



HD APPROVED

CORPORATE LAW

MLP331

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

TOPIC	PAGE
1 REGULATORY FRAMEWORK	14
History of company law	14
Section 51(xx) of the Australian Constitution	15
<i>Corporations Act 2001</i> (Cth)	16
REGULATORS	16
1) The Australian Securities & Investments Commission (ASIC)	16
2) Australian Stock Exchange	17
3) Takeovers Panel	17
2 REGISTRATION & ITS EFFECTS	18
WHAT IS A COMPANY?	18
1) SEPARATE LEGAL ENTITY	18
Consequences of treating the company as a separate legal entity	18
2) LIMITED LIABILITY	19
3) PERPETUAL SUCCESSION	19
PIERCING THE CORPORATE VEIL	20
1) Where company used to avoid existing legal duty	21
2) Where company used to perpetrate a fraud	21
3) Insolvent trading	21
Lifting the corporate veil for group companies	21
CORPORATE LIABILITY FOR CRIMES AND TORTS	21
Direct liability: Organic theory	22
<i>Tesco Supermarkets Ltd v Natrass [1972] AC 153</i>	22
COMPANY VS OTHER FORMS OF BUSINESS ORGANISATIONS	22
3 TYPES OF COMPANIES	24
1) MEMBERS LIABILITY	25
i) Company limited by shares	25
ii) Company limited by guarantee	25
iii) Unlimited company	26
iv) No liability company	26
v) Company limited both by shares and guarantee	27
2) PUBLIC & PROPRIETARY COMPANIES	27

i) Small vs Large proprietary companies	28
Test: Small/Large Pty Co: s 45A	29
ii) Conversion from Proprietary to Public Company	29
3) ASX LISTED COMPANIES	29
i) Listing requirements	29
ii) Listing rules	30
iii) Listing requirements	30
4) HOLDING & SUBSIDIARY COMPANIES	30
i) Controlled entities	31
ii) Ultimate Holding Company	31
iii) Wholly-Owned Subsidiary	31
iv) Related Bodies Corporate	31
5) OTHER BODIES	32
Foreign companies: s 601CD	32
Registrable Australian Bodies: s 601CA	32
6) TYPE OF BUSINESS: TRUSTEE COMPANIES	32
i) Types of Trustee Companies	32
ii) Trustees' Right of Indemnity	32
iii) Liability of Directors of Trustee Companies	33
4 CONSTITUTION & REPLACEABLE RULES	34
A COMPANY'S INTERNAL GOVERNANCE RULES	34
REPLACEABLE RULES	34
After 1 July 1998 (Current)	34
Table of replaceable rules	35
THE COMPANY'S CONSTITUTION	36
Adoption & alteration of the constitution	36
EFFECT OF CONSTITUTION & REPLACEABLE RULES	37
Contractual Effect	37
i) Contract between Company and Members	37
ii) Contract between Members	37
iii) Contract between the Company and its Directors and Secretary	37
Non-compliance with internal governance rules	38
Limitations on enforcement of the statutory contract	38
<i>Eley v Positive Government Security Life Assurance Co Ltd</i>	38
LIMITS ON THE RIGHT TO ALTER A CONSTITUTION & REPLACEABLE RULES	38
1) Statutory requirements: Corporations Act	38
Corporations Act: Entrenching provisions	39
Variation of Class Rights	39
Oppression remedy	39

2) Common law	39
Expropriation of Shares: <i>Gambotto</i>	40
<i>Gambotto v. WCP Ltd (1995)</i>	40
Significance of <i>Gambotto</i>	40
5 THE COMPANY'S RELATIONS WITH OUTSIDERS	41
COMPANY CONTRACTS	41
1) CONTRACTING DIRECTLY	41
With a company seal: s 127(2)	41
Without a company seal: s 127(1)	42
Transaction Authorised	42
2) CONTRACTING THROUGH AN AGENT	42
Actual authority	43
Implied actual authority	43
i) Implied actual authority arising from appointing a person to a particular office	43
<i>Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971]</i>	43
ii) Implied actual authority arising from conduct	43
Apparent authority	44
CORPORATE LIABILITY FOR DEFECTIVE CONTRACTS MADE BY AGENTS	44
Defective contracts	44
What can a TP do to argue the contract is valid?	44
Indoor management rule: <i>Turquand's case</i>	45
<i>Royal British Bank v Turquand (1856)</i>	45
Indoor management rule: Exceptions	45
<i>Northside Developments Pty Ltd v Registrar-General</i>	45
Statutory assumptions	46
<u>s 129(1): Statutory indoor management rule</u>	46
<u>s 129(2): Assumptions about authority of officers</u>	46
<u>s 129(3): Assumptions about apparent authority</u>	46
<u>s 129(5)&(6): Documents properly executed</u>	47
s 128: When can assumptions be made?	47
Limitations on statutory assumptions	47
6 PROMOTERS & PRE-REGISTRATION CONTRACTS	47
SUMMARY	47
PROMOTERS & THEIR DUTIES	48
<i>Tracy v Mandalay</i>	48
Duties of promoters	48
Duty: Conflict of interest & disclosure	49
Remedies for breach	49
PRE-REGISTRATION CONTRACTS	50
Ratification	50
Person's liability in absence of ratification	50

