Commercial Applications of Company Law

*Commercial Applications of Company Law* is an integrated teaching and learning resource designed especially for the study of company law by business students. The book makes corporate law more accessible to students by putting the law in context.

Written by three leading corporate law experts, it focuses on the ordinary events and issues faced by companies and their advisers, explaining and applying the law in a manner that is understandable and relevant. The new edition has been updated and revised to reflect legislative and case law developments, including recent changes to government policy such as the decision of the Commonwealth Government to abolish the Corporations and Markets Advisory Committee (CAMAC).

The book is divided into four parts:  
**Part One** explains the core principles of corporate law (corporate legal personality, corporate management and governance, corporate finance and corporate liability) in a straightforward way, illustrating the application of these principles with case law. The commentary also covers a number of related subject areas (namely, securities and takeover law, financial services regulation, and corporate insolvency).  
**Part Two** contains case studies and problem sets. Two running case studies about a listed public company and a large proprietary company are included. Each problem set requires the student to apply the principles explained in the commentary to real life situations involving these different types of companies.  
**Part Three** provides examples of corporate documents (such as a corporate constitution, a notice of meeting, minutes of meetings, and ASIC filings).  
**Part Four** provides extracts of important provisions in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). These are referred to in the commentary.
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Commercial Applications of Company Law

Pamela Hanrahan
Ian Ramsay
Geof Stapledon

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Preface

Commercial Applications of Company Law is an integrated teaching and learning resource designed especially for the study of company law by business students. The book comprises four different parts. The first is the commentary, which is written by three of Australia’s leading corporate law academics, each of whom has taught corporate law to business students at the University of Melbourne. The commentary aims to explain the core principles of corporate law in a straightforward (but not simplistic) way and to illustrate the application of those principles by reference to important case law. In addition to dealing with the “four pillars” of company law — corporate legal personality, corporate management and governance, corporate finance and corporate liability — the commentary also includes chapters introducing the related areas of securities and takeover law, financial services regulation, and corporate insolvency.

The second part consists of the case studies and problem sets. The book includes two running case studies, involving a listed public company and a large proprietary company. Each problem set requires the student to apply the principles explained in the commentary to real life situations involving these different types of companies.

In the third part, examples of corporate documents (such as a corporate constitution, a notice of meeting, minutes of meetings, and ASIC filings) are provided, and the fourth part extracts important provisions of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) that are referred to in the commentary.

The 16th edition reflects recent changes to the law and government policy, including the lamentable decision of the Commonwealth Government to abolish the Corporations and Markets Advisory Committee (CAMAC), established in 1989 to provide a source of independent advice to successive governments on issues that arise in corporations and financial markets law and practice. The authors acknowledge the rich and valuable contribution of the members and staff of CAMAC and its predecessor bodies over the last 25 years to the thoughtful, considered and research-based reform and development of corporate and markets law in Australia. Corporations and markets law and regulation is a vital part of Australia’s national infrastructure; botched, poor quality regulatory reform damages the Australian economy at home and internationally, and harms individual businesses, investors and financial consumers. It is hoped that future governments will resource this important area appropriately.

On the 15th anniversary of its first publication, the authors would like to thank CCH Australia Ltd for its support in publishing new print editions of this book in Australia in each year, to ensure it always provides the most up-to-date treatment of the law possible and continually evolves to meet the changing needs of teachers and students in this area. Over the years the expert editorial, marketing and corporate staff at CCH have maintained a steadfast commitment to the book and the vision behind it, which is to make the complex and often challenging body of corporate law accessible to the people whose future working lives will be so influenced by it. We would also like to thank our colleagues who teach corporate law (as we do) and adopt or recommend our book for their students. Their contributions and suggestions (including those from
their students) are incorporated into each new edition and are always very gratefully received.

While the book is a collaborative effort, responsibility for the different chapters is allocated as follows. Pamela Hanrahan wrote Chapters 1–8, 17–20 and 22, and parts of Chapter 21. Ian Ramsay wrote Chapters 9–16 and ¶6-130. Geof Stapledon wrote Chapters 23–25, ¶2-400, ¶3-500 to ¶3-540, ¶6-120 to ¶6-140 and ¶21-200 to ¶21-420.

