

DIFFERENT BUSINESS STRUCTURES

ANSWER PLAN: 1. Does Corps Act apply (post 1998)? 2. Can you rule out any business structures? (3) W/ issues are raised by client? (deal w/ each separately and apply to facts) 4. Which is best structure for those issues and why? 5. W/ structures would not work for those issues and why? 6. Address other issues not raised by client 7. Tentative conclusion 8. How can you overcome issues that don't fit with best business structure?

Considerations: nature and purpose of business, sector, anticipated profits, tax considerations, liability, capital, managerial control, business objectives, rigidity of structure, issues of control, exposure to financial risk (*Company tax rate capped at 30c for each S)

Sole Traders: owns and controls own business, simplest form of structure to create

Advantages: keep all profits, ownership, lack of formalities, nature of business can be easily changed, information doesn't have to be shared. **Disadvantages:** unlimited liability, business and sole trader are synonymous, good will attached to individual makes business harder to sell, lack of management skills or expertise, difficulty in raising large amount of capital.

Partnership: collective ownership, each partner is jointly and severally liable for actions of other partners and the firms. **Advantages/Disadvantages:** contractual agreement can be written or oral, able to utilize pool of resources and skills, unlimited liability

Joint Venture: contractual undertaking between one or more parties to engage in economic activity together, written agreement sets out details, could be a single venture or a continuing arrangement, individual participants only liable for individual liability arrangements, common in mining activities, exploration, construction, technology industries etc. *It is the substance not the form that is the crucial factor, look for indicative features!*

Canny Gabriel Castle Jackson Advertising P/L v Volume Sales (Finance) P/L: agreement called a JV between V giving money to FFM to promote concerts and in return V would receive 50% profit, agreement said all decisions to be made together, any decisions about activity needed to be agreed to, matters of policy and management had to be agreed, sharing of profits. **Crt:** held to be a partnership, it is the substance not the form, a weighing up exercise of indicative factors (intention of parties v partnership indicators: sharing profits, policy decisions, sharing of strategies etc.)

United Dominions Corporation Ltd v Brian P/L: B had 9.2% share in proceeds of sale shopping centre developed w/ other companies, but UDC was providing 90% of the finance for the project and had entered into arrangement with SPL to lend money to S and in agreement provision said all monies due to be paid upon the sale of any properties, when sale went ahead UDC claimed 100% of sale proceeds, B challenged saying UDC had a duty to disclose. **Crt:** was a fiduciary relationship so UDC owed fiduciary duty to other participants, was a partnership even though it was called a JV and was for a single project.

Incorporated Associations: separate legal entity to its members, not-for-profit, profit put to use for benefit of the association, it is reinvested no redistributed, governed by State legislation.

Unincorporated Associations: members come together to pursue similar social interest, not a separate legal entity.

Trusts: property held by a trustee for the benefit of a beneficiary, trustee hold legal title or exercises control over the property for the purpose of applying it to the benefit of others, beneficiary holds equitable title. Useful for tax purposes-allows income to be distributed to beneficiaries. Can be express (created by intentional act) or implied/constructive/resulting (possible for Courts to imply or infer intention to create a trust).

Companies: separate legal existence and limited liability, an artificial legal person that may enter contracts, sue be sued, own property etc. 30% tax rate. Corporate veil: creditor goes to the company but has no automatic right to go behind the veil to its members.

Saloman v A Saloman & Co Ltd [1897]: Mr S started as sole trader, as business grew set up a company and sold business to it, was major shareholder but also lent money as a creditor and had charge over company to secure monies owed, business failed and liquidators appointed, Mr S sought to recover money. **Crt:** Mr S had every entitlement as a creditor, company was a separate legal entity which had to honor and pay its creditors.

Franchises: a contractual arrangement/marketing concept not a separate business vehicle. Franchisor agrees to maintain continuing interest in business of franchisee in such areas as technical knowledge, advertising and marketing, product control, expertise and training, license to use intellectual property. Regulated by Franchising Code of Conduct (CCA).

Business Names: Regulated by the *Business Names Registration Act 2011* (Cth). Anyone wanting to trade in a name other than their own is required to register.

AGENCY

WAS THERE AN AGREEMENT? WHAT WERE THE TERMS OF THE AGREEMENT?

PLAN: 1. Identify parties 2. Actual authority (express or implied)? 3. Apparent authority? 4. Was it reasonable for TP to believe A had authority? 5. Anything to make it unreasonable? 6. Tentative conclusion (is P bound)? If you fail on agency b/w parties: 7. Operation of law creating agency relationship? 8. Requirements of necessity if this fails can P be bound in any other way? 9. Other area of law, e.g. vicarious liability

Definition: A relationship between three parties, the principal grants authority to the agent who acts with that authority to contractually bind the P with a third party. A is authorized by the P to do on their behalf certain acts w/ affect P's rights and duties in relation to 3rd parties.

Authority of Agents: authority can be express, implied (what would be usual for this type of agent/situation), apparent or ostensible (where an agent's authority is represented-held out to have such authority e.g. by wearing shirt with company logo, business cards with title of manager etc.)

Creation: partners both principals and agents, in a company agents may be created by being appointed or held out as directors/officers, or by being appointed as agents of the company.

Employer-employee: employee subject to control and direction of employer, agency arises where employee acting within the scope of their employment, must have authority to enter into contractual relationships w/ third parties, consider scope of employment arrangement.

Independent contractor: not always an agent, has contract to perform services/deliver certain products, usually controls manner, method and materials for agreed task, in dealings within third parties the contractor is normally the principal

Categories of Agency relationships

(1) Special: limited to making a certain type of K or carrying out a particular task (**(2) General:** can make K's of a class that are usual for that particular type of agency/within the ordinary course of business

(3) Universal: can do almost anything the P would have done (e.g. power of attorney).

