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1. INTRODUCTION

WHAT IS A CORPORATION/COMPANY?

STEP 1 → IS IT A CORPORATION?

- a. **Non-exhaustively includes four types of entities** (s 57A(1) and (3) CA)
 - i. **(1) Company** (s 57A(1)(a))
 - 1. Definition → company means a company registered under the Act (s 9)
 - ii. **(2) Any body corporate** (s 57A(1)(b)) - not defined comprehensively in the Act, under general law the term refers to 'any body whatsoever that has corporate personality'
 - 1. Merely labelling it as 'not a body corporate' does not make it such if it has the rights/characteristics of a corporation under statute e.g. ability to own property, enter contracts, behave as separate legal persons (*Qld Rail*)
 - iii. **(3) An unincorporated body** that may sue or be sued, or may hold property in the name of its secretary or an officeholder of the body (s 57A(1)(c))
 - iv. **(4) An ATSI corporation** that is registered under the Corps (ATSI) Act 2006 (Cth) (s 57A(3))
- b. **Exclusions** (s 57A(2) CA)
 - i. **'Exempt public authority'** (s 57A(2)(a) CA) – i.e. gov instrumentality - defined in s 9 as a body corporate incorporated within Aus (or an external Territory) that is either a 'public authority' or an 'instrumentality or agency of the Crown'
 - 1. 'An agency or instrument of gov set up to exercise control or execute a function in the public interest' and 'must perform a traditional or inalienable function of gov and have gov authority for so doing' (*FCT v Bank of WA*) (i.e. regulated by state/fed gov corporations legislation)
 - ii. **'Corporation sole'** (s 57A(2)(b) CA) – refers to the largely historical circumstance where the occupant of a particular position or office was given corporate status
 - 1. Compare stat corporations (see also Public Governance, Performance and Accountability Act 2013 (Cth); State Owned Corporations Act 1989 (NSW))
- c. **Foreign companies** may also only carry on a business in this jurisdiction if registered under Pt 5B.2 Div 2 or if it has its registration transferred to Aus under Pt 5B.1
 - i. **Registration of foreign company** per Pt 5B.2
 - 1. Foreign co must appoint a local agent (s 601CF) (who is liable for responsibilities of the foreign co)
 - 2. Requirement to disclose annual financial stmts (s 601CK)

3. CORPORATE PERSONALITY

1. State the prima facie assumption from **Salomon**
2. Identify whether any of the exceptions for piercing the corp veil are applicable
 - a. Statute
 - b. Agency or negligence
 - c. Equitable remedies
3. If none of the above, pierce veil
 - a. Evasion principle
4. Conclude who has **liability**

SEPARATE LEGAL ENTITY/LIMITED LIABILITY

STEP 1 → THE PRINCIPLE

- a. *A company is a separate legal entity from its members (s 124; Salomon) and has all the powers of a natural person and powers of a body corporate (e.g. issue shares, debentures) (s 124(1)) – from the day of registration (s 119)*
 - i. Co totally controlled by one person does not est an agency (**Salomon**)
 - ii. **A co is separate from its controllers** (**Lee's Air Farming**)
 1. A person can operate in a dual capacity in a co → as a worker and governing dir (**Lee's Air Farming**)
 - iii. A **co's property is separate from the property of its members** (**Macaurea**)
 1. Dirs and creditors do not have any legal or EI in the assets of the corporation (**Macaurea**)
 - iv. **Members enjoy limited liab** → under **s 516**, for a co limited by shares, liab is limited to the value of the shares → members have limited liab if shares are fully paid
 1. If not fully paid, if co goes into liq → need to pay back up to full issue price
- b. **Application of Salomon to corporate groups**
 - i. Prima facie, in corp groups, each co is a separate and independent legal entity (**Walker v Winborne**)
 - ii. However, per **s 46**, a body corp can be a subsidiary of another body corporate if: (**s 46**):
 1. **The other body controls:**
 - a. **The composition of the first body's board**; or (**s 46(a)(i)**)
 - i. I.e. can appoint or remove a majority of dirs (**s 47**)

DIRECTOR'S MEETINGS (BOARD MEETINGS)

Management power of dirs is given to collective board decisions (s 198A), not to individuals, unless there is formal delegation (Northside Developments).

