

# PART 1.1 – HISTORY OF THE CORPORATION

## I Introduction

### A Definitions

The key definitions are found in the *Corps Act*:

- Statutory Definitions of *Corporations*: s 57A of the *Corps Act*
- Statutory Definition of *Company*: s 9 (Dictionary) of the *Corps Act*

NB: *Corps Act* > general definition (aggregation of individuals)

### B Points of tension

#### 1 'group versus individual' issue

To what extent should the corporation be seen as a legal person with rights and obligations?

A corporation has *legal personhood* (person in law) – can take on rights and obligations. For example, corporations can own property—in a state of perpetuity regardless of shareholders, directors etc.

It became controversial in the 19<sup>th</sup> century due to *limited liability* (flows from legal personhood)—shareholders are only liable for the amount of money they have invested in the corporation. The problem, here, is that a sole shareholder/director can be only liable for their nominal consideration, while the corporation is liable for all damages.

#### 2 Roles of management and 'ownership' of the corporation

Do shareholders own the corporation?

A corporation is managed by a board of directors i.e., CEO, CFO (management) and 'owned' by shareholders (do not run the entity). There is a separation of ownership and control—how do we know if management is working in the best interest of the shareholder?

This led to *shareholder primacy* in the 1970s, a theory which views the directors as agents of the shareholders, and shareholders as the principals. Directors run the company to maximise (value of shares/share price) in the shareholders' interest.

Modern pressure to maximise has caused unethical and rapacious practices in corporations.

#### 3 Debate between facilitation and intervention

Should the government regulate corporations in the social good/positive freedom (freedom to do things), or is should it be the free market?

Free market/negative freedom argues the *invisible hand* of the market will create the ideal conditions to produce the right goods and most efficient prices. Government regulation will only disrupt this balance.

However, there are externalities that are not properly costed by the *invisible hand* e.g., environmental pollution and waste.

#### 4 'private versus public' issue

Are corporations private/owned by the shareholders and therefore without any social responsibility, or considering their power and authority, are they more a public, quasi-government institution with social responsibility?

The idea, *corporate social responsibility* encourages to voluntarily take on charitable work. In contrast, there is an argument that it is better for society if corporations focus on their own work.

## **II Early History of Corporate Law**

### **A Roman corporations**

The word 'corporation' comes from the Latin '*corpus*' (body), representing a body of people authorised to act as an individual (legal personhood).

Roman corporations existed of artisans, builders, cities, and other community groups. This gave the groups certain rights and freedoms and allowed them to initiate joint ventures that could continue in perpetuity.

### **B Middle ages**

It continued in the form of chartered corporations serving public or religious purposes with no connection to business or profit, such as cities, monasteries, and universities. However, guilds or traders could incorporate and have monopoly in their region by paying their sovereign.

The Royal Mint (886 AD) was formed for a purely public purpose and remains the oldest UK company.

### **C Colonial corporations**

Both had the purpose of dominating the trade for species and good from the East, which was dominated by Portugal at the time.

- 1602: Dutch East India Company
- 1600: English East India Company  
Chartered by the Crown for trading goods from the East (mainly India) by ships

It had all the hallmarks of a modern corporation – separation of ownership and management. It had a board and shareholders (investors/owners) with limited liability. However, practically they were arms of the state, as they acted within a specific remit defined and supported by the state.

NB: All companies had to specify their purpose (purpose clause) and this maintained in English law until 2005. Now companies can exist for any purpose.

### **III English Company Law (17th-19th Centuries)**

#### **A Early corporations: 17<sup>th</sup>-18<sup>th</sup> century**

- Required incorporation by Royal Charter or by specific statute
  - Royal Family/Parliament had to approve the corporate venture
  - Companies had to be established for a particular purpose – few companies
- The Bubble Act (1720)
- The Joint Stock Company
- Deed of Settlement Companies

#### **B 19<sup>th</sup> century**

Industrial revolution was key for company law, as it marked the beginnings of industrial capitalism—the movement from rural farmers to factory workers. Suddenly, people needed to invest together through a *limited liability company* to build railways, factories and ships. A *limited liable company* allowed high risk investment with the protection of legal personhood.

This resulted in changes to company law, from incorporation by Royal Charter to individual approval by the Crown.

