

CORPORATE LAW

NOTES

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1 REGULATORY FRAMEWORK

INTRODUCTION + HISTORY

Corporate law = structure and regulation of corporate entities

Why is company law important?

- “The limited liability corporation is the greatest single discovery of modern times. Even steam and electricity are less important than the limited liability company”. — N M Butler, President of Columbia University, 1911.
- “We may think this is a rather extravagant claim, but its general thrust is clear, and telling: the importance of the corporate form and of limited liability over the past century and a half has been immeasurable; the greater part of the commercial expansion, the scientific development and the many other achievements which have changed the shape of society during and since the industrial revolution have come about through the medium of the limited company”. — LS Sealy, *Company Law and Commercial Reality* (1984).
- companies are essential actors in the economy — they are the entity of choice for business and commerce in Australia and internationally

History of company law

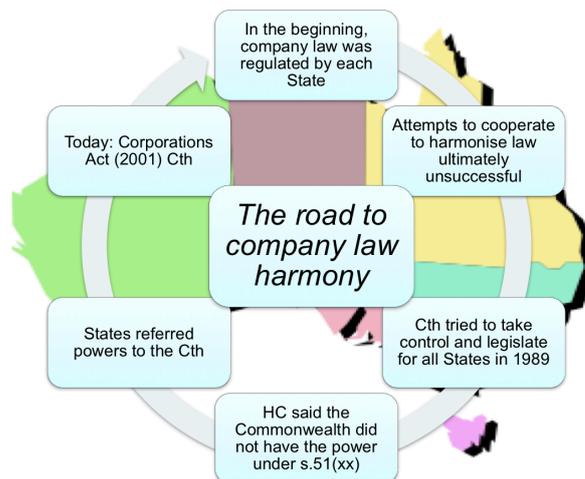
- 15th century — corporate aggregates created by Royal Charter granted to monasteries, boroughs and trade guilds
- Revolution of 1688 — companies created by Private Acts of Parliament

Joint Stock Companies

- 17th century —
 - joint stock companies
 - unincorporated entities
 - basis of the modern day company
 - shares transferrable
 - voting rights attached to shares
 - profits distributed through dividends
- *Bubble Act 1720* (UK) —
 - speculation in joint stock shares
 - South Sea Company
 - Bubble Act — confines trading to the sale of shares in formally incorporated bodies
- 1825 — Bubble Act repealed
- 1844: Incorporation by registration —
 - i.e. not by Royal Charter or Act of Parliament
 - distinct legal entity with perpetual succession **but** shareholders did not have limited liability
 - “... legislative ancestors of modern company law.” (Ford, p. 41)
- *Limited Liability Act 1855* —
 - liability of investors ‘limited’ to the amount they agreed to invest
 - catalyst: large amount of capital required to finance new railways
 - ‘limited’ at end of company’s name warned of shareholder’s diminished liability (Today: Ltd, Pty Ltd)

Company law in colonial Australia

- *Companies Act 1862* (UK) — adopted by Australian colonies as their company law
- Late 19th century Victorian Developments —
 - need for capital to fund gold mining prompt unique Victorian company law developments
 - 1871: no liability mining company



- 1896: failures in the 'land boom' lead to restrictions on 'proprietary companies' — compulsory audit and annual presentation of financial statements
- 1901: Federation —
 - **s 51(xx)** Constitution: The Parliament shall... have power to make laws ... with respect to: ... Foreign corporations, and trading or financial corporations **formed** within the limits of the Cth
 - each state retained its own company legislation

Quest for Cth/State uniformity

- 1961: 62 cooperative regime — states enacted uniform companies legislation, but the state Acts were not uniform and variations increased with time
- *Companies Act 1981* (Cth) —
 - Cth enacted *Companies Act 1981* (Cth) in ACT and NT per **s 122** Consti
 - each state enacted a Companies Code that was uniform with the Cth Companies Act

Quest for Cth Control

- *Corporations Act 1989* (Cth) — Cth legislated independently of the States to introduce a national scheme: *Corporations Law* scheme
- *NSW v Cth* (1990) — HC held that the Cth lacked power under the Constitution to make laws about the incorporation of companies

The road to company law harmony in Australia

- Today, companies are regulated by Commonwealth legislation, the *Corporations Act 2001* (Cth)
- Originally, company law was regulated by each State (and the Commonwealth on behalf of the Territories)
- This fragmented 'federal' system resulted in 7 separate sets of legislation that regulated company law in Australia
- Throughout the 20C, attempts were made to cooperate between the States and Commonwealth to achieve a uniform companies law
- These attempts were not very successful, so in 1989 the Commonwealth tried to take control and legislate for all States (so there would be just one piece of legislation)
- Problem: **s 51(xx)** of the Australian Constitution
- HC in *NSW v Cth* (1990) said the Commonwealth did not have the power under **s 51(xx)** of the Constitution to legislate in relation to the 'incorporation' of companies
- After this, the States all agreed to refer their powers in respect of companies to the Commonwealth
- Commonwealth then passed the *Corporations Act 2001* (Cth)