STEP 1 → CONVENING PHASE

1. Who is entitled to convene the meeting?

- a. Any dir can convene the meeting by giving reasonable notice individually to every other dir (RR - s 248C)

2. Timing of notice and who receives notice

- a. Meeting may be called on reasonable notice to all dirs (s 248C)
 - i. **Standing notice** may be given (e.g. first Monday of the month)
 1. Periodic meetings – don't need additional notice, since dirs already know that Board meetings occur periodically
 - ii. **Notice may be in formal** (e.g. verbal notice)
 - iii. **Reasonable notice assessed in all of the circumstances**
 1. A **failure** to give reasonable notice will render the meeting and its outcome a nullity (Bell v Burton) - unless all dirs attended (Barron v Potter)
 - a. If a matter is urgent → short notice may be reasonable
 - b. If matter is not urgent → short notice will likely be unreasonable → that will invalidate the meeting, and thus invalidate any decisions made at the meeting
2. **Examples:**
 - a. Reasonable:
 - i. Knowledge of absence → short notice just prior to meeting is okay where dir indicated she would not attend such a meeting anyway (Mcmaster v Eznut)
 - ii. Insolvent → 2 days notice was okay where the co was insolvent → urgency (Sliteris v Ljubic)
 - b. Not reasonable:
 - i. Personal plans → less than 2 hours notice due to impending travel plans not sufficient (Re Keneally)
 - ii. 20 mins by phone → 20 mins notice not reasonable (Re Deposit Power)
 - iii. 5 days → notice 5 days before meeting was not reasonable (Eastone Mining)
 - iv. Consequences for nonattending dirs → 25hrs notice not reasonable where resolutions had significant consequences for dirs who refused to attend and who

- ii. **Certain appointed or de facto officers** (e.g. CEO, MD, but not singular dir) has authority to manage co generally, unless the const restricts their powers
- c. NO → **no actual authority**
 - i. **Singular directors** → no authority to manage co generally, or enter contracts, must participate in the Board as a collective
 - ii. **Certain appointed or de facto officers** (e.g. CEO, MD), but their authority has been restricted by the Board or const
 - 1. **Crabtree-Vickers** → the appointed MD's power was restricted, so that MD did not have actual authority to enter that contract, and could not make the representation
 - iii. **Agents w/o actual authority**
 - 1. A representation of authority by an agent may be confirmed by the existing course of conduct b/w the parties. However, a mere assertion by a person that they have authority is not sufficient to create actual authority w/o some actual or implied confirmation by the co (**Crabtree-Vickers**)
 - 2. **Crabtree-Vickers** → the agent (Peter) only had express actual authority to obtain info and quotes, but no actual authority to buy the machines, so the agent could not represent that they had authority to enter the purchase contract

3. 3rdP relied on the representation

- a. *[3rdP] must also have relied on the rep.*
- b. *As per the **indoor mgmt rule**, persons dealing w the co in good faith are **entitled to assume that acts within its const and powers have been complied with**, and are not bound to inquire whether acts of internal mgmt have been regular (**Turquand**)*
 - i. E.g. will remedy procedural irregularities → lack of quorum, voting irregularities, notice deficiencies, etc
- c. Exception → However, there are exceptions to the indoor mgmt rule (**Northside Developments**)
 - i. (1) 3rdP **knows** that agent has no actual authority = no estoppel
 - ii. (2) 3rdP **ought to know** of the lack of authority = no estoppel
 - iii. (3) 3rdP was **put on inquiry** and required to make further inquiries to determine whether actual authority exists → failure to do so will prevent 3rdP from enforcing the contact (**Northside Developments**)
 - 1. E.g. if transaction is entered into for purposes apparently unrelated to the co's buss
 - iv. (4) **Forged seals or sigs**
 - v. [Applying exception to facts →] *However, the [X] has **actual knowledge or suspicion that the const has not been complied with or a reasonable person in his positon would have known or suspected this was the case such as***

