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Categories of Corporate Theories

Is the corporation a real thing or not?

YES	NO
<ul style="list-style-type: none"> • Managerialist (co-ordinator of production) • Aggregate/natural entity (more than the sum of shareholders) • Communitarian (company as a social institution) <ul style="list-style-type: none"> ○ Impact of large corporations is very significant in today's society so corporations should be accountable to anyone who is impacted by the corporate activities, thus accountable to lenders, employees, local communities and investors, etc. ○ Have a particular role for Corp law - the parties that enter do so on an unequal basis, there is an inequality of bargaining power between stakeholders and directors • Political institution (company as an expression of social power) • Feminist (company as a social institution founded on gender bias, inequality, exploitation of property rights and conflict) 	<ul style="list-style-type: none"> • Contractarian (economic) – a corporation is a nexus of contracts <ul style="list-style-type: none"> ○ Minimise agency costs - cost of the shareholders monitoring the management ○ Shareholder primacy theory - benefits should go exclusively to shareholders because they are the residual claimants as they risk their money thus the benefits should go to them ○ Best way to minimise agency costs is to let the parties do it themselves

<u>Theory</u>	<u>What is the corporation?</u>	<u>Constituency</u>	<u>Role for Law</u>	<u>Rationale of role for law</u>
Managerial	Co-ordinator of production; contrast to market	Shareholders	Strengthen management accountability; empower shareholders	Accountability of managers diminished
Contract	Contracts between self-interested parties; surrogate market	Shareholders	Minimal regulation	Parties not state can find the best way to reduce agency costs
Team Production	Mediating hierarchy or production coalition of team members;	Stakeholders	Maintain status quo	Theory is to better describe reality not for law reform
Communitarian	Community of various parties who owe each other mutual duties and support	Stakeholders including local community; workers; creditors and shareholders	Create duties to all stakeholders	Parties unable to protect themselves due to unequal power

- Qintex claimed Schrodgers couldn't do this as currency dealing was done on behalf of another co in the Qintex group, QTL.
- Person from Schrodgers claimed **"it was not my practice to ask which of the Qintex companies was responsible for the deal. I . . .did not differentiate between companies in the group"** at 268]
- Judge found **"The facts and documentation point to QTL [another company in the qintex group] as the party to the contract rather than the plaintiff."**

On separate entity of co within corporate group see also

- The dominant view in Australia is to UPHOLD separate entity
- *Adams v Cape Industries* [1990] 2 WLR 657
- *Walker v Wimborne* (1976) 137 CLR 1(High court)

Criminal liability

- A company can be criminally liable
- Problems with corporate criminal liability:
 - Finding intent
 - Difficult to find MR and distil MR in the corporation b/c a corporation is not a natural person
 - Punishment
 - How do you punish a corporation thus fines are imposed and if you fine a corporation you may also hurt the creditors
 - Separating acts attributable to the company from those attributable personally to the actors
 - Need to do things in order to commit crimes and these are generally done by natural persons – when do you say the crime belongs to the person rather than the corporation?
- Different bases of liability:
 - Vicarious liability
 - Direct or primary liability
 - Further statutory bases for holding a company liable

Vicarious Criminal Liability

- Generally not available at common law (with minor exceptions)
- Presumption against can be overcome by statute
 - Generally (there are some exceptions) cannot be vicariously liable for crime at general law
 - Vicarious civil liability is fine however criminal vicarious liability, generally NO
 - Presumption of crim liability can be overcome by statute, thus legislature may address crim liability or may be able to infer from statute crim liability
 - Involves holding party A liable for the acts of party B – thus all you need is crime to be done by first party

***Moussell Bros v London and Northwestern Railway* [1917] 2 KB 836 (UK C of A)**

- Clarks working for a company deliberately understated cargo in order to reduce tolls

7. MEETINGS

Overview:

1. Meetings & resolutions
2. Division of powers between directors and shareholders
3. Informal corporate acts

Typical Powers of Directors and Shareholders

- Directors
 - s 198 (replaceable!) – primary power to manage corporation
 - Includes most decisions relating to company's business, except if limited by statute or constitution (see non-exhaustive list s 124)
- Shareholders
 - Power to vote on certain major decisions, including: electing directors, changing constitution, changing company type, voluntary winding up etc
- But all these powers (of directors and shareholders) are subject to the Constitution, if company as one
- Some pty companies give one or more shareholders all management powers, or power to veto any decisions of directors

