Theories and concepts of the corporation

- **Managerialist**: regulation necessary to align interests of shareholders and management, and promote accountability.
- **Contractual**: regulation necessary to reduce transaction costs, prevent market failure & market will promote efficient companies.
- **Concession/Privilege**: incorporation is a privilege conferred by government, which must not be abused.

Policy concerns

- **Shareholder Maximization**: regulation should support the maximization of shareholder wealth.
- **Stakeholder Approach**: regulation should promote consideration of non-shareholder interests.

Types of companies

- The following types of companies can be registered: s112(1)
  - (1) Proprietary companies.
    - (1.1) Limited by shares.
    - (1.2) Unlimited with share capital.
  - (2) Public companies.
    - (2.1) Limited by shares.
    - (2.2) Limited by guarantee.
    - (2.3) Unlimited with share capital.
    - (2.4) No liability.
- Must have at least one member: s114.
- Trade union cannot be registered: 116.
- Partnership 1) >20 members & 2) for profit, cannot be formed unless incorporated: s115(1). (NB: higher number for some types: s115(2)).

Classification according to liability

1. **Company limited by guarantee**: liability of members is limited to the amount the members undertake to contribute if company is wound up: s9.
   a. Guarantee can only be called during winding-up and is limited to the amount promised: s517.
   b. Cannot pay dividend: s254SA.
2. **Company limited by shares**: liability of members is limited to the amount unpaid on the shares respectively held by them: s9.
   a. Call by director (s254M(1)) or liquidator in winding up (s516) according to terms of share issue.
   b. Forfeit shares if not paid within specified time.
3. **Unlimited company**: members have no limit on their liability: s9.
   a. If full paid share capital insufficient to discharge liabilities, call on members: s520 (joint and several liability).
b. Exempt from prohibition on unsanctioned capital reduction [useful investment vehicle – shares represent bonds, cash in bonds by sell share back to company] (s258A).

4. **No liability company**: s112(2).
   a. Share capital.
   b. Constitution states its sole objects are mining purposes.
   c. No contractual right under constitution to recover calls made on shares from a shareholder who fails to pay them (shares forfeited).

**Classification according to size**

**Public Company**: a company that is not a proprietary company: s9.

**Proprietary Company**:

- 1) Limited by shares or unlimited with share capital.
- 2) No more than 50 non-employee shareholders: s113(1).
  - Employee shareholder = is or was employee of company or subsidiary: s113(2)(b).
  - Joint holders of a share counts as one person: s113(2)(a).
- 3) Not engage in conduct that would require investor disclosure under Ch 6D: s113(3).
  - If contravene, ASIC may require company change to public: s165.
  - Transaction not invalid because of contravention: s113(4).
  - Exception: offer of shares to existing shareholders/employees.

**Small Proprietary Company**

- Small: satisfy two of the following (s45A(2)):
  - Consolidated revenue <$25m.
  - Consolidated gross assets <$12.5m.
  - <50 employees.
- Large: default if not small (s45A(3)).
- Small proprietary company has reduced financial reporting & audit requirements: s292(2).

**Share Capital**

- Share: proportionate interest in net worth of the company.
- Device that allows allocation of risk of loss and profit, member liability and control of business venture.
- Share Capital: amount of money that members have agreed to contribute permanently to the company.
  - Pool of assets that company can use to engage with creditors/trade.
  - Residual claimants in liquidation.
  - Entitled to surplus (risk bearers).
- No minimum share capital requirement.
- Power to issue shares vested in board (contract of allotment; registered).
• Pre-emption: Directors of a proprietary company must first offer new shares to existing members of that share class in proportion to their holdings: s254D(1) (RR).
  o Director issue an shares not taken up as they see fit: s254D(3).
  o GM ordinary resolution may authorize a share issue free from requirement of pre-emption: s254D(4).
• Issued capital: aggregate amount of money that members have paid or agreed to paid for shares they have subscribed to.
• Paid up capital: aggregate amount of money company has received for issue of shares.
• Uncalled capital: aggregated of issued capital yet to be paid.
• Rights attached to shares are determined by CA, constitution and terms of share issue.

Corporate Constitution

• Only mandatory for listed companies.
• If company adopts constitution, displaces inconsistent replaceable rule (except for mandatory rule applying to public company).
• Public company must lodge constitution with ASIC & any resolution altering it: ss 117(3), 136(5).
• Replaceable rules don’t apply to sole director/shareholder proprietary company: ss 198E, 201F, 202C.
• May adopt or vary terms of constitution by special resolution: s136(1)-(2). Constitution may impose further requirement for alteration (s136(3)), and entrenching provision may not be repealed unless it is complied with (s136(4)).
• Constitution/replaceable rules have effect as a contract between (1) company and member, (2) company and director-secretary and (3) members themselves: s140.
  o Failure comply with RR not itself a contravention of Act: s135(3).

