Chapter 1

Introduction

Overview

This chapter introduces corporate law by considering three fundamental aspects of the company: (1) its legal features; (2) the background to, and current form of, its regulation; and (3) some theoretical perspectives with which it may be viewed. The legal characteristics of the corporation have made it a particularly attractive form for business organisations. These characteristics can be seen by comparing its legal features with those of other organisational forms. Corporate regulation in Australia is complex and an understanding of its background is necessary for an appreciation of some of the peculiarities of the current law and the tensions that exist between the states and the Commonwealth over the right to regulate. Finally, different theoretical perspectives of the company are introduced as this provides a useful basis for the assessment of policy and reform issues carried out in subsequent chapters.

1.1 Introduction

Companies are entrenched members of modern society.[1] As stated in the book (and subsequent film) *The Corporation*, 'corporations govern our lives. They determine what we eat, what we watch, what we wear, where we work, and what we do. We are inescapably surrounded by their culture, iconography, and ideology.'[2] While companies are most commonly encountered conducting businesses, and this will be our primary focus, the corporate form is also used by a range of other individuals and groups, including charities, sporting groups, governments and universities. Even families often find it advantageous to use companies to own their assets. Like individuals, companies enter into contracts, own property, commit crimes and breach the civil law. That is, like individuals, they enter into legal relationships and so have legal rights and duties. It is for this fundamental reason that an understanding of the legal principles that govern corporations is important, not just for those who want to understand or practise in commercial law, but as part of a broader appreciation of our legal system.[3]

This book examines the legal principles and policies that govern companies.[4] One of our primary concerns is to explore the changes, if any, that other areas of law must make to accommodate the special features of the company. As we analyse these features we will see what is so attractive about the corporate form. There is also a dark side, however. Companies can wield real power and the corporate form can be abused by those in control of it. Corporate law is also concerned, therefore, with regulating the misuse of power.

1 There are almost two million companies registered in Australia: see the website of Australia's corporate regulator, the Australian Securities and Investments Commission (ASIC) at www.asic.gov.au/asic/asic.nsf.

2 J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable and Robinson Ltd, London, 2004) at 5.

3 It is tempting to say that the importance of the company cannot be overstated, but an attempt was made some years ago by the President of Columbia University who suggested that '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, quoted in T Orhmial (ed), *Limited Liability and the Corporation* (Croon Helm, London, 1982).

4 The terms 'company', 'corporation' and 'body corporate' are often used interchangeably but have defined meanings in the *Corporations Act 2001* (Cth) ('the Act') (s 9). 'Company' refers to companies registered under the Act and as these are the concern of this book, this is the term used throughout. 'Corporation' is a broader term that includes not only companies but also other 'bodies corporate' and unincorporated bodies that have corporate features: see s 57A of the Act.

This first chapter begins by briefly comparing companies with other forms of business organisations, in order to identify the special features of the corporate form. It then traces the background to the current scheme of regulation. One reason for this is to explain some of the peculiarities of the existing law. The chapter then outlines the shape of the current law. Finally, different theoretical explanations of the corporate form are introduced. This will provide a framework for some of the critical analysis in the following chapters.

1.2 Companies compared with other business organisations

A business may be conducted by an individual but there will commonly be advantages in a group of individuals banding together. This may be necessary simply to raise sufficient funds to finance the business but there may also be other advantages in operating as a group, such as to spread the risks of failure and to increase the range of expertise available to conduct the business. There are a number of different organisational forms available for a group (or individual) who want to form a business. The choice of form affects the legal relationships that are created, both in relation to the rights and duties the individuals themselves owe and are owed to each other and in relation to the rights and duties that will be created with those who deal with the business. Common choices are a corporation, a partnership, a trust or a joint venture.[5] These different organisational forms are sometimes combined, as for example with a partnership of corporations or a corporate trustee.

Generally the parties have complete freedom in their choice of business form. An exception to this is imposed by s 115 of the *Corporations Act 2001* (Cth) ('the Act'). This section requires that a partnership or association formed for profit that exceeds a specified number of individuals *must* form a company. The idea here is to require large groups to be brought within the regulatory requirements of the Act. The specified maximum number of individuals who can carry on business is generally 20 but this number is increased for certain professional partnerships, where professional rules may prevent or limit the use of the corporate form.[6]

5 A trust or joint venture is not strictly an organisational form. A trust is a legal relationship between a trustee (who holds legal title) and a beneficiary (for whom the legal title is held). An arrangement may also be simply contractual. For example, a 'syndicate' or 'joint venture' is not a legal structure and if it does not constitute a partnership, it may be a contract. It should be noted that it is ultimately for the court to determine a group's legal status. Thus the fact that an agreement has been entered into stating that the parties are not in a partnership does not in itself mean that a partnership has not been formed. The court will look at the substance as well as the form. See, for example, *United Dominions Corp v Brian Pty Ltd* (1985) 157 CLR 1.

6 For example, the minimum for accountants is 1000 partners, for lawyers 400, 100 for architects, pharmacists and veterinarians, and 50 for doctors and stockbrokers. See *Corporations Regulations 2001* (Cth), reg 2A.1.01.

What factors are likely to be taken into account when deciding which organisational form to choose? The potential liability of members for the liabilities that may be incurred in the course of running the business will often be foremost. The ability to limit such liability will be an important factor although it will not be the only one. Other factors that will influence the choice are likely to be whether one form of business organisation, in comparison with others:

- offers taxation benefits;
- has lower costs to establish and maintain it;
- is less complex and so easier to understand and operate;
- involves more or less exposure to legal regulation generally and to penalties in particular;
- will allow an appropriate level of control and management of the business by the members;
- will allow members to move in and out of the business;
- is durable in the sense of lasting beyond the movements in and out of the business by members;
- will affect the ability of the business to raise funds.

In deciding which organisational form to adopt, then, the decision-makers will have to decide the weighting to be given to each of the above factors in their particular case and the extent to which the features of the various organisational forms match these needs. For this reason it is useful to consider the legal features of the different organisational forms.