How Directors Make Decisions

- Collectively by passing director' resolutions in meetings s 248C – 248G
 - N.B: Chair's casting vote s 248G (This is a replaceable rule thus many companies get rid of this b/c it gives too much power to heads of power)
- Or without directors' meeting
 - s 238A – circulating resolution
 - Don't need to have a meeting but you need every director to sign, if one does not sign it won't be passed
 - s 248B – single director companies
 - N.B: MOST OF THESE ARE REPLACEABLE RULES

Directors' Meetings: Notice Requirements

- Notice must be 'reasonable', but not strict re formalities
 - Check corporation constitution for further requirements
- Directors must know and agree they are having a meeting

How Shareholders Make Decisions

- By circulating resolution for unanimous written consent (pty co's only): ss 249A-B
- Or, in shareholders meetings: **ss 249C – 251:**
 - About procedures for meetings
- Proxy voting systems

What are the duties?

GENERAL LAW DUTIES	EQUIVALENT STATUTORY DUTIES
<ul style="list-style-type: none"> • Duty of care, skill and diligence <ul style="list-style-type: none"> ○ Duty of care towards the corporation to which a reasonable officer would need to meet ○ Involves things that they should've done – not meeting required standard • Fiduciary duty to: <ul style="list-style-type: none"> ○ Act in good faith in best interests of company ○ Exercise powers for proper purposes (similar to statutory duty in s 181) ○ Cannot act in own best interests if the corporation suffers ○ Corporations' interests is equivalent to current and future shareholders' interests as a whole e.g. issuing shares to a friend to prevent other shareholders from taking control of the company is improper purpose • Duty to avoid undisclosed conflicts of interest • Duty not to misuse confidential information • Duty not to prejudice interests of creditors when company nearing insolvency 	<ul style="list-style-type: none"> • S 180(1): duty of care and diligence • S 181(1) duty to exercise powers <ul style="list-style-type: none"> (a) In good faith in best interests of company and (b) For a proper purpose • S 182(1): duty to avoid improperly using position to benefit themselves or others, or to harm company • S 183(1): duty to avoid improper use of information to benefit self/others, or to harm company (overlap between s 182 + 183) main difference is that s 183 relates to people even if they have left the corporation – as long as information was obtained when working at the corporation e.g. customer lists or private accounting information to set up competing business • S 588G: duty to avoid “insolvent trading” when company is in financial difficulty – the duty shifts from acting in the best interests of the shareholders to the creditors. A director cannot allow the company to incur any new debts when they know that the company is insolvent or is likely to become insolvent because of new debts. Consequence is that directors will be personally liable if the company cannot pay off the new debts

Why retain both statutory and general law duties?

- Different consequences for breach
- Different enforcement procedures

Consequences of breaching statutory directors'/officers' duties

- Breach of statutory duty
 - Civil penalty under Pt 9.4B and/or
 - Criminal penalty if dishonest under s 1884 or s 588G(3)
- Civil penalties may include:
 - Fine s 1317G
 - Compensation order s 1317H-J
 - Disqualification from managing s 206

12. DUTY OF CARE OF DIRECTORS AND OFFICERS; DEFENCES TO BREACH

Different Causes of Action for Breach of Duty of Care

General Law:

- Equitable duty to exercise care, skill and diligence when performing functions of director or senior officer
 - **PBS v WHEELER**
- Common law duty not to be negligent
 - AWA cases: **DANIELS v ANDERSON** where the directors were partly responsible

Statutory: S 180(1) duty of care and diligence

- Standard of care are equivalent for general law and stat duty
- Interpreted in **ASIC v ADLER, ASIC v RICH, ASIC v MACDONALD**
 - Talk about certain kinds of people within corporation may have extra responsibilities because of their position

Elements of the duty

- Breach of standard of care of a reasonable director/officer
 - Contextual test: see below s 180(1) & **ASIC v RICH**
- Balancing risk with potential benefits
 - Business judgment rule: s 180(2) – whether directors have made a reasonable judgment that the courts should not interfere with
 - **PBS v WHEELER**
- For compensation claims: causal link between breaching behaviour and losses. Must show causation that the breach of duty of care caused your losses
 - **PBS v WHEELER**

What is the standard of care?

- *Daniels v Anderson*
 - Leading case on current standard of care for directors and officers
 - Raise the standards for directors
 - Esp. quotation from US case **FRANCIS v UNITED JERSEY BANK**
- Minimum standards for all directors, exec and non-exec: (OBJECTIVE TEST, what a reasonable person would've done in their position)
 - Gain familiarity with all aspects of the business
 - Stay informed, make inquiries
 - Attend all meetings (even if via skype, conference call etc)