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

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[The history of Australian company law has attracted remarkably little attention in academic literature, perhaps because it has mainly been seen as a copy of English law with few, if any, noteworthy features. This article points out several interesting and significant aspects of the evolution of Australian company law and considers this evolution in the context of the economic development of colonial Australia. Australian company law is an example of the transplantation of English law, raising the question of whether this transplant was successful. The central contention of this article is that although a substantial part of Australia's company law was transplanted from England, its evolution was innovative and responsive to the economic needs of Australian society at the time. In particular, Australia's company law was instrumental in financing the development of the mining industry, which played an important role in the economic success of colonial Australia.]

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I INTRODUCTION

The interaction between economic development and the evolution of company law in colonial Australia presents an interesting case study of a company law transplant because this interaction can be examined in 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 apart from some local innovations in the 1870s and 1890s. This article looks at the history and evolution of company law in

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[1] See, eg, the brief discussions in R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (12th ed, 2005) 42–5; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (4th ed, 2005) 44–6; R Tomasic, J Jackson and R H Woellner, *Corporations Law: Principles, Policy and Process* (4th ed, 2002) 12–13; Robert Baxt, Keith Fletcher and Saul Fridman, *Corporations and Associations*: *Cases and Materials* (9th ed, 2003) 138–9. 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.

colonial Australia and finds several noteworthy features that defy claims that the Australian developments were largely a wholesale 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.

First, by the 1820s and 1830s there was already demand for pooled equity investment and share trading, and for 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.

Secondly, limited liability partnerships that had some of the characteristics of companies were introduced in New South Wales and Victoria in the early 1850s for mining enterprises.[2] This legal form was short-lived, but it indicates the willingness of colonial governments to seek innovative responses to the needs of their business communities despite the absence of equivalent English legislation. Indeed, the introduction of limited liability was still being vigorously debated in England at the time.[3]

Thirdly, the introduction of companies legislation in Victoria in 1864 (and in the other colonies also around this time) broadly coincided with the beginning of a gold mining boom, which was a major driver of economic growth. This legislation facilitated company formations in the gold mining industry, and this in turn was a significant factor in the development of this key industry and the enormous wealth it generated. Moreover, 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.[4]

Fourthly, 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, bust and severe depression of the 1890s.

Thus far, 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.[5] He described this

2 Discussed below in Part III.

3 See generally Carleton Hunt, *The Development of the Business Corporation in England 1800–1867* (1936) 23–7, 56–87; R A Bryer, 'The Mercantile Laws Commission of 1854 and the Political Economy of Limited Liability' (1997) 50 *Economic History Review* 37.

4 This article focuses on the Victorian legislation because it was the originator of the main 19th century company law developments which were usually followed by the other colonies.

5 Rob McQueen, 'Company Law as Imperialism' (1995) 5 *Australian Journal of Corporate Law* 187; Rob McQueen, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15 *University of New South Wales Law Journal* 1; Rob McQueen, '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

adoption as 'company law as imperialism',[6] serving English economic interests rather than assisting Australian economic development. He also viewed the introduction of the no liability company as being largely brought about by the inadequate administration of the companies legislation.[7]

This article reassesses the transplantation of English company law in Australia in terms of whether it was successful and appropriate, and whether it encouraged economic development. The establishment 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 19th century and also explains why the Australian colonies were able to avoid the 'resource curse'.[8]

This article also adopts the classification formulated by Ron Harris, who analysed the relationship between legal and economic developments in England from 1720 to 1844.[9] Harris suggests that this relationship between legal and economic development has been characterised 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 synchronisation so that the legal framework is responsive to economic needs. The third perspective sees the law in the books as divorced from and initially unresponsive to economic needs, although the resourceful practice of businesspeople enables the law to be adapted so that it can be functional in its operation.

This article 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 for a form of business organisation suitable for pooled investment and share trading effectively evolved without specific legal encouragement. However, the period after the introduction of limited liability legislation in the 1850s — culminating in the transplant of English companies legislation — can be seen as a period in which legal evolution responded to economic development and a number of legislative changes were made that furthered economic growth and the interests of important business constituencies. Hence, the legal evolution of company law can overall be seen as responsive to the economic circumstances that existed in the Australian colonies in the 19th century.

The main focus of this article is the evolution of company law during the colonial period. The evolution of Australian company law is considered in the context of the broad economic history developments of the time. However, a detailed examination of the various debates engaged in by economic historians

deficiencies which were exposed by the crash of the 1890s and the resultant Victorian reforms: John Waugh, 'Company Law and the Crash of the 1890s in Victoria' (1992) 15 *University of New South Wales Law Journal* 356.

6 Indeed, McQueen's 1995 article, above n 5, is entitled 'Company Law as Imperialism'.

7 Ibid 193–8. See especially at 197.

8 The term 'resource curse' is discussed below in Part VII.

9 Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (2000) 3–8.

and the operation of corporations in other settings is outside the scope of this article.

II Pre-Legislative Development of Companies

In the early years following settlement, the development of the NSW economy was a concern secondary to that of maintaining a penal colony. Hence, 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 NSW was the Bank of New South Wales in 1817.[10] At a time when the colony was moving away from its convict origins and a free economy was starting to develop, Governor Lachlan Macquarie wished to develop a source of finance and local currency so as to reduce dependence on the Treasury in London and facilitate the development of an even freer society.[11] 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.[12] However, the charter required approval from the government in London and ultimately this was refused, perhaps because it was seen to be undesirable for banks to be formed with limited liability, as this placed depositors at greater risk. This reluctance to extend limited liability to banks resulted in their exclusion from the *Limited Liability Act 1855*, 18 & 19 Vict, c 133. 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. Nevertheless, the unlimited liability of shareholders did not greatly discourage investors from taking up the bank's shares as the bank traded profitably from the beginning, perhaps partly due to the very fact that unlimited liability instilled confidence in depositors.[13]

Unincorporated joint stock companies operating under deeds of settlement had been formed in England for a long time, but had increased in numbers during the railway boom of the 1830s and 1840s.[14] A similar development took place in NSW, with the formation of several banks and other companies such as the Australian Agricultural Company in 1824, the Australian Gas Light Company in 1836 and others associated with the pastoral boom of the 1830s. The extent of company formations and share trading in NSW can be seen from newspaper commentary in 1836, which warned that there appeared to be 'a sort of mania for

[10] Stephen Salsbury and Kay Sweeney, *The Bull, the Bear and the Kangaroo: The History of the Sydney Stock Exchange* (1988) 8.

[11] Ibid.

[12] Ibid.

[13] Ibid 13. Even though unincorporated, Salsbury and Sweeney note that the larger banks had paid-up capital of more than £170 000.

[14] For a detailed history of deed of settlement companies: see Harris, above n 9. See especially at ch 5.

the formation of "Companies"'.[15] In 1835, the first share list was published by William Barton, an early stockbroker. He also published a book on NSW companies,[16] which is evidence of strong interest in share investment.

