

Topic 2: Registration and its Effects

Per **s 119**, a company comes into existence as a body corporate at the beginning of the day on which it is registered. A new artificial legal person will come into existence upon registration (**s 119**). A company ceases to exist on deregistration (**s 601AD(1)**). A company is registered by lodging an application with ASIC per **s 117**, using form 201 available through the ASIC website. **s 117(2)** contains full requirements and relevant information. Per **s 117(2)**, the application must state the following:

- Type of company
- Company's proposed name (**ss 147-156**)
- Replaceable rules or constitution
- Registered office and principal place of business of the company
- Name, address & DOB of each director / company secretary
- Name and address of each member
- Details of any holding company
- Share structure
- Signature of the applicant

Legal requirements for company names

- Must be stated on the application, unless the ACN is to be used (**s 117(2)(b)**)
- Name must be available (**s 148(1)(a)**)
 - A name is not available where it is identical to a name held or registered on the Business Names Register (**s 147(1)(b)**) or it is unacceptable for registration under the regulations (**s 147(1)(c)**).
- Name must contain "Limited" or "Proprietary Limited", as appropriate (**s 148(2)** – or the abbreviation (**s 149**)
- A company must set out its name and ACN on all public documents (**s 153**).
- A person may reserve a company name for 2 months (with 2 months extensions) (**s 152**).

Per **s 124(1)**, a company has all the powers of a body corporate, including power to

- (a) issue and cancel shares in the company;
- (b) issue debentures (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long);
- (c) grant options over unissued shares in the company;
- (d) distribute any of the company's property among the members, in kind or otherwise;
- (e) grant a security interest in uncalled capital;
- (f) grant a circulating security interest over the company's property;
- (g) arrange for the company to be registered or recognised as a body corporate in any place outside this jurisdiction;
- (h) do anything that it is authorised to do by any other law (including a law of a foreign country).

Corporate Groups

- A corporate group is not a separate legal entity – each company within the group has separate legal personality, but not the group as a whole
 - Duties are owed by directors to the company on whose board they sit. The question is what is in the best interests of the individual company and not what is in the best interests of the corporate group (Walker);
 - Profits of each company must be treated separately and a parent company cannot pay a dividend based on the profits of the group as a whole (Industrial Equity v Blackburn);

- A contractual promise made by a subsidiary does not bind the holding company to the contract (Pioneer Concrete).

Separate Legal Entity Doctrine and Limited Liability doctrine

Companies are separate legal entities, separate and distinct from shareholders, directors, officers, employees (**s 119; *Salomon***). According to the limited liability doctrine, in a company limited by shares, member liability is limited to the amount to unpaid purchase price on shares (if any) (**s 516**).

A company has the legal capacity and powers of a natural person, as well as those of a body corporate (**s 124(1)**). A member of a company (even a sole member company) can function in dual capacity and enter into contracts with the company (*Lee*)

Salomon affirmed the separate legal entity doctrine (corporate veil)

- Mr S registered a company with 7 shareholders (minimum required by law), sold his business to new company (Salomon & Co Ltd). Part of the purchase price was in shares
- 20,000 shares for Mr S, one share each to wife and children
- Company incurred trading debts (unsecured) and became insolvent
 - The sale of the business was not a fraud
 - The company is a separate legal entity, not the agent of Mr S
 - Using a company to limit liability is not an illegal purpose, it is an intended benefit of incorporation
 - Did not matter that the vast majority of shares belonged to one person
 - Transfers risk to creditors – they need to take steps to protect themselves
- In *Lee*, sole member entered into an employment contract with the company (upholding *Salomon*)
 - Lee was managing director of the company, killed in course of business, widow claimed under insurance policy
 - Company was a separate legal entity from Lee in his capacity as managing director and shareholder therefore company could enter into contract of employment with him
- In *Macquarie*, M owned timber plantation which was insured in his own name. He transferred property to a company he had registered but forgot to transfer the insurance policy to the company. There was a fire at the plantation and he wanted to claim on his individual policy
 - No insurance available for timber farm – it is the company's property, not his
 - Courts are not very willing to pierce the corporate veil

Piercing the corporate veil: exceptions to limited liability

General rule: In a company limited by shares, member liability is limited to the amount owing on shares (**s 516**). But some exceptions exist which enable members to be liable for more than the shares they paid for ('piercing the corporate veil').

Exception 1: Company as agent of the SH

Exception 2: Fraud or improper conduct

Exception 3: Statutory interpretation

Exception 5: Policy

Exception 4: S588G – Insolvent trading

Company as an agent of the shareholder

- If the company is an agent of the SHs and not acting on its own, then liability will fall on the SHs as principals (*Smith, Stone & Knight*)

- This is in exceptional cases only – 100% ownership of a company's shares by one person alone is not usually sufficient (*Walker, Industrial Equity*)
- The fact that a holding company exercises 'control and dominance' over a subsidiary is insufficient to pierce the veil (*Briggs*)
- In *Smith, Stone and Knight*
 - SSK (holding company) owned and on which its wholly owned subsidiary conducted a business
 - Local govt authority compulsorily acquired the land and agreed to pay SSK compensation but refused to compensate it for the disturbance to the business being conducted on it
 - Court accepted the subsidiary was acting as an agent of the holding company (not a separate entity)
 - Subsidiary did not have its own accounts, no agreement between subsidiary and SSK, no payments between the two etc

Six (overlapping) questions are relevant here (*Smith, Stone & Knight*):

1. Were the profits of the subsidiary (sub) treated as profits of the parent company (PC)?
2. Were the persons conducting the sub's business appointed by PC?
3. Was the PC the head and the brain of the trading venture?
4. Did the PC govern the venture, decide what should be done and determine what capital should be embarked on the venture?
5. Were the business profits made by the PC's skill and direction?
6. Was the PC in effectual and constant control?