

Week 1: Business Organisations and the History of the Corporation

I. Introduction to Corporations and Statutory Definitions

The study of business organisations begins with an understanding of the corporation; a term often used interchangeably with "company". Generically, a corporation is defined as an association of persons who, after satisfying the registration requirements of the *Corporations Act 2001* (Cth), are granted the status of a separate legal entity. Legally, the term "corporation" is a broad descriptor for all artificial legal entities possessing the attributes of a legal personality, while a "company" refers to a specific type of corporation registered under the Act. Under Section 57A of the *Corporations Act*, a corporation includes a company, anybody corporate, and certain unincorporated bodies that may sue or hold property in the name of an office holder.

A fundamental characteristic of a company is its separate legal existence, which remains distinct from its owners (members or shareholders), managers (directors and secretaries), employees, and agents. Consequently, the company possesses its own legal rights and obligations, including the power to own property, enter into contracts, and engage in litigation. While many businesses begin as sole traders or partnerships, the decision to incorporate carries significant legal and financial ramifications.

II. Advantages and Disadvantages of the Corporate Form

Incorporating as a company offers several distinct advantages, most notably the creation of a separate legal entity and the provision of limited liability for its members. Companies also benefit from perpetual succession, meaning they have an indefinite life regardless of changes in ownership or management. Shares in a company are generally transferable, and there are specific taxation benefits, such as a fixed company tax rate of 30% (or 25% for entities with turnover below \$50 million).

However, these benefits are balanced by various disadvantages, including high establishment costs and ongoing compliance fees. Companies are subject to onerous reporting and administrative requirements mandated by law. Furthermore, shareholders often have a limited role in management, leading to a potential loss of control. Officers and directors also face increasingly heavy legal responsibilities and must operate under a high degree of public scrutiny.

III. Points of Tension and Corporate Law Theories

Modern corporate law is shaped by four central points of tension that emerged between the 17th and 19th centuries. The "group versus individual" issue questions whether rights and liabilities should be attached to the corporation as a whole or to individual investors. The "management versus ownership" tension highlights the conflict between liberal philosophy regarding individual property control and the delegated power of corporate managers. Additionally, the debate between "facilitation and intervention" considers whether the state should merely facilitate private enterprise or intervene to protect public interests. Finally, the "private versus public" issue debates whether corporations exist solely for private benefit or carry broader social responsibilities because they owe their existence to the state.

Several theories provide a framework for reflecting on these tensions:

- **Concessional Theory:** Views the corporation as an artificial entity created by the state; its status is a privilege that must be earned (strong version) or applies once legislative requirements are met (mild version).
- **Aggregate Theory:** Argues that corporations are merely groups of individuals with a common interest, suggesting the entity has no independent existence separate from its owners.
- **Economic Theories:** Includes **Agency Theory**, which addresses problems arising from the separation of ownership and control, and **Transaction Cost Economics**, which suggests organizational structures are designed to minimize exchange costs.
- **Team Production Theory:** Posits that the board of directors acts as a "mediating hierarchy" to balance the interests of various stakeholders rather than focusing solely on shareholder wealth.
- **Natural Entity Theory:** Claims corporations are natural products of human interaction that the law recognizes rather than creates.
- **Organizational Theory:** Views corporations as decision-making structures where information and control can become diffuse as the organization grows.
- **Feminist Theory:** Critiques the corporation through lenses of gender equality (Liberal), the role of women as workers (Socialist), and the influence of male virtues on modern society (Radical).

IV. Corporate Social Responsibility (CSR)

The debate regarding Corporate Social Responsibility (CSR) asks whether corporations must consider social and environmental impacts or focus exclusively on profit maximization. The **Berle-Dodd debate** of the 1930s serves as a historical foundation; Berle initially argued that all powers were exercisable only for shareholder benefit, while Dodd contended that corporations have a social service function. Modern iterations include **Enlightened Shareholder Value Theory**, which encourages a long-term approach to profits, and **Stakeholder Theory**, which seeks to balance the interests of shareholders with employees, customers, and the community. Conversely, **Shareholder Theory**, championed by Milton Friedman, asserts that the primary responsibility of a corporation is to increase profits while engaging in open competition.

