

LAW5011 Principles of Company Law

EXAM NOTES

CONTENTS	PAGE
Registration	2
Company names	2
Lifting CV	4
Types of companies	6
Constitution and RRs	9
Replaceable Rules table	99
Statutory K	13
Altering Constitution	14
Shares	16
Reducing Share Capital	18
Share Buy-Backs	20
Financial Assistance	21
Dividends	22
Debt Capital	22
Directors	23
Officers	25
Members	25
Directors' Meetings	26
General Meetings	27
Directors' Duties Map	29
Step 1: who owes duty?	30
Duty to retain discretion	31
Duty to avoid conflict	31
Duty to act in GF and best interests	36
Duty to act for proper purpose	38
Duty to act with care, skill and diligence	39
Insolvent trading	42
Members' remedies	45
SDA	45
Oppression	46
Winding up	48
Personal action	49
Statutory injunction	51

QUICK CHEATS:

SLE Doctrine/CV

- Identify the separate corporate groups including any potential subsidiary/holding company relationships
 - Outline the SLE doctrine
 - Applying the factual circumstances, outline how the corporate veil may be pierced (noting any policy considerations in the case of a Tort Creditor discussion)
 - Identify the significance/advantages if piercing the veil
- Conclude on the likely success of opposing arguments

Variation of Class Rights

- What share does the party have?
 - Ordinary shares v Preference shares: s254(2)
- Is there a variation of a class right?
 - Variation of class rights at common law: These focus on legal rights not effects: *Greenhalgh v Adrenerne*; *White v Bristol Aeroplane*
 - Statute proceedings: s246C sets out what constitutes a variation of rights
- Has the proper process been followed?
 - Has the company's constitution been followed?
 - If the constitution is silent on the matter, than s 246B sets out the default process for variations or cancellation of shares
 - s 246B(2) Otherwise the company may change it only (c) by special resolution and (d) with the written consent of members with at least 75% of the votes in the class (s 246B(2) & (c) & (d))
- Minority to apply to court
 - Members (who did not agree to the variation) may apply to the court to have it set aside if they have 10% of the votes of the class concerned
 - NOTE: GAMBOTTO if they don't have more than 10%
- Remedies
- Injunction & see members remedies i.e. s 232 Oppression remedy and SDA

Share Capital – Capital Reduction & Share Buy Backs

1. State the general proposition: A company may buy back their own shares (s 257A), provided the purchase does not prejudice the ability of the Co to pay its creditors, and the correct procedure is followed (ss 257B-J)
2. Does the purchase materially prejudice creditors?
3. Which buy back scheme does it fall under? See s 257B table

Financial Assistance/Related Party Benefit

1. State the general proposition: A company may indirectly reduce its capital if it financial assists a person to acquire shares in the company. As a general rule financial assistance is prohibited (*Trevor v Whitworth*), however ss 206A-D permits it where the requirements are strictly complied with
2. Determine whether financial assistance is being provided
3. Determine whether the financial assistance is permitted
 - Materially prejudice the interests of creditors
 - Shareholder approval
 - Exemptions
4. Consider breach/consequences

Topic 2: Incorporation and its Effects

REGISTRATION

1. A company is created by lodging an application with ASIC (s 117(1))
2. Using Form 201 (s 117(4))
3. Form must include the information listed in s 117(2)

Section 117(2) form criteria:

- (a) Type of company
- (b) Proposed name
- (c) Name and address of each member
- (d) Name and DOB of each director
- (e) Name and DOB of each company secretary
- (f) Addresses of directors and company secretary
- (g) Registered office address
- (h) Proposed opening hours of office (public company only)
- (j) Address of proposed place of business (if no registered office)
- (k) **For a company limited by shares or an unlimited company**, for each share:
 - i. Number/class of share
 - ii. Amount paid for share
 - iii. Whether fully paid on registration
 - iv. Remaining balance if not fully paid
 - v. Whether share is beneficially owned by member
- (l) **For a company limited by shares or is an unlimited company**, and shares issued for a non-cash consideration, must describe particulars of issue of those shares
- (m) **For a company limited by guarantee**, the proposed amount of the guarantee of each member
- (n) State/Territory company is registered in

Public company requirements:

1. Proposed opening hours (s 145(2) and (3))
 2. If shares issued for non-cash consideration (s 117(2)(l))
 3. Copy of constitution (s 117(3))
4. ASIC registers the company, gives an ACN and issues a certificate of registration (s 118(1))
 5. Company comes into existence on day of registration (s 119), and:
 - a. MD, D and Company secretary come into the role (s 120(1))
 - b. Shares taken by members are issued (s 120(2))
 6. Expenses incurred before registration may be paid out of company assets (s 122)

COMPANY NAMES

1. A company can reserve a name for 2 months by lodging an application with ASIC (s 152)
2. A company must set out its name and ACN on all public documents (s 153), except on receipts (s 154) *unless* specified by regulations (s 155)

Requirements of a name:

- Must be available on National Business Names Register (s 148(1)(a))
- Limited companies: Ltd, Limited proprietary companies: Pty Ltd (s 148(2))

- Exception: not-for-profits (s 150)
- Unlimited proprietary: Pty (s 148(3))
- No liability: No liability (s 148(4))
- Public companies: CANNOT have Pty (s 148(5))
- CANNOT be an unacceptable name per s 147(1)(c):
 - Name that is undesirable or likely to be offensive in opinion of ASIC (Schedule 6, Pt 2)
 - Contains phrases which imply connection with govt, Royal Family or Sir Donald Bradman (Schedule 6, Pt 2)
 - Implies misleading status, e.g. executor, stock exchange, trust, RSL, chartered (Schedule 6, Pt 3)
 - It is an **offence** to carry on a business under a name other than is required in the Act (s 156).