Ways of Creating an Agency Relationship:

1. Express: orally/in writing/by deed, appointment must be in writing if Property Law Act applies s.59.

2. By implication or by conduct: agency implied from what is usual or customary (e.g. solicitor in legal firm usually to prepare, file and serve documents), a reasonable person examining the conduct and actions of the parties would conclude that there was an agency in existence.

3. Operation of Law (representation & reliance): representation by principal either direct or implied (e.g. clothing, name above door, business card) and reliance by third party on reasonable grounds so that the person holding themselves out as an agent was really an agent of the principal.

Freeman & Lockyer v Buckhurst Park Properties: Mr K and H start company B w/ constitution stating authority to appoint MD, K in dealing w/ 3rd party contractor F (architect firm) held himself out as MD but nothing ever passed by company to confirm this, but had business cards, company resisted paying bill, argued contracted with K not w/ company. **Crt:** company liable, K held out as agent as if authorized to act on B's behalf, K binding and enforceable. **Lord Diplock's requirements:** (1) rep made to 3rd party is enforceable by 3rd party to P (business crds, name on letter heads, designated on paper, name on door), (2) rep made by the P who had actual authority to manage the business (company had power to appoint MD, company had the actual authority to make such a rep), (3) 3rd party reasonably relied on rep, (4) nothing in company's constitution that would have stopped/prohibited it from entering into type of K.

Pacific Carriers Ltd v BNP Paribas: An employer may hold out that a employee has authority if the employer/principal permits the employee to act in a particular way, for example signing documents w/out taking precautions. A kind of representation that often arises in business dealings is one w/ flows from preparing an officer of a company w/ a certain title, status and facilities...The holding out might result from permitting a person to act in a certain manner w/out taking proper safeguards against misrepresentation. **Agency by cohabitation:** a presumption that a spouse or de facto has authority to pledge credit for necessities suitable for lifestyle. **Pianta v Macrow & Sons Pty Ltd:** Mr P was a miner and earned 10 pounds a week, wife bought an expensive diamond for 11 pounds. **Crt:** limitation on what is considered necessary (food, water, utilities, housing), no valid presumption of agency by cohabitation.

Agency by necessity/emergency: emergency arises w/ allows one person to bind another w/out authority of the other (in order to preserve nature of K). **Great Northern Railway Co v Swaffield:** GNR agreed to carry horses from A to B, arrived & no one there to collect, no way of contacting owners as to what they should do, GNR decided to place in stables for the night & insured they were securely kept, had to pay stable keeper for charges, sought reimbursement from S-S argued no authority. **Crt:** operation of law created agency of necessity, carrier did what a reasonable person would do and entered into K for horses to be kept.

Springer v Great Western Railway Company: carriage of tomatoes (perishable goods), shipping & carriage delayed, sold ripening tomatoes locally. **Crt:** not an agency of necessity, evidence didn't establish carrier had done everything it could have reasonably tried in order to contact owner of tomatoes, reasonable person would have made contact & obtained instruction.

4. Ratification: where A acts w/out authority at time of entering K, P can subsequently ratify and validate transaction, ratification retrospective and dates back to time K was made. Relieves A of personal liability. **Bolton Partners v Lambert:** B was company that owned property, MD acting w/out authority entered into K (w/ L to sell property, L went to w/draw offer, B ratified K, ratification occurred w/in a reasonable time (1 week). **Crt:** ratification was express or implied, occurred w/in reasonable time, **ratified in full (must be ratified in full, not just in part).**

Authority of Agent:

1. Actual/Express: express authority given to A in writing or orally

2. Actual/Implied: implied authority to do whatever is necessarily incidental to carrying out P's express instructions. Agent must be acting w/in scope of actual or implied authority (i.e. not on a frolic of their own)

3. Apparent (Ostensible): rep made by P leading a 3rd party to reasonably believe that an A has authority to contract on P's behalf when in fact this is not the case. **Freeman & Lockyer (see above).**

Tooth & Co v Laws: T supplied ale to pub for no of years, hadn't been told of sale of pub by L to Mr K, name on license sign remained as Mr L, no change of sign above the door, T continued to supply A to pub, new owner refused to pay Mr L informed of that he no longer owned the pub. **Crt:** L had held himself out as still being the owner through sign on door, liable to pay as at the time ordered by K, K had apparent authority to enter into the contract on behalf of L as his name was still on door as the licensee.

Panorama Developments (Guildford) Ltd v Fidelis Furnishings Fabrics: a company secretary has apparent authority to hire vehicles and the company is bound to pay the costs of such hire even where the vehicles are used for the secretary's own purposes. Where a person is appointed to a particular position such person will have as part of their apparent authority all the usual authority of a person occupying that position.

Duties of the Agent

Arise from express provisions of the agency agreement (contract), nature of the fiduciary relationship and implication of law.

