

LAWS5104: CORPORATIONS LAW

key

Start of topic

Section in code

Element

case

or (case)

***CF = compare

NATURE, FUNCTION, ORIGINS AND REGULATION OF COMPANIES

What is a corporation/company?

- An artificial legal person created by law
- Separate from the people who own it, run it and work in it
- Legal powers of a natural person
- What is a company? A company is an artificial person that exists by virtue of the law. The company is effectively a legal device where this fictional legal entity acquires the legal rights, powers and liabilities of a natural person. So for example a company can enter into contracts. It can own property. It can sue and be sued. So a company as a legal person enters into a contract.

Section 119 Corporations act 2001 (Cth)

Company comes into existence on registration

A company comes into existence as a body corporate at the beginning of the day on which it is registered. The company's name is the name specified in the certificate of registration.

Section 124 Corporations act 2001 (Cth)

Legal capacity and powers of a company

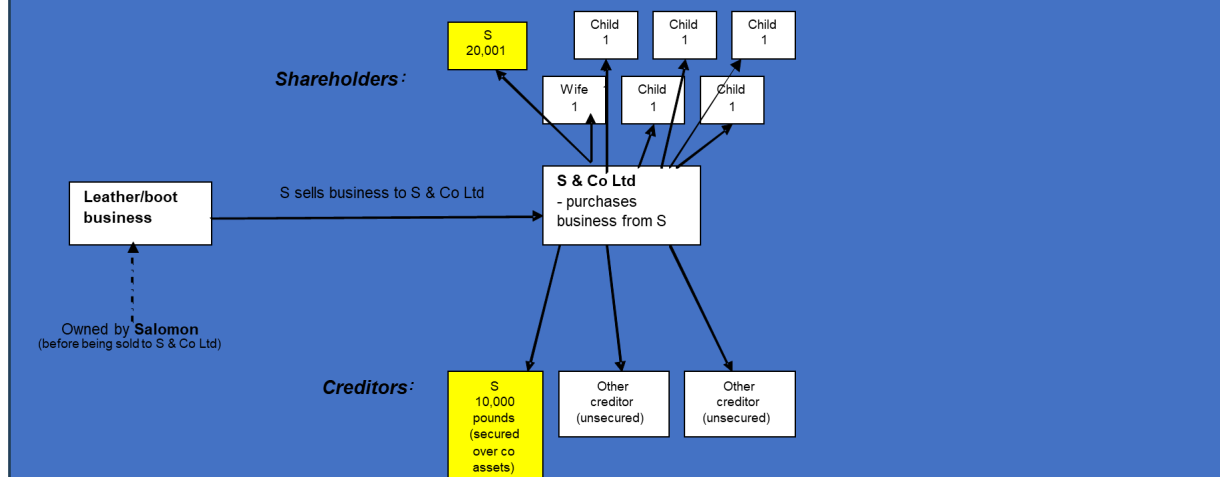
(1) A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate, including the power to:

...

S172 Companies Act 2006 (UK) – enlightened shareholder value

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
- (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.

Salomon v Salomon:



How are companies used

- Conduct an enterprise: In Australian corporate law, conducting an enterprise refers to a company actively managing and operating a business or commercial activity under the Corporations Act 2001.
- Vehicle for raising large amounts of capital: A company in Australia serves as a vehicle for raising large amounts of capital by issuing shares or securities to investors, regulated under the Corporations Act 2001.
- Joint Venture (JV): A joint venture in Australian corporate law is a collaborative arrangement where two or more parties, often companies, pool resources to pursue a specific commercial project while maintaining separate legal identities.
- Hold family assets: Under Australian law, a company can be established to hold family assets, providing a structured entity to manage and protect wealth, often for tax or estate planning purposes.
- Corporate Trustee: A corporate trustee in Australia is a company appointed to manage a trust's assets and obligations, offering limited liability and perpetual succession under the Corporations Act 2001.
- Privatised Government Enterprise: A privatised government enterprise in Australia is a former state-owned entity converted into a private company, subject to corporate governance and regulations under the Corporations Act 2001.
- Pursuing charitable purposes: In Australian corporate law, a company can be incorporated as a not-for-profit entity to pursue charitable purposes, eligible for tax concessions if registered with the Australian Charities and Not-for-profits Commission (ACNC).

