

LAW3311 Company Law

Week 0: Introduction to Company Law and ASIC

The corporate lifecycle

- Butterworths Encyclopaedic Legal Dictionary- Corporation is 'A legal entity created by charter, prescription, or legislation'
- The Pocket Oxford English Dictionary – corporation is defined as 'a large company'
- Contrast these definition with the one in the *Corporations Act 2001* (Cth)
 - Section 57A
 - Section 9 (*a company registered under this act*)

Historical development

- Emergence of 'corporation aggregate' and the concept of joint stock company
- South Sea Bubble — led to *Bubble Act 1720* (*A monopoly created to underwrite the UK national debt for exclusive trade in South America.*) *Many people lost in this get rich quick schemes.*
- 1844 Act (UK) – provided a right to incorporate for private purposes for a fee.
- Introduction of limited liability under *Limited Liability Act 1855* (UK)
- Consolidation of corporate laws in the *Companies Act 1862* (UK)
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Company law in Australia

- Who has the power to legislate in relation to corporate law?
- Section 51(xx) of the Commonwealth Constitution of Australia; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 (*Head of power can't legislate new companies*)
- Uniform Companies Acts 1961
- National Co-operative Scheme (1980s- eventually ASIC)
- *Corporations Act 1989* (Cth)
- *NSW v Commonwealth* (1990) 169 CLR 482 (*was a challenge, Cwealth could not challenge incorporation of a company*)
- Constitutional crisis 1999
- *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (So HC could not hear Company Law matter)
- See also *R v Hughes* (2000) 202 CLR 535
- Referral of power by the states = one company law statute for Australia = *Corporations Act 2001* (Cth) *Require renewal every 5 years.*

Regulation and Reform

- **Regulators**
 - ASIC: companies and financial services
 - APRA: oversight of financial services some overlap, but mostly fin services
 - ACCC
 - ...
- Reforming corporate law

Changing expectations of corporations

- Corporate social responsibility?
- Different theoretical perspective of corporations
- ❖ Concession theory As there are significant benefits, corporation need to hold their end up. But, not a monarch thing, just pay a fee, get a licence, not a big deal
- ❖ Law and economics approach/ aggregate theory Corporations are just a mere coming together, this entity all put money in, law of economics approach, this is exercising private rights.
- ❖ Real entity theory No, this is separate entity controlled by managers, tolling them is double dipping on them.

Australian Securities and Investments Commission (ASIC)

Establishment of ASIC

- National Corporations and Securities Commission (1980)
- Australian Securities Commission (1989)
- Expansion of role in 1998: Australian Securities and Investments Commission + Further expansion of ASIC's role *Superannuation, consumer Credit, Brokerage, Aust Licence Equity*. And taken business name registry off the states
- Transparency and accountability S12 ss1 the minister can given direction- general in nature

Role of ASIC

- Objectives – Section 1(2) of the *ASIC Act*.
 - promote fair, efficient and competitive capital markets

Improving consumer confidence, being a watchdog, actions for breaches. Provide information to public on corporations, stimulates growth,

Functions

- Register and regulate companies
- Receive and process information
- Register company auditors and liquidators
- Regulate financial markets and providers of financial services
- Regulate the creation of and trading in futures contracts
- Investigate contraventions of the corporations legislation
- Investigate contraventions of the provisions of the consumer protection laws

Company Law Exam Guide

[Phoenix](#) [Share Dilution](#) [Conflict of Interest](#) [Insider trading](#) [Director Personal Interest](#)
[Into Liquidation](#) [Disclosure](#) [Share Class Rights](#) [Oppression](#) [Trading when insolvent](#)

ASIC Roles and powers

- ☑ ASIC Act and Corporation Act 2001 give a wide range of powers such as s11 (4) anything it needs to carry out its' function
- ☑ ASIC v Healey signified that directors must stay informed of business activities
- ☑ ASIC v Vrisakis stated that director need to attend meeting where practicable to do so
- ☑

Registering a company

Z1 ☑ Most companies now are registered by ASIC s119 of the Corporations Act, once formed they have the resemble a natural person with full legal capacity s 124. As per Saloman v A Saloman & Co Ltd [1897]

Z2 ☑ A proprietary company or public company can be with only one member but a public company must have 3 directors , 2 living in Aust s 201 A.

Z3 ☑ A proprietary company must not solicit funds from the general public, unless crowd sourced s 113(3) But s 245D (RR) old share holder get first crack at new shares

☑ A proprietary company

Z4 ☑ A new company does not need a constitution- unless its in mining or a public company- use replaceable rules ss 134-136

Z5 ☑ The company owns the assets and the shareholders have no equitable interest Macaura v Northern Assurance Co [1925]

Z6 ☑ Lifting the corporate veil can occur when a corporation is formed to evade a legal duty Gilford Motor Co Ltd v Horne [1933]

Lifting the corporate veil can occur when director trade when insolvent and company debts are imposed on them s 588G-588U

Z7 ☑ Lifting the corporate veil can occur when a holding company has debts placed upon them due to insolvent trading 588V-588X

Z8 ☑ Lifting the corporate veil can occur when directors of trustees have not got indemnities from beneficiaries s 197

Z9 ☑ Lifting the corporate veil can occur when companies hold controlling companies to reveal guarantees under cross securities Ch 2M Div 6.

☑ Section 129 deals with dealings and outsider may have with a company

1. RULE- STATE THE LEGAL DUTY BRIEFLY.
2. LEGAL TEST- YOU MUST IDENTIFY WHAT HAS TO BE PROVEN.
3. APPLICATION- THIS IS WHERE YOU PLUG IN FACTS
4. CONCLUSION

WHAT DOES THE LAW REQUIRE? (RULE/TEST)
WHICH FACTS MATCH THAT REQUIREMENT? (APPLICATION)
DO ENOUGH FACTS MATCH? (CONCLUSION)

🔴*Promoters and contracts ! 🔴*

Y1 🔴* Promoter duties come under Meriton Apartments Pty Ltd v The Owners Strata Plan No 72381 [2015] NSWSC 202.

y2 🔴* If you do not promote but also profit from the venture you are held to be a promoter Tracy v Mandalay Pty Ltd (1953)

Y3 🔴* Promoters have a fiduciary relationship and can't make secret profits Erlanger v New Sombrero Phosphate Co (1878)- rescission of contracts is one of many remedies

And s191 disclosure of material personal interest Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218

Y4 🔴* If you enter a contract for a business pre-registration Part 2B.3 Corporations Act state the company, in most circumstance, will be bound by it DGF Property Holdings v Di Federico

Y5 🔴* Part 2B.3 Corporations Act says initially the Company is to bear the contract as per s131(1) the person who executed s 131(2)