Week 1 – Introduction to Corporations Law and Companies

- **Corporations Law**: Area of law that regulates corporations, which in turn includes companies. Consists of:
  1. **Statute Law – Corporations Act 2001 (Cth)**: Administered and enforced by ASIC (with the DPP re crime), and
  2. **General Law**: Principles and rules derived from Case Law through precedent and application and interpretation of Statute Law

A ‘Company’

- A company is created by registration under CA and is a corporation *(s57A(1)(a)):
  - **s117**: Lodge application with ASIC (Form 201)
  - **s118**: ASIC gives company ACN, registers company and issues certificate
  - **s119**: Company comes into existence on day of registration

- A company is:
  - **Legal person** (recognized by Law but distinct from natural person) that has its own rights and liabilities yet as an artificial creation of statute;
  - “Separate and independent legal entity” *(Walker v Wimborne (1976), 7 Mason J)*
    - A legal person separate and independent from directors, officers, senior managers and members as well as from employees and creditors;

- Can be any one of the types listed under **s112**:
  1. **Proprietary Companies**
     - Limited by shares
     - Unlimited with share capital
  2. **Public Companies**
     - Limited by shares
     - Limited by guarantee
     - Unlimited with share capital (i.e. Accounting Partnerships)
     - No liability company (i.e. mining company: **s112(2)**)

- Only public companies having shares can be **listed companies** on ASX

- An entity that has directors who are:
  - **Members**: (usually) of the company appointed as directors
  - **Comprise board of directors** (unless sole director/sole shareholder proprietary company)
  - **Directing mind and will of company** – Empowered to manage company (excepting any powers required to be exercised by members in AGM or EGM)
  - **Subject to directors’ duties** under statute and general law
  - **Of the type** defined by statute and general law *(s9 – director)*

- An entity (where limited by shares) that has members who:
  - **Hold shares** (shareholders), either:
    - **Beneficially** (for themselves), or
    - **Non-beneficially** (in trust for others)
  - **Can exercise voting rights** at AGM or EGM according to rights attaching to their shares – directing mind and will

- An entity that, apart from directors and members, can have officers and senior managers *(s9)*, employees and creditors

- An entity whose members have **privilege of limited liability** - protection from exposure to liability for debts:
- **Company limited by shares** – Member need not contribute more than amount (if any) unpaid on shares in respect of which the member is liable as a present or past member ([s516](#)) *(Fully paid-up shares)*
- **Company limited by guarantee** – Member need not contribute more than amount member has undertaken to contribute to company’s property if the company is wound up ([s517](#)) *(Partly paid-up shares)*
  - N.B. calls cannot be made by liquidator on no liability shares i.e. mining

- A company is a **legal person** that has perpetual succession - Exists indefinitely, regardless of changes in directors or members, unless wound up and deregistered

- A company is a legal entity that is **enlivened by its organs**:
  - **Board of directors** (management)
  - **Members**: in general meeting (voting in an AGM or EGM)

- A company is a legal person that has both ([s124(1)](#)):
  - **Legal capacity and powers of an individual** *(i.e. natural person)*, and
  - **All powers of a body corporate** – distinct from, and in addition to, capacity and powers of an individual *(St George Bank Ltd v F C of T (2009))*

- A company is a legal person that can exercise **legal capacity and powers of an individual** as applicable to companies ([s124(1)](#)), including *(note [s53](#) & [s53AA](#))*:
  - Own, lease and dispose of property
  - Earn money, borrow funds, incur debts
  - Be either for profit or not-for-profit
  - Sue and be sued, engage in transactions and dealings
  - Be victim, or be convicted, of crime
  - Make, vary, ratify and discharge contracts
  - Appoint agents and attorneys, and be a trustee

- A company is a legal person that can exercise all the **powers of a body corporate** ([s124(1)(a)-(h)](#)), including:
  - Issue and cancel shares in company *(not companies limited by guarantee)*
  - Issue debentures
  - Grant options over unissued shares in the company
  - Distribute any of the company’s property among the members
  - Grant a security interest in uncalled capital
  - Grant a circulating security interest in company property