(1) To follow instructions (Bertram, Armstrong & Co v Godfrey): P instructed A to sell stock at certain price per share, A failed to do this and was forced to sell at lower price, P able to recover difference in price

(2) Use reasonable diligence care and skill (Rawlinson & Brown v Whitham): negligent misstatements made, A liable because had knowledge and knew purchasers did not, A could have avoided liability by negating purchaser's reliance

Mitor Investments P/L v General Accident Fire & Life Insurance Corp: a client instructed an insurance broker to obtain unqualified insurance cover against damage from storm or flood. Policy obtained didn't cover flood caused by sea, client's property damaged in this manner. **Crt:** broker liable for loss suffered by client b/c of failure to exercise reasonable care and skill

(3) Act in P's best interests (John McCann & Co v Pow): J engaged to sell property on behalf of P, J unknown to P engaged subcontractor to sell property w/out P's knowledge or permission, and still tried to claim commission. **Crt:** not entitled to commission even though he had been instrumental in arranging the sale, his skill and competence were important qualities that could not be delegated

(4) To act in P's best interests: essence of fiduciary duty-not to act in conflict w/ P's interests, not put personal interests above those of the P **Hewson v Sydney Stock Exchange Ltd:** stockbroker buying and selling in same market, undisclosed buying and selling of share on his own account as P-w/ clients as counterparties (

5) Not to receive secret commission/secret profit (also a criminal offence): P must receive fully informed disclosure, criminal offence to profit secretly w/out full disclosure to P

Regier Campbell-Stuart: Principal instructed real estate agent to find property suitable for converting apartments, agent bought in name of his brother in law, fictitious transfer made to Agent at price of 4,500 pounds, then on sold to principal for 5,000. **Crt:** P entitled to recover profit from Agent.

(6) Not to divulge confidential information: Consult Development P/L v DPC Estates P/L-Clerk: used knowledge that allowed C to purchase units, benefit not for clerk but for family, no knowledge of breach of fiduciary duty

Lunghi v Sinclair: L owner of land wanting to sell, approached S real estate agent to sell land, L sold land to Mrs S, then discovered that Mrs S was a partner in the real estate agency and that no real attempt had been made to sell land, was in fact worth more than S had told him, since then Mrs S had sold land for 9,000 more. **Crt:** S had a direct or indirect interest in the K and should have made full disclosure to L including full value of property, Mrs S had made a secret profit

(7) Keep separate accounts

Rights of the Agent

(1) Right to payment: entitled to remuneration if expressly or impliedly agreed to in K for expenses incurred in course of carrying out P's instructions (but can have a gratuitous agency relationship-not paid).

Luxor (Eastbourne) v Cooper: A could not recover commission where sale did not go through, **Moneywood P/L v Saloman Nominees P/L:** A found a buyer but no K, P and that buyer then entered into K, A was entitled to claim commission.

(2) Indemnity and reimbursement: indemnified against any liabilities and reimbursed for any expenses incurred in the course of carrying out P's instructions. Can also have the right to exercise a lien. A particular lien only generates a right over the goods/documents that are the subject of that transaction (e.g. solicitor acts in particular matter for client, can hold file until payment made on that file. General lien, where A can hold onto goods/documents until such time as A receives payment for all expenses/reimbursement lawfully incurred in transacting the P's affairs. Also have right of stoppage in transit-if goods still in transit and A has not been paid can intercept delivery of goods from carrier to P.

Liability under Agency (In contract)

Agent who discloses agency to TP has no personal liability if TP agrees to contract on that basis, A cannot sue or be sued under a K b/w P and TP.

Vicarious Liability for actions of agent: Great Northern Railway Co v Swaffield: plaintiff railway comp agreed to deliver d's horse to a particular railway station, on arrives no one to take possession, so P's stationmaster sent horse to nearby stable and paid the charges. **Crt:** P acted reasonably in placing horse in nearby stable and was entitled to recover from defendant.

Springer v Great Western Railway Company: GWR contracted to carry consignment of tomatoes, ship delayed and arrived late, when unloaded some tomatoes has gone bad so GWR's agent decided to sell quickly locally. **Crt:** was not reasonably since should have contacted owner and awaited instruction.

Exceptions to general rule: A agrees to be personally liable, trade custom or usage makes A personally liable (e.g. stockbroker personally liable for K's made w/ other brokers for sale or purchase of shares), A personally signs bill of exchange, P is non-existent in law (i.e. fictitious person, unregistered company-but now supplemented by Corps Act), A exceeds authority (breach of warranty of authority).

Doctrine of Undisclosed Principal: A can be personally liable if A fails to disclose to TP that he or she is acting as an agent, if acting w/in authority A can claim reimbursement and indemnity from TP. However if P fails to provide resources necessary to complete K, then TP can sue A for breach of K. Where P is undisclosed, P may disclose agency agreement and enforced the K w/ TP if A was acting w/in the agreement. **Keighley, Maxstead & Co v Durant:** A must act w/in authority and rights of P must be consistent w/ terms of the K (e.g. K must not be personal to A) **Said v But:**

Breach of warranty of Authority: A represented had authority to act, rep induced TP to enter into K, TP would not have entered into the K but for the rep, and TP had not actual or constructive knowledge of the true situation=Remedy is damages for actual loss incurred.

Liability under Agency (In tort): person seeking damages from the P must prove: (1) That the A committed the tort, (2) That the tort was committed by A while acting w/in actual/apparent authority **Lloyd v Grace, Smith:** solicitor's clerk conducted conveyancing business, defrauded widow into transferring him property that he then sold for own benefit. **Crt:** firm liable as he was acting w/in the scope of his authority

Deaton P/L v Fiew: barmaid threw a glass of beer at a customer following abusive and insulting observation made to her, customer lost sight in one eye from being struck b/ the glass. **Crt:** hotelier not liable as actions were outside the scope of their employment, an independent personal act.

Remedies of a principal: rescission, refusing to pay a commission, suing for damages, suing agent for recovery of a secret commission.

Termination of agency: mutual agreement, revocation of A's authority, A withdrawing from the agreement, secret commission, completion of the purpose of the agency agreement, expiry of a time limit in the agreement.

By operation of law: performance of agency agreement, lapse of time where A has been appointed for specific time, death of either P or A (*acts done after P's death but before notice has reached A are valid and A will not be held liable), Insanity (not of enduring power of attorney), bankruptcy, frustration (e.g. destruction of subject matter).