1.2.1 Separate legal personality

A primary distinction between companies and other organisational forms is that a company is treated in law as a legal person, separate from the individuals who own and control it.[7] The fact that a company is a legal person makes it possible for the corporation itself to enter a contract, own property, incur liabilities etc., rather than the owners or managers of the company. This is an important difference between companies and other organisational forms and is fundamental to the legal nature of the company. Indeed, much of company law is concerned with the implications of this feature. This contrasts with partnerships, where individual partners are the relevant legal persons: the partnership itself is not a legal person and so does not hold property, nor have legal rights or incur liabilities in its own name. Nor is a trust a legal person. A trust is not strictly an organisational form at all, but refers to a situation where one person (the trustee) owns property for the benefit of others (the beneficiaries). The use of trusts flourished in the 1970s because of significant taxation advantages trusts offered over

7 In other jurisdictions, including the United States, the United Kingdom and some European jurisdictions, there is a greater range of organisational forms. These include 'limited liability partnerships' and 'limited liability companies', which combine limited liability and a separate legal entity with the unincorporated form.

companies and partnerships. The taxation differences between business structures are now, for the most part, far less significant. For this reason trusts are less commonly created today for business purposes, although many still remain in existence. However, trusts continue to be favoured for certain business purposes.[8]

1.2.2 Perpetual existence

The separate legal personality of the company is examined more closely in Chapter 3 but we can note here the features it brings to the company in comparison with other forms. One is its durability. The corporation is an artificially created entity and so will exist, independently of the existence of its members, until some action is taken to bring its life to an end. A partnership on the other hand exists only so long as its members remain in it. Unless the partnership agreement makes special provision, the partnership accordingly dissolves each time a member enters or leaves it.

1.2.3 Level of regulation

The artificial nature of the company does, however, come at a cost. As will be seen in subsequent chapters, and is apparent from the mere size of the Act, companies are much more highly regulated than partnerships. This increases the complexity and costs of understanding, establishing and maintaining them. Further, the Act exposes those who manage companies to significant legal duties. Partnerships, in contrast, are simpler and much more lightly regulated.

1.2.4 Limited liability

The limited liability of members is generally seen as the primary advantage of companies over other organisational forms. It should be noted that the term 'limited liability' refers to the liability of the company's shareholders being limited to the amount they agreed to pay the company[9] for their shares. The terminology is confusing, as a limited liability company in fact itself has no limit on its liabilities. Strictly, limited liability is not confined to companies and, further, not all companies provide limited liability to shareholders. In relation to the former, state Partnership Acts make provision for a partnership to be registered as a 'limited partnership'.[10] A limited partnership has one or more 'general' partners, who have the full liability of partners but also one or more 'limited' partners. The liability of limited partners is limited to the amount they agree to contribute to the partnership. There is an important restriction on limited partners,

8 Public unit trusts are regulated by Chapter 5C of the *Corporations Act 2001* as managed investment schemes. Private unit trusts may be used for joint ventures or other trading purposes. For a recent example, see: *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2008] VSCA 86; (2008) 66 ACSR 325. See generally Kam Fan Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, Oxford 1998).

9 The amount, if any, owing to the company, it should be noted, should be distinguished from the amount that might be owing to the shareholder from whom the shares were purchased.

10 See, for example, *Partnership Act 1958* (Vic), Pt 3.

however, and that is that they cannot be involved in managing the partnership without losing their limited liability protection. That is, if they take part in management, they are treated as general partners.[11]

As noted, companies and limited liability of members do not necessarily coincide. First, it is possible to form an 'unlimited liability' company to run a business, in which case the members will be liable to meet the company's liabilities if the company cannot.[12] Not surprisingly, this form of company is rarely used.[13] Second, and more importantly, it will also be seen in Chapter 3 that there are important exceptions to this restriction on liability.

Nevertheless, the possibility of restricting members' liability represents an important distinction between partnerships and companies.

1.3 Historical development of corporate law

An appreciation of at least some aspects of the historical background to the present company law is helpful to an understanding of the current law. It is necessary for an understanding of certain peculiarities of the existing law. It can also provide a useful perspective to some modern law reform issues.

This part begins by identifying certain themes that have been important in this development and that still have a current relevance. These themes consider:

- why the company developed as a necessary (convenient) legal form;
- the changes that have occurred in the legal requirements to create a company;
- the development of limited liability;
- the national interest in the regulation of companies.

1.3.1 The company as a necessary legal form

We have seen that the essential feature of the company, from a legal perspective, is that the law invests legal personality in this entity. The group of persons is treated as if it were itself a person separate from the individuals who make up the group.[14] The company is then able to enter into legal relationships with other parties. Such relationships are between the company and the other parties, not between the members of a group and the other parties (although there will also be legal relationships created among the members and between the members and the company).

11 *Partnership Act 1958* (Vic), s 67.

12 In fact limited liability of members was a relatively recent legislative introduction. Before its introduction, although the company was a legal person in its own right, and so could incur its own liabilities, members remained liable if the company was unable to meet its obligations. This is explained in the next section.

13 See Chapter 2 for the types of company that may be formed.

14 Note also that there may be a 'one-person company' (a 'corporation sole') as well as a group ('corporation aggregate').

This idea of treating the group of individuals as itself a legal person is commercially artificial but legally convenient. This is particularly so for a group whose membership fluctuates. For example, the company rather than a fluctuating group of individuals can hold title to property and the company can take legal action separate from those individuals who happen to make up the group at any time. Likewise, the company can take on legal duties in its own right.

The need to have a legal person separate from the natural persons behind it is a very old one.[15] Such a device has been seen as necessary in almost all societies. It was used in Greek and Roman societies and such a legal device has even been found in primitive societies (which might treat objects or animals as having legal rights). Companies have been known in English law from the earliest times. Under canon law, the position of bishop in the church, for example, was treated as separate from the natural person who was the bishop at any one time. In this sense the position of bishop was a corporation (now referred to as a 'corporation sole'). This meant, therefore, that when church property was owned by the 'bishop' this did not refer to the individual who happened to be bishop at any one time but in effect the position of bishop. When the individual bishop died, there was no need to transfer property to the next individual. This feature of the canon law influenced the common law because of its convenience.

Some points should be noted about this development. The first is that the development of the corporate form was not influenced by the 'limited liability' it can offer to individuals. This, it will be seen, took much longer to come. In fact it took a long time for the *commercial* implications of the corporate form to be recognised. And even in their earliest commercial contexts, companies were used, not even to get the advantages of a separate entity, but more likely for the anti-competitive effects that accompanied the right to form a company.[16] Second, while the separate legal entity feature has its advantages, it also has its disadvantages. Difficulties flow from the fact that the company is an abstraction. How can it act? What is the connection between the liability of the company and the acts of individuals? And so on. These matters are taken up in subsequent chapters.

