CHAPTER 1

About Companies

[¶1-001] Introduction

This book is about company law and how it works to create companies, to organise the relationships between participants in companies (including the directors and other corporate officers, and the company's members), to facilitate the raising of capital by companies to carry on their activities, and to give legal effect to dealings between companies and others, such as their creditors and the people with whom they contract. Companies are the most significant form of business organisation in Australia and in most other developed economies. This Chapter introduces some of the basic features of companies. The first part looks at companies as a form of business association and explains the difference between public listed companies and unlisted (often privately owned) companies. The second part provides an overview of the structure or architecture of companies. It describes in very general terms some of the key features of companies. The third part explains the historical development of companies. The final part defines some of the important concepts discussed throughout this book.

[¶1-050] What is a company?

A company is an artificial person created by the law. The function of a company in a legal sense is to hold assets (property) and to carry on a business or other activity, as an entity separate from the participants (investors, managers) in that business or activity.

Companies come into existence through a process of registration. A person or group who wishes to use a company to carry on a particular activity makes an application to the Australian Securities and Investments Commission (ASIC), the Commonwealth government agency responsible for the formation and regulation of companies, for the registration of a new company. Provided all the conditions for registration are met, ASIC will exercise its power to create a new company by registering it. The process of registration is discussed in detail in Chapter 5. A company's existence comes to an end when it is de-registered. De-registration is discussed in Chapter 25.

COMPANIES AS A FORM OF BUSINESS ORGANISATION

[¶1-100] Introduction

A company is a type of corporation. The terms ***corporation*** or ***body corporate*** are general ones, used to describe all artificial legal entities that have the attribute of separate legal personality. What is meant by separate legal personality? This phrase is defined in ¶3-100. In brief, it means that a company is treated as a separate person from those who participate in the company. Because it is a separate person, it has its own legal identity or personality, which means that it can, for example, hold property in its own name and enter into contracts in its own name. It can commence or defend legal proceedings in its own name. Importantly, its liabilities are its own and not those of its members or officers.

Most corporations that are used to carry on business in Australia are ***companies***, that is, corporations formed or treated as being formed by being registered under the *Corporations Act 2001* (Cth) (Corporations Act).[1] Companies are the focus of this book, because they are the most common and economically significant form of corporation.[2]

Historically, commercial companies developed as a means of allowing a number of people to pool their resources (in the form of capital or management skills) to undertake an enterprise too large for a single individual. Creating a separate legal person to hold and incur the rights and obligations of the enterprise simplified dealings between the enterprise and those with whom it conducted business.

With the introduction of limited liability in the middle of the 19th century, certain types of companies[3] also provided a way for participants in an enterprise to limit the extent to which their own personal wealth was put at risk if the enterprise failed. Limited liability is discussed in detail in ¶3-300. In brief, limited liability means that even if a company is unable to pay all of its liabilities, then those participants who have invested money in the company are not liable to contribute any more than what they have paid (or agreed to pay) to acquire their shares in order for the company to meet those liabilities. Because liabilities incurred in running the enterprise are the company's own, and not the participants', the participants generally would not be required to provide any more than their initial or agreed contribution to the company to meet those liabilities.

Company law developed alongside the company to regulate the relationship between:

- participants in the company
- the company and the state
- the company and those with whom the company had dealings.

The development and structure of company law is discussed in detail in Chapter 2.

Although one of the key drivers of the development of companies was to simplify the participation of large numbers of people in a collective enterprise, the special characteristics of companies (in particular, the limited liability conferred on participants) also made the corporate form attractive to those engaged in small business. Traditionally, the law required that corporations have more than one member, but it is now possible to incorporate a company with only one member. This means that it is possible for a single individual to form a company and conduct his or her business through that company, obtaining the benefits that flow from using that form of organisation.[4]

In Australia, companies are used for both large and small business.

1 The Corporations Act is the statute that governs the formation, conduct and termination of companies in Australia. It is discussed in Chapter 2.

2 The differences between companies and other types of corporations are discussed in Chapter 4.

3 In particular, companies limited by shares.

4 The advantages and disadvantages of using a company to carry on a business are discussed in Chapter 4.

[¶1-120] What are companies like?

