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ESSENTIAL CORPORATE LAW

Michael A Adams
BA (Hons), LLM (Lond), FCIS, MACE
Professor of Corporate Law, Faculty of Law,
University of Technology, Sydney

General Editor
Professor David Barker
Dean of the Faculty of Law,
University of Technology, Sydney

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Foreword

This book is part of the Cavendish Essential Series. The books in the series constitute a unique publishing venture for Australia in that they are intended as a helpful revision aid for the hard-pressed student. They are not intended to be a substitute for the more detailed textbooks which are already listed in the current Cavendish catalogue.

Each book follows a prescribed format consisting of a checklist covering each of the areas in the chapter, and an expanded treatment of ‘essential’ issues looking at examination topics in depth.

The authors are all Australian law academics who bring to their subjects a wealth of experience in academic and legal practice.

Professor David Barker
General Editor
Dean of the Faculty of Law,
University of Technology, Sydney
Preface

*Essential Corporate Law* was inspired by the many students of law and business who must study this subject but generally find it hard work. After teaching corporate law for over a decade in the United Kingdom and Australia I believe there is a need for a book that crystallises the major points to enable the good student to really take advantage of their lecturer’s notes and nominated textbook. Australia is fortunate to have a range of good company law textbooks for both business and law students, but they are by their very nature heavy going, and a helpful guide I am sure will be most welcome.

On a personal note, this book came into existence back in 1997 with the encouragement of Jo Reddy, Ruth Massey and Cara Annett, all of Cavendish Publishing. My Dean, Professor David Barker is a permanent inspiration, and my amazing secretary at UTS Kuring-gai, the late Shirley Turnbull, gave me exceptional support. During 2001, I was greatly assisted at UTS by my research assistant, Jeremy Green.

However, none of my work could have ever been possible without the 100% emotional and intellectual support of my marvellous wife Melissa. This book is dedicated to all the 21st century students of Australian corporate law, and especially my very special daughters, Lucy Etta and Jessica Marie.

Michael A Adams
Sydney, Australia
February 2002
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Introduction

Company law can be seen as a difficult subject grounded in complex legislation and ever expanding case law. This book is not intended as a replacement for the major company law textbooks in Australia; it is, however, a valuable tool for obtaining an understanding of the major principles and leading authorities. It is aimed at helping economics, accounting, commerce and business students studying company law, as well as the many law students trying to survive their LLB!

Essential Australian Corporate Law focuses on the key issues of corporate law under the existing legislation and developing case law. However, it is worth noting that, since the Corporations Law legislation was proclaimed on 1 January 1991, there have been at least 25 amending statutes and approximately 2,700 cases dealing with company law matters. The Australian Constitutional matters relating to corporate law have been ‘put to bed’ for the next five years by the States referring their ‘corporate powers’ to the Commonwealth and the enactment of the Corporations Act 2001 (Cth). Thus, in any company law course it is of value to focus on the main principles and known exceptions. Where possible, it is worthwhile to know the original authority (often an old English case) and some modern Australian examples of how the principle has been applied or adapted.

At the end of each chapter, references to the relevant chapters in the main company law textbooks are provided. The internet also provides some very useful sites for obtaining the latest company information. Throughout the book there are approximately 100 cases referred to and many of these cases are available online for free. If you go to www.law.uts.edu.au/~corp/ you will find hyperlinks to the cases mentioned in this textbook.

Please note: references to legislative sections throughout the book are to the Corporations Act 2001 (Cth) (CA) unless otherwise stated.

Useful company law internet sites

- www.asic.gov.au  Australian Securities & Investments Commission
Main Australian company law textbooks


1 Australian Corporate Law

You should be familiar with the following areas:

- The Australian framework of corporate law
- The use of common law and statutory interpretation of the Corporations Act 2001
- The concept of separate legal entity and lifting the veil of registration (incorporation)
- The various business structures in Australia, including partnerships
- The various types of companies that may be registered and the role of promoters
- The role of the regulator, Australian Securities and Investments Commission (ASIC)

1.1 Introduction

Australia operates under a Federal system of government, with specified powers granted to the central Federal (Commonwealth) parliament and residual powers vested in the State parliaments. The corporate law system has traditionally been based upon State laws, but since 1991 it has been treated as a Federal law. This chapter explains the legal framework of Australian corporate law, including the alternative types of business enterprises and the role of the regulator.