Tesco: Liab in Criminal

Display indicated lower price. Store mngr admitted he had failed to check the fixture and remove the poster when it ran out. Assistant also failed to notify. Held → whether the store manager's acts could be treated as the acts of the co itself or as the acts of another person. DMW applies to senior officers i.e. dirs or those entrusted w corporated policy. A store manager, even tho entrusted w day-to-day running of the branch, was not the alter ego of the co ∴ acts could be those of 'another person' for the purposes of s 24(a) Trade Descriptions Act. Liab in crim law depends on whose conduct is identified w the co. The manager was a cog in the corporate machine, not part of the co's directing brain.

Meridian: Liab in Criminal

Whether the knowledge of a co's investment officers, acting w authority but w/o informing the board, could be attributed to the co for the purposes of disclosure obligations. M Ltd was an investment mgmt co based in HK. CIO and senior portfolio manager used co-managed funds to acquire a 49% stake in another corp. They acted with the co's authority, but w/o informing the board or MD. Acquisition made M a substantial security holder under s 20(3) of the Securities Amendment Act which required immediate notice to the public issuer & stock exchange. No notice was given. Held → attribution of facts and knowledge to a co depends on rules of attribution. Primary rules are found in the const and company law, while general rules incl agency and VL. Irrelevant that they corruptly or failed to report to their superiors, their knowledge, acquired while exercising authorised functions, was attributable to M. AR and MR of a co may come from dirs, officers, or em/ees entrusted w relevant functions. Crim Code codified this.

Presidential Security: Liab in Criminal

Whether a corp can be held liab in crim law for intentional acts of violence committed by its MD & sole em/ee. B broke into Club w accomplices intending to steal cash. Bingle, the MD was guarding the club as part of his co's contract. During incident, Bingle fired gun at B, wounding him, then fired at his accomplices when they fled. He also attempted to shoot B at close range, later fired at escaping vehicle. B sued PS for assault and battery. Attribution of crim responsibility may arse thru the DMW doctrine, thru stat interpretation or thru acts of agents acting within their authority. Whether Bingle's single conduct in shooting B was performed as part of the co's security responsibilities & whether his state of mind could ∴ be identified w company. Held → yes, since the acts were done in furtherance of corporate purposes.

- iii. Usually, **disclosure of the interest is sufficient to remove the conflict** (*Grand Enterprises*)

- 1. Sometimes, the common dir may be obliged to avoid voting on transactions or even taking part in negotiations to avoid the conflict (*Grand Enterprises*)

STEP 2 → WAS THE CORPORATE OPPORTUNITY/SECRET PROFIT OBTAINED BY REASON OF THE DIR'S POSITION?

- 1. Go to step 3 in no profit rule PG 97

STEP 3 → IS THERE FULLY INFORMED CONSENT?

1. Fiduciary breach

- a. *[The FD, however, can be attenuated if [X person] obtained full disclosure and consent of the GM, or a provision of the const attenuated the strict duty (*Woolworths v Kelly*).]*

b. SHER ratification at GM

- i. Consent by the co can be given by the SHers thru passing a resolution at a GM to ratify the dir's conduct (*Woolworths v Kelly*). This requires:
 - 1. Full and complete disclosure to the SHers
 - 2. MUST be consent by SHers, not BOD, unless BOD are all SHers (like in *Qld Mines*)

c. Const provision of attenuation

- i. An **express provision in the const** allows dirs to have conflicts in the transactions

2. Statutory breach

- a. Members can't ratify statutory breaches as the breach remains enforceable by ASIC
 - i. This reflects public nature of stat duties serving more than just SHER interests (*Cassimatis*)

STEP 4 CONCLUSION → STATUTORY DUTY → SS 182, 183

[Thus, as [X] owed FDs and improperly used their position/information from their position to obtain a personal benefit w/o consent, this conduct could equally contravene ss 182 and 183, which mirror the equitable no-profit rule. A person involved also contravenes these sections (s 182(2), s 183(2)).]

