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A HISTORY OF COMPANY LAW IN COLONIAL AUSTRALIA: LEGAL EVOLUTION AND ECONOMIC DEVELOPMENT

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ABSTRACT

The history of Australian company law has attracted remarkably little attention in academic literature, perhaps because it has been mainly seen as a copy of English law with few if any important features worthy of note. This paper seeks to point out several interesting and significant aspects of the evolution of Australian company law and to consider this evolution in the context of the economic development of colonial Australia. Australian company law represents an example of the transplant of English law. This raises the question whether this transplant of law was successful. The central contention of this paper is that the evolution of company law in colonial Australia was innovative and responsive to the economic needs of the society and in particular, it was instrumental in financing the development of the mining industry which played an important role in the economic success of colonial Australia.

A HISTORY OF COMPANY LAW IN COLONIAL AUSTRALIA: ECONOMIC DEVELOPMENT AND LEGAL EVOLUTION

Introduction

The interaction of economic development and the evolution of company law in colonial Australia presents an interesting case study of a company law transplant because it allows for the examination of this interaction in the context of the development of a capitalist society over a relatively short period of time.

Little has been written about the history of Australian company law, [1] possibly because it has been regarded as a mere copy of the English legislation with few if any distinguishing features worthy of note apart from some local innovations in the 1870s and 1890s. This paper looks at the history and evolution of company law in colonial Australia and finds several noteworthy features which depart from the notion that the Australian developments were largely a bland imitation of the law in England. In fact, there were innovative features in the development of company law which were specific to the Australian experience and which cast light on the interrelationship between economic development and legal evolution.

By the 1820s and 1830s there was already demand for pooled equity investment and share trading and the utilisation of unincorporated joint stock companies with transferable shares. This early use of joint stock companies set in train an evolutionary trajectory well before the introduction of companies legislation and the establishment of formal stock exchanges. This suggests that companies would have continued to evolve as a matter of commercial practice irrespective of legislative developments.

I am grateful to Richard Mitchell for his insightful comments and stimulating discussions which were of invaluable assistance.

[1] See for example the brief discussions in R P Austin and I M Ramsay *Ford's Principles of Corporations Law* 12th edition Lexis Nexis Butterworths 2005, 42; P Redmond *Companies and Securities Law Commentary and Materials* 4th edition Lawbook Co Sydney 2005, 44-46; .R Tomasic, J Jackson and R Woellner *Corporations Law Principles, Policy and Process* 4th edition Butterworths 2002, 12-13 and R Baxt, K Fletcher and S Fridman *Corporations and Associations Cases and Materials* 9th edition Lexis Nexis Butterworths 2003, 138. For a history of the law of business corporations in Canada see R C B Risk "The Nineteenth-Century Foundations of the Business Corporation in Ontario" (1973) 23 *University of Toronto Law Journal* 270.

Limited liability partnerships which had some of the characteristics of companies were introduced in New South Wales and Victoria in the early 1850s for mining enterprises. This legal form was short-lived, but it indicates a preparedness of colonial governments to seek innovative responses to the needs of their business communities despite the absence of equivalent English legislation. At the same time in England, the introduction of limited liability was still being vigorously debated.

The introduction of companies legislation in Victoria in 1864 and in the other colonies around this time, broadly coincided with the beginning of a gold mining boom which was a major driver of economic growth. The facilitation of company formations in the gold mining industry was a significant factor in the development of this key industry and the enormous wealth it generated. The introduction of the no liability company in 1871 was an innovative response to the requirements of the gold mining industry and occurred at a time of significant expansion in gold output.[2]

The investor protection reforms of the 1890s in Victoria were also highly progressive and while largely based on English law reform proposals, occurred more than a decade before similar reforms were introduced in England. These legislative amendments were a response to the widespread losses suffered by investors in the aftermath of the boom and bust and severe depression of the 1890s.

The only significant interpretation of the history of Australian company law is a series of articles by Rob McQueen in the early and mid 1990s which questioned whether the adoption of English company law by the Australian colonies was appropriate for the local conditions.[3] He described this adoption of English company law as "company law as

[2] This paper focuses on the Victorian legislation because it was the originator of the main nineteenth century company law developments which were usually followed by the other colonies.

[3] "Company Law as Imperialism" (1995) 5 *Australian Journal of Corporate Law* 1; "An Examination of Australian Corporate Law and Regulation 1901-1961" (1992) 15 *University of New South Wales Law Journal* 1; and "Limited Liability Company Legislation – The Australian Experience" (1991) 1 *Australian Journal of Corporate Law* 22. John Waugh also wrote an historical analysis of Australian company law in terms of the deficiencies which were exposed by the crash of the 1890s and the resultant Victorian reforms in "Company Law and the Crash of the 1890s in Victoria" (1992) 15 *University of New South Wales Law Journal* 356.

imperialism" serving English economic interests rather than assisting Australian economic development and he argued that the adoption of English company law was inappropriate for Australian conditions. He also argued that the introduction of the no liability company was largely brought about by the inadequate administration of the companies legislation [4] This paper reassesses the transplant of English company law in Australia in terms of whether it was successful and appropriate and encouraged economic development. The development of sound institutions is conducive to strong economic growth and the successful transplantation of company law can be seen as a significant factor in the remarkable economic success of the Australian colonies in the latter half of the nineteenth century and also explains why the Australian colonies were able to avoid the "resources curse".

This paper seeks to adopt the classification formulated by Ron Harris who analysed the relationship between legal and economic developments in Britain during the period 1720 to 1844.[5] Harris suggests that this relationship between legal and economic development has been characterized in three ways. The first sees the law as developing autonomously or in isolation from economic developments; the second interpretation regards legal and economic developments as occurring in rough synchronization so that the legal framework is responsive to economic needs; and the third perspective sees the law in the books as divorced from economic needs however the resourceful practice of businessmen enables the law to be adapted so as to become functional in its operation despite its apparent initial unresponsiveness to business needs. This paper argues that the foundations of the institutions of company law had already been laid before the enactment of limited liability companies legislation. This early period prior to 1850 can be seen as fitting the third interpretation because the economic need of a form of business organization suitable for pooled investment and share trading effectively evolved without specific legal encouragement. The period after the introduction of limited liability legislation in the 1850s and which culminated in the transplant of English companies legislation can be seen as a period when legal evolution was responsive to economic

[4] "Company Law as Imperialism" (1995) 5 *Australian Journal of Corporate Law* 1, 46-55.
[5] R Harris *Industrializing English Law* Cambridge University Press 2000, 4-8.

development and a number of legislative changes were made which furthered economic development and the interests of important business constituencies. The introduction of the no liability company can be seen in this light and the legal evolution of company law can overall be seen as responsive to the economic circumstances which existed in the Australian colonies in the nineteenth century.

The main focus of this paper is on the evolution of company law during the colonial period. While it is the intention of this paper to consider this evolution in the context of the broad economic history developments of the time, a detailed examination of the various debates engaged in by economic historians and the operation of corporations in other settings is outside the scope of this paper.

Pre-legislative Development of Companies

In the early years following settlement, the development of the New South Wales economy was a secondary priority to its maintenance as a penal colony. For several decades the economy was quite primitive. Any private financial resources which were accumulated were utilised in small scale trading or agricultural activities. Most infrastructure was developed by the government as part of its main function as administrator of a prison colony.

The first company formed in New South Wales was the Bank of New South Wales in 1817. At the time when the colony was moving away from its convict origins and a free economy was starting to develop, Governor Macquarie wished to develop a source of finance and local currency so as to reduce dependence on the Treasury in London and facilitate the further development of a free society. Macquarie sought to encourage local investment in the bank and conferred upon it a charter granting limited liability to its shareholders under which the bank operated for some time. However the charter required approval from the government in London and ultimately this was refused largely because it was seen as undesirable for banks to be formed with limited liability, as this placed depositors at greater risk. The result of this refusal was that the Bank of New South Wales operated as an unincorporated joint stock company governed by the law of partnership and its deed of settlement which provided for transferability of its shares and management by a board of directors. The unlimited liability of shareholders did not greatly discourage investors taking up the bank's shares as the bank traded profitably from the beginning, perhaps partly as a result of depositor confidence arising from the unlimited liability of its shareholders.

Unincorporated joint stock companies operating under deeds of settlement had been formed in Britain for a long time but had increased in numbers during the railway boom of the 1830s and 1840s. A similar development took place in New South Wales with the formation of several banks and other companies such as The Australian Agricultural

Company (1824) and Australian Gas Light Company (1836) and others associated with the pastoral boom of the 1830s. The extent of company formations and share trading in New South Wales can be seen from newspaper commentary in 1836 which warned that there appeared to be "a sort of mania for the formation of companies".[6] In 1835 the first share list was published by William Barton, an early stockbroker. He also published a book on New South Wales companies which is evidence of strong investor interest in share investment.[7]

A further indication of the widespread extent of colonial share trading in this period can be seen from there being 48 stock traders who advertised shares for sale during the period 1835 to 1851.[8] Early share trading mostly arose from sales by deceased estates or when a shareholder was leaving the colony but later attained a more commercial nature. Newspaper advertisements expressing a desire to purchase shares became increasingly common from the 1830s onward. Prior to the formation of formal stock exchanges in the 1860s and 1870s most share trading was carried out by means of auctions conducted by auctioneers who dealt in a wide range of goods, animals, real estate and shares. Not all of those listed as share traders advertised on a regular basis and none were full time stock brokers but the large number of auctioneers who dealt in shares, together with the number of listed companies formed during the period, indicates the frequency with which shares were traded and their popularity as an investment.