1.2 The company and other business structures

Although there are over one million companies registered in Australia, there are many other choices of business structure which need to be evaluated. The major choices are:
sole traders;
partnerships;
joint ventures; and
companies.

Although businesses can be established as trusts, co-operatives, mutuals, friendly societies and associations, these are beyond the scope of this book. The selection of the best type of business structure or enterprise will depend upon a variety of factors. The key factors in determining business structure are:

- How easy is it to establish?
- What is the cost of setting up?
- Are there any minimum or maximum capital requirements?
- What are the laws and who will control the management of the business?
- What is the degree of business flexibility?
- What taxation rate is applied (personal or corporate)?
- Size of business enterprise?
- The process involved in the sale of the business entity or part.
- The process involved in the termination of the business.

Although there is in theory a great choice, a business will often end up being registered as a company because there is a general perception that it is the appropriate structure. Also, the change of the tax regime on July 2000 to a Goods and Services Tax (GST) required an Australian Business Number (ABN), which was much easier to obtain if the business was a company rather than a sole trader or partnership. Thus, in Australia, the business structure of choice tends to be the company.

**What are the legal requirements of a sole trader?**

An individual is allowed to operate in business as a sole trader under Australian law – a structure that is very easy to establish. However, unlike when dealing with companies, the law does not distinguish between the person and the business. Thus, the sole trader is governed by the ordinary commercial laws of Australia, which include contract, tort, crime, agency, trust and legislation, such as the Fair Trading Act (State) or Trade Practices Act 1974 (Cth).
There are limited taxation issues that must be taken into account by a sole trader, and the individual will be personally liable for any debts the business incurs. A sole trader may obtain an ABN from the Australian Tax Office (ATO) tax office and may be required to make annual or quarterly payments to the government based on the Business Activity Statement (BAS).

The benefit of the sole trader structure is that the person has a lot of flexibility and is in control of the business. This has to be weighed up against the lack of capital for expansion, the shortage of skills and the potential for unlimited liability for debts!

**What are the legal issues in respect of partnerships?**

Partnerships require at least two persons to come together with the intention to make a profit. Partnerships have a maximum number of 20 partners (s 115), the exception being professional practices, such as lawyers and accountants, which may have up to 400. The governing laws of partnership are contract, trust and agency, plus the codifying State statute of the Partnership Act 1892 (NSW), or other State equivalent. This Act has not really changed in the last 100 years and is based on the same UK statute of 1890. In 1991, the Partnership Act was amended to allow some partners to have limited liability by virtue of the Partnership (Limited Partnership) Amendment Act 1991 (NSW). However, every limited partnership must be registered with the State government and have at least one unlimited liability partner.

Partnerships are quick and easy to establish both informally or more formally with a partnership deed (contract), but can run into difficulties with the concepts of joint and several liability. Each partner owes a fiduciary duty to the partnership (usually called the ‘firm’) and to each partner. Thus, if one partner binds the partnership to a contract, all the partners are equally liable for the debt. If a partner is bankrupt, then the other partners can be liable for that partner’s debt as well!

The cost and ease of registration of a corporation means that in Australia it is more common for a company to be created, rather than a partnership. This enables all the investors, as shareholders, to have limited liability, rather than a few partners having protection under a registered limited partnership.
What is a corporate body?

Corporations are seen in law as being separate legal persons. Thus, there is a distinction between the company and the shareholders and management and other stakeholders. Originally, corporations (dating from the 14th century) were ‘chartered’ corporations created by the Crown by way of a royal charter. Other companies were created by an Act of Parliament and these became known as ‘statutory’ corporations.

Unfortunately, a financial disaster called the ‘South Sea Bubble’ resulted in the Bubble Act 1720 (UK), which prohibited any future companies from being formed until the legislation was finally repealed in 1825. The UK conducted a review of companies in the early 1800s and as a result passed the Joint Stock Companies Act 1844 (UK). This statute is the basis of the modern day ‘registered’ company that exists in the UK and Australia.