Person's liability even with ratification	50
Release & indemnity	51
SUMMARY	51
7 FUNDRAISING	52
CORPORATE FINANCE: Debt and equity	52
FUNDRAISING BY ISSUING SHARES	52
1) MEMBER APPROVAL	52
2) RESTRICTIONS ON THE PEOPLE TO WHOM THE SHARES CAN BE OFFERED	53
3) CHAPTER 6D	53
Purpose of the Ch 6D fundraising provisions: Why is disclosure needed?	53
Ch 6D: Disclosure requirements	53
Exceptions: Do not need disclosure	53
Types of disclosure documents	54
Disclosure requirement	54
Consequences of breach of disclosure requirements	54
Who is liable?	55
Defences	55
SHARES	55
What is a share?	55
<i>Pilmer v The Duke Group [2001] HC</i>	55
Choses in action	56
What rights do shares confer?	56
Rights conferred by a constitution	56
Rights conferred by the Corps Act	56
Issue of shares	57
Classes of shares	57
Preference shares	59
Variation of class rights	59
Procedure to vary and cancel class rights	59
Challenging a variation of class rights	60
Other remedies	60
8 SHARE CAPITAL	60
Maintenance of share capital: Common law rule in <i>Trevor v Whitworth</i>	60
Maintenance of share capital: Modern statutory rules	61
Purpose of the <i>Corps Act</i> rules	61
Permitted share buy backs: s 257A	61
Permitted share capital reductions: s 256B	62
(a) Fair & reasonable to shareholders as a whole	62
(b) Ability to pay creditors	63
(c) Shareholder approval	63
Shareholder approval: Is reduction equal or selective?	63

Shareholder approval: What vote is required?	63
Shareholder approval: Notice requirements	64
<i>Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd (2000)</i>	64
Permitted financial assistance: s 209A	64
(a) No material prejudice	65
(b) OR shareholder approval	65
(c) OR financial assistance exemptions	65
Consequences of breaching s 260A	66
<i>Asic v Adler [2002]</i>	66
9 MEMBERSHIP	67
Significance of being a member	67
Becoming a member: s 231	67
Register of members	67
Significance of the register	67
Use of information on register: s 177	68
EVIDENCE OF SHAREHOLDING	68
1) Share certificates — unlisted companies	68
2) CHESS — Companies listed on ASX	68
TRANSFER OF SHARES	69
Liability of members	69
10 DIVIDENDS	70
Procedure for payment	70
Can shareholders force payment?	70
Effect of declaring a dividend: When does a debt arise?	70
Declaration of interim dividend: When does a debt arise?	71
Old law	71
New law	71
Remedies for improper dividend payments	72
Dividend franking	72
DEBT FINANCE	72
Debt and equity	73
Debt capital	73
Borrowing company v other debtors	74
Security	74
11 DEBENTURES & PERSONAL PROPERTY SECURITIES	75
DEBENTURES	75
How do debentures work?	75
<i>Personal Property Securities Act</i>	75
PERSONAL PROPERTY SECURITY REFORMS	76
<i>Personal Property Securities Act 2009 (Cth)</i>	76
Registration of security interests	76

Scope of the PPSA	76
Personal property securities	77
Non-circulating security interest	77
Circulating security interest	77
Circulating charges: Crystallisation	77
Retention of title	78
ENFORCEABILITY OF SECURITY INTERESTS	78
Enforceability against grantor: s 19	78
Enforceability against third parties: s 20	78
REGISTRATION OF "PERFECTION" OF SECURITY INTERESTS: s 21	78
Registration procedure	79
PRIORITY RULES	79
1) First default priority rule	79
2) Second default priority rule	79
3) Third default priority rule	79
Super priority of PMSIs	79
Circumstances where security interests may be invalidated	80
Security interests in favour of company officers	80
Personal property securities	80
12 DIRECTORS	80
DECISION MAKING	80
Who makes decisions	80
Types of decisions	80
Division of responsibility	80
DIRECTORS' DECISION MAKING POWERS	81
Can members override decisions of the board?	81
<i>Automatic Self-Cleaning Filter Syndicate Co Ltd v Cunninghame</i>	81
<i>John Shaw & Sons (Salford) Ltd v Shaw</i>	81
What can members who disagree with board decisions do?	81
MEMBERS' "RESERVED" DECISION MAKING POWERS	82
ROLE REQUIREMENTS	82
Requirements for company directors	82
Requirements for company secretary	82
Types of directors	83
Definition of a Director: s 9	83
DIRECTOR APPOINTMENT	83
Who can be appointed as a director?	83
How are directors appointed?	84
DIRECTOR DISQUALIFICATION	84
How can a director be disqualified?	84
BOARD MEETINGS	84

Can boards delegate their powers?	85
Responsibility of directors for actions to delegate	85
13.1 CORPORATE GOVERNANCE	86
Importance of CG	86
<i>Corporations Act</i> rules impacting on CG	87
ASX CG listing rule	87
CORPORATE GOVERNANCE PRINCIPLES AND GOOD PRACTICE	87
PRINCIPLE 1) ROLE & FUNCTIONS OF THE BOARD & MANAGEMENT	87
Responsibilities of the board	87
PRINCIPLE 2) STRUCTURE & COMPOSITION OF THE BOARD	88
Chair	88
Nomination committee	88
Diversity on boards	89
PRINCIPLE 3) CODE OF CONDUCT	90
PRINCIPLE 4) AUDIT COMMITTEE	90
PRINCIPLE 5) TIMELY DISCLOSURE	90
PRINCIPLE 6) RESPECT THE RIGHTS OF SHAREHOLDERS	90
PRINCIPLE 7) RISK MANAGEMENT AND INTERNAL CONTROL	91
PRINCIPLE 8) RENUMERATION	91
13.2 DUTIES OF DIRECTORS	91
General law vs statutory duties	91
Who owes these duties?	92
Who are the duties owed to?	92
Duty to individual shareholder/s?	92
Who can enforce the duties?	92
Consequences of breaching a duty	93
DUTY OF CARE	93
Sources of duty of care	93
DUTY: CARE AND DILIGENCE	93
Who owes the duty?	93
Standard of care expected	93
<i>Daniels v Anderson (1995)</i>	94
The reasonable person standard	95
FACTORS IMPACTING THE STANDARD OF CARE, SKILL AND DILIGENCE	95
Company's circumstances: s 180(1)(a)	95
Director's office & responsibilities: s 180(1)(b)	95
EXECUTIVE V NON-EXECUTIVE DIRECTORS	95
Standard of care of executive directors	95
Chair	96
When appointed for particular skill	96
BREACH OF DUTY OF CARE	96

