## Topic 1: Introduction

### 1.1 What is a Company?

- **Company Advantages**
- **Theories and conceptions of the corporation**
- **Types of companies**
- **Corporations Act 2001 Section 112**
- **Classification according to liability**
  - Company limited by shares
  - **Company limited by guarantee (DEFINITELY PUBLIC – Cannot be registered)**
  - Companies limited by both shares and guarantee
  - **Unlimited Liability Company**
  - **No liability company (DEFINITELY PUBLIC – Cannot be registered)**
- **Classification according to size**
- **Proprietary Companies (Either type 1 or 3)**
- **SMALL**
- **LARGE**
- **Classification according to listing**
- **Corporate constitution and organs**
- **CORPORATE ORGS:**
- **Corporate groups**
  - The Patrick Group Restructure and its Industrial Aftermath

### 1.2 Evolving Legal conception of the corporate group

### 1.3 Administration of Australian companies

- **The Australian Securities and Investments Commission (ASIC)**
- **The Australian Securities Exchange**

### 1.4 How do you form a company?

- **Factors affecting the decision to incorporate**

## Topic 2: Corporate Personality and Limited Liability

### The Doctrine of corporate Personality

### Separate Corporate Personality

### Limited Liability

- **What IS the benefits/Downsides of limited LIABILITY, WHICH have made it so successful?**
  - **Salomon v A Salomon & CO Pty Ltd [1897] AC 22**
  - **Lee v Lee’s Air Farming Ltd [1961] AC 12**

### piercing the Veil of incorporation

### What is the ‘corporate veil’?

### The Company as an Instrument of Fraud

- **Gilford Motor v Horne [1933] 1 CH 935 Court of Appeal, England and Wales**
- **Jones v Lipman [1962] 1 ALL ER 442 (English HC, Chancery Division)**

### Agency

- **Smith, Stone & Knight (SSK) v Birmingham Corp [1934] King’s Bench Division**

### Problem Question: Incorporation

### Corporate Groups

- **DHN Food Distributors v London Borough of Tower Hamlets [1976]**
**What is a corporate constitution?**

*Historical Background*

*Contents of the corporate constitution*

*Provisions that apply as replaceable rules*

*Removal of Directors: ss 203C, 203D, 203E*

*Replaceable rules for proprietary companies: s 203C*

*Effect of mandatory rules*

*Section 203D, Corporations Act 2001 (Cth)*

**Articles inconsistent with Mandatory rule: Link v Shanahan**

*Link Agricultural Pty Ltd v Shanahan (1998)*

*Dealing with Section 203D (2)-(7)*

*Allied Mining & Processing v Boldbow (2002)*

*Scottish & Colonial Ltd v Australian Power and GAs (2007) ACSR 313*

*Removal of directors by other directors in public company is not allowed: s 203E*

*Section 203E, Corporations Act 2001 (Cth)*

*Questions for discussion:*

*Coca-Cola Amatil Pre-nuptial Agreement Case Study*

**Alteration of the corporate constitution**

*Section 136(2)*

*Section 137*

*The power to alter is mandatory*

*Section 249L: Notice – Procedural requirements*

*Peters' American Delicacy Co Ltd v Health (1939)*

*Limitations on alterations*

**RESTRICTION 1:**

*Entrenchment – Sections 136(3), 136(4)*

*Corporations Act – Section 136*

*Boral (2004)*

**REstriction 2:**

*Weighted voting: Bushell v Faith [1970]*

**Restriction 3:**

*Statutory entrenchment – Section 140(2)*
Corporations Act – Section 140(2) .................................................................45
Section 246C: Certain actions taken to vary rights etc .................................45
Restriction 5: ...............................................................................................46
Section 232: Fraud on the minority and oppression: .....................................46
Gambotto v WCP (1995) ..............................................................................46
Restriction 6: ...............................................................................................47
Shareholder agreements: .............................................................................47
Effect of the corporate constitution .............................................................47
Statutory Contract .......................................................................................47
History .........................................................................................................47
Foss v Harbottle (1843) 67 ER 189 ...............................................................47
Hickman v Kent or Romney Marsh Sheep Breeders Association [1915] ............48
Eley v Positive Security Life Assurance [1875] ..............................................48
Membership rights v Corporate rights ..........................................................49
Appointment: section 201J .........................................................................50
Powers: section 198C ..................................................................................50
Ceasing of office: ss 203C, 203D, 203F .........................................................50
Where is the employment contract found? Section 140 or outside contracts ....50
Contracts in the Constitution .......................................................................50
Fraud Case: Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd [1927] ....50
Read v Astoria Garage (Streatham) Ltd [1952] ..............................................51
Contracts Outside the corporate Constitution .............................................52
Shindler v Northern Raincoat Co Ltd [1960] ..................................................52
Special contracts and intention ...................................................................52
Bailey v NSW Medical Defence Union [1995] HCA ....................................53
Problem Questions 1: ..................................................................................55
Topic 4: Corporate Organs ...........................................................................56
Division of Powers between the Corporate organs .......................................56
New approach: Entity Model ........................................................................56
Section 198A: Power given to the Board (Replaceable rule) .......................56
Section 198E, Corporations Act 2001 (Cth) ...............................................56
De-Facto Directors ....................................................................................56
Shadow Directors ......................................................................................56
Powers carved out by the Corporations Act thus requiring approval of GM ....56
Powers carved out and given to the GM .......................................................57
Compliance with ASX listing rules .............................................................57
Reserve powers ..........................................................................................57
Powers exercised by the board of directors ................................................57
Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] ....58
John Shaw 7 Sons (Salford) v Shaw [1935] ....................................................58
Gramophone and Typewriter v Stanford [1908] ............................................59
NRMA v Parker (1986) ................................................................................59
Division of Powers recap .............................................................................60
Board of Directors meeting .........................................................................60
Irregularities ...............................................................................................61
Director’s Access to Corporation Information ...........................................62
The company in General meeting ..............................................................62
Formal decisions at meeting .................................................................................................. 62
Section 249D – Calling of general meeting by directors when requested by members .......... 63
Section 249F ......................................................................................................................... 63
Section 249G ......................................................................................................................... 63
What is “impracticable” for the purposes of s 249G? ................................................................. 63
Re Totex-Adon [1980] .............................................................................................................. 63
Notice, and conduct, of the general meeting ........................................................................... 64
Whitlam v ASIC (2003) ........................................................................................................... 65
Re jervois Mining Ltd [2009] fca ............................................................................................. 65
Minutes: ................................................................................................................................ 66
Disclosure obligations in relation to resolutions at GM ............................................................. 66
Kaye v Croyden Tramways [1898] ......................................................................................... 66
Re Marra Developments (1976) ............................................................................................... 66
ENT v Sunrasia TV (2007) ....................................................................................................... 67
Informal decisions by shareholders: Unanimous consent .......................................................... 68
Re express engineering Works [1920] ...................................................................................... 68
Re Duomatic [1969] ................................................................................................................ 69
in Re Compaction Systems [1976] (Unanimous consent not allowed) .................................... 69
Herrman v Simon (1990) ........................................................................................................ 69
Doctrine of unanimous assent Under statute ........................................................................... 70
Section 249A (Multiple member Companies) ....................................................................... 70
Section 249b (ONE member companies) ............................................................................... 70
Court’s jurisdiction to cure irregularities .................................................................................. 70
Section 1322(2) .................................................................................................................... 70
Cordiant Communication v Communication Group Holdings (2005) ..................................... 70
How does a shareholder get access to corporate information? .................................................. 70
Section 247D ........................................................................................................................ 71
Statutory right of inspection [s247A] ....................................................................................... 71
S247C – Need to keep information confidential .................................................................... 71