It was a further 11 years before the concept of limited liability for shareholders was accepted, when the Limited Liability Act 1855 (UK) was passed. This statute also added the word ‘Limited’ to the end of a company’s name and required auditors to be appointed to protect shareholders. This is a distinction from companies created in the United States, which use the word ‘Inc’ to mean incorporated under the US State legislation, such as Delaware.

Under s 124 Corporations Act 2001 (Cth), a company is an independent person, re-enforcing the common law position set out in *Salomon v Salomon & Co Ltd* (1897). The House of Lords resolved that a company was a person, distinct from its shareholders, creditors and management (directors and employees). This concept (often referred to as ‘the corporate veil’) is an important and distinguishing feature of a corporation.

1.3 Corporations Act 2001

What is the structure of Australian corporate law?

The major legal control governing the functions of Australian companies, and in fact for all corporate officers, is the CA. On 15 July 2001, the Federal government was able to finally change the previous decade of debate over whether Australia had State or Federal corporate law. Prior to 1991, each State of Australia had its own Companies Act, which was broadly codified. Each State also had a Corporate Affairs Commission, which co-operated with the National Companies and Securities Commission and Ministerial Council to help codify the laws.
Between 1991 and 2001, the relevant statute was called the Corporations Law. This was an unusual Act of Parliament because, although it was technically State/Territory based, it actually operated as Federal legislation. This special arrangement arose because of a constitutional challenge by New South Wales, South Australia and Western Australia against the Commonwealth’s Corporations Act 1989. The High Court of Australia (HCA), in *NSW v Commonwealth* (1990), determined (in a 6:1 majority judgment) that parts of the legislation were unconstitutional.

As a result of the HCA ruling, a special agreement was made between all the Attorneys-General (six States and Commonwealth) to allow the new pseudo-Federal corporate laws to operate from 1 January 1991, as if it were a national law. Thus, the Corporations Law came into existence and for most practical purposes, Australia had one system of corporate law. This system remains under constant reform due to the ongoing Corporate Law Economic Reform Program (CLERP).

It is possible to observe, in the current legislation, traces of the original drafting of the previous State laws from the Companies Code, Securities Industry Code, Futures Industry Code and the Companies (Acquisition of Shares) Code, dating from the early 1980s. In fact, the Corporations Law was mostly an amalgamation of these previous State statutes. In 1993, the reform process was commenced by the Commonwealth Labor Attorney-General and called the ‘Corporations Law Simplification Program’. With the change of Federal Coalition government, this program of reform continued under the auspices of the Federal Treasury Department and is called the Corporate Law Economic Reform Program.

A series of High Court cases followed, including *Gould v Brown* (1998); *Re Wakim* (1999); and *R v Hughes* (2000), which all challenged the constitutional validity of the Corporations Law. During 2000 and 2001, the Commonwealth Attorney-General and the Minister for Financial Services and Regulation pressured the States to refer their individual corporations powers to the Commonwealth for five years. The States all eventually passed legislation, conferring their powers to the Federal government, which facilitated the passing of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Act 2001 (Cth) (the ASIC Act), both of which commenced on 15 July 2001.

The CA is divided into 27 Chapters and three Schedules. There were 1,362 sections when it became operative on 1 January 1991; but now, with 1,409 numbered sections, capital letters have been added to the section numbers when inserting new provisions in order to keep
the structure logical. Such additions have taken the total number of
sections in the CA to over 2,000. For example, the appointment of a
company secretary for a public company is found in s 204A, as there
was already an existing s 204 and s 205.

Thus, the Corporations Act 2001 is organised as follows:

Table 1: Corporations Act structure

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Schedule 3 Penalties (criminal)
Schedule 4 Transfer of financial institutions and friendly societies

A decade of corporate law reform

As previously mentioned, over the last decade there has been a major reform of the corporate law, prompting Mr Alan Cameron (former Chairman of ASIC), while speaking at the Corporate Law Teachers Association conference in 1994, to muse ‘you will need to keep buying legislation for some time yet’. Some of the key dates of reform are noted below. The law is not generally retrospective and thus companies and its officers can only be held liable for breaches of the law after the date of the commencement of any new law.

- Pre-1991 State Companies Code, Futures Industry Code, Securities Industry Code etc.
- 1 January 1991 commencement of the Corporations Law consolidating the previous State codes and establishing the Australian Securities Commission as a national regulator.
• 23 June 1993 commencement of the new external administration provisions, such as voluntary administration and insolvent trading after passing the Corporate Law Reform Act 1992.