BUSINESS JUDGEMENT RULE: s 180(2)	96
Importance	96
Principle	97
DELEGATION & RELIANCE	97
Directors responsible	97
Defence	97
<i>ASIC v Adler [2002]</i>	98
DUTY: GOOD FAITH & PROPER PURPOSE: s 181	99
FIDUCIARY OBLIGATIONS	99
Fiduciary relationships	99
Fiduciary obligation	99
A) Duty to act in good faith in the best interests of the company: s 181(1)(a)	99
'Good faith'	100
Company interests: Members	100
Individual shareholders	100
<i>Coleman v Myers [1977]</i>	101
<i>Brunninghausen v Glavanics (1999)</i>	101
Company's interests: Creditors	101
Company's interests: Corporate groups	101
Company's interests: Employees, customers, suppliers and the community	102
B) Duty to exercise powers for a proper purpose: s 181(1)(b)	102
What powers do directors have? Directors' power of management	102
Proper purpose: TEST	103
<i>Howard Smith Ltd v Ampol Petroleum Ltd [1974]</i>	103
Mixed purpose and the 'but for' test	104
Other examples of improper purpose	104
<i>Australian Metropolitan Life Assurance Co Ltd v Ure (1923)</i>	104
CONSEQUENCES OF BREACH: Duty to act in good faith and for proper purpose	104
Remedies for breach of statutory duty	104
Remedies for breach of common law duty	105
DUTY TO RETAIN DISCRETION	105
DUTY TO AVOID CONFLICTS OF INTEREST + DISCLOSURE: Ch 13.3	105
COMMON LAW RULES: Duty to avoid conflicts of interest	105
Who owes the common law duties?	106
<i>Transvaal Lands Co v New Belgium</i>	106
Loss to company or profit to director not necessary	106
Taking corporate property, information & opportunities	106
<i>Furs Ltd v Tomkies (1936)</i>	107
<i>Regal (Hastings) Ltd v Gulliver [1967]</i>	107
<i>Peso Silver Mines v Cropper (1966)</i>	107
Confidential information: Factors to determine whether information is confidential	108
Examples of misuse of confidential information	108

CONSTITUTION: Duty to avoid conflicts of interest	109
CORPORATIONS ACT: Duty to avoid conflicts of interest	109
1) Duty to disclose material personal interest: s 191	109
Material personal interest	110
Exempt Interest	110
Standing notice: s 192	110
Entitlement of interested director to vote	111
Consequence of breach	111
2) Duty not to misuse information or position: ss 182 & 183	111
Improper use of position or information	111
To gain advantage or benefit: <i>Chew v R</i>	112
Advantage even if no profit: <i>R v Donald</i>	112
<i>ASIC v Vizard [2005]</i>	112
Consequence of breach	113
3) Related party transactions: Ch 2E	113
Financial benefits to directors of public companies	113
How to solve a 'related party transaction' problem	113
Exemptions	114
Arm's length transaction	114
Member approval	115
<i>ASIC v Adler [2002]</i>	115
Consequences of breach	115
DUTY TO PREVENT INSOLVENT TRADING: Ch 13.5	116
Four essential elements	116
1) Person was a director when the company incurs a debt: ss 588G(1)(a) and (b)	116
s 588G(1)(a): Who owes the duty?	116
s 588G(1)(a): What types of debts can be incurred?	116
2) The company must be insolvent: s 588(1)(b)	118
Rebuttable presumptions of insolvency	119
3) There were reasonable grounds for suspecting insolvency: s 588G(1)(c)	119
<i>Williams v Scholz [2007]</i>	119
4) Section 588G(2) —	120
DEFENCES	120
1) Reasonable grounds to <i>expect</i> solvency: s 588H(2)	120
<i>Hall v Poolman [2007]</i>	120
2) Reasonable reliance on information provided by others: s 588H(3)	121
3) Absence from management: s 588H(4)	121
<i>Deputy Commissioner of Taxation v Clark (2003)</i>	121
4) Reasonable steps to prevent incurring of debt: s 588H(5)	121
Consequences of breach of duty to prevent insolvent trading	122
REMEDIES & PENALTIES FOR BREACH OF DUTY: Ch 13.6	123

