

INTRODUCTION

1. Is it a company?
 - 1.1. Must be registered under the *Corporations Act* (s9)
 - 1.2. Company comes into existence on registration (s119)
2. What type of company is it?
 - 2.1. Proprietary companies have fewer than 50 members (s113)
 - 2.1.1. Large proprietary company (45A)
 - 2.1.2. Small proprietary company (45A)
 - 2.2. Public companies have more than 50 members (s113)
 - 2.2.1. Is it listed?
 - 2.3. N.B may be a subsidiary or holding company (s46)
 - 2.3.1. Controls board, or majority of shares, or majority of votes
3. Who wants to bring a claim?
4. Who will the claim be against?

Corporate Personality and Limited Liability

1. Upon incorporation, a company gains the legal status of an individual (s124)
2. No fixed rules for 'piercing the corporate veil' (*Briggs v James Hardie*), however there are certain classes of situations at common law where courts have tended to do this.
 - 2.1. Fraud or improper conduct
 - 2.1.1. Where the company was set up purely as a device for evading existing contractual obligations (*Gilford Motor Home; Jones v Lipman*)
 - 2.1.2. Query whether courts would pierce the corporate veil for an existing legal obligation that is not contractual.
 - 2.1.2.1. *Prest v Petrodel*—veil pierced in context of family law dispute
 - 2.2. Agency
 - 2.2.1. Where a subsidiary company is, in fact, best understood as an agent of the holding company, the holding company may be liable for the actions of the subsidiary (*SSK v Birmingham*). Six factors to consider:
 - 2.2.1.1. Same profits?
 - 2.2.1.2. Same businesspeople?
 - 2.2.1.3. Parent head?
 - 2.2.1.4. Parent governing?
 - 2.2.1.5. Skill and direction?
 - 2.2.1.6. In control?
 - 2.3. Corporate Groups
 - 2.3.1. Just because a company is in a corporate group, doesn't diminish its separate legal personality
 - 2.3.2. In *DHN Food v LBC Hamlets*, Lord Denning was willing to pierce the corporate veil for corporate groups
 - 2.3.3. But this approach has never been followed in Australia (*Industrial Equity; Qintex*)
 - 2.4. Tortious liability

- 2.4.1. A holding company may be liable for an action brought against its subsidiary, where the holding company did not provide the subsidiary with enough capital to cover foreseeable actions that may be brought against it (*Briggs v James Hardie*)
- 2.4.2. The corporate veil doesn't preclude the operation of negligence law (*CSR v Ren*)
- 3. Directors/Holding companies may also be liable for the insolvent trading of companies/subsidiaries (s588G, V)
 - 3.1. Are they directors? Includes shadow and de facto directors (s9)
 - 3.1.1. Shadow directors—do they have control over the management and financial affairs? (*Antico*). Are their suggestions reason enough for the Board (or its majority) to act (*Buzzle*)
 - 3.1.2. De facto directors—look to substance, not to title (*Grimaldi*)
 - 3.2. Are they are holding company? (s46)
 - 3.2.1. Do they hold a majority of shares, a majority of votes of the board, or a majority of votes? (s46)
 - 3.3. Have they engaged in insolvent trading?
 - 3.3.1. Has the company incurred a debt? (s588G(1)(b))
 - 3.3.2. Was the company insolvent, or did it become insolvent due to the debt? (s588G(1)(c))
 - 3.3.2.1. Insolvency is calculated at the time a debt becomes due and payable (s95A)
 - 3.3.3. Was the director aware of it, or were there reasonable grounds to suspect insolvency? (s588G(1)(d)).
 - 3.3.3.1. Standard is objective—presumes the financial knowledge of a director (*Metro Fire Systems*)
 - 3.3.3.2. . Not a defence to be ignorant of financial reporting (*CBA v Friedrick*)
 - 3.4. Are any defences available? (s588H)
 - 3.4.1. Expectation of solvency on reasonable grounds (both objective and subjective) (s588H(2))
 - 3.4.2. Reasonable reliance (588H(3))
 - 3.4.3. Justifiable non-participation (588H(4))
 - 3.4.4. Took all reasonable steps to avoid incurring debt (588H(5))
- 4. Liability for entering into an agreement to deprive employees of entitlements upon insolvency (s596AA-AI).

Corporate Constitution

- 1. What is the company governed by?
 - 1.1. Company governed by replaceable rules and/or constitution (s134)
 - 1.2. Public companies also are subject to some mandatory rules
 - 1.3. Constitution comes into effect on registration, or when adopted by special resolution (s136)
- 2. What is the company purporting to do?
 - 2.1. Do something in tension with its constitution
 - 2.1.1. An act in contravention of the constitution is not of itself invalid (s125(2))
 - 2.1.2. Removal of director—public company