• 9 December 1995 commencement of the First Corporate Law Simplification Act 1995 which rewrote the laws governing buy-backs, company registers and proprietary companies.

• 1 July 1998 commencement of the Company Law Review Act 1998 (originally the Second Corporate Law Simplification Bill), which re-wrote the maintenance of capital laws, simplified registrations, corporate constitutions, reduced meetings, reduced annual returns and simplified the deregistration process. Commencement of the Financial Sector Reform (Consequential Amendments) Act 1998 changed the name of the ASC to Australian Securities and Investments Commission (ASIC) and outlined its role for consumer protection. The government also established the Australian Prudential Regulatory Authority (APRA) with responsibility for the wholesale market in financial services.

• 13 March 2000 commencement of the Corporate Law Economic Reform Program Act 1999, which rewrote the fundraising provisions, officers’ duties, takeover laws and accounting standards.

• 15 July 2001 commencement of the national Corporations Act 2001 (Cth) and the ASIC Act 2001 (Cth).

• 11 March 2002 commencement of the Financial Services Reform Act 2001 (previously known as ‘CLERP6’), which repeals the existing Chapters 7 and 8 of the CA dealing with securities and futures and replaces it with a completely new Chapter 7 entitled ‘Financial services and markets’.
There are still further reforms to occur under the CLERP process and the next most likely is called CLERP7, which deals with paperwork and compliance of corporations and the government. There are details at the Federal Treasury website: www.treasury.gov.au.

1.4 Australian Securities and Investments Commission

The national agency responsible for the enforcement and administration of the CA is the Australian Securities and Investments Commission (ASIC). The Chairman of ASIC (Mr David Knott) is aided by a Deputy Chair and Commissioners within a national structure of 1,400 employees operating on an annual budget of $140 million. ASIC is responsible for the 1.2 million companies registered in Australia, which are kept on the massive ASIC database called ASCOT. ASIC also has responsibility for consumer protection in respect of financial services and the licensing of stockbrokers, insurance agents and other financial advisers. Approximately one-third of the ASIC budget is spent on enforcing the CA, involving criminal, civil, and civil penalty litigation. ASIC has been successful in over 70% of its cases.

A number of other bodies involved in the investigation, reform and disciplinary measures of the CA were introduced or reconstituted under ASIC. These include:

- **The Corporations and Securities Panel (Takeovers Panel)**
  The Panel is often called the ‘Takeovers Panel’ and from 11 March 2002 will formally have that name. It has primary responsibility for resolving disputes between parties involved in a takeover.

- **The Companies Auditors & Liquidators Disciplinary Board (CALDB)**
  This disciplinary board has responsibility for complaints made against auditors and liquidators who are registered with ASIC and it can impose restrictions on or removal of the licence to practice as an auditor or liquidator if in breach of the CA.

- **The Companies and Securities Advisory Committee (CASAC)**
  CASAC is the official ‘think tank’ for corporate law reform and produces a number of quality consultative reports and discussion papers, such as Corporate Groups (2000) and Insider Trading (2001). After the Financial Services Reform Act 2001 commences, it will be known as the Corporations and Markets Advisory Committee (CAMAC).
The Australian Accounting Standards Board (AASB)

The AASB, in consultation with the accounting profession, the International Accounting Standards Committee and the Financial Reporting Council make appropriate accounting standards for Australia. The acceptability of international accounting standards and harmonisation of practices is critical to the work of the AASB.

How does the doctrine of precedent operate in corporate law?

The doctrine of precedent (case law) is important in fully understanding the legal framework of corporate law. A case heard before a superior court will bind the future decisions of lower courts on that point of law. Thus, a judgment of the HCA is binding on all other courts. However, a decision in a State Supreme Court would only be persuasive to other judges in other States. This can cause ambiguities in the law, which lead to the need for appeals and legislative intervention. The development of Australian corporate law through case law can best be illustrated by the figures in Table 2.