Corporate Organs

• Vision of power between 1) Shareholders in GM and 2) Board of Directors is a matter of choice (constitution).
• 198A (RR) vests management power in the board.
• Must appoint secretary: s204A.
• Delegation of board powers to MD: s198C.

Corporate Group

• Corporate group: a number of companies associated by common or interlocking shareholdings, allied to unified control: Walker v Wimborne (1976).
  o 1) Holding-subsidiary company.
  o 2) Economically integrated group.
• Tension between reality of corporate groups and traditional doctrine of separate legal personality.
• **Holding company**: in relation to a company, a holding company is a company of which the former company is a subsidiary: s9.

• A company is a **subsidiary** of another company if:
  - Latter EITHER (s46(a)):
    - 1) Controls the composition of the board of the former.
      - Satisfied if either (s47): 1) No person can be appointed to the board with later company’s consent, 2) Person is appointed to first company as consequence of being appointed director of later company.
      - Legally enforceable (not practical/de facto) power: *Mount Edon Mines v Burmine*.
    - Majority of directors.
  - 2) Position to cast or control the casting of more than half the maximum number of votes that can be cast at the GM of the former.
    - Not sufficient to control <1/2 shares, even if as matter of commercial practice can ordinarily determine result of GM: *Mount Edon Mines v Burmine*.
    - Actual power to cast >1/2 votes: *Bluebird Investments*.
  - 3) Holds more than ½ the issued share capital (carrying right to vote) of the former.
    - Former is a subsidiary of a subsidiary of the later: s46(b).

• **Wholly owned subsidiary**: holding company owns (directly, through nominees or subsidiaries with no outside interests) **all** the shares in the subsidiary: s9.

### Why form a company?

• 1) Limited liability.
• 2) Perpetual succession.
• 3) Financing (floating security, public share issue).
• 4) Cost, formalities & tax implications.

### How do you form a company?

• Lodge application with ASIC (s117(1)) in prescribed form (s117(4)).
• Application **must** state: s117(2).
  - Type of company.
  - Proposed name, office and place of business.
  - Name/address of each member, director and secretary.
  - Limited by shares/guarantee ➔ share/guarantee structure.
  - Holding company, it’s name and ACN.
  - State/Territory of registration.
• If public company, must lodge any constitution with application: s117(3).
• If application lodged under s117, ASIC may register company, give company ACN and issue certificate of registration (conclusive evidence requirements of registration have been met): s118(1).
• ASIC must keep record of registration: s118(2).
• Company comes into existence at beginning of day on which it is registered: s119. (Remains until deregistered).
• Expenses incurred before registration promoting/setting up company may be paid out of company assets: s122.
• Person specified as member, director or secretary in application (with their consent) takes up their position upon registration: s120(1).
  o Member’s names entered into the register of members: cf s169.
• Shares specified in application are taken to be issued upon registration: s120(2).
• Address specified as registered office becomes the registered office on registration: s121.

  • Limited company must include “Limited” or “Ltd” at end of name AND a proprietary company must include “Proprietary Limited” or “Pty Ltd:” s148(2).
• Save time by buying a “shelf company” (pre-made company; activate by changing name, modifying constitution & notifying ASIC).

Jurisdiction

• Incorporated in the Australian jurisdiction: s119A(1).
• Registered in the State/Territory specified in the application: s119A(2).
  o State/territory of registration does not affect company’s legal capacity and powers: s124.
  o However a state/territory law might impose rights or obligations on a company by reference to its state of registration (e.g. stamp duty on share transfers by companies within a state).
  o Company continues to be registered even if the State in which the company is registered ceases to be a referring state: s119A(4).

Common Seal

• Company may have a common seal (include name, ACN): s123(1). May make and execute contracts w/wo seal: s126-127.

Corporate Personality and Limited Liability

Doctrine of Corporate Personality

• Company comes into existence as corporation on day it is registered: 119.
• Minimum one member: s114.
• Proprietary company = minimum one director (ordinarily reside in Australia): s201A(1).
• Public company = minimum three directors (two ordinarily reside in Australia): s201A(2).