Salsbury and Sweeney tabled companies whose shares were listed or traded in the period 1835 to 1871.[9] In the period up to 1851, at least 71 firms[10] were either active or promoted and about 40 of these were listed for share trading.[11] Of these firms, 60 originated in New South Wales and the others were formed in Britain, New Zealand or

[6] Stephen Salsbury and Kay Sweeney *The Bull, the Bear and the Kangaroo: The History of the Sydney Stock Exchange* Allen & Unwin Sydney 1988, 10 quotes from *Sydney Herald* 11 February 1836 where the newspaper commented on the formation of the Australian Gas Company (later Australian Gas Light Company) hoping that the company would not "burn fingers".
[7] *Particulars of Joint Stock Institutions in New South Wales* J Tegg & Co Sydney 1838 reissued in 1839.
[8] Salsbury and Sweeney, above n 6, Appendix 3, 479-481.
[9] Salsbury and Sweeney, above n 6, Appendix 2, 468-477.
[10] "Firms" appears to mean companies as the term was understood before the general incorporation statutes. These were partnerships whose shares were tradable.
[11] Salsbury and Sweeney, above n 6, 13 and Appendix 2 at 468-471.

Van Diemen's Land (Tasmania). Most of these firms were engaged in banking and finance, insurance and shipping or other transport with very few engaged in mining.[12] Most companies of this time had a short life, as was also often the case in England, so that at any one time the number of companies whose shares were actively traded was quite small. The *Sydney Herald* share list in 1840 comprised 23 companies. This fell to nine after the depression in the 1840s.

Several colonial companies of this time were relatively large and had substantial numbers of shareholders. Barton's 1835 share list showed the Australian Agricultural Company had a paid up capital of £240,000.[13] The largest company on the 1840 share list was the Commercial Banking Company of Sydney which had a paid up capital of £218,000 divided into 3000 shares. This indicates that the average par value of a share was over £70. The Bank of New South Wales had a paid up capital of £170,000 and only a slightly lower average par value of its shares.[14]

The main problem faced by the joint stock company banks was that because they were not incorporated, they were incapable of suing and being sued in their own name. This was a problem for all joint stock companies because under the law of partnership which applied to them, all members had to be named as parties to litigation by or against the company. From a practical point of view this presented considerable difficulties because it was in the nature of these companies that their memberships were constantly changing. The first "companies" legislation in Australia dealing with joint stock companies was passed in New South Wales in 1839[15] to address this problem by validating certain contracts "entered into by banking and other co-partnerships". In 1842 a further Act was passed to enable banks and other companies to sue and be sued in the name of an officer of the company[16] and in 1848 legislation was passed which enabled joint stock

[12] Salsbury and Sweeney, above n 6, Appendix 2, 468-471.
[13] Salsbury and Sweeney, above n 6, 20. Table 1.1 reproduces Barton's first share list of 1835 containing eight companies with details of amount of share capital paid up, share price and dividends.
[14] Salsbury and Sweeney, above n 6, 13.
[15] *An Act to Make Good Certain Contracts which have been and may be Entered into by Certain Banking or other Co-partnerships* 3 Vic No 21
[16] 6 Vic No 2

companies to sue and be sued by their members.[17] Unincorporated joint stock companies were prohibited after the introduction in the Australian colonies of limited liability companies legislation based on the 1862 English *Companies Act*. This is discussed below.

The collapse of the pastoral boom in the 1840s depressed the colonial economy and led to a drastic decline in company formations and the failure of several prominent companies including the Bank of Australia which was, in 1826, the second bank formed after the Bank of New South Wales. It was formed by interests that included the Macarthur family and was known as "the pure merino bank".[18] Its collapse was the first widely publicised and far-reaching corporate failure in Australia and as with many later corporate collapses, it revealed structural weaknesses in the company law of its time.

The absence of a charter conferring limited liability on bank shareholders came to the fore when the Bank of Australia collapsed in 1843. The bank had become over-extended after land values fell and had borrowed money from and given a promissory note to the Bank of Australasia, which was an English bank formed by charter in 1835 and whose shareholders, mainly British, had limited liability. The bank sought to recover its losses on the bills and sued the shareholders of the Bank of Australia. It was ultimately successful in the Privy Council for the full amount of the claim, interest and costs.[19] It was held that the directors had the power under the deed of settlement to bind the company by borrowing money and under partnership law they acted as agents for the company and so bound the company and its shareholders.[20]

There were several bank and other company collapses at this time although none had the disastrous results for shareholders as occurred in the Bank of Australia case. These cases highlighted the risks involved in being a shareholder of an unlimited company and resulted in a marked downturn in company formations and share trading. These risks

[17] 11 Vic No 56
[18] Salsbury and Sweeney, above n 6, 9.
[19] *Bank of Australasia v Breillat* (1847) 13 ER 642
[20] Ibid, 657-658.

were exacerbated because plaintiffs did not have to sue all shareholders but could selectively sue wealthy shareholders for the full amount owing.[21]

Company formations increased markedly after 1851 as New South Wales and the newly established colony of Victoria experienced rapid population increases following the discovery of gold in both colonies. At the same time there was large scale investment in the pastoral sector and railway networks developed to service the mining and agricultural sectors. The growth in equity markets and company formations was particularly marked in Victoria to the extent that by 1860 there were ten specialised broking firms in Melbourne and two in Sydney. This reflected the beginning of deep lead mining in Victoria which required substantial amounts of pooled investment finance from large numbers of investors organised into syndicates. Initially the membership of the syndicates comprised local miners, silent partners and merchant suppliers. This soon led to active share trading in a large number of relatively small mining companies.

Early Experiments in Limited Liability

During the period prior to the introduction of general incorporation legislation, there were several attempts in New South Wales and Victoria to introduce limited liability as a means of encouraging the development of business. These attempts were made in response to perceptions of the needs of local business interests and were ahead of similar developments in England.

The New South Wales Parliament passed several acts in the period 1848 to 1853 which incorporated some of the leading banks such as the Bank of New South Wales and later some mining, insurance and shipping companies. In most cases, the liability of shareholders was limited to twice the nominal value of shares held. This reflected the reluctance of British government authorities to authorise the incorporation of banks with limited liability while being prepared to accept liability of double nominal value. It was

[21] This was a major issue of concern at the time. Salsbury and Sweeney, above n 6, 13 quote the *Sydney Morning Herald* of 9 August 1847 "the creditor is not obliged to look to the enrolled list of members of the Company and levy rateably and equitably upon each. He takes the shortest cut into what appears to him to be the longest pockets".

for this reason that banks were excluded from the English limited liability legislation of the 1850s. This double nominal value liability served as a model for incorporations in industries other than banking including the Great Nugget Vein Gold Mining Company, incorporated in 1852 despite the fact that this type of extended limited liability was rarely used in Britain.[22] These incorporations led to increased company activity in Sydney where investors favoured shares which paid regular dividends, especially the large banks.[23] Melbourne investors focused on gold mining shares and were more speculative in their share dealings. Several advertisements in Melbourne newspapers sought investment funds and announced the intention to seek incorporation by act of the Legislative Council.[24]

Sole traders and partnerships were by far the most common forms of business organisation and both New South Wales and Victoria introduced legislation which recognized limited liability partnerships in the early 1850s.[25] These early forms of limited liability enterprises were little used[26] and repealed by the companies Acts introduced in Victoria in 1864 and New South Wales in 1874 which provided for the incorporation of companies with limited liability. Although the limited liability partnership Acts were short-lived and not widely used, they nevertheless reflected a preparedness of colonial governments to depart from English law and to adopt business forms suited to the local economic and business environment in response to the demands of some sectors of the local business community. In particular, the recognition of limited liability partnerships may have been a response to community concern during the downturn of the 1840s when large numbers of shareholders became liable for company losses.

[22] Salsbury and Sweeney, above n 6, 33-34 quote the *Sydney Morning Herald* 21 June 1853 which opposed the double nominal share value liability and favoured liability limited to the nominal amount of the shares. Double nominal value liability was also adopted by banks in Canada. See Risk, above n 1, 295.
[23] Salsbury and Sweeney, above n 6, note that in 1858 there were over 20 dividend-paying companies in New South Wales and this increased during the 1860s.
[24] R W Birrell *Staking a Claim: Gold and the Development of Victorian Mining Law* Melbourne University Press 1998, 108.
[25] *An Act to Legalize Partnerships with Limited Liability* 1853 NSW (17 Vic No 9) and *An Act to Legalize Partnerships with Limited Liability* 1854 Vic (17 Vic No 5). Limited Liability also generally prevailed in Canada even in the absence of express provision. See Risk, above n 1, 295-298.
[26] R W Birrell, above n 24, 36 notes that according to the *Victorian Government Gazette* only 14 partnerships, of which six were mining enterprises, were registered under the Victorian Act.

