

## **Incorporation and Company Formation in Australasia, 1790-1860**

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Full name of author(s)

Aaron Graham

Full address, including email and phone number

Department of History

University College London

Gower Street, London, WC1E 6BT

United Kingdom

+44 7980 472 147

aaron.graham@ucl.ac.uk

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## **Incorporation and Company Formation in Australasia, 1790-1860**

Nearly 260 companies were founded in and for the Australasian colonies between 1790 and 1860. A quantitative survey shows that suggests that the patterns of incorporation mainly reflected 'functionalist' economic factors rather than 'autonomous' legal conditions, though the changing nature of company law did influence the various forms that incorporation took. In some sectors, outside factors and even historical accidents also pushed patterns of incorporation along distinct lines. The result was a tradition of adapting legal powers of incorporation to local needs which persisted beyond the introduction of modern company acts to the region in the 1860s and therefore shaped the subsequent evolution of the company in Australia and New Zealand.

Keywords                      Australasia; Britain; Incorporation; Regulation

JEL Codes                    N47; N87; D22

## INTRODUCTION

In 1790 there were no joint-stock companies in Australasia. By the 1860s, when territories began to adopt statutes allowing for general incorporation, over 120 had been founded by special legislative enactment, and a further 130 or so in the United Kingdom for the express purpose of operating in Australia or New Zealand. These seven decades were thus an important period of the evolution of the joint-stock company, in the United Kingdom and the United States but also in the Australian colonies as well. They established the formal and informal limits in which companies and the later acts for general incorporation could operate, and therefore helped to define the particular nature of post-1860 Australian capitalism, recently described by Simon Ville and David Merrett as ‘settler capitalism *sans* doctrines’, and marked by ‘particular elements in the local operating environment and transmissions from overseas which blend into a distinctive set of Australian practices’ (Ville and Merrett, 2017). Yet efforts to examine how the experience of company formation before 1860 shaped economic development, and vice versa, have so far been stymied by the absence of any wider quantitative framework which could contextualise the few case studies of individual Australasian companies in this period, and help to connect it with the vast theoretical literature on company formation, entrepreneurship, innovation and management. This article builds on recent approaches pioneered for the United States by assembling a dataset of nearly 260 companies formally incorporated in and for the Australian colonies before 1860, including by royal charter, by parliamentary and colonial legislative enactment, and by administrative registration. This makes it possible to quantify the scope and scale of incorporation, to locate existing studies into a broader framework, and to analyse how the experience of company formation shaped the economy and law of the Australian colonies. It shows that incorporation followed its own pattern in the region, shaping and shaped more by economic conditions than legal circumstances, which then continued to influence how entrepreneurs reacted to companies after 1860.

## CONTEXT AND SCHOLARSHIP

The business company is a complex thing to define, especially in historical terms, but at the very least it has both an economic and legal existence. On the one hand, it

possesses a corporate or institutional identity or 'personality', often expressed in this period through the possession and use of a corporate seal. This distinguishes it from various other legal ways of structuring business relationships which do not have a full corporate personality, such as the sole proprietorship or the partnership. Other elements such as the possession of some form of limited liability for shareholders, and the separation of ownership and management, became increasingly common in the nineteenth century (Harris, 2000). On the other hand, business corporations are also distinct from corporations founded for political and administrative purposes, including guilds and municipal councils, and from non-profit corporations such as hospitals and schools, though before the 1860s it was not uncommon for many of these business corporations to claim to serve a wider public interest. A growing body of work has emphasised the advantages that incorporation offers for economic development. By providing stable institutional structures the corporation allows for the cultivation and development of specialised technical and managerial expertise, offering substantial advances in efficiency over smaller or temporary partnerships (Wright, 2013, Wright, 2017). Because the joint-stock company is not dependent on a small circle of investors but raises its capital directly from smaller shareholders, it can often mobilise higher amounts of money than partnerships, while other features such as corporate personality, perpetual succession and the integration of multiple stakeholders enables the company to spread its risk and to invest effectively in long-term, highly technical projects. By enabling complex capital-intensive ventures such as banking, transportation projects and industrial projects, the corporation was therefore a crucial factor in the runaway economic development of the Western world.

Given the importance of the corporation, an extensive scholarship has – naturally – arisen to explain how and why it emerged, and its impact on the growth of individual national economies and the global economy as a whole. Ron Harris divides this scholarship into two types, the first stressing the 'functional' development of the company and company law in response to the economic incentives, and the second the 'autonomous' development of company law through legal scholarship, which then shaped how economic growth occurred (Harris, 2000). The first builds on the

work of Alfred Chandler, who argued that joint-stock companies emerged in the United States in response to the challenges of economic complexity and the need for stable institutions. Studies of industrialisation in Britain likewise argue that the corporation did not fully emerge until it was needed the mid-nineteenth century, at which point the legal obstacles which had hitherto retarded company formation – most notably the ‘Bubble Act’ of 1720 – were put away (Cottrell, 1980, Harris, 2000). The second approach emphasises the disruptive effects of the Bubble Act, passed at the urgent request of the South Sea Company during the height of the speculative frenzy in order to prevent funds being redirected to other investments, and prohibiting the formation of joint-stock companies without either a royal charter or parliamentary statute (Harris, 2000: 60-81). This approach therefore focusses not on economic change but on the external processes of legal development which swept it aside after 1787 in the United States and after 1825 in the United Kingdom, when the Bubble Act was repealed, and thereby enabled the rapid expansion of company formation. It therefore rests in part on the new institutional economics pioneered by Douglass North and Barry Weingast, which argues that the institutional design of political states and corporate structures directly affects economic development (North and Weingast, 1989). Neither is sufficient though to explain how and why the company emerged in the United Kingdom and the United States, and in recent years various scholars have brought forward more nuanced explanations which stress the complex interplay between economic and legal forces and the role of politics as a mediating agent (Kostal, 1994, Alborn, 1998, Harris, 2000, Freeman et al., 2012, Taylor, 2013, Wright, 2013). These debates depend upon a large body of broader scholarship which provides both individual case studies and relatively precise measures of the wider uptake of companies in both places to enable analysis.