There are more than 2.5 million Australian companies. More than 99% of these are companies limited by shares.

What do these companies actually look like? Some are very large, with billions of dollars in assets and hundreds of thousands of shareholders. Often, shares in these large public companies are quoted on the Australian Securities Exchange (ASX), so that they can be bought and sold through the ASX by investors. The largest entity listed on the Australian market is the Commonwealth Bank of Australia, which in October had a total market capitalisation of more than $125 billion.

There are about 2,250 Australian entities listed on the ASX. That is a very small percentage of companies overall (about 0.1%). But these large listed companies are very significant in the Australian economy. The total market capitalisation of Australian companies listed on the ASX as at September 2018 was $1,9879 trillion. Of that, almost half is made up of the largest 20 companies.[5]

However, the vast majority of Australian companies by number (almost 99.9%) are not the large listed companies we read about in the newspaper. While there are many unlisted companies that operate substantial businesses, most unlisted companies are very small and have only a few participants.

Statistics collected by the Australian Taxation Office (the ATO) offer a picture of what companies look like and what they are used for. The most recent statistics indicate that, in 2015/16, a total of 914,166 companies lodged tax returns in Australia. Based on company income:

- 14% had total income equal to or less than $0
- 77% were micro-companies (with income of between $1 and $2 million)
- almost 7% were small companies (with income of between $2 million and $10 million), and
- 2% were medium companies (with income of between $10 million and $100 million).

Large and very large companies, with total income exceeding $100 million, accounted for only 0.3% of the total number of companies.

Despite accounting for only 0.3% of the total number of companies, large and very large companies paid about two-thirds of company tax. Company income tax makes up about 21% of all tax collected in Australia.[6]

[¶1-140] What are listed companies, and who invests in them?

As noted above, some companies have their shares or other securities listed for quotation on the ASX. The ASX is one of three listing markets in Australia and is the most significant in terms of scale. If a company is listed on the ASX, investors can buy and sell the company's shares on the stock market conducted by the ASX (or, from November 2011, ASX listed

5 www.asx.com.au/about/historical-market-statistics.htm.

6 ATO *Taxation statistics* 2015-16 <www.ato.gov.au>.

securities on the market operated by Chi-X). As at October 2018, there were 2,155 entities with tradeable equities listed on the ASX; this included 2,015 Australian companies.[7]

Who owns the shares in listed companies?

According to the Reserve Bank of Australia, about half of Australian listed securities and bonds are owned by foreign investors. Domestic institutional investors, such as superannuation funds, managed investment schemes, insurance companies and other investment entities own most of the remaining issued securities, and retail investors, a relatively small portion (see ¶7-120).

Larger listed companies will generally have at least several thousand shareholders and, in the case of Australia's largest companies, may have many more. But the majority of listed companies by number are actually quite small, with a market capitalisation of less than $10 million, and may have far fewer shareholders. So there is significant diversity even between listed entities.

The Australian Share Ownership Study released by the ASX in July 2015 shows that 6.48 million Australians, or 36% of the adult Australian population, were invested in the Australian sharemarket, either directly (via shares or other listed investments) and/or indirectly (via unlisted managed funds) in 2014. While small shareholders comprise the vast majority by number of shareholders, between them they hold a relatively small percentage of the total shares on issue. This is very significant because it indicates that large (generally institutional) shareholders 'control' Australian listed companies.

The process of listing and its effect are discussed in greater detail in Chapter 4.

THE ARCHITECTURE OF COMPANIES

[¶1-200] Introduction

As the above discussion indicates, companies come in a great variety of shapes and sizes. However, companies formed and operating under Australian law have, for the most part, a common architecture or structure. All companies must have at least one member. In the case of a company limited by shares, the member will hold a share or shares in the company. All companies must also have at least one director, who is responsible for managing the company's business. Most proprietary companies and all public companies have a secretary, who has certain administrative responsibilities to fulfil. Larger companies may also have other officers involved in management.

The following summarises these key features and discusses the architecture of companies: their capital structure, their management structure and their legal attributes.

7 ASX Historical Market Statistics <www.asx.com.au/about/historical-market-statistics.htm>.

[¶1-220] How is a company's capital structured?