What is a public company?

Often referred to as a publicly-traded company, a public company is a corporation that is open to investment by the public via an initial public offering (IPO).

In other words, public companies can be listed on the Australian Securities Exchange (ASX), and with this power comes great responsibility.

This means that a public company can raise funds by making offers or invitations to the public to purchase through the ASX or subscribe for securities to enhance the marketability of its securities.

If you're looking to start a public company, the following factors would be good to know:

- A public company must have at least 1 member; unlike a proprietary company where there is no statutory maximum
- A public company must have at least 3 directors
- Public companies can raise money from the public, whereas private companies can't
- Public companies must appoint each director by a separate resolution unless there is a unanimous agreement to a single resolution

Other key considerations from a taxation perspective involving public companies include:

- Shares are listed on the stock exchange anywhere in the world

- A company is cooperative. A cooperative is a member-owned business structure with at least five members, all of whom have equal voting rights regardless of their level of involvement or investment.
- The company is a mutual life assurance company
- The company is a friendly society dispensary
- The company is a registered organisation
- The company is a public purpose body constituted by a law of Australia
- The company is a subsidiary of a public company

Now that you have a good understanding of a public company, let's move on to a private company.

What is a private (or proprietary) company?

In Australia, under the Corporations Act 2001 (Corporations Act), a private company must consist of the following elements:

- Must have shared capital under s 112(1) of the Corporations Act
- Have at least 1 member but cannot have more than 50 non-employee shareholders as members under s 113
- Have at least 1 director under s 201A(1)
- Not engage in any activity that would activate the operation of fundraising provisions in chapter 6D of the Corporations Act
- Include the words Pty limited or the abbreviation Pty Ltd at the end of its name under s 148(2) of the Corporations Act

Other business structures? Alternatives?

- Sole Trader
 - No separation of business and personal assets/liabilities.
 - The business is not carried on by a separate entity in law.
 - The proprietor is the taxpayer and is personally liable for the debts of the business.
- Partnership
 - Definition: **Partnership Act 1895 (WA): s7(1)** provides: 'Partnership is the relation which subsists between persons carrying on a business in common with a view of profit'.
 - General vs limited partnerships
- (Unincorporated) Joint Venture
 - JVs can be incorporated or unincorporated
 - Typically, involves parties working together on a single project
 - Typically, the participants in a joint venture do not owe each other a fiduciary duty and thus are not restricted from competing with each other; nor are they required to account to each other for their share of profits and losses & usually no authority to act as agents of each other (hence not profits in common)
 - Participants frequently share product not profits (so no view to profits)
 - **(United Dominions Corp Pty Ltd v Brian Pty Ltd (1985) 157 CLR 1)**
- Trust

- A legal relationship relating to property
- *A trust may be defined as an obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of a certain person (the beneficiary) or persons, or for the advancement of certain purposes.* [Lawbook Co, *Principles of the Law of Trusts*]
- Trading Trusts
- Unit Trusts

Origins of company law

- Why do we consider the history of company law?
- Incorporation is a ‘device’ which:
 - addresses changes in the persons holding corporate property and performing corporate actions over time – eg corporations sole
 - permits groups of people to enter into legal relationships with each other and with third parties, especially where the membership of the group fluctuates.
- Corporations sole: the holder of a specified office (in succession) is treated as an artificial person (Roman Catholic **Church Property Acts (Amendment Act) 1916 (WA) – Archbishop of Perth**).
- Corporations aggregate: a group of persons treated as having a separate legal existence that survives changes in the individual members of the group from time to time (eg Institute of Chartered Accountants).
- A general understanding of the earlier regimes and rules is relevant as:
- * Many Australian provisions are still based on UK precursor provisions (**Companies Act 1862 (UK)**).
- Helps you evaluate the policy behind and the appropriateness of, current provisions and reform proposals.
- After all, corporate law can be viewed as a response to regulatory needs within our society as they exist at a particular point in time. So the history of corporate law can enable you to appreciate the problems posed by corporations over time. It can provide lessons on whether past suggestions for law reform have had, and whether current proposals for law reform are likely to have the desired effects.
- Understanding how companies developed helps you understand different viewpoints on the nature of the company (and hence how we should regulate it today).
- As the history shows, you can think of incorporation as a ‘device’ by which:
- to address changes in the persons holding corporate property and performing corporate actions over time – eg corporations sole
- to permit groups of people to enter into legal relationships with each other and with third parties; especially where the membership of the group might change over time.
- A need for this type of device has been recognised in almost all societies, even as far back as Greek and Roman societies.
- Note that when it was initially being developed in the UK, the corporate form did not include limited liability, the need for that emerged only in the late 1800s.
- The historical development of the registered company – in England
 - Created by common law (judiciary), royal charter (executive) or statute (Parliament)

