

**“THE HISTORICAL DEVELOPMENT OF CORPORATIONS LAW”**  
**FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY**  
**INTRODUCTION TO AUSTRALIAN LEGAL HISTORY TUTORIALS**  
**THE HON T F BATHURST**  
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**Introduction**

1. Today, the corporate form is a ubiquitous part of modern commercial life and has a significance to our economy which it is difficult to overstate. The development of corporations law as we understand it today however, is relevantly recent – at least in legal terms. What we consider the fundamental elements of the commercial corporation, namely separate legal personality, perpetual existence, transferable shares and limited liability for members were for a long time controversial and did not become established until the mid 19<sup>th</sup> Century.
2. Some attributes of the corporation can be traced back to mediaeval times, but modern Australian company law really began with developments in England in 1825, which were then largely mirrored in Australia. This paper will trace the development of corporations law in England and in Australia, ending in 2001 when the *Corporations Act* (Cth) was enacted. While many of the substantive rights and duties of shareholders, directors and creditors were worked out by the courts, the historical development of the defining features of corporations law is largely a product of statutory reform and commercial reactions to that reform. That will therefore be my focus.
3. One further preliminary matter is worth noting. Because corporations are today so intrinsic to commercial and investment activity, it can be easy to fall into the trap of thinking that tracing the history of the corporation is akin to tracing the history

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\* I express my thanks to my Research Director, Ms Sienna Merope, for her assistance in the preparation of this paper.

of commercialism. The two are certainly linked, but the corporate form is just one type of vehicle for commercial association. Corporate partnerships for example have a history as long or longer than the corporation and continue to be a common form of commercial association.

### **Mediaeval corporate forms and early commercial associations**

4. The notion of a separate fictitious “corporate personality” can be traced to ancient times, perhaps even to the ancient Greeks from where it was passed to the Romans. It was certainly established by mediaeval times, originating in Italy and spreading to England from there. Edward Coke, in his 1628 commentary on *Littleton’s Tenures* refers to “persons natural” and “persons incorporate or politick created by the policy of man...either sole or aggregate of many”.
5. There were two types of early corporate personality: the *corporation sole* and the *corporation aggregate*. The *corporation sole* was associated with the Church. It provided for a separate legal personality for an individual position, such as the bishop. This notion arose because people would often leave property to saints, which then had to be managed by church officials. It was necessary to distinguish between a person managing land in their official church capacity and that person in their private capacity, so that on their death land managed by them could pass to their successors in office. Theory developed that a series of successive people in a particular church position constituted an artificial legal person – the *corporation sole*.
6. The *corporation aggregate* is more relevant to our topic. The genesis of a *corporation aggregate* is in a group whose existence survived the individuals who at any one time might constitute its membership. The early types of corporation aggregate were boroughs – ie. municipalities. There is some debate about when groups of this kind began exhibiting corporate status. In his essay on Anglo-American Legal History, Cecil Thomas Carr argues that municipalities had the attributes of a common seal, the right to make by-laws binding on town inhabitants, plead in the courts and to hold property in succession from the time of William the Conqueror.<sup>1</sup> Others date the first municipal incorporation to the

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<sup>1</sup> *Selected Essays in Anglo-American Legal History* (Vol. III) (1968) p 162.

15<sup>th</sup> century, during the reign of Henry VI.<sup>2</sup> Certainly groups with the attributes I have outlined above (eg: common seal) existed by this point. Over time it became settled that a corporation aggregate could not exist spontaneously; it owed its existence to the grant of a Royal Charter.