In most cases the commercial activities of companies require the use of a fund of money or property that belongs to the company. The sources of that fund (referred to in general terms as the company's ***capital***) are:

- contributions of capital made by the persons who form the company and persons who become members after the company is formed
- amounts of credit advanced to the company by creditors, including those who lend money to the company and those who supply goods and services on credit
- profits (if any) not distributed to members.

These sources of capital are discussed in greater detail in Chapters 18, 19 and 20.

What is equity capital?

The capital contributed by the members of the company is sometimes referred to as ***equity capital***. In the case of a company limited by shares, the members provide money or property to the company and receive a ***share*** or ***shares*** in return.

What is a share?

The share represents a number of rights that may or may not (depending on the terms of issue of the share) include control rights (such as voting rights and rights to receive information) and distribution rights (such as a right to receive dividends or to share in the assets of the company on a winding up of the company).

Once the person has paid money or transferred property to the company and a share is issued in return, the money or property becomes the property of the company and not of the member.

A company can issue different ***classes of shares***, with different rights attached to each class. Examples of classes of shares include preference shares and ordinary shares. Classes of shares are discussed in Chapter 19.

What does it mean to be a member of a company?

A person who holds shares in a company is a member of the company. Members of companies have particular rights in relation to the administration of the company's affairs that depend on the law and the terms of issue of the share.

The company's members are, generally speaking, its owners or proprietors. They are the people who have invested money with the company in the expectation that they will receive a return on their money if the company is successful, either in the form of distributions (dividends) paid out by the company during its trading life or in the form of growth in the value of their investment in the company over time. In the case of a company limited by shares, the members are the company's shareholders — the people who have purchased shares in the company.

Any legal person can be a member of a company. This means that the member does not have to be a natural person (that is, a human being) but may itself be a company. This is particularly the case in business enterprises structured as corporate groups. Corporate groups are discussed in Chapter 4.

It is possible to form and operate a company with only minimal paid up capital. Sometimes the total amount subscribed for shares may be as little as $1.00.

What is debt capital?

Another important source of capital for companies is ***debt capital***. Like any other legal person, companies are able to borrow money, and typically a company may borrow money from a bank or other credit provider to fund its operations. The loan may be secured (by a charge over some or all of the company's assets or business) or unsecured. Suppliers may also supply goods and services to companies on credit.

Persons who lend or advance credit to companies are not members of the company. Instead, they are in a contractual relationship with it. However, company law does contain particular provisions that affect the relationship between debtor and creditor where the debtor is a company. These include rules designed to protect the interests of creditors when the company becomes insolvent (that is, when the company is unable to meet its debts when they become due for payment).

[¶1-240] How is a company's management structured?

Managing companies involves decision-making. That decision-making may include:

- deciding on the appropriate capital structure for the company (whether to borrow money, to pay dividends, or to increase or reduce the number of shares on issue)
- deciding on the nature and form of the company's activities (what enterprise to carry on and how to use the company's capital).

The distinguishing feature of the management structure of many companies is that it involves the separation of responsibility for decisions made in constituting and running the company between members and officers.

Who are the company's officers, and what is their role?

As explained previously, members of the company are, in a general sense, its proprietors. The ***officers*** of the company are those persons responsible for its management. In small companies, the members and officers may be the same people (and indeed in single director/shareholder companies are always the same person). However, in large companies with many members it is not possible for all the members to take an active part in the management of the company. In these cases, the separation of the roles of officers and members in corporate decision-making is more pronounced.

Only a natural person (that is, a human being) can be appointed as an officer of a company.

The officers of the company include its ***directors***. All proprietary companies are required to have at least one director and all public companies at least three. Where a company has more than one director, the directors collectively are referred to as the ***board of directors***. The directors are selected in the manner agreed between the members and reflected in the company's internal governance rules[8] and are usually responsible for

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8 See ¶1-500 for a definition of internal governance rules. Internal governance rules are discussed in Chapter 5.

managing the business of the company. The precise scope of the directors' powers, and the division of decision-making power between members and directors, depends on the law and the company's internal governance rules. The division of power between directors and members is discussed in Chapter 6.