Enforcement of directors' duties by ASIC	123
CONTRAVENTION OF THE <i>CORPS ACT</i>	123
1) Prescribed offence	123
2) Civil penalty provision	124
i) Pecuniary penalty order: s 1317G	124
ii) Disqualification order: s 206C	125
<i>ASIC v Vizard [2005]</i>	125
<u>Factors in determining punishment that should be imposed under civil penalty provisions: <i>ASIC v Vizard [2005]</i>:</u>	
125	
Compensation order: s 1317H	125
3) Criminal penalty provision	125
The company's civil remedies	126
1) Civil remedies for breach of common law duty	126
2) Civil remedies for breach of statutory duty	127
EXONERATION & RELIEF FROM LIABILITY FOR BREACH OF DUTY: Ch 13.7	128
When can relief from liability be given by the court?	128
When can breach of duty be ratified by the Company?	128
When can breach of duty NOT be ratified by the Company?	128
Indemnity and insurance	128
Insurance for breach of duty	129
Prohibition on indemnification for breach of duty	129
14 SHAREHOLDERS' MEETINGS	130
MEMBERS' MEETINGS	130
Requesting members' meeting	130
<i>Re Totex- Adon Pty Ltd and the Companies Act (1980)</i>	131
Who decides the agenda?	132
Notice requirements	132
If proper notice not given: Procedural irregularities	134
Conducting meetings	134
<i>Campbell v Jervios Mining Ltd (2009)</i>	134
Corporate representatives	135
Minutes	135
Member voting	135
Irregularities: s 1322	136
<i>Bell Resources Ltd v Turnbridge Pty Ltd (1988)</i>	136
17 MEMBERS' STATUTORY RIGHTS & REMEDIES	137
Statutory member remedies	137
1) STATUTORY DERIVATIVE ACTION: s 236	137
Section 237: Elements	138
i) Inaction by the company	138
ii) Applicant's good faith	138

iii)	Best interests of the company	138
	<i>The Court in Swansson v RA Pratt Properties Pty Ltd considered the following factors:</i>	138
	Rebuttable presumption	139
iv)	Serious question to be tried	139
v)	Notice of proceedings to the company	139
	<i>Charlton v Baber [2003]</i>	140
2)	OPPRESSIVE OR UNFAIR CONDUCT: s 232	141
	Remedies: s 233	141
	Main elements:	141
i)	What types of companies can the oppression remedy apply to?	142
ii)	Who can apply for the oppression remedy?	142
iii)	What type of conduct may be oppressive?	142
iv)	What is the meaning of oppressive and unfair?	143
v)	Examples of oppressive conduct	143
	<i>Scottish Co-operative Wholesale Soc Ltd v Meyer (1959)</i>	144
	<i>Sanford v Sanford Courier Services Pty Ltd (1986)</i>	144
	<i>Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd [2001]</i>	144
	<i>Mopeke Pty v Fine Foods Pty Ltd (2007)</i>	144
	<i>Re Overton Holdings Pty Ltd [1985]</i>	145
	<i>Hannes v MJH Pty Ltd (1992)</i>	145
vi)	Remedies for oppression	145
	<i>Re H R Harmer Ltd (1959)</i>	146
	<i>Hannes v MJH Pty Ltd (1992)</i>	146
3)	WINDING UP COMPANY: s 461	146
	Grounds for compulsory winding up	147
	Who can apply to have company wound up?	147
4)	STATUTORY INJUNCTION: s 1324	148
	What is a statutory injunction?	148
	Who can apply for a statutory injunction?	148
	Section 1324 and directors' duties	148
5)	RIGHT TO INSPECT BOOKS: s 247A	148
	What are company books?	149
	Other rights	149
6)	MEMBERS' PERSONAL RIGHT OF ACTION	149
	SUMMARY	150
21	ASIC INVESTIGATION POWERS	151
	SOURCES OF ASIC INVESTIGATORY POWERS	151
	POWERS TO QUESTION PERSONS	151
	POWERS TO INSPECT COMPANY BOOKS	151
	CONSEQUENCES OF INVESTIGATIONS	151

22 CORPORATE INSOLVENCY	152
Main forms of external administration	152
AIMS OF INSOLVENCY LAW	152
23 RECEIVERSHIP	153
RECEIVERSHIP: OVERVIEW	153
What is receivership?	153
Who may be a receiver?	153
WHO MAY APPOINT?	154
a) Appointment by secured creditor	154
What happens if appointment is defective?	154
What relief can receiver obtain that appointment is valid?	154
b) Appointment by Court	155
LEGAL EFFECT OF APPOINTMENT	155
SOURCES OF RECEIVERS' POWERS	155
Statutory powers of receivers: s 420	155
Power to obtain information	156
DUTIES OF A RECEIVER	156
Conflict between interests of secured creditor & debtor company	156
Reasonable care: Section 420A	156
Other statutory duties	156
When does receivership end?	157
24 VOLUNTARY ADMINISTRATION	157
VOLUNTARY ADMINISTRATION: OVERVIEW	157
Aim of voluntary administration: s 435A	157
ADMINISTRATION PROCESS	157
Who initiates voluntary administration?	158
ROLE OF VOLUNTARY ADMINISTRATOR	159
ADMINISTRATION 'SAFETY ZONE'	160
Exceptions to creditors moratorium on enforcing security	160
ADMINISTRATOR'S LIABILITIES	161
Outcomes of 2nd creditor's meeting	161
1) DEED OF COMPANY ARRANGEMENT	161
What can the deed say?	162
Effect of deed of company arrangement	162
Why would creditors agree to a deed of company arrangement?	162
How does the deed come to an end?	163
25 LIQUIDATION	163
LIQUIDATION / WINDING UP: OVERVIEW	163
TYPES OF LIQUIDATION	164
1A) MEMBERS' VOLUNTARY WINDING UP	164
a) Solvency statement: s 494	164