7. Another early corporate form and commercial association was the *gild*. This was essentially a voluntary trade association, which received royal recognition through grant of a *gilda mercatoria*, which then allowed their members monopoly over a particular branch of trade. Each member operated autonomously and guilds supervised and regulated conditions of trade and labour and quality of output, including making by-laws binding on members. Members of a common profession joined by making an oath to obey the rules of and support the gild, and paid a membership fee.<sup>3</sup>
8. There is some controversy over whether the grant of a *gilda mercatoria* was itself what rendered a burrough a municipal corporation; ie that a town became incorporated on royal recognition of a gild (that the two were synonymous), or whether the two were separate entities.<sup>4</sup> We need not answer that question – what it shows is that the early history of the corporate form is difficult to chart or classify. The gild shares little in common with the corporation as we think of it today; it is relevant only in what it shared with the early chartered corporations, which we will come to consider in a moment.
9. The second early form of commercial association was the *commenda*. This was a type of partnership where one of the parties supplied the capital and shared in the profits but took no actual part in the business (the sleeping partner), while the other party was responsible for the running of the venture. The *commenda* form was often used for one-off ventures. Over time the principle evolved that the investor/sleeping partner's liability was limited to the capital they had advanced and there also developed *commenda* associations with multiple investors. The *commenda* was a common form of commercial association in continental Europe from the middle ages onwards, but never really became established in England.<sup>5</sup> (There are a number of possible explanations for this including the insularity of

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<sup>2</sup> *A History of Burroughs*, cited in *Selected Essays in Anglo-American Legal History* p 162(fn2).

<sup>3</sup> *Selected Essays in Anglo-American Legal History* pp 177, 181.

<sup>4</sup> *Ibid* pp 177-179.

<sup>5</sup> *Ibid* pp. 185-186; L.C.B Gower, *Principles of Modern Company Law* (4th ed, 1979, Steven & Sons) p 23.

English commercial law and the legislative distrust of limited liability up until the 19<sup>th</sup> Century, which was really the attraction of the *commenda* form).

10. The other type of partnership more relevant to England was the *societas*. This was a permanent type of association in which each partner was fully individually liable for all the debts of the firm and could bind the other partners. This form of partnership also has its early roots in Italy but in its features of agency and unlimited liability we see the foundations of the modern partnership.

### The Early Trading Companies

11. The earliest types of associations to be known as “companies” were those engaged in foreign trade. The earliest include the Russia Company and the Turkey company, but the most famous is the East India Company, which was chartered by Queen Elizabeth in 1600.<sup>6</sup> Associations of individuals would petition for the grant of royal charter or a private Act of Parliament, recognising the company as independent in its own right. Once this was granted, it allowed the corporation to exist in perpetuity, sue and be sued, and act separately to its members. Royal charters also generally carried limited liability. By the end of the seventeenth century at least, courts had recognised that individual members of a corporation were not liable for the corporation’s debts: *Edmunds v Brown & Tillard* (1668) 1 Lev 237; *Salmon v The Hamborough Co* (1671) 1 Ch Cas 204 HL. However this does not appear to have been regarded as an important benefit of incorporation. That may be because “*many charters expressly conferred a power on the company to make levitations (or calls) on the members and it was by no means clear that a company did not have this power in the absence of an express provision, being so limited liability was illusory...moreover the creditors by a process resembling subrogation could proceed directly against the members if the company refrained from taking the necessary action*”<sup>7</sup>
12. In fact, Royal Charters of incorporation were obtained not so much because of the commercial benefits of having a corporate form, but because they brought with them a grant of monopoly, commonly the exclusive right to conduct trade in a particular geographical area.

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<sup>6</sup> *Selected Essays in Anglo-American Legal History*, p 199.

<sup>7</sup> L.C.B Gower, *Principles of Modern Company Law*, p 26.

13. The earliest trading companies operated similarly to the domestic *gilds*, in that each member traded their own stock and their liability was completely separate from that of the company. The corporation enacted laws which members had to abide by, promulgated by-laws and provided access to the monopoly rights the Royal Charter granted. Later the principle of “joint stock” also came into usage - namely that each member would contribute capital to a venture, which would be used as operating capital and that would then be redistributed in the same proportions. When the East India Company was first chartered for example there was a joint stock, which was redistributed after each voyage, but members could also trade privately in the Indies as long as they were members of the company. By 1692 however, private trading by members was banned and there was a permanent joint stock which was used for trading purposes.<sup>8</sup> This marked the emergence of one of the key elements of the modern corporate form – permanent joint capital that could be used by the corporation for its activities.