To encourage investment in the mining industry, Victoria passed a Mining Companies Act in 1855[27] which introduced a form of incorporation and limited liability for mining corporations and partnerships. The distinction between companies and partnerships was blurred until the introduction of the companies legislation modeled on the 1862 English act. The 1855 Victorian legislation enabled a company to be formed and registered with a local court although it was in many respects a partnership governed by partnership law. The structure of these companies was based on the "cost-book"[28] system which was commonly used in Cornwall however this type of company proved to be cumbersome and unsuited to an environment where people moved frequently from one goldfield to another. Shareholder meetings were required to be held every six months at which time the shareholders authorized the declaration of dividends or making calls on the shares. The shareholders were mostly miners who formed groups that were able to sink the shafts that were becoming necessary after alluvial gold petered out. Each miner in the group, which could comprise up to 80 members received a share and shares were also issued to providers of mine materials. These shares could be divided so as to enable the holder to acquire money for living purposes. These interests in shares soon came to be traded at designated locations in the mining towns from which early stock exchanges developed in Ballarat and Bendigo from the late 1850s.[29]

The concepts of paid up shares, minimum par value and the limiting of liability to the amount unpaid on shares were introduced in the legislation in 1858[30] and simplified in 1860[31]. This legislation represents an early introduction of limited liability to mining companies contemporaneously with its introduction in England and despite its drawbacks it appears to have encouraged some investment in mining companies. Similar legislation

[27] *An Act for the Better Regulation of Mining Companies* 18 Vic No 42. This act was often referred to as "Haines' Act" after the Chief Secretary who presented it to the Legislative Council. See Birrell ibid, 36-37.
[28] N Lindley (later Baron Lindley) *A Treatise on the Law of Companies* 5th edition Sweet & Maxwell London 1889, 93-98 describes these as a type of company governed under the law of partnership whereby the shareholders agree to share in a mining enterprise in certain proportions and appoint an agent as manager. The "cost book" was a book in which was contained the agreement entered into by the venturers, the receipts and expenditures of the mine, the names of shareholders and their accounts with the company and transfers of shares. A feature of such companies was their ability to sell shares on which calls were not paid.
[29] Birrell above n 24, 63-64. Birrell, 112 says that in 1859 there were 27 Bendigo mines, 10 Castlemaine mines and 10 Maldon mines quoted on various stock exchanges.
[30] *Mining Associations Act 1858* 21 Vic No 56 was often referred to as "Ireland's Act".
[31] "Pyke's Act" 24 Vic No 109.

was adopted in New South Wales soon after, although gold had much less impact in New South Wales because production was much smaller and there was much less deep lead mining.

A major impetus to investment in gold mining companies came after a change of government in 1858 which saw a change in policy, led by Melbourne business interests, in favour of mining companies and the encouragement of the inflow of capital into the industry. Mining companies had previously been viewed with suspicion and hostility by individual alluvial miners who saw them as a threat to their livelihoods and the government was responsive to their grievances in the years after the Eureka. By the late 1850s alluvial mining was in rapid decline. A necessary requirement for the development of mining companies was the granting of large leases which gave greater security of tenure. By the late 1850s stock exchange trading and the utilisation of limited liability mining companies as an investment vehicle had already become well established in Victoria despite the lack of a general incorporation procedure. The system of company registration had developed in an *ad hoc* way and was complex in that companies could be registered under several statutes. The 1855 Haines' Act was based on the cost book system and proved unwieldy and cumbersome, the 1858 Ireland's Act attempted to overcome some of these difficulties but was not widely used largely because it was interpreted so as to impose liability on wealthy shareholders[32] and the 1860 Pyke's Act which was simpler and ultimately the most successful of these legislative attempts to provide for registration of companies and limited liability.

There were many companies whose shares were actively traded and several of them, especially the banks, were quite large in terms of their issued capital. It is clear that there were entrepreneurs who wished to establish pooled investment business organisations and there were also investors seeking investments which offered returns with varying degrees of risk. A major development which was about to occur was the use of the company form by a large number of mining companies which came to dominate colonial stock

[32] Birrell above, n 24, 68 quoting Vincent Pyke as describing it in Parliament as "so cluttered with conditions as to be virtually useless".

exchanges. This development coincided with the introduction of "modern" companies legislation.

The Transplanting of the English 1862 *Companies Act*

Soon after the consolidation of the Companies legislation in England in 1862,[33] much the same legislation was passed in most Australian colonies.[34] The main features of this legislation were that it allowed for incorporation by lodgment of constituent documents, required associations of more than 20 members to incorporate by prohibiting them from operating as partnerships or unincorporated joint stock companies and introduced limited liability of members. Within 6 months after the passing of the 1862 *Companies Act*, a version was introduced into the Victorian Parliament although it took several further months before it was finally passed. Other colonies adopted virtually the same legislation between 1863 and 1874. Prior to this, South Australia had passed legislation in 1847 based on the English *Companies Clauses Consolidation* Act 1845.[35] However this was little used and ultimately repealed in 1864 by legislation based on the English 1862 Act. Western Australia passed the *Joint Stock Ordinance* 1858[36] based on the English *Joint Stock Companies* Act 1856.[37]

As the Victorian *Companies Statute* 1864 and similar colonial legislation was based on the English *Companies Act* 1862, they contained few public disclosure requirements beyond the lodgment of the memorandum and articles of association on registration and subsequent lodgment of the register of members and summary of capital.[38] Information which was not generally available to the public therefore included financial information about the company's activities, the extent to which the company's issued capital had been paid up in non-cash consideration and the nature and value of this consideration. There was no requirement to disclose details of contracts entered into by the company with its

[33] *Companies Act* 1862 (25 & 26 Vic c. 89).
[34] *Companies Act* 1863 Qld (27 Vic No. 4); *Companies Statute* 1864 Vic (27 Vic No 190); *Companies Act* 1864 SA (27 & 28 Vic No.13); *Companies Act* 1869 Tas (33 Vic No 22); *Companies Act* 1874 NSW (37 Vic No. 19).
[35] *Joint Stock Companies Ordinance* 1847 SA 10 & 11 Vic No 5.
[36] 22 Vic No 6.
[37] 19 & 20 Vic c 47.
[38] *Companies Statute* 1864 ss 15 and 24.

promoters so investors had little opportunity to ascertain the circumstances behind company promotions.

Apart from the important exception of the gold mining industry, initially there appeared to be little strong local demand for companies legislation and it was not for another 20 years that the company form became widely used.[39] During the early 1860s the most important sectors for investment in company shares were in banking and mining companies and most large banks were either incorporated by Act of Parliament or were established in Britain. This slow development in the number of company incorporations outside the mining sector is consistent with developments in Britain because it also took several decades after the introduction of companies legislation for company registrations to increase appreciably in Britain. The Australian economy and business sectors were much smaller and far less diversified than was the case in Britain. Evidence of the lack of real interest in the introduction of the 1864 companies legislation is shown in the fact that the Act inadvertently repealed the *Mining Partnerships* Act 1860. This was much to the annoyance of mining interests which found the repealed Act far more suitable for their purposes than the later introduced *Companies* Statute which, Hall suggests, was "obviously tailored to the requirements of relatively large-scale firms operating in England".[40] This oversight was redressed within six weeks by the passing of a separate Act for mining companies, sometimes referred to as Frazer's Act and the regulation of mining enterprises in Victoria remained separate from the general companies legislation for the remainder of the century. Even though the *Companies Statute* had little or no impact on most business organisations, it enabled companies, especially in the mining sector, to be incorporated far more easily and with a minimum of compliance requirements, the main one of which was to require annual reports to be lodged. However there was no prescribed form which had to be used and in any case, the enforcement of compliance requirements was generally lax. This ability to incorporate and seek listing on a stock exchange was important for capital raising.

[39] A R Hall *The Stock Exchange of Melbourne and the Victorian Economy 1852-1900* Canberra 1968, 43.
[40] Ibid.

The market value of ordinary shares listed on the Melbourne Stock exchange in 1865, soon after the Victorian *Companies Statute* was introduced, was nearly £9 million, of which bank shares comprised 45 per cent. There were 133 mining companies listed on the Melbourne Stock Exchange with a market value of £3,626,000 compared to 25 non-mining companies with a market value of £5,298,000.[41] In 1884, before the height of the boom of the 1880s, the market value of ordinary shares had increased threefold in twenty years.

This marked increase in the market value of listed shares shows that the transplant of company law legislation and limited liability in particular, had the effect of encouraging the promotion of stock exchange listed companies and trading in their shares. Certainly the capital markets of the Australian colonies were less developed than their contemporary equivalents in Britain but there was already by the 1860s significant and growing share market activity, especially in gold mining shares which led to the establishment of several stock exchanges. Blainey notes that within one year of the introduction of the Victorian *Companies Statute*, the Woods Point district had 262 registered companies comprising 13 per cent of Victoria's mining companies.[42] This increased share market activity fuelled the conversion of many co-operative mining companies into limited companies. The main reason for this adoption of the company form was that it allowed greater flexibility in the capital structure of the enterprise, especially by enabling the issue of large numbers of shares in the event of a company becoming successful. Co-operatives generally had a small number of shares and so gold mining companies registered under the *Companies Statute* were more accessible to large numbers of investors. Hall notes that in some cases the price of a company's shares rose to as much as £3,000 at which price level there was a considerable volume of transactions.[43] This indicates the wealth of investors and the strength of demand for speculative investment in gold mining shares at this time.

