

# CORPORATIONS LAW – EXAM NOTES

Corporations Act 2001 (Cth)

<b>Q1</b>	10 marks	20 mins	6:30 – 6:50 pm
<b>Q2.1</b>	12 marks	24 mins	6:50 – 7:14 pm
<b>Q2.2</b>	8 marks	16 mins	7:14 – 7:30 pm
<b>Q2.3</b>	10 marks	20 mins	7:30 – 7:50 pm
<b>Q2.4</b>	10 marks	20 mins	7:50 – 8:10 pm
<b>Q2.5</b>	10 marks	20 ins	8:10 – 8:30 pm

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## DIRECTORS/OFFICERS/MEMBERS DEFINITIONS

### Directors Definition

- **Appointed** (s9(a)(i) properly or (ii) as an alternate)
- **De facto dr** (s 9(b)(i))
  - Acting in the position of a Director
  - Cannot be a company (Antico)
- **Shadowing dr** (s 9(b)(ii))
  - Where dr's of co are accustomed to act in accordance with their wishes or instructions
  - Can be a co if they influence Board re: decisions about asset transfers/range of internal controls and board simply accepted their decision (Hodgson J in Antico)
  - Just because they follow SD's instructions, in itself is insufficient, but also need not control every facet (Buzzle)
    - Less likely SD if has genuine interest in advising board in a certain way
    - Irrelevant if Board just tends to take that advice by virtue of their lower bargaining position (Buzzle)

### Officers Definition

- Officers include (s 9):
  - (a) Dr
  - (b) Person who (i) makes or participates in decision making which affected substantial part of C's business or (ii) has capacity to affect C's financial standing significantly or (iii) people are accustomed to listen to them

- UNLESS capacity to affect financial standing was exercise for own interest (Buzzle)
    - (c) receiver/manager
    - (d) administrator
    - (e) administrator of DOCA
    - (f) liquidator
    - (g) trustee
- If not a co: includes partners, office holder, or generally persons whose decision making affects business / capacity to affect financial standing

### **Members Definition**

- Being a member
  - Register of members (s 168)
  - Register requirements (s 169)
  - Register is conclusive of evidence of shares (s 176)
  - Person is a member if they register on registration (s 231(a)) or agree to become a member (s 231(b)) or by conversion from Ltd by guarantee, to Ltd by shares under s167 (s 231(c))
  - Transfer of shares only effective until new member registered (s 1072F, effected by Article 4.3 of the CC)
- Ceasing to be a member
  - By transferring shares (s 1072F)
  - Transmission on death (s 1072A, replaced by Article 5.1; 5.3)
- Capital reduction per s 256B
- By shareholder approval of cancellation per s 256C

### **Involvement Definition (s 79)**

- (a) aid/abet/counsel/procure contravention; OR
- (b) induce(threat/promise) contravention; OR
- (c) act/omission that is direct/indirect, knowingly/party to contravention; OR
- (d) conspired to contravention

## TOPIC 2 – REGISTRATION AND ITS EFFECTS

### **Registration**

- Per s117, a co is created by lodging an application with ASIC using Form 201 to register and must include certain information per ss(2).
- Upon registration ASIC will give the co an ACN and certificate of registration (s118(1)).
- Per s119, the co will come into existence on the beginning of the day it is registered.
- S122 allows for the expenses of setting up the co to be paid out of the co's assets.
- Per s123, the co can have a common seal, like a signature.

### **Company names**

- When selecting a co name, it must not match any names already in the Aus Business Register or this is unacceptable (s147), with unacceptable defined in co Regs, Sch 6.???
- An ACN or any available name can be used (s148)
- Must show if it is Ltd, Pty Ltd, NL (s148)
- Per s152 a name can be reserved whilst waiting for registration to occur

## Separate legal entity

- A separate legal entity is created upon registration, separate from its shareholders (SHs), directors (drs), officers and employees (Salomon); meaning it can be contracted with by anyone even where sole dr and SH (Lee).
- Implication of this is that the risk is transferred to creditors
- Evidentiary point in Lee that they looked at proof of his employment to show he was an employee: was paid weekly wages, as opposed to taking profits at the end of each year which would look more like SH
- Separate legal entity principle can also work the other way, as in Macaura, where Mr Macaura's insurance policy did not extend to his co; in his own name = separate
- A co has the powers of a natural person as well as the powers of a body corporate (s124) (including to issue and cancel shares in the co (unless limited by guarantee), issue debentures, grant options over unissued shares in co, distribute property among members, etc.)

## Piercing the corporate veil

Generally, as co is a separate legal entity, *member liability is limited to amount owing on shares, if any (if co limited by shares), /a co is separate from any members of a corporate group* however this corporate veil may be lifted in limited circumstances, under which co remains liable, but SHs/drs/HC's also become liable

### 1. Agency exception

Where the subsidiary is deemed to be the agent of the holding co (Smith, Stone & Knight), the corporate veil may be pierced. This is based on exceptional facts and unlikely to make out.