Specific types of agency: (1) Auctioneer: agents of vendor until the fall of the hammer when they become an agent for the purchaser. (2) Mercantile (or factor) agents: have control or possession of goods on behalf of P and can sell them in their own name. (3) Brokers: a general agent who buys and sells on behalf of P but has neither possession or control. (4) *Del credere* agents: guarantees both the sale of goods and payment to P, command higher commissions.

EVOLUTION OF THE COMPANY AS A FORM OF BUSINESS ORGANISATION

Statistics: over 1.8 million registered, more than 2200 companies registered on ASX

History: developed the need for separate entities, monasteries/local government boroughs and guilds able to separate ownership and control through the form of a royal charter w/ recognizes the separation of ownership from membership, continued on beyond the lifespan of individuals (perpetual succession).

Example-South Sea Company: formed in 19th cent but w/out official royal charter, SSC purchased rights to trade in South Seas from the British Empire (South America) then controlled by Spanish w/ were at war w/ Britain, repeated issue of shares/continued to issue shares in themselves, really was company wasn't breaking even, no realistic prospects of ever being able to do trade in South Seas due to political

environment, management secretly sold their shares w/ caused a run by other investors and crash of the company (South Sea Bubble).

Post-South Sea bubble: Bubble Act passed to suppress boom, designed to try to regulate this sort of event and prohibit companies from operating that didn't have a royal charter.

Evolution of the Corporation in Australia

Australian Constitution: s 51(xx)...empowered, subject to the Constitution to make laws for the peace, order, and good government of the Commonwealth w/ respect to: ...foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

Huddart Parker & Co Pty Ltd v Moorehead: considered extent of this power, focused on definition of word 'formed' in line w/ a strict interpretation. **HC:** 'formed' means those companies formed and in legal existence at the time the Constitution was passed, did not apply to companies that might be formed at some stage in the future. Consequence = general corporations power under the Constitution reserved for States.

Moves to standardise Australian company law: Federal government passed the *Corporations Act 1989* in order to take control of company law, states challenged the takeover

New South Wales v Commonwealth (1990): NSW objected to scope of power for Cth under s 51 and whether corps act was valid. **HC:** Cth only has power of companies that have formed.

The Corporations Law Scheme: had to work to ensure legislation could validly be implemented to get a national regime, each state would pass the same legislation. The Australian Securities Commission (ASIC) replaced the National Companies and Securities Commission (NCSC) as national regulator to administer law of each state. **Features:** administration and enforcement by a national regulator ASIC w/ was responsible to the Cth, corporations laws of each State to be administered and enforced on a national basis as if those laws constituted a single law of the Cth, Cth gained substantial control over the reform process.

The Trilogy of Cases

Re Wakim: issues involving Fed Court's power to decide matters that involved what was exclusively w/in State's powers, Federal Court did not have power to decide matters that were exclusively w/in jurisdiction of States, coordination of administrative regime did not translate to the power of the Courts, all judgments dealing w/ companies were no longer valid.

Bond v R: prosecution of Bond by the Cth DPP and the extent of the DPP's powers in performing these functions/tasks under the Constitutions. **HC:** Cth DPP did not have the authority to institute an appeal against decisions made by the Court.

R v Hughes: whether Cth DPP had power to institute proceedings and appeals against decisions, whether the transfer of powers from State to Cth translated also to the DPP who would then have the power to take action on this basis. **HC:** state law did not translate to give power to the DPP (got power from Constitution and legislation), commonwealth body that undertook a function under State law involving the exercise of a duty only had constitutional powers if the Constitution gave the Federal parliament power in relation to the matter.

Reforms of July 2001: States passed legislation referring/relinquishing power to the Cth to make laws in respect of corporations and make amendments to this legislation. *Corporations Act 2001* (Cth) was passed alongside the *Australian Securities and Investments Commission Act 2001* (Cth).

Corporate Law Economic Reform Program (CLERP): Established May 1997 to develop policy in wider economic framework, recognition that simplified system would attract investment, audit regulation and red-tape, passed a number of acts to achieve this: company law review act, managed investments act, CLERP act, financial services reform act, corporations legislation amendment bill. A constant reform process.

ASIC: corporate regulator, power under the ASIC Act, administers the Corps act, responsible to the Cth treasurer, reg of companies, regulation of financial services and markets, powers of investigation and to bring legal proceedings **ASX:** public company, operator of stock exchange, listing of public companies, operates main financial markets for equities (shares, derivatives and fixed interest securities), ensures integrity of market to operate in fair, orderly & transparent way.

PROMOTERS AND PRE-REGISTRATION CONTRACTS

PLAN: 1. Who are the promoters-anyone contributing anything w/ view of getting benefit (examine active, passive and directing mind and will) 2. What has gone wrong 3. Which section are they liable under? 4. Can they avoid liability?

Who is a Promoter: person who enters into a pre-registration K on behalf of company or a person involved in the formation of the company, encompasses a range of persons involved in pre-incorporation activities.

Tracy v Mandalay: Mr T was a company secretary, tried to defend position by saying he wasn't actively involved in the promotion, but part of his job was to prepare minutes and be engaged in the company's business, was deemed to be a passive promoter. **Crt:** anyone who stands to gain or benefit from the establishment of the company can be deemed a promoter (those that establish the company).

Aequitas v AEFQ: The fiduciary obligations arise automatically once a person is identified as a promoter. It is not necessary to find a specific undertaking of any kind that would constitute a fiduciary relationship in the specific circumstances

Franger v New Sombrero Phosphate Co: those who set in motion the machinery by w/ the Act enables them to create an incorporated company.