A further indication of the widespread extent of colonial share trading in this period is given by the fact that there were 48 stock traders who advertised shares for sale from 1835 to 1851.[17] Early share trading mostly arose from sales of 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[18] — but the large number of auctioneers who dealt in shares, together with the number of listed companies formed during the period, indicate the frequency with which shares were traded and their popularity as an investment.[19]

Stephen Salsbury and Kay Sweeney tabulated companies whose shares were listed or traded in the period 1835 to 1871.[20] In the period up to 1851, at least 71 firms[21] were either active or promoted, and about 36 of these were listed for share trading.[22] Of these firms, 60 originated in NSW and the others were formed in England, New Zealand or Van Diemen's Land (Tasmania).[23] Most of these firms were engaged in banking and finance, insurance, and shipping or other transport, but very few were engaged in mining.[24] 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 of 23 companies.[25] This fell to nine after the depression in the 1840s.[26]

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 as having a paid-up capital of £240 000.[27] The largest company on the 1840 share list was the Commercial Banking Company of

15 Salsbury and Sweeney, above n 10, 10, quote from the *Sydney Herald* (Sydney), 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'.

16 William Barton, *Particulars of Joint Stock Institutions in New South Wales* (1838), cited in Salsbury and Sweeney, above n 10, 21.

17 Salsbury and Sweeney, above n 10, 479–81.

18 Ibid 15.

19 See generally ibid 468–71.

20 Ibid 468–77, 479–81.

21 Ibid 6. 'Firms' appears to mean 'companies' as the term was understood before the general incorporation statutes. These were partnerships whose shares were tradeable.

22 Ibid 13, 468–71.

23 Ibid 6.

24 Ibid 468–71.

25 Ibid 13.

26 Ibid.

27 Ibid 20. Table 1.1 reproduces Barton's first share list of 1835 containing eight companies, with details of the amount of share capital paid-up, share price and dividends.

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.[28]

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 names. This was a problem for all joint stock companies because under the law of partnership that 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 NSW in 1839 to address this problem by validating certain contracts entered into by banking and other co-partnerships.[29] 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,[30] and in 1848, legislation was passed which enabled joint stock companies to sue and be sued by their members.[31] Unincorporated joint stock companies were prohibited after the introduction in the Australian colonies of limited liability companies legislation based on the English *Companies Act 1862*, 25 & 26 Vict, c 89. This is discussed further in Part IV.

The collapse of the pastoral boom in the 1840s led to a recession in the colonial economy and a drastic decline in company formations. It also led to 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'.[32] Its collapse in 1843 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 collapse brought to the fore the absence of a charter conferring limited liability on bank shareholders. The bank had become overextended after land values fell and had borrowed money from and given a promissory note to the Bank of Australasia,[33] an English bank formed by charter in 1835 and whose (mainly English) shareholders had limited liability. The English 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.[34] It was held that the directors of the Bank of Australia had the power under the deed of settlement to bind the company by borrowing money

28 Ibid 13.

29 *An Act to Make Good Certain Contracts Which Have Been and May Be Entered into by Certain Banking or Other Copartnerships 1839* (NSW).

30 *An Act for Further Facilitating Proceedings by and against All Banking and Other Companies in the Colony Entitled to Sue and Be Sued in the Name of Their Chairman Secretary or Other Officer 1842* (NSW).

31 *Companies (Process) Act 1848* (NSW).

32 Salsbury and Sweeney, above n 10, 9, quoting the local paper, *The Monitor*.

33 Salsbury and Sweeney, above n 10, 11.

34 *Bank of Australasia v Breillat* (1847) 6 Moo PC 152; 13 ER 642.

and that under partnership law, they acted as agents for the company and so bound the company and its shareholders.[35]

There were several other bank and company collapses at this time, although none had the disastrous results for shareholders as did that of the Bank of Australia. 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 were exacerbated because plaintiffs did not have to sue all shareholders, but could instead selectively sue wealthy shareholders for the full amount owing.[36]

However, company formations increased markedly after 1851 as NSW and the newly established colony of Victoria experienced rapid population growth 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 striking in Victoria, to the extent that by 1860 there were 10 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.

III Early Experiments in Limited Liability

Prior to the introduction of general incorporation legislation, there were several attempts in NSW 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 NSW Parliament passed several Acts between 1848 and 1853 that incorporated some of the leading banks — such as the Bank of New South Wales — and later some mining, insurance and shipping companies.[37] In most cases, the liability of shareholders was limited to twice the nominal value of shares held. This reflected the fact that, although the British government was reluctant to authorise the incorporation of banks with strictly limited liability, it was prepared to limit liability to double nominal value.[38] It was for this reason that banks were excluded from the English limited liability legislation of the 1850s.[39] This double nominal value liability served as a model for incorporations in industries

[35] Ibid 657–8 (Pemberton Leigh J).

[36] This was a major issue of concern at the time. Salsbury and Sweeney, above n 10, 13, quote *The Sydney Morning Herald* (Sydney), 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'.

[37] See, eg, R F Holder, *Bank of New South Wales: A History* (1970) 149–52, for a detailed discussion of the incorporation of the Bank of New South Wales in 1850.

[38] Salsbury and Sweeney, above n 10, 32.

[39] The *Limited Liability Act 1856* (Vic) 18 & 19 Vict, c 133 was repealed after a few months by the *Joint Stock Companies Act 1856* (Vic) 19 & 20 Vict, c 47.

other than banking, including the incorporation in 1852 of the Great Nugget Vein Gold Mining Company, despite the fact that this type of extended limited liability was rarely used in England.[40] These incorporations led to increased company activity in Sydney, where investors favoured shares which paid regular dividends, especially the large banks.[41] 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 an Act of the Legislative Council.[42]

Sole traders and partnerships were by far the most common forms of business organisation, and both NSW and Victoria introduced legislation that recognised limited liability partnerships in the early 1850s.[43] These early forms of limited liability enterprises were seldom used[44] and were repealed by the *Companies Statute 1864* (Vic) and *Companies Act 1874* (NSW), 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 the willingness of colonial governments to depart from English law and to adopt business forms more suited to the needs 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.

Furthermore, to encourage investment in the mining industry, Victoria passed *An Act for the Better Regulation of Mining Companies 1855* (Vic) ('*Haines' Act*') in 1855,[45] 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 Statute 1864* (Vic) modelled on the *Companies Act 1862*, 25 & 26 Vict, c 89. The 1855 Victorian mining legislation enabled a company to be formed and registered with a local court, despite being in many respects a partnership governed by partnership law. The structure of these companies was based on the 'cost-book'[46]

40 Salsbury and Sweeney, above n 10, 33–4, quote *The Sydney Morning Herald* (Sydney), 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.

41 Salsbury and Sweeney, above n 10, 46, note that in 1858 there were over 20 dividend paying companies in NSW and that this increased during the 1860s.

42 Ralph W Birrell, *Staking a Claim: Gold and the Development of Victorian Mining Law* (1998) 108.

43 *An Act to Legalize Partnerships with Limited Liability 1853* (NSW); *An Act to Legalize Partnerships with Limited Liability 1854* (Vic). Limited liability also generally prevailed in Canada, even in the absence of express provision: see Risk, above n 1, 295–8.

44 Birrell, above n 42, 36, notes that, according to the *Victorian Government Gazette*, only 14 partnerships, of which six were mining enterprises, were registered under the Victorian Act.

45 This Act was often referred to as '*Haines' Act*' after the Colonial Secretary who presented it to the Legislative Council: see Birrell, above n 42, 36.