[41] Ibid, 58. There seemed to be a similar trend in Canada. Risk, above n 1, 278-279 notes that 1850 and 1860 Canadian legislation saw 220 incorporations of which 145 were for mining purposes.
[42] G Blainey, *The Rush that Never Ended: a History of Australian Mining* 5th edition Melbourne University Press 2003, 71.
[43] Hall, above n 39, 61

A characteristic feature of most early gold mining companies was the issue of high par value, partly paid shares. This adopted the prevalent practice in England during the boom in the shares of bank and finance companies of the 1860s, which culminated in the "Panic of 1866" and the collapse of Overend, Gurney & Co Ltd.[44] The ability of gold mining companies to make calls was particularly useful given the nature of quartz mining with its continual exploration and developmental costs. In the gold mining industry, very few mines were continuously profitable as deep leads changed course, ran into a neighbouring lease or yields fell, possibly rising again at greater depth. When a rich ore body was found, this generated speculative activity in the share market. Calls on shares would be made by companies which owned the mines where ore bodies were discovered and owners of other mines in the vicinity were also encouraged to further explore their leases and make calls on their shareholders who were often prepared to pay the calls so as to enable further exploration. Inevitably the extravagant expectations of investors would not be met and the burst of speculation would be replaced by a more cautious approach and share prices fell. Companies still required funding and so continued to make calls, the payment of which operated as a dampener on share prices as it reduced the amounts available to purchase other shares and float new companies. The money paid for calls then fell as investors chose to cut their losses or successful companies funded their development needs from profits. Eventually optimism would return and another speculative cycle would begin. Hall considers that this cyclical nature of the gold mining industry played a positive role in encouraging investment into a key economic sector and enabled gold output to reach very high levels.[45]

A marked shift from alluvial to deep quartz gold mining took place in the late 1860s and early 1870s. In 1868 quartz mining companies paid a fifth of total dividends paid by all public companies in Victoria. In 1871, this proportion had grown to well over half.[46] This move to deep mining greatly increased the complexity and scale of operations of mining companies and required the application of new technology such as dynamite, invented in

[44] J B Jefferys "The Denomination and Character of Shares, 1855-1885" (1946) 16 *The Economic History Review* 45. On the "Panic of 1866" see B C Hunt *The Development of the Business Corporation in England 1800-1867* Harvard University Press 1936, 148-155.
[45] Hall, above n 39, 62.
[46] Ibid, 74.

the mid 1860s and more sophisticated machinery and ventilation. These developments also required companies to be able to efficiently raise capital and establish suitable management and administrative structures. The ability to tap the market for capital was particularly important because it was the nature of quartz mining that considerable expense had to be incurred and development work undertaken before any profit could be earned and dividends paid. These industry characteristics lent themselves to widely held listed companies being the most efficient means of financing.

The Victorian mining companies and ultimately the mining industry itself benefited greatly from the introduction of a general incorporation system and limited liability legislation. Co-operatives, which were the previously prevalent form of business organisation in the mining industry when it was smaller scale and mostly engaged in alluvial mining, were inappropriate and highly inefficient as a means of conducting quartz mining. They issued relatively few shares and therefore were not generally able to raise capital from large numbers of passive investors as members retained unlimited liability. Their shares were not freely transferable on a stock exchange and they were not conducive to the development of professional management structures as the shareholders were nearly always active gold seekers. The practice of issuing partly paid shares was also a further advantage of the limited company form as it was advantageous in the gold mining industry that a company could retain the ability to seek further capital from its shareholders as the need arose during the exploration and development phases.

The importance of mining shares, especially in Victoria, gave the share markets a highly speculative, high risk character.[47] Hall suggests that an important characteristic of the prosperity of the Victorian economy was the "speculative spirit and haste to be rich" of Victorian investors in the 1880s.[48] The growth in market value of listed shares indicates that the introduction of companies legislation made a significant contribution to economic development and the high standard of living in the Australian colonies. The gold mining industry was particularly subject to speculative booms and downturns and a

[47] C White *Mastering Risk: Environment, Markets and Politics in Australian Economic History* Oxford 1992 at 124 and Blainey, above n 42, 97-100.
[48] Hall, above n 39, 198-199.

large number of investors necessarily displayed a considerable appetite for risk. This would probably have encouraged diversification of portfolios of gold mining companies on the expectation that for every successful company there would be several that would become worthless, making the introduction of limited liability a very important feature of the legislation.

Of course the vast majority of small businesses in the Australian colonies did not adopt the limited liability form but remained sole traders or partnerships. It was not until the 1880s, some 20 years after the introduction of companies legislation, that the number of company registrations significantly increased, although from a low base. McQueen calculates that in 1903 there were over 9,000 registrations of firms (being partnerships) and 157 company registrations. On the basis of these figures he concludes that partnerships were chosen in more than 98 per cent of businesses as their preferred organisational structure. Part of the explanation he puts forward for this slow uptake in the use of the limited liability company form was the "prejudice and distrust prevailing among respectable people towards the corporate form".[49] However the argument presented here is that this generally slow uptake does not indicate that the colonies were ill-suited to the introduction of companies legislation. It is only in some industries that the company form of business organization is advantageous. In order to determine whether the introduction of companies legislation was appropriate to the local conditions, it is necessary to consider the degree to which this form was utilised by particular key industries, most notably, the mining industry. It should be noted that there was also a slow uptake of limited liability companies by small businesses in England for several decades after the introduction of limited liability.[50]

Mining Companies No Liability Legislation

While the Australian colonies adopted the English companies legislation in almost unchanged form, there was an early development in Victoria which marked a departure

[49] McQueen, above n 4, 37-40.
[50] P W Ireland "The Rise of the Limited Liability Company" (1984) 12 *International Journal of the Sociology of Law* 239, 244-245.

from the almost exact adoption of the English legislation. Given the importance of the gold mining industry in Victoria and the necessity of raising capital from large numbers of investors after the development of deep quartz mining, it is not surprising that legislative innovation in Victoria would address a difficulty which arose in relation to the raising of capital by gold mining companies and that it would be passed almost precisely at the time that quartz mining was becoming the dominant mining activity. The following background to the no liability legislation is based on the account by Hall.[51]

The cyclical nature of gold mining meant that companies found it relatively easy to raise capital at times of high speculative interest but at other times, it was common for investors to resist payment of calls despite the legal obligation to do so. Companies often found it difficult to pursue shareholders who failed to pay calls and the costs involved often did not justify taking legal proceedings. Some shareholders sought to avoid liability by use of the common practice of "dummying". This meant that a number of shareholders used false names in registering themselves with the company. This served as a type of insurance for shareholders who could choose to pay calls if prospects looked favourable or in the event the prospects of the company looked bleak or the company went into liquidation the shareholder could "disappear". This situation created difficulties for the company which had to meet the claims of creditors despite some shareholders reneging on their liabilities and also resulted in situations where shareholders failed to pay calls but if the company became profitable, they would pay the outstanding calls and become entitled to dividends and the benefit of a higher share price.

These factors tended to discourage investment in mining companies because if the company failed, the burden of meeting the company's debts fell disproportionately on those shareholders holding partly paid shares who were traceable or who were wealthy. The technique which was often employed to overcome these difficulties was to include provisions in the memorandum of association to enable the forfeiture of shares on non-payment of a call. The forfeited shares could then be purchased by either existing shareholders or sold at auction. This provided a mining company with greater certainty of

[51] Hall, above n 39, 75-77. See also Birrell, above n 24, 98-100.

supply of capital as it received the proceeds of the sale of forfeited shares and thereby ensured that shareholders who provided calls during times of exploration or uncertainty would gain the benefit of share ownership when the company became profitable. The practice of forfeiture and sale was an effective response to dummy shareholders and those who refused to pay calls. However doubts were cast on the validity of forfeiture provisions in the company constitution by a decision in the Court of Mines which held that such provisions were contrary to the legislation under which the company was incorporated.[52] The strong political influence of the mining industry is indicated by the almost immediate introduction into Parliament of a Bill to overrule this decision.

The legal uncertainty remained for another year before the introduction of the no liability legislation which sought to formalise the practice of forfeiture of partly paid shares upon failure to pay calls.[53] This legislation still operates today[54] so that shareholders of mining companies registered as no liability companies under *Corporations Act* 2001 s 112 are not contractually liable to pay calls, but if a call is unpaid the shares are forfeited and must be offered for sale at an advertised public auction. The effect of this legislation was to extend limited liability to unpaid share capital. From a creditor's point of view, this was significant if the company had issued shares of high par value and large unpaid amounts. This practice was already becoming less common both in Britain and Australia as lower par value shares attracted more investors and enhanced the marketability of shares.

The *Mining Companies Act* 1871 introduced a stricter regulatory regime for mining companies in Victoria than that which applied to trading companies under the *Companies Statute* 1864. Mining companies were subject to more stringent disclosure requirements such as having to prepare a report of the company's prospects and assets and liabilities before a general meeting. Books of account were required to be kept and made available for inspection by shareholders and creditors and half yearly statements had to be lodged.

[52] Hall, above n 39, 76 refers to an 1869 decision of the Sandhurst Court of Mines in *Nash v Annabella Company* where the forfeiture provisions were held to be invalid. This decision was affirmed on appeal in the Chief Court of Mines. See Birrell above n 24, 66-67 for a description of the legislation which established Courts of Mines.
[53] *Mining Companies Law Amendment* Act 1871.
[54] *Corporations* Act ss 112, 254M(2) and 254Q.

Various criminal offences were created for breaches of duty and making false statements. These legislative provisions imposed a more rigorous statutory regulatory environment than existed in Britain and elsewhere in Australia. These stricter investor protection requirements reflected the fact that mining companies dominated the share market lists and they had the widest spread of shareholders. Despite these statutory investor protection provisions, the government offices charged with responsibility for administering the legislation were largely incapable of ensuring widespread compliance with these legislative requirements.

The introduction of the no liability legislation in 1871 coincided with a period of intense speculative fervour surrounding the sudden dominance of the Bendigo quartz mines which resulted in a marked increase in gold mining company registrations and investment. Share ownership was widely held across a wide cross section of society and the financing of Victorian gold mines depended on this domestic speculative investment as there was little British investment in Australian gold mines before the late 1880s.[55] The total nominal capital of new registrations increased nearly three-fold in one year from £6 million in 1870 to nearly £17 million in 1871.[56] In the first 10 months of 1870, 765 new companies were registered at Bendigo and calls of £200,000 were made.[57] Either the legislation encouraged the increased capital raising activity or reflected the growing importance of the industry to the Victorian economy. Certainly extreme fluctuations in investment in the mining industry occurred from time to time and the timing of a speculative boom increased the urgency of legislation designed to assist capital raising. The wild fluctuations of the speculative mining boom can be seen in the capital raised in 1872 by new mining company registrations falling back to near 1870 levels. This raises the possibility that the boom in 1871 was directly related to the introduction of the no liability legislation or that it at least encouraged mining company investment.