b)	Members resolution: s 491; ASIC Form 205	164
c)	Liquidator: s.495(1)	164
d)	Business ceases: s 493; s 493A	165
e)	Directors power cease: s 495(2)	165
f)	Deregistration	165
2A)	CREDITORS' VOLUNTARY WINDING UP	165
a)	Members resolution: s 491	165
b)	OR: Creditors vote: s 446	165
2A)	COMPULSORY WINDING UP IN INSOLVENCY	166
a)	Insolvent company: What is insolvency?	166
b)	Application to court: Proof of insolvency	167
e)	Statutory demands & Winding up	167
	Timeline	168
c)	Provisional liquidator	168
d)	Application determined	168
2B)	COMPULSORY WINDING UP ON GROUND OTHER THAN INSOLVENCY	168
b)	Grounds: s 461	168
	LIQUIDATOR'S FUNCTIONS & DUTIES	169
	Liquidator's powers: s 477	169
	Funds available for distribution by liquidator	170
	RECOVERY OF ASSETS & VOIDABLE TRANSACTIONS	170
1)	Unfair preferences	170
	TEST: s 588FA	171
2)	Uncommercial transactions	171
	TEST: s 588FB	171
3)	Unfair loans	172
4)	Unreasonable director-related transactions	172
	SUMMARY EXAMPLE	172
	SECURITY INTERESTS IN FAVOUR OF COMPANY OFFICERS	173
	How are funds distributed?	174
	DEREGISTRATION	174
	Effects of deregistration: s 601AD	175

1 REGULATORY FRAMEWORK

INTRODUCTION + HISTORY

Corporate law = structure and regulation of corporate entities

Why is company law important?

- “The limited liability corporation is the greatest single discovery of modern times. Even steam and electricity are less important than the limited liability company”. — N M Butler, President of Columbia University, 1911.
- “We may think this is a rather extravagant claim, but its general thrust is clear, and telling: the importance of the corporate form and of limited liability over the past century and a half has been immeasurable; the greater part of the commercial expansion, the scientific development and the many other achievements which have changed the shape of society during and since the industrial revolution have come about through the medium of the limited company”. — LS Sealy, *Company Law and Commercial Reality* (1984).
- companies are essential actors in the economy — they are the entity of choice for business and commerce in Australia and internationally

History of company law

- 15th century — corporate aggregates created by Royal Charter granted to monasteries, boroughs and trade guilds
- Revolution of 1688 — companies created by Private Acts of Parliament

Joint Stock Companies

- 17th century —
 - joint stock companies
 - unincorporated entities
 - basis of the modern day company
 - shares transferrable
 - voting rights attached to shares
 - profits distributed through dividends
- *Bubble Act 1720* (UK) —
 - speculation in joint stock shares
 - South Sea Company
 - Bubble Act — confines trading to the sale of shares in formally incorporated bodies
- 1825 — Bubble Act repealed
- 1844: Incorporation by registration —
 - i.e. not by Royal Charter or Act of Parliament
 - distinct legal entity with perpetual succession **but** shareholders did not have limited liability
 - “... legislative ancestors of modern company law.” (Ford, p. 41)
- *Limited Liability Act 1855* —
 - liability of investors ‘limited’ to the amount they agreed to invest
 - catalyst: large amount of capital required to finance new railways
 - ‘limited’ at end of company’s name warned of shareholder’s diminished liability (Today: Ltd, Pty Ltd)

Company law in colonial Australia

- *Companies Act 1862* (UK) — adopted by Australian colonies as their company law
- Late 19th century Victorian Developments —
 - need for capital to fund gold mining prompt unique Victorian company law developments

- 1871: no liability mining company
- 1896: failures in the 'land boom' lead to restrictions on 'proprietary companies' — compulsory audit and annual presentation of financial statements
- 1901: Federation —
 - **s 51(xx)** Constitution: The Parliament shall... have power to make laws ... with respect to: ... Foreign corporations, and trading or financial corporations **formed** within the limits of the Cth
 - each state retained its own company legislation

Quest for Cth/State uniformity

- 1961: 62 cooperative regime — states enacted uniform companies legislation, but the state Acts were not uniform and variations increased with time
- *Companies Act 1981* (Cth) —
 - Cth enacted *Companies Act 1981* (Cth) in ACT and NT per **s 122** Consti
 - each state enacted a Companies Code that was uniform with the Cth Companies Act

Quest for Cth Control

- *Corporations Act 1989* (Cth) — Cth legislated independently of the States to introduce a national scheme: *Corporations Law* scheme
- *NSW v Cth* (1990) — HC held that the Cth lacked power under the Constitution to make laws about the incorporation of companies

The road to company law harmony in Australia

- Today, companies are regulated by Commonwealth legislation, the *Corporations Act 2001* (Cth)
- Originally, company law was regulated by each State (and the Commonwealth on behalf of the Territories)
- This fragmented 'federal' system resulted in 7 separate sets of legislation that regulated company law in Australia
- Throughout the 20C, attempts were made to cooperate between the States and Commonwealth to achieve a uniform companies law
- These attempts were not very successful, so in 1989 the Commonwealth tried to take control and legislate for all States (so there would be just one piece of legislation)
- Problem: **s 51(xx)** of the Australian Constitution
- HC in *NSW v Cth* (1990) said the Commonwealth did not have the power under **s 51(xx)** of the Constitution to legislate in relation to the 'incorporation' of companies
- After this, the States all agreed to refer their powers in respect of companies to the Commonwealth
- Commonwealth then passed the *Corporations Act 2001* (Cth)

Section 51(xx) of the Australian Constitution

- **s 51(xx)** empowers the Commonwealth Parliament (i.e. **not** the States) to: "make laws ... with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth"

NSW v Cth (1990)

- does **s 51(xx)** grant the Cth the power to make laws in relation to the 'incorporation' of companies?
- s 51(xx) empowers the Cth to: "make laws ... with respect to... foreign corporations, and trading or financial corporations **formed** within the limits of the Commonwealth"

Held — majority of High Court (6:1)