Duties of Promoters

Promoters are fiduciaries and have a duty (not to act in conflict w/ interest of company, if potential conflict of interest must disclose in full so that principal (when it comes into existence) can make a reasonable and informed decision about the pre-registration dealing. Disclose conflict to an independent board or to existing or potential members.

Franger v New Sombrero: island rich in phosphate minerals, Mr E successfully put together syndicate group to purchase island for 55,000 pounds including license to mine phosphate, a company (NSP) was formed and agreed to purchase land from syndicate w/in a couple of weeks for 110,000, Mr E was a promoter for the company, Mr E also had control over the board w/ didn't exercise independent judgment or will, company sought to rescind K **Crt:** promoters breached fiduciary duty and company entitled to rescind K, promoters have a duty to ensure an independent board is set up and the directors are to act in the best interests of the company, promoters have the duty to act w/ utmost candour

Active promoter: person who actively undertakes the formation of the company by carrying out the procedure necessary for incorporation.

Passive promoter: A person who takes no active part in the incorporation process but intends to profit from the enterprise may also be a promoter (*Tracy v Mandalay*), any person behind the scenes effectively giving instructions and **directing the mind and will** of the company may also be caught as a promoter.

Liability of promoters

1. Fiduciary duties: disclosure of a conflict of interest in relation to a K (*Erlanger v NSP*); disclosure of any secret profits (*Gluckstein v Barnes*)

Gluckstein v Barnes: promoters negotiated property sale from liquidator, two stage deal, first paid some money directly to mortgagee and then received a 20,000 pound discount off the price, paid 140,000 pounds for property, after new company formed promoters disclose to board that they had paid 140,000 pound profit and were overselling for 180,000 to new company CrT: they were right to disclose price paid but failed to disclose 20,000 pound discount that was a secret profit, obligation to disclose to independent board or if not available the shareholders.

2. Duty to comply w/ statutory duties and fundraising provisions, Chapter 6:

Chapter applied to protect unsuspecting public (information asymmetry)

s 709: company seeking subscriptions must issue a prospectus
s 711(2): P to set out nature and extent of interests promoter had in formation of company
s 711(3): amount of \$\$\$ paid for promoter's services in formation of the company

Remedies for breaches by promoters: remedies are those of the company not the shareholders: rescission of K, damages or equitable compensation, recovery of secret profit/commission, constructive trust imposed by court

s 728(1): breach of fundraising provision by promoters

Post-registration options: one registered a company (through its board) can either: ratify any pre-registration K, not ratify the K and possibly sue the person who purported to execute the K on behalf of their company, or execute a new K (on same or similar terms in its own name-known as novation).

3. Pre-registration contracts

Traditionally at common law a person who purported to enter into a K on behalf of a company was not personally liable, only liable if at the time the agent intended to contract as a P (***Keiner v Baxter***). Company was not bound by pre-reg K as it has no legal status before reg. 3rd party couldn't sue company (technically didn't have capacity as the principal at time of K so could not ratify the K upon registration). Agent would only be personally bound (***Black v Smallwood***).

Modifications from the Corporations Act ss 131-133: altering common law position.

Aztech Science PL v Atlanta Aerospace (WoyWoy) P/L: Mr Azji was a promoter of unreg company A inventor of IP, entered into a K with WW on behalf of A, provisions said WW required to provide services and if for some reason A never reg or failed to ratify win 60 days the K would be at an end and no party would have rights against the other, looked liked company reg would take longer so agreed to extend 60 days, WW continued to provide services but breached K. A sought to enforce legal rights, WW tried to argue there was no K. CrT: time agreed by the parties under s 131(1) means not just what is contained within the written agreement but also what can be inferred from the circumstances, the parties continued to treat the K as if it was on foot even after the 60 days had passed.

Rights of third parties: can sue promoters if (1) a company never registered, (2) company registered but doesn't ratify, (3) company registered and ratifies but fails to perform.

COMPANY REGISTRATION AND THE CORPORATE FORM

PLAN: 1: Set the scene examining separate legal entity, limited liability, corporate veil 2. Examine statutory claims, common law, torts and agency 3. Tentative conclusion 4. Brief remedies

Effects of registration

Reg creates separate legal entity, facilitates limited liability
Register with ASIC who issues CAN and cert of reg. **Form 201** ASIC form, single member/director companies rely on **s 198c** and/or own constitution, other Pty Ltd rely on replaceable rules OR adopt constitution.

Ongoing compliance requirements: varies depending on type of company, some apply to all: registered office, notify certain events to ASIC, maintain financial records, registers and minute books, rights of members to inspect registers and books, use/display company name.

Consequences of registration: company can sue/be sued in own name, continue in existence despite changes to members (only ceases when removed from register by ASIC), acquire, hold and dispose of assets (BUT shares do not confer a proprietary interest in company's assets ***Macaura v Northern Assurance Co Ltd***), enter into K's and incur liabilities in own name, exercise all powers of a natural person plus corporate powers (e.g. to issue shares etc.)

s 119: Registration and incorporation of company. **s 601A-D:** end of the company.

Limited Liability

SH's liability limited to unpaid amount on shares **s 516:** **Advantages:** facilitates investment and economic activity, reduces need for monitoring, promotes liquidity and marketing efficiency, facilitates equity diversification. **Disadvantages:** less important to small companies, may encourage excessive risk taking, affects trade creditors the most.

Saloman v Saloman: once the formalities of registration are observed, the company obtains separate legal personality and limited liability, a shareholder can be a secured creditor, here the company was not Mr Saloman's agent.

Lee v Lee's Air Farming: Mr L a pilot (employee) and director/major SH of LAF, died during course of employment, wife claimed worker's compensation. CrT: one person may act in dual capacities and have rights within each of these.