Table 2: Classification of Australian corporate law cases 1991–2000

<table>
<thead>
<tr>
<th>Year</th>
<th>All court cases</th>
<th>Total corporate cases</th>
<th>HCA</th>
<th>FC</th>
<th>SSC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>4,797</td>
<td>275</td>
<td>1</td>
<td>47</td>
<td>227</td>
</tr>
<tr>
<td>1995</td>
<td>7,835</td>
<td>238</td>
<td>6</td>
<td>68</td>
<td>164</td>
</tr>
<tr>
<td>2000</td>
<td>7,397</td>
<td>250</td>
<td>5</td>
<td>10</td>
<td>235</td>
</tr>
</tbody>
</table>

Source: Butterworths Australian Current Law Reporter

This table illustrates three specific years (1991, 1995 and 2000) and a cumulative total for the litigation commenced during the whole decade of corporate law. All cases relate to superior court decisions reported in the Butterworths Australian Current Law Reporter service. Corporate cases are classified in Category 120 of Halsbury’s Laws of Australia. This enables a consistent approach to the analysis of which court hears specific corporate law cases.

It can be seen that there are few High Court decisions relative to both State Supreme Court and Federal Court decisions. Furthermore, the Federal Court of Australia has been developing considerable expertise in the use of the Australian corporate legislation. However,
in *Gould v Brown* (1998), the HCA, in a very narrow decision (3:3 judgment), questioned the validity of the cross-vesting legislation between the States and the Commonwealth. This cross-vesting scheme enabled civil cases to be heard in either the Federal or State systems. The High Court of Australia subsequently ruled in *Re Wakim* (1999) that the cross-vesting legislation was in fact unconstitutional and thus invalid. This meant that corporate law matters needed to be determined in the State Supreme Courts rather than the Federal Courts, which accounts for the significant fall in the number of cases heard before the Federal Court as illustrated in Table 2.

Although it has to be accepted that the High Court’s interpretation of the Australian Constitution is correct, it is hard to understand how the States and the Commonwealth have been able for over 10 years to effectively and efficiently transfer legal powers to the Federal Court. However, in *ASIC v Edensor Nominees Pty Ltd* (2001), ASIC won the right to be able to bring litigation in the Federal Court as a Commonwealth agency. After the commencement of the CA and ASIC Act, litigation may be brought in either the State or Federal Courts.

### 1.5 Public and proprietary companies

![Diagram of Types of corporation in Australia](Diagram.png)
What types of corporation may be registered?

There are just two main types of company in Australia: public and proprietary companies. Section 112 allows these two main types to be sub-divided into various categories:

- proprietary companies limited by shares or unlimited in liability (with a share capital); or
- public companies with liability:
  - limited by shares;
  - limited by guarantee;
  - unlimited with a share capital; or
  - no liability.

The type of relationship that exists between the company and its members (shareholders) may also classify them. 99% of companies are limited by shares, meaning that the member is only required to give the company the share price value of their investment. Effectively, the shareholder cannot be required to pay any more to the company, even in liquidation (hence the term ‘limited liability’). A ‘guarantee’ company means that the member only pays the agreed amount (usually $50 per member) on a winding-up of the company. ‘Unlimited’ companies are the same as a partnership and are only used for professional practices, such as those of lawyers or accountants. ‘No liability’ companies are mining companies that give the members extra protection from having to pay up the full value of their shares on winding-up.

Table 3 shows the various types of corporations that exist in Australia and their distribution over the last ten years. It should be noted that companies listed on the Australian Stock Exchange (ASX) are a subset of either the public companies with shares or no liability mining companies. Proprietary companies make up 98% of all registered companies in Australia and vary from a $2 company to companies such as Tattersalls Holding Pty Ltd, which is worth billions of dollars. The category labelled ‘other public companies’ relates to public companies that do not have a limitation of liability by shares, such as charities, clubs and professional associations, which are limited by guarantee only. These are not commercial entities.
Table 3: Classification of Australian companies 1991–2001

