1. Introduction

1.1 What is a Company?

✦ *A corporation (also known at common law as a "body corporate") in the common law sense (as distinct from the special provisions of s 57A of the Corporations Act) is a legal device by which legal rights, powers, privileges, immunities, duties, liabilities and disabilities may be attributed to a fictional entity equated for many purposes to a natural person.*

Corporations Act 2001 (Cth)
PART 1.2----INTERPRETATION
Division 7--Interpretation of other expressions

> ***s 57A Meaning of corporation***
> *(1) Subject to this section, in this Act, corporation includes:*
> *(a)a company; and*
> *(b)any body corporate (whether incorporated in this jurisdiction or elsewhere); and*
> *(c)an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose.*
> *(2) Neither of the following is a corporation :*
> *(a)an exempt public authority;*
> *(b)a corporation sole.*

1.1.1 Historical Development of the Corporation Form

Some key moments (in England) in the derivation of the modern company

✦ *Early boroughs and guilds (13th century - 1650)*
- *From the 13th century certain boroughs were granted franchises by royal charter, conferring "liberties" or privileges upon the municipal group.*
- *The privileges commonly included jurisdictional privileges for the borough court (exclusive jurisdiction), limited powers of self government.*
- *Other franchises commonly granted to boroughs included 'the right to perpetual succession, the right to sue 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'.*
- *With respect to guild ordinances, they prescribed the conditions upon which members might trade and the guild court exercised jurisdiction in all trade disputes. -- Outsiders were permitted to trade in the borough, if at all, only on terms dictated by the guild, terms which secured the trading advantage of its members.*

✦ *Incorporation by Royal Charter (1650) -- 'regulated companies'.*
- *It became settled in England that a corporation aggregate could not arise spontaneously – it could be created only by the consent of the monarch expressed in a grant of a royal charter.*
- *The early form of the chartered corporation was the regulated company, effectively a limited purpose guild in which the member merchants engaged in foreign trade on their own account and risk, subject to regulations passed by the company.*
- *But the movement from individual to joint stock trade was gradual.*
- *The East India Company was incorporated by royal charter in 1600.*
- *Charters typically ceded to the company not only trading privileges but extensive powers of self-government in the region such as power to make laws, raise taxes, establish a currency, conduct wars and settle the peace.*

✦ *Incorporation by private Act of Parliament – An example is the NSW Water Board. – 'statutory companies'.*
- *In England, at least from the 16th century, parliament could create a corporation. – a petition for a grant of incorporation by private Act of Parliament was an alternative to a petition to the monarch for a charter.*

✦ *The rise of the joint stock company (or de facto incorporation)*
- *Commercial developments in the 18th century necessitated the raising of large sums of capital and encouraged the solicitation of funds from the public.*
- *However, it was not always possible for a new enterprise to obtain a charter or the passing of an Act.*
- *This led to the formation of large quasi-partnership known as joint stock companies.*
- *"Company" here meant simply association. It was an unincorporated association.*

- *Unlike the position in a partnership in the strict sense, membership shares were issued on terms that they were transferable without the consent of other investors in the company. – This created opportunities for speculation in shares in joint stock companies and in some economic conditions a market boom could develop. – Such a boom occurred in the early part of the 18th century.*

✦ *The "bubble" and the "Bubble Act" – 1720 (no companies without legislative authority or royal charter)*
- *The Act was designed to outlaw joint-stock companies and after it was passed there was a massive market downturn.*
- *Parliament wanted to end the creation of joint stock companies which presumed to act as corporate bodies without a charter or statutory authority and which pretended to make their shares transferable without the authority of an Act of Parliament.*
- *The Bubble Act was on the books for 105 years but never enforced. It was repealed in 1825.*

✦ *The Deed of Settlement company (deed only binds subscribers – stock not freely transferable)*
- *Under this device, a large partnership would be constituted by a deed of settlement containing rules for government of the partnership. – Thus, the prohibition of the Bubble Act were effectively circumvented.*
- *Instead of a charter or act of incorporation, the basis of the unincorporated organisation has to be found in the articles of association which were, as a rule, in the form of a deed of settlement signed by those participating in the society.*
- *The deed provided that every person to whom a share was transferred would promise to perform all the duties of an investor as laid down in the deed. Transferees of shares agreed to be bound by the deed and signed a supplementary deed. For matters not dealt with in the deed, the general law of partnership applied.*
- *The deed provided that stockholders should be liable only to the extent of their contributed capital.*