- *Corporations sole* arose in England in the middle ages to facilitate the holding of church property by the occupant of a particular office (eg a Bishop). A particular officer holder within the church hierarchy is treated as an artificial person in whom title to church property is vested. The individual who occupies the office represents the corporation, which still exists even if the office is vacant for a time.
- Eg *Roman Catholic Church Property Acts (Amendment Act) 1916 (WA)* – Archbishop of Perth.
- The emergence of “Corporations aggregate” and the concept of “joint stock” during the 15th to 19th centuries.
- *corporations aggregate*:
 - In the middle ages “corporations aggregate” emerged in England as a means of conferring on a *group of people* the capacity to hold and deal with property and interests to advance their collective aims.
 - A corporation aggregate was/is an *incorporated group* of co-existing persons or an incorporated single person with whom others could associate and which has a legal existence that survives individual members of the group from time to time. Eg universities.
 - Prior to the 16th Century a corporation aggregate could only be created by the monarch who would grant a royal charter allowing the members of the group to trade through a corporation. [Still possible in Australia – generally has been used in relation to public interest bodies. Eg Institute of Chartered Accountants (supplemental Royal Charter issued in 2005)]
 - Some commercial groups, such as trade guilds and merchants’ associations received royal charters. The corporation existed as the beneficiary of some special right or entitlement conferred by the Crown, such as a monopoly or the right to control the operation of a particular trade.
 - Eg the East India Company.
 - During the 16th and 17th Centuries parliament also acquired the power to create a corporation by passing a private Act. A private Act of Parliament was an alternative to a petition to the Monarch for a charter. Obviously, neither of these methods made it simple to incorporate and initially such Acts were confined to public interest corporations (eg to build public works like canals) rather than for private commercial enterprises.
- *Joint stock*:
 - The 18th century also marked the development of “joint stock”. The larger commercial activities of the period needed, in many cases, greater amounts of capital than a single individual could provide. To meet this need a mechanism developed whereby a person could invest a sum of money in a venture (or a series of ventures) receiving in return an entitlement to a share in the profits of the venture. The investor’s entitlement was represented by a share. These shares were transferable and could be sold by the investor without the consent of other investors.
 - In some cases (eg East India Company) the venture was carried on by a corporation, and the share represented a claim against the corporation. But as incorporation could be achieved only by royal charter and was relatively rare, many such ventures were carried on through a form of unincorporated association that became known as a “joint stock company” – essentially a partnership (but partnership agreement permitted new partners to be admitted as sh/h without the need for agreement from other members). This meant

inherent problems b/c each investor liable for the company's debts; each investor had power to bind all the others to a contract with outsiders; if Coy wanted to sue then all investors had to be joined as Plaintiffs.