Topic 5: Binding the Corporation: Capacity, Authority and Breach ........................................ 72
Capacity of the corporation ..................................................................................................... 72
Section 124 ............................................................................................................................. 72
Section 125 ............................................................................................................................. 72
Can contract in two ways: ...................................................................................................... 72
Contracting by corporate organs (s 127) ................................................................................... 72
Section 127 ............................................................................................................................. 73
Contracting by agent (s 126) .................................................................................................. 73
Section 126 ............................................................................................................................. 73
Authority of Organs and Agents ............................................................................................. 73
At Common Law ..................................................................................................................... 73
Actual authority: Hely-Hutchinson v Brayhead [1968] ............................................................ 74
Panorama Developments v Fidelis [1971] ............................................................................... 75
Apparent/Ostensible Authority ............................................................................................... 76
Freeman & Lockyear v Buckhurst Park Properties (mangal) [1964] ......................................... 76
Crabtree – Vickers pty ltd v australian direct mail advertising (1975) .................................... 77
Pacific carriers v BNP Paribas (2004) .................................................................................... 77
The indoor management rule (IMR) (Turquand’s case) ............................................................ 78
Exception to imR: Northside developments v RG of Nsw (1990) ............................................. 78
Statutory assumptions as to authority ..................................................................................... 78
Entitlement to make assumptions: Section 128 ...................................................................... 78
Duty to avoid conflict between duty and interest and no profit

Section 181
Statutory duty to act in good faith and for a proper purpose s181(1)
Where t

Duty to act for proper purposes
Interests of another company in the corporate group

Problem Question – Topic 3

Topic 6: Directors’ Duties
The duties and to whom they are owed

Exception to general rule: Coleman v Myers [1977] 2 nzlr 225
Brunninghausen v Glavancics [1999] NSWCA 199
Crawley v Short [2009] NSWCA 410

Acting for the benefit of ‘the company as a whole’
Corporators as a general body
Ngurli Ltd v McCann [1953] hca
Mills v Mills [1938] hca

Present and future members (Another interpretation of what is meant by the ‘company as a whole’)
Gaiman v National Association for Mental Health [1971] ch 317

Creditors in insolvency
Kinsela v Russell Kinsela Pty Ltd (1986) 4 nswlr 722
Others: Employees, customers and community interests
Dodge v Ford Motor company (1919)
Parke v Daily News [1962] ch 927
But what about the philanthropic acts of companies today?
Tech Corp ltd v Millar (1972) British Columbia Supreme Court
Section 172 Corporations Act 2006 (UK)

Interests of another company in the corporate group
Walker v Wimborne [1976] hca
Equiticorp Finance v Bank of NZ (1993) 32 nswlr 50

Duty to act for proper purposes

proper purpose cases:
Howard Smith v Ampol [1974] Ac 821 Privy Council
Hogg v Cramphorn [1966] All er 420
Teck Corp ltd v Millar (1973) 33 supreme court of british columbia
Whitehouse v Carlton Hotel [1987] hca
Darvall v North Sydney Brick and Tile (1989)

Where there are multiple purposes use a ‘but for’ test: Whitehouse v Carlton
Statutory duty to act in good faith and for a proper purpose s181(1)
Duty to avoid conflict between duty and interest and no profit

Profits and/or conflicts may be authorised by:
Common situations that may involve a conflict of interest and duty of making of profit .................................. 99
Type 1: Directors interest in contracts with their own company ................................................................. 99
Aberdeen Railway v Blaikie Bros (1854) 1 macq 461 .................................................................................. 99
Transvaal Land v New Belgium (transvall) Land and Development (1914) ................................................... 100

Effect of corporation constitution or replaceable rules .................................................................................. 101
Section 194 (Replaceable rule) .................................................................................................................... 101
Section 194 – proprietary companies ........................................................................................................ 101
Voting and completion of transactions – directors of proprietary companies (replaceable rule)........... 101
Section 195 (mandatory rule) .................................................................................................................... 101
Restrictions on voting – directors of public companies only .................................................................... 102
Disclosure .................................................................................................................................................... 102
Section 191 .................................................................................................................................................. 102

How do we prevent companies removing all restrictions on duty-interest conflicts? .............................. 102
Guinness plc v Saunders [1990] 1 all er 652 .................................................................................................. 103
Woolworths v Kelly (1991) 22 nswlr 189 .................................................................................................. 103
Section 191 (Mandatory and applies to both public and proprietary) ....................................................... 104
Secret profits: Appropriation of corporate property, information and opportunity ........................................ 104
Cook v Deeks [1916] .................................................................................................................................. 104
Regal (Hastings) v Gulliver [1942] ukhl 1 .................................................................................................... 105
Peso Silver Mines Ltd v Cropper (1966) ...................................................................................................... 106
Industrial Development Consultant v Cooley [1972] .................................................................................. 107
Canarero (Canadian Decision) ................................................................................................................. 108
Queensland Mines v Hudson (1978) ........................................................................................................... 108
Statute ......................................................................................................................................................... 109

Cannot improperly use position for personal advantage: Section 182(1) .................................................... 109
Doyle v ASIC ............................................................................................................................................. 110

Cannot improperly use information obtained for personal advantage: Section 183(1) ........................... 110
ASIC v Vizard .......................................................................................................................................... 110

public companies only: Related Party Transactions: Ch 2E ........................................................................ 112

Duty not to fetter discretion (Thorby) ........................................................................................................ 112
Nominee Directors .................................................................................................................................... 112
Competing directors ................................................................................................................................... 113

Duty of care, diligence and skill .................................................................................................................. 114
Re City Equitable Fire insurance co [1925] ................................................................................................. 114
Daniels v Anderson [1995] nswca (The awa case) ....................................................................................... 114
Why has the standard of skill and care for directors traditionally been so low? ...................................... 115

The changing environment for directors: Australia’s super fund ............................................................... 115
CBA v Fredrich (1991) .............................................................................................................................. 116
Brisarkis v ASC ....................................................................................................................................... 116

The the scope of the duty under current law .............................................................................................. 116
The key statutory provision ....................................................................................................................... 116

Care and diligence: Section 180(1) ............................................................................................................... 116

