in deciding what info to include, regard to the nature of the securities and body and matters likely investors may reasonably be expected to know: s 710(2)
 - i. nature of securities and body
 - ii. if the securities are investments in managed investment scheme, nature of scheme
 - iii. matters likely investors may reasonable be expected to know; and
 - iv. fact that certain matters advisors may reasonably be expected to know
 - b. specific disclosure obligations: 711
 - terms and conditions of offer
 - interests and fees of people involved
 - details of any application to be quoted on securities
 - expiry date of prospectus

viii. prohibited conduct

- offering securities in a non-existent body: s 726
- offering securities requiring disclosure without disclosure document lodged with ASIC: s 727(1)
→ CIVIL PENALTY PROVISION under s 1317E
- person must not accept application for, or issue or transfer, securities offered under disclosure document until 7 days after lodgement of dd has ended: s 727(3)
- Advertising for small scale offers: s 734(1); requires disclosure doc under s 734(2)
- Restrictions on advertising
 - a. For offers that required disclosure document, must NOT (a) advertise offer OR (b) publish statement that either (i) directly or indirectly refers to the offer; or (ii) is reasonably likely to induce people to apply for the securities: s 734(2)
 - b. For small scale offers (20 issue sin 12 mth), must not (a) advertise or (b) publish statement that directly or indirectly refers to offer that would need a disclosure doc but for ss 708: s 734(1)
 - c. Above offence are strict liability offence

ix. ASIC power dealing with securities

- ASIC has broad function by specific enforcement power to effect Cth laws: s 1(2)(g)
- Power to do whatever necessary for or in connection with or reasonably incidental to performance of functions: s 11(4) ASIC Act
 - a. Stop order – may issue a stop order to prevent further offers, issues, sales or transfers of securities: s 739 [only applies to LODGED disclosure doc]
 - i. Where satisfied lodged dd not worded and presented in clear, concise, effective manner as per s 715A; or
 - ii. Offer would contravene s 728 or advertisement or publication is defective
 - b. ASIC may apply to court for injunction: s 1324 [applies to unregulated financing]

- i. May be sought where person engaging, engaged or proposing to engage in conduct that is contravention of act
- c. Exemptions of person – ASIC may exempt a person from particular provision or modify or vary provisions where strict compliance is inappropriate under Ch 6D: s 741(1)
- d. Civil penalty declaration – ASIC can seek a civil penalty declaration, pecuniary penalty order, compensation order where civil penalty provision breached: s 1317(1)
 - i. Offer securities without disclosure document: s 727
 - ii. Offer securities with materially deficient disclosure document: s 278
 - iii. Engage in illegal fundraising

ASIC v Maxwell [2006]

- Accountant did not investigate investors' circumstances in contravention of s 708(1)
- HELD* – financial services licensee has statutory duty to inquire into all matters and be satisfied on reasonable grounds that the person receiving the share offer has prior experience in investigating securities which allows them to assess:
- Merits and risks of offer; values of securities; risks involved in accepting; information needed in respect of offer; adequacy of information given by person offering
 - Account. NOT met most of the investors nor investigated their financial circumstances = no reasonable grounds
 - Licensee has statutory duty to inquiry into all matters relevant to the opinion it must form and then consider whether, in the factual circs, reasonable grounds for it to be satisfied: Barret J in *Elm Financial Services*

Beck v Weinstock [2014]

- Company's constitution had provision allowing issue 14 classes of shares: A-D described as preference shares; E to N described as ordinary shares
 - Shares described as preference shares but no ordinary shares ever issued
- HELD* – fact ordinary shares never issued did not deny that the disputed shares in question were preference shares

DSHE Holding v Potts [2022] – *when can dividends be paid*

- Concerned three appeals from events arising from collapse of Dick Smith in 2016
 - Potts, company secretary, CFO and director, were defendants to proceedings brought by NAB and HSC a
- HELD* –
- s 254T(1): company not pay dividend unless (a) assets significantly exceed liabilities, (b) payment of dividend is fair and reasonable to shareholders; (c) payment does not materially prejudice company's ability to pay creditors
 - Regarding (c), relevant prejudice extends to company's ability to pay creditors as and when claims fell due
 - company's *ability* to pay creditors must be materially prejudiced NOT the creditor's interest [99]
 - Appropriate focus is comparison btw position before and after payment in question [101]
 - The prejudice must be material: a small or slight delay may not satisfy this requirement and to be assessed in relation to company's ability to service *all* creditors; not creditor by creditor basis [104]
 - Director must consider what creditors the company is likely to have a time of dividend payment [109]
 - On the facts, the fact the company held trading stocks that could be sold to address cash flow issues arising from payment of dividends, consider whether they can *readily* be sold