#### **Joint Stock Principle: the Expansion of Domestic Companies**

14. By the middle of the seventeenth century the joint stock principle was well established and there was an expansion in domestic companies. Most of these domestic companies however were not incorporated. Rather they operated as partnerships, drawing on the inheritance of the *societas* form. Incorporation through Royal Charter was often expensive and time consuming and, at the time, the distinction between an incorporated joint stock company and an unincorporated partnership with joint stock was far less clear than today. Partnerships could be unlimited in size and provide for the transferability of shares. That said however, the commercial benefits of incorporation, including existence in perpetuity and majority rule were becoming more evident. Consequently an increasing number of domestic companies did choose to incorporate. In 1694 for example the Bank of England received its first charter.<sup>9</sup>

15. One thing to remember is that while incorporation was increasing and a share market was becoming established there was in fact little law governing corporations. As Gower puts it, there was only an “embryonic law of partnership

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<sup>8</sup> *Selected Essays in Anglo-American Legal History*, p 201; L.C.B Gower, *Principles of Modern Company Law*, p 24.

<sup>9</sup> W.S. Holdsworth, *A History of English Law* (Vol. III) (2<sup>nd</sup> ed, 1937, Methuen & Co Ltd) p 211.

which applied to companies that were unincorporated as well as those that were".<sup>10</sup>

### **Speculation, the South Sea Company, and the Bubble Act**

16. In the first two decades of the eighteenth century a volatile investment market developed. Trade in shares was common and speculative. Many companies which were not incorporated operated as though they were, without worrying about the grant of a Royal Charter. Still others bought the Charters of older companies that were no longer operating. The fact that the Charter might be for an entirely different enterprise than the one which they were carrying out was not seen as an impediment. This was generally true of Royal Charters – after having been granted one, “the society considered itself free to undertake business projects wholly outside the business for which it was incorporated”.<sup>11</sup> For example, in 1691 the banking partnership of Turner Casswall and Sawbridge began operating under the charter of a company that had been incorporated to manufacture hollow sword blades<sup>12</sup> (why hollow sword blades were ever considered useful in the first place is a different and far more perplexing question).

17. The most famous speculative investment of them all was the South Sea Company. The South Sea Company was formed in 1711, with the intention of taking over the slave trade in South America. In 1719 it convinced the state to let it take over the national debt of the British Government (around **31,000,000 pounds**). Essentially, creditors of the Government were either bought out or offered the opportunity to swap their debt for shares in the company’s stock. Because the company was prosperous, many investors took up this option. The idea was that the company would then hold an interest bearing loan owned by the state, which it could use to raise new capital for trade by floating the debt (the details on all of this are a little hazy). Stocks soared, but purely on speculation – the company wasn’t even trading at this point.

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<sup>10</sup> L.C.B Gower, *Principles of Modern Company Law*, p 27.

<sup>11</sup> W.S. Holdsworth, *A History of English Law*, p 216.

<sup>12</sup> *Ibid*, p 215.

18. In 1720, at the height of this speculative frenzy (around 200 companies formed in about the year 1720)<sup>13</sup>, the Government passed the Bubble Act. This is perhaps the first instance of “companies legislation” but it was not a particularly fine one. The Act made it illegal to form a joint stock company or offer transferable shares unless the company was a chartered one, either by Royal Charter or a Private Act of Parliament. Essentially it clamped down on bodies “purporting to act as corporate bodies without legal authority”, while allowing other speculation to run rampant. As argued by Sir William Holdsworth, “What was needed was an Act which made it easy for joint stock societies to adopt a corporate form, and at the same time safeguarded both the shareholders in such societies and the public against frauds and negligence...What was passed was an Act which deliberately made it difficult for joint stock societies to assume a corporate form and contained no rules at all for the conduct of such societies if and when they assumed it”.<sup>14</sup>
19. In the same year, proceedings were instituted against companies that were operating under obsolete charters (it is generally but not universally accepted that these proceedings were started by the directors of the South Sea Company). These proceedings led to those companies’ charters being forfeited and to the beginning of a panic on the stock market, which soon led to the collapse of the South Sea Bubble. The South Sea Company’s stock crashed spectacularly and subsequent investigations showed corruption and fraud, including bribery in relation to the agreement to take over government debt.

### **Deed of Settlement Companies: 1720 –1825**

20. There were very few prosecutions under the *Bubble Act* (only one is reported, *R v Cawood* (1724) 2 LD Raym 1361, although there were probably more). However the legislative restrictions certainly put a dampener on the enthusiasm for corporations.
21. Because businesses still wanted the benefit of association and of transferable shares, the period after the passing of the *Bubble Act* saw a rise in the “deed of settlement company”. This was a legal innovation that was essentially a partnership, which by various structures managed to approximate a corporation, including importantly by having transferable shares.