46 Sir Nathaniel Lindley, *A Treatise on the Law of Companies* (5th ed, 1889) 93–7, describes this as a type of company governed by 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 that contained the agreement entered into by the venturers, the receipts and expendi-

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 at least every six months, at which time the shareholders authorised the declaration of dividends or the making of calls on the shares.[47] The shareholders were mostly miners who banded together in groups so as to be able to sink the mine shafts that were becoming necessary after alluvial gold petered out. Each miner in the group (which could comprise of 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, a practice from which early stock exchanges developed in Ballarat and Bendigo from the late 1850s.[48]

The concepts of paid-up shares, minimum par value and the limiting of liability to the amount unpaid on shares were introduced in legislation in 1858[49] and simplified in 1860.[50] This set of legislation represents the 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.[51] Similar legislation was adopted in NSW soon after,[52] although gold had significantly less impact in NSW 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 capital inflow 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 rebellion. However, by the late 1850s alluvial mining was in rapid decline.

By this stage, 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

tures 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.

47 *Haines' Act* s VII.

48 Birrell, above n 42, 63–4. In 1859, there were 27 Bendigo mines, 10 Castlemaine mines and 10 Maldon mines quoted on various stock exchanges: at 112.

49 *An Act to Facilitate the Formation of Mining Associations and to Amend and Extend the Provisions of an Act Passed in the Eighteenth Year of the Reign of Her Present Majesty Intituled An Act for the Better Regulation of Mining Companies and to Render Certain Preferable Liens and Mortgages of Personality by Miners and Mining Companies Valid without Delivery and for Other Purposes 1858* (Vic). This Act was often referred to as '*Ireland's Act*': see Birrell, above n 42, 67–8.

50 *An Act to Limit the Liability of Mining Partnerships 1860* (Vic). This Act was also known as '*Pyke's Act*': see Birrell, above n 42, 68.

51 Birrell, above n 42, 68.

52 *An Act to Limit the Liability of Mining Partnerships 1861* (Vic).

companies could be registered under several statutes. *Haines' Act* of 1855 was based on the cost-book system and proved unwieldy and cumbersome, whilst *Ireland's Act* of 1858 attempted to overcome some of these difficulties but was not widely used, largely because it was interpreted as imposing liability on wealthy shareholders.[53] *Pyke's Act* of 1860, however, 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 that came to dominate colonial stock exchanges. This development coincided with the introduction of 'modern' companies legislation.

IV THE TRANSPLANTING OF THE *COMPANIES ACT 1862*, 25 & 26 VICT, C 89

Soon after the consolidation of the companies legislation in England in 1862,[54] much the same legislation was passed in most Australian colonies between 1863 and 1874.[55] In Victoria, a version was introduced into Parliament within six months of the passing of the *Companies Act 1862*, 25 & 26 Vict, c 89, although it took several more months before it was finally passed. Prior to this, South Australia had passed legislation in 1847 based on the English *Companies Clauses Consolidation Act 1845*, 8 & 9 Vict, c 16.[56] However, this was little used and ultimately repealed in 1864 by legislation based on the *Companies Act 1862*, 25 & 26 Vict, c 89.[57] Western Australia passed the *Joint Stock Companies Ordinance 1858* (WA), which was based on the English *Joint Stock Companies Act 1856*, 19 & 20 Vict, c 47.

The main features of this new colonial legislation were that it: allowed for incorporation by lodgement 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.[58]

As the *Companies Statute 1864* (Vic) and similar colonial legislation was based on the *Companies Act 1862*, 25 & 26 Vict, c 89, they contained few public disclosure requirements beyond the lodgement of the memorandum and articles

53 Birrell, above n 42, 68 states that Vincent Pyke criticised the Act for being useless because it was so cluttered with conditions.

54 By the *Companies Act 1862*, 25 & 26 Vict, c 89.

55 *Companies Act 1874* (NSW); *Companies Act 1863* (Qld); *Companies Act 1864* (SA); *Companies Act 1869* (Tas); *Companies Statute 1864* (Vic).

56 *Joint Stock Companies Ordinance 1847* (SA).

57 The *Companies Act 1864* (SA) was based on the *Companies Act 1862*, 25 & 26 Vict, c 89 and replaced the *Joint Stock Companies Ordinance 1847* (SA).

58 Incorporation by lodgement: s V; association of more than 20 required to incorporate: s IV; limited liability: s VI.

of association upon registration and subsequent lodgement of the register of members and summary of capital.[59] 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 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 local need for companies legislation and it was not for another 20 years that the company form became widely used.[60] During the early 1860s, most investment in company shares was in banking and mining companies, and most large banks were either incorporated by an Act of Parliament or were established in England. This slow development in the number of company incorporations outside the mining sector is consistent with developments in England, where it also took several decades after the introduction of companies legislation for the number of company registrations to increase appreciably. Moreover, the Australian economy and business sectors were much smaller and far less diversified than those of England.

Evidence of the lack of real interest in the introduction of the 1864 companies legislation is shown by the reaction to the inadvertent repeal of *Pyke's Act* by the *Companies Statute 1864* (Vic). This repeal was much to the annoyance of those with mining interests, who found the repealed Act far more suitable for their purposes than the latter which, A R Hall suggests, was 'obviously tailored to the requirements of relatively large-scale firms operating in England.'[61] This oversight was redressed within six weeks by the passing of a separate Act for mining companies,[62] 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 1864* (Vic) 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. There was not even a 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. The market value of ordinary shares listed on the Melbourne Stock Exchange in 1865, soon after the *Companies Statute 1864* (Vic) 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 with 25 non-mining companies with a

[59] *Companies Statute 1864* (Vic) ss 15, 24.

[60] A R Hall, *The Stock Exchange of Melbourne and the Victorian Economy 1852–1900* (1968) 43.

[61] Ibid.

[62] This was sometimes referred to as '*Frazer's Act*': see *Mining Companies Limited Liability Act 1864* (Vic). For a discussion of *Frazer's Act*: see Birrell, above n 42, 71.

market value of £5 298 000.[63] In 1884, before the height of the boom of the 1880s, the market value of ordinary shares had increased threefold in 20 years.

This marked increase in the market value of listed shares shows that, despite the initial lack of interest, the transplant of English companies legislation (and limited liability in particular) encouraged the promotion of companies listed on the stock exchange and the trading of their shares. Certainly, the capital markets of the Australian colonies were less developed than their contemporary equivalents in England, but by the 1860s there was already significant and growing share market activity, especially in gold mining shares, which led to the establishment of several stock exchanges. Geoffrey Blainey notes that within one year of the introduction of the *Companies Statute 1864* (Vic), the Woods Point district had 262 registered companies comprising 13 per cent of Victoria's mining companies.[64]

Indeed, this increased share market activity fuelled the conversion of many cooperative 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. Cooperatives generally had a small number of shares, whereas gold mining companies registered under the *Companies Statute 1864* (Vic) 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 £3000, at which price level there was a considerable volume of transactions.[65] This indicates the wealth of investors and the strength of demand for speculative investment in gold mining shares at this time.

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 banking and finance companies of the 1860s, which culminated in the 'Panic of 1866' and the collapse of Overend, Gurney & Co Ltd.[66] The ability of gold mining companies to make calls was particularly useful given the nature of quartz mining with its continual exploration and development 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 that 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, leading to a fall in share

[63] Hall, above n 60, 58. There seemed to be a similar trend in Canada where 1850 and 1864 Canadian legislation saw 220 incorporations, of which 145 were for mining purposes: see Risk, above n 1, 278–9.