GO TO PG 103

IMPROPER USE OF POSITION AND INFO (SS 182, 183)

[The statutory duties apply in addition to general law duties (s 185).]

Summary (ss 182 + 183) → A dir, secretary, other officer or em/ee must not improperly use their position or information obtained by their position to gain advantage for themselves or someone else or cause detriment to a corporation (ss 182(1), 183(1)).

IMPROPER USE OF POSITION (S 182)

STEP 1 → WHO CAN BE LIABLE UNDER S 182?

1. Director, secretary, officer, em/ee (s 182(1))
 - a. [Broader than fiduciary duties] – not limited to senior em/ees
2. Persons involved in a contravention (s 182(2)) → accessorial liab)
 - a. s 79 – person 'involved' if they:
 - i. aided, abetted, counselled or procured the contravention (s 79(a));
 - ii. induced, whether by threats or promises or otherwise, the contravention (s 79(b));
 - iii. have been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention (s 79(c));
 - iv. have conspired w others to effect the contravention (s 79(d)).

STEP 2 → IS THE CONDUCT IMPROPER?

1. [1] State the prohibition on improper use of position

- a. *[[XX], as [director] cannot improperly use their position to gain an advantage for themselves or someone else OR cause detriment to the co (s 182(1)).]*
 - i. **[A]** *[The mere fact that a benefit was obtained or that the co was harmed, does not of itself est that the dir's purpose was to gain the benefit (Metal Manufactures).]*
 - ii. **[B]** *[It is **not necessary to actually obtain a benefit**, it is sufficient that you attempt to/had the purpose of gaining an advantage even if you do not actually make one (Chew).]*

2. [2] Did the dir actually 'use' their position?

- a. See no profit rule – was the adv gained by reason of their fiduciary position – GO TO PG 97

3. [3] Objective test

- a. Conduct is 'improper' if it breaches the standard of conduct that would be expected of a reasonable dir with the same responsibilities and knowledge in the circumstances (Byrnes)
 - i. The dir's **subjective consciousness** of impropriety is irrelevant (Byrnes)

ii. Abuse of power = improper

1. E.g. gaining a personal benefit is an improper purpose bc it is not acting for the co's benefit (*Adler*)
 - a. *Byrnes* → B and Hopwood were dirs of Jeffcott, needed underwriting support to get loan. B and H used other co (Magnacrete) they were dirs in to provide guarantee and obtain loan w/o co's knowledge. Held → improper (gaining adv for Jeffcott) = breached s 182(1)
2. But, impropriety extends beyond an abuse of power (*Byrnes*)

iii. Dishonesty (lying) = always improper

1. *Byrnes* → dirs were dishonest bc they lied to the board
 2. *Somerville* → Somerville (solicitor) advising clients to set up a new co, transfer assets from existing co to new co in exchange for worthless shares and put the old co into liq
- iv. **Failing to prevent co from contravening law** does not amount to an 'improper' use of dir's position (*Maxwell*)
- v. **Developing opportunity out of buss hours** did not prevent it being improper (*Holyoake*)

4. [4] Was there SHer ratification?

- a. SHers cannot give effective ratification for statutory breaches (*Cassimatis*)
- b. BUT, SHer ratification may mean that the conduct is not 'improper' (*Angas Law Services*)

IMPROPER USE OF INFORMATION (S 183)

STEP 1 → WHO CAN BE LIABLE UNDER S 183?

1. Director, secretary, officer, em/ee (s 182(1))
 - a. [Broader than fiduciary duties] – not limited to senior em/ees
2. Persons involved in a contravention (s 182(2)) → accessorial liab
 - a. s 79 – person 'involved' if they:
 - i. aided, abetted, counselled or procured the contravention (s 79(a));
 - ii. induced, whether by threats or promises or otherwise, the contravention (s 79(b));
 - iii. have been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention (s 79(c));
 - iv. have conspired w others to effect the contravention (s 79(d)).