Duty of care owed by non-executive directors: the AWA case ............................................................... 117
Daniels v Anderson [1995] NSWCA (the AWA case) – PIVOTAL case ....................................................... 117

Duty of care owed by persons in special positions e.g. CFO .................................................................. 118
ASIC v Vines (No 2) (2005) ...................................................................................................................... 118
ASIC v Rich (2003) .................................................................................................................................. 118

Duty of care owed by managing directors: PBS v Wheeler ....................................................................... 118
Permanent Building Society v Wheeler (1994) ............................................................................................ 118

Duty of care owed by regular directors: ASIC v Adler ............................................................................. 119
<table>
<thead>
<tr>
<th>Page</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>119</td>
<td>ASIC v Adler (2002) .................................................................</td>
</tr>
<tr>
<td>120</td>
<td>Duty not to misinform the ASX .....................................................</td>
</tr>
<tr>
<td>120</td>
<td>ASIC v Fortesque Metals Group [2012] HCA ......................................</td>
</tr>
<tr>
<td>121</td>
<td>Statutory right to delegate and rely on others ....................................</td>
</tr>
<tr>
<td>121</td>
<td>Delegation: ss 198D &amp; 190 .............................................................</td>
</tr>
<tr>
<td>121</td>
<td>Section 190 ...................................................................................</td>
</tr>
<tr>
<td>121</td>
<td>Reasonable reliance on others: s 189 ................................................</td>
</tr>
<tr>
<td>121</td>
<td>ASIC v Healy [2011] – centro liability and penalty decisions ..................</td>
</tr>
<tr>
<td>122</td>
<td>Statutory Business judgment Rule: s 180(2) ..........................................</td>
</tr>
<tr>
<td>122</td>
<td>Section 180(2) ...............................................................................</td>
</tr>
<tr>
<td>122</td>
<td>Onus is on the director: Austin J in ASIC v Rich ...................................</td>
</tr>
<tr>
<td>123</td>
<td>Remedies and the civil penalty regime ..................................................</td>
</tr>
<tr>
<td>125</td>
<td>Director’s liability under s 588g ......................................................</td>
</tr>
<tr>
<td>125</td>
<td>Cash flow test: s 95A ........................................................................</td>
</tr>
<tr>
<td>123</td>
<td>Reasonable grounds for suspecting company is insolvent ..........................</td>
</tr>
<tr>
<td>123</td>
<td>Defences to s 588G liability: s 588H ...................................................</td>
</tr>
<tr>
<td>124</td>
<td>Deputy Commissioner of Taxation v Clark [2003] .....................................</td>
</tr>
<tr>
<td>124</td>
<td>Tourprint International P/L v Bott [1999] NSWSC ....................................</td>
</tr>
<tr>
<td>125</td>
<td>parent company liability: s 588V .......................................................</td>
</tr>
<tr>
<td>125</td>
<td>Remedies available to ASIC ...............................................................</td>
</tr>
<tr>
<td>125</td>
<td>pecuniary penalty order: s 1317G .......................................................</td>
</tr>
<tr>
<td>126</td>
<td>Compensation to the company: s 1317H ...............................................</td>
</tr>
<tr>
<td>125</td>
<td>Disqualification order: s 206C ............................................................</td>
</tr>
<tr>
<td>126</td>
<td>Remedies available to company ...........................................................</td>
</tr>
<tr>
<td>126</td>
<td>Criminal liability .............................................................................</td>
</tr>
<tr>
<td>127</td>
<td>How to get off the hook if you breach directors’ duties ...........................</td>
</tr>
<tr>
<td>127</td>
<td>shareholder ratification ....................................................................</td>
</tr>
<tr>
<td>127</td>
<td>board ratification ............................................................................</td>
</tr>
<tr>
<td>127</td>
<td>Relief granted by the court: ss 1317s &amp; 1318 .......................................</td>
</tr>
<tr>
<td>128</td>
<td>How broad are these provisions? .........................................................</td>
</tr>
<tr>
<td>128</td>
<td>No constitutional escape hatch: s 199A ...............................................</td>
</tr>
<tr>
<td>129</td>
<td>Liability insurance: s 199B ................................................................</td>
</tr>
<tr>
<td>130</td>
<td>Shareholder’s rights and remedies ........................................................</td>
</tr>
<tr>
<td>130</td>
<td>Fraud on the minority .......................................................................</td>
</tr>
<tr>
<td>130</td>
<td>Misappropriation of corporate property and rights ...................................</td>
</tr>
<tr>
<td>130</td>
<td>Release of director duties ....................................................................</td>
</tr>
<tr>
<td>130</td>
<td>Can a willful breach be cured? If full disclosure, maybe: Winthrop ...........</td>
</tr>
<tr>
<td>130</td>
<td>Winthrop Investments Ltd v Winns Ltd [1975] NSWCA ..............................</td>
</tr>
<tr>
<td>131</td>
<td>Fraud on the minority cases: Alteration of the articles prejudicing minority rights</td>
</tr>
<tr>
<td>131</td>
<td>Peter’s American Delicacy Co Ltd v Heath (1939) ....................................</td>
</tr>
<tr>
<td>133</td>
<td>Expropriation of Share Case: Gambotto ...............................................</td>
</tr>
<tr>
<td>134</td>
<td>Shareholder suits .............................................................................</td>
</tr>
<tr>
<td>134</td>
<td>Injunctive relief under s 1324 .............................................................</td>
</tr>
<tr>
<td>134</td>
<td>Statutory derivative suit: s 236 ............................................................</td>
</tr>
<tr>
<td>134</td>
<td>Section 236 ......................................................................................</td>
</tr>
<tr>
<td>135</td>
<td>Court discretion to grant leave: Section 237 .........................................</td>
</tr>
</tbody>
</table>
GM ratification does not prevent shareholder from bringing suit: s 239 ........................................ 136
Statutory protection for minorities.......................................................... 137
Compulsory liquidation orders................................................................ 137
Just and equitable ground for winding up: s 461(1)(K) ................................................. 137
Re Trivoli Freeholds Ltd [1972] – failure of substratum ........................................ 137
The directors acting in their own interests’ ground for winding up: s 461(1)(e) ............ 138
Oppression orders: s 232 (grounds)................................................................ 139
s 232 distinguished from previous oppression provisions .................................. 139
Section 234 (Standing) ................................................................................. 140
Section 233 (Court orders) ........................................................................ 140
What amounts to oppression?........................................................................ 140
Re Trivoli Theatre – Illustrative of the early case law. ....................................... 140
Thomas v H W Thomas Ltd (1984) – NZ Action (NZ changed oppression provision to similar thing at similar time) .......................................................... 141
Wayde v NSW Rugby League (1985) ................................................................ 142
Remedies under s 233 ................................................................................... 143
Entrenchment (Protection) of class rights: s 246B - G ........................................ 145
Section 246B ............................................................................................... 145
What are class rights? .................................................................................... 145
Are the majority shareholders varying or cancelling class rights?....................... 146
1.1 WHAT IS A COMPANY?

