

WEEK ONE: BUSINESS ORGANISATIONS AND THE HISTORY OF THE CORPORATION

- Chapter 1: context, history and regulation
- Chapter 2: corporate law theory and debates

AUSTRALIAN CONTEXT

SMALL BEGINNINGS: 1788-1850S

- Early corporate activities were dominated by the English Deed of Settlement, companies of World Charters and companies incorporated by **special acts of parliament**
- Companies incorporated by **the Crown or by parliament** were the first examples of joint enterprises which resemble modern business corporations
 - These were associations formed for some commercial or public purpose that petitioned for legal status as entities in their own right
- Limited liability of members for debts of the business was not an express part of the grant of incorporation, but it was assumed that each member was liable for their capita contribution
- During this time the alternative to incorporation was trade as a commercial partnership
- Rapid expansion of trade in 18th century required commercial associations to have large amounts of capital

BOOM AND DEPRESSION: 1850S-1890S

- Gold rush in the 1850s prompted the creation of many new public companies concerned with mining, waterworks and other activities associated with the development of the gold fields
- Boom period of 1880s: dramatic increase in no. of new companies
 - Due to a growth in investment in speculative land developments through capital from Britain

EARLY MOVES TOWARDS UNIFORMITY: 1890S-1930S

- Economic crash in 1890s – collapse of many companies and growing acceptance for more direct governmental regulation of economic activity
- Resulted in **the Companies Act 1896 Vic**
- Calls for national Commonwealth legislation
- Section 51 (xx) of the Australian Constitution provides that the Commonwealth shall have power to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth
- 20th century: each state maintained and revised its own corporations legislation along with its own system of companies administration

FIRST UNIFORM LEGISLATION: 1950S-1980S

- Economic growth following WW2 highlighted the differences in State legislation and administration which made corporate activity on a national scale difficult
- Resulted in the **Uniform Companies Act** which was adopted by tall the states and territories
- Changes to legislation weren't matched by administrative uniformity
- The various uniform acts continued to be administered by the different state bureaucracies with each differing in their approaches to administrative practice and quality

- The legislative uniformity was gradually eroded during the 1960s as different states began to amend their versions of the uniform corporations legislation in response to local developments in the companies and securities field
- Boom and crash of the mining industry late 1960s: serious attention being paid to securities laws at State and federal levels
 - 1970, NSW, Vic, Qld, WA enacted uniform legislation to regulate securities industry, however there were significant differences between the Acts
- NSW, Vic, Qld, WA entered into their own agreement to establish the Interstate Corporate Affairs Commission (ICAC)
 - Objective was to promote greater uniformity in the companies and securities legislation and establish common standards and coordination in administering the law
- **Uniform Securities Industry Act 1975** passed in the ICAC states

THE COOPERATIVE SCHEME: 1980-1990

- It was realised over time that a national scheme was necessary. ×Companies wishing to raise funds or conduct business on a national basis were frustrated by the need to meet different requirements in each State.
- Object was to promote commercial certainty and greater efficiency in the capital market which would be achieved through uniform legislation
- Also wanted to maintain the confidence of investors through suitable measures for their protection
- Involved Commonwealth and six state govts
- Attempted to compromise between national legislation enacted by Commonwealth and uniform legislation enacted by States
- **Companies Act 1981**: dealt with general matters of incorporation and company affairs
- Advantage was that a company trading in more than one participating jurisdiction only had to lodge documents in its jurisdiction of corporation
- Under this scheme the Commonwealth Parliament passed a package of legislation regulating companies and securities that applied directly in the ACT
 - Each state then passed statutes applying the Commonwealth Acts as part of the laws of that State

CORPORATIONS ACT 1989

- Challenge to the legislation which focused on the constitutional power of the Commonwealth regarding incorporation under s 51(xx) of the Constitution
- HC handed down its decision in *NSW v Commonwealth* holding that the Commonwealth government had no power to legislate for the incorporation of trading and financial corporations
- After the High Court decision, a compromise was reached between the States and Commonwealth and the States agreed to adopt the Commonwealth legislation by passing an Application Act, known as the "Corporations Law.
- ASIC responsible to Commonwealth Parliament
- × Corporations Laws of each State administered and enforced on a national basis "as if those laws constituted a single law of the Commonwealth"
- Different to the Cooperative Scheme because for the first time the Commonwealth government gained control of the administration, enforcement and reform of corporate law