[55] Blainey above n 42, 100-102.
[56] Hall, above n 39 at 81. Blainey, above n 42, 97 notes that Anthony Trollope said that Bendigo's vice was not drunkenness but share speculation. The speculative boom in Bendigo is described by Blainey, 74-76 and Birrell, above n 24, 115-116.
[57] Birrell, above n 24, 117.

Hall argues that the no liability legislation encouraged a regular supply of investment in an inherently risky but very important industry and he thought its continued existence for more than a century confirms its success in achieving this objective.[58] The relative importance of payment of calls in the gold mining industry can be seen from the fact that dividends paid by Bendigo gold mining companies in 1871 and 1872 amounted to nearly £1 million while calls made were a little over £600,000.[59] The weight of this overhang of unpaid liabilities operated as a dampener to new fundraising especially if it is borne in mind that relatively few companies paid dividends but almost all issued partly paid shares and made calls when finance was required. Blainey described the no liability legislation as "one of the most radical experiments in company law in the English-speaking world" and "Victoria's revolutionary answer to the dearth of capital for mining".[60] He considered that this legislation encouraged wealthy investors who had previously been suspicious of mining, to invest in gold mining companies. Birrell described the legislation as "an excellent example of lateral thinking to come up with a novel and workable solution to a difficult problem".[61]

McLean argues that the institutions which were in place ensured that resource abundance became a blessing rather than a curse and partly explain the economic success of the Australian colonies during the second half of the nineteenth century.[62] The introduction of companies legislation and the concept of the no liability company can be seen as beneficial institutional factors which encouraged investment in the gold mining industry. The decline of the mining sector after the turn of the century may be explained by the replacement of a large number of relatively small companies financed by investors who had a high appetite for risk with a smaller number of larger, more risk averse companies.[63]

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[58] Hall, above n 39, 77.
[59] Ibid, 89-90.
[60] Blainey, above n 42, 99.
[61] Birrell, above n 24, 99.
[62] I W Mclean "Why was Australia so Rich?" The School of Economics The University of Adelaide Working Paper 2005-11 August 2005. Mclean, 3-4, notes that Australia's per capita GDP was considerably higher than that of the US between 1870 and 1890.
[63] P A David and G Wright "Increasing Returns and the Genesis of American resource Abundance" (1997) 6 *Industrial and Corporate Change* 203, 221 argue that nineteenth century US and Australian mineral law encouraged mineral exploitation through maintaining exploration incentives, respect for law and minimizing disputation. The authors point

McQueen regards the practice of "dummying" by mining company shareholders as providing an example of regulatory failure because there were no administrative means of preventing such malpractice. He argues that the introduction of no liability legislation was a direct result of this failure of enforcement and inability to ensure compliance.[64] Even if the practice of dummying was more common in Australia than in Britain, this may have been due to a more transitory population and large geographic area from which investors came rather than regulatory failure. In this era when there were relatively low expectations of government regulation and enforcement action, it would not have been expected that it was a role of government administrative agencies to ensure that the members' register of a company was accurate and false names were not used. It was and still is a private matter for companies to enforce calls made on their shares. It is therefore an incomplete explanation of the no liability legislation to attribute its introduction to a regulatory failure to ensure all shareholders used their real names or could be readily found in the event of non-payment of a call. As discussed above, the introduction of this legislation coincided with a boom in gold mining share market activity and probably played a beneficial and significant role in encouraging this growth of investment in a critically important colonial export industry which depended for finance upon listed company capital raising.

The Reforms of the 1890s

The investor protection reforms of the 1890s were a response to the frauds and malpractices of the boom of the 1880s and depression of the 1890s. The latter half of the 1880s saw a major speculative boom, especially in Melbourne, in shares of land companies and finance companies which speculated in mostly urban land as well as mining shares in companies operating at Broken Hill and in Queensland and Tasmania. The land and mining booms were fuelled by heavy investment in public infrastructure works such as railways, irrigation works, roads, tramways, water and sewerage. The land

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out at 235 that Australia was an underachiever in minerals other than gold in the twentieth century suggesting this was due to the absence of "the atmosphere of buoyant expectations about major new discoveries".

[64] McQueen, above n 4, 30.

boom was associated with building activity which saw Melbourne's suburbs greatly expand as the public transport system stretched out and the central business district was substantially rebuilt with what at the time were high rise buildings. The main "land boomers" were several prominent politicians.[65] This unprecedented investment activity demanded more capital than was locally available and was financed by large amounts of British capital inflow attracted by higher interest rates than were available in Britain, which flowed into both the public and private sectors.

During the boom of the 1880s there was a substantial increase in the number of Victorian registered companies. From 1871 there had been two separate administrative schemes under which companies were incorporated and regulated. Mining companies fell under the jurisdiction of the *Mining Companies Act* 1871 (Vic) and other companies, described as "trading" companies were formed and regulated under the *Companies Statute*. Trading company registrations were below 100 per year until the late 1880s when they jumped to 145 in 1887 and 343 in 1888 of which about a half were land and finance companies.[66] Relatively few companies were engaged in manufacturing which remained undeveloped and mostly in the hands of small sole proprietorships or partnerships. The activity of land companies was typically to purchase large tracts of agricultural land on the fringes of cities and then seek to subdivide and auction housing lots. The scale of these activities was largest in Melbourne where the population increase was greatest. Blainey considered that there was also more of a gambling culture in Melbourne.

> "That Melbourne's land boom of the 1880s was wilder and more disastrous than Sydney's may partly be explained by Victorian gamblers turning from waning gold mines to a newer and faster set of dice, blocks of city and suburban land."[67]

In 1888, there were approximately 1500 companies registered under the *Companies Statute* in Victoria.[68] This figure understates the size of the corporate business sector

[65] The best known history of the personalities and their activities of this period is M Cannon *The Land Boomers: the Complete Illustrated History* Lloyd O'Neil South Yarra 1972.
[66] R McQueen "Limited Liability Company Legislation – The Australian Experience" (1991) 1 *Australian Journal of Corporate Law* 22, 50
[67] Blainey, above n 42, 100.

because a large number of companies carrying on business in Victoria were incorporated in Britain or other Australian colonies. The value of shares listed on the Melbourne Stock Exchange increased from £7 million in 1865 to £65 million in 1889.[69] This nearly ten-fold increase in 24 years reflects the rapidly expanding economy and increasing maturity of the share market of colonial Victoria in the period following the introduction of the companies legislation. This increase in share market activity was particularly pronounced in 1888 when share turnover was three times that in 1887 which was itself a boom year.[70]

During this period of strong growth in the number and value of listed companies, the administration of companies by government bodies was haphazard. McQueen draws attention to the *ad hoc* and undeveloped nature of colonial administrative bodies charged with the responsibility of administering the companies legislation. He puts forward the argument that the introduction of limited liability legislation in the Australian colonies was a failure largely because of the absence of effective regulatory structures with enforcement arms to prevent malpractices.[71] The Board of Trade in England had a long history of overseeing commercial legislation with a specialised and experienced bureaucracy. In Australia, there were relatively few registered companies so administrative arrangements were made almost as an afterthought being added to the responsibilities of existing functionaries. In South Australia and Queensland, administrative responsibility was given to Masters of the Supreme Court, in New South Wales, it was the responsibility of the Registrar-General and in Victoria for a time, it was the responsibility of the Titles Office.[72] Lacking expertise and resources due to inadequate funding, these functionaries concentrated on raising revenue from incorporations and lodgment fees rather than the more expensive and difficult task of enforcing compliance. This was also much the case in England where non-compliance with lodgment requirements was very widespread in the nineteenth century. The role of nineteenth century government regulators was far less developed than is the case today as

[68] E A Boehm *Prosperity and Depression in Australia 1887-1897* Oxford 1971, 248; J Waugh "Company Law and the Crash of the 1890s in Victoria (1992) 15 *UNSW Law Journal* 356, 358.
[69] Hall, above n 39, 37 and 169.
[70] Waugh, above n 68, 357 quoting *The Argus* 1 January 1889.
[71] McQueen above n 56, 30.
[72] Ibid, 25.

the role of government in regulating commercial activity was generally seen as considerably less intrusive and less concerned with investor and creditor protection than in current times.

The severity of the depression in the 1890s led to strong calls for legislative responses to address the perceived deficiencies in company law regulation.[73] Share market activity on the Melbourne Stock Exchange after the banking crisis in 1893 was significantly below that which occurred in the late 1880s and took some years after that to recover. The market value of ordinary shares listed on the Melbourne Stock Exchange declined from £65 million in 1889 to £47 million in 1900 and the number of listed companies declined during this period from 231 to 130.[74] Bank reconstructions, the prospects of paying calls and the bad experiences of shareholders discouraged investment in bank shares for a number of years and the dominant investment activity during the period between 1893 and 1900 was in mining, especially in companies operating the newly discovered gold fields of Western Australia and copper mines of Tasmania. This compensated for the fall in silver prices which led to a temporary decline in the value of Broken Hill shares in the early 1890s.[75] Apart from high risk mining speculation, Hall notes that local private enterprise was hesitant and there was little capital formation financed through the stock exchange.[76] This background gave impetus for the introduction of reforms in an attempt to increase investment in listed companies.

