Corporations Law Scaffolds

Introduction

Historical Development

16th – 17th centuries	**Guilds** were the earliest corporate entities [bands of traders who traded separately but had a common interest]. They could be incorporated by: 1. Royal Charter to become 'regulated companies' [which could exclude non-regulated companies from their industry]; or 2. Private Act of Parliament to become 'statutory companies'. **Joint Stock Companies** were not incorporated via the above methods, but its members traded together and held shares in the common enterprise. They mimicked the benefits of incorporated companies without being incorporated.
Bubble Act 1720	Made it an offence to trade without the authority of the monarch [designed to outlaw Joint Stock Companies]. It was **unsuccessful** for two reasons: 1. Investors panicked and dumped their shares in both JSCs and incorporated companies. 2. Enforceability issues – no JSC was prosecuted. It was repealed in 1825.
Joint Stock Companies Registration and Regulation Act 1844	This permitted statutory incorporation of Joint Stock Companies as a private right [i.e. without requiring the monarch's approval]. A s a result, companies could sue, and vest all rights and property in the company and not a person. This was followed by the *Limited Liability Act 1855*, and the *Companies Act 1862* (UK), the first companies legislation.
1901 – 1950	Australia had separate State Acts for incorporation, where each State maintained its own administration of those companies. Inter-state compliance was tough.
1961 – 1963	*Uniform Companies Act 1961* (Cth) saw the adoption of the Victorian Act in every State. But each State administered the Act separately without Cth involvement.
1978 – 1991	*Companies Code 1981* was the first uniform scheme with Commonwealth administration. However, there were also State administrations, leading to inconsistent State court decisions.
1989	*Corporations Act 1989* (Cth) granted sole power to ASIC to administer corporations. This was successfully challenged in *NSW v Commonwealth* (1990), because although s 51(xx) gives Cth Parliament the power to legislate with respect to trading or financial corporations formed within

	the limits of the Commonwealth, the power to legislate for the **registration** of corporations belongs to the States. **The Commonwealth has no constitutional power over incorporation**.
1990	Alice Springs Agreement took place: Cth agreed to draft a uniform piece of legislation, which every State would implement and administer as if it were a piece of Cth legislation. This led to *Corporations Law 1991*. This was successfully appealed in two cases: 1. *R v Hughes* (2000): Cth DPP was prosecuting corporate offences, but HC said it had to point to a valid head of Cth legislative power to do so. 2. *Re Wakim; ex parte McNally* (1999): HC deemed it unconstitutional to cross-vest jurisdiction in the Federal Court to hear corporate law matters.
2000	Inter-Governmental Reference Agreement: States agreed to refer their power to administer corporations to the Cth by contract. This led to the *Corporations Act 2001*. The Act has a 5-year sunset clause, which has been extended every time so far. However, a rogue State could still derail the regime by opting out.

Theories of the corporation

Concession theory	The corporation is an artificial entity whose privileges have been granted by the states [Lord Thurlowe]. This was more applicable during the Royal Charter period, when the monarch controlled the incorporation of companies. Now, since incorporation is a matter of private right, this is outdated.
Aggregate/contractualist theory [dominant]	The corporation is an artificial legal entity which is a **group of aggregate individuals bound by private contracts.** Essentially, the corporation is the product of private dealings. The state's role is limited to assisting the implementation of those dealings.
Corporate realism	The corporation is a distinct entity with a 'life of its own'. This means that the corporation itself holds certain rights and can incur [criminal] liabilities. *Burwell v Hobby Lobby Stores* (2014) saw a 'closely-held company' bring an action in its own name in the US Supreme Court. It is unclear whether this was limited to closely-held companies [shareholders = managers].

Note also the different possible responses to the question: for whom do/should managers of public corporations manage?

- Shareholder theory: managers work to maximise the profits of shareholders.
- Stakeholder model: managers should take wider considerations into account, like future shareholders, society at large, the environment, creditors, employees.

Types of Companies

'Companies' are corporations which are registered under the *Corporations Act*.

1. Classification by liability of its members

Limited by shares [public or proprietary]	A company formed on the principle of having **liability of its members limited to the amount (if any) unpaid on the shares respectively held by them** [s 9].
Limited by guarantee [only public]	A company formed on the principle of having liability of its members limited to the **respective amounts that the members undertake to contribute to the property of the company if it is wound up** [s 9]. There are no shares, which is not popular because the only feasible way to raise capital is to charge fees to subscribers [debt finance], given that equity finance [selling shares] is not an option.
No liability [only public]	Mining companies [s 112]. A company which has a share capital and members that hold shares, but the members are **not liable to pay any calls on their shares**, and if a director makes a call on the shares, the members can choose whether to pay or not. This is because the shares are sold undervalue because mining is a speculative 'treasure-hunting exercise'.
Unlimited with shares [public or proprietary]	A company whose members have **no limit placed on their liability** [s 9] – i.e. shareholders personally pay their proportion of the unpaid company debt if the sale of all assets is not sufficient to repay that debt. Some professionals (e.g. legal practitioners) have this type.

2. Classification by size and capital raising power

	Proprietary	**Public**
Shareholders	1 shareholder minimum	1 shareholder minimum