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<sup>13</sup> *Selected Essays in Anglo-American Legal History*, p 202.

<sup>14</sup> W.S. Holdsworth, *A History of English Law*, pp 219-220.

22. Deed of settlement companies operated as followed:

- Companies were formed under a deed by which subscribers agreed to become associated in an enterprise with a prescribed joint stock divided into a prescribed amount of shares;
- The deed could be amended by agreement of a majority of the shareholders;
- Management was delegated to a committee of directors;
- Property was vested in a separate group of trustees who could generally sue and be sued on behalf of all shareholders

23. This was seen to be legal despite the prohibition in the *Bubble Act*, because s 25 of the Act had provided that nothing therein would extend “to prohibit or restrain the carrying on of any home or foreign trade in partnership in such manner as hath hitherto usually and may be lawfully done according to the Laws of this Realm now in force”. This meant that there was a certain amount of grey area in the realm of partnerships, and new types of partnership association took advantage of it. Initially these companies placed restrictions on transferability of shares, but as the *Bubble Act* increasingly came to be soon as toothless, shares were treated as freely transferable.<sup>15</sup> Deed of settlement companies therefore freely operated as de facto corporations, although without limited liability (some attempts were made to limit liability via expressly contracting that liability was limited to the company funds, but there was always legal doubt as to whether these provisions were effective vis a vis creditors. They were eventually held not to be in *Re Sea, Fire & Life Insurance Co* (1854) 3 De GM & G 459; 43 ER 180). As a side note, it is interesting that more than two and a half centuries later, limited liability partnerships achieved recognition in NSW. Under amendments to the *Partnership Act* 1892 (NSW) introduced in 1991 and 2004, both limited liability and incorporated limited liability partnerships may be formed (there are equivalent provisions in most other Australian States). The structure of these partnerships shares some similarities with the mediaeval *commenda* form I mentioned earlier, in that there are general partners, who have unlimited liability and who are active in the management of the business, and limited partners, who

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<sup>15</sup>L.C.B Gower, *Principles of Modern Company Law*, p 33.

contribute capital and share in profits but cannot bind the partnership or take any active role in management. In essence therefore they are sleeping partners.

24. In the early 19<sup>th</sup> Century, the growth in deed of settlement companies led to the dusting off of the *Bubble Act* and some prosecutions, and there was for sometime confusion in the case law as to whether it was unlawful for an unincorporated company to have freely transferable shares, under either the Act or common law.<sup>16</sup>

25. In 1825 however, the Government finally repealed the *Bubble Act*. Even after this point, while deed of settlement companies continued to proliferate, some confusion persisted about the legality of their activities under the common law (as the repeal had not purported to affect the common law). This was resolved by a string of cases in 1843, which held that the activities of such companies, including transferring shares, were not unlawful: *Garrard v Hardley* (1843) 5 M & G 471; *Harrison v Heathorn* (1843) 6 M & G 81. The repeal of the *Bubble Act* is commonly regarded as the starting point of modern corporations law.

### **The Birth of Modern Company Law: The *Joint Stock Companies Act(s)* and Limited Liability**

26. In 1844 the *Joint Stock Companies Act* was passed. The Act drew a clear distinction (which had not really been present to that point) between the corporate form and unincorporated partnerships. The Act prohibited the formation of partnerships or association for commercial gain of more than 25 members. It provided that any company with more than 25 members or with shares that were transferable without the consent of all members must be incorporated. Secondly the Act provided for incorporation by a system of registration, rather than through Royal Charter or Act of Parliament.<sup>17</sup> That of course remains the system we have in place today (although registration under the 1844 Act was extremely cumbersome). The Act also provided for a Registrar of Companies, where particulars of a company's constitution and its annual returns were lodged. Full transparency in relation to these documents was provided for.<sup>18</sup> The Act therefore

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<sup>16</sup> See cases cited at L.C.B Gower, *Principles of Modern Company Law*, p 37(fn 75)

<sup>17</sup> L.C.B Gower, *Principles of Modern Company Law*, p 14.