✦ *Repeal of the "Bubble Act" – 1825*

✦ *Joint Stock Companies Registration and Regulation Act 1844 (UK).*
- *The Act was passed establishing accountability mechanisms through obligations with respect to the holding of company meetings and the audit and publication of company accounts.*
- *The Act adopted the constitutional structure of the deed of settlement company.*

✦ *Limited Liability Act 1855 (UK): first allowed limited liability for corporations.*

✦ *Joint Stock Companies Act 1856 (UK).*
- *A consolidating 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.*

✦ *Companies Act 1862 (UK): First 'Companies Act'. – this is the act which was brought to Australia.*

The Australian experience

✦ *Pre-1901: colonies adopted individual legislation*

✦ *1901: at federation, states retained legislative power*

✦ *1961-2: 1st national cooperative scheme*

✦ *1981: 2nd national cooperative scheme*

✦ *1991: 3rd national cooperative scheme*

✦ *2001: after State referral to the Commonwealth, the Commonwealth enacted Corporations Act 2001 (Cth) (the current law).*
- *Referral power: s 51(xxxvii) of the Constitution.*

1.1.2 Theories and Conceptions of the Corporation

Managerialist Theory

✦ *The managerialist theory emphasises corporate management and the power that it wields.*

✦ *The issue is whether management holds and exercises this power legitimately.*

✦ *Critics of management argue that managers often exercise power without accountability to shareholders; in public companies, shareholders are unable to monitor effectively the managers of their companies, so that legal intervention is needed to protect the interests of shareholders.*

✦ *In the managerialist theory, accountability is secured by the imposition of mandatory legal duties upon directors and other officers. These include the duty to act honestly, to exercise care and diligence, not to make improper use of information acquired by virtue of being an officer of the company, and not to make improper use of position as an officer of the company.*[1]

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[1] *s 232 of Corporations Act 2001 (Cth).*

- In addition: corporate managers are subject to disclosure obligations.
- These legal duties and obligations may be enforced by the company itself, by shareholders, or by the Australian Securities Commission.

Concession / Privilege Theory

- A privilege is offered by the State to individuals to form corporation.
- High level of regulation in corporate affairs by the State said to be justified.
- Inappropriate to afford limited liability to small/sole proprietor companies because they don't contribute much to the economy and there is no separation of ownership and control.
- Since the state is the device which allows a corporation to be created and gives it its qualities, then as a quid pro quo, the state may require for that concession certain obligations on companies (i.e. can tax them etc.).

Contractual Theory

- Under the contractual theory, the corporation is deconstructed to reveal no more than a "nexus of contracting relationships" between shareholders, managers and other employees, lenders, suppliers and other stakeholders.
- The contracting relationships are a conception of "relationships characterised by reciprocal relations and behaviour".
- Thus, competitive markets are more important than mandatory legal rules in providing managers with appropriate incentives to maximise shareholder wealth. –Contract theory rests upon the assumption that the duty of management is to maximise the wealth of their principals, the shareholder owners of the firm and that the function of corporate law is to promote that end.
- As a consequence, since the firm is no more than a web or nexus of contracts, the view of corporation as hierarchy disappears and with it the so-called problem of management accountability and legitimacy.
- In addition, 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. – Corporate law is useful to catch management fraud and as a standard form contract which reduces the transaction costs of negotiating an optimal contract afresh each time. – thus, under contract theory, corporate law is permissive and supplementary.

Shareholder Approach

- Shareholder primacy – the only reason for directors to decide anything at all is to make the most money for the shareholders.
- Shareholders as owners of the corporation: ultimate risk bearers (provide capital but financial claims postponed to creditors when winding up), entitlement to surplus income during life of company and control exercised by voting rights.
  - View prevalent in the 19th century
  - Believed that the greatest benefits achieved when companies acted so as to maximise the profits distributable to their shareholders
  - Management accountable to shareholders (reflected in CL via directors duties)
  - In Dodge v Ford Motor Co. (1919) 170 NW 668, it was held that the director of the Ford Motor Co. was accountable to the company's shareholders for unpaid dividends even though these dividends had been reinvested in the company to make their cars cheaper for society.

Stakeholder Approach

- Stakeholder could be:
  - employees who, without the company, would not have jobs
  - bondholders who would like a solid performance from the company and, therefore, a reduced risk of default
  - customers who may rely on the company to provide a particular good or service
  - suppliers who may rely on the company to provide a consistent revenue stream
- There is an overriding need to think of the corporate entity as having a public vision, and so therefore there should be controls on countries that require directors to have other concerns.
- Multi-fiduciary obligations – duty owed by corporate managers to all stakeholders and not merely shareholders (ie no preferring of short term shareholder gains over legitimate non-shareholder expectations). Management should pursue profit seeking strategies that harmonise shareholder and non- shareholder interests.
  - Recognition of interests of debtors, creditors, employees, suppliers, consumers and the public.
  - Stakeholders cannot seek remedies against directors hence not widely adopted in Australia.