ASIC v Cyccclone Magnetic Engines [misleading and deceptive under s 1041H]

- Foreign company trading illegally, sought to raise money to develop prototype magnetic engine
- Promoted business to prospective investors through website, newsletter, investor demonstrate days at factory
- Failed to lodge disclosure document

Issue: ASIC alleged breach of s 727 and misleading and deceptive conduct re issue of shares, contrary to s 1041H HELD –

Breach of s 727

- Share issuer bears burden of establishing whether exception made out; respondent bears onus of proving exception
- Evidence demonstrated making of offers, receipt of application form, issuing of shares to more than 20 persons in relevant period = breach of s 727

Misleading and deceptive conduct: s 1041H

- Likelihood of conduct being misleading/deceptive is question for fact finder not for witnesses to decide
- Alleged misrep to be assessed from point of view of an ordinary and reasonable member of the relevant class; necessary to isolate some criterion of representative member of that class
- Misleading/deceptive requires nexus btw conduct and actual/anticipated deception
- Argued that Invention and/or Prototype rep was misleading/deceptive because not scientifically feasible: thus, falsely represented shares were of a particular quality and had performance characteristic that did not have [91]
- Disclaimers can “erase” misleading conduct BUT must be “worded unambiguously, feature prominently and must be communicated to the reader that the disclaimer is relevant to information that it is seeking to qualify” [172]
 - o A positive future representation may be misleading if relevant circs show need for qualification
 - o On the facts, passage in Patent Program highlighted that they could not guarantee future results and that it involved risks that Cycclone could give no assurances

(1) CORPORATE RESPONSIBILITY & LIMITED LIABILITY

(1) SEPARATE LEGAL ENTITY DOCTRINE - PRINCIPLE

Once incorporated, company is a separate legal entity distinct from its incorporators: *Salomon* [as such, Salomon not personally liable for the corporation's debts in liquidation and was able to enforce his debentures against it as a secured creditor]

- Individuals can operate in a dual capacity in a company: *Lee v Lee Air Farming* [Lee's wife could claim workers compensation for employee notwithstanding he was also the director of the company]
- Companies are separate even from their controllers: *Salomon*; *Lee Air Farming*
- Principle recognised in s 124: company has legal capacity and powers of individual and of body corporate

(2) LIMITED LIABILITY

- *Limited liability now widely accepted as one of the most foundational elements of corporate law*
- Although corporate personality and limited liability are distinct conceptually, they are linked functionally
 - corporate personality marks out an asset pool against which creditors of the enterprise have prior claims; entity status partitions asset pool from the personal assets of the stakeholders
 - Absent special circumstances, shareholders and directors are NOT liable for the debts of the corporation
 - *Salomon's* case confirmed that individuals could legitimately minimise their personal risk through incorporation
- The recognition of the corporation as an entity whose rights and duties are distinct from those of its members and directors is a precondition to limited liability that members of registered companies enjoy