<sup>18</sup> C.M. Schmitthoff et al, *Palmer's Company Law* (Vol I) (1982, Stevens & Sons) at [2-06].

established many of the fundamental building blocks of corporations law as we know it today.

27. One thing which was withheld however, was limited liability. The Act made clear that members were liable for the debts of the company just as if they were partners. Personal liability ceased three years after a member transferred their shares.<sup>19</sup> You will recall that deed of settlement companies also had unlimited liability, although as I mentioned early some contractual attempts were made to approximate limited liability.

28. Following the Act therefore, there were three type of companies:

- Private partnerships of not more than 24 persons, and “quasi partnership” deed of settlement companies that had been formed prior to 1844 and which did not obtain corporate form pursuant to the Act. These companies were unincorporated and members had unlimited liability;
- Companies that had been formed by Royal Charter or statute. As previously mentioned, these companies enjoyed limited liability;
- Companies registered pursuant to the 1844 Act, which were incorporated but whose members faced unlimited liability.

29. The next few years were marked by vigorous debate about the extent to which limited liability should extend to partnerships and registered companies. In 1852 the question of limited liability for partnerships was referred to a Royal Commission, which by a bare majority recommended not extending limited liability to that form of association.

30. In 1855, the *Limited Liability Act* was passed. It applied to registered companies and not partnerships. This was interesting because the preceding debate had centred almost exclusively on partnerships with little discussion of corporations. The Act provided that members’ liability could be secured to the nominal amount of the shares they held.

31. Limited Liability was made subject to a number of conditions, of which the most significant were inclusion of the word Limited in the company’s title, and

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<sup>19</sup> Ibid.

requirements on paid up capital. (The company had to have at least 25 members holding 10 pound shares paid up to 20% and three quarters of the nominal capital had to be subscribed).

32. In 1856, the *Limited Liability Act 1855* and the *Joint Stock Companies Act 1844* were consolidated into and replaced by the *Joint Stock Companies Act 1856*. The 1856 Act provided for a much easier process of registration, and removed the requirements on paid up capital in the 1855 Act. The Act provided that directors would be liable if they paid dividends while knowing the company to be insolvent. This, along with the requirement of the word “Limited” and full transparency were effectively the only safeguards provided to shareholders and creditors – in accordance with the *laissez faire* ideology of the time. (Note that Banking and Insurance companies were excluded from the Act and dealt with separately).

33. With the 1856 Act, the major structural components of Corporations Law were in place. In 1862 the existing law, including that applying to banks and in relation to winding ups, was consolidated into the *Companies Act*. This would be refined by many further amending Acts throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries, largely directed to more closely regulating corporations’ affairs, thereby moving away from the *laissez faire* model and leading to ever more expansive and complicated legislation. In 1900 for example the requirement that company prospectuses be issued to the public was introduced, while in 1907 legislative amendments introduced duties for auditors, a requirement for the holding of an AGM, and established different rules for “private companies”.

### **Developments in Case Law**

34. While the architecture of corporations law was largely developed through statutory reforms, there were also of course many developments in case law, particularly as to the substantive rights and duties of company members and officers. It is far outside the scope of this paper to mention all of them, let alone analyse them. The historical development of directors’ duties or members remedies for example would warrant a paper in their own right, or perhaps more accurately a thesis. I will however just mention a couple of important cases.

35. The first case is actually one that does relate to what I have called the “architecture” of corporations law. In 1897 *Saloman v A Saloman Co Ltd* [1897]

AC 22 upheld the separate corporate personality of the one-person company and held that although a company required seven persons to sign a memorandum of association to register a company, there was no need for seven beneficially interested members – one person was sufficient. This case clarified the strength of the “corporate veil” and paved the way for the one-person company to become a popular commercial vehicle. It also largely removed the need for limited liability for partnerships, at least at that time, as smaller businesses could easily incorporate and obtain benefits in that manner.