Pamela Hanrahan
Ian Ramsay
Geof Stapledon
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About the Authors

Dr Pamela Hanrahan

Pamela Hanrahan is an Associate Professor of the Melbourne Law School and is one of Australia’s leading authorities on corporations and securities law and financial services regulation. She has been a senior academic at the Melbourne Law School for many years and her career also includes 15 years in private practice with Allens and four years as a senior regulator in both Commonwealth and State government agencies.

Her primary expertise is in the complex interaction between principles of common law and equity and the statutory obligations imposed on individuals and corporations in areas regulated by the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority, including financial services, funds management, superannuation, corporate governance, and securities and financial product disclosure.

In particular, Dr Hanrahan is an expert on the duties and liabilities of firms and individuals in the investment chain. This includes fiduciary intermediaries such as responsible entities of registered managed investment schemes, operators of wholesale collective investment vehicles and schemes, superannuation trustees, custodians, asset consultants, fund managers, broker/dealers, financial advisers and investment banks. She is a frequent speaker and commentator on Australian and international regulation of fiduciary intermediaries. In 2014, she was a keynote speaker at the Law Council’s superannuation law conference (Adelaide, March 2014), a panellist at the workshop “Institutional Corruption and the Capital Markets” (Harvard Law School, May 2014), a panellist at the Law Council Corporations Workshop (Gold Coast, July 2014), a speaker at the Centre for Law, Markets and Regulation’s workshop on the FSI Interim Report (Sydney, August 2014), a speaker at the Centre for International Finance and Regulation’s FSI Workshop II (Sydney, August 2014), and a presenting delegate at Griffith University’s “Global Integrity” Summit (Brisbane, September 2014).

From 2008–2010, Dr Hanrahan was head of the Investment Managers stakeholder team at ASIC and a member of the International Organization of Securities Commissions’ Technical Committee 5 on collective investments. Her responsibilities included dealing with the aftermath of complex, high profile GFC-related investment scheme collapses, including frozen mortgage funds and failed agribusiness, tollway and other infrastructure schemes, and the Trio Capital fraud. In 2010–2011 she was a Special Counsel at ASIC and the ASIC Regional Commissioner for Queensland.

Dr Hanrahan has taught and published widely in the areas of financial services regulation, funds management and superannuation law, and corporations and securities law. She has taught corporations law at the undergraduate and graduate level at the Melbourne Law School and for several years was the subject co-ordinator for the company law subject taught to undergraduate commerce and business students at the University of Melbourne. She has taught managed investments law and financial services law in the Melbourne Law Masters program for over a decade and is a former director of studies in banking and financial services law for the Melbourne Law Masters and a former deputy director of the Centre for Corporate Law and Securities Regulation at the University of Melbourne.
In the financial services area, Dr Hanrahan’s books include:

- *Managed Investments Law & Practice* (CCH, loose-leaf, 1999–2014), which is the leading Australian text on the law of managed investment schemes, and

- *Funds Management in Australia: Officers’ Duties and Liabilities* (LexisNexis, 2007), which provides a detailed treatment of directors’ and other officers’ legal responsibilities across a range of Australian collective investment vehicles.

She is the author of numerous book chapters and referred journal articles on the duties and liabilities of investment intermediaries including, most recently:

- "The relationship between equitable and statutory ‘best interests’ obligations in financial services law" (2013) 7 *Journal of Equity* 46


Her work on the duties and liabilities of responsible entities and their officers is frequently referenced and has been cited with approval by the High Court of Australia. Her forthcoming book, *The Law of Collective Investment Schemes: A Comparative Perspective*, will be published by Edward Elgar in London in 2015.

In corporations and securities law, she is co-author with Professor Bob Baxt AO and Justice Ashley Black of the main securities law treatise in Australia, *Securities and Financial Services Law* (LexisNexis, 2012). She is lead author of the Australian, Singaporean, Malaysian and New Zealand editions of the corporations law textbook *Commercial Applications of Company Law* (CCH, 2000–2014); her other recent publication in this field includes ‘Officers’ liability for mandatory corporate disclosure: Two paths, two destinations’ (2013) 31 *Company and Securities Law Journal* 474 (co-authored with Tim Bednall).

In 2014 she was the Australian Reporter to the International Academy of Comparative Law’s world congress on the law of close corporations.