A number of reform proposals were passed by the Victorian Legislative Council but were blocked in the Legislative Assembly. This was probably because the Legislative Assembly was dominated by some of the most prominent land speculators, Matthew Davies who was Speaker, James Munro, who was Premier and Thomas Bent who was also Speaker and later became Premier.[77] The presence of leading politicians on the

[73] Waugh, above n 69, 381 footnote 175. See Waugh article generally for a detailed discussion of the deficiencies of company law in addressing the malpractices of this period.
[74] Hall, above n 39, 230.
[75] Ibid, 221-240.
[76] Ibid, 233.
[77] A number of other prominent Parliamentarians who were directors of companies controlled by Davies were James Bell (Minister of Defence) and James Balfour. Other directors included Sir George Baden Powell who was a member of the British Parliament and Sir Graham Berry, a former Premier of Victoria and Agent-General in London for the Colony of Victoria.

boards of some land companies gave an air of what turned out to be undeserved respectability to these companies and also appeared to make the Parliament captive or at least receptive to the wishes of these men. Boehm quotes *The Economist* which commented that the need for law reform relating to land companies "has been frequently pointed out, but it has to be confessed that Parliament has hitherto shown no disposition to encourage any efforts in that direction. Too many members have, in fact, become involved in company promoting."[78]

During this period the *Voluntary Liquidation Act* 1891 was passed in Victoria at the time of a severe run on building societies and the collapses of a number of land companies. A number of these companies were threatened with compulsory liquidation under which a creditor could apply to the court for an order winding up the company on the grounds of its insolvency and if the order was granted, the court appointed a liquidator with powers to investigate misconduct by the directors.

The *Voluntary Liquidation Act* made it difficult to put a company (including a building society) into compulsory liquidation against the wishes of its directors by requiring the consent of a majority of creditors by number and value of debts to consent to the winding up proceeding in cases where the company was not already being wound up voluntarily.[79] Where the company was in the process of a voluntary winding up and had no creditors outside Victoria, a court order to wind up the company could not be made without the consent of one third of creditors by number and value of debts. Where the company did have creditors outside Victoria, the proportion of creditors required to approve a court order for winding up was one quarter by number and value of debts.[80] The lower creditor threshold where there were creditors outside Victoria was intended to placate British investors.[81]

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[78] Boehm, above n 68, 266 footnote 1.
[79] *Voluntary Liquidation Act* 1891 s 4.
[80] *Voluntary Liquidation Act* 1891 s 3.
[81] J Waugh "The Centenary of the *Voluntary Liquidation Act* 1891" (1991) 18 *Melbourne University Law Review* 170, 172. An example of the operation of the Act is provided at 173 in *Re Phillip Island Company Limited* (1892) 13 ALT 269 where a creditor bank which was owed £9343 was prevented from petitioning for the compulsory winding up of the debtor company in the face of opposition from other creditors who were owed £628

The Preamble of the Act stated its purpose as being "to prevent injury and loss to creditors by the compulsory winding up of companies and building societies against the will and interest of creditors". The Attorney-General William Shiels described the object of the legislation as being to prevent the loss arising from compulsory liquidation by the actions of "one litigious cantankerous or mischievous person, or it might be a person simply bent on plunder and rapine".[82] This seems to contemplate unworthy winding up applications being brought by creditors who sought to acquire a company's assets cheaply in a sharply falling market in circumstances where the company could realistically regain its solvency in the not too distant future and thereby ensure a better return to creditors as a whole. While other attempts to introduce remedial legislation over several years were unsuccessful, this statute was brought into the Legislative Assembly without notice and immediately passed both Houses within a day with only minor technical amendments. The Act commenced from its date of passage.

The *Voluntary Liquidation Act* was widely condemned by the business community who were not provided the opportunity to have input into the legislation. In practical terms it was difficult to meet the creditor approval requirements so that the creditor safeguards built into compulsory liquidation were effectively suspended. The main effect of the Act in preventing compulsory liquidations was that it enabled companies to go into voluntary liquidation without court supervision or control. This enabled greater secrecy and concealment of mismanagement, breaches of duty and fraud and the liquidator could be appointed from the directors or their associates who had most to conceal. It greatly reduced the role of creditors as supervision of voluntary liquidations was with shareholders and it took away the protection of court supervision and the possibility of binding compromises. At the conclusion of the liquidation, the books and records of the company could be destroyed if so directed by the shareholders' meeting.[83] This legislation may ultimately have been self-defeating in that far from encouraging greater investment, it may have further undermined fragile investor confidence which was to be further shaken with the bank collapses over the next few years.

[82] T Sykes *Two Centuries of Panic* Allen & Unwin 1988, 151.
[83] *Companies Act* 1890 (Vic) s 140.

At about the same time, New South Wales also passed legislation which was aimed at assisting companies to arrive at compromises with their creditors and reconstructions.[84] Where a numerical majority of creditors holding three quarters of a company's liabilities agreed to an arrangement with the company, this arrangement was binding on all creditors. This had the effect of preventing a single or small number of creditors forcing the company into compulsory liquidation. The provisions of this legislation were based on similar English legislation[85] and were more widely accepted than the counterpart Victorian legislation.[86]

After a prolonged period of deadlock between the Victorian Houses of Parliament, a change of government in 1894 resulted in Isaac Isaacs[87] becoming Attorney-General with a strong commitment to company law reform to address the misconduct which arose during the land boom and crash. He introduced a comprehensive Companies Bill in 1894 and after the usual protracted debates and deadlock between the Houses, it was ultimately passed in a reduced form at the end of 1896.[88] Isaacs introduced the legislation to deal with the types of cases of "deliberate and widespread fraud" which were evident during the period leading up to the crash and which caused "widespread ruin upon the people".[89] This indicates the broad based nature of share ownership throughout the community. The main impediment to the passage of the legislation was in the unelected Legislative Council where, according to *The Age*, 30 out of 48 members were themselves directors.[90]

The 1896 legislation introduced compulsory audit by certified auditors under a statutory duty to verify the accuracy of the accounts; requirements for sending to shareholders and filing an audited balance sheet in the prescribed form; prohibitions on misleading statements in prospectuses; misleading company names (the use of the word "bank" had

[84] *Joint Stock Companies Arrangement Act* 1891 (NSW).
[85] *Joint Stock Companies Arrangement Act* 1870 (UK)
[86] Boehm, above n 68, 268.
[87] Later Sir Isaac Isaacs, Governor-General of Australia and Justice of the High Court of Australia.
[88] *Companies Act* 1896 No 1482. Waugh, above n 54, 382-385 describes the passage of the legislation through the Houses and the various political alignments which formed during the debates on the legislation.
[89] *Victoria Parliamentary Debates* 1896 Volume 81, 123.
[90] Waugh, above n 68, 383 citing *The Age* 16 March 1896.

mislead many land company depositors and investors); loans by a company secured by its own shares; and detailed winding up provisions.

Some of the provisions of the 1896 legislation adopted English legislation. This included s 38 from the 1867 *Companies Act* (UK) which required prospectuses to contain details of contracts entered into by the company with its directors and promoters and the *Directors' Liability Act* 1890 (UK) which overruled *Derry v Peek*[91] by allowing an action in deceit by shareholders against directors whose misstatements fell short of fraud. Most of the disclosure provisions of the 1896 *Companies Act* came from the recommendations of the 1895 report of the English Davey Committee. It is a strong reflection on the willingness of the Victorian Parliament to improve its company law regulation and respond to calls to overcome weaknesses apparent in the land boom period that its legislation contained the first modern disclosure provisions some ten years before similar requirements such as compulsory filing of balance sheets were incorporated into the English legislation. The concept of the proprietary company was introduced and such companies were exempted from laying an audited balance sheet before members in general meeting. A proprietary company was defined as having no more than 25 members, not being able to borrow from non-members and meeting certain prohibitions on raising funds from the public. It also had to have the word "proprietary" in its name.

The *Companies Act* 1896 was a very progressive and far-reaching response to the abuses of the previous decade and marked a significant change in regulatory policy towards greater investor protection after the relatively *laissez-faire* approach which had previously prevailed. It sought to guard the public "on the one hand against ignorance and on the other hand against misrepresentation".[92] A strong criticism of the legislation was that it did not apply to mining companies when they were the most common type of company formed at the time.[93] The exclusion of mining companies was repealed in 1910. These reforms were enacted because of the spectacular nature of the boom and bust

[91] (1889) 14 App Cas 337.
[92] Isaac Isaacs *Victoria Parliamentary Debates* 1896 Volume 81, 124.
[93] *Victoria Parliamentary Debates* 1896 Volume 81, 150.

which occurred in Victoria. The consequent widespread losses throughout the community had the effect of galvanising political support for the reforms put forward by Isaacs.

The "Transplant Effect"

There has been considerable recent interest by academics in a range of disciplines in determining key factors which encourage or discourage economic development. A number of studies outlined below have asserted that those former colonies which have developed strong institutions have experienced successful economic growth. The concept of institutions in this context refers to the broad way the society is organised. "Good" institutions are those that provide incentives and opportunities for investment.[94] They are characterised by ensuring secure property rights for a wide cross section of the society as opposed to what Acemoglu et al describe as "extractive institutions" which concentrate power in the hands of a small elite and create a high risk of expropriation for the vast majority of the population and discourage innovation and change which are seen by the elite as threatening. This type of analysis can explain the different economic histories of Australia and Argentina which were in similar stages of economic development during the second half of the nineteenth century.

The economic success of the Australian colonies during the nineteenth century indicates that the institutions which were transplanted from Britain were conducive to economic development largely because they encouraged investment from a wide cross section of the society through the protection of property rights. The transplantation of company law in Australia is consistent with this analysis because in a society with relatively very high per capita income as well as a wide distribution of wealth, share ownership was encouraged and became relatively broad-based. This encouraged entrepreneurship and innovation making the mining industry in particular, a very successful global competitor.