NATIONAL SCHEME: 1991-2001

- New national scheme of uniform companies and securities regulation to be based on the Corporations Act 1989 and the Australian Securities Commission Act 1989
- Proposed national uniform legislation, uniform administration of the legislation and a single court system to adjudicate matters arising under the scheme
- The States and the NT each passed their own application legislation – these acts applied the substantive and interpretive provisions of the Corporations Act 1989 as the law of each state and territory jurisdiction thereby ensuring that the substantive law on corporations applied australia wide

- Scheme was criticised in Re: Wakim – court held that those parts of the scheme that purported to vest State judicial power in the federal court were invalid because ss 75-77 of the Constitution do not permit State jurisdiction to be conferred on the Federal Court
 - Meant that disputes under the corporations legislation had to be heard in the State supreme courts whilst the federal court retained some limited jurisdiction
- R v Hughes raised significant doubts about the validity of the second component of the national scheme – uniform administration
- The court held that the Commonwealth cannot authorise its officers or authorities to undertake functions or exercise powers conferred by a state law unless those functions or powers are supported by one or more of the heads of legislative power in the Constitution
- As a result of Hughes, there were doubts about the capacity of ASIC and other Commonwealth authorities to regulate certain areas of the state corporations legislation

Resulted in the current scheme: Corporations Act 2001 (Cth) and the Australian Securities Investment Conditions Act 2001 (Cth)

- Agreed to pass legislation to refer the necessary powers to the Commonwealth to enable the Commonwealth to enact corporations legislation which would apply in the territories and in all participating states

CORPORATIONS ACT 2001 (CTH)

- Under this agreement, the States passed legislation referring the making and amending of laws in respect of corporations to the Commonwealth.
- ×This legislation was passed by all States and the new scheme commenced on 15 July 2001 when the Corporations Act 2001 (Cth) and Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) came into force.
- Commonwealth legislation intended to apply in the territories and in those states that have agreed to refer power to the Commonwealth
- Jurisdiction includes all states and territories in AUS
- ASIC has power under the Act to issue declarations (known as class orders) that omit, modify or vary the application of provisions in the Act generally, or in relation to a class of persons
-

THE HISTORY OF CORPORATIONS

- Separate legal entity formed under the Corporations Act
- Owners are called shareholders and their ownership interest is represented by the number of shares they hold in the company
- Corporations Act is the key legislation which regulated companies in AUS
- ASIC is the regulatory body which oversees companies in AUS
- Regulates the creation, operation and termination of companies in AUS – Corporations Act

EARLY CORPORATIONS – 17TH CENTURY

- South Sea Bubble case and the Bubble Act 1720
- The South Sea Company was formed in 1711, initially with the object of obtaining a trade monopoly with rich Spanish colonies in South America and the West Indies
 - In 1719 the company offered to take over almost all the national debt from the British government
 - Creditors of the British government were being offered the chance to swap their claims against the Government for shares in what looked like a prosperous company
 - The government benefitted because the interest payable on the debt owed to the annuity holders was to be reduced
 - The benefit to the company lay in holding a loan on which the government paid interest, and the anticipation that this could be used by the company to raise further sums to extend its trading venture
 - The success of the scheme depended upon the market value of the company's shares remaining high so that annuity holders would be tempted to invest

- Was a huge success initially, however eventually the share price collapsed and the South Sea bubble burst
- The boom in stock speculation spilled over into the stocks of other companies

THE BUBBLE ACT

- The unparalleled level of share speculation eventually led to the collapse of many of the 'bubble companies' in 1720
- The purpose of the Act was an attempt to confine the benefits of the boom market to the South Sea Company
- The Act sought to achieve this by making it illegal to form a joint stock company and to create transferable shares without a grant of legal authority, either by Act of Parliament or by Royal Charter
- Unincorporated companies with transferable shares were prohibited, and only incorporated companies and common law partnerships were allowed to continue
- The main alternative to incorporation for commercial enterprises was to operate as a partnership – however, problem was that partnerships had their own legal restrictions
- Partnerships at common law lacked two features needed for an investment vehicle: free transferability of shares and continuity of existence