Unfortunately, the same is not true of Australia, where work on the spread of the company before 1860 is relatively limited, and almost entirely restricted to case studies – in varying levels of detail, and to varying degrees of analytical rigour – of individual companies founded during this period (Ville, 1998). There are a number of studies of individual economic sectors, some of which, such as the banking and mining sectors, were characterised by high levels of incorporation, but others have

received less attention (Butlin, 1953, Butlin, 1986, Linge, 1979, Blainey, 1993). Although these wider studies provide important evidence of how these companies interacted with the other forms of organisation within their individual sectors, they have less to say about the factors common to companies across the wider economy. Most of these economic studies fall into the 'functionalist' approach outlined above. For example, several preliminary studies in the 1960s argued that many early companies were founded during the economic boom which peaked in 1841, and were driven either by a genuine economic need or by speculators (Hartwell, 1954, Kolsen, 1960, Dyster, 1967). In his survey of subsequent literature in 1998, Simon Ville has reaffirmed this conclusion, arguing that few local businessmen wanted or needed the benefits of incorporation before 1860, so it was 'concentrated in a few capital-intensive industries such as transport and utilities, ... floated in a cyclical boom by a small number of promoters, and had high failure rates' (Ville, 1998). Studies of entrepreneurs in this period have shown that the partnership was a flexible and effective form of organisation that enabled individuals to respond effectively to the volatile and unpredictable shifts in fortune as Australasia transitioned into a capitalist settler economy, and even to raise the necessary funds from both colonial and imperial investors (Stevens, 1965, Holcomb, 2014, Diamond, 1988, Robin, 2018, Broeze, 1993). Legal scholars examining the introduction of English company law in the 1860s to the Australasian colonies have argued that it was part of an imperial process of legal harmonisation in the British Empire intended for the benefit of metropolitan companies, and had little impact either on company formation or economic growth outside the mining sector before the 1880s (McQueen, 1991, Lipton, 2007). However, none of these works are based on a wider study of the overall patterns of incorporation in Australasia before 1860, making it unclear how representative the case studies and sectors chosen for analysis are.

As an alternative to studies of individual companies and sectors, Richard Sylla and Robert Wright have argued for taking a quantitative approach to the question of company formation and the role of institutions and economic needs. By counting the acts of special incorporation passed for each individual company by each state legislature of the United States between 1790 and 1860, when general incorporation

became widespread, they identified 22,419 acts of incorporation, rising from 247 in the 1790s to 9,356 in the 1850s (Sylla and Wright, 2013). The companies formed had a nominal or 'minimum authorised capital' of over \$4.5 billion, rising again from \$16 million in the 1790s to \$2.6 billion in the 1850s. The survey identified important variations by sector and region, with the bulk of incorporation occurring in finance, transportation, and industry, and in the north-east part of the United States, and has enabled Wright to nuance elements of the functionalist view of incorporation by highlighting the political and legal changes made possible by the Constitution in 1787, which gave corporations security and helped to encourage investment, making the United States the world's leading 'corporation nation' (Wright, 2013, Wright, 2017). This has been challenged by Leslie Hannah, who has laid out the conceptual and methodological limitations of this approach and argues that it perhaps says more about the culture of incorporation in individual countries than their economic origins and impact (Hannah, 2014). While any quantitative study of Australasian company formation is subject to similar limitations and cannot pretend to offer conclusive answers, it can, therefore, nevertheless suggest the profile of its broader developments, clarify the culture of company formation, and provide a basis for cautious comparisons that will assess the importance of economic and legal factors in shaping company formation in Australasia and their legacy.

This article is therefore built around a dataset of the nearly 260 companies which were formally incorporated in some way in and for Australasia between 1790 and 1860, including those chartered or given legal recognition by an act of legislature in New South Wales, van Diemen's Land (or Tasmania), South Australia, Victoria and New Zealand, and those incorporated in Britain by royal or parliamentary charter or by registration with the Board of Trade after 1844. As in Wright and Sylla's study, these have been harvested from the lists of statutes passed by individual colonies before 1860, as well as the published lists of companies registered with the Board of Trade in Britain after 1844 and those incorporated by royal charter.<sup>1</sup> As Hannah has pointed out in his detailed critique of Sylla and Wright's dataset, this approach is not

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<sup>1</sup> For the list of sources, see Table 1.

without its problems. It excludes other forms of corporate organisation such as the sole proprietorship or joint partnership, which accounted for most economic activity in Australasia until the early twentieth century, and cannot systematically track companies formed as unincorporated associations with a deed of settlement or co-partnership, which were widespread outside the United States for much of the nineteenth century, or institutions such as building societies formed after 1847 by registration rather than legislative incorporation (Ville, 1998, Butlin, 1964 pp. 247-53). For this reason it is also difficult to compare data from the United States, Britain or Australasia with other countries who had their own distinct forms of incorporation such as the *société en commandite* in France. This approach also fails to account for turnover or rates of failure in company formation, which may have reached three quarters in the United States and two thirds in the United Kingdom, compared to one half in Europe, and can therefore give a highly misleading indication of the actual importance of companies in economic life. It also ignores how these companies could evolve. For example, the Bank of New South Wales was founded by a gubernatorial charter in 1817, renewed in 1823, but was re-founded in 1828 as an unincorporated partnership under a deed of settlement, when it received an act of the assembly allowing it to sue and be sued in the name of the president, and was not finally and definitively incorporated until a further act in 1850 (Butlin, 1953). Each one was technically a different company from the other, and are therefore double- (or quadruple-) counted here as four separate companies.

Further problems arise through the focus on the nominal capital authorised for the companies rather than the actual amount of paid-up capital, which is much more difficult to recover but arguably a more accurate measure of corporatisation within national economies. Hannah has estimated, for instance, that, despite the lower total nominal capital of companies in the United Kingdom, actual paid-up corporate capital in 1860 exceeded 55 per cent of GDP, whereas in the United States it was somewhere between 36 and 52 per cent, suggesting that incorporation may actually have been more important to British than American economic growth (Hannah, 2014). Assessing the nominal capital of the 100 or so British companies registered with the Board of Trade was not practical for this article, due to the scale of this task,



so the data could not be included in calculations. Since the various acts of incorporation passed in the colonies generally included the nominal capital, it has been possible to include this data, supplemented where necessary by reference to contemporary newspapers accessed through Trove. In both cases it would be almost impossible, at least without a great deal more work, to assess the actual paid-up capital of all of these companies at any given time. The matter is further complicated by the incorporation of mutuals such as savings banks and insurance companies, which operated using the deposits or contributions of their members rather than having a nominal capital. For the purposes of this article, all figures for overall patterns of incorporation therefore include the total numbers of companies founded, but all references to nominal capitalisation exclude imperial companies and colonial incorporations such as mutuals for which no data could be provided.