- the word 'formed' is used in the past tense to refer to companies that have already been incorporated
- this means the Cth **cannot** rely on **s 51(xx)** to make laws about bringing new companies into existence (i.e. the process of incorporating companies)
- "the power conferred by **s 51(xx)** to make laws with respect to artificial legal persons is not a power to bring into existence the artificial legal persons upon which laws made under the power can operate" (para 8)

Corporations Act 2001 (Cth)

- state referral of power to the Cth under **s 51(xxxvii)** Consti
- Act commenced operation on 15 July 2001

- The Cth was able to enact this legislation after the States agreed to refer their power over corporations to it
- The Corps Act is to be read in conjunction with the principles of common law relating to companies which have evolved over the years

Note: referral needs **continuous renewal** (see right)

REGULATORS

There are 3 main regulators:

- 1) Australian Securities and Investments Commission (ASIC)
- 2) Australian Stock Exchange (ASX)
- 3) Takeovers Panel

1) The Australian Securities & Investments Commission (ASIC)

- Commonwealth Agency (b/c referral of State power); ASIC is the principal body charged with the administration of the law relating to companies
- responsible for ensuring the *Corps Act* is complied with
- legislative authority:
 - *ASIC Act 2001* (Cth)
 - *Corporations Act 2001* (Cth)
- powers include:
 - investigate breaches of the *Corps Act* — includes power to compel a person to produce all relevant books and records
 - instigate civil proceedings and criminal prosecutions (concurrent with DPP)
 - advises ministers on necessary changes to the *Corps Act*
 - educational role
- more than 2 million Australia companies; 99% of these companies limited by shares
- Accountability of ASIC: The Parliamentary Joint Committee on Corporations and Financial Services is elected to provide some level of parliamentary supervision over the operations of ADIC

2) Australian Stock Exchange

- private company
- public companies that 'list' on the stock exchange 'contract' with the ASX that they will comply with the Listing Rules

3) Takeovers Panel

- a peer reviewed body at least 5 members; The Takeovers Panel has been established as the primary forum for the resolution of disputes arising from takeover transactions
- important part of the machinery for the control of company takeovers (Formerly, these powers were held by the Courts)
- has power to declare 'unacceptable circumstances'

OTHER REGULATORS

- The **Companies Auditors and Liquidators Disciplinary Board** — established to register and discipline company auditors and liquidators who do fail to discharge their duties properly

RECENT REFORMS

- The *Insolvency Law Reform Act 2016* (Cth) aims to promote a high level of practitioner professionalism and competency, enhance transparency and communication between insolvency practitioners and stakeholders, and promote increased efficiency in insolvency administration.

2 REGISTRATION & ITS EFFECTS

WHAT IS A COMPANY?

There are 3 main concepts re: company

- 1) **Separate legal entity**
- 2) **Limited liability**
- 3) **Perpetual succession**

1) SEPARATE LEGAL ENTITY

- on registration, a company becomes a separate legal person: **s 119**
- **s 124**: The company has the legal capacity of —

- natural person (own property, contract (*Salomon v Salomon & Co Ltd*), sue and be sued)
- body corporate (issue shares, grant a security interest)
- a company is a separate legal entity even though a single person manages and controls it: *Salomon v Salomon & Co Ltd* (see more below)

Consequences of treating the company as a separate legal entity

- Company's obligations and liabilities are its own, and not those of its participants
 - Shareholders have limited liability
 - Liability of shareholders is limited to the amount they have not paid on their shares.
 - So if a shareholder has fully paid for the shares – he has no liability
 - If only paid \$1 on a share that was issued by a company at the price of \$3 – the shareholder's liability would be limited to the amount unpaid on the share - \$2
- Company can sue and be sued in its own name
- Company has perpetual succession
- Company's property is not the property of its participants
- Company can contract with its participants
- A person may **concurrently** have a variety of legal relationships with a company (e.g. director, shareholder and employee): *Lee v Lee's Air Farming Ltd* [1961] AC 12

Example:

A and B each own 50% of the shares in AB Co Pty Ltd. There are no shareholders. AB Co owns property worth \$1 million. What's A's interest in the property? Answer: no interest, property owned by company, not shareholders (separate legal entity)

Example:

You go into a Telstra shop to get a mobile contract. The sales rep promises great coverage. He takes your details and issues the contract. The service is (surprisingly) terrible. Whom do you sue? Answer: Telstra (company)

4) LIMITED LIABILITY

- Liability of shareholders is **limited to the amount unpaid on their shares**

5) PERPETUAL SUCCESSION

- the corporation continues to exist despite the death, bankruptcy, insanity, change in membership or an exit of any owner or member, or any transfer of shares.

Case examples

Salomon v Salomon & Co Ltd [1897] AC 22

- Mr S was the sole trader of a shoe and leather business. Co Act 1862 (UK) required 7 shareholders. Salomon & Co Ltd incorporated.
- Mr S 99% shareholder and managing director. Mr S sold business to Co for shares and secured debt. Business failed, assets of Co insufficient to repay secured (Mr S) and unsecured creditors.
- liquidator argued that because the business operated by the Company was the same as that operated by Mr S, and because Mr S had effective control of the company, the court should hold Mr S liable for the loss suffered by the company

Held — House of Lords:

- a company is a separate legal entity even though a single person manages and controls it
- a company can contract with its controlling participants

- “The company is at law a different person altogether from the subscribers to that memorandum [shareholders]; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided in the Act” (Lord Macnaughten at 51)
- In rejecting the agency argument, Lord Halsbury LC observed: “I observe that the learned judge (Vaughan Williams J) held that the business was Mr Salomon’s business, and no one else’s, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.” (31)

Lee v Lee’s Air Farming Ltd [1961] AC 12

- Company operated a crop dusting business. Mr Lee was the main shareholder and managing director of the company. Mr Lee was also employee pilot. While working, Mr Lee was killed in a plane crash. Mrs Lee claimed she was entitled to workers compensation because Mr Lee was an employee. Insurer argued Mr Lee could not be an employee and employer.