Abbreviations may be used (s 149):

Co/Coy, Pty, Ltd, NL, Aust, No, 7, ACN, ABN

SEPARATE LEGAL DOCTRINE

Upon incorporation, the company is a separate legal entity (*Salomon*) and has legal capacity and powers of an individual (s 124(h)) and a body corporate (s 124(1)), including:

- (a) Issue and cancel shares
- (b) Issue debentures
- (c) Grant options over unissued shares
- (d) Distribute company property amongst members
- (e) Grant security interest in uncalled capital
- (f) Grant circulating security interest over company property
- (g) Register for recognition in other jurisdictions
- (h) Do anything authorised by the law (including foreign law)

Consequences of SLE:

- Company is distinct from SHs, Ds, officers, and employees (*Salomon*)
- Company's property does not belong to its members (*Macaoura*)
- Company can contract with controlling members and members can act in a number of capacities (*Lee's Air Farming*)
- SHs and Ds can be secured creditors (*Salomon*) or employees capacities (*Lee's Air Farming*)
- **Corporate groups (CG)**: number of companies associated by common or interlocking shareholdings, allied to unified control or capacity to control (*Walker*)
 - Each company in a CG is a separate legal entity (*Walker*)
 - Not considered one legal entity in either formal (s 46) or informal relations (s 50AA)
 - **Therefore...**
 - Duties are owed by D to the company on whose board they sit, i.e. what is in the best interest of the *company* not the entire CG (*Walker*)
 - Profits of each company must be treated separately, i.e. parent company cannot pay dividend based on profits of group as a whole (*Industrial Equity*)
 - Contractual promise made by subsidiary does not bind holding company (*Pioneer Concrete*)
 - Creditors can only enforce rights against the debt company, not a related party

LIFTING THE CORPORATE VEIL

The veil of incorporation recognises that a Co is a SLE distinct from its SHs. In exceptional cases the Court has been willing to lift the corporate veil to make Ms and Ds liable. There is no consistent principle in lifting the CV (*Briqqs*), there are certain circumstances under which exceptions have been given, although the categories are non-exhaustive (*Pioneer Concrete*)

P may seek to rely on [facts] as an exception to CV. P must strongly argue that the strict application of Salomon should not apply.

1: Implied agency

1. *Per Smith, Stone and Knight, the CV can be lifted between separate parties if one is an agent and the other is its principal. However, in Australia, courts are reluctant to lift the CV (Walker)*
2. *P can argue that [HC] is liable for the actions of the [SC] according to the criteria of agency outlined by Atkinson J in Smith, Stone and Knight:*
 1. Profits of the SC must be treated as profits of the HC
 2. Persons conducting SC's business must be appointed by HC
 3. HC must be the head and brain of the SC
 4. HC must govern the SC, deciding what should be done and what capital should be embarked on it
 5. Profits of the SC must be made by the HC's skill and direction; and
 6. HC must be in effectual and constant control
3. *The Court will also look to the control of the HC, business decisions, composition of the board, arrangement with equipment, etc.*
4. **NB. Exceptional cases only** – even 100% ownership of the Co's shares are not sufficient to create agency (*Walker; Industrial Equity*)
5. **If question does not state that they are related/part of CG:** must apply ss 46 or 50AA to establish this
6. **Tortious Actions:**
 - Application of CV to tortious creditors is unclear
 - Rodgers JA in *Briqqs* commented that tort victims are in a substantially different position as they do not choose to be injured, whereas commercially contracting parties contract by choice following due diligence
 - **NB.** Only found to be arguable in *Briqqs*, as the dispute was settled
 - Undetermined when tortious creditor may pierce CV, HC may nonetheless be liable to an employee of its subsidiary for tortious acts in negligence
 - This is based on the HC itself owing a DOC to employees of SC
 - DOC can arise where the HC exercised a high degree of control over the day to day activities of its SC (*Wren; Young*), i.e. where HC provides all management staff
7. **CONCLUSION:** *A relationship of agency does/does not exist, meaning the CV is/is not lifted, and [HC] will/will not be liable for [SC]'s actions, as it is/is not acting on its own behalf but acting on the behalf of [HC] (SSK).*

2: To make a person liable for avoiding existing obligation/fraud

- *P may be able to argue that the CV be lifted as the Co is being use dot perpetrate a sham or avoid an existing legal obligation (Gilford Motors).*
- **Avoiding obligation:** *The Co cannot be a 'device' to mask the carrying on of a business by a person (Gilford Motors) or a puppet of controller (Harper). These [facts] are analogous to:*
 - *Harper* – where the HC was using SC to avoid existing duty
 - *Gilford Motors* – starting a new company to avoid restraint of trade clause
 - *Creasey* – winding up of a Co and transferring assets to new Co to avoid payment of employee benefits
 - *Lipman* – transferring land to Co to avoid an order for SP on the same K concerning the land