There are also issues specific to the Australasian context that have yet not been addressed in the existing literature. Sylla and Wright do not count any of the 'free-standing' companies headquartered in the United Kingdom for operations in the United States, whether by royal charter, deed of settlement or, after 1844, by registration with the Board of Trade, but these were hugely important vehicles for the export of British capital (Jenks, 1971, Wilkins and Schröter, 1998, Jones, 2000). They therefore need to be included in any analysis of company formation in and for the Australasian colonies, since they provided services such as finance which would possibly otherwise have been met by local companies. However, some of these free-standing companies also secured colonial acts of incorporation or registration which gave them additional local powers, raising further problems of double-counting. The approach adopted here has been to count these acts in the overall numbers of colonial incorporations, but not to include them or ostensible capitals of their parent company in calculating total nominal authorised capitals. Moreover, several imperial companies were founded for broader regional operations or failed ever to operate in Australia. For instance, the Chartered Bank of India, Australia and China was founded in 1853 with a nominal capital of £3 million intended to support financial operations across the region, but never opened a branch in Australia, though it made a number of efforts to do so (Mackenzie, 1978, Jones, 1993). It has nevertheless

been included in the totals here, for the sake of consistency. The quantitative approach thus involves substantial conceptual and methodological compromises, but when used with caution it does at least offer some indication of the size, scale and scope of company formation in Australasia before 1860, and allows some provisional conclusions about the forces behind it.

## **OVERALL PATTERNS**

Company formation in and for Australasia showed distinct variations, as will be clear from Table 1. At least 126 companies were founded by colonial governors or their legislatures between 1790 and 1860, and 128 in the United Kingdom, accounting for more than half of the total number and probably an even greater share of the total nominal capital. This changed over time. Whereas in the 1820s only a quarter of company formation occurred in the United Kingdom, this rose to half in the 1840s, and nearly two thirds in the 1850s. As in the United States, where the pattern of incorporations tended to follow the business cycle and major economic booms were marked by extensive rises in incorporation before the crashes in 1819, 1837 and 1857, incorporations in and for Australasia reflected the ebb and flow of economic prosperity. Around 40 companies were founded in the decade ending in the economic boom of 1839 to 1841, including twenty during the boom itself. The discovery of gold in Victoria, and the rush which followed, led to another surge in company formation between 1851 and 1854. Total incorporations thus increased from 16.6 companies per 100,000 people in the 1820s to 32.27 in the 1850s (Table 2), as the population increased by an order of magnitude from around 50,000 to 555,000. The total nominal capital of those in Australasia was about £13.6 million or \$62.7 million, about £130,000 or \$600,000 per company. Breaking these figures down by sector, location and other factors reveals other important differences.

Sylla and Wright have pointed out that incorporation in the United States also had distinct regional variations, with the industrial economy of the North accounting for two-thirds of incorporations and half of authorised nominal capital compared to the agricultural economy of the South and the frontier economy of the western states (Sylla and Wright, 2013). Incorporation in the Australasian colonies also showed a

predictable variations, as seen in Table 3. The established and relatively mature colony of New South Wales accounted for about half of all incorporations and half the nominal authorised capital. The newer frontier colonies of South Australia and New Zealand were of negligible importance, and no companies were incorporated in Western Australia, which was even more marginal in this period. The older colony of van Diemen's Land passed nearly a quarter of all acts of incorporation, distributed relatively evenly throughout this period, but these had only about 10 per cent of nominal authorised capital. By contrast, between separation from New South Wales in 1851 and 1860, the boom-state of Victoria passed nearly 20 per cent of all acts of incorporation before 1860, with more than a third of all nominal authorised capital. Given that an act of 1855 permitted general incorporation by registration of mining companies, the regional importance of Victoria was probably even greater than the figures here suggest (McQueen, 1991, Lipton, 2007). Company formation in the Australasian colonies therefore followed predictable patterns, occurring mainly in areas, and during times, of economic development.

In terms of function, transportation companies accounted for about half of all company formation by number in the United States and even more by nominal capital, with industrial and then financial companies accounting for about a quarter each. By contrast, Table 4 shows that incorporation in Australasia was dominated by insurance, trust and banking companies, which accounted for about half the total number and the nominal capital, with transportation and industrial companies each making up about a quarter of the incorporations and nominal capital. Companies offering services were in a minority. In Britain, half the companies incorporated for Australasia were industrial – mainly mining – and a quarter were for transportation enterprises, while the remainder were mainly banking, investment, colonisation, agricultural and emigration companies. They included large companies such as the Australian Agricultural Company in 1824, the van Diemen's Land Company in 1825, the New Zealand Company in 1841, and the South Australian Company in 1855. Other sectors of the economy saw very negligible levels of company formation during this period. Despite the importance of wool exports in colonial economic development after 1820, sheep farming itself and the preparation, marketing and

transportation of wool continued to be handled by sole proprietors or small partnerships of merchants rather than pastoral or stock companies until the late nineteenth century (Barnard, 1958, Ville, 2000, Butlin, 2013). This was because until the 1870s banks preferred to invest in this business through merchants rather than corporate intermediaries, and British investment was mainly channelled after 1840 either through the banks or through finance companies such as the British Colonial and Loan Bank, the Australian Trust Company and the Scottish Australian Company, with capitals ranging from £100,000 to £1 million (Macmillan, 1960, Butlin, 1953). As a result, no companies emerged.

This survey therefore suggests that company formation in and for the Australasian colonies followed a distinctive profile which had little to do with legal or political changes. The establishment of legislative bodies for van Diemen's Land in 1824, South Australia in 1836, New Zealand in 1840 and Victoria in 1851 potentially required existing companies that wished to operate in these areas to secure new charters, though in fact only the Union Bank of Australia – an unincorporated British bank founded in 1837 under a deed of co-partnership – thought it necessary to secure multiple acts of recognition in van Diemen's land in 1837, New South Wales in 1838, New Zealand in 1844 and South Australia in 1850 (Butlin, 1953). Most other companies, both British and Australasian, either restricted their operations to a single colony or did not feel it necessary to secure formal recognition for branches and agencies in other colonies. As noted above, the establishment of procedures in Victoria after 1855 for the general incorporation of mining companies may have diverted large numbers away from formal incorporation by acts of legislature. The creation of new administrative procedures in the United Kingdom in 1844 and 1856 undoubtedly accounted for the small rise in imperial incorporations after 1844, but the major expansion came with the gold rush of 1851 and declined sharply after 1854 as the rush tapered off, with consequences for colonial incorporation noted below. In general though, economic conditions clearly drove company formation.