- The Trading Companies Act 1834 (UK)
- Limited Liability Act 1855 (UK)
- Joint Stock Companies Act 1856 (UK)
- Companies Act 1862 (UK)

### **IV The History of Australian Corporate Law**

Demonstrates the movement from a colonial state-based system to a federal system, signified by the *Corps Act* in 1989.

Corporate law aligns with the political and economic contexts of the time—more state centric and interventionist (regulatory) than in the UK e.g., mining companies.

#### **1 1788-1850s: Small beginnings**

#### **2 1850s-1890s: Boom and Depression**

**3 1890s-1930s: Early moves towards uniformity**

**4 1950s-1980: The first uniform legislation**

**5 1980-1990: The co-operative scheme**

**6 The Corporations Act 1989 in the High Court**

**7 1991-2001: The national scheme**

**8 The current scheme**

## V Corporate Regulations

- Case law (or “precedent”)
- The Corporations Regulations 2001 (Cth)
- The ASIC Act 2001 (Cth)
  - Oversight body of the *Corps Act*
  - ASIC exemptions and modifications
- The accounting and auditing standards
- Recent proliferation of new standards for corporations concerned with *environmental, social, and governance* (ESG) e.g., mandatory climate disclosures (Jan 2025)
- The ASX Listing rules

### A Jurisdiction of the Courts

- Civil Jurisdiction - **Div 1 of Pt 9.6A** of the *Corps Act*
- Criminal Jurisdiction - **Div 2 of Pt 9.6A** of the *Corps Act*
- Transfer of Matters
- Administrative Appeals Tribunal (AAT)

## VI Corporate Law Bodies

### A Australian Securities and Investments Commission

In general, ASIC’s main functions in connection with the regulation of companies are: (*ASIC Act*):

- Registration, regulation and termination of companies
- Collection and dissemination of corporate information
- Provide advice on law reform and education
- Investigation, enforcement and surveillance

### B Other relevant bodies

- Takeovers Panel (*ASIC Act Pt 10*)
- Companies Auditors and Liquidators Disciplinary Board (*ASIC Act Pt 11*)
- The Financial Reporting Council (FRC) (*ASIC Act Pt 12*)
- The Australian Accounting Standards Board (AASB) (*ASIC Act Pt 12*)
- The Auditing and Assurance Standards Board (AUASB) (*ASIC Act Pt 12*)
- Parliamentary Joint Committee on Corporations and Financial Services (*ASIC Act Pt 14*)
- The Australian Securities Exchange (ASX)

## PART 1.2 – CORPORATE CONTEXT & THEORIES

### I Corporate Law Theories

#### 1 Concessional theory

Corporations are a privilege created by State—a concession. Legal personhood must be granted by the State.

- Strong version  
Corporations must earn their rights (e.g., enter into contracts, owning property, commence and defend legal actions in their own right) on a continuing basis. Its extent of existence as a legal actor is dependent on the law, distinct from the individuals who populate it. State must regulate corporations to enable and then control these rights, emphasising the wider public interest over the private interests of individuals involved in the corporations.
- Mild version  
Corporate status is presumed to apply once the basic legislative prerequisites for incorporation have been met e.g., minimum membership and director requirements. State may regulate corporate activity.

#### 2 Aggregate theory

Corporations are aggregation of individuals who are joined by mutual agreement, and as a right of association, has no existence separate from these persons. It asserts the private status of the corporation and the primary status of the individuals who comprise it. Why should corporations be subject to specialised regulatory regimes that differ from those applying to other forms of contractual association e.g., partnerships?

#### 3 Economic theories

Corporations are a type of firm (economic concept) which consists of transactions, or contracts, between individual actors (i.e., investors, managers, creditors, customers). The corporation is a private initiative and enterprise.

- (a) Agency theory  
Describes this arrangement of firm as ‘a nexus of contracts’—contract symbolising the voluntary and adaptive nature of the arrangements made between the participants. The corporation is not a separate entity from the individual contractors and should work only to maximise the returns to individual investors. Management acts separately as ‘agents of the investors’ as rational economic actors guided by self-interest. Investors incur ‘monitoring costs’ and managers incur ‘bonding costs, known jointly as ‘agency costs’.
- (b) Transaction-cost theory (Chicago School)  
Two mechanisms that reduce transaction and ‘monitoring costs’:
  - 1) Operation of various market forces
    - (i) The market for corporate securities  
The price of a company’s shares is assumed to reflect all available information about that company (i.e., terms of the corporate contract) and in effect, the market does the job of monitoring the company.