Usually, the directors will be responsible for making most decisions affecting the company, without requiring the approval of members and without being required to comply with instructions from the members. However, certain fundamental decisions, such as changes to the company's internal governance rules and changes that affect the rights of members, will require the approval of members. The decisions requiring member approval are discussed in Chapter 7.

In small companies the directors themselves will generally make most of the ongoing decisions relating to the company. However, in large complex business enterprises the directors may delegate management functions to the company's executives, and retain responsibility for selecting and supervising those executives, and setting the broad strategic direction for the company.

Directors may be ***executive*** or ***non-executive*** directors. Executive directors are those who are employed by the company and devote all or substantially all of their working time to managing the company's affairs. Non-executive directors are not employed in the company's business and provide an 'outsider's' contribution and oversight to the board of directors.

All public companies must also have a ***secretary***. Most proprietary companies also have a secretary, although the appointment of a secretary for a proprietary company has been optional since March 2000. The secretary is responsible for certain administrative and reporting functions set out in the law. A person can be both a director and a secretary; a situation that is common in smaller companies.

In addition to its directors and secretary, a company may have other officers. Company law imposes certain duties and restrictions on directors and other company officers. Directors and other officers must act honestly, act in the interests of their company, and also act with care and diligence. These duties are discussed in Chapters 11–14.

The general responsibility for management of the company remains with the directors while the company is solvent and operating normally. However, in some circumstances the management of the company passes from the directors to an external administrator. This most often occurs when the company is insolvent or is being wound up. Where the company is being wound up, the person managing the company is called its liquidator. External administration is discussed in Chapter 25.

[¶1-260] What are a company's key legal attributes?

Company law clothes companies with special legal characteristics or attributes that enable them to undertake activities in their own right. The law makes companies into legal entities that are separate from their participants.

The law also confers on companies the legal capacity (that is, the capacity to do things that have legal effect) of a natural person. It gives it perpetual succession – that is, the company continues to exist indefinitely until it is wound up. Winding up is discussed in Chapter 25.

Finally, the law confers limited liability on members of companies limited by shares. The important concepts of separate legal personality, corporate capacity and limited liability are explained in Chapter 3.

THE HISTORICAL DEVELOPMENT OF COMPANIES

[¶1-300] How did companies develop?

It is important, when studying company law, to understand the history of companies and the development of company law in the social and economic context in which they occurred. This helps to make clear why the rules evolved in the way they did and how they work in relation to modern companies.

Some key milestones in the historical development of the modern company were:

- the emergence of the ***corporation aggregate*** and the concept of ***joint stock*** during the 15th to 19th centuries
- the introduction of legislation to make incorporation available as a general right in 1844
- the introduction of limited liability under statute in 1856
- the recognition of the proprietary company as a distinct form of company in 1896
- confirmation that the privileges of incorporation extend to small, closely held companies, in *Salomon's* case in 1897
- the statutory facilitation of true 'one-person' companies in 1998.

These key milestones are described below.

[¶1-320] What are *corporations aggregate* and *joint stock*, and when did these concepts develop?

The development of the modern Australian commercial company can be traced back to the earliest ***corporations aggregate***, which emerged in England during the Middle Ages as a means of conferring on a group of people the capacity to hold and deal with property and interests to advance their collective aims. Bodies such as municipal boroughs, trade guilds and colleges facilitated joint activity through conferring legal existence on a group that was independent of the (perhaps fluctuating) identity of the members from time to time.

Frequently, as was the case with the trade guilds and merchants' associations, the corporation existed as the beneficiary of some special right or entitlement conferred by the Crown, such as a monopoly or the right to control the operation of a particular trade.

The creation of a corporation aggregate — its *incorporation* — required the consent of the Crown, through a Royal Charter.

During the 17th century, incorporation was granted by Royal Charter to various 'merchant venturers',[9] conferring upon them rights to conduct trade in a particular region. Well known examples of such corporations include the East India Company, the Hudson's

9 JH Farrar and BM Hannigan, *Farrar's Company Law* (4th edn, 1998), p 17.

Bay Company and the Massachusetts Bay Company, which had clear links to England's developing colonial activities. These corporations shared with the modern company the attributes of separate legal personality discussed below.

What is *joint stock*, and why is it important?