[64] Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (5th ed, 2003) 71.

[65] Hall, above n 60, 61.

[66] J B Jefferys, 'The Denomination and Character of Shares, 1855–1885' (1946) 16 *Economic History Review* 45. On the 'Panic of 1866': see Hunt, above n 3, 148–55.

prices. However, companies still required funding and so continued to make calls, the payment of which operated as a further 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 in a key economic sector and enabled gold output to reach very high levels.[67]

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.[68] In 1871, this proportion had grown to well over a half.[69] This move to deep mining greatly increased the complexity and scale of the operations of mining companies and required the application of new technology, such as dynamite (invented in 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 meant that widely held listed companies were the most efficient means of financing.

Hence the Victorian mining companies, and ultimately the mining industry itself, benefited greatly from the introduction of a general incorporation system and limited liability legislation. Cooperatives, which had been the prevalent forms 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 cooperative members retained unlimited liability. Furthermore, a cooperative's shares were not freely transferable on a stock exchange, and a cooperative structure was 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 benefit of the limited company form, as it was advantageous in the gold mining industry for a company to 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.[70] Hall suggests that an important characteristic of the prosperity of the Victorian economy was the 'speculative

[67] Hall, above n 60, 62.
[68] Ibid 74.
[69] Ibid.
[70] Colin White, *Mastering Risk: Environment, Markets and Politics in Australian Economic History* (1992) 124; Blainey, above n 64, 97–100.

spirit and "haste to be rich"' of Victorian investors in the 1880s.[71] Indeed, 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 large number of investors displayed a considerable, but necessary, appetite for risk. This would probably have encouraged diversification of the 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 instead 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, and even then from a low base. McQueen calculates that in 1903 there were over 9000 registrations of firms (partnerships) and 157 company registrations in NSW.[72] On the basis of these figures, he concludes that partnerships were chosen by more than 98 per cent of businesses as their preferred organisational structure.[73] Part of the explanation he puts forward for this slow uptake of the limited liability company form was the 'prejudice and distrust prevailing amongst "respectable" business people towards the corporate form'.[74] 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. Certainly, it is only in some industries that the organisational form of a company is advantageous. However, in order to determine whether the introduction of companies legislation was appropriate for 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. Moreover, it should be noted that there was also a slow uptake of the limited liability company structure by small businesses in England until several decades after the introduction of limited liability.[75]

V THE NO LIABILITY LEGISLATION FOR MINING COMPANIES

While most of the Australian colonies adopted the English companies legislation in near unchanged form, there was an early development in Victoria that precluded 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 neither surprising that legislative innovation in Victoria would address a difficulty that arose in relation to the raising of capital by gold mining companies, nor that it would be passed almost precisely at the time that quartz

[71] Hall, above n 60, 198–9.
[72] McQueen, 'Company Law as Imperialism', above n 5, 199.
[73] Ibid.
[74] Ibid 200.
[75] P W Ireland, 'The Rise of the Limited Liability Company' (1984) 12 *International Journal of the Sociology of Law* 239, 244–5.

mining was becoming the dominant mining activity. The following background to the no liability legislation is based on the account by Hall.[76]

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', which involved using false names when registering themselves with the company. This served as a type of insurance for shareholders — they could choose to pay calls if prospects looked favourable or, if 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. It also resulted in situations where shareholders failed to pay calls, but if the company became profitable they could again become entitled to dividends and the benefit of a higher share price by paying the outstanding calls.

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 that was often employed to overcome these difficulties was to include provisions in the memorandum of association that enabled the forfeiture of shares on non-payment of a call. The forfeited shares could then either be purchased by existing shareholders or sold at auction. This provided a mining company with greater certainty in relation to 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 certainly an effective response to dummy shareholders and those who refused to pay calls. However, doubts were cast on the validity of forfeiture provisions in a company's constitution by a decision of the Court of Mines, which held that such provisions were contrary to the legislation under which the company was incorporated.[77] However, the strong political influence of the mining industry is indicated by the almost immediate introduction of a Bill into Parliament to overrule this decision.

Nevertheless, the legal uncertainty remained for another year before the introduction of the no liability legislation — the *Mining Companies Act 1871* (Vic) — which sought to formalise the practice of forfeiture of partly paid shares upon failure to pay calls.[78] The substance of this legislation still operates today,[79] so that shareholders of mining companies registered as no liability companies under

[76] Hall, above n 60, 75–7. See also Birrell, above n 42, 98–100.

[77] Hall, above n 60, 76, refers to an 1869 decision of the Sandhurst Court of Mines in *Nolan v Annabella Company*, where the forfeiture provisions were held to be invalid. This decision was affirmed on appeal to the Chief Court of Mines. See Birrell, above n 42, 66–7, for a description of the legislation which established Courts of Mines.

[78] *Mining Companies Act 1871* (Vic) s 118(v).

[79] *Corporations Act 2001* (Cth) ss 112, 254M(2), 254Q.

the *Corporations Act 2001* (Cth) 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 new 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 England and Australia as lower par value shares attracted more investors and enhanced the marketability of shares.

The *Mining Companies Act 1871* (Vic) introduced a stricter regulatory regime for mining companies in Victoria than that which applied to trading companies under the *Companies Statute 1864* (Vic). 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.[80] 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.[81] Various criminal offences were created for breaches of duty and for making false statements.[82] These legislative provisions imposed a more rigorous statutory regulatory environment than existed in England and elsewhere in Australia. These stricter investor protection provisions reflected the fact that mining companies dominated the share market lists and had the widest spread of shareholders. However, despite these investor protection provisions, the government offices charged with the responsibility of administering the legislation were largely incapable of ensuring widespread compliance with these legislative requirements.

As noted above, 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. This speculation resulted in a marked increase in gold mining company registrations and investment. Share ownership existed across a broad cross-section of society, and the financing of Victorian gold mines depended on this domestic speculative investment as there was little English investment in Australian gold mines before the late 1880s.[83] The total nominal capital of new registrations increased nearly threefold in one year, from £6 million in 1870 to nearly £17 million in 1871.[84] In the first 10 months of 1870, 765 new companies were registered at Bendigo and calls of £200 000 were made.[85]

Hence, the legislation either 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

80 *Mining Companies Act 1871* (Vic) s 25.

81 *Mining Companies Act 1871* (Vic) ss 36–8.

82 *Mining Companies Act 1871* (Vic) pt VII.

83 Blainey, above n 64, 100–2.

84 Hall, above n 60, 81. See also Blainey, above n 64, 97, who notes that Anthony Trollope said that Bendigo's vice was not drunkenness but share speculation. The speculative boom in Bendigo is described by: Blainey, above n 64, 74–6; Birrell, above n 42, 115–16.

85 Birrell, above n 42, 117.

legislation designed to assist capital raising. One such wild fluctuation can be seen in the fact that capital raised in 1872 by new mining company registrations fell 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.