36. In relation to directors’ duties, it was established by the early twentieth century that directors had equitable obligations to exercise their powers bona fide in the interests of the company and for proper purposes. The earlier cases are referred to in considerable detail in the judgment of Isaacs J in *Australian Metropolitan Life Insurance Co Ltd v Ure* (1923) 33 CLR 199 at 217. In 1925, *In Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 established that directors have duties to exercise such skill and diligence as an ordinary person “might be expected to [exercise] in the circumstances on their own behalf”.<sup>20</sup> The Court there also clarified that in considering the standard of care required, regard was to be had to the nature of the company’s business and the director’s own experience and knowledge, and that directors may delegate certain functions to other officials and, absent grounds for suspicion, trust that those duties have been performed honestly. This was not the first case in which these propositions were put, but it is commonly regarded as the source of directors’ duty to act with due care. These principles continue to endure under the common law and are largely, although by no means exactly, reflected in directors’ statutory duties under the *Corporations Act 2001*.

37. In relation to members, probably the most important historical case is *Foss v Harbottle* (1843) 67 ER 189, which restricted the right of a shareholder to sue on behalf of the company. The “rule in *Foss v Harbottle*”, as it commonly called, established that the company is the proper plaintiff for wrongs done to it. This means that a corporation initiates proceedings in its own name and that generally speaking members do not have a right to sue of their own accord for wrongs done to the corporation, for example due to a breach by directors of their duties. In other words, members do not generally have a right to commence derivative

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<sup>20</sup> at p 428.

actions. The second aspect of the rule in *Foss v Harbottle* was that the Court will not intervene in management decisions of the corporation, provided that they are within power, meaning that generally a member could not complain of actions which had been confirmed by the majority of shareholders. The court in *Foss v Harbottle* acknowledged that there would be exceptions to this “rule”, but on an extremely limited basis. Over time those exceptions were widened by the courts, which recognised the potential for the rule to operate unfairly (see for example *Residues Treatment & Trading Co Ltd v Southern Resources Ltd (No 2)* (1988) 51 SASR 177). Ultimately a statutory right was conferred on shareholders and some other persons to bring a derivative action when the company is unable and unwilling to do so.

38. The remedies of oppression and fraud on the minority developed, namely that a member may make an application to the Court on the grounds that the company’s affairs are being conducted in a manner contrary to the interests of the members as a whole or in a way that is oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members. It is now enshrined in statute. The history of the development of these remedies in the context of expropriation of the minority’s shares by the majority is dealt with in detail in the judgment of Ormiston AJA in *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at paragraphs [466]-[624].

## **AUSTRALIAN DEVELOPMENTS**

39. Moving to Australia, the first thing to note is that of course, as a penal settlement, commercial development was not a top priority in the earliest years of the colony. The second is that Australian company law initially developed very much by appropriating English law, although there were some local innovations. As you no doubt know, from 1828 legislation provided that all laws and statutes in force in England should be applied in the administration of justice in the courts of New South Wales “so far as the same could be applied within those colonies”,<sup>21</sup> essentially meaning that all English law which at that time existed was also in force in Australia

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<sup>21</sup> *Australian Courts Act 1828* (UK).

40. The first Australian company, the Bank of NSW was formed in 1817, when Governor Macquarie conferred a charter on it, including granting limited liability to shareholders. However the approval of that Charter was ultimately denied by London (probably because of the reluctance at the time to grant banks limited liability – remember banks were excluded even from the 1856 Companies Act.)
41. Most early Australian companies operated as deed of settlement companies, as in England at the same time. Early Australian companies include the Australian Agricultural Company, formed in 1824, and the Australian Gas Light Company, formed in 1836.

### **Early Australian Legislation**

42. Early Australian companies legislation was piecemeal. The first Act passed in NSW in 1839 was *An Act to Make Good Certain Contracts Which Have Been and May Be Entered into by Certain Banking or Other Copartnerships 1839* (NSW) – its effect was to validate “certain contracts entered into by...co-partnerships”.<sup>22</sup> In 1842 the NSW legislature passed *An Act for Further Facilitating Proceedings by and against All Banking and Other Companies in the Colony Entitled to Sue and Be Sued in the Name of their Chairman Secretary or Other Officer 1842* (NSW), which as name suggests allowed companies to be sued in the name of an officer. In 1848 the *Companies (Process) Act 1848* (NSW) allowed joint stock companies to be sued by members.
43. There were also some attempts at limited liability, which preceded those in the UK. In 1848 NSW passed legislature allowing for the incorporation of banks, mining insurance companies and shipping companies, with limited liability to twice the nominal value of shares held.<sup>23</sup> In 1853 and 1854 respectively NSW and Victoria introduced legislation recognising limited liability partnerships: *An Act to Legalize Partnerships with Limited Liability 1853* (NSW); *An Act to Legalize Partnerships with Limited Liability 1854* (Vic). These Acts were little used and were subsequently repealed by the Companies Statute 1864 (Vic) and Companies Act 1874 (NSW).