[94] Referred to as "institutions of private property" by D Acemoglu, S Johnson and J A Robinson in "Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution" (2002) *The Quarterly Journal of Economics* 1231, 1235

The economic success of the Australian colonies in the second half of the nineteenth century can be attributed to the abundance of natural resources. McLean argues that natural resource abundance is a key factor in explaining Australia's very high income per capita.[95] However this cannot be a complete explanation because there are many countries endowed with abundant natural resources which have failed to produce sustained economic growth. In fact many political scientists and economists have noted that abundant natural resources are more often a curse than a blessing for developing countries. Jones-Luong and Weinthal suggest that this "resource curse" stems from institutional weakness which in turn is related to ownership structure. The authors found that strong fiscal and regulatory institutions are more likely to emerge under private domestic ownership because a significant political and economic group has a mutual interest in establishing suitable institutional outcomes which reduce transaction and monitoring costs. They conclude "the concentration of wealth impoverishes the state whereas the dispersion of wealth enriches the state".[96]

Increasing importance is being given to the role of growth-enhancing institutions as the main determinant in explaining why some countries are wealthy and others poor and therefore may explain a significant reason for why Australia was economically successful in the period prior to 1890. Acemoglu et al argue that differences in colonial experience could explain variations in effectiveness of institutions such as expropriation risk, rule of law or property rights enforcement. The authors claim that European colonial powers adopted different colonization strategies in places such as Australia and Canada where they settled and replicated institutions that enforced the rule of law and encouraged investment. In other places, the purpose of colonization was purely extractive and exploitative so the established institutions were detrimental to the economic progress of

[95] McLean above n 62, 15.

[96] P Jones-Luong and E Weinthal "Rethinking the Resource Curse: Ownership Structure, Institutional Capacity and Domestic Constraints" (2006) 9 *Annual Review of Political Science* 241, 259. Various theories explaining the negative relationship of resource abundance and growth are set out in J D Sachs and A M Warner "Natural Resource Abundance and Economic Growth" Centre for International Development and Harvard Institute for International Development 1997. This paper may be accessed at http://scholar.google.com/scholar?hl=en&lr=&q=cache:VeXo-p2UEKIJ:www.geog.byu.edu/shumway/Geog331/Readings/Natres%26EG.pdf+natural+resource+abundance+and+economic+growth+. See survey of literature dealing with the "resource curse" in G Wright and J Czelusta "Mineral Resources and Economic Development" Working Paper 209 Stanford Center for International Development February 2004, 4-6.

the colony. The strategy which was adopted largely depended on whether European settlement was feasible. European settlement generally did not occur in tropical areas where Europeans faced high mortality rates and they were more likely to establish extractive colonies. Whether Europeans could settle in a particular area in colonial times is therefore an important determinant in explaining the nature of the institutions which exist today.[97]

From this perspective, the transplantation of English company law facilitated dispersed private domestic ownership of shares in gold mining and later other mineral companies together with strong regulatory and market institutions which enabled the abundance of resource wealth to be a blessing rather than a curse.

There has been considerable historical analysis in recent years which focuses on the evolution of corporate law and patterns of legal development in "transplant" countries compared with those of "origin" countries.[98] Pistor et al claim that irrespective whether a country's corporate law origin lay in the common law or civil law, transplant countries exhibit different patterns of legal development than do the countries where the law originated.[99] The authors survey a number of countries across legal families which include both origin countries and countries where corporate law was transplanted. In a number of transplant countries they found extreme volatility in legal change after enactment of the initial companies' legislation. They interpret this volatility as a response to the economic impact of the new law or as a rejection of parts of the imposed new law. They also found that in other countries, the legislation did not change for long periods despite considerable economic development. The Australian experience seems to indicate

[97] D Acemoglu. S Johnson and J A Robinson "The Colonial Origins of Comparative Development: An Empirical Investigation" (2001) 91 *The American Economic Review* 1369, 1373-1376. See also by the same authors "Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution" (2002) *The Quarterly Journal of Economics* 1231. For an analysis of the replacement of local forms of business organisation by the introduction of English company law as a tool of imperialism in India see R S Rungta *The Rise of the Business Corporations in India 1851-1900* Cambridge University Press 1970.

[98] See for example K Pistor, Y Keinan, J Kleinheisterkamp and M D West "The Evolution of Corporate Law: A Cross-Country Comparison" (2002) 23 *University of Pennsylvania Journal of International Economic Law* 791; K Pistor, Y Keinan, J Kleinheisterkamp and M D West "Innovation in Corporate Law" (2003) *Journal of Comparative Economics* 31; and D Berkowitz, K Pistor and J Richard "Economic Development, Legality and The Transplant Effect" available on SSRN website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=183269

[99] K Pistor, Y Keinan, J Kleinheisterkamp and M D West "The Evolution of Corporate Law: A Cross-Country Comparison" (2002) 23 *University of Pennsylvania Journal of International Economic Law* 791, 797 and 870.

an initial preparedness to adapt the received law in response to local circumstances. This occurred in relation to the requirements of the mining industry to adopt the no liability form and the inclusion of more detailed disclosure requirements and investor protection measures as a result of the corporate collapses of the 1890s and the inadequacies in the law that they exposed.

In “Evolution of Corporate Law” Pistor et al attempt to determine how “good” corporate law evolves. They argue that a continuous evolution of law is a key ingredient because the success of the corporation over a long period has come about because of its capacity to adapt to a changing environment and corporate law evolves in close interaction with socioeconomic and political factors. Successful legal systems encourage and facilitate this adaption process and then respond to changed circumstances by amending the law to better suit the new conditions. The writers conclude that common law countries have been more innovative than civil law countries and origin countries have been more successful than transplant countries. Australia has adapted its corporate law to suit local circumstances and experience in the late nineteenth century and since the 1970s with a long period of relatively little change in between.

Pistor et al also consider that the common law countries developed more liberal corporate law systems complemented by control devices such as a greater role for the courts and securities market regulation. This enabled these countries to rely less on legislated restraints and thereby encouraged more innovation in the uses of companies.[100] The evolution of transplanted corporate law was found to differ from the country of origin especially where complementary institutions were often not as fully developed as in the country of origin to support a flexible, enabling system. Legal change tends to be either erratic or stagnant. The advent of legal change appears to indicate that a transplanted law has taken root.[101]

[100] Ibid, 868.
[101] Ibid, 870.

In an article which considers the transplant of law generally rather than the specific transplant of corporate law, Pistor et al propose that those countries which received transplanted law and adapted it to suit local conditions and had a population that was familiar with its basic legal principles, were more likely to build an effective legal system. On the other hand, where these conditions were absent, the recipient countries experienced difficulties in developing effective legal systems.[102] This characteristic of transplant countries is described in this article as the "transplant effect". The authors consider that the way in which the law was transplanted and the receptiveness of the transplant country is more significant than the particular legal family origin, that is whether it is from the civil law or common law family of legal systems.
The Australian experience has exhibited a number of characteristics apparent in transplanted law societies. These include some innovative adaptions to local conditions, some erratic, idiosyncratic and self interested responses to times of crisis and long periods of relatively little change.

Legal Autonomy Versus Functionalism

Most discussions which examine legal evolution in the context of economic development adopt elements of one of two types of approaches. According to the first approach, the law is seen as developing autonomously or in some degree of isolation from mainstream society while the alternative view is that law evolves to serve the functional needs of business and the market economy.[103]

The autonomous approach could be used to argue that the development of unincorporated joint stock companies took place despite the existence of unsympathetic law which hindered the development of suitable business organisations. Investment was inhibited in the 1840s after the collapse of the Bank of Australia and the imposition of unlimited liability on some of its shareholders. Joint stock companies were largely governed by the

[102] K Pistor, D Berkowitz and J Richard "Economic Development, Legality and the Transplant Effect", 2-3 (November 1999). Available at SSRN: http://ssrn.com/abstract=183269
[103] Harris, above n 5, 3-12. See R W Gordon "Critical Legal Histories" (1984) 36 *Stanford Law Review* 57 which provides a "guidebook" to the legal functionalism perspective and criticisms of it.

law of partnership which was ill-suited because its development presumed small, tightly held business organisations. In this context, the legal framework can be seen as operating in isolation from broad economic developments and in a manner which was unresponsive to the needs of business, so early companies evolved despite the law rather than being encouraged by the law.

Deakin and Wilkinson point out that

> "…legal concepts are linguistic devices, cultural artifacts which are used for the purposes of determining and applying legal rules. They are not intended to be models for action and they are not synonymous with the social and economic relations which they purport to describe".[104]

From a political economy perspective, the apparent dysfunction between law and economic needs may be explained by the desire of the state to retain its control of incorporations by means of the conferring of charters of incorporation.