Held — Privy Council:

- a company is a separate entity from its controller — who may also be its sole employee
- a company is a separate legal entity and a person may concurrently have a variety of legal relationships with that company

Macaura v Northern Assurance Co Ltd [1925] AC 619

- Macaura (M) assigned right to timber to a company, received shares in consideration. Timber destroyed in fire. M claimed insurance — policy was in his individual name, not in name of company.

Held — House of Lords:

- shareholders do not have a proprietary interest in a company’s property
- insurance legislation required policy holder to have an ‘insurable interest’ in the property
- the company was the owner of the timber, not M (meaning he did not have an ‘insurable interest’ and so could not claim on the insurance for the damaged timber)
- Lord Buckmaster: “no shareholder has any right to an item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”

What is a ‘corporation’ for the purposes of s 51(xx) of the Constitution?

CEPU v Queensland Rail (2015) 256 CLR 171

- QRTA Act 2013 (Qld) established the Queensland Rail Transit Authority
- all the powers of an individual — specifically including power to enter into contracts, acquire, hold, dispose of, and deal with property, employ staff, appoint agents and engage consultants
- my sue and be sued in the name it is given
- **‘is not a body corporate’**. Why? — if QR is not a ‘constitutional corporation’ it would not be subject to commonwealth industrial relations laws (*Fair Work Act*)

Held — French CJ, Hayne, Kiefel, Bell, Keane & Nettle JJ

- ‘the [QRT] Authority is created as a separate right and duty bearing entity. It may own, possess and deal with real or personal property. It is an entity which is to endure regardless of change in those natural persons who control its activities and, in that sense, has ‘perpetual succession’. Its constituting Act provides for mechanisms by which its assumption of rights and duties may be formally recorded and signified. The Authority has “the full character of a corporation.” [38]

Held — Gageler J:

- ‘the statutory declaration that Queensland Rail is not a body corporate ... is ineffective to prevent Queensland Rail answering the constitutional description of a corporation. It answers that description because it is an entity established by law with capacity to own property, to contract and to sue’ [49].
- ‘Queensland Rail has legal personality because it is legislatively conferred with capacity to own property, to contract and to sue. It is unnecessary to consider whether any lesser subset of those attributes might suffice. The statutory declaration that Queensland Rail is not a body corporate does not deprive Queensland Rail of any of those attributes’ [67].

PIERCING THE CORPORATE VEIL

- legal rules that grant the company 'separate legal personality' and separate the company from its participants (e.g. shareholders, directors) are referred to as the veil of incorporation or corporate veil
- *Salomon's* case established that a company and its participants **must be treated separately** — i.e. the corporate veil protects the company's participants from liability
- this is the general rule in Australia

Only in **exceptional circumstances** will a court pierce the corporate veil and disregard the separate legal personality of a company:

Common law exceptions —

- 1) Where company used to avoid existing legal duty
- 2) Where company used to perpetrate a fraud

Statutory exceptions —

- 1) Insolvent trading
- 2) Debts incurred as trustee

1) Common law exception: Where company used to avoid existing legal duty

- corporate veil may be pierced where company formed for sole or dominant purpose of avoiding an existing duty
- **Note:** is okay to form a company to limit personal liability for **future obligations**, but not to avoid **existing obligations**

Gilford Motor Co Ltd v Horne — company formed for sole/dominant purpose of avoiding a non-compete clause

Jones v Lipman — company formed for sole/dominant purpose of avoiding contract for the sale and purchase of land

6) Common law exception: Where company used to perpetrate a fraud

- corporate veil may be lifted where the company is being used as a vehicle for fraud: *Re Darby* [1911] 1 KB 85

7) Statutory exemption: Insolvent trading

- **Insolvency** = company cannot pay its debts as they fall due for payment
- *Corps Act* lifts the corporate veil when a company trades while insolvent and imposes personal liability on directors for the company's debts: **s 588G**
- **s 588G:** directors become personally liable if they fail to prevent the company incurring a debt when there are reasonable grounds to suspect the company is insolvent or the debt will render the company insolvent
- defences: **s 588H** (see **topic 5**)

Lifting the corporate veil for group companies

"...the court is not free to disregard the principle of *Salomon v Salomon* merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to

be treated as separate legal entities with all the rights and liabilities that would normally attach to separate legal entities”: *Adams v Cape Industries plc*

CORPORATE LIABILITY FOR CRIMES AND TORTS

- a company is a legal fiction
- so how does the law impute an ‘action’ or ‘state of mind’ to a company to hold the company liable for criminal or civil wrongs?

Vicarious liability

- under common law, an employer (E.g. Company) is vicariously liable for the acts of its employees in the course of employment — i.e. Actor is personally liable and company is vicariously liable
- legislation may provide that company is liable for the actions of its employees and agents
 - e.g. **s 84(2) Competition and Consumer Act 2010 (Cth) (CCA)**: “Any conduct engaged in on behalf of a body corporate by a director, employee or agent of the body corporate within the scope of the person’s actual or apparent authority shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.”

