

# Corporations Law

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## Introduction

A **company** is a distinct legal entity with legal personality separate from those who created it and its members. It is an organisational 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. Around 98% of companies are proprietary corporations (smaller ones).

### Theories of corporations

1. **Concession (privilege) theory.** This reflects the early English history of corporations where government was prepared to give businesses a charter do to something, thus granting them a *privilege* to carry on operations as a corporation, subject to heavy regulation.
2. **Aggregate (partnership) theory.** This is the view that corporations are just like partnerships. In this view, people have a constitutional right to get together and do business.
3. **Social entity theory.** This emerged in the early 1900s in the US where big businesses started to get funds from the upper- and middle-classes, driving a divide between ownership and control. This brought regulatory implications into focus as well as corporate social responsibility.
4. **Nexus of contracts theory.** This emerged in the 1980s in response to perceived over-regulation. The view that a corporation is simply a matrix of contracts between economic agents.
5. **Team production theory (UCLA).** In this view, shareholders give the board wide discretion to allocate resources.

### 1.1 A short history of Anglo-Australian corporations law

- Boroughs and guilds
- Incorporation by royal charter – the state feared the power of the corporation so only gave legitimacy to those with royal charters – effectively gave them monopolies to run business in return for royalties.
- Incorporation by private Act of Parliament. An example is the NSW Water Board.
- The rise of the joint-stock companies (or de facto incorporation). This was essentially a black market for companies which were really just large partnerships that held property on trust.
- South Sea Bubble and the *Bubble Act 1720*. The Act was designed to outlaw joint-stock companies and after it was passed there was a massive market downturn. The Bubble Act was on the books for 105 years but never enforced. It was repealed in 1825.
- The *Joint Stock Companies Registration and Regulation Act 1844* was passed giving registered joint stock companies separate legal personality but not limited liability.
- The *Limited Liability Act 1855* granted shareholders limited liability.
- In Australia there was a mishmash of state legislation until the introduction of the Uniform Companies Acts in 1961-62 as a result of state cooperation.
- A National Companies Bill died with Whitlam government in 1975.
- The *Corporations Law* was introduced in 1989 and relied on a system of cross-vesting to enforce.
- After challenges to the legitimacy of cross-vesting legislation in *Re Wakim; R v Corporations Act 2001* (Cth).
- Now, chief regulatory bodies include:
  - Australian Securities and Investment Commission (ASIC)

- Australian Securities Exchange (ASX) handles listing rules
- Takeovers Panel
- Corporations and Market Advisory Committee (CAMAC) handles legislative reform. It has the responsibility to advise The Treasury on key aspects of corporate law.
- Australian Accounting Standards Board (AASB)
- Financial Reporting Council (FRC)

## 1.2 Classification of corporations: s 112

Pursuant to s 112(1) the following types of companies can be registered under the *Corporations Act*:

Section 112 types of companies	
Proprietary companies	Limited by shares
	Unlimited with share capital
Public companies	Limited by shares
	Limited by guarantee
	Unlimited with share capital
	No liability company

Since 1995 in Australia you can have a corporation (proprietary company) with only a single director/shareholder: s 201A(1).

### 1.2.1 Types of liability: s 9

Limited by shares: both public and proprietary companies

- 95% of companies have their liability limited in this way. Essentially, the liability of members is limited by the amount **left unpaid** on their shares: s 9

Limited by guarantee: ONLY public companies

- Liability of members are limited by respective amounts they guarantee in case of bankruptcy: s 9. These are called **members NOT shareholders** because they do not raise share capital and if they do make profit there is no way to apportion it.

Unlimited with share capital: both public and proprietary companies

- This was the only kind of company which could be registered under the *Joint Stock Companies Registration and Regulation Act 1844* until the *Limited Liability Act 1855* was passed.
- Only a handful of companies in Australia still have this structure.
- Basically unlimited liability for shareholders.