

**LLH305**  
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# LLH305 CORPORATE LAW - LECTURE NOTES

## Week 1 - Introduction to companies, incorporation and corporate personality

### What is a company?

- A device created by law to encourage economic activity
- Companies are separate legal persons. This means they have a legal identity of their own.
- Theories of the firm help to understand the purpose of forming a company.
- Companies provide a legal structure that allows for the pooling of ideas, capital and skills.

### The Nature of Companies: Essential Features of Companies

- a. All companies are separate legal entities. Note s124(1) Corporations Act
- b. All companies accommodate the separation of ownership from management
- c. All companies come with well-established modes for regulating their internal and external affairs
- d. Companies can raise capital in unique ways
- e. All companies have perpetual succession
- f. Some companies offer limited liability
- g. Companies are uniquely suited for highly liquid investment

#### a. Separate Legal Entity

The immediate effect of incorporation is that a company becomes a separate legal entity. As a separate legal entity, companies have the legal capacity and powers of a natural person, such as power to:

- own property in its own name
- enter into contracts in its own name
- sue and be sued in its own name.

In addition, companies have some powers that natural persons (and many other business forms) do not have, such as the powers listed in s124.

The law rarely allows for looking beyond the separate legal status of the company. When the law does allow this, it is called 'lifting' or 'piercing' the corporate veil.

#### b. Separation of Ownership and Management

- Companies have 2 organs: a board of directors & members in a general meeting.
- Company law is understood as considering members to be the ultimate owners of the company.
- In this sense, company law allows for ownership and management to be separated.
- Separation of ownership and management is a particularly useful mechanism in large companies where there many members and/or members who have no interest in being involved in the running of the company.
- Managers can be expert/professional managers. The success of the enterprise does not require investors to be expert managers.

#### c. Well established modes of regulating internal and external affairs

- Company law is seen as providing a standard form contract governing internal and external relationships. Some of these laws are mandatory and others are default rules that the company can vary.
- Internal Governance - The Corporations Act includes a pre-determined set of internal governance rules. These are called ‘replaceable rules’. Companies can use these replaceable rules or replace some or all of them in a company constitution approved by members.
- External Affairs – The Corporations Act sets out mandatory rules for how companies can sign documents and presumptions that external parties may rely upon to bind the company to a contract signed by an agent.

#### **d. Raising Capital**

- Capital is an economic term. In broad terms, capital describes the fund the company uses to operate its commercial activities or business.
- Fundraising is a term used in corporate law to describe the various ways companies can raise capital.
- Capital includes
  - \$ in the bank and the value of the assets that the company owns.
  - \$ that the company has borrowed. Companies can acknowledge and secure indebtedness in unique ways (eg debentures). These types of capital are broadly described as loan capital.
  - \$ that the company has raised by issuing shares. When a company issues shares, the \$ paid for those shares forms the share capital of the company. Some, but not all companies, have power to issue shares.

#### **e. Perpetual Succession**

- Perpetual succession is a consequence of registration as a separate legal entity.
- The company exists as a legal entity right up until it is de-registered by ASIC: s601AD(1).
- This is so even if all the members die, or the company is abandoned.
- The effect of perpetual succession is that companies outlive changes to members and directors.

#### **f. Limited Liability**

- Not all companies have limited liability, but most business that choose to register as a company, incorporate as a company with limited liability
- Where a company offers limited liability to members, liability is limited either by guarantee or by shares. Liability limited by shares is by far the most common.
- “shareholders in a company limited by shares are not liable to contribute additional money to meet the company’s debts, beyond the amount initially agreed to be paid for the share”\*
- Limited liability allows the company to agree in advance with its members the limit of the member’s liability to contribute funds to the company. Beyond that agreed limit, no further contribution to the company is required.
- How is the limit of liability agreed? The process is different depending upon whether the company is one where liability is limited by shares or by guarantee. We will explore this in greater detail when we consider the types of companies later in this topic.

#### **g. Transferability of Interests**

- Members are generally free to transfer their interests in the company.

- Where the company is one with power to issue shares, this means that shares can be readily transferred. Note this is a general rule and it can be displaced by the company in its internal governance rules.
- The effect of this transferability is that shares can be traded with other interested investors either privately or via a highly organised market such as a securities exchange (eg ASX).

## Types of companies

### Section 112

- **Proprietary companies**
  - Limited by shares
  - Unlimited with share capital
- **Public companies**
  - Limited by shares
  - Limited by guarantee
  - Unlimited with share capital
  - No liability company

### Approach to this part

- a. Distinguishing public and proprietary companies
- b. Proprietary companies
  - i. Share capital
  - ii. Restrictions on proprietary companies
    1. #1 Number of shareholders (+ CSF Shareholders)
    2. #2 Fundraising
  - iii. Reporting and disclosure requirements
- c. Public companies
  - i. Listed public companies
  - ii. Unlisted public companies
- d. Classification of companies by type of liability
  - i. Limited by Shares
  - ii. Limited by Guarantee
  - iii. Unlimited Liability
  - iv. No Liability

### A. Distinguishing Public & proprietary companies

- Limited or Ltd: ss148(1), 149. Note registered charities can apply to drop the word limited from their name: ss150-151.
- Proprietary Limited or Pty Ltd: ss148(2), 149
- Conversion of company type is possible: ss162-165.

### B. Proprietary companies

- All proprietary companies must have a share capital: s 112.
- Private companies operating under restrictions
- Different reporting and disclosure requirements compared to public companies.