Section 51(xx) of the Australian Constitution

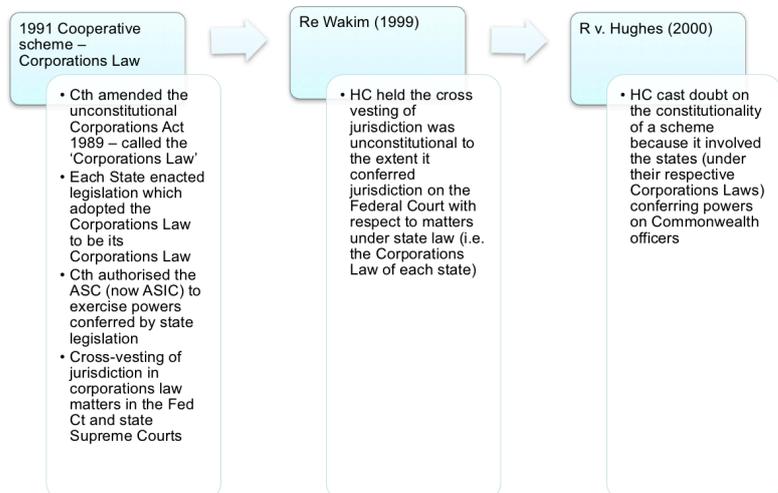
- **s 51(xx)** empowers the Commonwealth Parliament (i.e. **not** the States) to: "make laws ... with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth"

NSW v Cth (1990)

- does **s 51(xx)** grant the Cth the power to make laws in relation to the 'incorporation' of companies?
- s 51(xx) empowers the Cth to: "make laws ... with respect to... foreign corporations, and trading or financial corporations **formed** within the limits of the Commonwealth"

Held — majority of High Court (6:1)

- the word 'formed' is used in the past tense to refer to companies that have already been incorporated
- this means the Cth **cannot** rely on **s 51(xx)** to make laws about bringing new companies into existence (i.e. the process of incorporating companies)
- "the power conferred by **s 51(xx)** to make laws with respect to artificial legal persons is not a power to bring into existence the artificial legal persons upon which laws made under the power can operate" (para 8)



Corporations Act 2001 (Cth)

- state referral of power to the Cth under **s 51(xxxvii)** Consti
- Act commenced operation on 15 July 2001
- The Cth was able to enact this legislation after the States agreed to refer their power over corporations to it
- The Corps Act is to be read in conjunction with the principles of common law relating to companies which have evolved over the years

Note: referral needs **continuous renewal** (see right)



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Corporations (Commonwealth Powers) Act 2001 PROCLAMATION OF EXTENSION OF VICTORIA'S CORPORATIONS LAW REFERENCES

I, Linda Dessau, Governor of Victoria, with the advice of the Executive Council and under section 6(1) of the **Corporations (Commonwealth Powers) Act 2001**, fix 15 July 2021 as the day on which both the references under section 4 of that Act terminate.

Given under my hand and the seal of Victoria on 21 June 2016
(L.S.)

LINDA DESSAU
The Honourable Linda Dessau AM
Governor
By Her Excellency's Command
MARTIN PAKULA
Attorney-General

REGULATORS

There are 3 main regulators:

- 1) Australian Securities and Investments Commission (ASIC)
- 2) Australian Stock Exchange (ASX)
- 3) Takeovers Panel

1) The Australian Securities & Investments Commission (ASIC)

- Commonwealth Agency (b/c referral of State power); ASIC is the principal body charged with the administration of the law relating to companies
- responsible for ensuring the *Corps Act* is complied with
- legislative authority:
 - *ASIC Act 2001* (Cth)
 - *Corporations Act 2001* (Cth)
- powers include:
 - investigate breaches of the *Corps Act* — includes power to compel a person to produce all relevant books and records
 - instigate civil proceedings and criminal prosecutions (concurrent with DPP)
 - advises ministers on necessary changes to the *Corps Act*
 - educational role
- more than 2 million Australia companies; 99% of these companies limited by shares
- Accountability of ASIC: The Parliamentary Joint Committee on Corporations and Financial Services is elected to provide some level of parliamentary supervision over the operations of ADIC

2) Australian Stock Exchange

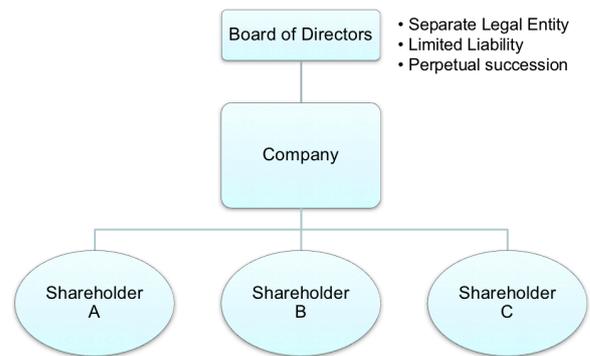
- private company
- public companies that 'list' on the stock exchange 'contract' with the ASX that they will comply with the Listing Rules

3) Takeovers Panel

- a peer reviewed body at least 5 members; The Takeovers Panel has been established as the primary forum for the resolution of disputes arising from takeover transactions
- important part of the machinery for the control of company takeovers (Formerly, these powers were held by the Courts)
- has power to declare 'unacceptable circumstances'

OTHER REGULATORS

- The **Companies Auditors and Liquidators Disciplinary Board** — established to register and discipline company auditors and liquidators who do fail to discharge their duties properly



RECENT REFORMS

- The *Insolvency Law Reform Act 2016* (Cth) aims to promote a high level of practitioner professionalism and competency, enhance transparency and communication between insolvency practitioners and stakeholders, and promote increased efficiency in insolvency administration.