

COMPANY NAMES

PROVISIONS

s10: requires every company to have: 1 shareholder, 1 director, 1 or more shares and a **company name**

s20: prohibits the Registrar from registering a company **unless the name has been reserved** under s12

s22(2): registrar **must not reserve a name** (a) the use of which would **contravene an enactment** or (b) that is **identical or almost identical to the name of another company** or (c) that in the opinion of the registrar is **offensive**.

CONTRAVENTE AN ENACTMENT: S22(2)(a)

Flight Centre: Flight Centre Ltd had franchises throughout NZ – a separate company set up, Flight Centre Rotorua Ltd – P argues that the name contravened s13(1) FTA (false representation that it was associated with P)

1. The **interpretation of s22(2)(a) is narrow** i.e. restricted to statutes that **“specifically prohibit or restrict the use of a name”**.
2. **Not necessary** or appropriate to consider **whether a name might contravene any and every enactment**. Policy: this would be a **strain on registrar** and slows down process.

NZ Conference Seventh-Day Adventists: impossible to tell at time of registration whether a name would contravene an Act such as the FTA, **question is whether at time of application the use contravened enactment**.

IDENTICAL OR ALMOST IDENTICAL NAMES: S22(2)(b)

What are the key words – are they identical? Flight Centre. Are they almost identical in that they come in a similar order? Stanley Hunt. What are the policy considerations behind the section? Public factor

1. **Dr Rust Ltd:** Dr Rust Ltd cf. The Rust **Doctor** Ltd.
 - a. **Test:** whether the public is **likely to be able to distinguish the two names** - objectively determined by the court.
 - b. **Objective test cf.** whether the public was actually confused
 - c. Held: Dr Rust Limited and The Rust Doctor Ltd are not “almost identical”.
2. **Flight Centre:** names which are **“almost identical”** are those where the key words and the order in which they appear make them **virtually indistinguishable from one another**.
 - a. A name with a geographical location attached to it (Flight Centre Rotorua Ltd cf. Flight Centre Ltd.) is not almost identical to name with plainly different location.
3. **Stanley-Hunt Earthmovers Ltd:** Stanley Hunt Earthmovers Ltd cf. Stanley Hunt Earthmovers **(1996)** Ltd

- a. The purpose is to ensure **members of the public can recognise that the companies are separate and distinct entities** - addition of year didn't prevent them from being "almost identical".
- b. Factors that may be relevant: **degree of distinctiveness of the words common to both names, whether the words are in the same order.**
- c. Factors that are **irrelevant**: the nature of the business carried out, the place where the companies operate.

OFFENSIVE: s22(2)(c)

South Pacific Airlines: "undesirable" = widest discretion; the registrar shouldn't be limited by definition.

1. Names of an **obscene nature**, might give **offence to a friendly State**, offend **public policy**, might give offence to any particular **section of the community or religion**.
2. **s24**: where Registrar believes on reasonable grounds that the name under which a company is registered should not have been reserved the Registrar may direct the company to change its name.

THE CONSTITUTION

s26: a company is **not required** to have a constitution.

s27: if the company **does not adopt a constitution** then the company (and directors, collectively and individually, and shareholders) possess the rights, powers and duties and obligations set out in the Act unless so modified or negated by a constitution.

s29: constitution can either be **registered on incorporation** or **adopted, altered or amended by shareholders later**.

s30: constitution can **contain any matter** the company may wish to include. **Subject to:**

- a. **s31(1):** it has no effect to extent that it **contravenes or is inconsistent with the Act**. Mandatory provisions cannot be negated or modified by constitution. They **protect the interests of shareholders and creditors rather than provisions providing for the internal management of a company**. For example, the solvency test protects creditors, and directors' duties protect the company and shareholders.
- b. **s16(2):** it may contain a provision relating to the **capacity, rights, powers or privileges of the company** only if the provision **restricts them**. **A constitution cannot increase a company's capacity beyond that conferred by legislation or the general law**.

PRESUMPTIVE PROVISIONS CAN BE MODIFIED OR NEGATED BY THE CONSITUTION – OPTIONAL PROVISIONS ONLY APPLY IF THEY ARE EXPRESSLY ADOPTED