- Due to speculation in shares in joint stock companies, stock market bubble in early 18th century which 'popped' in 1720, resulting in large losses and considerable hardship for many members of England's growing middle class. In response, Parliament passed legislation, called the *Bubble Act*, to prohibit such associations from acting as bodies corporate and from issuing transferable shares without the authority of a royal charter or an Act of Parliament
- *SO: Deed of settlement companies*
 - Deed of settlement companies were, essentially, a combination of association (partnership) and trust. The assets of the partnership were held on trust by trustees, and the venture was managed by the managers or directors (the trustees). The venture did not have separate legal personality and its property, rights and obligations were held by the trustees. Investors received a share that represented an interest in the trust property.
 - The terms of the trust deed (contained in the deed of settlement which was in fact referred to as 'articles of association') often permitted the transfer of the shares and attempts were made in drafting the deed of settlement to limit the liability of investors to the amount invested by them in the enterprise (not necessarily effective).
 - Limited liability also sought through the use of contractual provisions by the trustees when entering into contracts with third parties – limit liability to trust assets.
 - Deed of settlement companies were becoming more common in England by the beginning of the 19th century. However, they were complex to establish and administer, were ineffectually regulated by the state and did not have the benefits of separate legal personality.
- *The Joint Stock Companies Registration and Regulation Act 1844*
 - allowed (and required many) business associations to become companies by a process of registration. Now any group wishing to form a company for a lawful purpose could apply for registration and, by lodging the required information and paying the prescribed fees, could obtain it.
 - The Act was more aimed at protecting the public than inducing business associations to incorporate - idea was public registration (hence notification) and also a degree of public accountability by way of publicity of accounts.
 - Companies registered under the 1844 Act were corporations with separate legal personality – but this didn't of itself confer limited liability on the participants in the company. If the debts of the company exceeded its assets, creditors could pursue individual investors once their claims against the company had been exhausted.
- *Limited Liability*
 - In 1855, the English Parliament passed the *Limited Liability Act 1855*, which allowed those forming a company to elect to do so on the basis that the liability of its investors would be limited to the amount they agreed to invest in the company. These companies were required to include the word "limited" in their name, to alert those dealing with the company to the fact that the liability of the members was limited.

– *Companies Act 1862 (UK)*

- 6 years later, the *Companies Act 1862 (UK)* was enacted, consolidating the procedures for incorporation and winding up of companies and putting in place many of the key features of modern company law. This act was adopted by the Australian States as the model for their own companies legislation thereby mirroring the position in England. And has subsequently influenced Cth corporations legislation.
- Companies, as we know them, evolved from partnership (joint stock companies) or combination partnership/trust (deed of settlement companies) structures – which created some inherent problems.
- Initially it was quite difficult to form a corporation as an action of the monarch (executive) was required, or later a special Act of parliament. Formation by means of registration under a general Act of parliament was provided for in the *Joint Stock Companies Registration and Regulation Act 1844 (UK)*.
- Limited liability for members was not provided for until the *Limited Liability Act 1855 (UK)*.

Australian legislative history

- Initially each colony/state modelled co legislation on UK, but with material variations, including due to mining context.
- Subsequently, move towards greater uniformity in:
 - Legislation
 - Administration
 - Interpretation & application of the law
- But, practical difficulties for states in harmonising & Cth constitutional problem – Cth has power with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”.
- Various cooperative schemes failed: (*Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535)
- In Australia’s early history, the colonies and, later, the states initially adopted legislation modelled on that in England. Though innovations and changes arose based on local circumstances (as between states/colonies and Au/England). So, for instance, no liability mining companies were an Australian (Victorian) invention as a result of legislation in 1871 – particular context of mining.
- Pressure for greater uniformity subsequently (1950/60) developed due to matters such as greater national operations of companies.
- Uniformity of *legislation*, that is, of the actual legislative text, is one obvious requirement;
- Uniformity of *administration*: uniformity of legislation can be a hollow achievement if it is not accompanied by uniformity of administration of that law by the relevant regulatory bodies; and
- Uniformity of *interpretation and application of the law* – “uniformity” in this context may not be quite the right concept and “consistency” is perhaps a more realistic aim. (Justice R P Austin, paper presented at the Corporate Law Teachers Association Conference, “The Future of Corporate Regulation: Hughes and Wakim and the Referral of Powers)
- BUT, problem is that states always find it hard to agree and keep uniformity in legislation and then there are 8 different administrators; and the Cth does not have a clear head of power that permits it to legislate wrt all matters relevant to corporations.

- **Section 51 of the Constitution** gives the Commonwealth the ability to legislate on the topics contained therein. Subsection (xx) states that the Commonwealth has powers with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”; - the key word being “formed”. This section arguably pre-supposes that the corporations are already FORMED. This interpretation is supported by some evidence of legislative intent regarding the constitutional powers in the federation papers at the constitutional convention debates
- although broadening of what Cth is perceived to be able to do following Workchoices case
- In 1991, the Commonwealth, States and the NT enacted new co-operative legislation. However, there were two big problems. The High Court held in (*Re Wakim; Ex parte McNally* (1999) 198 CLR 511) that the cross vesting of jurisdiction was unconstitutional to the extent that it tried to confer jurisdiction on the Federal Court for matters relating to the Corporations Law of a state. And then in (*R v Hughes* (2000) 202 CLR 535) – the Court cast doubt on the validity of the scheme in that it involved the states conferring powers on Commonwealth officers.
- Our current approach
 - Referral of state powers to the Cth
 - Inter-governmental reference agreement
 - No reference of industrial relations matters
 - Sunset provisions cause the referrals of power to terminate at the end of 5 years unless extended -> rolling extensions (now for 10 years)

