



This article will discuss the *Corporations Act 2001* (Cth) (“The Act”) and its primary functions in relation to business entities and their operations.



INTRODUCTION

The *Corporations Act*, enacted in 2001, is the main legislation that regulates Australian business entities – including the formation, operation and dissolution of companies. Moreover, The Act states the duties and responsibilities of company directors, officers, and shareholders.

REGISTERING A COMPANY

Section 112(1) of the Act states the following types of companies that can be registered:

- I. Proprietary companies:
 - i. *Limited by shares; or*
 - ii. *Unlimited with share capital.*
- II. Public Companies:
 - i. *Limited by shares;*
 - ii. *Limited by guarantee;*
 - iii. *Unlimited with share capital; or*
 - iv. *No liability company.*
- III. Corporate collective investment vehicles:
 - i. *Limited by shares.*

A company must have at least **one** member according to Section 114.

An application must be lodged with ASIC (*Australian Securities and Investments Commission*) in order to register a company (Section

As per Section 117(2), the application must state (but is not limited to):

- a. The **type** of company;
- b. The company’s proposed **name**;
- c. The name and address of each person who consents to become a member;
- d. The full name, date and place of birth of each person who consents in writing to become a director or company secretary; and
- e. The proposed registered **office address** of the company.

Section 118 states that once the application is approved by ASIC, the company will be provided an Australian Company Number (ACN) and issued a certificate stating the company details. The certificate will also state the date of registration – this is the day the company comes into existence as a corporate body (Section 119).

COMMON SEAL

Section 123 states that a company may have a common seal. As of August 2021, a company **may execute a document without a common seal** if the document is **signed (generally) by ‘two directors’**, or a ‘director and a company secretary’, per Section 127(1).

APPOINTMENT OF DIRECTORS

A ‘public company’ must have at least **three** directors at least two of whom must ordinarily reside in Australia. A ‘proprietary company’ must have at least **one** director who must ordinarily reside in Australia (Section 201A).



Only an individual aged at least 18 may be appointed as a director of a company.

DUTIES OF DIRECTORS

Section 180(1) requires directors to act with the “**care and diligence**” exercised by a reasonable person in their shoes.

Section 180(2) introduces the “**Business Judgment**” rule – wherein a directors is deemed to have satisfied the requirement under Section 180(1) if he has made judgments:

- a. in good faith and for a proper purpose;
- b. without having material personal interest in the subject matter;
- c. after informing himself about the subject matter to the extent he reasonably believes to be appropriate; and
- d. he rationally to be in the best interests of the company.

Section 181 requires directors to **act in good faith**; in the **best interests** of the corporation and for a **proper purpose**.

Section 182 prohibits directors from **improperly using their position** to gain any improper advantage for themselves or someone else, or to cause detriment to the company.

Section 183 imposes the duty of directors not to improperly use information obtained through their position to gain an advantage for themselves or someone else, or to cause detriment to the company.

Section 191 highlights the duty for directors to **disclose material personal interests** which arise in relation to affairs of the company.

Section 286 states directors duty to maintain **accurate records** of the company’s transactions, financial position and performance.

BREACH OF DUTY

In the instance that a director breaches his duties, a payment of a pecuniary penalty may be ordered, per Section 1317G.

LIMITED LIABILITY

Shareholders of a limited company have limited liability, that is, they cannot not to be held liable for the company’s debts. This is reflective of the U.K. landmark case *Salomon v Salomon* [1896] which established the Doctrine of Separate Legal Entity.

CONCLUSION

The Act is regularly updated to reflect the changing business practices and developments in the law. It is a complex piece of legislation.

Comasters can advise clients on corporate matters and on commercial and business law.

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