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General

Separate legal personality

General principles

- A corporation is a separate legal entity distinct from its members.
- Corporate property is distinct from the property of the members.
- The property of its members cannot be taken in execution for the debt of the corporation, and vice versa.
- The same person can be a sole director and sole member of a company. **Salomon**
 - o That person can also be a creditor of the company in a different capacity. **Salomon**
- A person can have more than one role, including sole shareholder, director and employee. They are treated differently even IF in fact they are the same person (legal fiction). **Lee v Lee**

Piercing the corporate veil

In exceptional circumstances the legal fiction of separate legal personality can be removed “piercing the veil”

General

- Exceptional circumstances – Last resort.
- Requires more than unfairness.
- Usually Pty company / wholly owned subsidiary.

When?

- Common law:
 - o Fraud or agency
- Insolvent trading [see directors duty section]

Fraud

- Companies were “mere shams” used for the sole purpose of enabling a person to avoid an *existing* legal obligation.
- Evident impropriety **Gilford Motor; Jones v Lipman**
- Subjective dishonesty makes it easier to conclude entity is a sham **Kensington**

Agency

- Is the subsidiary carrying on the business as the parent’s business or its own? **Smith Stone Knight**
- Indicia:
 - o Were the profits treated as the profits of the parent?
 - o Were those conducting the business appointed by the parent?
 - o Who was the ‘head and brain’ of the enterprise?
 - o Did the parent make all strategy, tactics and capital decisions?
 - o Did the parent make profit by application of its skill and direction?
 - o Was the parent in effective and continual control?
- No reason to lift CV *where* there was a good commercial purpose for having separate companies in the group performing different functions. **Pioneer**
- Control is not sufficient to find agency – casts doubt over SSK in Australia. **Bird Cameron**

Corporate groups

- Generally, a subsidiary can act in the interest of the holding company when that benefit will be for the whole group. **Equiticorp finance**
- Must be some benefit of the payment or conduct to the subsidiary. Just being a related company is not sufficient. **Walker v Wimbourne**
- Also consider **section 187 CA**

Corporate groups

Definitions

Subsidiary – Section 46

- A body corporate (in this section called the first body) is a subsidiary of another body corporate if, and only if:
 - (a) the other body:
 - (i) controls the composition of the first body's board; or
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or
 - (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
 - (b) the first body is a subsidiary of a subsidiary of the other body.
- Relevance – ss **113, 187 202B, 214, 588W**

Related companies – Section 50

- A body corporate is related to a second body corporate when:
 - o it is a holding company of the second body corporate;
 - o it is a subsidiary of the second body corporate; or
 - o it is a subsidiary of a holding company of the second body corporate:
- Relevance: s **191(2)(a)(viii); s 206F(2)**

Control – Section 50AA

- (1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (2) In determining whether the first entity has this capacity:
 - (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
 - (b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (4) If the first entity:
 - (a) has the capacity to influence decisions about the second entity's financial and operating policies; and
 - (b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;the first entity is taken not to control the second entity.

Wrinkle #1: can a holding coy be a shadow director of its subsidiary?

- Rationale: holding coy controls share register and often appoints directors
- Not as a matter of course, but perhaps on the facts
 - *Standard Chartered Bank v Antico*

Wrinkle #2: when the coy's 'best interests' accommodates benefitting a group member

Basic rule: Directors must have regard for the best interests of the company as a whole

but cf *Darvall v Nth Sydney Brick* where courts looked through to members

Not acceptable to 'gift' benefits to other parts of a group, though collateral benefits may be ok *Brick & Pipe*

The prohibition is not absolute - Directors can have regard to the benefit their company may derive from intra-group transfers, guarantees etc - Two exceptions:

1. s187 *Corps Act*
2. *Equiticorp Finance v BNZ* (1993) 32 NSWLR 50 – where the failure of the holding coy would likely lead to the failure of the subsidiary

Directors' Powers

Basic propositions

- The power of a corporation is divided between the two organs of the company. **Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame**
 - o Directors – Management
 - o Members/Shareholders – General Meeting.
- This division of corporate powers is governed by the constitution.
- Can be adopted on registration ALL members **136(1)(a)** later by special resolution **136(1)(b)**
- Constitution can be modified or repealed by special resolution. **136(2)**

Basis of powers – 134

- Constitution; OR
- Replaceable rules; OR
- Combination of both

Constitution is a contract – s 140

- Between members and the company.
- Between members and other members.
- Between directors and the company.

- No direct enforcement of constitution by members. **Foss**
- Contract can be altered without express approval of every party. **136(2)**
- Not enforceable by outsiders. **Marketing advisory v Football Tasmania**
- Rectification NOT available. **Santos v Pettingell**
- No damages available; ONLY declaration or injunction. **Houldsworth**
- Unlikely to obligations of good faith or fair dealing are implied into the contract. **St-george Football**
- In construing terms, should aim for reasonable business efficacy, if possible. **Lion Nathan**

The Board

- Minimum no of directors. **201A**
- Directors can be appointed. [see below]
- Shadow or de facto directors [see directors duties]
- Officers are also defined under the act. **s 9**
- Directors have a right to access financial records at all reasonable times. **290**

Types of directors

- Managing directors. **201J, 198C**
- Alternates. **201K**
- Executive v Non-executive.
- The Chair.
- Company secretary. **Part 2D.4**

Appointment of directors – Part 2D.3

- Can be on incorporation. **120**
- By members through GM. **201G**
- By Board of Directors. **201H** (must be confirmed by GM) **(2)(3)**
- Must be 18 years of age. **201B**

Ceasing to be a director – part 2D.3 Div 3

- Resignation. **203A**
- Because of disqualification. **203B**
- Removal by members (pty) **203C** (pub) **203D**
- Expiration of term in contract or constitution.
- Death or mental incapacitation.

Powers and responsibilities of the board

Ordinarily the business of the company is to be managed by the board of directors. **s 198A(1)**

- First place to look for the director's powers is the constitution of the company/replaceable rules.
- The directors exercise any powers EXCEPT those under the act or constitution reserved for GM. **s 198A(2)**
- Directors exercise their powers and make company decisions through director's meetings.
- Board only organ that can authorise litigation on behalf of company. **Massey v Wales**

Directors meetings. **Part 2G.1**

- Minutes of board meetings. **Part 2G.3**

Powers provisions. **Part 2D.1 Div 4**

- Remuneration. **Part 2D.3 Div 2**