- (ii) The market for corporate control  
Underperforming companies will be taken over by those who place a higher value on the company's assets, providing incentive for the current management to aim for performance.
  - (iii) The market for company managers  
Competition for managerial services encourages management to act in the shareholder's best interest, controlling the risk of abuse.
- 2) Corporate law rules  
Provides a set of 'default' rules which allow for tailor-made contracts. However, stakeholders should have the freedom to construct their own contractual arrangements.

#### 4 *Team production theory*

Corporate law requires team members to hand over certain rights to the corporation, which is a separate entity and owner of the team assets. The use of these assets is determined by an internal hierarchy of authority (board of directors), who operate independently, using the criterion of economic efficiency.

#### 5 *Natural entity theory*

Corporations are a natural product of human interaction and initiative. It is sceptical of corporate law and holds that it simply gives formal recognition to their existence. Corporations has an existence separate from its members and managers. It is a 'group-person' that possesses its own group-will and capacity for action, resulting in a state of perpetuity. Corporations should be entitled to the same rights and held to the same standards, as natural persons.

#### 6 *Organisational theory*

Corporations are complex organisational environments that determine the status of, and shape the decisions made by, the individuals and groups who work in them. The larger the organisation the more distorted the organisational hierarchy, diffusing the exercise of control. Corporations are decision-making organisations, shaped by the internal workings of many stakeholders.

#### 7 *Feminist theory*

- (a) Liberal feminism  
Accepts the organisational structure of the corporation and advocates for gender equality within that environment.
- (b) Socialist feminism  
Argues corporations dominate the capacity for individual action in modern society, and are concerned with corporatism on women and the larger culture. Individual managers and workers have become the agents and instrumentalities of the corporations, which has doubly devalued the lives of women.
- (c) Radical feminist literature  
Explores the reasons behind the development of the corporate form to serve the needs of liberal and capitalist patriarchy. Argue male values shape corporations i.e., bureaucratic organisations are centrally concerned with maintaining discipline and control. In contrast, theorists' emphasis the obligations of care, responsibility, and responsiveness which corporate participants owe each other.

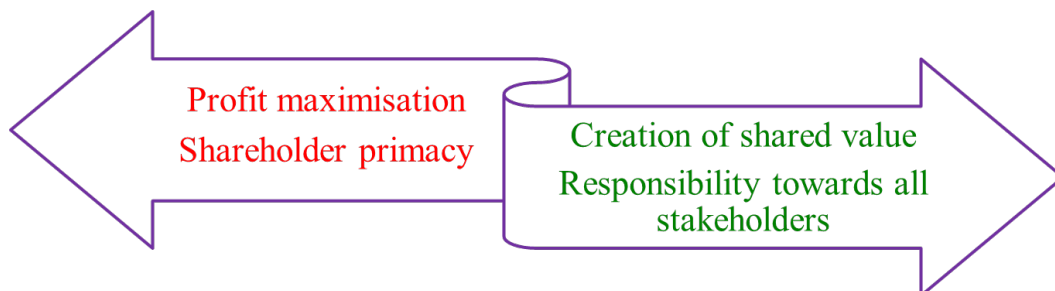
## II Corporate Social Responsibility

What is Corporate Social Responsibility?

Corporations should be bound to ethical expectations and obligations, to consider the social and environmental impact of their actions.

### A Berle-Dodd debate (1930s) – to whom are corporations accountable?

There are two contrasting views:



- (a) According to Berle (shareholder primacy view):  
All actions should be for the benefit of the shareholders.

*'all powers granted to a corporation or to the management of a corporation, or to any group within the corporation. . . [are] at all times exercisable only for the ratable benefit of all the shareholders as their interest appears'.*

- (b) According to Dodd:  
It should consider the interests of society, alongside its profit-making function.

*'Public opinion, which ultimately makes law, has made, and is today making substantial strides in the direction of a view of a business corporation as an economic institution which has a social service as well as a profit-making function'.*

### B CSR & 'Enlightened Shareholder Value'

The main critic of CSR is Milton Friedman (the *Shareholder Theory*):

*'In [a free market] economy, there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it ... engages in open and free competition, without deception or fraud'.*

### C CSR & Stakeholder Theory

Edward Freeman (prominent exponent of the stakeholder theory) defined stakeholder as *'any group or individual who can affect or is affected by the achievement of the organisation's objectives.'* Directors should consider the interest of their wider stakeholders (i.e., workers, consumers, local population, planet, and this may differ between corporations).