1.3.2 Creation of companies

Companies are artificial persons and so they must be 'created' in some way. As companies historically grew in importance, the method of their creation also gathered significance. It will be seen in the next chapter that the current procedure is a simple registration process. The creation of a company is in effect a right that a group (or individual) may exercise. This was not always the case and there are some who argue that incorporation is currently too readily available.

15 See generally S Stoljar, *Groups and Entities* (ANU Press, Canberra, 1973).

16 The first commercial companies had as their members traders who traded independently of the company. The advantages were therefore not to have the company carry on the members' business. But the company had certain privileges, including, most importantly, the right to prevent non-members from carrying on a trade in competition.

Prior to the sixteenth century, companies were created by the monarch. A 'royal charter' was given to allow members to trade through a company. The monarch was concerned to keep control over the action of groups generally, which would include companies, and so controlled the conferral of authority and legitimacy on their actions. Even today there are companies that have been created by royal charter, although this is rare.[17]

During the sixteenth and seventeenth centuries, as power moved from the monarch to Parliament, the creation of companies also became the province of legislation. A special Act was required to be passed each time it was considered necessary to create a company. Initially such Acts were confined to groups engaging in areas of public interest, rather than for private commercial enterprises. Thus companies were created to engage in public works such as building canals. Companies are still commonly created in this manner. For example, some universities and bodies such as the Australian Securities and Investments Commission (ASIC) or the Australian Competition and Consumer Commission (ACCC) are companies created by Parliament.

As will be seen below, it was not until the nineteenth century, at a time when the formation of companies was being encouraged for commercial enterprises, that a simpler 'right' to create a company developed.

1.3.3 Companies and limited liability

The limited liability of members of a company is now seen as one of the major benefits of incorporation. It has already been noted that this was not historically linked to the development of the corporate form. Indeed, the earliest commercial companies were 'guilds'. Guilds were traders who banded together to protect their common interests. Members still traded separately. The modern equivalent is the trading association. Members wanted incorporation for the guild, not for the benefits of limited liability nor even for the convenience of having legal rights and duties vested in the company rather than the individuals, but in order to get legitimacy from the King for their trading activities and to be authorised to exclude non-members from engaging in the trade.

These companies were known as 'regulated' companies: the members traded individually but the trade was regulated by the state. Regulated companies were prominent in the sixteenth and seventeenth centuries when England expanded its overseas trade. Some famous companies created for this purpose were the East India Company, the Russia Company, and the Hudson Bay Company. All these companies were linked with British imperialism of the time. The monarch gave charters that set out the powers of these companies. The terms of the charters typically both controlled the company's activities in foreign lands but also gave them significant powers and control over trade.

17 An example is the Royal College of Surgeons.

A later development was the 'joint stock' company.[18] These were so named because, unlike the regulated companies, they traded as one group (that is, with a joint stock) and members held shares in this common enterprise. The joint stock company was thus the progenitor of the modern commercial company. As with the regulated company, however, the attraction of the joint stock company was not linked to the desire to restrict members' liability. Limited liability, as will be seen below, did not arise until the nineteenth century.

1.3.4 Companies and the national interest

It can be seen even from the above brief account that there has long been a national interest in the regulation of companies. This national interest is highlighted in the story of the South Sea Company, a company whose fortunes shaped the development of company law.[19] The background to the relevant events started during the seventeenth century. At this time there developed an enormous demand for company shares. Stock exchanges were established and wild speculation in company shares was common. Hand in hand with speculation went the opportunity for abuse. Projects of little or no substance, and that were bound to fail (to become known as 'bubbles'), were promoted. (It will be seen that such wild speculation was not confined to that time. There were parallels in the 1960s in Australia in relation to the boom in mining companies and, more recently, many of the so-called dot.com companies could be described as 'bubbles'.)

As noted above, the only way companies could be legitimately created at this time was by royal charter or special legislation. There was a dramatically inadequate number of companies to meet the demand of the public for shares. One way entrepreneurs responded to the lack of charters was to purchase obsolete charters. For example, in one case there was an obsolete charter that authorised the manufacture of 'hollow sword blades'. The charter was purchased by a bank, which then issued 'sword blade' bonds and notes. In fact it was this bank that subsequently financed the South Sea Company itself.

The principal actor in the drama that was to follow was the South Sea Company. This company was established in 1711 to trade with the Spanish colonies in South America. The trade engaged in by the South Sea Company included trade in slaves as well as goods. The company called upon its political connections and devised an ambitious scheme. At this time the British Government was in financial difficulty as a result of the considerable expenditure it had incurred during wartime. Not only did it owe a considerable debt to the public, in the form of bonds and annuities, but the terms of these bonds and annuities were very unfavourable to the government as the interest rate on the bonds was high and the annuities were for an indefinite period.

18 An excellent summary of the background to English company law can be found in Gower and Davies' *Principles of Modern Company Law* (7th edn, P Davies (ed), Sweet & Maxwell, London, 1997), Chs 2 and 3. See also R Formoy, *The Historical Foundations of Modern Company Law* (Sweet & Maxwell, London, 1923).

19 See generally J Carswell, *The South Sea Bubble* (Alan Sutton, Dover, NH, 1993).

The company's scheme was to get the public to swap their government bonds and annuities for shares in the South Sea Company. This would not only provide a very sound credit base for the company to raise funds in the future; if it could get a good deal on the swap with the public, the company would also be in a position to attract further investors. The scheme was also attractive to the British Government as it involved lowering the interest payable on the bonds, making the annuities redeemable, and the government was to receive a 'gift' of £3 million (which later went up to £10 million when other companies, including the Bank of England, starting bidding to take over the scheme). Legislation was passed, although only after some corruption had enabled it to get through Parliament.

There was an enormous public response to the float of the South Sea Company. Shareholders included Isaac Newton, Jonathan Swift and Daniel de Foe. The directors were national heroes. Shares that were nominally issued for £100 each increased their market value at one stage to over £1000.