MANDATORY SECTIONS	
SUBJECT	SECTION
Incorporation Every company must have a name, one or more shares, shareholders and directors	10
Company Constitution The adoption, alteration or revocation of the constitution must be approved by shareholders by a special resolution.	32
Shares and Distributions	
A share must not have a nominal/par value	38
An issues of shares by the board, the value of the consideration is a matter to be decided by the board	47
No shares may be issued which increase the liability of a shareholder, unless a written consent is received by the company	50
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Shareholder approval for major transaction	129
Directors' Duties	
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Shareholder Meetings	
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Directors	
Right of a director to vote in respect of a contract in which he/she has an interest	144
Appointment and removal of directors by shareholders	153&156
The appointment of a director to be voted on individually	155
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OPTIONAL SECTIONS	
SUBJECT	SECTION
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Authorise a non pro-rata acquisition of a company's own shares	60
Authorise the issue of redeemable shares	68
Transfer of Shares	
Power of board to refuse or delay registration of shares for reason other than debt owing on shares	84
Rights and Obligations of Shareholders	
Imposition of unlimited liability on shareholders	97
Procedures for the alteration of shareholder rights	117
Shareholder Meetings	
Power of any person to call a special meeting of shareholders	121
Directors	
Directors of a subsidiary or joint venture company may act in the best interests of the holding company or shareholders of the joint venture company instead of the company	131
Indemnification of directors for costs of successfully defending legal actions	162

against them	
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ADOPTION

s32(1): the shareholders of a company that **does not have a constitution** can **vote and pass a special resolution to adopt one**;

1. **s2(1):** special resolution = majority of **75% of the votes of shareholders** entitled to vote and voting.

ALTERATION/REVOCAION

s32(2): shareholders of a company may, by passing a **special resolution s2(1), alter or revoke the constitution**. The Act restricts some amendments though:

1. **Group interests (s117):** a company must not take an action that affects the **rights attached to shares** unless that action has been **approved by a special resolution of each interest group: s116(1)**. The standard rights attaching to a share include the right to one vote at a shareholders' meeting, and the right to a share in any dividends or the distribution of surplus assets of the company
2. **Unfair or discriminatory alterations (s174):** shareholder can apply to court for relief if they show that the alteration of the constitution is **oppressive, unfairly prejudicial or unfairly discriminatory**.
3. **Reduction of shareholders liability (s57):** if alteration **reduces or cancels liability** of shareholder this is deemed to be a **distribution**. Company will have to comply with solvency test where the directors are personally liable if not complied with (s4) and the distribution may also be taxable income.
4. **Alteration cannot increase a shareholder's liability (s101):** an alteration to the constitution that requires a SH to hold more shares or increases a SH's liability **is not binding unless the SH consents**.

ALTERATION BY THE COURT

s34: the court may alter the constitution where:

1. It is **not practicable in the circumstances to alter the constitution** in the **manner prescribed by the Act (s34)** e.g. where a shareholders meeting is unable to be convened or
2. Where it would be **unfair or prejudicial and the court orders the alteration to the C to be revoked (s174)**.

CORPORATE PERSONALITY

s15: a company is a **legal entity in its own right separate from its shareholders** and continues in existence until it is removed from the New Zealand register.

s16: a company has **full capacity to undertake any activity** and **possesses full rights, powers and privileges.**

DOCTRINE OF SEPARATE CORPORATE PERSONALITY

s15 codifies **Salomon**: S incorporates business and sells to company – company owes S \$10k (via debentures i.e. secured loan) – company goes into liquidation – **liquidator sues S personally** on behalf of unsecured creditors arguing company was merely an agent of S (principal)

1. HOL: **“form over substance” – once incorporated, the company was a separate corporate personality from shareholders (i.e. S) – shareholder not responsible for company’s obligations** – S recoups secured debentures from company
2. Company is a **separate corporate personality from its shareholders** – the **rights and duties attach to the company cf. shareholders, directors and employees**
3. Company is **not an agent for its shareholders (and vice versa)** – otherwise the benefits of forming a company i.e. L/L would be redundant
4. “The company is at law **a different person altogether** from [the shareholders]; and though it may be that after incorporation the business is *precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the [shareholders].*” (Lord McNaughton)

CONSEQUENCES OF CODIFICATION OF SEPARATE CORPORATE PERSONALITY

A company can contract with its controlling shareholder: *Lee v Lee’s Air Farming*

1. L = major shareholder, governing director, chief pilot – constitution = “relationship of master and servant shall apply between comp and L” – L killed in plane crash – wife wanted to claim insurance under “workers” compensation scheme
2. HELD CA: since L was governing director and controlling shareholder who had full control of company, he could hardly be a “worker” i.e. servant of the company
3. HELD PC:
 - a. Like the HL in **Salomon**, “form over substance” – a **person may function in dual capacities i.e. one hat on; one hat off** – L could give and receive “orders”
 - b. The **fact one person holds substantially all of the shares (2,999 out of 3,000) does not make the company’s business that persons business.** A person may be identified with a corporation so as to be its embodiment or directing mind and will, not merely its servant, representative, agent or delegate.
 - c. “The fact that so long as [Lee] continued to be governing director, with amplitude of powers, it would be for him to act as the agent for the company [“employee”] to give orders does not alter the fact that **the company and the deceased were two separate and distinct legal persons**”