<table>
<thead>
<tr>
<th>Year</th>
<th>Total no of companies</th>
<th>Proprietary companies</th>
<th>Other public companies</th>
<th>Public companies</th>
<th>ASX listed companies</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>892,749</td>
<td>871,648</td>
<td>10,699</td>
<td>10,402</td>
<td>1,096</td>
</tr>
<tr>
<td>1992</td>
<td>859,678</td>
<td>839,946</td>
<td>10,381</td>
<td>9,351</td>
<td>1,116</td>
</tr>
<tr>
<td>1993</td>
<td>839,593</td>
<td>821,485</td>
<td>10,146</td>
<td>8,062</td>
<td>1,067</td>
</tr>
<tr>
<td>1994</td>
<td>885,118</td>
<td>866,726</td>
<td>10,311</td>
<td>8,081</td>
<td>1,163</td>
</tr>
<tr>
<td>1995</td>
<td>833,652</td>
<td>915,437</td>
<td>10,503</td>
<td>7,712</td>
<td>1,186</td>
</tr>
<tr>
<td>1996</td>
<td>965,869</td>
<td>947,776</td>
<td>10,702</td>
<td>7,391</td>
<td>1,184</td>
</tr>
<tr>
<td>1997</td>
<td>1,026,206</td>
<td>1,007,879</td>
<td>10,965</td>
<td>7,362</td>
<td>1,192</td>
</tr>
<tr>
<td>1998</td>
<td>1,088,922</td>
<td>1,070,050</td>
<td>11,363</td>
<td>7,509</td>
<td>1,219</td>
</tr>
<tr>
<td>1999</td>
<td>1,111,214</td>
<td>1,092,436</td>
<td>11,337</td>
<td>7,441</td>
<td>1,222</td>
</tr>
<tr>
<td>2000</td>
<td>1,173,709</td>
<td>1,154,044</td>
<td>11,559</td>
<td>8,106</td>
<td>1,295</td>
</tr>
<tr>
<td>2001</td>
<td>1,208,484</td>
<td>1,188,042</td>
<td>11,549</td>
<td>8,896</td>
<td>1,475</td>
</tr>
</tbody>
</table>

Source: ASIC and ASX Annual Reports

What is a proprietary company?

A proprietary company (usually shown as Pty Ltd) is defined in a variety of sections in the CA, including ss 9, 45A and 112 to 114. Examples of a proprietary company include Tattersalls Holding Pty Ltd (clubs and gaming) and Transfield Holding Pty Ltd (major infrastructure construction). It must be limited only by shares and thus have a share capital. The law requires only one member (shareholder) and there is a maximum limit of 50 non-employee shareholders. Also, the company must not engage in activity that would require a fundraising document (prospectus) to be lodged with ASIC. Thus, the fundamental aspect of a proprietary company is that it is private and must not raise capital from the public.

In 1995, as part of the Simplification Task Force, Part 1.5 CA (s 111J) was introduced as a ‘Small Business Guide’. This part of the CA is written in plain English and is a great starting point to understanding the law applicable to approximately 500,000 companies. At that same time, the government altered the CA to allow for proprietary
companies to be classified into small proprietary or large proprietary companies (s 45A) for disclosure purposes. To be classified as a small proprietary company, two of the three following criteria must be satisfied in a financial year:

- gross revenue of no more than $10 million;
- gross assets of no more than $5 million; or
- no more than 50 full time employees.

If the company exceeds any of these criteria, it will be deemed a large proprietary company. A small proprietary company is not required to lodge accounts or financial statements unless requested by a notice from ASIC or shareholders representing 5% of the voting rights. A large proprietary company must lodge accounts with ASIC, as if it were a public company. If a proprietary company wishes to convert to public, the process is laid down simply in the CA.

**What is a public company?**

Public companies are defined in s 9 (the CA dictionary) as being all companies that are not proprietary companies! Public companies usually end in ‘Ltd’ and examples include News Corporation Limited and BHP Billiton Ltd. Public companies are not required to be listed on a stock exchange like the ASX, yet may still raise capital from the public. Only one member is necessary (shareholder, s 114) and there is no maximum number of shareholders. Every public company must have at least three directors and a company secretary (ss 201A, 204A). Although there are fewer than 20,000 public companies, in economic terms they are extremely important.

**1.6 Promoters, corporate personality and lifting the veil**

A corporation must legally come into existence, and this process was previously called ‘incorporation’. After July 1998, the process of creating companies became known as ‘registration’. The person responsible for the process of registration is called a ‘promoter’. Once the entity has been registered, it becomes a corporation, with a personality distinct from its investors (members), creditors or directors. While the courts will not generally look behind the company to the identity of the directors or shareholders, in special
circumstances they may do so. This is known as lifting the veil of incorporation.