An even more distinctive aspect of the pattern of incorporation in Australasia was the changing nature of corporate powers for both colonial and imperial companies.

Before 1844, companies in the United Kingdom had either incorporated themselves by royal charter or not at all, the first offering benefits such as limited liability but the second offering greater flexibility and less government oversight. The Companies Act of 1844 in the United Kingdom introduced a system of registration which enabled companies to be formed along standardised lines granting legal personality and uniform procedures of finance and corporate governance, while the act of 1856 reduced reporting requirements and added limited liability. However, some British companies continued to incorporate themselves by royal charter even after 1844, generally the bigger banking, transportation and mining companies with large capitals or multinational ambitions, who wanted to take advantage of the limited liability and greater geographical flexibility offered by a charter compared to registration. They included several of the largest mining companies founded during the gold rush, as well as the Chartered Bank of India, Australia and China noted above, and three large steamship companies set up in 1852 to serve Australia and the Pacific. British entrepreneurs forming companies for operations in Australasia therefore continued to choose from the various legal forms whichever ones best suited their needs.

This was even more so in Australasia, where patterns of incorporation underwent an equally extreme shift. The first company, the Bank of New South Wales, was formed in 1817 by a charter issued by the governor under his own authority, whose validity was unclear, and it was therefore allowed to expire in 1827 and was not copied. This left only the route of legislative incorporation, but whereas in the United States companies generally secured acts of full incorporation, the practice in Australia until the 1840s was to secure an act of legal recognition which did not include other powers such as limited liability. One of the chief disadvantages of an unincorporated company was that all its legal actions had to be commenced and answered in the name of all those owning shares, which was often impractical when dozens or even hundreds of shareholders were involved (Harris, 2000). In Britain several companies therefore secured acts of parliament which did not incorporate them but gave them the right to sue and be sued in the name of a single nominee, usually the company's chairman or secretary, which simplified these legal matters without the raising wider

and more contentious issues of limited liability, corporate governance and the separation of ownership and management. Nearly 85 per cent of the companies set up in Australia in the 1830s were 'incorporated' on this basis, including banks, insurance companies, auction houses and navigation companies, in acts which often explicitly noted that they were not granting these controversial rights of incorporation. The act for the Australian Auction Company in New South Wales in 1841, for example, firmly stated 'nothing herein contained shall extend or be deemed, taken or construed to incorporate the members of the said company' or relieve them from the unlimited financial obligations they had as members of an unincorporated partnership (NSW, 5 Vic. c. 10 ss. 12). Even in the 1840s nearly sixty per cent of companies were founded on this basis, and the balance only decisively shifted in the 1850s, when more than ninety per cent of Australasian companies received full acts of incorporation, for reasons that will be discussed at the end of the next section.

## **ANALYSIS AND CASE STUDIES**

Company formation in and for the Australasian colonies was therefore more than just a pale imitation of the United Kingdom or the United States. Taken together, some 253 companies were founded, for a European population which grew from about 4,000 in the 1790s to over 550,000 by the 1850s. Numbers rose from 16.6 companies per 100,000 people in the 1820s to 24.0 in the 1830s, 15.2 in the 1840s, and 32.3 in the 1850s. Company formation therefore lagged behind the United States until the 1850s (Table 1). Companies within Australasia though were nearly three times as large as American ones, with an average nominal capital of about £130,000 or \$600,000 compared to \$204,000 or £44,000 for American companies (Table 2). The real difference was probably even greater than this, as the average capitals of companies founded in Britain were generally far higher; the authorised capital of the 5 banks formed in Britain was £4.2 million, for example, compared to the £5.3 million authorised for the 23 banks formed in the Australasian colonies, much of this in acts renewing existing corporations rather than representing fresh capital formation. These differences were also reflected at the level of individual sectors. In the United States the transportation companies had the largest average

nominal capitals, some \$270,000 per company, but in Australasia the average was about \$456,000, which was dwarfed in turn by an average nominal capital of \$948,000 in the financial sector (Table 5). Australasian companies were therefore bigger in general than American ones and the biggest companies were concentrated in different sectors, revealing significant areas of difference.

The pattern of incorporation in and for Australasia revealed by this dataset strongly supports the 'functionalist' interpretations of company formation. Incorporation largely reflected the changing economic fortunes of the region, particularly the economic booms of 1839 and 1851. While the growth of banks and investment and loan companies in the 1820s and 1830s may have helped to create the wool staple economy and the frenzy of speculation between 1839 and 1841 that launched several further companies, the gold rush of 1851 to 1853 was a purely exogenous event which launched several dozen mining companies in response. Railway and steam navigation companies were founded before 1849 but incorporations surged after 1851 to meet the transportation demands created by the gold rush, while the upsurge in large banks and insurance capitals after 1851 was similarly a response to the boom conditions created by the gold rush. There was likewise no sustained increase in company formation for Australasia after the Companies Acts in Britain in 1844 and 1856, while some British companies continued to seek royal charters, and at least five companies were founded in Australasia during the 1850s under acts of partial incorporation. These facts all strongly suggest that there was no vast untapped demand for incorporation that was frustrated by the difficulty and cost of getting corporate charters. In his study of company formation in New South Wales from 1828 to 1851, Kolsen found that 51 companies published prospectuses in Sydney and only 14 secured an act of incorporation, but many of the others were speculative ventures which subsequently sank without further trace, and would probably have done so even if they had managed to secure incorporation (Kolsen, 1960). Hartwell found a similar proportion in his study of van Diemen's Land between 1838 and 1840, where only four of the 22 companies proposed were incorporated, even under comparable conditions of economic speculation (Hartwell,

1954). In other words, company formation tended to reflect wider economic conditions in the region.