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<sup>22</sup> Phillip Lipton, *A History of Company Law in Colonial Australia: Economic Development and Legal Evolution* (2007) 31 Melb. U. L. Rev. 805, p 810.

<sup>23</sup> *Ibid*, p 811.

44. In 1858, Victoria also passed legislation specific to the mining industry, introducing limited liability by limiting liability to any amount unpaid on shares. *An Act to Facilitate the Formation of Mining Associations and to Amend and Extend the Provisions of an Act Passed in the Eighteenth Year of the Reign of her Present Majesty Intituled an Act for the Better Regulation of Mining Companies and to Render Certain Preferable Liens and Mortgages of Personality by Miners and Mining Companies Valid without Delivery and for Other Purposes 1858* (Vic). Victoria was then in the midst of the gold rush. This economic context motivated other Australian innovations in Corporation Law, as we will see in a moment.

45. As we have discussed, the *Joint Stock Companies Act* 1856 had provided for corporate registration and limited liability in England and those developments were consolidated into the Companies Act in 1862. Legislation mirroring the English model was introduced in NSW in 1874 and Victoria in 1864.<sup>24</sup> These Acts provided for incorporation by registration, required incorporation of associations of more than 20 members and introduced limited liability.<sup>25</sup> In NSW, enforcement of the Act (registration etc) was overseen by the Registrar General's department.<sup>26</sup>

### **Australian Innovations**

46. Despite largely transplanting English developments, there are a couple of distinct Australian developments worth mentioning.

47. The first is the no liability company, which emerged in Victoria, as a result of the gold mining boom. Gold mining often required raising capital from a large number of investors and was highly speculative. A problem that often arose was that investors resisted payments for calls at times when the company needed them. "Dummying" whereby investors registered with the company under a false name, allowing them to disappear if the investment went badly, was also a common

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<sup>24</sup> *Companies Act 1874* (NSW); *Companies Statute 1864* (Vic).

<sup>25</sup> Phillip Lipton, *A History of Company Law in Colonial Australia*, p 814.

<sup>26</sup> Rob McQueen, *Limited Liability Company Legislation – The Australian Experience* (1991) 1 *Australian Journal of Corporate Law* 22, 25.

practice. There was little effective company administration and oversight at the time so this type of behaviour went unchecked.<sup>27</sup>

48. The legal response was the “No Liability” company, which was introduced in 1871. It provided for the forfeiture of shares if there was non-payment of the call. This then allowed the company who had forfeited the shares to raise necessary revenue by reselling them. This arrangement survives today in the No Liability company under the Corporations Act. It is restricted to mining enterprises and provides that while share holders are not *contractually* liable to pay calls on shares, their shares can be forfeited if a call is made and they do not pay it: *Corporations Act* s 254Q.

49. The second development was legislation introduced by then Victorian Attorney General Isaac Isaacs. In 1896, comprehensive corporate legislation was passed by the Victorian parliament in the form of the *Companies Act* 1896. Amongst other matters, the legislation introduced new disclosure requirements on public companies, including compulsory audits (s 28) and a requirement to file and send shareholders an audited balance sheet (s 29). These initiatives picked up on recommendations made by the Davey Report in the UK in 1895, but preceded similar developments in England by 10 years. The Act also established the concept of the proprietary company, before it was recognised in England. It set out that proprietary companies, which were defined as having no more than 25 members and being unable to borrow from non-members or raise capital from the public, were exempt from the requirement to provide members with an audited balance sheet.<sup>28</sup>

## **Post Federation**

50. From federation onwards, arguably the most major structural development in Corporations was the slow (sometimes halting) progress towards uniformity in company legislation between different jurisdictions.

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<sup>27</sup> Rob McQueen, *Limited Liability Company Legislation – The Australian Experience* p 27; Phillip Lipton, *A History of Company Law in Colonial Australia*, p 819.