**Who is a promoter?**

In s 9, there is no definition of a promoter and in the whole of the CA the only reference to a promoter relates to a public company that is issuing a prospectus (s 711). Thus, in most cases, there is a complete reliance on the common law definition established by Lord Cockburn in *Twycross v Grant* (1877), where he defined a promoter as:

> One who undertakes to form a company with reference to a given project and who takes the necessary steps to accomplish that purpose.

In Australia, this UK definition was accepted by the HCA in *Tracy v Mandalay Pty Ltd* (1953), and was developed to include ‘deemed’ promoters. This is where some of the people involved with the establishment of the company do not take an active role in the registration, but rather delegate this task to others. Lawyers and accountants, in providing professional services, are not deemed to be promoters. If a person is held to be a promoter, they will automatically owe a fiduciary duty to the company. This can cause difficulties with conflicts of interest, in particular when entering into contracts on behalf of the company before it has been registered.

**Can a promoter obtain a benefit from registering the company?**

The answer is yes, but there must be full and frank disclosure if a promoter is involved in a transaction with the company. This is best illustrated in *Gluckstein v Barnes* (1900), where the judge held that ‘honest disclosure’ is the key. Shareholders who feel that the promoter is in breach of the fiduciary duty may bring an action for the rescission of the contract or an order to make an account of profits.

**What steps have to be taken to register a company?**

The first question is to make sure that you actually need to register a company. Australia does not require a minimum level of capital to establish a company and so it is easy and cheap to be registered. The promoter has a process cost of approximately $1,000. There are three simple steps:
(1) option to reserve a corporate name;
(2) lodge documents & forms with ASIC; and
(3) pay fees to ASIC.

ASIC will issue a certificate of registration and the corporation is deemed to have come into existence on that specified day (s 119).

**What issues relate to the choice of corporate name?**

The promoter may select any name that has not already been registered (remembering that there are over one million companies already registered in Australia). There are some specific rules regulating names that are offensive or show a false connection to the government, royalty or certain charities, such as the Australian Red Cross. Each company is given an Australian Company Number of nine digits (usually called an ACN). This is different from the ATO requirement of an ABN, which has 11 digits. For convenience, the tax office has inserted two digits in front of the existing nine-digit ACN. A company may be registered as ACN 123-456-789 and the ATO will allocate the ABN as 00-123-456-789 for the sake of business efficacy. The name must end in either ‘Limited’ (for a public company) or ‘Proprietary Limited’ (for a private company), or an approved abbreviation such as ‘Ltd’ or ‘Pty Ltd’. The name may be similar, but not identical, to a name on the ASIC register or the database of Australian Business Names (which are registered at a State level). If there is potential for confusion, an action can be brought in the State court for either the tort of passing-off or in the Federal Court under s 52 of the Trade Practices Act 1974 (Cth) (for misleading or deceptive conduct).

**What are the necessary documents?**

ASIC Form 201 is the application form that must be lodged with ASIC, and contains the basic information. This is available from their website (www.asic.gov.au). The company may have a corporate constitution (this is optional) and must have a certified list of directors who consent and give notice of the registered office. The law for proprietary companies only requires one shareholder and one director (who can be the same person).
What fees have to be paid?

On the lodgment of the ASIC form and officers’ consent declarations, the regulated fee has to be paid. ASIC issues a certificate of registration and the company is deemed to come into existence at the beginning of the day the certificate is granted under s 119.

What happens if there is a pre-registration contract?

The position was originally stated that a promoter should be liable for all contracts entered into prior to the company being registered. This was stated in *Kelner v Baxter* (1886) at common law, but since 1981 the corporate statute has changed the position. In ss 131 to 133 of the CA it states that any contract made before the company is registered will be validated, provided:

- the company is registered; and
- the contract is ratified within a reasonable time.

If this procedure is followed, the company is bound in the contract and the promoter is treated as an agent of the company. Alternatively, promoters can have a written release from liability or use the concept of novation for protection. Reasonable expenses may be paid to the promoter out of the company’s assets by way of s 122.

What are the consequences of registration (incorporation)?