While there was not necessarily anything wrong with the commercial objectives of the company, in practice two things went wrong. The first was that the boom spread to other companies. This meant that demand fell for shares in the South Sea Company. The second was that war broke out between Spain and England and this stopped trade to South America, the basis of the company's business. This led to the collapse of the company. The inevitable public outcry led to panic, exposure of the corruption referred to, and calls for retribution, primarily against the directors.

The government's response was to pass what was to become the first attempt at companies legislation. This was the so-called *Bubble Act* of 1720. This Act was designed to stop 'bubbles' by prohibiting the use of unauthorised companies. That is, companies could operate only if they had a charter, which of course many did not. This response by the government was subsequently seen as inadequate. It simply cut off supply for a product for which there was an enormous demand.[20]

1.4 Corporate legislation

Over the next century, that is, from 1720–1820, commercial enterprises were forced, as a result of the *Bubble Act*, to invent a new response to the demand for the corporate form. What legal advisors came up with was the deed of settlement company. This was an attempt to get the benefits of incorporation without incorporating. It involved the use of both partnership and trust: property was transferred to trustees, who were then authorised, under the trust deed, to carry on business under prescribed conditions. It should be noted that this 'deed of settlement' was in fact referred to as 'articles of association', a term still used in company law. The device was for the most part an effective

20 See generally A DuBois, *The English Business Company after the Bubble Act 1720–1800* (Octagon Books, New York, 1971).

alternative to the chartered company but it also had its limitations. In particular, such an enterprise was not strictly a 'company' and so did not have perpetual succession. This created difficulties when the trustee died. Further, the trustees' duties were very onerous. Despite these drawbacks, the deed of settlement company was a significant development and had a lasting impact. For example, the articles of association could only be changed by 'special majority' (75 per cent of members) and, to comply with the *Bubble Act*, there were restrictions on the transfer of shares. These features can still be found in the modern company.

It was not until the nineteenth century that systematic companies legislation was enacted. Although there were some early tentative attempts to make incorporation more readily available to groups who wished to undertake commercial enterprises, it was only after various public scandals [21] that a parliamentary committee was established in 1841 to undertake a thorough examination of the whole area. The recommendations of this committee ultimately led to the passage of the 1844 *Companies Act* (UK). This Act established a simple procedure for a group of individuals to register a company. The commercial advantages of incorporation were finally recognised.

In addition to enabling a simple process for incorporation, the *Companies Act* also sought to protect the public from the risks associated with the creation of companies. The technique relied on for this purpose was largely that of publicity. All companies were required to appoint auditors and the auditors were to report on company accounts. The accounts were also available for inspection. And directors were personally liable for company liabilities if a company traded while it was insolvent.

The next significant step in companies legislation was the introduction of limited liability. This occurred in 1855. Interestingly, the 1855 Act also required that companies, in order to be registered, were required to have a minimum paid-up capital. If three-quarters of this capital were lost, the company was required to stop trading.

The period of 1856–62 saw a liberalisation of company law. A laissez-faire approach tended to replace a concern for investor protection. As part of this shift, both the minimum capital provisions and the directors' liability for insolvent trading were deleted. Publicity of the company's accounts became the mainstay of investor and creditor protection.

1.4.1 Background to Australian legislation

1.4.1(a) Early state legislation

Historically, Australian companies legislation has been state legislation.[22] For a long time this was considered to be the only option in view of the terms of the Commonwealth Constitution (considered below). The first state Companies Acts were based squarely

21 An account is provided by Dickens in his novel *Martin Chuzzlewit*.

22 See generally R McQueen, 'Limited Liability Company Legislation—The Australian Experience' (1991) 1 *Aust J of Corp Law* 22.

on English legislation (that is, the Acts of 1855–62).[23] There were some local variations but these were minor.

During the twentieth century, it became clear that having different company statutes in different states created problems. This was most noticeable in the case of companies that traded in more than one state. Such national companies would have to comply with the requirements of each state Act. To make matters worse, the provisions were not always the same or even consistent. It was an expensive and cumbersome process.

1.4.1(b) Uniform Companies Acts

The initial response to this problem was to pass the so-called Uniform Companies Acts. These Acts were passed in 1961 following agreements among the states that they should have legislation in similar terms. The Uniform Companies Acts were accordingly state Acts that as far as possible were in identical terms. But there was nothing formally to bind the states to keep the statutes in the same terms and it was not long before state variations crept in. For example, following the spectacular crashes of mining companies in the 1960s, noted below, Victoria introduced provisions regulating takeovers and securities. At this point there was not even nominal uniformity in the state legislation.

But dealing with differences in the laws was only one of the problems for companies that operated beyond one state. Of even more fundamental importance was the requirement that such companies had to incorporate in each state and to comply with the requirements of each state's laws. And so if, for example, a company wished to raise funds from the public throughout Australia, it would have to comply with the costly prospectus requirements of each state.

All this was brought to a head by a mining boom in the late 1960s. There were notable parallels with the early eighteenth century. The mere announcement of a possible mineral find sent the stock market into a frenzy. New companies were formed without any substance. These were effectively the same as the eighteenth-century 'bubbles'. One of the most notorious illustrations was Poseidon NL whose share price became front page news. At one stage Poseidon shares went from $1.10 to over $200.

When the bubble inevitably burst, recriminations started and explanations were sought as to why companies legislation seemed so inadequate in dealing with the problems that had emerged. A parliamentary committee, known as the Rae Committee after its chairman, was established. The Rae Committee thoroughly examined the boom and bust period and the inadequacies of the legislation. A key finding of this committee was that differences in state law and law enforcement was a contributing factor in the debacle. The committee recommended that a national enforcement authority for company law be established along the lines of the US Securities and Exchange Commission.[24]

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23 See R McQueen, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15 *University of NSW Law Journal* 1.

24 See Report of the Senate Select Committee on Securities and Exchange, *Australian Securities Markets and their Regulation* (PP 98/1974), especially Ch 16, 'The Need for an Australian Securities Commission'.

1.4.1(c) Commonwealth legislation—Mark I

At this point (1972) the Whitlam Labor Government came to power. The Whitlam Government had its own reform program and this included the introduction of a national companies legislation that would be enforced by a national authority. This time really marks the beginning of decades of tension between state and Commonwealth attempts to regulate companies. The Labor Government introduced the Corporations and Securities Industry Bill 1974 (Cth), which would have established a national enforcement authority, and the National Companies Bill, which provided for national regulation of companies. The constitutional validity of this bill was highly contentious. In any event the Labor Government lost office and the bill lapsed.

