

## **MODULE ONE – INTRODUCTION TO COMPANY LAW**

corporation – a device for obtaining individual profit without individual responsibility

### **Purpose of Company Law**

- enabling law – designed to enable entrepreneurs to take advantage of the corporate form of business organisation (formation of separate legal entities)
- why facilitate use of company structure – in terms of social / economic institutions, the modern company is said to be the most revolutionary discovery of our times

### **Advantages:**

- provides an efficient framework for capital aggregation + locking capital in enterprise
  - earliest combination [method of pooling resources] was the partnership. However, because of the ease with which participants can withdraw their investment partnership is not a very efficient instrument of business organisation, especially in respect of large enterprises
- provides for separate legal personality, continuity and limited liability
  - limited liability has not always been available to business people. It was introduced in England in 1855 after a long debate. Recognised that there was need to limit the liability of, and thus protect, participants in a business venture who had no control over the conduct of its affairs
- advantages of limited liability: promotes entrepreneurial activity
  - enables people with business ideas to raise capital without fear of personal recrimination should venture not succeed
  - encourages people to contribute capital to business ventures without fear of personal ruin should venture fail
- disadvantages of limited liability:
  - trap for creditors especially involuntary creditors
  - may encourage reckless activity

### **Use of Company Structure Encouraged**

- despite problems associated with limited liability, there is wide recognition that the limited company is a useful instrument of economic co-operation and wealth creation and so should be encouraged

### **Company Law as Regulatory Law**

- company law regulates the formation, functioning and operations of companies, including the activities of controllers
- aim: to prevent abuse of corporate form, protect the interests of investors and society generally

## Company Law in Australia

- introduced by various colonies based on English Law
- 1862 [English] *Corporations Act* adopted by most colonies
- Victoria introduced some innovations
  - 1871 – introduced No Liability Companies for Mining Companies
  - 1896 – introduced requirement of compulsory audit and presentation of financial reports, this was required only in respect of public companies
- imported law applied as state law
  - problem – failed to reflect that Australia basically one continent-wide (and later national) economy. Dissimilarities in law and its administration imposed unnecessary cost and inconvenience on business community
  - solution – attempts to introduce uniform legislation
  - achieved in 1961 – *Uniform Companies Act* based on *Companies Act* 1958 Vic
  - but still state legislation, old problems soon resurfaced
- need for change intensified by allegations of improper conduct during 1960s boom – hectic activity of Securities Exchanges and attendant problems
- establishment of Rae Committee – recommended tightening of legislation and creation of national authority to regulate dealing in securities
- 1973 Labor government announced plans to establish national companies law, but lost office before the task was accomplished
- 1974 Non Labor governments formed Inter State CAC (Vic, NSW, Qld and later WA) with a view to providing uniform companies and securities administration)
- 1978 Co-Operative Scheme:
  - uniform legislation – *Companies Code; Takeovers Code & Securities Industry Code* enacted by Commonwealth for ACT and mirror legislation enacted
- - ministerial council
  - NCSC
  - state corporate affairs commissions
- deficiencies of co-operative scheme, old problems persist:
  - dissimilarities in administration of law
  - requisite reforms not always achieved
- 1989, May – commonwealth enacts the *Corporations Act* to enable it to assume complete control over all corporate affairs

- 1990, February – act held unconstitutional
  - by an overwhelming majority (6-1) the High Court held that the commonwealth has no power to legislate on matters governing the incorporation of companies – *The State of New South Wales v The Commonwealth of Australia* (1990) 8 ACLC 120
- 1991 arrangements:
  - uniform law – commonwealth enacts law for the ACT, ACT law adopted by the States and Territories
  - ministerial council – commonwealth minister (originally the Attorney General now the Treasurer) permanent chairman of ministerial council
  - weighted voting in favour of commonwealth minister
  - ASC (Now ASIC) sole agency responsible for policy development and administration of law
  - cross vesting of jurisdiction – Federal Court principle forum for litigating corporate law matters instead of State Courts
  - offences against *Corporations Law* to be treated as offences against commonwealth law – commonwealth DPP responsible for offences against *Corporations Law*
  - scheme built upon a novel legislative device designed to deliver a single national corporate law regulatory regime, arrangement effectively revised co-operative scheme aimed at overcoming many of the old problems
- 1991 - 2000 Developments – scheme under strain
  - cross vesting scheme invalidated – *Re Walkin; ex parte McNally* (1999)
  - offences: enforcement on national basis threatened – *R v Hughes* (2000)
  - ASIC incorporation power challenged – *GPS First Mortgage Securities v Lynch*
    - states response: *Corporations (Administrative Actions) Act 2001*
- solution:
  - agreement by all states to refer their corporations power to commonwealth
  - pursuant to this agreement, the commonwealth enacted the *Corporations Act 2001*, the *Australian Securities and Investments Commission Act 2001* and other associated legislation relating to company law
  - these commonwealth laws govern all aspects of company law and apply throughout Australia, A Truly National Scheme of Corporations Law has now been set in place in Australia