The main consequence is that a company is a separate legal entity, as stated in the 1897 *Salomon* case. This principle has been supported in many cases including the Privy Council decision in *Lee v Lee’s Airfarming Ltd* (1961). Other consequences include:

- perpetual succession (*Lee v Lee’s Airfarming Ltd* (1961));
- ownership of property (*Macuara v Northern Assurance* (1925));
- litigation in company’s own name (*Foss v Harbottle* (1843));
- own signature (common seal is optional under s 123); and
- natural and independent person (ss 124 and 140).

How can a court lift the veil of incorporation?

A company is seen as the correct plaintiff in any litigation. It is the company, rather than the shareholders or the management, that
should sue or be sued in most circumstances. However, the court has
the power from either the CA or the common law jurisdiction to ‘lift
the veil’ (look behind the name of the company). The court may look
behind the veil in the following circumstances:

- group accounts;
- document signed makes assumptions in ss 126 to 127;
- insolvent trading (s 588G) and the example of Morley v Statewide
  Tobacco Services (1992);
- under tax law;
- avoiding contracts by using a corporate entity in Gilford Motors Ltd
  v Horne (1933);
- agency or groups (Walker v Wimborne (1976));
- vehicle for fraud (Green v Bestobell Industries Ltd (1982)); and
- under public policy, such as at times of war as in Daimler v
  Continental Tyre and Rubber Co (1916).

The courts prefer not to lift the veil of incorporation, as the company
is a separate legal entity, but would still wish for justice under equity
to prevail.

### 1.7 References

This chapter is covered in more depth in the following chapters of
these leading Australian textbooks:

- Baxt, R, Fletcher, K et al, Afterman & Baxt’s Cases and Materials on
  Corporations and Associations, 1999, Sydney: Butterworths, Chapters 1–6
- Ford, HAJ, Austin, RP et al, Ford’s Principles of Corporations Law, 2001,
  Sydney: Butterworths, Chapters 1–5
- Hanrahan, P, Ramsay, I et al, Commercial Applications of Company Law,
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- Lipton, P and Herzberg, A, Understanding Company Law, 2001, Sydney:
  Lawbook Co, Chapters 1–4, 6, 21
- Redmond, P, Companies and Securities Law – Commentary and Materials
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- Tomasic, R, Jackson, J et al, Corporations Law – Principles, Policy and
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Process, 2002, Sydney: Butterworths, Chapters 1-4 LAW
2 Corporate Constitution and Liabilities

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3 Company Officers and Management

This chapter is covered in more depth in the following chapters of these leading Australian textbooks:

Baxt, R, Fletcher K et al, Afterman & Baxt’s Cases and Materials on Corporations and Associations, 1999, Sydney: Butterworths, Chapter 9

Ford, HAJ, Austin, RP et al, Ford’s Principles of Corporations Law, 2001, Sydney: Butterworths, Chapters 7-9, 12-16


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Redmond, P, Companies and Securities Law – Commentary and Materials, 2000, Sydney: Lawbook Co, Chapter 7

4 Capital and Fundraising

This chapter is covered in more depth in the following chapters of these leading Australian textbooks:


Lipton, P and Herzberg, A, Understanding Company Law, 2001, Sydney: Lawbook Co, Chapters 7, 8, 10, 11

Redmond, P, Companies and Securities Law - Commentary and Materials, 2000, Sydney: Lawbook Co, Chapter 9

5 Shareholders’ Protection

This chapter is covered in more depth in the following chapters of these leading Australian textbooks:

Baxt, R, Fletcher, K et al, Afterman & Baxt’s Cases and Materials on Corporations and Associations, 1999, Sydney: Butterworths, Chapters 8, 10, 12


Lipton, P and Herzberg, A, Understanding Company Law, 2001, Sydney: Lawbook Co, Chapters 14, 17

Redmond, P, Companies and Securities Law - Commentary and Materials, 2000, Sydney: Lawbook Co, Chapters 6, 8

6 Companies in Financial Trouble

This chapter is covered in more depth in the following chapters of these leading Australian textbooks:

Baxt, R, Fletcher, K et al, Afterman & Baxt’s Cases and Materials on Corporations and Associations, 1999, Sydney: Butterworths, Chapters 16-17


Lipton, P and Herzberg, A, Understanding Company Law, 2001, Sydney: Lawbook Co, Chapters 22-25