Macaura v Northern Assurance Co Ltd: M owner of land w/ valuable trees w/ insurance over them, set up company and transferred land to company but failed to update insurance policy, trees damaged, tried to claim against insurance policy. CrT: SH have no legal or equitable interest in their company's property should have had new policy (note s 17 Insurance K Act now allows insurable interests to be recognized even if at time asset wasn't necessarily in name of the owner that suffered the loss).

Corporate Groups

Parent/holding company w/ number of subsidiaries under its control (often to reduce risk and protect assets and encourage investment). **s 46:** definition

Smith Stone & Knight v Birmingham Corp: (some suggestion this case may no longer apply since Spotless and BHP cases) B Council resumed land occupied by Subsidiary, under assumption laws had to pay compensation for loss suffered, b/c of arrangement subsided only had short lease over land so technically only nominal amount comp payable, parent comp argued it was affected by resumption and

therefore entitled to a high amount of comp, argued subsid was the agent of the parent company. CrT: parent co entitled to comp since subsid conducted its business as its agent

(6 requirements which will make P and S one and the same): profits of S must be treated as profits of P, persons conducting business must be appointed by P, P must be the head and brain of the trading venture, P must govern venture and decide what should be done and what capital should be embarked on, profits of business must be made by P company's skill and direction, P must be in effectual and constant control.

Walker v Wimborne: HC considered liability of directors of a number of associated companies, D's had moved funds b/w companies to enable various debts to be paid and used assets of one company as security for loans obtained by others, companies went into liquidation and liquidator brought action on grounds D's guilty of fraud, negligence, breach of duty. CrT: where companies associated in a group, D's cannot disregard their duties to individual companies in the group even for the benefit of the group as a whole.

Industrial Equity v Blackburn: consolidated accounts of a group of I's subsid's disclosed sufficient profits to issue dividends, I asserted it could also distribute dividends to its own SH through these profits. CrT: each company win group is separate, profits of subsid are not those of the parent company.

Pioneer Concrete Services Ltd v Yehnah P/L: agreement for manufacture and sale of ready mix concrete b/w 3 parties P, H, Quality Concrete (Holdings) P/L and its subsid's and interests associated w/ Y, clause provided a subsid of H would at all times act in best interests of Pioneer Concrete and other companies associated in business and would not attempt to increase its interest in venture at P's expense. 3 yrs later P alleged that H (holding company) entered into agreement w/ Y in breach of the agreement. CrT: holding company not a party to the clause, that was an undertaking given by its subsid, 2 were sep legal entities. Not possible to infer an agency relationship in those circumstances.

Equitior Finance Ltd v Bank of NZ: Bank loan to one comp was repaid from funds transferred by other group c's, upon liquidation of E Group, liq sought to recover funds from bank, claimed breach of duty not to act in best interests of individual companies CrT: no breach, in some instances a transaction entered into for the benefit of one or more companies in a group can have devolutive benefits for other companies in the group, had transaction not taken place the c's would have lost the bank's support for their own funding arrangements.

Premier Building and Consulting PL v Spottless Group Ltd: S had number of subsid's, 2 or 3 responsible for contaminating land, S restructured itself and de-registered those companies, claim made against S for nuisance and negligence. CrT: parent not responsible, restructure and deregistration was not done to avoid liability but undertaken for good commercial reasons. Not a Court of morals but a court of law (Justice Byrne)

Commissioner of Taxation v BHP Billiton Finance Ltd: parent company had large operations and had to have a constant flow of capital and money, established BHPF as subsid company to borrow debt capital and then in turn make decisions about w/ mining company subsid's to fund and how to fund, 2 of subsid's had to be written off for significant amount of money and as a result taxable income was significantly reduced, COT tried to argue it was not an independent company and therefore not entitled to treat these amounts as a write off. CrT: separate legal personality upheld, entitled to benefit of this.

Lifting/piercing the Corporate Veil:

Look for (1) a creditor or third party under a K (often unsecured creditor), or (2) a tort creditor seeking to claim against the company

Gifford Motors Co L v Home: H was MD of GF and appointed for 6 yrs under K and agreed not to compete, after 3 yrs resigned, set up company in competition and sought to solicitor clients of GF. CrT: H was liable, company was just a mere cloak of sham (puppet master analogy) to avoid H's legal obligations.

Re Darby: D and friend Gyde both bankrupt, set up company and got license to mine slate on island, set up 2nd company and sold shares to public, transferred license for excessive price so that 2nd company paid too much and went into liq, liquidator tried to go against D and G personally. CrT: company was really a dummy company and directors were personally liable due to presence of fraud (extensive, premeditated abuse-very high threshold)

Creasy v Breachwood Motors: C sacked employee commenced legal proceedings for wrongful dismissal, company transferred business and interests to BM another company they controlled, had no assets left for C's successful claim. CrT: BM was liable for the other company's debt to Creasy

Green v Bestobell Industries: G was Vic manager of B, became aware that B was preparing a tender for construction works, w/out B's knowledge of consent G incorporated own company to submit tender for the work, tender was successful and awarded K. CrT: G breached fiduciary duty to B by placing himself in a position where his duty conflicted w/ his own personal interests, further b/c company knowingly and for its own benefit participated in G's breach of duty it was ordered to account to B for the profit it derived.

Statutory examples:

Express provisions for imposing liability/penalty on directors/officers

Insolvent trading: definition within **s 95A**, penalized by **ss 588G, 588D, 588AC**

Uncommercial transactions: transaction beyond normal commercial balance b/w net benefit to company v detriment to company and other factors) penalized by **ss 588FB-588FF**

Company officer charges: s 267 now been replaced by **s 588FF**

Financial assistance: see below, **ss 260A, 260D(2)**

Other legislation: competition and consumer act.