- A company is:
  - Managed by directors (i.e. board of directors) exercising for the company powers contained in [s124(1)](#) - [rr] [s198A]
  - Directors may confer on a managing director any of the powers that they can exercise ([rr] [s198C] + [rr] [s201])
  - Directors may delegate any of their powers to:
    - A **committee of directors** ([s198D(1)(a)](#) + [s190])
    - A **director** ([s198D(1)(b)](#) + [s190])
    - An **employee** ([s198D(1)(c)](#) + [s190])
  - Any other person ([s198D(1)(d)](#) + [s190])

- [rr] = section is a replaceable rule *(see [s135](#))*

- A company is an **incorporated vehicle** *(business structure)* for the purposes of:
  - **Raising (pooling) capital from members** - equity finance
  - **Borrowing finance from lenders** - debt finance
  - **Asset protection** - separate legal entity + limited liability
  - Engaging in business activity, including:
o Holding of assets
o Domestic & Global trading / manufacturing
o Not-for-profit functions
o Private sector or government use

Proprietary Companies
• s9 – A proprietary company is a company registered under CA and has meaning given by s45A(1).
• s45A(1) – A proprietary company is a company that is registered as, or converts to, a proprietary company under CA.
  • Note 2 refers to s113
• s113 – A proprietary company must:
  • Be registered as a proprietary company (s113(1))
  • Have no more than 50 shareholders (non-employee) (s113(1))
  • Not engage in (fundraising) activity requiring Ch 6D disclosure to investors (i.e. via prospectus: s706 & s709), except for an offer of shares to (s113(3)):
    (a) Existing shareholders of company, or
    (b) Employees of company or its subsidiary
• s114 – A company needs to have at least 1 member
• s201A(1) – A proprietary company must have at least 1 director who must ordinarily reside in Australia
• s204A(1) – A proprietary company is not required to have a company secretary (for regulatory responsibilities see s188(1)) – if it does have one or more secretaries, then at least 1 must ordinarily reside in Australia

Financial Reporting
• s45A – For the purposes of determining financial reporting obligations, proprietary companies are classified as being either:
  • Small proprietary company (s45A(2)) - Financial, directors’ and auditor’s reports not required (unless directed by members (s293) or ASIC (s294)), or
  • Large proprietary company (s45A(3)) - Financial, directors’ and auditor’s reports required annually (see s285)
• s45A(2) – Proprietary company is a small proprietary company for a financial year if it (together with any entities it controls) satisfies at least 2 of the following criteria:
  (a) Financial year consolidated revenue < $25m
  (b) Financial year-end consolidated gross assets < $12.5m
  (c) Financial year-end number of employees < 50
• s45A(3) – Proprietary company is a large proprietary company for a financial year if it (together with any entities it controls) satisfies at least 2 of the following criteria:
  (a) Financial year consolidated revenue ≥ $25m
  (b) Financial year-end consolidated gross assets ≥ $12.5m
  (c) Financial year-end number of employees ≥ 50

Public Companies
• s9 – A company, other than a proprietary company, registered under CA.
• Public companies can engage in fundraising activities that require Ch 6D disclosure (e.g. prospectus) and have extensive financial reporting obligations including provision to members and lodgment with ASIC of annual reports (s285) – Financial, Directors’, and Auditor’s report
• Public companies must hold an AGM (s250N)
• s114 – A company needs to have at least 1 member
• s201A(2) – Public company must have at least 3 directors, at least 2 of whom must ordinarily reside in Australia
• s204A(2) – Public company must have at least 1 company secretary (for regulatory responsibilities see s188(1)), at least 1 of whom must ordinarily reside in Australia

Listed Companies
• s9 – A company that is included in official list of a prescribed financial market operated in this jurisdiction (ASX).
• Listed corporations are public companies that can engage in fundraising activities that require Ch 6D disclosure - attract public investors via ASX.
• As disclosing entities, are required to prepare half-year financial reports (see s285).
• Members of listed companies can readily trade their securities on ASX.
• Listed companies are regulated by CA + ASX LR