1. The profits of the subsidiary must be treated as the profits of the holding co
  - Unlikely if publicly listed co
2. Persons conducting business must be appointed by the holding co
3. Holding co must be the head and brain of the trading venture
4. Holding co must govern the venture, decide what should be done & what capital should be embarked on
5. The profits must be made by the holding co's skill and discretion
6. Holding co must be in effectual and constant control
  - Won't be met if enter into K's with each other; respecting each other as separate legal entities e.g. moving product between places

### 2. Torts exception

Holding co may be liable for tortious acts of subsidiaries (Briggs)

- A tort victim cannot choose who will do them harm, cf. a contracting party, thus holding co should be liable to cover damages
- However, the court in Briggs did not have to make a final decision on this, so it is a potential exception but has not been tested.

### 3. Existing obligations

The corporate veil will be pierced where a co is used to avoid a pre-existing legal duty that is otherwise owed by the controller, using co as a device/stratagem/cloak/sham (Gilford)

- Gilford: def set up co to avoid non-complete clause in employment K

### 4. By Statute

The corporate veil may be pierced in certain circumstances under CA

- **See topic 8: insolvent trading**
- Per s588V, a holding co will be liable for debts of subsidiary co if
  - (a) Was holding co at the time subsidiary incurred a debt (ss(a) – go thru s9;s46;s49 tests);
  - (b) co is insolvent at that time/becomes incurring that debt/debts at that time (ss (b)) (insolvency defn s95A);

- (c) reasonable grounds for suspecting insolvent/close to insolvent at that time (suspecting = more than mere idle wondering; positive feeling of mistrust)
- (d) (i) the co/one or more of drs, aware at time of such grounds for suspecting; and/or (ii) considering nature & extent of co's control over co's affairs & other relevant circ's, reasonable to expect that (A) holding co in those circs would be aware; or (B) one or more of such holding co's drs would be so aware; and
- (e) after the commencement of the Act

In such a case, holding co should stop subsidiary from trading. From policy perspective there are knock on effects on society from insolvent trading.

### Corporate groups

A co is separate from its corporate groups (Walker), with a subsidiary co (SC) being legally separate from its holding co (HC) (Industrial Equity).

\_ may be a holding co of \_ per s50 if one of the following met:

- 1. \_ controls composition of the board (s46(a)(i))** – control means it can appoint or remove all, or the majority, of the drs and is taken to have power to make such appointment if (a) a person cannot be appointed as a dr of \_ w/o the exercise of \_ of such power in the persons favour; or (b) a person's appointment as dr of \_ follows necessarily from being a dr/other officer of the other body
  - Must be legal control not de facto control Mount Edon
- 2. HC is in a position to cast/control casting of more than 50% of votes cast at SC's GM (s46(a)(ii))**- Can have a legally enforceable power to control casting of votes; Or just de facto control is enough e.g. proxy (Bluebird)
- 3. HC owns more than 50% of SC's shares (s46(a)(iii))**
- 4. SC is a SC of the HC (i.e. grandparent/great grandparent) (s46(2))**
- OR 5. More flexible test for control (s50AA)** - HC if has capacity to make decisions about \_'s financial and operating policies (s50AA(1)); considering (2)(a) the practical influence that \_ exerts rather than rights it can enforce and (b) any practice/pattern of behaviour affecting \_'s operating or financial policies (even if breach of agreement/trust)
  - No control if: first co and a third co jointly determine decisions about \_'s financial/operating policies (s50AA(3)) OR If \_ has (a) capacity to influence decisions about \_'s financial and operating policies and (b) under legal obligation to exercise that capacity for someone other than its members – then not controlling \_ . (s50AA(4))

Wimborne - Dr's of one co in a group owe their duties to that co, not the whole group

Blackburn - HC cannot treat profits of SC as its own; must get SC to declare dividend to it

## TOPIC 3 – TYPES OF COMPANIES

'Corporation' includes (a) company; (b) any body corporate; (c) an unincorporated body that may sue/be sued/hold property in the name of an office holder appointed for that purpose (s57A).

'Companies' are co's registered under the CA (s9). Per s112(1) there are different types of co's:

PROPRIETARY/PUBLIC	LIABILITY OF MEMBERS	PROPRIETARY/PUBLIC STATUS
Proprietary companies	Limited by shares Unlimited with share capital	Small Large
<i>Public companies</i>	Limited by shares <i>Limited by guarantee</i> Unlimited with share capital <i>No liability company</i>	<i>Listed</i> <i>Unlisted</i>

\_ is a company registered under Corps Act (s9; s57A), specifically a \_ \_ \_ co (s112(1)).