Liability under Tort:

Briggs v James Hardie & Co P/L: B suffered from asbestosis w/ he alleged contracted while employed by subsid of J. B argued corp veil could be lifted to make P comp liable. CrT: control and dominance by a P of an S do not in themselves increase the risk of injury to tort victims and are probably not enough to pierce the veil.

James Hardie & Co P/L v Hall: employee contracted mesothelioma due to exposure to asbestos dust at NZ subsid of J. CrT: P not responsible for workplace safety in NZ plant, all P was in a position to do was insist that proper workplace standards were maintained.

CSR Ltd v Wren: where a P comp directed and controlled its subsid's operations and provided management, they owed a duty of care to the subsid's employees, and directly to W. Failed to provide safe system and place of work.

CSR Ltd v Young: Y exposed to asbestos when young infant, father was employed by a S comp and often returned from work w/ fibres on clothing, Y contracted malignant mesothelioma. CrT: P owed a duty of care since it conducted the overall operations, degree of control was sufficiently strong so that

controlling company itself was effectively conducting those activities and subsid was merely a conduit or facade.

TYPES OF COMPANIES

Corporate v. Non-corporate entities: corporate entity is a separate legal entity. A business may involve more than 1 corporate, more than 1 non-corporate, mix of corporate and non-corporate structures (depending on size, profit motive, taxation treatment, liability, administration burden etc.). Bodies corporate include companies formed under the corporations act, and other incorporated bodies (e.g. trade union, s co-operative societies).

Ways of classification:

(1) by liability of its members (2) Public status (public or proprietary) (3) Size (particularly for proprietary companies) (4) Place of formation (e.g. foreign or Australian jurisdiction) (5) Principal activity (trustee, investment vehicle, syndicates, mining sector, profit driven or object driven, profit or not-for-profit) (6) Relationship (holding, parent, related, associated, not connected to any other body) (7) Obligations (e.g. disclosing entity).

s 148(2) Use of Limited or Ltd: required by law to give notice to third parties that the company has limited liability and therefore members liability is limited, (either limited by shares public or proprietary, by guarantee-public only, or a no liability company-mining sector-public only).

Limited by shares: any unpaid amount of share owing, limited to this amount

Limited by guarantee: not-for-profits, have subscribers who agree in the event of winding up to commit or guarantee up to a certain amount that they will pay.

No liability company: companies engaged in activities w/ high level risk, in order to facilitate engaging in that activity a lot of money is needed but there is no guarantee of return.

Unlimited company: members liable for company's debt.

Classification: Public Status

Public: either listed with ASX or on international exchange (may be dual listed or unlisted)

Private: separated into small and large under the Corporations Act: **s 45A**

	Proprietary	Public
Shareholders	1-50 max s 113 and 114	1-Unlimited
Directors	Min 1 (1 Resident)	Min 3 s 201A (2 residents)
Finance	Can't get equity funds from public (can still have debt funding from lender/borrower)	Can get funds from public (need public disclosure document)
Listing	Can't be listed	Can be listed or unlisted

Conversions between forms of companies s 162(1)

Certain conversions permitted: PL to L, L to PL, PL limited by guarantee to Ltd by shares, no liability to L, special resolution of members plus other requirements under **ss 163-164**

Disclosing entities: mainly listed entities but also where securities issued (to over 100 people and a disclosure document lodged w/ ASIC **Part 1.2A**), subject to periodic reporting (lodge half year financial reports as well as annual), subject to continuous disclosure requirements. Anything w/ may affect share price has to be disclosed (directors payments, related parties transactions etc.)

Holding/subsidiary companies: where a parent company controls the composition of the board of a subsidiary and is in a position to cast or control the casting or, more than half of the votes at a general meeting (s 46 Corporations Act).

Related bodies corporate: s 59

Purpose and role of internal rules (constituent documents)

Important to have rules in place internally so that there is a system of rules and procedures that are followed to ensure that things run smoothly, clear lines of communication & designation of roles.

Govern the internal relations between: the company, the members, officers of the company/directors, how it makes decisions, composition of boards, remuneration, risk management, whether it has legal liability & responsibility to follow particular rules.

-Company can adopt a personalized set of rules to suit its particular circumstances. Able to draft its own constitution, subject to fiduciary principles and provisions of the Act that cannot be excluded/contracted out of (e.g. can limit powers of director, how much money you can enter into K's for w/out board approval, appointment of MD, sale of shares win company and existing shareholders first's)

Sources of Internal Rules

Dependent on type of company and whether company registered before or after 1 July 1998 (Constitution had to have memorandum and articles of association, or could adopt default constitution known as Table A or B Constitution). Options for pre-1998 companies: repeal entire constitution, amend existing or take no action.

Options for Internal Rules

Single member/director companies: RR's do not apply **s 135(1)** may have constitution but cannot exclude **s 198c**

Other companies: RR's or Constitution or Combination of both

Replaceable Rules s 141: 39 replaceable rules that apply to companies w/out a constitution.

Constitution as a Statutory Contract

Required for NL companies, limited by guarantee companies. Can either exclude all RR's (except any mandatory rules applying to public companies) or include some (rules apply to extent that they are not modified by the Constitution).

s 140(1): Constitution and replaceable rules applying to company have effect as a K between members and company, company and each director/secretary, members and members.