The failure of national regulation of companies meant that pressure was still building on the state system. During the Whitlam years, the eastern states had got together in an attempt to coordinate company law. The states set up a 'Ministerial Council'. The Ministerial Council was made up of attorneys-general from the eastern states. Its role was to oversee a new proposed scheme of cooperation. This involved not only uniform companies legislation in the states but also a system of recognition of companies incorporated in other states.

Chronologically, the next important step was the decision by the Liberal–National Party Government to build on this state arrangement. However, before considering this, we will jump ahead to another attempt by the Commonwealth government to pass Commonwealth legislation. This occurred when the Hawke Government came to power. In 1989 the Hawke Government passed the *Corporations Act 1989* (Cth). This was the first Commonwealth Act passed on company law. It was ultimately to founder on constitutional grounds.

The Hawke Government wanted national legislation for reasons already considered. It was unhappy with the cooperative scheme introduced by the Fraser Government (considered below). It referred the matter to the Parliamentary Standing Committee on Constitutional and Legal Affairs. This committee obtained legal advice to the effect that the High Court could be expected to interpret the Constitution in a manner that would allow national legislation over companies.

What are the constitutional issues?[25] Under s 51(xx) of the Commonwealth Constitution, the Commonwealth can pass laws 'with respect to foreign corporations and trading and financial corporations formed within the limits of the Commonwealth'. The issue essentially was what 'formed' meant in this context. Was it to be confined to companies that were *already* formed? If so, the Commonwealth Parliament would have limited power over companies and in particular would not be able to provide for the registration of new companies. Or was 'formed' to be read as referring to companies formed *within the Commonwealth* as opposed to foreign companies (which were formed outside the Commonwealth)? If this latter view were taken, the Commonwealth

25 See S Corcoran, 'Corporate Law and the Australian Constitution: A History of Section 51(xx) of the Australian Constitution' (1994) 15 *Journal of Legal History* 131.

would then have power to provide for incorporation. An alternative approach would have been for the states to transfer to the Commonwealth their constitutional powers over companies but, in addition to states being reluctant to give up their 'rights' to the Commonwealth, there was also concern that once transferred the powers could never be recovered. Further, the regulation of companies provided a source of revenue for the states.

The *Corporations Act 1989* (Cth) was based on the broader of the two views of the Constitution and so assumed a power to provide for incorporation. There were still other limitations that the Act had to provide, such as confining its scope to trading, financial and foreign corporations, but otherwise it was a comprehensive statute regulating companies. However, when it was passed, the *Corporations Act* was not proclaimed as constitutional challenge by states had already been foreshadowed. When these challenges were ultimately heard, in *NSW v Commonwealth*,[26] the High Court held that 'formed' means already formed and so the *Corporations Act 1989* (Cth) was held to be constitutionally flawed. Company law was at that stage in chaos.

There was of course still some scope for Commonwealth legislation over companies. One proposal, which received a good deal of support, was for the Commonwealth to legislate over 'national' issues, such as takeovers and securities, and allow the states to provide for incorporation and internal affairs of companies. Such a 'split' scheme operates in the United States.

Ultimately agreement was reached between the states and the Commonwealth for a 'cooperative' scheme. This scheme was based very much on the model developed during the 1980s when the Fraser Government was in power, although an attempt was made to deal with the deficiencies that had become apparent in that scheme. It is appropriate therefore to go back to that scheme.

1.4.1(d) Cooperative legislation

In 1978 all states (and later the Northern Territory) and the Commonwealth agreed to coordinate companies legislation. This agreement, reached among the attorneys-general, was designed to meet the need for national regulation of companies but was to be based on the sound constitutional bedrock of state legislation. The new scheme was the 'Code' system. The first part of the scheme was for the Commonwealth to pass comprehensive companies legislation (the *Corporations Act 1989* (Cth)) in the Australian Capital Territory. This statute presented no constitutional issues as the Commonwealth had full power over the territories under s 122 of the Constitution. The *Corporations Act 1989* was based on the then existing state companies statutes as the point of the new scheme was not to change the law but to achieve uniformity and minimise the effects of state boundaries. The next stage in the scheme was for

26 (1990) 169 CLR 482.

the states to pass legislation that 'automatically' adopted the ACT law. This was the 'application' legislation. In effect, the application legislation simply stated that the substantive provisions of the ACT *Corporations Act* were to apply to the relevant state. These provisions were referred to as the state's 'Code'.

At the head of the Code scheme was the Ministerial Council, made up of state and Commonwealth Ministers. The Ministerial Council had ultimate responsibility for the scheme. Amendments to the ACT *Corporations Act* could only be made if the Council agreed. The Council was also in charge of the National Corporations and Securities Commission (NCSC). The NCSC had a number of roles under the legislation but one of its key roles was to enforce the various Codes. In practice, the NCSC delegated much of its power to state offices.

Built into the scheme was a 'one stop shopping' feature. That is, companies incorporated in one state were 'recognised' as valid companies in other states. In this sense the scheme had 'national' features. For example, there was no need for a company to be incorporated in different states, nor was it necessary for a company that wished to raise funds in a number of states to register a prospectus in more than one state.

It can be seen from the brief outline above that the objective of the scheme was to have state companies legislation operating in a similar manner to a national statute but without the constitutional (and political) problems of a truly national scheme. Even though the thrust of the scheme was effective, it was not long before problems emerged. In particular, there were three fundamental concerns:

1. There were concerns about the efficiency and effectiveness of the NCSC both in regard to the question of whether it was adequately funded to perform its regulatory role and whether its delegation to state offices involved a loss of control and duplication of resources.
2. There were concerns about the level of accountability of the Ministerial Council to Parliament. The Ministerial Council was ultimately responsible for the cooperative scheme, including responsibility for amendments to the legislation. Nevertheless, the Council was not politically accountable to any Minister or Parliament. The Federal Parliament (by now the Hawke Labor Government) could reject proposed amendments to the legislation but not initiate amendments and saw itself as a 'rubber stamp' to the reform process.
3. Amendments to the law were cumbersome. Proposals for reform had to go through the Ministerial Council and required a majority of the states to agree. Company law is an area of law that often requires quick and flexible responses and there were concerns that the scheme was (a) too slow and (b) too conservative in that only the 'lowest common denominator' amendments were likely to be agreed to.