Historical development of the corporate form

- The joint stock company is a hybrid growth… a partnership which has been invested with the character of incorporation and the rules which are applicable are partly referable to both characters.

- The recognition of corporate persons:
  - Corporations are legal persons, rights and duty bearing units.
  - They were persons created by the law, distinct from their human members. They were immortal and invisible. They could commit neither sin nor crime, and some said no tort – truly suitable representatives for saints and churches.
  - Corporations aggregate: consists of many persons united together into one society and are kept up by a perpetual succession of members. Corporations sole consists of one person only and his successor, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity. (eg. King is a sole corporation)
  - Recognition of corporate persons included recognition of 3 principles:
    - A corporation is a person distinct from its members
    - The property of the corporation is distinct from the property of its members
    - The property of its members cannot be taken into execution for the debt of the corporation, and vice versa.
  - Boroughs and Guilds:
    - From the 13th Century, boroughs were granted franchises by royal charter, conferring privileges upon the municipal group. This may include jurisdictional privileges, limited powers of self-government, including power to pass by-laws and impose taxes. Also included the right to perpetual succession, the right to sue and be sued in the group name, the power to hold lands and the right to use a common seal to identify acts on behalf of the borough.
    - Eg. Merchants
  - Chartered corporations:
    - The guild's functions were succeeded by chartered corporations to regulate trade in the public interest. The early form of charters was effectively a limited purpose guild, where merchants engaged in foreign trade on their own account and risk, subject to regulations passed by the company.
    - Eg. Monopolies
    - Chartered joint stock companies had an enduring effect:
      - Voting power of members of the company should be based upon the size of their shareholding and not upon the 'one person, one vote' principle of the guilds.
      - Governors and associates of the companies (directors) were held to the rigorous trustee standard of disinterested service. The treatment of the managing body as fiduciaries is a central principle of modern company law.
      - Company possesses a personality distinct from that of its members, a concept of central importance to modern company law and underlying many of its doctrines.
  - South Sea Bubble:
    - By the 17th century joint stock companies made their stocks freely transferable. An organized stock market was established.
    - The South Sea Company, was formed in 1711 to secure the trade, largely in slaves to South America. It was granted monopoly rights with respect to trade to South America. The company's shares went from $100 to over $1000. There was a government scheme where it acquired the national debt in the form of annuities for shares.
    - The Bubble Act passed in June 1720 to staunch irrational exuberance. It prohibited the acting or presuming to act as a corporate body and the raising or pretending to raise
transferable stocks in either case without legal authority, either by Act of Parliament, or by any charter from the Crown.

- **Deed of settlement company:**
  - The Bubble Act was repealed in 1825.
  - The birth of the deed of settlement, which provided members the principal corporate advantages, but without benefit of incorporation.
    - This included articles of association, which was in the form of a deed of settlement signed by those participating in the society.
    - **The deed constitutes certain persons as trustees of the partnership property. It contains regulations relating to the management of private affairs of the company.**
  - By the 19th Century three forms of association were available for business activity: The Partnership, The unincorporated joint stock company formed by a deed of settlement and the recent innovation of the company incorporated by private Act of Parliament.
  - In 1856, a consolidated statute provided for incorporation on the application of seven persons. The deed of settlement gave way to two constitutional documents, the memorandum of association and the articles of association.

- The corporation is an organizational structure that facilitates the raising of finance for business activity from those with capital for investment but no interest or capacity for management of that business. This usually includes professional managers with business or technical skills but inadequate personal wealth to fund the venture. The suppliers of long-term capital (shareholders) thus share in the financial gains of the enterprise without having to participate in its management.

**Theories and conceptions of the corporation:**

- **The corporation as contract (Shareholder theory)**
  - Contractarian theories were stimulated in 1970 where it was no more than a ‘nexus of contracting relationships’ between shareholders, managers and other employees, lenders, supplier and other stakeholders.
  - This was seen as the **optimal firm structure as it achieves the greatest reduction in agency costs.** When managers and promoters offer corporate securities, a skeptical market will bid down the price of those securities upon capital markets, and make managers bear the risk of their shirking and disloyalty unless managers offer sufficient monitoring and bonding structures to obviate this risk.
  - This view diminishes the view that corporation as hierarchy and the problems of management accountability and legitimacy. The role of corporate law and state regulation also declines since the contracting parties as rational utilitarians are entitled to structure their relations as they wish.
  - There is also the assumption that the duty of management is to maximize the wealth of their principals, the shareholder owners of the firm and that the function of corporate law is to promote that end.
    - Shareholders are ultimate risk bearers in the firm in that their financial claims as shareholders are postponed to those of creditors in the winding up of the company, their entitlement to surplus income during the firm’s life and their usual monopoly of voting rights. (Shareholder Primacy)
  - Against: Seeing a corporation as no more than a vast network of implicit contracts overlooks the empirical reality of social interactions within corporation. It implies that the circumstances that any participant in the enterprise may confront at any moment are fully accounted for by reference to one or more earlier negotiated bargains he or she made. (Too simplistic)

- **Stakeholder Theories**
  - **The team production model**
    - A public corporation is a team of people who enter into a complex agreement to work together for their mutual gain. Participants including shareholders, employees and perhaps other stakeholders such as creditors enter into a ‘pactum subjectionis’ under which they yield control over outputs and key inputs. They do not agree to specific terms
or outcomes (as in traditional contracts), but to participation in a process of internal goal setting and dispute resolution.

- The primary job of the BoD of a public corporation is not to act as agents who ruthlessly pursue shareholder’s interests at the expense of employees, creditors… rather directors are trustees for the corporation itself, mediating hierarchs whose job is to balance team member’s competing interests in a fashion that makes everyone happy so productive coalition stays together.

  - **Communitarian theory**
    - This theory offers the concept of multifiduciary obligation, a duty owed by corporate managers to all stakeholders in the company and not merely to shareholders.
    - This means that there are duties on shareholders to bare risk and to act reasonably to avoid injury to non-shareholder – eg. Short-term shareholder gain (takeover premiums).
    - This theory has been criticized due to the indeterminacy of its standards and as ultimately concentrating power in management hands.

- Modern Definition: A company is a *separate legal personality* made up of a group of people with a *common cause*. It does not have a physical manifestation but it is *accorded the same rights and obligations* as a natural person (eg. Rights to own property, deal with property, sue and be sued, perpetually exist). However, it also does not have the right to vote, freedom of political communication/religion.