Dr Hanrahan holds Honours degrees in Arts and Law from the University of Melbourne, a Masters degree (with Honours) from Case Western Reserve University in the United States, and a Doctorate of Juridical Science from the University of Melbourne. She is a Fellow of the Financial Services Institute of Australasia, a member of the Corporations Committee of the Law Council of Australia and was a member of the Corporations and Markets Advisory Committee’s ad hoc legal committee on managed investments. She is a former academic visitor to the Centre for Corporate and Commercial Law at the University of Cambridge and is currently the Registrar of Community Housing for New South Wales.
Professor Ian Ramsay

Ian Ramsay is the Harold Ford Professor of Commercial Law in the Law School at the University of Melbourne where he is Director of the Centre for Corporate Law and Securities Regulation. He has practised law with the firms Sullivan & Cromwell in New York and Mallesons Stephen Jaques (now King & Wood Mallesons) in Sydney. Other positions Ian currently holds or has previously held include:

- Associate Dean, Masters Program, Faculty of Law, The University of Melbourne (2005–2010 and 2013)
- Dean, Faculty of Law, The University of Melbourne (2002–2003)
- Member of the Takeovers Panel (which is the main forum for resolving takeover disputes) (2000–2012)
- Deputy Director of the federal government’s Companies and Securities Advisory Committee where he wrote a number of reports which resulted in changes to the law including a report on directors’ and officers’ insurance (1991–1992)
- Head of the federal government’s inquiry on auditor independence (2001)
- Member of the federal government’s Corporations and Markets Advisory Committee (2002–2014)
- Member of the Australian Securities and Investments Commission External Advisory Panel (2009–2013)
- Member of the federal government’s Implementation Consultative Committee for the Financial Services Reform Act (2001–2005)
- Member of the Executive Committee of the Business Law Section of the Law Council of Australia (1990–1999)
- Member of the National Law Committee of the Australian Institute of Company Directors (1995–2011)
- Member of the Corporations Law Committee of the Law Council of Australia (1995 to date)
- Member of the Executive Committee of the Corporate Law Teachers Association (1995–2014)
- President of the Corporate Law Teachers Association (2000–2001)
- Member of the International Federation of Accountants taskforce on rebuilding confidence in financial reporting (2002–2003)
- Consultant to ASIC and author of the report for ASIC on disclosure of fees and charges in superannuation and other managed investments (2002)
- Director of the Audit Quality Review Board (2006–2009)
- Member of the federal government’s Companies Auditors and Liquidators Disciplinary Board (2004–2013)
- Member of the Securities Commission of Malaysia Capital Markets Advisory Group (2013 to date)
- Member of the Appeals Panel of the Federation of International Basketball Associations (2002 to date)
- Consultant to the Australian Broadcasting Authority (ABA) and author of the report for the ABA on reform of the ABA’s enforcement powers (2004)
• Member of ASIC’s Corporate Governance Roundtable (1998–2002)
• Consultant to the Australian Law Reform Commission for its managed investments project (1992)
• Member of the Australian Law Reform Commission’s Advisory Committee for its civil and administrative penalties project (2000–2002)
• Consultant to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria (2008)
• Visiting Professor, Faculty of Law, The University of Paris (2008)
• Distinguished Visiting Professor, Faculty of Law, The University of Toronto (1997)
• Distinguished Visiting Professor and Professorial Fellow, Faculty of Law, The University of Hong Kong (2001).

Ian has published extensively on corporate law and corporate governance issues, both internationally and in Australia. His books include Ford’s Principles of Corporations Law, which is Australia’s leading corporate law book (co-author, 15th edn, 2013); Incentivising Employees: The Theory, Policy and Practice of Employee Share Ownership Plans in Australia (co-author, 2013); Law, Corporate Governance and Partnerships at Work: A Study of Australian Regulatory Style and Business Practice (co-author, 2011); The Takeovers Panel and Takeovers Regulation in Australia (editor, 2010); Varieties of Capitalism, Corporate Governance and Employees (co-editor, 2008); Commercial Applications of Company Law in Singapore (co-author, 4th edn, 2011); Commercial Applications of Company Law in Malaysia (co-author, 3rd edn, 2008); Commercial Applications of Company Law in New Zealand (co-author, 4th edn, 2012); Company Directors: Principles of Law and Corporate Governance (co-author, 2005); Experts’ Reports in Corporate Transactions (co-author, 2003); Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford (editor, 2002); Company Directors’ Liability for Insolvent Trading (editor, 2000); Securities Regulation in Australia and New Zealand (co-editor, 1998); The Corporate Law Economic Reform Program Act Explained (co-author 2000); The New Corporations Law (co-author, 1998); Corporate Governance and the Duties of Company Directors (editor, 1997); and Education and the Law (co-author, 1996).