Legal Capacity and Powers of a Company
• Legal capacity and powers of an individual: s124(1) [e.g. deal with property, sue & be sued].
• Powers of a body corporate, including issue shares, debentures, options, security interest & declare dividends: (s124(1)).
• Legal capacity not affected by fact that the company’s interests are not served by doing it: s124(2).
• Constitution may expressly restrict or prohibit company’s exercise of any of its power or set out objects. An act is not invalid merely because it is contrary to limitation/objects (s125(1), (2)).

Separate corporate personality and limited liability

• Corporation is a separate legal person, with separate legal rights and duties, from its founders, members and directors: Salomon v Salomon [1897].
  • Even where the same business is carried on by and for the same persons as before incorporation.
  • Robust principle, with very rare exceptions.

• Company is a separate legal person, even in a sole shareholder/ director/ employee company: Lee v Lee’s Air Farming Ltd [1961].
• Members of a company are not personally liable for the debts of the company, except as provided by the Act: Salomon v Salomon [1897].
  • Company is not an agent or trustee of the members.
  • Shift risk of corporate failure from entrepreneur to unsecured creditors.

Salomon v Salomon and Co [1897]

1. Facts:
   a. Salomon incorporated his business into Salomon Ltd compliance with CA 1862.
   b. Salomon Ltd issued 20,000 $1 shares, $10,000 debenture and $9000 secured debt to Salomon in exchange for $39,000. 7 family members (nominee directors) held 7 shares and he held rest.
   c. Salomon borrowed $5000 from B in exchange for $5000 debenture. He advanced the money to Salomon Ltd.
   d. Salomon Ltd liquidated. B enforced debenture. $1000 surplus remaining against which Salomon tried to enforce his debenture.
2. Salomon Ltd validly incorporated under CA 1862.
3. Salomon Ltd, being a separate legal person from Salomon could validly engage in the transaction.

Lee v Lee’s Air Farming Ltd [1961] AC 12

• Facts:
  o Lee was sole shareholder and director of Lee’s Air Farming Ltd.
  o He carried out crop dusting on behalf of the business as its only pilot.
  o On Lee’s death, his wife claimed workers compensation, which required her to prove Lee was an “employee” of Lee’s Air Farming Ltd.
- Lee’s Air Farming Ltd was a separate legal person from Lee (notwithstanding sole director/shareholder).
- Lee’s Air Farming Ltd could enter employment contract with Lee (Lee entered contract as agent for the company, with himself in his personal capacity: possible as separate legal persons).
  - Possible to simultaneously act in personal capacity and as agent for company.

**Macaura v Northern Assurance Co Ltd [1925] AC 619**

- Macaura assigned a pine forest to his company, but forgot to transfer insurance. Pine forest burnt down.
- As the company owned the forest, Macaura could not claim on the insurance policy (he had no interest in the forest).

**Veil Piercing**

- **Exceptional circumstance** where Court imposes liability or benefit on those behind the corporation. **Not based on any settled, unifying principle:** Briggs v James Hardie (1989).

**1) If company is being used as a “cloak or sham” to circumvent an existing legal obligation, court may pierce corporate veil:** Gildford v Horne [1933] (injunction), Jones v Lipman [1962] (specific performance).
  - Gildford v Horne [1933]: Gildford set up Gildford Ltd to compete with his previous employer, in an attempt to get around a restrain of trade clause in his employment contract. Injunction against Gildford Ltd.
  - Jones v Lipman [1962]: Lipman transferred land to X Ltd at below market price (a company he solely owned & controlled) to try and avoid a contract of sale with Jones. Specific performance ordered against X Ltd to complete contract of sale (‘sham’).
  - Note, same outcome could be achieved whilst respecting corporate personality by holding the company guilty of tort of unlawful interference in contractual relations & ordering injunction (Garbuff [1939] CANADA).

**2) Company is liable for debts/benefits incurred by an agent company.**
  - **Agency is very unlikely to arise,** and **at a minimum the following factors must be satisfied**, noting Australian courts have been wary of this approach (Smith Stone & Knight v Birmingham Corporation [1939]):
    - 1) Profits treated as those of parent.
    - 2) Employees/Directors appointed by parent.
    - 3) Parent was head and brain.
    - 4) Parent governed venture.
    - 5) Parent made the profits.
    - 6) Parent had effectual and constant control.
    - 7) Mere fact that wholly owned subsidiary not sufficient.
    - In SSK v Birmingham Corporation [1939], SSK Ltd could claim compensation for disturbance to the business of its wholly owned subsidiary BC Ltd (agent).
      - All BC Ltd directors/employees appointed by SSK Ltd.