**Advantages:**
- Economies of scale (pooling resources together to allow development of society).
- Accumulation of capital from global sources
- Provided a way a large company to be managed: ‘Separation of ownership and control - the shareholders and the managers’
- Markets were created called the ‘Stock Exchange’ where people could trade their part ownership of a company to another.
- **Floating** a company is where a company’s shares are sold on the public stock exchange for the first time.
- **Bubble Act** – Prohibited the acting or presuming to act as a corporate body and the raising or pretending to raise transferable stocks.
  - Led to the invention of the **deed of settlement**: Secured principle corporate advantages but without the benefits of incorporations. This created the 1844 legislation, which enabled them to secure de jure corporate status by formal registration with a state official.
- **Joint stock companies Act 1844 (UK)** established accountability mechanisms through obligations with respect to the holding of company meetings and the audit and publication of company accounts. **Registration and regulation Act**: First corporate law.
  - Made corporation a right not a privilege.
- **Limited Liability Act 1855 (UK)**: Persons forming a company to limit their value to the par value of the share.
  - Found that those who considered unlimited liability were given more capital due to more protection.
- Deed of settlement gave way to two constitutional documents, the memorandum of association and the articles of association.

**COMPANY ADVANTAGES**

1. Perpetual existence
2. Separate legal personality
3. Ownership interest can be transferred without affecting company
4. Centralised management (Even if ownership is geographically dispersed).
5. Limited Liability

Framework in Australia:
We recede into 1862 UK Act. In 1871 Victoria created the expedient of the no liability company form to defeat fraudulent practices arising out of the mining boom.

**Constitutional Issue:**
1989: Third national cooperative scheme was attempted. This was struck down by HC as unconstitutional s 51 (xx) corporation power, only extended to existing corporations not corps which were yet to be established.
   - Huddart, Parker v Moorehead (1909) – reason was that company law was a matter primarily for the states.

The Whitlam Labor government introduced the Corporations and Securities Industry Bill 1974 (Cth) to establish a national regulatory commission with responsibility for securities markets.


2001: Corporations Act

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**THEORIES AND CONCEPTIONS OF THE CORPORATION**

**Concession or Privileged Theory:**
- Companies can only be formed in the public interest since the Crown acts on behalf of the public.
- The State must have the duty to supervise and manage the company.
- The managerialist model views the corporation essentially as hierarchy and senior management, at the apex of the hierarchy, as the principal subject of legal regulation.

**Contractual Theory: Nexus of contracts** between different parties; shareholders, managers and other employees, lenders, suppliers and other stakeholders.
- Contracts are not in the sense that lawyers understand but rather the economist’s conception of ‘relationships characterized by reciprocal relations and behavior.’
- Since it is no more than a web of contracts, the view of corporation as hierarchy disappears and with it the so-called problem of management accountability and legitimacy.
- Set of private relationships and the role of corporate law should be greatly reduced.

**Limitations:**
- Contract theory conceives of the corporation as no more than a vast network of implicit contracts. This means it does not recognize the large firm as having an institutional reality:
  - Overlooks social interactions within corporations.
- Moreover, corporations are seen by realists as collective entities that have identities apart from those of the individuals who temporarily fill roles within them.

**Shareholder Approach:**
- A company exists to maximise profits for its shareholders.

**Stakeholder Approach: Team production model and Communitarian theory**
- A company exists to serve all stakeholders; shareholders, creditors etc.
- Directors are trustees for the corporation itself- mediating hierarchs whose job is to balance team members competing interest in a fashion that keeps everyone happy enough that the productive coalition stays together.
- This would require shareholders to internalize the costs that pursuit of profit maximization imposes upon non-shareholders through a duty to act reasonably to avoid injury to non-shareholder constituent groups in the process of corporate decision making.

**Limitations:**
- Large amounts of power fall in the hands of management since managers are empowered to set constituency against constituency in the end.

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**TYPES OF COMPANIES**

A company is EITHER a proprietary or a public company
Proprietary company traits:

- A proprietary company may not have more than 50 non-employee shareholders and is constrained in the distribution of its securities.
- Proprietary companies are registered (if not registered it is public)

<table>
<thead>
<tr>
<th>CORPORATIONS ACT 2001 SECTION 112</th>
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<tbody>
<tr>
<td>Proprietary companies</td>
</tr>
<tr>
<td>Limited by shares</td>
</tr>
<tr>
<td>Unlimited with share capital</td>
</tr>
<tr>
<td>Public companies</td>
</tr>
<tr>
<td>Limited by shares</td>
</tr>
<tr>
<td>Limited by guarantee</td>
</tr>
<tr>
<td>Unlimited with share capital</td>
</tr>
<tr>
<td>No liability company</td>
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</table>

CLASSIFICATION ACCORDING TO LIABILITY

Definitions:

- **Share Capital** is that amount, in money or money’s worth, which members of the company agree to contribute permanently to the company in their capacity as members to fund the joint enterprise or activities.
- ‘**Share**’ is simply a proportionate interest in the net worth of the business or undertaking of the company.
  - The power to issue shares in a company is usually vested in directors. 1. Intending member will submit to the board a form of application for a specified number of shares which, when accepted, results in contract of allotment.
- On a winding up, the holder of share capital are the lowest ranked claimants upon the assets of the company; only after creditors of the company have been paid their debts in full are those who have contributed share capital entitled to have it returned to them.

Rights attaching to shares in a company:

1. To participate in financial distributions
   a. Entitlement to receive dividend payments that the director decide and the shareholders resolve will be paid from time to time out of current profits or profit reserves.
2. In the governance of the company
   a. Right to receive notice of meetings of members
   b. Right to attend, speak at and demand a poll at shareholder meetings
   c. Right to elect and remove directors
   d. Right to vote
   i. Since shareholders have a monopoly of voting rights, they have the power to sell control of the company and thereby displace its management.

A company is either:

1. A company limited by shares
2. Company limited by guarantee*
3. An unlimited company with share capital or
4. A no liability company, a form available only to mining companies*

*Guarantee and no-liability companies are not allowed to be registered as proprietary companies. The six types are specified in s 112(1) of CA.

COMPANY LIMITED BY SHARES

- Liability to any amount that is unpaid on the shares held by shareholders (s 9)
  - If shares are fully paid, their holder has no further obligation to contribute to the debts and liabilities of the company, at least in relation to those shares.
- Proprietary company limited by shares only need 1 member at least.
Prior to 1998, a company limited by shares was required to include in its memorandum of association, the incorporating constitutional documents, a statement of the authorised or nominal capital with which the company was to be incorporated. (Abolished now)

**COMPANY LIMITED BY GUARANTEE** *(DEFINITELY PUBLIC – CANNOT BE REGISTERED)*

- Usually employed by non-profit activities.
- Limited to respective amount that the guarantees guarantee. (Here no shares are being issued)
  - Does NOT have share capital
- Since member’s guarantee may only be enforced on the winding up of the company, they are NOT assets of the company, which may be charged during its life.
- Since 2010, companies limited by guarantee are prohibited from paying dividends to members: s 254SA.
- Guarantee companies with annual revenue of $1 million or more must prepare an audited financial report
  - Those ranging between 250,000 - $1 million (and those below 250,000 but with deductible gift recipients statutes under the Income Tax Assessment Act) must prepare a financial report but may elect to have it reviewed rather than audited.
  - Small companies with under $250,000 and no deductible gift recipients are not required to prepare a financial report unless directed to do so by members of ASIC.