Statutory contract: remedies limited to declaration or injunction, can be modified w/out consent of ever party, no consideration given, can take into account extrinsic evidence for interpretation, can have a provision w/ provides for alteration

Von Neithan P/L v Coopers Brewery: LN private company and Coopers publicly listed, LN shareholder of B, provision for transfer and transmission of shares required director registered transfer-no members may make any transfer of shares or register transfers w/out complying w/ provisions of other articles, and also had to offer shares to existing shareholders. BC undergoing takeover and had issued share buy-back, LN tried to argue had to 1st offer shares to existing shareholders. CrT: constitution was a statutory K, narrow interpretation assessed at time constitution was drafted, share buy-back was technically not a transfer of shares, so LN did not have pre-emptive right to insist on being first offered shares.

Alteration of Internal Rules

s 136(2): Company has power to alter constitution by special resolution of members

s 135(2): replaceable rules displaced or modified by adoption of constitution

*Sections read together: RR's can also be displaced or modified by a special resolution

Other rules: ss 140(2), 136(3)-(4), Part 2F.2 (special rights) and Part 2F.1 (oppression)

General law tests: additional tests of fairness and proper purposes may have to be satisfied if the

alteration involves removal of any important membership right

Gambotto's case: Mr G holder of small % of shares in company, after takeover bid another party became majority shareholder and decided it wanted to make a change to the constitution to say anyone owning over 90% of shares can compulsorily acquire any other shareholder's shares, didn't talk about price or process, Mr G refused to sell, alleged no power to change constitution HC: only when the intended buyout is for a purpose and secondly where it is fair in terms of price and process, can an alteration of Constitution be accepted.

Amendments modifying the test from this case: s 661, Chapter 6A-s 664A

Objects Clauses: Limitations on powers

s 124: companies have the powers of an individual and also the powers of a body corporate

s 125(1): companies with a constitution can state objects, limits powers by stating an express restriction/prohibition

Typical for not-for-profits, joint ventures, no liability companies, professional practice company

Breach of objects clauses: companies w/ act outside their capacity (objects/restrictions) are said to have acted 'ultra vires' and therefore was invalid

ss 125-128: validity of ultra vires act by company is preserved

An ultra vires act may be a relevant fact in other actions under the Act:

-breach of duty by director under **Part 2D.1**

-oppression under **Part 2F.1**

-Winding up under **s 461(1)(W)**

Enforcement of Internal Rules

Breach of a company's constitution or RR's is not a contravention of the Corps Act

Statutory remedies only relevant if breach also constitutes oppression or breach of director's duties (i.e. a matter which is an offence) **ss 180, 181, 182, 183, 184**

Under general law: company may enforce internal rules against its members, and members may

enforce internal rules against the company

Using the statutory derivative action **Part 2F.1A** or

suing to enforce a personal right

DEALINGS WITH THIRD PARTIES

Competing Interests

s 124 Powers of a company: a company has all the powers of a natural person and more

Northside Developments PL v Registrar General: the need for commercial certainty (i.e. that contracts will be enforceable) and the need for fairness to 3rd parties (who have dealt w/ the company in good faith-innocent parties) VS need to protect members from unauthorized acts of company officers and the member's right to have the company's internal rules enforced with.

How do companies interact/contact?

Directly: company itself performing the necessary acts: **ss 126-127** allow for express K

Indirectly: through an agent who has authority to enter into the K on behalf of the company, by having delegated authority (express, implied, apparent/ostensible), the law attributes the actions of such agents back to the company (***Freeman v Lockyer***).

Execution of Contracts

s 127(2): company's common seal stamped on doc and its affixation is witnessed by 2 directors, director and secretary or sole director (one person company)

s 127(1): w/out common seal, document signed by combination above

Organic Theory: The directing mind and will of the company

Extension of the law of agency, the directing mind and will is not only the agent, but an organic part of the company, the person who has actual or apparent authority in some cases may be regarded as not only acting as an agent but acting as the company itself.

Lennox's Carrying Co Ltd v Asiatic Petroleum Co Ltd: Mr L was the acting director of a company L w/ owned a ship, AP transporting oil by ship of L's, ship was unsafe and unseaworthy, fire destroyed cargo, provision in applicable merchant shipping legislation at time to say owner of the ship could escape liability for loss/damage that wasn't their fault, company not liable unless they were directly at fault. HL: Mr L represented the company, had authority and by virtue of this he is the puppet master directing the mind and will of the company, therefore actions were attributable to the company.

Northside Developments PL v Registrar General: organic theory extends scope of agent's capacity to bind a company and there must first be authority, actual or apparent. It is only then that a person may be regarded not only as the agent but as the company itself.

HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd: The state of mind of the directors/managers is that of the company, their actions will attribute liability back to the company, Lord Denning's concept of the brains of the company, brain and nerve centre w/ controls what the company does, also had hands w/ hold the tools and act in accordance w/ directions from the centre. The intention of the company can be derived from the intention of its officers and agents.

Meridian Global Funds Management Asia Ltd v Securities Commission: Privy council considered w/ther knowledge of the company's chief investment officer was attributed to company. CIO caused company to contravene NZ substantial shareholder provisions and concealed this from directors. CrT: as he had authority to enter into share transactions, his knowledge of the breach could be attributed to the company, otherwise a company could claim lack of knowledge as a result of its failure to properly manage employees.

Tesco Supermarkets Ltd v Natrass: company owned supermarkets, manager failed to take down a sign advertising product on sale, false or misleading statements made about the price of the goods CrT: directing mind and will can be employees of the company to whom managerial powers have been delegated, however only those managers who have been entrusted w/ a significant degree of freedom from supervision are so regarded.

Donato v Legion Cabs (Trading) Co-operative Society Ltd: company was successfully sued for defamation arising from untrue statement, published by its secretary, that the plaintiff had been expelled from its membership.