The 17th century also marked the development of what is known as ***joint stock***. The more ambitious commercial activities of the period required, in many cases, greater amounts of capital than a single individual could provide. To meet this need, commercial practice developed a mechanism whereby a person could invest a sum of money in a venture (or ongoing series of ventures), receiving in return an entitlement to share in the profits of the venture. The investors' entitlement was represented by a share. Such shares were transferable and could be sold by the investor without the consent of other investors.

In some cases (such as the East India Company) the venture was carried on by a corporation, and the share represented a claim against the corporation. However, as incorporation could be achieved only by Royal Charter and was relatively rare, many such ventures were carried on through a form of unincorporated association that became known as a 'joint stock company'.

What is the South Sea Bubble?

By the beginning of the 18th century, there was a well-developed secondary market for shares in these ventures, and speculation was rife. Shares in one company formed in 1711, the South Sea Company, rose in price from £100 to £1,000 in a matter of days. It has been estimated that the amounts invested in such ventures immediately before the collapse of the boom amounted to £500 million, twice the value of all the land in England at the time.[10] This period is referred to by legal historians as the 'South Sea Bubble'.

The bubble finally collapsed in 1720, resulting in large losses and considerable hardship for many members of England's growing middle class. In response, parliament passed legislation, called the Bubble Act, to prohibit such associations from acting as bodies corporate and from issuing transferable shares without the legal authority of a Royal Charter or an Act of Parliament.

Although the joint stock company became illegal in 1720, the commercial factors that gave rise to it did not go away, and indeed those factors continued to grow in importance throughout the 18th century. Incorporation by Royal Charter or Act of Parliament remained difficult to obtain. Large scale ventures, such as the development of railways, demanded a means of raising capital from investors to be utilised by managers in these projects. Lawyers developed the 'deed of settlement company' as a means of achieving these commercial aims while circumventing the prohibition contained in the Bubble Act.[11]

What were deed of settlement companies?

Deed of settlement companies were, essentially, a combination of association and trust. The assets of the venture were held on trust by trustees, and the venture managed by the managers or directors. The venture did not have separate legal personality, and its property,

10 Ibid, 18.

11 Although it is not clear that deed of settlement companies were outside the Bubble Act: ibid, 19.

rights and obligations were held by the trustees. Investors received a share that represented an interest in the trust property. Such shares were often expressed to be transferable under the terms of the trust, which were contained in the deed of settlement. Attempts were made in drafting the deed of settlement to limit the liability of the investors to the amount invested by them in the enterprise.

By the beginning of the 19th century, deed of settlement companies were becoming more common in England. However, they were complex to establish and administer, were ineffectively regulated by the state, and did not confer upon participants many of the benefits of separate legal personality that a corporation possessed. Following the repeal of the Bubble Act in 1825, various means of better facilitating and regulating these commercial arrangements were explored. New legislation for the registration and regulation of deed of settlement companies was enacted in England in 1844, following the report by a Parliamentary Select Committee chaired by William Gladstone. The 1844 Act is sometimes described as 'the legislative ancestor of modern company law'.[12]

[¶1-340] When did the right to incorporate companies become generally available?

The 1844 Act allowed business associations to become companies by a process of registration. Before that time, incorporation had been a privilege conferred by Royal Charter or by Act of Parliament. Now, any group wishing to form a company for a lawful purpose could apply for registration and, by lodging the required information and paying the prescribed fees, could obtain it. Registration was granted in two stages, provisional and final, with final registration being available only after the company had secured investments from a quarter of the proposed final number of investors.

The fact that companies registered under the 1844 Act were corporations, and therefore had the key attributes of separate legal personality, did not of itself confer limited liability on the participants in the company. If the debts of a company incorporated under the 1844 Act exceeded its assets, creditors of the company could pursue individual investors once their claims against the company had been exhausted. Attempts to limit investors' liability depended on specific agreement with creditors or on complex drafting in the deed of settlement itself. However, unlimited liability was seen as a disincentive to investment, requiring investors to monitor closely the financial position (and therefore ability to meet their share of any claim by a creditor) of other investors and the activities of managers.

[¶1-360] When was limited liability first introduced?