**COMPANIES LIMITED BY BOTH SHARES AND GUARANTEE**

- No longer exists but those incorporated prior to legislation still exist (s 1378)
- Usually exist when companies limited by guarantee require some initial capital eg to acquire a premise.

**UNLIMITED LIABILITY COMPANY**

- Original form of the registered company, a company whose members have no limit placed on their individual liability to contribute to the debts of the company. (s 9)
- Only when company’s debts are exhausted then liability rests on the shareholders. (Not directly liable)
- Advantage: Under law of maintenance of a company’s share capital, a company may only reduce its share capital pursuant to a formal approval mechanism. They can simply buy back their shares.
- It enables to obtain additional funds because the financiers are assured of refund of loan.
- Acts as a cushion against reckless business activities
- Guard against inefficiency and carelessness of partners
- Credibility of the firm in the eye of public
- Disadv:
  - Discourages partnerships and risky business initiatives.

**NO LIABILITY COMPANY** *(DEFINITELY PUBLIC – CANNOT BE REGISTERED)*

- Shareholders are not liable to pay a call on their shares while their company is a going concern.
- When company requests more capital, shareholders have a choice to give more capital or give up their share. If they give up their share they do not get any money back.

**Requirements to register as no-liability:**

- Company needs to have share capital
- Needs to have the sole purpose of mining (extracting, selling ores, metals or minerals: s 9)
- Company has no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them (s 112(2))
- Has NL as part of the name/end of the name (s148(4)).
CLASSIFICATION ACCORDING TO SIZE

- Company can register as a proprietary company if it has no more than 50 shareholders and does not engage in the Corporation Act that requires it to issue a prospectus.
- Section 45A sets out the requirements of a proprietary company and s 113 extends on the 50 non-employee shareholder rule.
- Public company is not a proprietary company.
- Only type 1 or 3 can be a proprietary company
- Type 2 or 4 must be public companies.

PROPRIETARY COMPANIES (EITHER TYPE 1 OR 3)

- No more than 50 members excluding employees of the company or its subsidiaries AND
- Must not engage in any activity that would require the lodgement of a prospectus or other disclosure document under Ch 6D although the company may offer its shares to existing shareholders and employees of the company or its subsidiaries (s 113)

Privileges of all proprietary companies:

- Can register with a single shareholder and trade with a single director (ss 114(1), 221(1))
- Requirement to hold an annual general meeting applies only to public companies (s 250N)
- May use the facility of passing shareholder resolutions without holding a meeting (s 249A)
- Proprietary companies stand outside the prohibition upon participation of directors in deliberations of the board of directions in relation to matters in which they have a material personal interest and upon related party transactions under Ch 2E. (Directors can participate in decision making even with personal interest)

All companies must keep written financial records that correctly record and explain their transactions and financial position to be prepared and audited (s 286).

<table>
<thead>
<tr>
<th>SMALL</th>
<th>LARGE</th>
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<tbody>
<tr>
<td>To be a small proprietary company for a financial year, it must satisfy at least 2/3 criterion:</td>
<td>Must also prepare financial statements for each financial year, have those statements audited and lodge them with ASIC so that they are publicly accessible (s 295).</td>
</tr>
<tr>
<td>- Consolidate gross income is less than $25m</td>
<td></td>
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<tr>
<td>- Assets is less than $12.5m</td>
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<tr>
<td>- Total number of employees is less than 50.</td>
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</tbody>
</table>

A small company is required to prepare financial statements and send them to members only if:

- Shareholders with at least 5% of votes direct the company to do so (s 293)
- Company is controlled by a foreign company and is not included in consolidated accounts lodged with ASIC by the foreign company (s 292) or
- ASIC directs it to do so (s 294)

ASIC may relieve a company from financial reporting and audit obligations, including those arising by virtue of shareholder direction, by reference to criteria including whether these obligations would impose unreasonable burdens on the company (s 342).
Public companies (s 9) is anything that is not a proprietary company. BUT not all public companies can be listed on the stock exchange. This increases liquidity but carries with it additional obligations; eg enhanced disclosure obligations.

- Public company can be listed or unlisted.
  - ASX is a marketplace that has listed public companies.

<table>
<thead>
<tr>
<th>Proprietary Companies</th>
<th>Public Companies</th>
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<tbody>
<tr>
<td>Min 1 director (who ordinarily resides in Australia) s 201A(1)</td>
<td>Min 3 directors (not including alternate directors, and 2 of whom ordinarily reside in Australia) s 201A(2)</td>
</tr>
</tbody>
</table>

### CORPORATE CONSTITUTION AND ORGANS

- English statute in 1856 introduced two distinct constitutional documents, the:
  1. **Memorandum of association** and the

- This was altered in 1998 and the requirement of a constitution was abolished. In its place, a series of provisions which any company may use to regulate its internal proceedings and management. (Replaceable rules) (S 135). Table of replaceable rules was contained in s 141.
  - A company choosing to **adopt its own constitution**, that will displace the application to the company of any inconsistent rule except, in the case of a public company, a rule which is expressed to be mandatory and which operates therefore as an ordinary provision of the Act for the company.

- Three options:
  1. May elect to function without constitution, relying solely on the replaceable rules.
  2. Company may adopt its own constitution to displace or modify the replaceable rules wholly or in part (s 136)
    - A term of the constitution can be **varied by special resolution** (s 136(1)-(2)).
      - Special resolution is when there is **at least 75%** of the votes cast by members entitled to vote on the resolution who have notice of intention to propose the special resolution and its terms.
      - A further requirement might also require it to be satisfied to pass a special resolution: (s 136(3), (4))
        - Passed with more than 75%
        - Consent of particular person
        - Particular condition to be fulfilled.
  3. **If incorporated prior to 1 July 1998**, it may **retain its memorandum and articles of association** as the constitution of the company to the exclusion of inconsistent replaceable rules.
    - If the company is PUBLIC, those provisions of the Act, which contain a mandatory rule for public companies, also apply to them (s 135).

- Failure to comply with a replaceable rule is not of itself a contravention of the Act (s 135(3)) and the intention is clear that the rules and constitution are on an equal footing in terms of their status and enforceability.

A **public** company, which adopts a constitution MUST lodge a copy with ASIC together with a copy of any special resolutions altering its provisions (ss 117(3), 136(5)). It is then publicly available.

A **proprietary** company, which adopts a constitution, need not lodge with ASIC but must send a copy to a member of the company upon request (s 139)
Replaceable rules do not apply to a proprietary company while the same person is both its sole shareholder and sole director. This is justified on the ground that such a company has little need for a formal set of rules governing its internal relationships.

**CORPORATE ORGANS:**

Corporation is itself an abstraction; it has no physical existence and requires the mediation of people for the expression and execution of its will. Historically, these people who have authority to act for the corporation include its

A. Members assembled in general meeting and its
B. Board of directors or governing committee.

In a smaller company, the board may function as an organ to take the active direction of company affairs. However in most companies of significant size, senior managers appointed by the board conduct management and operations.