<sup>28</sup> Phillip Lipton, *A History of Company Law in Colonial Australia*, p 827; *Companies Act* 1896 (Vic) s 2.

51. There was some enthusiasm, shortly after federation, for a corporations Act to be enacted by the Federal Government. In 1909 however, in *Huddart Parker v Moorehead* (1909) 8 CLR 330, the High Court ruled unconstitutional certain sections of the Commonwealth *Industries Preservation Act* 1906. The Act was essentially directed to protecting commercial competition, including through anti-monopoly provisions. In invalidating relevant sections of the Act, the Court effectively limited the Commonwealth's Corporations power under s 51(xx) of the *Constitution*, holding that it did not confer a power on the Commonwealth government to create corporations, or to regulate corporations lawfully engaged in domestic trade within a State. This decision therefore foreclosed the possibility of a federal Corporations Act.
52. Subsequent decades saw moves toward obtaining uniformity between jurisdictions. Eventually this led to the drafting of a "Uniform Companies Bill" in 1961, largely based on Victorian Companies legislation which had been enacted in 1958. This was then implemented by each of the States as a *Companies Act* between 1961 and 1962. Further uniform amendments occurred in 1971-1972, although there was some jurisdictional deviation, with NSW for example departing from uniform company law in relation to insider trading.<sup>29</sup>
53. In 1973 the Whitlam Government announced its intention to establish national companies law and a national securities commission. Bills in respect of both were drafted, but due to subsequent political events never became law.
54. In 1976, rather than a national law, a scheme was established for the Commonwealth parliament to enact companies and security legislation, which it would pass in the ACT (using power under s 122 of the *Constitution*) and which each State would then legislate to apply. The cooperative scheme provided for both interlocking uniform legislation and delegation by State and Territory administrative authorities of their powers to the "National Companies and Securities Commission". Under this scheme the *Companies Act* 1981 (Cth) and *Companies (Acquisitions of Shares) Act* 1980 (Cth) were passed. This was largely a consolidation and updating of previous companies legislation. The States passed complementary legislation, known as the Companies Code and the Companies (Acquisition of Shares) Code.

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<sup>29</sup> H A J Ford, *Principles of Company Law* (4<sup>th</sup> ed, 1986, Butterworths) p 15.

55. In 1989 the Commonwealth again tried its hand at a federal law governing companies, without the need for State cooperation, based on s 51(xx) of the *Constitution*. That law was successfully challenged in the High Court in *New South Wales v Commonwealth* (1990) 169 CLR 482. The Court held that the power in s 51(xx) to make laws in relation to “*foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth*” did not extend to allowing the Commonwealth to make a law for the *incorporation* of trading and financial corporations, as opposed to regulating those that were already incorporated.
56. Following the High Court’s decision, the Commonwealth carried out negotiations with the States for further uniform legislation, based on a similar cooperative mechanism to that discussed above. This led to the enactment of the *Corporations Act 1989* (Cth). The States passed complementary legislation, the Commonwealth Act being a schedule to the State Acts. The scheme essentially involved a purported conferral of jurisdiction on the Federal Court of Australia under the State Acts and an authorisation under the Commonwealth Act for the Federal Court to exercise such jurisdiction, so conferred. It was held in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 that this was a purported conferral on the Federal Court of jurisdiction not found in ss 75 or 76 of the *Constitution*, and was therefore invalid. Had the matter been left there, the result would have been that the Federal Court would effectively have no corporations jurisdiction. It is not for me to comment on the desirability of that situation.
57. In 2001, a fully unified system was achieved with the enactment of the *Corporations Act 2001* (Cth) and *Australian Securities and Investment Commission Act 2001* (Cth) based on a referral of State power to the Commonwealth. This allowed for some simplification of the previous scheme through streamlining, although as you would know only too well, it remains an extremely complex and ever changing piece of legislation. Let me leave you with this final thought. It is worth considering whether all the problems experienced in Australia over some 40 years to achieve a unified national corporations scheme could have been avoided if the High Court had reached the conclusions about the scope of the corporations power that it ultimately came to in the *Workchoices* case (*State of NSW v Commonwealth of Australia* (2006) 229 CLR 1). It may be that historical developments have not yet reached the end of the line.