STEP 2 → IS THE CONDUCT IMPROPER?

1. [1] State the prohibition on improper use of info obtained by their position

- a. *[[XX], as [director] cannot improperly use info obtained by their position to gain an advantage for themselves or someone else OR cause detriment to the co (s 183(1)).]*

11. CORPORATE INSOLVENCY; INSOLVENT TRADING

1. Assess whether the company is insolvent
 - a. Apply s 95A(1) definition
2. What is the type of insolvency the company is facing/should the company opt for? Choose from
 - a. **Voluntary Administration** (most attractive)
 - b. Receivership
 - c. Creditors Scheme of Arrangement
 - d. **Liquidation**
3. Have the criteria for the insolvency procedure been met/what steps need to be done?
 - a. Voluntary Administration – follow the steps in ‘B’
 - b. Liquidation – follow the steps under A
4. Did the **company trade whilst insolvent** and thus could attract liability?
 - a. Is the person a director at the time the company incurs a debt?
 - i. Has a debt been incurred?
 - b. Was the company insolvent at the time?
 - c. Were there reasonable grounds for suspecting insolvency?
 - d. Liability
 - e. Defences
 - i. Safe harbour?
 - f. Consequences
 - g. Consider failure of care and diligence (s 180(1)); duty to act in good faith (s 181); improper use of position (s 182) to get equitable remedies like rescission and injunction

DUTY TO NOT TRADE INSOLVENTLY - DIRECTORS ONLY

[[Dir] may be liable for insolvent trading if they fail to prevent [Company] from incurring a debt when a company is, or would become insolvent, and they have reasonable grounds for suspecting insolvency (s 588G).]

STEP 1 → WHO CAN BE LIABLE FOR INSOLVENT TRADING UNDER S 588G(2)?

1. Director of a company?

a. *[1] [Here, [person] is clearly a director as defined in s 9AC.]*

- i. If contentious, Go to PG 93
- ii. Includes de facto and shadow directors, but not officers or secretary

- a. Usually requires a combination of the below conduct to lead to grant of members' remedy
- b. (1) Reduce or remove dividend payments**
 - i. No legal right to receive a dividend, unless one is offered/declared by the company
 - ii. Company is not bound to pay a dividend (s 254U)
- c. (2) Limit information flows (compare public vs private company)**
 - i. More effective for private companies than for public companies (especially public listed companies - since there are mandatory disclosure requirements)
- d. (3) Restrict participation in management**
 - i. Example of Minority Oppression, especially for quasi- partnership situation
 - 1. E.g → remove them off the board
- e. (4) Dilute shareholdings**
 - i. Issue new shares
 - 1. Breach of director's duty (to act for a proper purpose) - since issuing shares to manipulate voting power is an improper purpose
 - 2. Shareholders have an equitable right they can exercise if their shares are improperly diluted, and they have standing to enforce that right to challenge the share issue (e.g. *Ngurli v McCann*; *Howard Smith*; *Whitehouse v Carlton*)
 - ii. Selective capital reductions
 - 1. Method to manipulate who has the Majority shareholdings (*Howard Smith*)
- f. (5) Variation of class rights (s 246B)**
 - i. Approval mechanisms might be required → but if the Majority have enough votes to pass a special resolution, then approval of the variation will not be difficult
- g. (6) Changing the fundamental nature of the business**
 - i. One of the grounds for 'Just and equitable winding up' remedy is the fundamental nature of the business has completely changed so it is just and equitable to wind up the company
- h. (7) Related party transactions (Ch 2E)**
 - i. Directors sell the company's assets to related parties (themselves, their spouse, their own companies) to extract financial benefits from the company → reducing the share value (to oppress Minority shareholders - company does not have enough money to pay dividends)
 - ii. This is a breach of director's duty - in breach of Ch 2E, but shareholders cannot enforce this