In 1855, the English Parliament passed the *Limited Liability Act 1855*, which allowed those forming a company to elect to do so on the basis that the liability of its investors would be limited to the amount they agreed to invest in the company. These companies were required to include the word 'limited' in their name, to alert those dealing with the company to the fact that the liability of the members was limited.

12 RP Austin and IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (17th edn, 2018), [2.130].

Various reform proposals over the next six years resulted ultimately in the enactment of the *Companies Act 1862* (UK) (the 1862 Act), consolidating the procedures for incorporation and winding up of companies and putting in place many of the key features of modern company law. The 1862 Act was adopted by the Australian states as the model for their own companies legislation and the position in England was therefore mirrored in Australia. Companies formed under the 1862 Act, on which Australian company law is substantially based, had many of the attributes of the modern commercial company.

[¶1-380] When were companies first used for small business?

The Chapter so far has discussed the historical development of the company as a means of bringing together providers of capital (investors) with specialist business managers or entrepreneurs in larger scale, collective enterprises. Typically this involved asking members of the public for investment and required a separation of ownership of the enterprise (which was in the hands of a large, fluctuating membership) and its management. Company law developed in part for the protection of public investors and adopted the large-scale collective enterprise as its model.

However, the attributes of companies, in particular the limited liability conferred on their members, also made them an attractive form through which to carry on small business. Typically a company formed to carry on a small business would not have public investors, and would be controlled and managed by its main investor, often a person who had perhaps conducted the business as a sole trader before its incorporation.

The fact that the 'corporation aggregate' model was adopted for company law was reflected in the fact that the companies legislation required that companies have a certain minimum number of members. Historically, incorporation required the coming together or association of more than one person to form a company. This position has now been reversed by statute (see below).

What was the significance of *Salomon's* case?

It was not clear until the landmark English case of *Salomon v Salomon & Co Ltd* in 1897 that the benefits of incorporation would extend to incorporated small businesses that were effectively under the control of a single entrepreneur. *Salomon's* case is discussed in detail below. A business formed and operated by Mr Salomon as a sole trader had been transferred by him to a company which he had formed under the 1862 Act and in which he was the major shareholder and controller. To meet the then statutory requirement that a company have at least seven shareholders, shares were issued to other members of his family, but those family members did not have any real interest in the business.

Mr Salomon transferred his business to the company in order, among other things, to obtain limited liability. He intended that, if the business failed, his personal wealth would not be put at risk as he would not be personally liable to satisfy the outstanding claims of the business's creditors.

The English Court of Appeal initially took the view that such an arrangement should not attract all the benefits of incorporation (including limited liability for Mr Salomon and the other family members). One judge said:

> It would be lamentable if a scheme like this could not be defeated. If we were to permit it to succeed, we should be authorising a perversion of the Joint Stock Companies Acts … The transaction is a device to apply the machinery of the [Act] to a state of things never contemplated by that Act — an ingenious device to obtain the protection of that Act in a way and for objects not authorised by that Act, and in my judgment in a way inconsistent with and opposed to its policy and provisions.[13]

Another judge took the view that:

> If the legislature thinks it right to extend the principle of limited liability to sole traders it will no doubt do so, with such safeguards, if any, as it may think necessary. But until the law is changed such attempts as these ought to be defeated wherever they are brought to light. They do infinite mischief; they bring into disrepute one of the most useful statutes of modern times, by perverting its legitimate use, and by making it an instrument for cheating honest creditors.[14]

Therefore, the Court of Appeal held that Mr Salomon and his company should not be accorded the privileges of incorporation. Mr Salomon appealed and the court's decision was reversed by the English House of Lords. The House of Lords said, in relation to small business:

> It has become the fashion to call companies of this class 'one man companies'. That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of the creditors.[15]

The final decision was that the benefits of incorporation were capable of extending to small, private companies, even though such companies arguably were not the type of business which the companies legislation was intended to facilitate. The decision in *Salomon's* case confirmed the availability of the limited company as a vehicle for both large and small business, whether or not it involved public investors.

When was the concept of a proprietary company introduced?