Australian companies legislation has reverted to a facilitative model by constituting a BoD and GM and leaving to the replaceable rules or the constitution the division of corporate powers between these organs.

- **Management powers are, however, all but invariably vested in the board as in s 198A** (replaceable rules) of the CA.

**CORPORATE GROUPS**

Corporate groups are ‘a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control’.

- Group can be a family of subsidiary companies (s 46) under a holding (parent) company which has majority ownership or voting control of the subsidiary companies OR
- Economic entity of a parent and its controlled entities under a broader and more generally expressed definition of corporate control.

**Why Corporate groups are formed or gradually evolve:**

1. **Consequence of company takeovers** following acquisitions of all or a majority of the shares of another company; taxation and stamp duty law favour this mode of acquisition over the purchase of the assets of the acquired business.
2. Achieve **organizational efficiencies** by segregating different businesses or functions into separate companies
3. **Maximise the benefits of limited liability** by isolating the risk of business failure in a single entity and
4. Cases of **partly owned subsidiaries**, to obtain control of another entity and access to its resources without the cost of acquiring all of its share capital.

**Advantages:**

1. Insulation from liability: Debts and liability are restricted to the subsidiary companies. The parent company will not be affected (separate).
2. Structural efficiency
3. Local law of a large foreign company: eg. LVMH

**THE PATRICK GROUP RESTRUCTURE AND ITS INDUSTRIAL AFTERMATH**

- Patrick group had long conducted stevedoring operations across Australia. The group was restructured and they (the employer companies) sold their business and assets to another company in the group (the stevedoring company) but continued to employ staff. The employer companies used the sale proceeds to buy back a large portion of their own shares and to repay debts. The stevedoring company entered into labour supply contracts with the employer companies, terminable without notice if there was any interruption in the supply of labour. When employees took industrial action in 1998, the stevedoring company terminated the labour supply agreements and the employer companies lost their only significant income, becoming insolvent. The stevedoring company immediately entered into contracts for the provision of labour by a new workforce.
Evolving Legal Conception of the Corporate Group

- A subsidiary company is one in which another company (holding/parent company) controls
  - The composition of the board,
  - Is in position to cast, control more than half of the votes in a GM,
  - Holds more than half of the share capital of another company, the subsidiary company (s 46)

- For the composition of the board, parent company is in control of second company if:
  - If no person can be appointed to the board of the second company without the exercise by the first company of the power in favour of that person OR
  - Person’s appointment as a director of the second company follows necessarily from the person being a director of the first. (s 47)

- For the ‘more than half of the votes’
  - This is uncertain

- Each company in a group retains its distinct entity status with its own separate liabilities and assets.
  - This raises questions of loyalty, duty of good faith and fair dealing, liability of debt, pooling of assets and liabilities in the liquidation of a group company.

Administration of Australian Companies

The Australian Securities and Investments Commission (ASIC)

- ASIC is an independent regulatory agency. It is charged with legislative implementation and the routine administration of the Corporations Act, which would otherwise be beyond the institutional capacities of government, Parliament and the Courts.

- Its goal is to maintain the performance of companies, the markets in which their securities trade and the confidence of their investors, and to administer and enforce the corporations legislation.

- Powers include, investigate breaches of national law, take civil enforcement action, initiate criminal prosecutions and exercise some adjudicative powers.

Differences between SEC and ASIC:

1. SEC is a regulator whose responsibilities are limited to regulating the markets for corporate securities, the conduct of their participants and related transactions affecting those markets such as corporate takeovers and fundraising. (State regulators manage conduct and compliance with non-market statutory requirements)

2. ASIC deals with both market and non-market regulations.
   a. Therefore, it sometimes presents difficult choices since it may need to pursue one remedy over another.

ASIC is appointed by the GG (s 9(2)) and is not subject to direction by the legislative and governance forum for corporations. It is only accountable to the Cth Minister and Parliament.

ASIC’s role was further expanded into consumer protection for financial services and products and dealt with statutes dealing with insurance, superannuation and banking.

ASIC’s broad function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.

The ACCC retains responsibility for the competition laws as they affect financial services and products.

The Australian Securities Exchange

- A market for shares in joint stock companies and a group of people, stockbrokers, acting as commission agents or traders in that stock market.

- ASX had a dual character:
  - As a body given statutory approval to conduct a stock market it had extensive powers and obligations as a market regulator.
  - And as a commercial enterprise conducted for the benefit of its shareholders it charged fees from listed entities for initial and continuing listing and for transactions effected upon its markets.
In 2010:
- Role conflict was resolved with ASIC assuming responsibility for the supervision of Australian financial markets and market participants, principally stockbrokers, as well as its longstanding statutory responsibility to enforce market misconduct laws relating to inside trading and market manipulation.
- ASX retains responsibility for ensuring that companies admitted to its list comply with the listing and operating rules it has promulgated.

**Advantages of listing:**
1. Makes it easier for companies to raise funds through the new issue facilities of securities markets.
2. Listing secures liquidity for corporate securities, which enhances the appeal of the security to investors, and thereby facilitates the raising of further funds.
3. Listing enables proprietors whose capital has been effectively locked up in illiquid shareholdings to realize the value of their investment through the market for the shares once they are granted quotation by the stock exchange.
4. Securities exchange promotes investors confidence through monitoring of trading in securities and reduce transaction costs through its standard-form governance and transaction settlement rules.
5. Admission to the exchange list conveys a valuable reputational signal concerning the listed company, which is of potential value in dealings with suppliers and financiers.

The stock exchange no longer enjoys a natural monopoly with respect to these advantages.

**Costs:**
1. Threat of loss of control through takeover if they have used the listing to dispose of a significant portion of their holding.
2. Loss of privacy
3. Considerable expense for listing fees, share registry, annual reports and general investor relations
4. Face greater regulation of conduct through higher governance standards and trading restraints

### 1.3 WHY FORM A COMPANY?

<table>
<thead>
<tr>
<th>Sole Trader</th>
<th>Co-operatives (Partnerships)</th>
<th>Incorporated associations</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Not involved in business association.</td>
<td>- Two or more people carrying on business to profit (Essentially a <strong>contract</strong> between partners).</td>
<td>- Similar to corporations relating to its duties such as company meetings, director's duties and minority shareholder protection from oppressive conduct.</td>
</tr>
<tr>
<td>- Individual conducting the business alone without the benefit of any legal structure or entity status distinct from that of the individual who conducts it.</td>
<td>- Limited liability for their members and provide an alternative incorporated form for the pursuit of business as well as for non-profit goals.</td>
<td>- <strong>Must appoint a public officer</strong> (s 34) who acts as a point of liaison between the association and the Commissioner.</td>
</tr>
<tr>
<td>- <strong>Responsible for management and financing</strong> the business and</td>
<td>- <strong>Formation</strong> and <strong>conduct</strong> of co-operatives are different to registered company. (Still relatively informal)</td>
<td>- Committee must convene a general meeting of members each year (s 37).</td>
</tr>
<tr>
<td>- <strong>Personally liable</strong> for the debts and other liabilities of the business without any limitations, including those incurred by employees, within scope of their authority.</td>
<td>- Open membership</td>
<td>- If association’s receipts or assets exceed amounts prescribed in regulation it is designated a <strong>Tier 1</strong> association and must prepare and lay before the annual general meeting audited financial</td>
</tr>
<tr>
<td>- <strong>No formalities</strong> in formation, conduct, transfer or</td>
<td>- Democratic control (regardless of shareholding)</td>
<td>reports.</td>
</tr>
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<td></td>
<td>- Return upon share capital should be strictly limited</td>
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<td></td>
<td>- Distribution of surplus in</td>
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</table>
• **Taxed on individual basis.**
  (Only modest opportunities for tax minimisations relative to corporate form).