Direct liability: Organic theory

- applies to crimes and torts
- company may be primarily liable when the act/intent of a person are taken under the ‘organic theory’ to be the act/intent of the company itself: *Tesco Supermarkets Ltd v Natrass* [1972] AC 153
- company liable for the act/intent of employees “who represent the directing mind and will of the company, and control what it does”: *HL Bolton (Engineering) v TJ Graham and Sons Ltd* [1956]
 - “Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such.” per Lord Denning in *HL Bolton (Engineering) v TJ Graham and Sons Ltd* [1956]
- whether person constitutes the mind and will of the company determined on a case-by-case basis — seniority is key factor

Tesco Supermarkets Ltd v Natrass [1972] AC 153

- radiant washing powder advertised at sale price. Sale items all sold, shop assistant restocked items, but at full price. Shop manager not aware of this. Offence under legislation to sell products at higher price than as advertised. Defence available if due to act or omission of another person. Tesco argued that the shop manager and shop assistant were ‘another person’.

Held — House of Lords:

- Court applied the ‘organic theory’ to the shop manager and shop assistant and held that neither represented the directing mind and will of the company
- accordingly, the acts of the shop manager and shop assistant were not the acts of the company

COMPANY VS OTHER FORMS OF BUSINESS ORGANISATIONS

The company structure is the most popular structure for operating a business, but it is not the only option. You need to know what the alternatives are and when to use them:

1) Company

Pros

- separate legal entity, limited liability, perpetual succession
- flexibility: share classes, liquidity
- finance

Cons

- *Corps Act* compliance
- establishment and ongoing cost
- shareholders less involved in management
- Public disclosure requirements

2) Sole Proprietor/Trader

- Individual conducts his/her own business.

Pros

- simple
- minimal establishment costs
- minimal regulatory compliance issues
- high level of control

Cons

- no limited liability
- small size makes raising finance difficult
- limited lifespan

3) Partnership

- Carrying on a business in common with a view to profit: **s 5 Partnership Act**

Pros

- minimal establishment costs: only need meet definition of partnership
- minimal regulatory compliance issues
- active in the conduct of the business

Cons

- no separate legal entity: partners contract personally for the partnership
- risk: partners incur debts/obligations on behalf of other partners i.e. joint and several liability
- size limited to 20 partners (subject to exceptions)

4) Joint Venture

- Contractual relationship similar to partnership but relationship is not a business in common

Pros

- severally liable: i.e. obligations and liabilities can be individualised (unlike partnership)
- inexpensive to create and maintain

Cons

- no limited liability
- no perpetual succession

5) Trust

- a relationship, not a legal entity
- many types

Pros

- beneficiaries have an equitable interest in trust property; contra shareholders who have no legal/equitable interest in company property
- income splitting — but may be contrary to anti-tax avoidance

Cons

- maximum life span of 80 years (law against perpetuities)
- beneficiaries have limited powers (unlike shareholders)
- no separate legal entity; trust cannot hold property, contract, sue or be sued
- trustee personally liable (may have right of indemnity from trust assets and beneficiaries)

6) Business

- not an entity; A business is an asset, or collection of assets, contracts, licenses etc.

3 TYPES OF COMPANIES

REGISTRATION PROCESS

How to create a company

- Lodge application form 201 with ASIC & pay fee (currently \$469)
- **s 117 CA** sets out the prescribed contents of the application:
 - Whether company proprietary or public
 - Members, number of shares and share classes
 - Directors
 - Pty – one ordinarily residing in Australia;
 - Public – min of 3, 2 ordinarily residing in Australia
 - Secretary
 - Public – must have
 - Consents of members, directors and secretary
 - Address of registered office
 - Constitution or replaceable rules
 - Company name
- ASIC registers company, allocates ACN, issues certificate of registration (http://download.asic.gov.au/media/1181215/201_20140701.pdf)

The effect of registration

- On registration, a company becomes a separate legal person: **s 119**
- **s 124**: Legal capacity of —
 - natural person (own property, contract, sue/be sued)
 - body corporate (issue shares, grant a charge)

CORPORATIONS & COMPANIES

General definition: Body corporate/corporation = entities recognised by the law:

- as separate from their members; and
- capable of acting in their own rights

The types of companies available under the Corporations Act differ in how they treat: (1) member liability and (2) their public status

Definition by the CA, **s 57A:**

A corporation includes:	A corporation does not include:
a company	an exempt public authority
any body corporate	A corporation sole; e.g. the Public Trustee
an unincorporated body	—

TYPES OF COMPANIES

- 1) **Members liability:** Limited liability or unlimited liability
- 2) **Public status:** Proprietary and public companies
- 3) **ASX Listed companies**
- 4) **Related companies:** Holding and subsidiary companies
- 5) **Place of formation:** Foreign companies
- 6) **Registrable Australian bodies**
- 7) **Type of business:** Trustee companies

1) MEMBERS LIABILITY

i) Company limited by shares

- **99%** of all companies registered in Australia
- can be a public or proprietary company
- may **raise funds** (equity or share capital) by **issuing shares** to investors
- **CA s 516:** member's liability to the company limited to the amount unpaid on their shares — so if shares are fully paid, there is no liability risk
- **CA s 9:** a company formed on the principle of having the liability of its members limited to the amount, if any, unpaid, on the shares respectively held by them
 - **fully paid shares:** the investor pays the entire issue price on one instalment, a shareholder has no liability to contribute to any further amounts to the company
 - **partly paid shares:** an investor pays only part of the issue price immediately a shareholder is liable to pay the balance of the issue price if the company makes a call
- Warning to creditors — **CA s 148(2):** "**limited**" or "**Ltd**" must be as a part of and at the end of its name

ii) Company limited by guarantee

- member's liability limited to amount member undertaken to contribute if company wound up: **s 517**