Hall argues that the no liability legislation encouraged a regular supply of investment in an inherently risky but very important industry and that its continued existence for more than a century confirms its success in achieving this objective.[86] 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.[87] The loom of unpaid liabilities operated as a dampener on new fundraising, especially because 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'.[88] He considered that this legislation encouraged wealthy investors who had previously been suspicious of mining to invest in gold mining companies. Ralph W Birrell described the legislation as 'an excellent example of lateral thinking to come up with a novel and workable solution to a difficult problem.'[89]

Moreover, Ian McLean argues that the institutions which were in place ensured that resource abundance became a blessing rather than a curse, and that they partly explain the economic success of the Australian colonies during the second half of the 19th century.[90] 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. This is discussed further in Part VII. 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.[91]

In contrast, McQueen regards the practice of dummying by mining company shareholders as an example of regulatory failure because there were no administrative means of preventing such malpractice. He argues that the introduction of

[86] Hall, above n 60, 77.

[87] Ibid 89–90.

[88] Blainey, above n 64, 99.

[89] Birrell, above n 42, 99.

[90] Ian W McLean, 'Why Was Australia So Rich?' (Working Paper No 11, School of Economics, The University of Adelaide, 2005) 2. Moreover, McLean notes that Australia's per capita gross domestic product was considerably higher than that of the United States between 1870 and 1890: at 3–4.

[91] Paul A David and Gavin Wright, 'Increasing Returns and the Genesis of American Resource Abundance' (1997) 6 *Industrial and Corporate Change* 203, 221, argue that 19th century US and Australian mineral law encouraged mineral exploitation through maintaining exploration incentives, respect for law and minimising disputation. The authors point out that Australia was an 'underachiever' in minerals other than gold in the 20th century, and they suggest that this was due to the absence of 'the atmosphere of buoyant expectations about major new discoveries': at 235.

no liability legislation was a direct result of this failure to enforce and inability to ensure compliance.[92] However, even if the practice of dummying was more common in Australia than in England, this may have been due to a more transitory population and large geographic area from which investors came, rather than regulatory failure. In that era, when there were relatively low expectations of government regulation and enforcement action, government administrative agencies would not have been expected to ensure that the members' register of a company was accurate and that 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 that 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 activity and probably played a beneficial and significant role in encouraging this growth of investment in a critical colonial export industry that depended for finance upon the share market.

VI 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 the shares of land companies and finance companies that speculated in mostly urban land, as well as in 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 systems and sewerage. The land 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.[93] This unprecedented investment activity demanded more capital than was locally available and was financed by large amounts of English capital inflow — attracted by higher interest rates than were available in England — 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. As previously discussed, 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), whilst other companies (described as 'trading' companies) were formed and regulated under the *Companies Statute 1864* (Vic). Trading company registrations were below 100 per year until the late 1880s when they jumped to 145 in 1887 and 345 in 1888, about half of which

[92] McQueen, 'Company Law as Imperialism', above n 5, 196–7, 202.

[93] The best known history of the personalities of this period and their activities is Michael Cannon, *The Land Boomers: The Complete Illustrated History* (1972).

were land and finance companies.[94] 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.'[95]

In 1888, there were approximately 1500 companies in Victoria registered under the *Companies Statute 1864* (Vic).[96] This figure actually understates the size of the corporate business sector because a large number of companies carrying on business in Victoria were incorporated in England 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.[97] This nearly tenfold 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 of 1887, itself a boom year.[98]

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.[99] He argues 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.[100] The Board of Trade in England had a long history of overseeing commercial legislation via a specialised and experienced bureaucracy. In Australia, there were relatively few registered companies, so administrative arrangements were added almost as an afterthought to the responsibilities of existing functionaries. In South Australia and Queensland, administrative responsibility was given to Masters of the Supreme Court; in NSW it was the responsibility of the Registrar-General; and in Victoria, for a time, it was the responsibility of the Titles Office.[101] Lacking expertise and resources due to inadequate funding, these functionaries concentrated on raising revenue from incorporations and lodgement fees, rather than the more expensive and difficult

94 McQueen, 'Limited Liability Company Legislation', above n 5, 50.
95 Blainey, above n 64, 100.
96 Waugh, 'Company Law and the Crash of the 1890s in Victoria', above n 5, 358.
97 Hall, above n 60, 37, 169.
98 Waugh, 'Company Law and the Crash of the 1890s in Victoria', above n 5, 357, quoting 'Review of the Year: Operations in the Markets', *The Argus* (Melbourne), 1 January 1889, 9.
99 McQueen, 'Colonial Law as Imperialism', above n 5, 194–5.
100 Ibid 197.
101 Ibid 195.

task of enforcing compliance. This was also much the case in England, where noncompliance with lodgement requirements was widespread in the 19th century. Certainly, the role of 19th century government regulators was far less developed than is the case today, as 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.

However, the severity of the depression in the 1890s led to strong calls for the legislature to address the perceived deficiencies in company law regulation.[102] Share market activity on the Melbourne Stock Exchange after the banking crisis in 1893 was significantly below that of the late 1880s and took some years 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.[103] Bank reconstructions, the prospects of paying calls and the bad experiences of shareholders all discouraged investment in bank shares for a number of years. Instead, the dominant investment activity 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 that led to a temporary decline in the value of Broken Hill shares in the early 1890s.[104] But apart from high risk mining speculation, Hall notes that local private enterprise was hesitant and that there was little capital formation financed through the stock exchange.[105] 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.[106] The presence of leading politicians on the 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. E A 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.'[107]

[102] Waugh, 'Company Law and the Crash of the 1890s in Victoria', above n 5, 381 fn 175. See further for a detailed discussion of the deficiencies of company law in addressing the malpractices of the 1890s.

[103] Hall, above n 60, 230.

[104] Ibid 221–40.

[105] Ibid 233.

[106] 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.

[107] E A Boehm *Prosperity and Depression in Australia 1887–1897* (1971) 266, quoting *The Economist*, 10 October 1891.

The *Voluntary Liquidation Act 1891* (Vic) was passed in Victoria at the time of a severe run on building societies and the collapses of several 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 insolvency and, if the order was granted, the court appointed a liquidator with powers to investigate misconduct by the directors. For failed companies that were not already being wound up voluntarily, the *Voluntary Liquidation Act 1891* (Vic) required consent to the winding-up proceeding from a majority of creditors by number and value of debts, making it difficult to put a company (including a building society) into compulsory liquidation against the wishes of its directors.[108] 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.[109] Where the company *did* have creditors outside Victoria, the proportion of creditors required to approve a court order for winding the company up was one-quarter by number and value of debts.[110] The lower approval threshold for when there were creditors outside Victoria was intended to placate English investors.[111]

The Preamble of the *Voluntary Liquidation Act 1891* (Vic) 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'.[112] 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 over the years to introduce remedial legislation were unsuccessful, this statute was brought into the Legislative Assembly without notice and immediately passed both Houses in a day with only minor technical amendments. Furthermore, the Act commenced from its date of passage.

However, the *Voluntary Liquidation Act 1891* (Vic) was widely condemned by the business community, which was not given the opportunity to have input into the legislation. In practical terms, it was difficult to meet the creditor approval requirements and hence the creditor safeguards built into compulsory liquidation were effectively suspended. In fact, the main effect of the Act in preventing

108 *Voluntary Liquidation Act 1891* (Vic) s 4.

109 *Voluntary Liquidation Act 1891* (Vic) s 3(a).

