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Week 1. Introduction to Company Law

Introduction

Main Legislation: Partnership Act 1892 (NSW) → Freedom of individual to own property

Perennial Questions

- The political philosophy of liberalism emphasises that society is made up of private individuals who possess rights, owe each other duties and should be personally liable for their actions
 - How could a legal system have built upon such ideas accommodate the growth of group enterprises
- **history of corporate law:** can be interpreted as a series of attempts to address this fundamental question. The question subsumes/includes four points of tension which are central to corporate regulation in a liberal legal system
 - **1. There is a group versus individual issue**
 - To what extent should the law recognise corporations, rather than individuals or investors, as bearers of rights, obligations and liabilities
 - Should the members of the group enterprise be able to minimise the risk of commercial failure by limiting their liability
 - **2. The second tension rluves between the roles of management and 'ownership' of the corporation**
 - Liberal philosophy emphasises the freedom of the individual to own property and within their limits, to control its use and disposal
 - Most large corporations are structured in a way that separates the 'ownership' function of its members from the management function of directors and company officers
 - **3. Third tension which is the debate between facilitation and intervention**
 - What is the role of the government regulation in relation to corporations
 - If, for example, corporations are regarded primarily as private entities, then the role of the state should be facilitative rather than interventionist
 - The law should assist individuals in private pursuit of profit because this, in turn, will promote economic efficiency
 - **4. The fourth tension is 'private versus public issue'**
 - This involves a debate about the legal and pollical status of corporations
 - For example, to what extent should corporations be regarded simply as associations created by, and operating for the benefit, of private initiative, versus a view in which, because they owe their legal existence to the state, they have broad public and social responsibilities

History of Corporations

English Company Law in the 17th and 18th Century

- Across the 17th and 18th century we see these various features emerging in different types of joint enterprises → earliest examples of the joint enterprises to bear some resemblance of business corporations of today were companies incorporated either by the Crown or by the Parliament
- The Corporation as Public Law Privilege Model
- The Corporation as the conduit for colonial expansion
- The Corporation as an instrument of capitalism- joint stock
 - early corporations were based on the idea that lies at the heart of the development of its modern company- **the joint stock principle**
 - Each original member of the company contributed to a common fund that was managed by a committee selected from the members
 - **joint stock** referred to the trading or floating capital that was used either by the company in the course of the enterprise
 - Idea that the ownership of the capital contributed by investors could be separated from the control of that capital
- During the 17th and 18th centuries the alternative to incorporation was to trade as a commercial partnership. The idea of the partnership preceded the incorporated company
- The Corporation as a vehicle for speculation and fraud → The South Sea Bubble case and the Bubble Act 1720

Corporations in the 18th Century

- Granting incorporation powers through legislation- over 100 statutory companies created
- The Deed of Settlement company and its features
 - Promoting private interests
 - Development of the modern corporate culture
- Alignment of the corporation with the economic and political context/though of the time
 - Corporations were created by charter and statute so people could pursue a joint making interest with some public purpose

The Bubble Act and its consequences

- The British parliament passed the first instance of the modern company legislation- the **Bubble Act 1720**
- The purpose of this 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 the Act of Parliament or by Royal Charter

The 19th Century

- At this time there were three types of association in use:
 - 1. The common law partnership
 - 2. The unincorporated joint stock company formed by a deed of settlement
 - 3. The incorporated company formed by charter or special Act of Parliament
- The economic foundations of the corporation
- The rationale for limited liability

Early company legislation- English Legislation

Trading Companies Act 1834

- allowed for some advantages of incorporation to be granted such as bodies by way of Letters Patent

The Joint Stock Companies Act 1844

- This Act 'for the Registration, Incorporation and Regulation of Joint Stock Companies' 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 firm as a form of economic activity with the idea of incorporation
- The development of company law became separate from that of partnership, as the legislative branch of government assumed a role alongside the courts of equity
- The 1844 Act **did not provide for limited liability of members** as a consequence of incorporation. Instead each stakeholder in the company was liable for the company's debts

The Joint Stock Companies Act 1856

- introduced the **process of incorporation** by registration of the **Memorandum of Association**
- This document contained a basic information about the company, such as its name and the purposes for which it was to be incorporated
- Along with this registration document, each company was required to have **Articles of Association**

The Companies Act 1862

- **The model for the first company statutes in Australia**
- Three aspects of the Act are worth mentioning
 - 1. The wording of the incorporation section revealed a shift in how the idea of the company was understood
 - 2. The Act continued to relegate provisions about accounts and model articles of the association
 - 3. The act was considerably longer than previous acts

The modern corporation

- Multinational corporation has evolved
- Raises several complex issues that challenge corporate laws
 - Whose jurisdiction
 - Large subsidiaries that are networked- how to distinguish one corporation from another
 - Block Chain and regulation it- which jurisdiction is the security
 - Environmental damage in a developing country- how to enforce laws
 - How will this global entity be regulated

The History of Australian Corporate Law

Context of corporate regulation and how it has evolved in Australia

- Companies are artificial creations
- Approximately 2million registered today
- Australia has adopted several different legislation approaches to the regulation of companies over the years
- From 15 July 2001, a truly regulatory scheme has finally been put in place
- Corporations Regulations act- To give back to the primary provisions in the act- key terms, key forms, fines, penalties
- Australia Corporate history

- Demonstrates Australia's move from colonial states through to one nation- corporate law is connected to the nation's history
- Corporate law aligns with the political and economic contexts of the time more state centric and interventionist than the UK
- Heavy emphasis on detailed legislation to guide the way the economy developed

Small beginnings 1788-1850s

- The first local company established was the **Bank of New South Wales**, which started as a Joint stock company under a charter granted by the Governor Macquarie in 1817
- *Royal charter Australian Agricultural Company (1834)*
- English legislation applied in each colony
- Dominated deed of settlement companies
- Practical, commercial reasons- British supply of labour and capital

Boom and Depression- 1850s-1890s

- The Victorian 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
- Economic growth

Early moves towards uniformity- 1890s-1930s

- **1901-1950s: Separate State Acts**
 - Each State had different Acts based on English *Companies Act*, and maintained their own administration
 - There was no uniformity of legislation or administration
- There was no Commonwealth involvement
- Towards a Unified National Scheme
 - 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
 - This lack of legislative and administrative uniformity combined with multiple regulations was also hampering supervision of the share markets and prejudicing investor protection
 - **1961-1963: Uniform Companies Act 1961**
 - Each State Act was based on the *Companies Act 1958* (Vic), but each State maintained their own administration
 - There was no Commonwealth involvement
 - Moves to enact uniform companies' legislation to overcome these difficulties began in the 1960s, but uniformity was not achieved until the introduction of the **Co-operate Scheme** in 1979

The first uniform legislation- 1950s-1980s

- Australian economy entered a phase of prosperity
- In 1959, the State and the Commonwealth Attorney's-General met to devise a method of bringing uniformity to the legislation. The result of the **Uniform Companies Act** which with various modifications were adopted by all States and Territories between 1961-1962

The co-operative scheme- 1980-1900

- *Companies Code 1981*
- Uniform legislation introduced and administered by State and Commonwealth Commissions
- Established by: The Formal Agreement December 1978
- Administered by:
 - **A) political arm:** Ministerial Council
 - **B) Executive arm:** National Companies and Securities Commission (Cth)
 - **C) Day to day:** Corporate Affairs Offices (State)
- The objectives of the **cooperative scheme** were to promote:
 - commercial certainty
 - reduce business costs
 - achieve greater efficiency in the capital markets,
 - maintain the confidence of investors through suitable measures for their protection.