Unsurprisingly, company formation was also concentrated in sectors which would benefit most from a combination large capitals, long-term investment and technical and managerial expertise such as finance, insurance, colonisation, steam shipping, railways, land development, and public utilities. The Australian Gaslight Company was founded in 1836 with a nominal capital of £100,000, for instance, but found it difficult even to raise half that, and large amounts of money had been swallowed up by the time it began operating in 1841 with purchasing the necessary equipment from Britain, adapting it to local conditions, obtaining the support of the colonial government and creating a market for gas lighting within the city (Ginswick, 1960a, Ginswick, 1961). 'What emerges is a picture of extraordinary difficulty and frustration', very similar to the pioneering efforts in London two decades before, and in both cases the success of the ventures relied heavily on the corporate structures which allowed directors to raise capital, marshal technical expertise, and manage relations with other parties, though in Australia this was done under an act of legal recognition rather than a parliamentary charter (Ginswick, 1960b, Tomory, 2012). This served as a precedent for entrepreneurs in Melbourne, Hobart and Launceston in the early 1850s as they founded their own gas companies. For example, the Hobart Gas Company was formed as an unincorporated partnership in July 1854 with a nominal capital of £50,000 and immediately applied for an act of recognition; the company's secretary reminded their solicitor in August of 'the urgency of these matters as regards the company's operations, which will be at an almost total stoppage until the act of council be obtained' (Tasmanian Archive Service, Hobart, Tasmania (TAS). NS 644/1/25). The final act was intended 'to simplify proceedings at law or in equity ... , to regulate criminal proceedings ... , and to restrict within certain limits the responsibility of shareholders' and did not grant incorporation, but included limited liability and various legal powers necessary for building and running a public utility, and was carefully scrutinised by the company before it was passed (TAS. NS 644/1/3, Directors' and Shareholders' Minute Book, 1854-8, pp. 19-59). On



this basis the company felt confident enough to invest in equipment and expertise in Britain.

However, the relationship between economic activity and incorporation was not always so direct. As noted above, many companies existed for several years or even decades before securing an act of incorporation, and were until the 1850s willing to accept some of the benefits of incorporation such as corporate personhood rather than others such as limited liability. The South Australian Company remained as an unincorporated partnership until its royal charter in 1855, for instance, and its own subsidiary, the Bank of South Australia, was spun off under a new deed of settlement in 1842 but decided not to obtain a charter, influenced by the strong opposition of its manager in Adelaide (Butlin, 1953). 'Unless the Board of Trade allow the bank to take [mortgage] securities from those who cannot pay their obligations ... a charter is an evil', he noted in 1843, for example, 'so long as the shareholders have confidence in the local management not involving them in serious liabilities', and the bank did not secure one until 1847 (ANZ Group Archives, Melbourne, Victoria. SA/8/2). By the same token, an act of incorporation sometimes proved to be wholly superfluous. The Australasian Sugar Company was founded in 1842 under a deed of settlement and secured an act allowing it to sue and be sued, but its nominal capital was only £23,000 and it seems likely that the venture could have operated just as effectively as an unincorporated partnership under a deed of settlement (Birch, 1965, Birch and Blaxland, 1956). In fact, it was re-founded in 1854 as The Colonial Sugar Refining Company on exactly this basis, with a far larger nominal capital of £150,000. It only secured a new act allowing it to sue and be sued in 1863, and left it until 1887 before formally incorporating itself.

Indeed, the phenomenon of the auction company even suggests that incorporation could be a matter of slavish imitation rather than a rational and sober calculation of commercial need. The Australian Auction Company was set up in 1839 and secured an act allowing it to sue and be sued in 1841, as one of many companies founded at the height of the boom, and proposed to profit both from taking commissions on the auction of lands and goods and by advancing credit to purchasers (Sykes, 1988). This

was an idiosyncratic business model which was apparently not copied anywhere outside in Australasia, but by the time that the company collapsed in 1842 three other auction companies, most of them equally short-lived, had been founded in Melbourne, Hobart and the Hunter Valley.<sup>2</sup> These examples strongly suggest that although certain sectors undoubtedly strongly benefitted by incorporation and the benefits it offered of limited liability, corporate personality and perpetual succession, and that broader economic and commercial circumstances often strongly influenced the decision to obtain an act, there was sufficient room for random factors to shape this process, including the accidents of timing and personality.

There are many examples from different sectors. The failures of railway companies in the 1850s, for instance, exercised a powerful impact on the pattern of railway construction and company formation in the Australasian colonies. Major railway companies were founded such as the Sydney Railway Company in New South Wales in 1849, spurred by the 'railway mania' of Britain before 1847 and the search by British capitalists for investments, but also with the practical intention of spearheading private development of the railway network (Birch, 1965). All these efforts were unsuccessful. In the case of the Sydney Railway Company, the unavoidable difficulties in acquiring an act of incorporation acceptable to both the colonial and imperial governments delayed construction until 1852, by which time the costs upon which the directors had based their financial estimates had become obsolete due to the general increase in prices during the gold rush. After various efforts to negotiate a subsidy or bailout, the colonial government of New South Wales took over all the railway companies in 1854. The Victorian railways were likewise bailed out and nationalised between 1856 and 1860, and those of South Australia in 1856, and railway construction was undertaken almost exclusively by colonial governments for the remainder of the nineteenth century. Most of these ventures seem to have been genuine efforts to exploit the potential of this new technology which were undermined from the start, Noel Butlin argued, by the gross under-estimation of unique costs of railway construction in Australia, and

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<sup>2</sup> A database I have assembled of all companies incorporated in the British Empire between 1790 and 1860 does not include any auction companies besides the four mentioned here.

inadequate returns compared to other investments, resulting from a miscalculation of the potential traffic and profits they would yield (Butlin, 2013). Unlike in Britain and the United States, where initial successes outweighed the later failures, these early examples of failure discouraged imitation by other railway entrepreneurs after 1860 and concentrated railway building in the hands of the colonial government, who provided the finance and management supplied by joint-stock companies elsewhere while subcontracting out the actual construction to private companies. Subsequent extensions of the system therefore occurred under this system rather than through private companies as in the United Kingdom and the United States, accounting for the far lower importance of transportation companies in the Australasian colonies, though the nature of most settlement along the coast rather than the interior may also have influenced this by favouring smaller private shipping partnerships over the large and incorporated joint-stock railway companies.