(3) PIERCING THE CORPORATE VEIL – EXCEPTIONS TO SEPARATE LEGAL ENTITY

- HOWEVER courts have been willing to look behind doctrine ('pierce the corporate veil') to make those in control of companies liable for actions or debts of company:
 - "there is no common, unifying principle which underlies the occasional decisions of court to pierce corporate veil": *Rojers AJA in Briggs v James Hardie*
- Usually in the case of perpetuate fraud or to avoid existing legal obligation; note very rare in Australia
 - a. Evasion of a legal obligation
 - Company established to avoid an existing legal obligation or to carry on an illegal activity ie it is a mere cloak/sham
 - *Gilford Motors Co* [Horne created company for sole or dominant purpose of avoiding restraint of trade clause in earlier contract with Gilford Motor; court issued injunction against Horne and company]
 - *Jones v Lipman* [vendor does not want to proceed with sale; purchasers sought specific performance; Lipman created company with solicitor's clerk as shareholder and director and sold to him; using company to evade existing obligation; granted specific performance]
 - Arguably this may work if there pre-existing company (not sole purpose fraudulent) used to evade liability: *Electric Light v Cormac*
 - *Prest v Petrodel* [high profile divorce proceedings; ownership of a number of residential properties owned by companies within Petrodel Group that husband worked for; SC found that properties held on trust for Prest so fell within divorce assets]
 - b. fraud
 - Court will be willing to pierce veil where corporate structure used to perpetuate fraud or conceal a fraudulent operation
 - Where the company is being used in an attempt to avoid an existing legal duty that otherwise falls on the controller personally; the whole purpose of incorporation must be to evade: *Gilford Motors*

c. agency exception

- If the company is the principal's agent, the principal itself will be liable: *Smith Stone & Knight v Birmingham* [parent of wholly owned subsidiary *could* claim compensation from counsel itself]
- Note courts are reluctant to infer agency: "mere dominance in and of itself is insufficient to establish agency": *Briggs v James Hardie*
- Is it really a licensee relationship: *Bird Cameron*
- Harder to break down wall of Solomon's case when imposing liability v awarding compensation; consider when analysis *Smith Stone* factors as this was award of compensation
- NB: does not actually involve piercing corporate veil, but practical effect is analogous
- Questions set out in *Smith Stone*:
 1. Were the profits of agent treated as profits of principal?
 2. Were persons conducting business appointed by the parent company?
 3. Was the parent company the head and brain of the trading venture?
 4. Did the parent company decide what should be done in the venture and how capital allocated?
 5. Were the profits of the business due to parent company's skill and direction?
 6. Was parent company in effectual and constant control?

d. corporate groups

- *UK position*: liberal approach to veil piercing; where entities are inextricably intertwined and cannot operate independent, may be treated as one: *DHN Food Distributors* [DHN ran food distribution business that wholly owned two subsidiaries; land owned by first subsidiary acquired by council and DHN sought compensation; Court of Appeal refused to adopt legalistic approach and held companies in group were partners giving DHN right to make claim; NOT FOLLOWED IN AU]
- *Prima facie Australian position*: less liberal approach, with companies in corporate groups to be treated as separate entities, with separate debts and creditors: *Industrial Equity v Blackburn*
 - *Quintex Australia Finance*: affairs of Quintex groups were so intertwined that Schroders did not know which entity it was actually indebted to, BUT no veil piercing
- *HOWEVER, ambiguity as AU law unclear and contested: Briggs v James Hardie*
 - *Torts/employees* – courts more likely to pierce veil for vulnerable persons like employees or tort victims compared to contractual creditors capable of due diligence: *Briggs v James Hardie* [asbestosis afflicted employee trying to sue parent corporation of asbestos mine operator]
 - Where companies are effective a 'partnership' they may be treated as one where the subsidiaries are "bound hand and foot to the parent company": *DHN Food* [ran a food distribution business and was holding company; two subsidiaries wholly owned by DHN]
 - *additional factors* – if undercapitalised, whether there is absolute dominance and what the intent was re formation of subsidiary may be relevant too: *Briggs v James Hardie*
- *alternative arguments where unlikely to establish piercing argument*:
 - duty of care owed by parent directly:
 - *CSR v Wren* [CSR owed duty directly to employee of wholly owned subsidiary who contracted asbestosis by virtue of proximity as employer]
 - vicarious liability
 - parent company may be vicariously liable for acts of employees appointed as nominee director on BOD of subsidiary
 - shadow directors: s 9(b)(ii) if parent/3rd party dominates affairs of company such that directors accustomed to acting according to wishes, parent may itself be considered a shadow director
 - *Standard Chartered Bank v Antico* [controlled company complied with controller's financial reporting requirements, actuality of control demonstrated, full access by controller to all records; together sufficient to establish shadow director]
 - *Buzzle v Apple* [Apple exercised degree of control as secured creditor but this did not make it a shadow director]