

CORPORATIONS LAW

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Incorporation and its Effects

CREATING THE ENTITY

A COMPANY IS AN ARTIFICIAL ENTITY RECOGNISED BY LAW AS A LEGAL PERSON WITH ITS OWN RIGHTS AND LIABILITIES (S124). A CORPORATION INCLUDES A COMPANY, AND BODY CORPORATE AND AN UNINCORPORATED BODY THAT MAY SUE OR BE SUED AND HOLD PROPERTY (S57A).

Registering a Company

- A company is registered using ASIC Form 201 (s117)
- Company comes into existence at the beginning of the day it is registered (s119)
- Must include information listed under s117(2)
- On registration, ASIC allots the company an CAN and issues a certificate of registration (s118(1))
- A company continues to exist until deregistered by ASIC (s601AD(1))
- Companies can have one member (s114)

Company Names

- Name cannot be identical to another company in the Australian Business Register or unacceptable as determined by Company Regulations, Schedule 6 (s147)
- Can use CAN as its name, or any other name (s148)
- Can reserve a name, as registration can be lengthy (s152)
- Company name must show if the company is "Ltd" or "Pty Ltd" or "NL" (s148)

SEPARATE LEGAL ENTITY DOCTRINE

COMPANIES ARE SEPARATE LEGAL ENTITIES, SEPARATE AND DISTINCT FROM ITS SHAREHOLDERS, DIRECTORS, OFFICERS AND EMPLOYEES (SALOMON).

- A company has the legal capacity and powers of a natural person, as well as those of a body corporate (s124(1))
- A member of a company (even a sole member company) can function in a dual capacity and enter into contracts with the company (Walker)
 - Sole member company can enter into employment contracts (Lee)
- Companies are independent legal entities separate from corporate groups (Walker)
 - A subsidiary is legally independent from the holding company (Industrial Equity)

CORPORATE GROUPS

A CORPORATE GROUP IS A "NUMBER OF COMPANIES WHICH ARE ASSOCIATED BY COMMON OR INTERLOCKING SHAREHOLDINGS, ALLIED TO UNIFIED CONTROL OR CAPACITY TO CONTROL" (WALKER).

Is the Company a Subsidiary?

A company will be a holding company of a subsidiary if ONE of the following is met:

1. Holding company controls composition of the board (s46(a)(i))
 - If they can appoint or remove all, or the majority, of the directors without consent of another person (s47)
 - De facto control is not sufficient- 38% of shares is not enough to be considered 'legal control' (Mount Edon)
2. Holding company is in a position to cast, or controls casting, of more than 50% of the maximum number of votes at the subsidiary's general meeting (s46(a)(ii))
 - Must have a present ability to cast the votes and support cannot depend on external sources (Bluebird Investments)
3. Holding company owns more than 50% of the subsidiary's shares (s46(a)(iii))
4. Holding company is a 'grandparent' or 'great-grandparent' of the subsidiary (s46(2))

Related Bodies (s50)

If a company is considered a related body to another company if it is:

- a) A holding company of the other company
- b) A subsidiary of the other body
- c) A subsidiary of a holding company of the other company

Control Test

If an entity has the capacity to determine decisions about another company's financial and operating policies, it is deemed to control that company (s50AA(1))

- Consider the practical influence rather than the rights it can enforce (s50AA(2)(a))
- Practices or patterns of behaviour affecting the financial and operating policies are relevant (s50AA(2)(b))
- Joint influence of two entity does not automatically determine that the first entity controls the company (s50AA(3))
- If the entity is under a legal obligation to exercise that influence they are not taken to control the company (s50AA(4))