DE FACTO CORPORATION

- To meet the demands for a commercial entity that would overcome these limitations but not fall foul of the Bubble Act, lawyers developed a de facto corporation – an association based on equitable trust
- Investors subscribed funds which were then vested in trustees to be held on trust and managed according to the purposes specified in the deed of settlement
- The deed contained a series of mutual promises and undertakings between the investors (members of the company) and the trustees
- These 'deed of settlement' companies continued to use the joint stock principle, but relied upon equity law to overcome the legislative prohibitions and the common law restrictions
- Owners of shares in deed of settlement companies had little, if any involvement, in management of the company, which was conducted by a managing committee
- Deed of settlement companies were only recognised in equity, whereas the courts of common law only recognised incorporated companies or partnerships

CORPORATIONS IN THE 18TH CENTURY

- Granting incorporation powers through legislation – over 100 statutory companies created
- Corporations were created by charter or statute so that people could pursue their profit making interests with some public benefit

CORPORATIONS IN THE 19TH CENTURY

- The rationale for limited liability
- Trading Companies Act 1834
- Joint Stock Companies Act 1844
- Joint Stock Companies Act 1856
- Companies Act 1862
- Limited liability – only liable for the money you put into the corporation
- Bubble Act was repealed in 1825
- There were three types of association in use: common law partnership, the unincorporated joint stock company formed by deed of settlement, and the incorporated company formed by Charter or special Act of Parliament
- By the end of the century, most companies on the register were small affairs hoping to escape the disadvantages of partnership law and gain the benefit of limited liability
- Company law had expanded to encompass large commercial investment based enterprise, small one person businesses, and non profit organisations such as clubs and charities
- Public companies developed from the joint stock companies via the deed of settlement companies

JOINT STOCK COMPANIES ACT 1844

- Was the first step towards establishing a system of company law based on legislative regulation, rather than common law doctrine
- The Act signalled the merging of the joint stock fund as a form of economic activity with the idea of incorporation
- Based upon two elements that continue to underpin contemporary corporate regulation: public registration of companies and public financial accountability
- The Act introduced the process of incorporation by registration
- All newly created deed of settlement companies with more than 25 members, or with shares freely transferrable without the consent of all the members, were required to register with the Board of Trade
- The registration requirement was intended to act as a form of public notification of the formation of the company
- Did not provide for limited liability of members as a consequence of incorporation – instead each shareholder in the company was liable for the company's debts
- The second significant element in the Act was a set of requirements concerning the publicity of the company's financial affairs
- The Act was amended in 1855 with the consequence that limited liability became an entitlement consequent to incorporation of company
- The liability of a shareholder was limited to the amount, if any, which was owed to the company for their shares

JOINT STOCK COMPANIES ACT 1856

- Introduced the process of incorporation by registration of a Memorandum of Association
- The minimum number of people necessary to incorporate was reduced from 25 to 7
- Required that partnerships of more than 20 people must be incorporated under the Act in order to carry on business
- Continued the idea that there was no separation between the company and its members

THE COMPANIES ACT 1862

- Model for the first companies statute in AUS
- Indicated that the company was now regarded as something distinct from its members
- The legislation between 1856 and 1862 was designed to serve the interests of the English investor class to stop the flight of investment and incorporations from England to Europe
- Another interpretation is that the legislation embodied a permissive attitude towards the creation and operation of companies and had the effect of shifting the risk of company failure onto creditors, such as banks and large merchants

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

- In general, ASIC's main functions are (ASIC Act 2001):
 - regulation, and maintenance of corporate information;
 - collection and processing of information on companies (eg: registration);
 - investigation, surveillance and enforcement;
 - Advice on law reform and education; and
 - consumer financial protection.
- Sole authority responsible for administering the Corporations Act
- The Australian Competition and Consumer Commission (ACCC) – the two agencies will refer complaints to the most appropriate agency, exchange information and if required undertake joint responses to problems in the market

THEORIES USED TO REFLECT ON CORPORATE LAW

CONCESSIONAL THEORY

- Treats the corporation as an artificial entity created by the state – their existence is subject to the government's discretion