In addition, he has published over 150 research reports, book chapters and journal articles.

His publications have been cited by the High Court of Australia, the Federal Court of Australia, the Courts of Appeal of the Supreme Courts of New South Wales, Victoria and Western Australia, as well as by the Supreme Courts of Queensland and South Australia.

His publications have also been cited by courts outside Australia including by the Supreme Court of the United Kingdom, the United States Bankruptcy Court, the Court of Appeal of New Zealand, the High Court of New Zealand, the Court of Appeal of the High Court of Hong Kong, the Court of Appeal of the Supreme Court
of Singapore, the High Court of Malaysia and the Scottish Court of Session (the supreme civil court in Scotland).

Ian is a respected commentator in the media on corporate governance and corporate law. He is regularly interviewed in the financial press and has been interviewed for international newspapers including the *New York Times*. His research has been reported in international newspapers including the *Financial Times* and the *Wall Street Journal*. Ian has been interviewed on major TV programs such as the *7.30 Report* and *Lateline*, as well as radio programs including the *Law Report* and various current affairs programs.

Ian has been subject coordinator for Corporate Law taught to business law students at the University of Melbourne.

**Professor Geof Stapledon**

Geof Stapledon is Vice President Governance for the resources company BHP Billiton. Prior to joining BHP Billiton, Geof headed Asia-Pacific research for RiskMetrics Group. Before that, Geof was a Professor of Law, teaching and researching in the fields of corporate law, competition law and corporate governance, at the University of Melbourne. During that period he also carried out several consultancies in the governance field for public- and private-sector clients. He has also worked as a lawyer specialising in corporate advisory and transactions. His book *Institutional Shareholders and Corporate Governance* was published by Oxford University Press in 1996. Geof has been a member of the Business Consultative Panel of Australian Securities and Investments Commission and the Editor of the *Company and Securities Law Journal*. He has degrees in Economics and Law from the University of Adelaide, and a doctorate from the University of Oxford.
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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.
ABOUT COMPANIES

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). Companies are the focus of this book, because they are the most common and economically significant form of corporation.

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 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 \(\text{¶}3-300\). 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.

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

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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.
What are companies like?

There are more than 2.11 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 November 2014 had a total market capitalisation of more than $130 billion.

There are about 2,000 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 October 2014 was $1.615 trillion. Of that, almost half (46%) 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 2011/12, a total of 817,885 companies lodged tax returns in Australia. Based on company income:

- 13% had total income equal to or less than $0
- 78% were micro-companies (with income of between $1 and $2 million)
- 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 0.2% of the total number of companies.

In 2011/12, companies reported total income of $2.573 trillion. Despite accounting for only 0.2% of the total number of companies, large and very large companies paid about 67% of company tax.⁶

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|       | 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 securities on the market operated by Chi-X). As at September 2014, there were 2,054 entities with tradeable equities listed on the ASX; this included 1,951 Australian companies.  

**Who owns the shares in listed companies?**

According to the ASX, investors in Australian listed securities consist of foreign investors (about 40%); domestic institutional investors, such as superannuation funds, managed investment schemes, insurance companies and other investment entities (40%); and retail investors (20%).

Listed companies will generally have at least several thousand shareholders and, in the case of Australia’s largest companies, may have many more.

Small shareholders comprise the vast majority by number of shareholders, but between them 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. Research conducted by the Australasian Investor Relations Association in 2006 indicated that, on average, shareholders that own less than 10,000 shares in the top 50 Australian listed companies own only 22.5% of all shares on issue, but comprise 95.3% of all investors on the share registers of these companies. By comparison, shareholders that own more than 10,000 shares in the top 50 Australian listed companies own on average 77.5% of all shares on issue, but comprise only 4.7% of all shareholders in these companies.

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

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|       | 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.  

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

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 rules9 and are usually responsible for 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.

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

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

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.

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”, 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 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. 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.

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11 Ibid, 18.