Corporations of today are expected to contribute to achieving sustainable development, and there is a clear shift from older ideas of corporate philanthropy or CSR. The stakeholder theory is evident in the rise of various ethical labels, benchmarks and ESG reporting is also underpinned by the stakeholder theory.

### D *Human Rights Due Diligence (HRDD)*

Emergence of HRDD is indicative of the rights of non-shareholders becoming critical in corporate governance. Corporations should consider a 4-step process to identify, prevent, mitigate and account for adverse human rights impacts in:

- Hiring and firing
- Managing supply chains
- Discharging directors' duties
- Dealing with mergers and acquisitions
- Financing of projects
- Meeting reporting requirements

## PART 1.3 – DIVERSITY OF BUSINESS ORGANISATIONS

There are several types of Business Organisations (BO) (Business Structures and Business Entities):

- Sole Trader
- Partnership
- Joint Venture
- Trust
- Association – Unincorporated and Incorporated
- Social Enterprise
- Company/Corporation

In choosing a Business Organisation, it would be appropriate for any given business to consider:

- Duration of the business
- Cost and method of formation
- Tax burden
- If property is to be owned by the individual/s or the entity
- Access to further capital for future expansion of the business
- Probable requirements of a lending institution
- Professional ethics or legal restrictions on organisational structure
- The desirability of limited liability if the business is high-risk in nature

### *I Sole Traders*

A sole trader (sole proprietor) is an individual person running and owning a business in their own name. It has no legal existence separate from that person and they bear sole responsibility—that is, not using a company, partnership or trust structure.

It is the simplest form of BO to create—only requires:

- (a) ABN
- (c) GST registration (if annual business activity turnover is > \$75,000)
- (d) ASIC registration (if you are conducting business under a name other than your personal name)

#### *1 Advantages*

- Keeping all profits
- Ownership and control
- Simple and quick
- Lack of formalities and inexpensive to form
- Easy to change nature of business
- Maintenance of privacy
- No specific law applies
- Least regulated BO

#### *2 Disadvantages*

- Lack of formalities and inexpensive to form
- Easy to change nature of business
- Maintenance of privacy
- No specific law applies
- Least regulated BO

## II Partnerships

A partnership is a business structure made up of 2 or more people who distribute income or losses between themselves. It is defined as '*the relation which exists between persons carrying on a business in common with a view of profit*': **s 1 Partnership Act 1892** (NSW). A partnership (firm) is essentially a contract (partnership agreement) entered into by the individual partners.

A partnership agreement may be:

- A formal written agreement
- Partly in writing and partly oral
- Purely oral or wholly or partly implied from the conduct of the parties

### A Types of partnerships

#### 1 General Partnership (GP)

- Most common and does not require registration
- All partners are equally responsible for the management of the business
- Each partner has unlimited liability for the debts and obligations it may incur
- Appropriate for multiple people wanting a BO with a simple structure

#### 2 Limited Partnership (LP)

**s 50A Partnership Act 1892** (NSW)

Consists of 1 ≥ general partners (whose liability is unlimited) and 1 ≥ limited partners:

- General partners manage the business and have the power to enter binding agreements on behalf of the partnership.
- Limited partners are passive investors, and must not manage the business. Liability is limited in proportion to the amount they agreed to contribute to the partnership.

#### 3 Incorporated Limited Partnership (ILP)

**s 50A Partnership Act 1892** (NSW)

- Primarily used by businesses engaged in high-risk venture capital projects
- Involves general and limited partner(s)
- Partners have limited liability for the debts of the business
- Must be at least one general partner with unlimited liability
- If the business cannot meet its obligations—the general partner(s) becomes personally responsible for any failure of the partnership

### B What constitutes a partnership?

A legal partnership does not exist unless the 4 elements in the statutory definition (**s 1 Partnership Act 1892** (NSW)) have been satisfied:

- A relation which exists between persons
- Carrying on a business
- In common
- With a view to profit

## C Advantages & Disadvantages

### 1 Advantages

- Lack of formalities and inexpensive to form
- Easy to change nature of business by agreement
- Tax advantages
- Maintenance of privacy
- Potential for partners to pool capital and experience

### 2 Disadvantages

- Not a separate legal entity—unlimited liability of partners
- Partnership limited to 20
- Difficult in selling one's interest
- Loss of control of management

## III Joint Venture

An arrangement or contract whereby 2 ≥ parties enter into an agreement to contribute to a specific project. Each of them earns an individual (not shared) profit or output from the business without forming a partnership. Each party contributes some skill or property for the purposes of the joint 'product' without binding their joint venturers as principals or agents—unless each has expressly agreed.