Reverting back to the chronology of events, the *Corporations Act 1989* was at this stage passed by the Commonwealth Parliament. As already noted, this Act failed on constitutional grounds and so a new cooperative scheme was adopted.

1.4.1(e) The *Corporations Law*

In June 1990 at Alice Springs a new agreement was entered into by the states and Commonwealth. This new cooperative scheme was based on the same cooperative approach as the Codes but was modified in an attempt to overcome the perceived weaknesses outlined above.

The new scheme was based on a similar application device to that employed for the Codes. That is, companies legislation was passed by the Commonwealth to apply to the Australian Capital Territory[27] and the states adopted the substantive provisions of this Act as their own statute. The Commonwealth *Corporations Act* was in two parts. The first part, ss 1–82, was referred to as the 'covering provisions'. The covering provisions established the machinery of company law, dealing with such matters as how the legislation would be administered and enforced. Section 82 then set out what was referred to as the '*Corporations Law*'. This was the substantive company law.

The new scheme attempted to overcome the problems of the old cooperative scheme in the following manner:

1 The *ASIC Act* established the Australian Securities and Investments Commission (ASIC).[28] This body replaced the NCSC and remains the body responsible for administering and enforcing Australian company law, as explained below. ASIC is responsible to the Commonwealth Minister[29] and so the accountability concern under the previous scheme has been addressed. ASIC has regional offices in each state. It also has business centres in capital cities and regional centres—to meet concerns of states, although not delegation to state bodies.

2 The Ministerial Council was retained but with significantly less power than it previously had. This was again a response to the accountability issue referred to above. Reform to companies legislation was now more easily made. Amendments were classified into two types: (a) those that dealt with 'national' market, namely provisions dealing with takeovers, securities and public fundraising and (b) other amendments. If the amendments fell within the first category then the Commonwealth Parliament could introduce legislation provided only that it first consulted with the Ministerial Council. The Ministerial Council had no power of veto. The Parliament's responsibility was to table any opposition by the Council in Parliament. For other types of amendment, the Ministerial Council's approval was required. However, for this purpose voting at the Ministerial Council was by majority and the Commonwealth had four votes and a casting vote. This meant that the Commonwealth was able to approve a proposed amendment provided it could get two other states to agree.

27 The Commonwealth Act was in fact the original *Corporations Act 1989* amended so that it applied only to the Australian Capital Territory.

28 The ASIC was formerly the Australian Securities Commission. It became ASIC following the recommendations of the Wallis Report, which led to an enhancement of the ASC's powers to include responsibilities over the finance industry as well as companies.

29 This was originally the Attorney-General but is now the Treasurer.

3 The *Corporations Law* was 'federalised'. This meant that the covering provisions of the state application legislation provided that for the purposes of administration and enforcement of the state law, the state law was to be treated as if it were federal law. There were three main effects of this approach. The first was that Commonwealth administrative law, not state law, applied. This was relevant, for example, in the case of a review of ASIC decisions. Secondly, criminal offences under the companies legislation were treated as if they were federal offences rather than state offences. Thus investigation and prosecution of offences against the legislation was carried out by Commonwealth bodies, namely ASIC, the Federal Police and the federal Director of Public Prosecution. Finally, the legislation established a cross-vesting scheme and this vested jurisdiction in the Federal Court as well as state courts to hear matters under the legislation.

4 The *Corporations Law* was also national in the sense that incorporation in one state was effective in all other states. Again, the concept of 'recognised' companies was used, so that a company that was registered in one jurisdiction was recognised in other jurisdictions. The legislation also introduced a single national register of companies, in which all companies were given a nine-digit 'Australian Company Number'.

1.4.1(f) *Wakim* and cross-vesting

The cooperative scheme embodied in the *Corporations Law*, despite its ingenuity and strengths, was fundamentally a compromise and something of a patchwork. It ultimately proved unable to cope with the strains that it would be placed under. Its Achilles' heel proved to be the cross-vesting scheme. The constitutional validity of this cross-vesting scheme was successfully challenged by a number of companies that were the subject of winding-up applications. The most commonly cited of these decisions is *Re Wakim; ex parte McNally*[30] where the High Court held that state legislation that purported to confer jurisdiction on the Federal Court to hear matters arising under the *Corporations Law* was invalid.[31] This meant that the Federal Court had jurisdiction to hear an insolvency matter (and other matters under the *Corporations Law*) only where the matter before it involved a corporation registered in the territories or in relation to a matter that also involved a federal matter that was sufficiently related to the non-federal claim. Otherwise corporate law matters were required to be heard in the state courts. Legislation was required to be passed in order to validate previous decisions of the Federal Court.[32] In addition to these cross-vesting difficulties, the High Court in *R v Hughes*[33] cast doubt on the ability of Commonwealth officers to exercise some of the powers and functions delegated to them under the *Corporations Law*.

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30 (1999) 198 CLR 511.

31 See also *Re Brown; ex parte Amann* (1999) 73 ALJR 839; *Welltina Pty Ltd v Mamone* (Unreported, Federal Court of Australia, Finkelstein J, 30 June 1999); *Amann Aviation Pty Ltd v Continental Venture Capital Ltd* (2000) 18 ACLC 277.

32 See, for example, *Federal Court (State Jurisdiction) Act 1999* (NSW).

33 (2000) 74 ALJR 802; 171 ALR 155.

1.4.1(g) Commonwealth legislation, Mark II: the *Corporations Act 2001* (Cth)

To overcome these problems, the states and Northern Territory entered into an agreement with the Commonwealth whereby the states and Northern Territory referred their own constitutional powers over corporations to the Commonwealth Parliament.[34] Under s 51(xxxvii) of the Commonwealth Constitution the Commonwealth may legislate with respect to matters referred to it by state parliaments and so this was relied upon to empower the Commonwealth to pass the *Corporations Act 2001*. The referral legislation has a 'sunset clause' that allows the states to terminate the referral of power after five years.[35] Ultimately a permanent solution will presumably need to be found. The simplest, at least in legal terms, would be an amendment to the Constitution that would give power over corporations to the Commonwealth.