An even stronger instance of the impact of culture, politics, law and circumstance upon the patterns of company formation revealed by this dataset can be found in the development of the banking industry before 1860. Due to a pervasive hostility within the United States towards large banks as political and economic threats, manifested most prominently during the 'Bank War' and Andrew Jackson's decision in 1832 to block the renewal of the charter of the Second Bank of the United States, many American banks were incorporated as small, local unit banks. At least 2,430 banking companies were incorporated between 1790 and 1860 with an authorised nominal capital of \$471,716,000, or about \$194,000 or £32,000 each (Hammond, 1957, Bodenhorn, 2000, Sylla and Wright, 2013). By contrast, many in Britain and Australasia favoured the English system of private merchant and provincial banking partnerships backed by the immense power of the Bank of England, or the 'Scotch' system of large joint-stock banks with multiple branches, which were felt to provide a better mixture of stability, utility and shareholder enfranchisement (Alborn, 1998, Turner, 2014). The incorporation or formal recognition of banks founded along these lines soared in the British Isles after the legal limits on banking companies were removed in 1825, and by 1860 the British financial system was characterised by a mixture of about 132 incorporated joint-stock banks, with a total paid up capital of

£48 million or \$240 million, and a large number of private partnerships specialising in retail, commercial and merchant banking, compared to the several hundred American banks with a total-paid up capital of \$396 million in 1860 (Hannah, 2014). Sylla and Wright's figures would therefore suggest that British banking was under-capitalised, but Hannah has argued that it actually reflect the superior efficiency of its financial system. 'A system like the UK's', he argues, 'with government-regulated note issue, a nascent central bank underpinning stability, a tradition of shareholder liability, large accumulated reserves and the risk-sharing of multi-branch banking, required less capital to provide any given level of banking service than their American counterparts' (Hannah, 2014). The banking systems of the United Kingdom and the United States therefore operated along very different lines, with patterns of incorporation determined in part by cultural and political factors.

Perhaps because the economic conditions of the Australasian colonies were closer to American conditions but the British cultural influences were stronger, the banking system there was thus something of a hybrid between the two, with a combination of larger imperial and colonial banks, often with branches, and smaller local unit banks. The first banking company in the region, the Bank of New South Wales, was chartered in 1817 with a nominal capital of only £20,000, but this was increased to £100,000 when it was re-founded in 1828, the same as the Bank of Australia in 1827, and the Commercial Banking Company of Sydney was founded in 1834 with a nominal capital of £120,000 and the promise that it would 'be conducted on the principle of the Scotch banks' (1988, *Select Documents* vol. i, 64). The colonial banks incorporated between 1790 and 1860 had a nominal capital, on average, of £230,000 or \$1 million, about five times that of typical American banks. Imperial banks were founded on an even larger scale. The Bank of Australasia was chartered in 1835 with a nominal capital of £200,000, which had been increased to £900,000 by 1851, for instance, and the average nominal capital of the imperial banks – even excluding the unincorporated Union Bank of Australia, which had an initial nominal capital of £500,000 – was £830,000 (Butlin, 1961). Following British rather than American practice, both imperial and colonial banks tended to have a high ratio of paid-up to nominal capital. In December 1851, for instance, the Bank of Australasia had called

up 90 per cent of its nominal capital; the Union Bank of Australia 100 per cent; the Bank of New South Wales 95 per cent; and the Commercial Banking Company of Sydney 99 per cent (Butlin, 1953). Sydney Butlin argued that economic considerations then determined the pattern of branching, as the larger banks opened branches to pre-empt the local ones; 'sometimes this was not done quickly enough to forestall the local proposals, ... [but] usually the branch killed the plan for a local bank before it was established ... [and] even where a "local" bank commenced operations it soon succumbed', cutting down the numbers of banks and increasing the average nominal capital of those remaining (Butlin, 1953). Yet this functionalist economic reading overlooks the key importance of the wider political and economic culture, which permitted those larger imperial and colonial banks to operate in the first place rather than closing them down, as in the United States.

This can be seen by comparing the banks of the Australasian colonies with the South African colonies in this period. The two colonies were roughly similar by the 1830s in their political and economic condition, especially in the expansion of wool cultivation as native peoples were driven off their lands by European immigrants and capital. When the promoters of the Bank of Australasia were making preparations in 1833 their prospectus praised, for instance, 'present prosperity and future greatness' not only of New South Wales and van Diemen's Land but also the Cape of Good Hope and other territories, and argued that 'no means can be devised more efficacious to work a rapid improvement in the colonies than the establishment therein of joint-stock banks with ample capital and conducted on sound principles' (ANZ Group Archives, Melbourne, Victoria. A1/1/1). Their application to the imperial government to charter a bank to operate in both places was rejected in 1835, as was their later proposal for a Bank of South Africa founded on the same lines as the Bank of Australasia, on the basis that this would create financial instability. A competing scheme by local merchants in Cape Town to charter by legislative ordinance a colonial bank was likewise rejected, because the Colonial Office did not want to give up the profits from the government discount bank (Arndt, 1928, Butlin, 1961). The local merchants therefore founded the Cape of Good Hope Bank in 1836 as an unincorporated partnership under a deed of settlement, which formed the model for

all subsequent colonial banks founded throughout the Cape in the 1840s and 1850s (Arndt, 1928). By 1861 there were 27 banks with a combined nominal capital of just under £1.6 million or an average of £58,000 each, which was double that of the American banks but only a quarter of that of the colonial Australasian banks, and the overall ratio of paid-up capital only amounted to 60 per cent of nominal capital (Arndt, 1928). A combination of accidents that had little to do with economic factors therefore undermined both imperial and colonial efforts to incorporate banks in South Africa, creating a precedent which pushed the local banking system there along a more American path of small, undercapitalised local unit banks, despite its close economic resemblance with Australasia and the equally strong influence of British banking culture. It was only after the introduction of chartered imperial banks in the 1860s spurred its consolidation and capitalisation that the Cape system began to converge on the Australasian one (Arndt, 1928, Mabin, 1985). Circumstances might thus have done little to affect the overall timing and extent of company formation, but they nevertheless affected the exact forms that these phenomena then took.

