

CORPORATIONS LAW

SUMMARY



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Sample

TOPIC 1. INTRODUCTION

1.1 Corporation? Company?

Corporations law is the field of law that, unsurprisingly, deals with the regulation of corporations. A corporation is a legal structure through which individuals carry out activities, typically for a business or commercial purpose. Note that there are many other legal structures apart from corporations, including:

- Sole Trader;
- Partnership; and
- Unincorporated Association.

Corporations are regulated by the *Corporations Act 2001* (Cth) (referred to as **the Act**). The terms *corporation* and *company* are often used interchangeably, although *company* actually refers to a narrower range of structures than a corporation. Other legislation that can sometimes be considered during the study of corporations law include:

- The *Australian Securities and Investments Commission Act 2001* (Cth),
- The *Foreign Acquisition and Takeovers Act 1975* (Cth), and
- The various jurisdictional Partnership statutes.

A company is an artificial entity recognized by law as a legal person with its own rights and liabilities. Specifically, s 9 defines a company as a legal entity registered under the Act. There are a number of different types of companies. The two most important types are proprietary (Pty) companies and public companies.

A corporation is a broader concept that includes companies (as per s 57A). Other types of corporations include foreign registered bodies and unincorporated bodies that may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose.

1.2 What is a company?

Companies have a number of unique and important features:

- **Legal personality.** A company is a legal entity that is separate to and distinct from its owners (shareholders), those who control its business (directors), and those who carry out its business (officers and employees). Even though the shareholders, directors and officers and employees may change over time, this does not affect the company's existence as a legal person. The company may exercise all the rights and powers of an individual.
- **Shareholders.** Shareholders are the owners of the company. Importantly, shareholders do not have any control over the business of the company – there is a separation of ownership and control. This is one of the key features of companies. Furthermore, shares in the company are usually transferable. This distinguishes companies from, for example, partnerships. Note that under the Act shareholders are known as members.
- **Directors.** Directors set the strategic direction for the company and provide oversight of its day-to-day activities. Some directors may be actively involved in the day-to-day running of the company (executive directors, e.g. CEO) while others may not be (non-executive directors).
- **Officers and employees.** These are the people who are engaged in the day-to-day running of the company.
- **Limited liability.** This is one of the key features of a company and perhaps the main reason for their prevalence. Limited liability means that the owners of the company (shareholders) can only be held liable for the debts of the company to the amount of their unpaid share capital. For example, if Mr X buys shares worth \$2 in company Y but has only paid \$1 of the share capital, if company Y incurs a debt of \$10 that it is unable to repay, Mr X will only be liable to contribute \$1 to repay the debt, being the amount of his unpaid share capital.

A number of these concepts are discussed in further detail below.

1.3 Administrative and Legislative Structure of Australian Corporations Law

The regulation of corporations in Australia has a complex and controversial history which has, fortunately, resulted in a relatively simple system. Corporations law is regulated by:

1. **Legislation:** The Australian Constitution provides that the states have jurisdiction over corporations. Under the current arrangements, the states have referred their power to legislate with respect to corporations to the Commonwealth, giving the Commonwealth the constitutional authority to create a uniform corporations law applicable across Australia. For example, in NSW, the *Corporations (Commonwealth Powers) Act 2001* (NSW) refers law-making powers regarding corporations to the Commonwealth.
2. **Administration:** Importantly, corporations law is regulated by a federal regulator – the *Australian Securities and Investments Commission* (ASIC). ASIC is established under the *Australian Securities and Investments Commission Act 2001* (Cth). ASIC's power to administer state legislation is formally referred by the States. This formal referral is subject to re-approval by States and the Commonwealth every five years. ASIC is an independent statutory Commission, has discretionary powers, is responsible for the day-to-day administration of legislation, and reports directly to the Commonwealth Minister. ASIC also has a policy role as it may advise the Minister of possible solutions to problems it finds with the legislation.
3. **Court jurisdiction:** the Act is interpreted uniformly across Australia – there are no differences of interpretation between the State Courts and the Federal Court.

Re Wakim [1999] 198 CLR 511:

The High Court held parts of the previous corporations law scheme to be invalid. Notably, it was held that state judicial power in Federal Court is an invalid exercise of power. Corporations cases are all heard in Supreme Courts of states because of the striking down of the cross vesting scheme. However, Federal and State Courts can now exercise federal judicial power as a result of corporations now being an area of Commonwealth control.

In addition to the above sources of regulation, the actions of a company may also be constrained by the provisions of its constitution. Section 140 of the Act provides that the

company's constitution has the effect of a contract between the members (the shareholders) of the company.

1.4 Legislative Amendments

In 2015, the *Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015* (Cth) came into effect. Schedule 1 prescribes changes to the *Corporations Act 2001* (Cth), including the following:

- In respect to subsection 327A(1), subsection (1) does not apply in relation to a company if:
 - (a) The directors reasonably believe that subsection 301(3) will apply to the company's financial reports; or
 - (b) The company is a small company limited by guarantee.
- In respect to section 327C(1), certain public companies are not required to appoint an auditor: see subsections 327A(1A) and 327B(1A).

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