Nature of Corporations

- What is the corporation? Is it a group of people or instead a separate entity?
- How should the conflicting interests of stakeholders in a corporation be resolved?
 - This requires consideration of the role or purpose of the corporation in society.
- To what extent should corporations be subject to public and private norms?
 - *Eg are corporations public rather than private institutions? Do/should they pursue public purposes?*
- To what extent should corporations be subject to regulation? Merely facilitative?
- But consider that corporations do maximise profits, which helps shareholders, which in the end is many of us. There are benefits for society from the efficient use of resources. The problem is with externalities that are not appropriately brought home as costs arising from the activities conducted by the corporation.
- State concession theory
- Natural entity model
- (*The following tend to shareholder primacy*)
 - Aggregate theory
 - Contractual Model
 - Managerialist/Agency Cost Model
- (*The following tend to stakeholder primacy*)
 - Firm/Team Production Model
 - Non-economic organisational theories
- Traditional Anglo-American view: The purpose of the corporation is shareholder wealth maximisation - grounded in the nexus of contracts theory. Corporations exist primarily to maximise enterprise value for shareholders, who are residual risk-bearers.
- Key features of shareholder wealth-maximisation model:
 - Directors' fiduciary duties focus on maximising shareholder returns.

- Shareholders have primacy in governance and decision-making.
- Provides managerial clarity - single objective of profit maximisation.
- Assumes external regulation (labour, environmental law) will protect non-shareholder interests rather than corporate governance mechanisms.

Whistleblowers

- **Part 9.4AAA:** establishes a framework to encourage and manage reporting of suspected contraventions of the Corps Act from within a corporation.
- From July 2019: whistleblower protections in the Corps Act expanded to provide greater protections for whistleblowers.
- The Corps Act protects a whistleblower against civil or criminal litigation for protected disclosures, and against dismissal from employment as a result of a protected disclosure.
- Those involved in regulation include not just government bodies, but everyone who performs a role under the company law framework.
- In particular, that includes whistleblowers.
- Part 9.4AAA was introduced into the Corporations act in 2004. The purpose of the provisions was to establish a framework to encourage and manage reporting of suspected contraventions of the Act from within a corporation. From 1 July 2019, the whistleblower protections in the Corporations Act have been expanded to provide greater protections for whistleblowers. This will include requiring public companies, large proprietary companies, and corporate trustees of APRA-regulated superannuation entities to have a whistleblower policy from 1 January 2020.
- In general, a whistleblower is an insider within an organization (current or former employee as well as their spouses, dependents etc), who reports misconduct or dishonest or illegal activity that has occurred within that same organisation.
- The Corporations Act protects a whistleblower against civil or criminal litigation (including a case for breach of contract) for protected disclosures. If the whistleblower is the subject of an action for disclosing protected information, they may rely on this protection in their defence. And permitted to disclose information to journalists and Parliamentarians in some circumstances.
- Further, if an employer terminates a whistleblower's employment as a result of a protected disclosure, the whistleblower may ask the court for an order to reinstate them either in their original position or in another position at a comparable level.
- The Corporations Act makes it a criminal offence (and creates civil penalty provisions for) to victimise a whistleblower because of a protected disclosure made by the whistleblower. The Act also provides that if a whistleblower suffers damage because of such victimisation, the whistleblower can claim compensation for that damage from the offender.

Step One: advantages of the functions of companies

- Separate legal identity: Under Australian law, a company has a separate legal identity, distinct from its shareholders and directors, enabling it to own assets, enter contracts, and sue or be sued independently.
- Limited liability: Limited liability in Australian corporate law means shareholders' financial responsibility is restricted to their investment in the company, protecting personal assets under the Corporations Act 2001.