Around the same time that the decision in *Salomon's* case confirmed that the benefits of incorporation were available to small, privately owned businesses, the Victorian Parliament passed the first legislation in the common law world providing for different, less onerous regulation of these types of companies. New disclosure requirements designed to protect public investors, introduced into Victorian law in 1896, were expressed not to apply to **proprietary companies**. Proprietary companies are companies that have a limited number

13 [1895] 2 Ch 232 at 340–341, per Lopes LJ.

14 Ibid, per Lindley LJ.

15 [1897] AC 22 at 53.

of members and that are not permitted to ask the public for investment (except by way of crowd funding platforms, and then subject to certain requirements). The proprietary company is by far the most common type of company in Australia.

When did it become possible to have a one-person company?

In 1998, the then Corporations Law (now the Corporations Act) was amended to enable the use of companies for small, one-person businesses. Since 1 July 1998 it has been possible to form a company that has only one participant. These are referred to in this book as **single director/shareholder companies**. These companies are discussed further in Chapter 5. The introduction of the single director/single shareholder company represents the final departure from the concept, reflected in the views of the Court of Appeal in *Salomon's* case, that association of at least two members is necessary to create a company.

SOME KEY TERMS

[¶1-500] What do these terms mean?

Set out below is a summary of some of the terms and concepts introduced in this Chapter.

Company is a particular type of corporation that is formed by being registered under the Corporations Act. The company is the most common form of corporation used in Australian business.

Company limited by shares is a particular type of company. In a company limited by shares, members have purchased shares by making a contribution to the company. If the company becomes insolvent, the members generally are not required to make any further contribution to meet the company's debts.

Corporation or ***body corporate*** is the general term used to describe an artificial person created by law to hold property and legal rights and incur obligations. A corporation is treated as a separate person from those who own shares in it or participate in its operation. This means the identity of the corporation is not affected by changes in the identity of those persons.

Corporations Act (the *Corporations Act 2001* (Cth)) is the statute governing the creation, operation and termination of companies in Australia.

Director is a person appointed in accordance with the company's internal governance rules to manage the business of the company. In small companies, the members may all be directors of the company, but in large public companies, with thousands of members, this will not be the case.

External administration refers to the situation where management of the company or its assets has passed from the company's board of directors to an external person such as an administrator, receiver or liquidator. Generally this occurs as a result of the company being insolvent or being wound up.

Insolvency means that the company is unable to pay all its debts as and when they become due for payment.

Internal governance rules are the rules agreed by the members of the company that govern matters connected with its internal administration, such as arrangements for appointing and removing directors, arrangements governing directors' meetings and members' meetings, details of the rights attaching to shares and procedures for the transfer of shares. A company may use the ***replaceable rules*** (which are a set of rules contained in the Corporations Act) as its internal governance rules, or replace some or all of those rules with a ***constitution*** approved by the members.

Limited liability is a term used to describe the fact that shareholders in a company limited by shares are not liable to contribute additional money to meet the company's debts, beyond the amount initially agreed to be paid for the share.

Listed company is a company that has its shares listed for quotation on the Australian Securities Exchange (ASX). This means that members of the public can buy and sell shares in the company through the stock market operated by the ASX. All listed companies are public companies.

Proprietary company is one type of company — public companies are the other. Proprietary companies are usually not permitted to have more than 50 members or to raise money by conducting a public offer of shares (the exception is under the crowd-sourced equity funding rules). In return for accepting these restrictions, proprietary companies are exempted from many company law rules that are designed to protect investors who do not participate actively in the operation of the business. Most Australian companies are small businesses and most of these are proprietary companies.

Public company is any company that is not a proprietary company. Public companies have wider powers to raise capital from members of the public than proprietary companies, but are subject to more onerous regulation.

Secretary is a person responsible for performing certain administrative functions required by law in connection with the company. The secretary is appointed by the directors.

Share is a claim against the company issued by the company to a person who contributes equity capital to the company. It is a form of personal property that represents an asset in the hands of the person who owns it. A person who owns a share in a company is called a ***shareholder*** or a ***member***. The members are the ultimate owners of the company. Shares have rights attaching to them that may give the holder the right to share in the company's profits and to have some say in certain fundamental decisions affecting the company.

Winding up refers to the process by which a liquidator realises and distributes all of a company's property in order for the company's existence to be terminated.