1.1.3 Policy Concerns

1.1.4 Types of Companies

	Proprietary Companies (Pty Ltd)	Public Companies (Ltd)
Shareholders: s 45A(1), Note 2; s 113	1-50.	at least 1, no maximum.
Members: s 114	Minimum: 1 member.	Minimum: 1 member.
Directors: s 201A	Minimum 1 director (1 resident).	Minimum: 3 directors (2 residents).
Finance: s 45A(1), Note 2; s 113	Cannot get fund from public.	Can get fund from public (with disclosure documents).
Listing: s 45A(1), Note 2; s 113	Cannot be listed.	Can be listed or unlisted.

Classification Accordingly to Liability

Corporations Act 2001 (Cth)
CHAPTER 2A--Registering a company
PART 2A.1----WHAT COMPANIES CAN BE REGISTERED

s 112 Types of companies
(1) The following types of companies can be registered under this Act:

Proprietary Companies	Limited by shares
	Unlimited with share capital
Public Companies	Limited by shares
	Limited by guarantee
	Unlimited with share capital
	No liability company

Share Capital

- Share capital is but a device to allocate certain risks, rights and functions among participants in the business venture, namely, the risk of loss, the distribution of profits and control of the venture.
- 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. It also includes other accumulations made during the life of the company without contribution by members, such as through the issue of bonus shares.
- On a winding up of a company, the holder of share capital are the lowest ranked claimants upon the assets of the company.
- During the life of the company share capital may not be returned to its holders, and those holders may not be released from obligations they have undertaken to contribute it, without formal approval.

Shares

- A share is simply a proportionate interest in the net worth of the business or undertaking of the company.
- It confers an interest in the company through a bundle of rights which are properly described as a chose in action since shareholders do not have any legal or equitable interest in the assets of the company.

- The rights attached to shares in a company are those which are conferred by the Corporations Act and general law doctrines of company law, the constitution of the company and the terms of issue of the shares. – two broad species:
  - to participate in financial distributions, being an entitlement to receive dividend payment and rights in a winding up of the company to be repaid proportionately.
  - to participate in the governance of the company.

✦ The power to issue shares in a company is usually vested in directors.

✦ The aggregate amount of money or its value (where shares are issued for a non-cash consideration) that has been received by the company for the issue of shares is called its paid up capital.

✦ The aggregate of issued capital for which payment has yet to be made is called its unpaid or uncalled capital.

✦ Types of shares
  - Ordinary/normal shares -- Standard rights include the right to dividends, the right to vote, the right to a return of capital on winding-up
    - Noteworthy, shareholders are bottom on the list of creditors so you only get your return of capital once everybody else has been paid.
  - Preference shares -- shares which have preferential right over other shareholders. Rights depend upon the issue of the shares but typically such shareholder has:
    - a right to a minimum dividend (preferential right to the distribution of profits);
    - right to be paid before ordinary shareholders in the winding up
    - more limited voting rights
  - Bonus shares – shares which are issued to existing shareholders without payment (dividend reinvestment): s 254A, CA.
  - Partly paid shares -- shares where the full issue price does not have to be paid at the time of issue (used if you want to have funds on call but do not need all of the capital in the company at the start). This type of share is discouraged by the ASX (Australian Stock Exchange).
    - Paid up capital is the amount of capital already paid.
    - Unpaid capital is the amount of capital owing.
    - Uncalled capital is the capital yet to be called by the company

Companies Limited by Shares

✦ A "company limited by shares " means a company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them: s 9 of CA.[2]

✦ Therefore, if shares are issued as fully paid, their holder has no further obligation to contribute to the debts and liabilities of the company, at lease in relation to those shares.

✦ By contrast, if shares are partly paid shares, their holder's obligation is simply to contribute to the company the amount which they have agreed to pay for them and which remains unpaid.

✦ Companies limited by shares may be incorporated either as a proprietary or public company: s 112(1) of the CA.

✦ A company limited by shares must be formed with a share capital.

✦ A company's share capital is the total amount:
  - contributed or promised to be contributed by its members;
  - as proprietors;
  - in money or money's worth;
  - to be adventured in the company's business;
  - on terms that the claim of the contributors to recover their contribution.