110 *Voluntary Liquidation Act 1891* (Vic) s 3(b).

111 John Waugh, 'The Centenary of the *Voluntary Liquidation Act 1891*' (1991) 18 *Melbourne University Law Review* 170, 171–2. An example of the operation of the Act is provided in *Re Phillip Island Co Ltd* (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. Waugh discusses this case at 173.

112 Trevor Sykes, *Two Centuries of Panic* (1988) 151.

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 those who had the most to conceal — the directors or their associates. It also greatly reduced the role of creditors as supervision of voluntary liquidations was carried out by 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 decided at the shareholders' meeting.[113] Hence, this legislation may ultimately have been self-defeating in that, far from encouraging greater investment, it may have undermined fragile investor confidence, which was to be further shaken by the bank collapses of the next few years.

At about the same time, NSW also passed legislation that was aimed at assisting companies with their reconstructions and with arriving at compromises with their creditors.[114] Where a 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,[115] and were more widely accepted than their counterpart Victorian legislation.[116]

After a prolonged period of deadlock between the Victorian Houses of Parliament, a change of government in 1894 resulted in Isaac Isaacs[117] becoming Attorney-General of Victoria, with a strong commitment to company law reform in order to address the misconduct that arose during the land boom and crash. He introduced the comprehensive Companies Bill 1894 (Vic) which, after the usual protracted debates and deadlock between the Houses, was ultimately passed in a reduced form at the end of 1896.[118] Isaacs introduced the legislation to deal with the various cases of 'deliberate and widespread fraud'[119] evident during the period leading up to the crash and which brought 'widespread ruin upon the people.'[120] This certainly indicates the prevalence of share ownership in 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.[121]

113 *Companies Act 1890* (Vic) s 140.

114 This legislation was the *Joint Stock Companies Arrangement Act 1891* (NSW).

115 *Joint Stock Companies Arrangement Act 1870*, 33 & 34 Vict, c 104.

116 Boehm, above n 107, 268.

117 Later Sir Isaac Isaacs, Governor-General of Australia and Justice of the High Court of Australia.

118 *Companies Act 1896* (Vic). Waugh, 'Company Law and the Crash of the 1890s in Victoria', above n 5, 382–5, describes the passage of the legislation through the Houses and the various political alignments which formed during the debates on the legislation.

119 Victoria, *Parliamentary Debates*, Legislative Assembly, 30 June 1896, 123 (Isaac A Isaacs, Solicitor-General).

120 Ibid 124.

121 Waugh, 'Company Law and the Crash of the 1890s in Victoria', above n 5, 383, citing 'Directors and the *Companies Act*: A Formidable List of Politicians', *The Age* (Melbourne), 16 March 1896, 5.

This *Companies Act 1896* (Vic) introduced: compulsory audits by certified auditors who were under a statutory duty to verify the accuracy of the accounts;[122] requirements for filing and sending to shareholders an audited balance sheet in the prescribed form;[123] prohibitions on misleading statements in prospectuses;[124] prohibitions on using misleading company names (the use of the word 'bank' had misled many land company depositors and investors);[125] prohibitions on loans by a company secured by its own shares;[126] and detailed winding-up provisions.[127]

Some of the provisions of this Act adopted English legislation. This included s 38 of the *Companies Act 1867*, 30 & 31 Vict, c 131, which required prospectuses to contain details of contracts entered into by the company with its directors and promoters, and s 3 of the *Directors' Liability Act 1890*, 53 & 54 Vict, c 64, which overruled *Derry v Peek*[128] by allowing an action in deceit by shareholders against directors whose misstatements fell short of fraud. Most of the disclosure provisions of the *Companies Act 1896* (Vic) came from the recommendations of the 1895 report of the British Davey Committee. The Victorian Parliament's legislation contained the first modern disclosure provisions some 10 years before similar requirements, such as compulsory filing of balance sheets, were incorporated into the English legislation. This was a strong reflection of 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. This also included introducing the concept of the proprietary company, where a proprietary company was defined as having no more than 25 members, unable to borrow from non-members and obeying certain prohibitions on raising funds from the public.[129] Such companies were exempted from having to lay an audited balance sheet before members in general meeting,[130] but had to have the word 'proprietary' in their names.[131]

Indeed, the *Companies Act 1896* (Vic) was a very progressive and far-reaching response to the abuses of the previous decade and it marked a significant change in regulatory policy away from the relatively laissez-faire approach that had previously prevailed towards greater investor protection. It sought to guard the public 'on the one hand against ignorance, and on the other hand against misrepresentation.'[132] A strong criticism of the legislation was that it did not apply to mining companies[133] when they were the most common type of

[122] *Companies Act 1896* (Vic) s 28.
[123] *Companies Act 1896* (Vic) s 29.
[124] *Companies Act 1896* (Vic) s 47.
[125] *Companies Act 1896* (Vic) ss 50–1.
[126] *Companies Act 1896* (Vic) s 44.
[127] *Companies Act 1896* (Vic) div VII.
[128] (1889) 14 App Cas 337.
[129] *Companies Act 1896* (Vic) s 2.
[130] *Companies Act 1896* (Vic) s 2.
[131] *Companies Act 1896* (Vic) s 2.
[132] Victoria, above n 119, 124 (Isaac A Isaacs).
[133] *Companies Act 1896* (Vic) s 1(3).

company formed at the time,[134] but this shortcoming was addressed in 1910 by repealing the exclusion of mining companies.[135] These reforms were enacted because of the spectacular nature of the boom and bust that occurred in Victoria. The consequent widespread losses throughout the community had the effect of galvanising political support for the reforms put forward by Isaacs.

VII THE 'TRANSPLANT EFFECT'

There has been considerable recent interest from academics within a range of disciplines in determining key factors that encourage or discourage economic development. A number of studies outlined below have asserted that those former colonies that have developed strong institutions have experienced successful economic growth. The concept of institutions in this context refers to the broad way a society is organised. 'Good' institutions are those that provide incentives and opportunities for investment.[136] They are characterised as ensuring secure property rights for a broad cross-section of society, as opposed to what Daron Acemoglu, Simon Johnson and James A Robinson describe as 'extractive institutions', which concentrate power in the hands of a small elite, 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.[137] This type of analysis can, for example, explain the different economic histories of Australia and Argentina despite the fact that the two nations were at similar stages of economic development during the second half of the 19th century.

The economic success of the Australian colonies during the 19th century indicates that the institutions which were transplanted from England were conducive to economic development largely because they encouraged investment from a wide cross-section of society by protecting property rights. The transplantation of company law in Australia is consistent with this analysis because, in a society with relatively high per capita income and a wide distribution of wealth, share ownership was encouraged and became relatively prevalent. This in turn encouraged entrepreneurship and innovation, making the mining industry in particular a very successful global competitor.

The economic success of the Australian colonies in the second half of the 19th century can in part 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.[138] However, this cannot completely explain Australia's economic success because there are many countries endowed with abundant natural resources that have failed to produce sustained economic growth. In fact, many political scientists and economists have noted that abun-

[134] Victoria, above n 119, 150 (William Moule).

[135] The repeal was effected by the *Companies Act 1910* (Vic), 1 Geo 5, s 2(1), sch 4.