The Act has reinstated the above cross-vesting schemes.[36] This means that proceedings may be heard in state or territory Supreme Courts or the Federal Court. Jurisdiction is also conferred on the Family Court and on state Family Courts. Courts are able to transfer proceedings to another Court if this is thought to be more appropriate.[37]

1.5 Administration of company law

The Australian Securities and Investments Commission (ASIC) is the primary body responsible for the administration of company law. ASIC's existence, functions and powers derive initially from the *Australian Securities and Investments Commission Act 2001* (Cth) but also from the *Corporations Act*. ASIC has regional offices in each state and territory.

ASIC has numerous functions but those of primary interest for present purposes are:

- acting as a registry. Companies are registered with ASIC, as are company auditors and liquidators. Documents are commonly required by the *Corporations Act* to be lodged with ASIC;
- providing information about companies. An important part of the Act's disclosure regime is the ability of the public to access many documents that have been lodged with ASIC;

34 The states were financially compensated for the loss of revenue involved in losing regulatory control over corporations.

35 The referral was originally planned to end in 2004. However, this was first extended to 2011 and, more recently, to 2016.

36 See *Corporations Act 2001* (Cth), Pt 9.6A, 'Jurisdiction and Procedure of Courts'.

37 The Act refers throughout to both 'Courts' and 'courts'. These terms are defined in s 58AA. 'Courts' are confined to the Federal Court, Supreme Courts and the Family Court of Australia (and some state Family Courts) whereas references to 'courts' include all courts. Although s 58AA provides that, generally, proceedings under the Act may be brought in any court, some provisions, such as those dealing with insolvency proceedings, may only be brought in a 'Court'.

- administering the *Corporations Act* and investigating and prosecuting breaches of it. This includes in some instances a discretion to relieve parties from compliance with particular provisions of the Act.

In performing this regulatory function, ASIC publishes regulatory guides and media releases. These are available on the ASIC website as well as in hard copy. ASIC decisions are subject to review by the Administrative Appeals Tribunal[38] and, in the case of failure to follow proper administrative processes, by the courts.[39]

The Australian Securities Exchange Group (the ASX Group) is responsible for the regulation and administration of the financial markets. It has a key role in the corporate governance of companies that are listed on the Australian Securities Exchange (the ASX).[40] This is considered in Chapter 6.

The *Australian Securities and Investments Commission Act 2001* (Cth) created a number of bodies in addition to ASIC, which have more limited roles in the administration of company law. These are:

- the *Takeovers Panel*. This body has broad power to declare that conduct associated with corporate takeovers, although not technically in breach of the *Corporations Act*, is nevertheless 'unacceptable' and so prohibited. It can conduct proceedings for this purpose.
- the *Companies Auditors and Liquidators Disciplinary Board*. As its name suggests, this body hears claims that auditors and liquidators have acted in breach of their duties.
- the *Australian Accounting Standards Board*. This body prescribes accounting standards to be observed by companies in their reporting requirements under the *Corporations Act*.
- the *Auditing and Assurances Standards Board*. This body prescribes the auditing standards with which companies must comply and provides general guidance on auditing and assurance matters.
- the *Financial Reporting Panel*. This panel overseas financial and accounting standards.
- the *Parliamentary Joint Committee on Corporations and Financial Services*. This is a permanent parliamentary committee that oversees the workings of ASIC and the Takeovers Panel and is required to report to Parliament.
- the *Corporations and Markets Advisory Committee*. This committee acts as an advisory body on law reform in this area . See further 1.6.3.

38 See Pt 9.4A of the Act.
39 Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
40 See www.asx.com.au.

1.6 Reforming company law

Because of the social significance of companies, companies legislation has been subject to fairly constant reform. As noted above, in the past much of this reform has been directed simply to having 'national' legislation, in effect if not in form. In this process, often matters of policy have been left behind. Nevertheless, there has also been a stream of significant reform of substantive corporate law, although such reform is often piecemeal.

A number of concerns have emerged from this reform process. One concerns the pace of reform. Some consider that reform has been introduced at such a rate that saturation point has been reached. Even if problems are identified that would normally merit legislative amendment, it has been argued that the reforms should be held back, in order to promote stability and certainty in the law. Another concern relates to the complexity of the legislation. Particularly following the 'dense' legislation of the 1980s, concern grew that the law was inaccessible to those who were subjected to it, that is, businesspersons. One suggestion was that greater use should be made of so-called fuzzy law (as opposed to detailed black letter law).[41] The argument was that such was the complexity of the matters regulated by the corporate legislation that general concepts should be employed, leaving it to the courts to fill in the gaps, rather than attempting to deal with all possibilities in the traditional black letter style.[42] Finally, others argued that corporate law remains in need of fundamental reform; that it is still in important respects based on the relevant nineteenth-century English legislation.[43]

The following provides an overview of recent reform processes, where it can be seen how these processes have responded to the concerns expressed above.

1.6.1 Simplification process

In the 1980s the Commonwealth Attorney-General[44] established a 'simplification' task force. The task force included a 'plain English' specialist and business advisor. The objective of the task force was stated as being to simplify the manner in which the existing legislation was expressed rather than to introduce policy changes. Inevitably, however, changes to the language brought changes also to the substance of the law. The intention was to work through the corporations legislation in stages. In fact the project, as will be seen, was subsequently superseded.

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41 J Green, 'Fuzzy Law: A Better Way to Stop "Snouts in the Trough"?' (1991) 9 *Company & Securities Law Journal* 144.

42 An illustration is s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) which prohibits 'conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive'.

43 One criticism, for example, is that the Act draws no fundamental distinction between small and large corporations.

44 At that stage company law fell within the portfolio of the Commonwealth Attorney-General. As noted immediately below, responsibility for corporations was transferred to Treasury in the 1990s.