<table>
<thead>
<tr>
<th>proportion to members</th>
<th>• Commitment to education of members</th>
</tr>
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<td></td>
<td>• Eg. Uni Co-Op Bookshop</td>
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</table>

• Fees for incorporation and lodgment of annual statements are significantly lower than for companies registered under CA.

• The members of the association are not by reason only of their membership, liable to contribute to the discharge of the association’s liabilities. **(Limited liability)**

• In situations of winding up, any surplus property is not the property of individual members to be distributed. It is vested in another non-profit association.

• Incorporation in 1 jurisdiction secures no recognition in another. It can either register a separate association OR register under CA as Australian body (operates nationally).

• Rather do company limited by guarantee.

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**Trading Trusts:**

- Passing down property
- Lacks transferability (difficult to pass interest from one trustee to another)
- No separate legal personality

**Joint Venture:**

- Acting together on a single project.
- Quite complex

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**FACTORS AFFECTING THE DECISION TO INCORPORATE**

**Limited liability:**

- Incorporation insulates members’ other assets from claims against the company and protects against potentially crippling losses which may not always be avoided through insurance.
- Quite illusory for small companies since banks require personal guarantees to lend money.

**Perpetual succession:**
The company is an entity distinct from the individuals comprising its membership. Therefore, unaffected by the death or bankruptcy of a member or the transfer of ownership interests.

Financing:
- Unincorporated forms of business organisations are denied the corporate advantages of the power to create a floating security over its assets or to make a public issue of its shares or debt interests.

Cost, formality and continuing obligations:
- Partnership is a remarkably flexible business form. No formality is required. Internal structure is not constrained by statute and no registration or reporting obligations are imposed. Can be dissolved without formality.
- Incorporation is expensive and formal and CA imposes continuing obligations to disclose information for the benefit of creditors, members and wider community.
- CA imposes penalties upon directors for non-compliance of the duties.
- Winding up is attended with legal complexity, delay and expense.

Taxation:
- Double taxation was a disincentive.
- Dividend imputation provision introduced in 1980s eliminated the double taxation of company dividends. Companies that paid tax on their profits at the company tax rate may pay dividends to shareholders which carry tax credit at this rate. The imputation measures go far towards restoring tax neutrality to the choice of business form.

Conclusion:
- Generally for large enterprises the advantage of incorporation will compel registration under CA.

1.4 HOW DO YOU FORM A COMPANY?
A company is incorporated by ASIC following an application by a person containing a statement of the matters specified in (s 117(2)) principally:
- The type of company that is proposed to be registered
- Its proposed name, unless it is intended that its name will simply be Australian Company Number
- The names and address of persons who consent to be members, directors or secretary of the company
- Proposed registered office and, if it is different, its proposed principal place of business AND
- Details of its proposed share capital or guarantee obligations, as applicable.

Once application is lodged, ASIC may register the company giving it a CAN and issue a certificate of registration stating its name, CAN and corporate type: s 118. A proprietary limited company has Pty Ltd at the end and Limited has Ltd (s 148(2)).

A company now registered under CA is taken to be incorporated in ‘this jurisdiction’, meaning the company needs to nominate which state or territory it wishes to be incorporated in (ss 119A(2), 118(1)(v)).

Local registration mean:
1. Companies are amenable to regulation by the State or Territory in which they are registered, such as laws imposing stamp duty on transfers of shares s 119A (note 3).
2. The requirement protects against the possibility that one or more States might withdraw their referral of powers to the Cth. Companies avoid the requirement of dual or multiple registration that interstate business activity would involve by the simple expedient of transferring their place of registration to a State that continues to be part of the national scheme (s 119A(3), (4)).
THE DOCTRINE OF CORPORATE PERSONALITY

The distinct status of a business organization that has complied with law for its recognition as a legal entity and that has an independent legal existence from that of its officers, directors, and shareholders.

SEPARATE CORPORATE PERSONALITY

- A company is a type of business structure that, through registration obtains the rights and powers of a natural person, the 'separate legal entity principle'. This is recognized in Corporations Act 2001 (Cth) (CA) s 124.
- Strictly speaking, this is not the same thing as limited liability that shareholders receive under a different provision (s 516).
- A company becomes a separate legal entity only after it has been formally incorporated by registration under the Corporations Act 2001 (s 119).
  - Selecting what type of company to incorporate
  - Deciding on directors (only 1 director is needed for a proprietary company, while at least 3 directors are needed for a public company) and the nature of the company’s capital (ownership – a company needs at least 1 shareholder.
  - Obtaining a name and CAN
  - Selecting the company’s official office location (referred to as the registered office)
  - Selecting the company’s internal management rules (which may be done by simply relying on the replaceable rules in the CA or by adopting a formal written constitution.
  - Lodging an application for registration form with ASIC and, after paying registration fees, obtaining a certificate of registration.
- Separate legal entity principle should not, however be confused with limited liability. Limited liability came in the 19th century with the Limited Liability Act 1855 (UK). (LLA)

LIMITED LIABILITY

WHAT IS THE BENEFITS/DOWNSIDES OF LIMITED LIABILITY, WHICH HAVE MADE IT SO SUCCESSFUL?

Advantages:
- Directors have more potential to start up businesses – Encourages risk taking.
- More likely to diversify a portfolio of shares. (Encourages portfolio diversification)
- Less competitive since more equity. In unlimited, the value of shares is influenced by the value of the person holding the share, will need to look at each shareholder’s credit worthiness.
- Enhances efficiency of capital markets by free transferability of shares
- Permits accumulation of large amounts of capital
- In unlimited liability, the risk is shifted to the shareholders and its unfair since they don’t really have a direct role in the company.
- Enforcement under a regime of unlimited liability would not be feasible.
- Creditors are better risk bearers than shareholders. Creditors can bargain either for protection (guarantees) or build risk into return demanded.
  - But some creditors are placed in that position without their choice.

Downside:
- From investor perspective there is lack of guarantee. Directors can do what they please. (Moral hazard)
- Shareholders in close corporations may be personally responsible for corporate acts.
- Capital boundary problem: You can theoretically shelter the most risky part of your business in an undercapitalised subsidiary companies.