[136] Referred to as 'institutions of private property' in Daron Acemoglu, Simon Johnson and James A Robinson, 'Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution' (2002) 117 *Quarterly Journal of Economics* 1231, 1235 (emphasis omitted).

[137] Ibid.

[138] McLean, above n 90, 15.

dant natural resources are more often a curse than a blessing for developing countries. Pauline Jones Luong and Erika Weinthal suggest that this 'resource curse' stems from institutional weakness, which in turn is related to ownership structure.[139] They found that strong fiscal and regulatory institutions are more likely to arise under private domestic ownership because a significant political and economic group emerges that has a mutual interest in achieving institutional outcomes that reduce transaction and monitoring costs. They conclude that '[t]he concentration of wealth impoverishes the state whereas the dispersion of wealth enriches the state.'[140]

Indeed, increasing importance is being given to the role of growth-enhancing institutions as the main determinant of why some countries are wealthy and others poor, and therefore may provide a significant explanation of why Australia was economically successful in the period prior to 1890. Acemoglu, Johnson and Robinson argue that differences in colonial experience could explain variations in the effectiveness of institutions as indicated by factors such as expropriation risk, rule of law or property rights enforcement.[141] They claim that European colonial powers adopted different colonisation strategies in different places: in countries where they settled (such as Australia and Canada), they replicated institutions that enforced the rule of law and encouraged investment; in other places, the purpose of colonisation was purely extractive and exploitative and so the established institutions were detrimental to the economic progress of the colony. The strategy 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 hence were more likely to establish extractive colonies. Therefore, whether Europeans could settle in a particular area in colonial times is an important determinant of the nature of the institutions which exist today.[142] From this perspective, the transplantation of English company law facilitated dispersed private domestic ownership of shares in gold mining and later other mineral companies and, together with strong regulatory and market institutions, enabled the abundance of resource wealth to be a blessing rather than a curse.

There has also been considerable historical analysis in recent years focusing on the evolution of corporate law and patterns of legal development in 'transplant'

[139] Pauline Jones Luong and Erika Weinthal, 'Rethinking the Resource Curse: Ownership Structure, Institutional Capacity, and Domestic Constraints' (2006) 9 *Annual Review of Political Science* 241, 254.

[140] Ibid 259. Various theories explaining the negative relationship of resource abundance and growth are set out in Jeffrey D Sachs and Andrew M Warner, *Natural Resource Abundance and Economic Growth* (1997). See also the survey of literature dealing with the 'resource curse' in Gavin Wright and Jesse Czelusta, 'Mineral Resources and Economic Development' (Working Paper No 209, Stanford Center for International Development, Stanford University, 2004) 4–6.

[141] Daron Acemoglu, Simon Johnson and James A Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *American Economic Review* 1369.

[142] Ibid 1373–6. See also Acemoglu, Johnson and Robinson, 'Reversal of Fortune', above n 136. 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 Radhe Shyam Rungta, *The Rise of Business Corporations in India 1851–1900* (1970).

countries compared with those in 'origin' countries.[143] Katharina Pistor et al claim that, irrespective of whether a country's corporate law origin lay in the common law or civil law, transplant countries exhibit different patterns of legal development from those of the countries where the law originated.[144] The authors survey a number of countries across different 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.[145] They interpret this volatility as a response to the economic impact of the new law[146] or as a rejection of parts of the new law.[147] They also found that in other countries the legislation did not change for long periods despite considerable economic development.[148] The Australian experience seems to indicate an initial preparedness to adapt the received law in response to local circumstances. For example, the no liability company form was adopted in response to the requirements of the mining industry, and the inclusion of more detailed disclosure requirements and investor protection measures was a result of the corporate collapses of the 1890s and the inadequacies of the law that they exposed.

Furthermore, Pistor et al attempt to determine how 'good' corporate law evolves. They argue that 'a continuous evolution of law is a key ingredient'[149] because the success of the corporation over a long period has come about because of its capacity to adapt to a changing environment and that corporate law evolves in close interaction with socioeconomic and political factors.[150] Successful legal systems encourage and facilitate this adaptation process of corporations, 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 that 'origin countries have been more successful than transplant countries.'[151] Australia has adapted its corporate law to suit local circumstances and experience in the late 19th 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.[152] This enabled these countries to rely less on legislated restraints and thereby encouraged more

[143] See, eg, Katharina Pistor et al, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2002) 23 *University of Pennsylvania Journal of International Economic Law* 791; Katharina Pistor et al, 'Innovation in Corporate Law' (2003) 31 *Journal of Comparative Economics* 676; Katharina Pistor, Daniel Berkowitz and Jean-Francois Richard, 'Economic Development, Legality and the Transplant Effect' (Working Paper, University of Pittsburgh, 1999).

[144] Pistor et al, 'The Evolution of Corporate Law', above n 143, 797, 870.

[145] Ibid 840.

[146] Ibid.

[147] Ibid 841.

[148] Ibid 840.

[149] Ibid 793.

[150] Ibid 793–4.

[151] Ibid 794.

[152] Ibid 866–7.

innovation in the uses of companies.[153] However, the evolution of transplanted corporate law was found to differ from legal evolution in 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.

In an article that considers the transplant of law generally rather than the specific transplant of corporate law, Pistor et al propose that, amongst the countries that received transplanted law, it was those countries that adapted it to suit local conditions and had a population that was familiar with its basic legal principles that were more likely to build an effective legal system.[154] On the other hand, where these conditions were absent, the recipient countries experienced difficulties in developing effective legal systems.[155] This characteristic of transplant countries is described by Pistor et al as the 'transplant effect'.[156] They consider that the way in which the law was transplanted and the receptiveness of the transplant country are more significant to the development of an effective legal system than the origin of the particular legal family (that is, whether the transplanted law was from the civil law or common law family of legal systems).

Legal change in transplant countries tends to be 'either erratic or stagnant'.[157] The advent of legal change appears to indicate that a transplanted law has taken root.[158] The Australian experience has exhibited a number of characteristics apparent in transplanted law societies. These include some innovative adaptations to local conditions, some erratic, idiosyncratic and self-interested responses to times of crisis, and long periods of relatively little change.

VIII LEGAL AUTONOMY VERSUS FUNCTIONALISM

Most discussions that examine legal evolution in the context of economic development adopt elements of one of two types of approach. The first approach sees the law as developing autonomously or in some degree of isolation from mainstream society, while the second view is that law evolves to serve the functional needs of business and the market economy.[159]

The autonomous approach could be used to argue that the development of unincorporated joint stock companies took place despite the existence of unsympathetic law that 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 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

[153] Ibid 868.
[154] Pistor, Berkowitz and Richard, above n 143, 2–3.
[155] Ibid 3.
[156] Ibid.
[157] Ibid 870.
[158] Ibid.
[159] Harris, above n 9, 3–12. See also Robert W Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, which provides a 'guidebook' to the legal functionalism perspective and criticisms of it.

isolation from broad economic developments and in a manner which was unresponsive to the needs of business, such that early companies evolved *despite* the law, rather than being encouraged by it.