JVs are often the first BO in large-scale, risky, and expensive commercial settings e.g., mining, property development, agriculture, entertainment.

### A Relationship between a JV and a PS

A JV is a single venture of *limited duration*, however a JV may be deemed a PS by the Court. The HC in *United Dominions Corporation Ltd v Brian Pty Ltd (1985)* considered this distinction:

*'The term 'joint venture' is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular...undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property, or skills. Such a joint venture will often be a partnership'.*

The agreement between the parties, although describing the parties as engaging in a JV, was in essence a PS agreement dealing with a *'partnership for one transaction'*.

#### 1 Advantages of JV over PS

- Not responsible for acts of co-venturers (limited liability): co-venturers are not agents for each other
- Have greater flexibility in determining the tax treatment
- Can dispose of its share of its product in any manner
- Can transfer or assign their interest in the venture without consent
- Uncertain nature of JV—have a measure of protection from being sued in the name of the JV

## **IV Trusts**

An equitable obligation where a person (the trustee) holds property (the trust property) for the benefit of another (the beneficiary).

There are 3 parties to a trust:

- 1 *Settlor (creator or donor)*  
Person who creates the trust
  
- 2 *Trustee*  
Person to whom the trust property is vested or transferred
  
- 3 *Beneficiary*  
Person/s who benefits under the trust

The subject matter of the trust is the trust property—tangible or intangible property, personal or otherwise.

## **V Association – Unincorporated and Incorporated**

Is a group of 2 or more persons who have agreed to join together to pursue a common lawful (usually not for profit) purpose. Examples include, social, sporting, trade, educational, religious, charitable and cultural groups.

Associations may be unincorporated or incorporated (under the *Associations Incorporations Act (2009)* (NSW)).

The main advantages of incorporation include:

- Association is a separate legal entity—members have limited liability
- Association can enter into contracts, sue and hold assets in its own name
- Association has perpetual succession

## **VI Social Enterprises**

Businesses that want to create profit, but are driven by making a positive social impact. Many countries have specific types of companies that are designed for social enterprises e.g., Community Interest Company (UK and Canada) and the Benefit Corporation in the US.

In Australia, there is no specific legal structure called or designed for 'social enterprise'. However, the most common structures that can be used are:

- Pty Ltd Company
- Company Limited by Guarantee (CLG)
- Cooperative
- Incorporated Association (IA)
- The Hybrid Structure (CLG or IA structure) and a Pty Ltd company separately

## VII Company/Corporation

Terms 'company' and 'corporation' are commonly used interchangeably. However, for definition purposes they are different (discussed in Part 2).

A company/corporation is a type of business structure where an individual or group of individuals who, having satisfied the requirements of the *Corps Act* for registration, are given a separate legal entity to conduct commercial practices to earn a profit. It has separate legal existence from its owners (shareholders) and the legal capacity of an individual.

These are governed by the *Corps Act* which sets out the rules and regulations for their formation, management, and dissolution.

### A What are the characteristics of a company/corporation?

There are several key characteristics that distinguish it from other business structures:

#### 1 Limited Liability

Shareholders have limited liability for the company's debts and obligations—their personal assets are protected in the event of the company's insolvency or legal disputes.

#### 2 Separate Legal Entity

It can enter contracts, sue and be sued, own assets, incur liabilities, and conduct business operations in its own name. The company's debts and obligations are separate from its shareholders.

#### 3 Perpetual Existence/Succession

Continue to exist even if its shareholders change or die. This makes it easier for corporations to raise capital, enter into long-term contracts, and conduct business operations over a sustained period.

#### 4 Management Structure

A board of directors manage it, who are appointed by the shareholders. Directors are responsibility for making strategic decisions and overseeing the company's operations. Shareholders have the right to vote on important matters, such as the appointment of directors and major business decisions.

Disadvantages include:

- Cost of establishment and ongoing fees
- Onerous reporting and administrative requirements required by law
- Limited management role for shareholders
- Possible loss of control of the company to shareholders
- Increasingly onerous legal responsibilities placed on company officers and directors