V. History of Corporate Law

English Origins (17th–19th Centuries): The modern corporation evolved from early entities created by Royal Charter or specific statutes for public purposes, such as the British East India Company. Private companies were initially distrusted, leading to the **Bubble Act 1720**, which banned their formation but was later repealed in 1825. The Industrial Revolution drove the need for capital, leading to the development of **Joint Stock Companies** and **Deed of Settlement Companies**, which allowed for the sale of shares to minimize investor risk. Key 19th-century legislation included the *Limited Liability Act 1855*, the first to recognize limited liability, and the *Companies Act 1862*, which consolidated corporate laws and became the template for early Australian statutes.

Australian Corporate History: Australia's corporate law history mirrors its transition from colonial states to a single nation. Early activity (1788–1850s) was dominated by English Deed of Settlement companies and Royal Charters, particularly during the pastoral boom of the 1830s. Rapid economic expansion occurred during the Gold Rushes (1850s–1890s), followed by a severe depression in the 1890s that highlighted the need for direct government regulation after many bank collapses. Economic growth in the 1950s exposed the inefficiencies of differing state legislations, leading to the first uniform legislation. This evolved into the **Co-operative Scheme (1980–1990)** and later a **National Scheme (1991–2001)** after a High Court challenge in the "Incorporation case" (*NSW v Commonwealth*) clarified Commonwealth powers. The current scheme, based on the *Corporations Act 2001* and the *ASIC Act 2001*, commenced on July 15, 2001.

VI. Regulating Corporations in Australia

Australian corporate regulation is multifaceted, relying on the *Corporations Act 2001*, **Case Law** (precedent), and the **Corporations Regulations 2001**, which specify procedures and penalties. The **Australian Securities and Investments Commission (ASIC)** is the primary federal agency responsible for registration, enforcement, and surveillance. Other specialized bodies include:

- **Takeovers Panel:** Resolves disputes regarding corporate takeovers.
- **ASX:** A public company that self-regulates listed entities in cooperation with ASIC.
- **Standard-setting boards:** The AASB and AUASB maintain accounting and auditing standards.
- **Courts:** State and territory courts maintain civil and criminal jurisdiction over Corporations Act offences.

VII. Comparative Business Organisations

Choosing a business structure involves considering duration, cost, tax, and liability.

- **Sole Traders:** An individual carrying on business in their own name. It is the simplest and least regulated form but carries **unlimited personal liability**, making the owner's personal assets vulnerable to business debts.
- **Partnerships:** Defined as "the relation which exists between persons carrying on a business in common with a view of profit" under the *Partnership Act 1892* (NSW). Partnerships are fiduciary relationships requiring good faith and full disclosure. Partners act as agents for one another, and their liability is **joint** in contract and **joint and several** in tort. The case of *Cribb v Korn* establishes that a partnership requires more than the mere sharing of gross returns; it must involve carrying on a business in common.
- **Joint Ventures (JV):** An arrangement where parties contribute skills or property to a specific project for individual profit without forming a partnership. Unlike partners, co-venturers are generally not agents for each other.
- **Trusts:** An equitable obligation where a **trustee** holds property for the benefit of a **beneficiary**. These can be **express** (fixed or discretionary) or **non-express** (resulting or constructive).

- **Associations:** Groups formed for common lawful purposes, typically non-profit. They may be unincorporated or incorporated, with the latter providing separate legal entity status and limited liability for members.
- **Social Enterprises:** Businesses driven by positive social impact. In Australia, no specific legal structure exists for them; they typically use Pty Ltd, Co-operative, or Hybrid structures