Simon Deakin and Frank Wilkinson point out that:

> Legal concepts are linguistic devices, cultural artefacts 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.[160]

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 conferring charters of incorporation. The isolation of the legal system from social and economic change may also be explained by the traditional methodology of the common law — which looks to the past to solve current problems — and by the traditional detachment of judges and the legal profession generally from the world of business.[161]

Conversely, functional interpretations hold that legal and economic developments occur more or less together and suggest that law responds to the needs of business, thereby encouraging 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.[162] Writers who link 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 acute differences of opinion as to whose needs the law is responsive to. For example, 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.[163] 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 changing environment survive a type of evolutionary natural selection process. This perspective applies Darwinian evolutionary theory to the evolution of legal concepts and is a longstanding tradition which has recently been revived.[164] A further explanation of the interrelationship between economic 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',

[160] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (2005) 28.

[161] Harris, above n 9, 5.

[162] Ibid 6: Harris refers to the German historical school whose members included 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, inter alia, US legal realists, Willard Hurst and E P Thompson as adopting a functionalist approach.

[163] See, eg, Judge Richard A Posner, *Economic Analysis of Law* (3rd ed, 1986).

[164] 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; Simon Deakin, 'Evolution for Our Time: A Theory of Legal Memetics' (2002) 55 *Current Legal Problems* 1.

evolved in successful economies in ways that complemented and facilitated growth.[165]

McQueen saw the transplantation of company law in functional terms as a means of serving the interests of the colonial power, such that the transplanted legislation enabled English companies to operate more conveniently in the Australian colonies.[166] He puts forward the view that English company law was ill suited to the colonies, in which the economy was considerably less developed than in England and where the bureaucracies charged with the responsibility of administering the legislation were less equipped to enforce compliance.[167] McQueen suggests that it was never considered that there may have been pre-existing local commercial traditions or existing organisational forms that were better suited to the Australian context.[168] He notes that, because few businesses outside the mining sector chose to incorporate in the years following the introduction of the Companies Acts, this indicates that the legislation was inappropriate for Australian conditions.[169] Furthermore, 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 businesses 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.

From a different functional perspective, at this time there was a growing class of investors who sought company shares, and when their wealth and demand for investment opportunities significantly increased after the discovery of gold in the early 1850s they were able to exert increasing political influence. Concurrently with these developments, the Parliaments of NSW 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 that had many of the characteristics of limited liability companies. These legal innovations, while not of great significance themselves because they were not widely adopted, signalled the direction of legal development, which culminated in the transplant of the *Companies Act 1862*, 25 & 26 Vict, c 89 in the 1860s and 1870s.

As discussed previously, 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 statutory changes that were more attuned to the investment and development needs of the growing gold mining industry, and the introduction of the no liability company is an example of one of these changes. With this

165 Douglass C North, 'Institutions' (1991) 5 *Journal of Economic Perspectives* 97, 98.

166 McQueen, 'Company Law as Imperialism', above n 5, 194. This approach to analysing imperialism was articulated by Brian Fitzpatrick, who expressed a strong sense of nationalism in his analysis of the historical economic interrelationship between Australia and England in Brian Fitzpatrick, *The British Empire in Australia: An Economic History 1834–1939* (2nd ed, 1969). Fitzpatrick wrote that '[t]he reservoir of Australian labour and industry has never failed to provide a stream tributary to the broad river of English wealth': at 348.

167 McQueen, 'Colonial Law as Imperialism', above n 5, 193–5.

168 Ibid 193–4.

169 Ibid 199–200.

legislation, the evolution of company law can be seen as functional in nature, changing to meet the needs of the gold industry.

The evolution of company law usually accompanies the rapid development of a new driving force industry that lends itself to pooled investment as its major means of financing. This is in contrast to more established industries, which are often able to meet their finance needs from internal sources, borrowings or the use of networks. For example, in England there was a growing need for an effective means of registering limited liability companies that would encourage the raising of capital, particularly in railways, 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 an incentive to float gold mining companies and resulted in 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 with other industries such as wool. The relative ease of incorporation encouraged promotions of many companies that required substantial numbers of investors.

The economic role of the mining industry was of critical importance, especially in Victoria. Therefore, legislation that 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 one of the highest living standards in the world for most of the second half of the 19th 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 companies in Victoria were similar to the railway companies in England two decades earlier, in that companies in both cases relied upon the pooled investments of large numbers of shareholders who attached importance to the fact that they had limited liability and that 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 which 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.

Lynn A Stout and Margaret M Blair have observed that the public company form is particularly appropriate for those businesses in industries that require large amounts of 'enterprise specific' assets, referring to 'assets that cannot be withdrawn from the enterprise without destroying most of their value.'[170] Mining and railways typify these sorts of industries because of the hefty development costs that must be incurred on assets specific to the enterprise before any return can be gained. Furthermore, in the case of mining, a return is uncertain even after the sinking of development costs. Once profits are earned, the machinery

[170] Lynn A Stout and Margaret M Blair, 'Specific Investment and Corporate Law' (2006) 7 *European Business Organization Law Review* 473, 489.

and equipment are of such a highly specialised nature that they are virtually worthless in other uses apart from as scrap. In these types of industry, incorporation serves the necessary purpose of locking in investors' capital so that it cannot be withdrawn by 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.[171] 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 to the growth of the mining industry after the change from alluvial to deep lead mining, which required far more capital.

Harris suggests that between the two opposing approaches of autonomy and functionalism there 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.[172] An example of this type of construct can be seen in the increased use of the unincorporated joint stock company form even though the law appeared to be hostile to it after the passing of what was officially entitled *An Act for Better Securing Certain Powers and Privileges, Intended to Be Granted by His Majesty by Two Charters, for Assurance of Ships and Merchandise at Sea, and for Lending Money upon Bottomry; and for Restraining Several Extravagant and Unwarrantable Practices therein Mentioned 1720*, 6 Geo 1, c 18, but is now more commonly known as the *Bubble Act 1720*.[173] Nevertheless, there was strong demand from various sectors of business and the investment community for a form of business organisation that 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 between legal evolution and economic development focuses on the gulf between legal fiction and reality and the various means by which the law permits flexibility in its application so as to allow businesspeople 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 true 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 that 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

[171] Ibid 488–93.
[172] Harris, above n 9, 7.
[173] Ibid. The *Bubble Act* made illegal unincorporated joint stock companies: at s 4. This Act was officially entitled the *Royal Exchange and London Assurance Corporation Act 1719*, 6 Geo 1, c 18.

Agricultural Company appeared to have successfully carried out their purposes.[174]

IX CONCLUSION

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

It was the Victorian mining companies' pressing need for capital that led to the introduction of legislation that 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 protection legislation in the common law world. Both of these legislative developments can be seen as examples of legal evolution and economic development operating in a complementary way.

Studying this interrelationship between 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 in turn an important driver of the rapid economic development of the Australian colonies. The introduction of the English legislation was probably inevitable in light of the important economic role played by several companies, most notably the large banks, which developed prior to the introduction of the legislation. These economic factors reinforced the cultural tendency to follow English law and customs. Hence this legislation essentially formalised developments that were already well in train. Ultimately, the main importance of the adoption of the *Companies Act 1862*, 25 & 26 Vict, c 89 was that it became easier to float companies and raise capital. This enabled the mining industry to flourish, in turn laying the foundations for the modern Australian economy.

[174] Cf Harris, above n 9, 8. Ron Harris considers that the unincorporated joint stock company in England was not successful in overcoming the constraints of the legal framework.