This is further supported by the parallel example of the growth of the insurance industry in Australasia and South Africa, which has recently been the focus of comparative study by Monica Keneley and Grietjie Verheof (Keneley and Verhoef, 2015). Unlike in the banking sector, both regions followed broadly similar paths of development, marked by the early profusion of small local joint-stock insurers which resembled the small unit banks of South Africa and the gradual emergence of large mutual life insurance companies by the late nineteenth century, though Australasian companies had far larger nominal capitals, about £145,000 on average compared to £29,000 for South African companies, which was close to the American average of £22,000 (Sylla and Wright, 2013). Corporate imitation was also widespread. Most Australasian companies followed the Australian Marine Assurance Company in 1832 and secured an act allowing them to sue and be sued, and most Cape companies imitated the South African Fire and Life Assurance Company and remained unincorporated co-partnerships. In the United States, various economic, social and cultural factors favoured the emergence of large joint-stock insurance companies,

but in both the South African and Australasian colonies these small joint-stock companies were increasingly overtaken either by imperial companies or large colonial mutuals, who tapped into the ethos of communal self-help common in settler or frontier colonies. Although all three places developed structures for delivering insurance, economic and social conditions therefore shaped how these developed, and Robin Pearson and Takau Yoneyama have accordingly concluded that regulatory culture, legal and political regimes, the prevailing social ethos, individual entrepreneurship and even historical contingency could all moderate the choices entrepreneurs made (Pearson and Yoneyama, 2015). 'The selection of a form of organisation for new insurance ventures', they argue, 'was not always an obvious or uncomplicated choice'.

Patterns of incorporation in and for Australasia before 1860 were therefore shaped by a variety of circumstances, across time, space and sector, including the interaction between imperial and colonial companies, a phenomenon which requires further comment. There was a dramatic shift in the forms of incorporation in Australasia in the ten years between 1848 and 1857. No act was passed in any colony granting the full privileges of incorporation, rather than the more limited power to sue and be sued in the name of a nominee and a clutch of other miscellaneous privileges, before the Commercial Banking Company secured an act in 1848 (Butlin, 1953). This act was largely a result of legal changes in Britain, in particular the promulgation by the Treasury and Board of Trade of new regulations for the operation of colonial banking companies in 1846, rather than the impact of competition from large imperial chartered banks noted above, which had entered the colony in 1836. The last acts to be passed which did not grant full incorporation for companies were in Victoria in 1857 for The Colonial Insurance Company, and in New South Wales in 1863 for the Colonial Sugar Refining Company, but these were anomalous and probably reflected particular circumstances. Only six such acts were passed between 1851 and 1863, compared to 78 acts of incorporation. A major shift had therefore occurred between 1848 and 1851 in the nature of company formation in Australasia.

Since no significant legal or political changes occurred in Australasia during this period, as noted above, the shift may instead reflect the impact of growing imperial corporate activity and the influx of British joint-stock mining companies registered with the Board of Trade from 1851 in the wake of the gold rush. As Woodland has recently demonstrated, proposals were made for at least 70 companies in the three years afterwards, of which 28 survived long enough to raise at least £1 million in funds, though most were severely undercapitalised, and only one – the Port Phillip and Colonial Gold Mining Company – enjoyed any success (Woodland, 2014). Nevertheless, they may have had a powerful impact on Australasian thinking. Although registered in Britain under the Companies Act of 1844 and thus without the benefits of limited liability, both the mining companies and the banking, railway, navigation and insurance companies established to support the new economy had other benefits, and colonial entrepreneurs may have therefore felt that their companies needed the additional protections provided by colonial acts offering full incorporation and limited liability in order to compete. The British acts may thus have helped to shape corporate practice in Australasia during the 1850s, through competition rather than through emulation, as entrepreneurs and legislatures responded by expanding the existing system of piecemeal incorporation. This was a process of competitive evolution which then continued after 1860 as legislatures developed new forms such as the non-liability company in 1871 to address the problems caused by the new Company Acts.

## **CONCLUSIONS**

This quantitative approach to the patterns of company formation in and for the Australasian colonies before 1860 has therefore suggested a distinct, and distinctive, pattern. In some respects it resembled the United States, being characterised by a comparably high volume of company formation per head of population, and by its corollary, a high turnover or failure among individual companies. This reflected the origin of most companies in the economic booms of 1839 to 1841 and 1851 to 1853, as speculative ventures which either lacked the financial and managerial resources to survive or were never seriously intended to survive anyway. Legal factors had little to do with the broad profile of company formation during this period, though



the passage of the Company Act in the United Kingdom in 1844 may have had a delayed impact upon the nature of company formation and the growing use of full incorporation after 1851 as British companies entered the Australasian economy with these greater powers. However, in a number of other respects the pattern of incorporation was closer to the United Kingdom, which Hannah has argued was characterised by larger, well-capitalised companies concentrated in sectors with a heavy 'public interest', and operating alongside a diverse series of unincorporated partnerships, trusteeships and sole proprietorships. Companies founded in and for Australasia tended have larger nominal capitals than their American counterparts, and in sectors such as banking this was matched by a high level of paid-up capital. Though the rise of banking companies reflected the growing size of the economy and the demand for specialisation financial services and investment, the exact form this took also reflected a complex combination of British cultural prejudices and historical circumstances, which meant that the banking sector more closely resembled practices in the United Kingdom than the United States or South Africa. Finally, in some areas the colonies followed their own path. The gold rush altered the practice of incorporation and led an early adoption of general incorporation for mining companies in Victoria in 1855, while accidents such as the failure of railway companies in the same decade meant that subsequent investment was organised through government departments and not the private railway corporations which dominated patterns of incorporation in the United Kingdom and the United States.

The dataset presented here therefore broadly supports the 'functionalist' reading of company formation and incorporation in both the Australasian colonies and, more generally, in the European world. In the Australasian case, company formation was largely a product of economic demand, which determined both its scope and scale. How far incorporation helped to stimulate that demand by facilitating wider growth is a much more difficult question, and will probably only be answered by studies of incorporation within individual sectors, and by comparisons across different regions. In the case of the banking and insurance sectors, where comparisons exist between colonies in Australasia and South Africa, Australian companies tended to be larger and to have greater legal powers, in many cases due to competition from imperial

companies trying to muscle into the market. But how far the smaller size of South African companies reflected the lack of incorporation, or whether the limited level of incorporation reflected the smaller size and lesser demands of these banks, is hard to say. Certainly the comparison with the United States suggests that incorporation did not automatically lead to larger companies, especially when there were wider political and cultural factors to prevent it, but how far this affected the pattern of wider economic development across these different regions or was a product of that remains a subject for further study. In general though, legal and political changes were in general important chiefly insofar as they offered new opportunities which entrepreneurs could use strategically to meet their aims.

