

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 itself⁵⁴ 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.