The *First Corporate Law Simplification Act 1995* (Cth) amended parts of the then *Corporations Law* and the results of these reforms can still be seen.[45] A Second Simplification Bill was prepared but at this stage there was a change of government and company law moved from the portfolio of the Attorney-General to Treasury and a new reform agenda took over. Nevertheless, this Bill was ultimately passed essentially intact, as the *Company Law Review Act 1998* (Cth). Again, in addition to simplifying language, the amending Act made some fundamental changes to the then *Corporations Law*.[46]

1.6.2 Corporate Law Economic Reform Program (CLERP)

Responsibility for corporate law was moved from the Attorney-General's office to Treasury so that company law could be part of the broader micro-economic reform process being undertaken by Treasury in other areas, such as in competition law. The general concern was that company law was not sufficiently efficient now that it was operating in a global market. There was particular concern expressed over the regulation imposing unnecessary costs. Treasury thus undertook to review the substantive provisions of the corporations legislation. This program is referred to as the Corporate Law Economic Reform Program (CLERP). A series of significant statutory reforms have come from CLERP and these will be referred to in the course of the book.

1.6.3 Other reform proposals

In addition to the reforms emerging from CLERP, the Corporations and Markets Advisory Committee (CAMAC) has proposed a number of important reforms. CAMAC was established in 1989 to provide the government with independent advice on corporate law issues that arise from time to time. It has released various reports and discussion papers.[47] The former include *Rehabilitating Large and Complex Enterprises in Financial Difficulties* in October 2004, which led to significant insolvency amendments to the *Corporations Act*. These are considered in Chapter 21. Other recent reports include *Managed Investment Schemes* (2012) and *Executive Remuneration* (2011).

1.7 Theories of corporate law

By 'theories' of corporate law we mean the way in which the nature of the corporation is viewed. These theories are useful not just to clarify our thinking on what a corporation is but they also affect the way we assess the regulation of companies and proposals for reform. For example, how we view the corporation will affect how we approach the following questions: whether criminal liability should be imposed on corporations

45 See, for example, the *Small Business Guide*, contained in s 111J of the Act.
46 For example, in relation to the constitutions of companies: see further Chapter 4.
47 The reports and discussion papers can be found at www.camac.gov.au/CAMAC/camac.nsf.

themselves, or whether, on the other hand, it should be confined to the individuals 'behind' the corporation; in what circumstances shareholders and officers should be liable for a corporation's debts; whether managers should be required to be 'socially responsible'; how a corporation should be governed; and generally the extent to which legal rules should be imposed on corporations. Thus the brief outline below will be revisited when we get to these contexts.

Although the terminology of corporate theory varies, a common classification is as follows.

1.7.1 The corporation as an artificial entity: the concession theory

On this view, the corporation is seen as an artificial entity whose privileges have been granted by the state. The emphasis is on the separate legal status accorded ('conceded') to the corporation by the state. One of the major implications of holding this view is that it sees a primary role for the state, representing the public interest, in regulating corporations. Critics of this view of the corporation see it as outmoded, that is, as being more appropriate to a time when the state played a significant role in the creation of corporations. They contrast that with the ease in which corporations are now created, effectively as a private 'right'. However, those who argue for a more interventionist approach to corporate regulation might be seen as at least partially adopting the concession theory.[48]

1.7.2 The corporation as a group of individuals: the aggregate theory

Another view of the corporation is that it is essentially a group ('aggregate') of individuals. The artificial legal entity that is created by the state, and corporate regulation generally, is seen as a convenient and efficient means of regulating the dealings[49] among the individuals who make up the corporation and those who deal with them. This is how most economists view the firm.[50] The law and economics movement has been extremely influential in the legal theory of corporations. It is doubtless true to say that this is now the predominant view of the corporation,[51] although it also has

48 See, for example, R Green, 'Shareholders as Stakeholders: Changing the Metaphors of Corporate Governance' (1993) 50 *Washington & Lee Law Review* 1409. See generally P Mahoney, 'Contract or Concession? An Essay on the History of Corporate Law' (2000) 34 *Georgia Law Review* 873.

49 These dealings are referred to by economists as 'contracts' and so the theory is often referred to as 'contractarian'. The term 'contract' in this context can be confusing to lawyers as it is not referring to a contract in the legal sense.

50 There are, however, other approaches. See, for example, Blair and Stout who suggest a company is most appropriately viewed as a 'team production' enterprise: M M Blair and L A Stout, 'Team Production Theory' (1999) 85 *Virginia Law Review* 247–328.

51 There is a voluminous literature on this, deriving initially from the United States of America. For a helpful general discussion of the issues, see 'Symposium, Contractual Freedom in Corporate Law' in (1989) 89 *Columbian Law Review* 1395.

its critics.[52] More attention will be given to this in the next chapter in the context of the arguments for limited liability of shareholders, but for now it can be noted that the primary implication of this approach is that, as the corporation is essentially the product of private dealings, the state's role is properly limited to assisting the efficient implementation of these dealings.

1.7.3 The corporation as a real entity: corporate realism

This theory sees the corporation as a 'real person' with a life of its own.[53] Like the concession theory, the realist approach acknowledges a significant role for the state in regulating corporations but also sees the corporation as a real person with real rights. This view of the corporation would suggest, for example, that it is appropriate that criminal liability and criminal sanctions should be imposed on the corporation itself[54] but also that it is appropriate for corporations to have certain rights, such as the right against self-incrimination.

1.8 Conclusion

The corporate form has proved to be the pre-eminently suitable form to conduct business, from closely-held companies conducting a simple family business through to the largest public companies listed on the securities exchange engaging in a diverse range of business activity. Of the various legal features of the corporate form, its separate legal personality and the availability of limited liability for its owners are its most often cited attractions. In relation to the latter, however, we saw in this chapter that limited liability is not an inevitable attribute of the corporate form and subsequent chapters will examine key areas where the protection of limited liability is removed.

The social significance of companies together with their artificial and abstract nature have resulted in a high level of regulation. One of the problematic aspects of this regulation in Australia has been the tension between the states and territories, on the one hand, and the Commonwealth on the other, in undertaking this regulatory role. At present there is an uneasy compromise. These same factors have also led to the development of different theoretical explanations of the company, with the predominant theories currently based on an economic perspective of the form. These theoretical views of the company are useful as an aid not only to explain the nature of the corporate form, but also, as we will see in subsequent chapters, as a policy basis to assess potential legal reform.

52 See, for example, W Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407; M Eisenberg, 'The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm' (1999) 24 *Journal of Corporate Law* 819.

53 See, for example, H Laski, 'The Personality of Associations' (1915–16) 29 *Harvard Law Review* 405.

54 It will be seen in Chapter 3 that this will generally be in addition to, not in replacement of, sanctions imposed on the individuals involved.