✦ A company with limited liability shall have "Limited" or the abbreviation "Ltd" as part of, and at the end of, its name: s 148(2) of the CA.

✦ The company limited by shares is all but exclusively used as a vehicle for trading activity.

Unlimited Companies

✦ An "unlimited company " means a company whose members have no limit placed on their liability: s 9 of the CA.

✦ Thus, an unlimited company differs from other companies in that its members may be made liable in a winding up for its debts without limit on their liability.

✦ An unlimited company can be registered as a proprietary company or as a public company: s 112(1) of the CA.

✦ Members of an unlimited company are not directly liable to creditors of the company.

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[2] Corporations Act 2001 (Cth), s 9.

- *Their liability for the company's debts is contingent upon the company being wound up and the assets of the company being inadequate to satisfy its liabilities.*
- *A creditor who cannot recover from the company must apply to the court for a winding up order if there is to be recovery against the members.*
- *Members will be called on in the first instance to contribute equally.*

✦ *Unlimited companies are not normally used by trading ventures.*
✦ *The name of an unlimited company does not have to end with the word "Unlimited" or with any other word drawing attention to the unlimited liability of the members.*
✦ *One advantage to have an unlimited company is that since members of an unlimited company bear full responsibility for the company's liabilities, this class of company is exempted from the prohibition upon unsanctioned capital reduction: s 258A of the CA.*

Companies Limited by Guarantee

✦ *A "company limited by guarantee " means a company formed on the principle of having the 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 of the CA.*
✦ *On the winding up of a company limited by guarantee no contribution is required from a member exceeding the amount undertaken to be contributed in the event of winding up: s 517 of the CA.*
✦ *A company limited by guarantee is in practice employed for non-profit activities.*
✦ *The feature that distinguishes a company limited by guarantee from a company limited by shares is that a company limited by guarantee does not have power to issue shares: s 124 of the CA.*
✦ *Since member's guarantees 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: Re Pyle Works.*[3]
✦ *A company limited by guarantee has no share capital. It may require fees to be paid by members or may raise loans but prima facie it is not a convenient vehicle for a business needing working capital.*
✦ *A company limited by guarantee cannot be a proprietary company and will always be a public company: s 112(1) of the CA.*
✦ *ASIC is permitted to authorise a guarantee company to dispense with the word "Limited" as part of its name when the constitution of the company requires the company to pursue charitable purposes exclusively and prohibits distributions to members and the payment of fee to directors: s 150 of the CA.*

No Liability Companies

✦ *A company may be registered as a no liability company only if: s 112(2) of the CA*
  (a)the company has a share capital; and
  (b)the company's constitution states that its sole objects are mining purposes; and
  (c)the company has no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them.
✦ *"Mining purposes" means prospecting for, obtaining or selling ores, metals or minerals: s 9 of the CA.*
✦ *A no liability company is required to include the words "No Liability" or "NL" as part of and at the end of its name: s 148(4) of the CA.*
✦ *A no liability company may only be registered as a public company: s 112(1) of the CA.*

Classification Accordingly to Size

Proprietary Companies

✦ *A proprietary company is a private company designed for a relatively small group of persons who do not wish the company to be able to invite the public to subscribe for its share capital or to lend money to it.*
✦ *Only a company limited by shares or an unlimited company may be incorporated as a proprietary company. Both company types must have a share capital.*
✦ *A no liability company, even though it has share capital, is excluded: s 112 of the CA.*

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[3] *Re Pyle Works (1890) 44 Ch D 534 at 574, 584.*

Two prohibitions of a proprietary company

s 113 Proprietary companies

(1) A proprietary company must have no more than 50 non-employee shareholders.

- *Proprietary companies are not limited to those where management and ownership are in the same person since a proprietary company can have a maximum number of 50 shareholders.*
- *Employee-shareholders are not included in this number.*
- *Thus, a proprietary company may be a well-established family business with some members actively managing and others who are merely passive recipients of dividends; or, at the other extreme, it may be a single-shareholder company.*

(3) A proprietary company must not engage in any activity that would require disclosure to investors under Chapter 6D (which deals with fundraising), except for an offer of its shares to:

(a)existing shareholders of the company; or

(b)employees of the company or of a subsidiary of the company.

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(4) An act or transaction is not invalid merely because of a contravention of subsection (3).