This helps to explain the response that met the new Australian company acts of the 1860s. Imported virtually wholesale by colonies from the United Kingdom to meet the demands of British investors putting their money into Australia, and applied without reference to local commercial and bureaucratic conditions, they met a lacklustre response outside the mining sector until the 1880s (Butlin, 2013, McQueen, 1991, Lipton, 2007). In New South Wales, which did not adopt a company act until 1874, at least 40 more companies were founded by individual act of incorporation, suggesting that it remained a viable option for those who wanted its benefits, and that the chief avenues for capital aggregation and investment remained either the proprietorship and partnership, on the one hand, or the imperial joint-stock company, on the other. Entrepreneurs continued to use the forms of corporate organisation that seemed most appropriate to their current needs, and the economic development of Australia and New Zealand in the late nineteenth and early twentieth centuries would therefore probably not have been noticeably different if the limited liability joint-stock company had been available for easy adoption at a much earlier stage. Even after it was introduced, entrepreneurs used these new corporate opportunities in much the same way they had done since 1790, informed by a mixture of economic rationality, imitation and historical accident. The pattern of company formation in Australasia before 1860 was thus consistent with, and constitutive of, the equally pragmatic practices of 'settler

capitalism *sans* doctrines' which Ville and Merrett have argued defined the post-1860 Australian economy.

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**Table 1: Incorporations in and for Australasia, 1790-1860**

<b>Decade</b>	<b>Australasia</b>	<b>United Kingdom</b>	<b>United States</b>
1790-1800	0	0	283
1801-10	0	0	867
1811-20	1	0	1,470
1821-30	6	2	1,659
1831-40	27 (19)	2	5,106
1841-50	19 (13)	16	4,471
1851-60	73 (65)	108	8,210
Total	126 (104)	128	22,419
Nominal Capital (£)	£13.6 million	Unknown	£921 million
Nominal Capital (\$)	\$62.7 million	Unknown	\$4,253 million
NOMCAP per Company <sup>3</sup> (£)	£130,711	Unknown	£41,769
NOMCAP per Company (\$)	\$603,280	Unknown	\$192,780

Sources: Colonial corporation acts are taken from the databases at 'Australasian Legal Information Institute' [<http://www8.austlii.edu.au/databases.html>]. British corporate registrations are taken from the annual lists of provisional registrations between 1844 and 1856, published as 'Returns from the office for the Registration of joint stock companies established under 7th & 8th Vict. c. 110' (PP 1845 (577); 1846 (694); 1847 (293); 1847-8 (339); 1849 (128); 1850 (244); 1851 (119); 1852 (147); 1852-3 (216); 1854-5 (474); 1856 (77)) and between 1856 and 1861 as 'Return of the names of all companies registered under the Joint Stock Companies Act (1856) with limited liability' (PP 1856 (60); 1857-8 (324); 1859 (188); 1862 (58)). Royal charters are taken from the record of charters granted on the Privy Council Office website [<https://privycouncil.independent.gov.uk/royal-charters/chartered-bodies/>]. Data on the United States are taken from Sylla and Wright, 2013. Figures in brackets exclude colonial acts of recognition for British companies.

<sup>3</sup> Not including acts of recognition for imperial companies or mutuals.

**Table 2: Incorporations in and for Australasia, 1790-1860, per 100,000 people**

<b>Decade</b>	<b>Total Companies</b>	<b>Population</b>	<b>Companies per 100,000 people</b>	<b>United States</b>
1790-1800	0	4,045	0.00	6.13
1801-10	0	8,756	0.00	13.82
1811-20	1	17,830	5.61	17.42
1821-30	8	48,109	16.63	14.74
1831-40	29	133,150	21.78	34.11
1841-50	35	229,691	15.24	22.21
1851-60	181	553,113	32.72	30.05

Sources: see Table 1. Totals include colonial acts of recognition for British companies.

**Table 3: Incorporations in Australia, 1790-1860, by region**

<b>Colony</b>	<b>Number</b>	<b>Percentage</b>	<b>Nominal Capital</b>	<b>Percentage</b>	<b>Average Size of Company<sup>4</sup></b>
New South Wales	63 (52)	50.0	£6.5 million	47.5	£124,269
van Diemen's Land	27 (23)	21.4	£1.6 million	11.9	£70,170
Western Australia	0	0.0	£0.0 million	0.0	£0
South Australia	10 (5)	7.9	£0.4 million	2.7	£73,000
New Zealand	6 (5)	4.8	£0.1 million	1.0	£73,360
Victoria	20 (19)	15.9	£5.0 million	36.9	£263,947
Total	126 (104)	100.0	£13.6 million	100.0	£130,711

Sources: see Table 1. The numbers in brackets are total incorporations excluding mutuals and colonial acts of recognition of imperial companies.

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<sup>4</sup> Not including acts of recognition for imperial companies or mutuals.

**Table 4: Incorporations in and for Australia, 1790-1860, by type**

Type	Australasia	Percentage	United Kingdom	Percentage	Total	Percentage	United States	Percentage
Financial	55 (38)	40.8	15	11.7	64	25.8	4,551	20.3
Industrial	31 (28)	25.8	35	49.2	104	37.9	6,148	27.4
Service	9 (8)	6.7	63	11.7	23	9.3	1,089	4.9
Transport	31 (30)	26.7	35	27.3	67	27.0	10,631	47.4
Total	126 (104)	100.0	128	100.0	248	100.0	22,419	100.0

Sources: see Table 1. The numbers in brackets are total incorporations excluding mutuals.

**Table 5: Incorporations in Australia and the United States, 1790-1860, by type and nominal capital**

Type	Australasia	Nominal Capital	Percentage	Average (£)	Average (\$)	United States	Nominal Capital	Percentage	Average (\$)
Financial	55 (38)	£7.8 million	57.5	£205,587	\$948,862	4,551	\$685 million	15.0	\$150,486
Industrial	31 (28)	£2.5 million	18.5	£90,000	\$415,385	6,148	\$935 million	20.4	\$152,065
Service	9 (8)	£0.3 million	2.2	£36,875	\$170,912	1,089	\$109 million	2.4	\$99,612
Transport	31 (30)	£3.0 million	21.8	£98,887	\$456,403	10,631	\$2,852 million	62.3	\$268,288
Total	126 (104)	£13.6 million	100.0	£130,711	\$603,280	22,419	\$4,580 million	100.0	\$204,309

Sources: see Table 1. The numbers in brackets are total incorporations excluding mutuals.