The isolation of the legal system from social and economic change may also be explained by the methodology of the traditional common law which looks to the past to solve current problems and the traditional detachment of judges and the legal profession generally from the world of business.[105]

Functional interpretations hold that legal and economic developments occur more or less together and suggest that law responds to the needs of business and thereby encourages economic development or the furtherance of particular economic interests. It is implicit in this type of analysis that law performs as a functional element in the broad development of society and that law is thus shaped by economic and social needs.[106] Writers who link

[104] S Deakin and F Wilkinson *The Law of the Labour Market* Oxford University Press 2005, 28.
[105] Harris, above n 5, 5.
[106] Harris, above n 5, 6 refers to the writings of the German historical school, Karl Marx and Max Weber as early proponents of this approach. He says that "Weber viewed the legal systems of western Europe as having distinctive rationalistic features which enabled them to develop along with the rise of capitalism and to instrumentally facilitate it." He also sees the American legal realists, Willard Hurst and E P Thompson as adopting a functionalist approach.

legal and economic development cover a broad range of views which are often in sharp disagreement. Among the diverse proponents of this perspective there are sharp differences of opinion as to whose needs the law is responsive to. Marxist and left-wing historians point to law as an instrument used to meet the needs of powerful class interests while law and economics writers regard the law as meeting the needs of efficiency in order to promote an optimal allocation of resources.[107] One explanation of why legal evolution and economic development work in conjunction is that only those parts of the legal system that better fit into the environment survive a type of evolutionary natural selection process. This perspective applies Darwinian evolutionary theory to the evolution of legal concepts and has a long standing tradition which has recently been revived.[108] A further explanation of the inter-relationship of economic development and legal development stems from the field of institutional economics which considers that law, as an institution in the broad sense of "rules of the game", evolved in successful economies in ways which complemented and facilitated growth.[109]

McQueen saw the transplantation of company law in functional terms as a means of serving the interests of the colonial power so the transplanted legislation in the Australian colonies enabled English companies to operate more conveniently in the Australian colonies.[110] He puts the view that English company law was ill-suited to the colonies where the economy was considerably less developed than in Britain and also the bureaucracies charged with the responsibilities of administering the legislation were more poorly equipped to enforce the necessary statutory compliance. McQueen suggests that the possibility was never considered that there were pre-existing local commercial traditions or existing organisational forms that were better suited to the Australian context.[111] He notes that because few businesses outside the mining sector chose to

[107] See for example Richard Posner *Economic Analysis of the Law* 3rd Edition Boston Little Brown 1986.
[108] Robert C Clark "The Interdisciplinary Study of Legal Evolution" (1981) 90 *Yale Law Journal* 1238; E Donald Elliott "The Evolutionary Tradition in Jurisprudence" (1985) 85 *Columbia Law Review* 38; and Simon Deakin "Evolution of Our Time: A Theory of Legal Memetics" (2002) 55 *Current Legal Problems* 1.
[109] Douglass C North "Institutions" (1991) 5 *The Journal of Economic Perspectives* 97.
[110] R McQueen, above n 4, 10-14. This approach to analysis of imperialism was articulated by Brian Fitzpatrick who expressed a strong sense of nationalism in his analysis of the historical economic interrelationship of Australia and Britain in *The British Empire in Australia: An Economic History 1834-1939* 2nd edition MacMillan 1969 where he wrote at 348 "The reservoir of Australian labour and industry has never failed to provide a stream tributary to the broad river of English wealth."
[111] R McQueen, above n 4, 8.

incorporate in the years following the introduction of the *Companies* Acts, this indicates that the legislation was inappropriate for Australian conditions.[112]

On the basis of a functionalist approach, it can be argued that until the development of deep lead gold mining with its greater demands for capital, Australian colonial business generally had little need for large amounts of capital and pooled investment except for the few large banks and a small number of other businesses mostly servicing the pastoral industry. At the same time, there was a growing class of investors who sought company shares, however the wealth of this group and demand for investment opportunity significantly increased after the discovery of gold in the early 1850s and they were able to exert increasing political influence. Concurrent with these developments, the Parliaments of New South Wales and Victoria introduced early limited liability partnership legislation, made it easier for unincorporated joint stock companies to sue and be sued and allowed the formation of mining enterprises which bore many of the characteristics of limited liability companies. These legal innovations, while not of great significance in themselves because they were not widely adopted, signaled the direction of legal development which culminated in the transplant of the English *Companies Act* in the 1860s and 1870s.

After the initial gold rushes, alluvial gold soon petered out and deep lead mining, with its far greater demands for capital, became the dominant form of mining. This shift from individual miners to companies necessitated statute law changes which were more attuned to the investment and development needs of the growing gold mining industry and can be seen with the introduction of the no liability company. With this legislation, the evolution of company law can be seen as functional in nature, changing to meets the needs of the gold industry.

The evolution of company law usually accompanies the rapid development of a new driving force industry which lends itself to pooled investment as the major means of financing. More established industries are often able to meet their finance needs from

[112] ibid, 10.

internal sources, borrowings or the use of networks. For example, in Britain there was a growing need for an effective means of registration of limited liability companies which encouraged the raising of capital in railways in particular but also in finance and other sectors. In Australia, especially in Victoria, a similar need arose in the gold mining industry which required large amounts of capital from the late 1850s. The introduction of limited liability companies provided a stimulus to the floating of gold mining companies and a major increase in the output of the gold mining industry. It is difficult to see how investment in gold mining companies would have been as widespread without the protection of limited liability as the industry was particularly high risk and therefore relatively unattractive to conventional lenders compared to the wool industry for example. The relative ease of incorporation encouraged promotions of large numbers of companies which required substantial numbers of investors.

The economic role of the mining industry was of critical importance, especially in Victoria. Therefore legislation which facilitated the raising of capital in this industry was highly beneficial to the colonial economies even though it was mainly the mining industry which utilised the legislation. The Australian colonies enjoyed among the highest living standards in the world for most of the second half of the nineteenth century. This high income per capita was relatively widely distributed resulting in a growing middle class eager to invest in company shares. In many ways the gold mining industry in Victoria performed a similar role to the railway companies in Britain two decades earlier, in that companies in both cases relied upon the pooled investments of large numbers of shareholders to whom it was important that they had limited liability and their shares were listed and freely transferable. In Australia, there were few if any listed railway companies because railways were largely developed by colonial governments who financed their construction by borrowing, mainly on the London market. A significant difference between the two industries was that gold mining was far riskier than railways, indicating the gambling character of a large part of Australian investment.

Stout and Blair have observed that the public company form is particularly appropriate for those businesses in industries that require large amounts of "enterprise specific" assets, meaning assets that cannot be withdrawn from the enterprise without destroying most of their value. Mining and railways typify these types of industries because of the large amount of development costs which must be expended on assets specific to the enterprise before any return can be gained. Further, in the case of mining, there is uncertainty of a return even after the sinking of development costs. Once profits are earned, the machinery and equipment is of a highly specialised nature so as to be virtually worthless in other uses apart from as scrap. In these types of industries, incorporation serves the necessary purpose of locking in investors' capital so that it cannot be withdrawn by the investors, their successors or creditors as could be the case with partnerships. Investor contributions belong to the company as a separate entity under the control of its directors.[113] This analysis explains why mining companies were the main form of listed company investment after the introduction of companies legislation in Australia and why the introduction of this legislation was a necessary precursor for the growth of the mining industry after the change from alluvial to deep lead mining with its far greater demands for capital.

Between the two opposing approaches of autonomy and functionalism, Harris suggests, is a type of amalgamation of both which makes a distinction between the law as it appears in case law and statutes and how this law operates in practice. An example of this type of construct can be seen in the increased use of the unincorporated joint stock company form when the law appeared to be hostile to it after the passing of the Bubble Act.[114] Nevertheless, there was a strong demand from various sectors of business and the investment community for a form of business organisation which facilitated the growth of pooled investment and large numbers of shareholders. This need was ultimately met by the evolution of deed of settlement companies which evolved out of partnership law and also utilised some features of trust law. This approach to the analysis of the relationship of legal evolution and economic development focuses on the gulf between legal fiction

[113] L Stout and M Blair "Specific Investment and Corporate Law" downloadable from the SSRN website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869010
[114] Harris, above n 5, 7.

and reality and the various means by which the law permits flexibility in its application so as to allow businessmen and lawyers to fashion the law for their economic purposes.

The study of the evolution of Australian company law indicates that the "amalgamation" interpretation probably holds good for the period up to the 1850s. The law as set out in statutes and case law had not evolved so as to encourage pooled investment, yet company formations and share trading were common features of colonial commercial life because existing forms which were historically based on partnership law were adapted to meet emerging needs. Despite some difficulties which emerged in the depression of the 1840s, the absence of limited liability and incorporation legislation did not appear to greatly inhibit these developments and several companies such as the Bank of New South Wales and the Australian Agricultural Company appeared to have successfully carried out their purposes.[115]

Conclusion

The Australian corporate law transplant experience indicates that there was a demand for public fund raising and the corporate form from the 1820s but particularly so from the 1860s as a result of strong investment demand in the mining sector. The institutions necessary to facilitate company formation and investment were already established before the introduction of the English limited liability companies legislation in the 1860s and 1870s. Therefore the introduction of this legislation did not mark the beginning of company share investment but did provide a stimulus to company formations, capital raising, widespread share ownership and the development of the stock exchanges.

It was the pressing need for capital by mining companies in Victoria which led to the introduction of legislation which created the no liability company. The shortcomings of company law in dealing with the excesses of the land boom later led to further innovative reforms which gave Victoria the most advanced disclosure requirements and investor

[115] Harris, above n 5, 8 considers that the unincorporated joint stock company in England was not successful in overcoming the constraints of the legal framework.

protection legislation in the common law world. Both these legislative developments can be seen as an example of legal evolution and economic development operating in a complementary way.

A study of the inter-relationship of legal evolution in company law and economic development indicates that far from being inappropriate for Australian conditions, company law developments were in fact instrumental to the growth of the mining sector which was an important driver of the rapid economic development of the Australian colonies. The introduction of the English legislation was probably inevitable in the light of the important economic role played by several companies, most notably the large banks, which developed prior to the introduction of the legislation. This legislation essentially formalised developments that were already well in train. The main importance of the adoption of the English *Companies Act* was that it became easier to float companies and raise capital and this enabled the mining industry to flourish and laid the foundations for the modern Australian economy.