Company Limited by Shares
• s9 – A company registered under CA and formed on the principle of having liability of its members limited to amount (if any) unpaid on shares held by them (s516).
• Company limited by shares (e.g. BHP Billiton):
  ▪ Must be either a public company or a proprietary company
  ▪ Most common type of company, typically used for trading purposes

Company Limited by Guarantee
• s9 – A company registered under CA and formed on principle of having liability of its members limited to respective amounts that members undertake to contribute to the property of the company if it is wound up (s517).
• Company limited by guarantee (e.g. World Vision):
  ▪ Must be public company (cannot be a proprietary company)
  ▪ Used for not-for-profit purposes by charitable and religious organisations

Comparison of Business Structures

Sole Trader
• Formation: Limited formalities, low compliance, not separate legal entity
• Liability: Unlimited
• Transfer / Succession: Difficult (valuations, clientele)
• Management: Individual
• Fundraising: Limited by personal assets, personal ability to borrow
• Tax implications: Marginal income tax rates

Partnership
• Definition: Relation which exists between persons carrying on business in common with a view of profit (PSA, s1)
• Formation: Relatively informal, low compliance, not separate legal entity (partnership deed required for certainty and to vary operation of PSA)
• Liability: Unlimited
• Transfer / Succession: Complex, requires unanimous consent of partners, valuation
• Management: Participation rights, managing partner
• Fundraising: Difficult, limited by partners’ personal assets & ability to borrow
• Tax implications: Individual marginal rates
• Formation: No registration requirements, exceptions:
  ▪ Business name and GST purposes
  ▪ Limited Partnerships
• Incorporated Limited Partnerships - Part 3 (PSA)

• Liability:
  • Joint liability, debts/obligations of partnership - s9 (PSA)
  • Joint & several liability:
    □ Wrongful acts/omissions - ss10 & 12 (PSA)
    □ Misapplication of money/property - ss11 & 12 (PSA)

• Limited Partnerships
  • Incorporated Limited Partnerships

• Transfer / Succession: Dissolution of partnership (unless otherwise provided in the partnership deed):
  ▪ s32 (PSA) – Expiration of partnership
  ▪ s33 (PSA) – Bankruptcy, death, change of partners

• Management: Right to take part in management - s24(1)(5) (PSA):
  ▪ Mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing: ss19 (PSA) (see also s24(1) (PSA))

Trust

• Formation: Complex structure, trust deed, not separate legal entity

• Liability:
  ▪ Trustee: Unlimited liability (indemnity from trust)
  ▪ Beneficiary: Limited to share in trust / fiduciary of trustee

• Transfer / Succession: Complex, subject to trust deed

• Management: Trustee (in accordance with trust deed)

• Fundraising: Difficult (subject to trust deed)

• Tax implications:
  ▪ Beneficiaries: Individual marginal rates
  ▪ Trustee: Penalty rates (top marginal rate)

Company

• Formation: Registration, ongoing compliance, separate legal entity

• Liability: Limited (except for unlimited liability companies)

• Transfer / Succession: Simple (e.g. transfer of shares – can be subject to board discretion)

• Management: Directors

• Fundraising: Security interests, mortgages, Ch 6D

• Tax implications: complex:

• Tax implications: Aggregated annual turnover below $2m - 28.5%, otherwise 30%

Corporate Veil

• Company is an independent legal entity in relation to:
  ▪ Creditors (as well as founders, vendors, directors, members) - Salomon v Salomon & Co Ltd
  ▪ Employees - Lee v Lee’s Air Farming Ltd
  ▪ Property - Macaura v Northern Assurance Co Ltd

• Corporate veil separates directors and members, employees and creditors, from company.

• Court only will lift corporate veil where warranted by an exception to corporate veil doctrine

• General Law:
  ▪ Avoiding legal obligations - Gilford Motor Co Ltd v Horne
  ▪ Committing a fraud - Re Darby
  ▪ Company involvement in director breach of duty - Green v Bestobell Industries