✦ *Thus, if a proprietary company:*
- *ceases to be a company limited by shares or an unlimited company with a share capital;*
- *allows its non-employee shareholders to exceed 50; or*
- *engages in activity that would require disclosure to investors under Ch 6D.*

✓ *ASIC can order the company to convert to a public company: s 165 of the CA.*

Categories of Proprietary Company

✦ *At various times throughout its existence a proprietary company may for a financial year be either a:*
- *small proprietary company as defined in s 45A(2) of the CA; or*
- *large proprietary company as defined in s 45A(3) of the CA.*

✦ *A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the followings:*
- *The consolidated gross operating revenue for the financial year of the company and the entitles it controls (if any) is less than $25 million.*
- *The value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than $12.5 million.*
- *The company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.*

✦ *A proprietary company is a large proprietary company for a financial year if it satisfies at least 2 of the followings:*
- *The consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is $25 million or more.*
- *The value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $12.5 million or more.*
- *The company and the entities it controls (if any) have 50 or more employees at the end of the financial year.*

✦ *Privileges confined to small proprietary companies – a small proprietary company is required to prepare financial statements and send them to members only if:*
- *shareholders with at least 5 percent of votes direct the company to do so: s 293 of the CA.*
- *the company is controlled by a foreign company and is not included in consolidated accounts lodged with ASIC by the foreign company: s 292 of the CA; or*
- *ASIC directs it to do so: s 294 of the CA.*

Advantages Enjoyed by Proprietary Companies Generally

✦ *Any proprietary company may register with a single shareholder and trade with a single director: ss 114(1), 221(1) of the CA.*

✦ *The requirement to hold an annual general meetings does not apply to proprietary companies: s 250N of the CA.*

✦ *Resolutions required or permitted to be passed at general meetings may be deemed to have been so passed even though no meeting was held provided all members sign a document stating that they favour a resolution. – but this informal procedure is not available where the resolution is to remove an auditor under s 329: s 249A of the CA.*

✦ *There is no need for each director to be appointed by a separate resolution when the appointment is by the company in general meeting. (compare s 201E of the CA)*

- ✦ *There is no entrenched statutory right of members to remove a director. (compare s 203D of the CA)*
- ✦ *Directors may be made removable by other directors, if power to do so is given in the constitution. (compare s 203E, CA)*
- ✦ *The legislative prohibition in s 195 of the CA on directors voting or being present at consideration of a matter in which they have a material personal interest does not apply to directors of a proprietary company (see s 191 on disclosure of interests).*
- ✦ *The regulation of financial benefits to directors and other related entities in Ch 2E does not apply to a proprietary company.*
- ✦ *Directors' reports of a proprietary company do not have to contain statements about directors' qualification, their attendance at meetings, their shares or their contracts with the company: s 300(10), CA.*
- ✦ *If the company appoints an auditor, the members are not prohibited from appointing:*
  - *an officer of the company;*
  - *a partner, employer or employee of an officer of the company; or*
  - *a partner or employee of an employee of an officer of the company.*
  - ✓ *provided that in each case he or she is a registered company auditor and is not otherwise disqualified: s 324, CA.*
- ✦ *Resignation of an auditor does not require the consent of ASIC: s 329, CA.*
- ✦ *If the company is wound up in a member's voluntary winding up, the person appointed as liquidator need not be a registered liquidator and can be an officer or auditor of the company: s 532, CA.*
- ✦ *There is no obligation to appoint a secretary: s 204A, CA.*

Public Companies

- ✦ *If a company is not a proprietary company, it is a public company, the residuary class of companies: s 9, CA.*

Identification of a Public Company

- *More than 50 shareholders.*
- *Ltd in the title (but not Pty Ltd).*
- *If the company is listed on the Stock Exchange.*
- *If the company is involved in fundraising activity.*

Directors in Public Company

Minimum number of directors: *s 201A, CA*
(1) Proprietary companies must have at least one director...that director must reside in Australia.
(2) Public companies must have at least three directors...At least 2 directors must reside in Australia.

Who can be a director: *s 201B, CA*
(1) Only an individual who is at least 18 may be appointed as a director of a company.

Powers of directors: *s 198A, CA*
(1) The business of a company is to be managed by or under the direction of the directors.
(2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting.

Classification According to Listing

s 114 Minimum of 1 member
A company needs to have at least 1 member.
s 115 Restrictions on size of partnerships and associations
(1) A person must not participate in the formation of a partnership or association that:
(a)has as an object gain for itself or for any of its members; and
(b)has more than 20 members;
unless the partnership or association is incorporated or formed under an Australian law.
s 116 Trade unions cannot be registered
A trade union cannot be registered under this Act.