

THE TRANSPLANT OF COMPANY LAW INSTITUTIONS IN COLONIAL AUSTRALIA: ECONOMIC DEVELOPMENT AND LEGAL EVOLUTION

Phillip Lipton*

Introduction

The interaction of economic development and the evolution of company law in colonial Australia present an interesting case study of company law transplant because it allows for their examination in the context of the development of a capitalist system over a relatively short period of time from its very beginnings as a remote penal colony.

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

There was early demand for pooled equity investment and share trading and the utilisation of unincorporated joint stock companies with transferable shares some time before the introduction of incorporation and limited liability legislation. This early use of joint stock companies set in train an evolutionary trajectory before the introduction of companies legislation. This legislation facilitated the formation of companies and encouraged their use by investors however companies were already quite widely used and share trading was common even before the introduction of companies legislation and the establishment of formal stock exchanges. This indicates that companies would have

*Senior Lecturer, Department of Business Law and Taxation, Monash University, Caulfield, Australia

¹ See for example R P Austin and I M Ramsay *Ford's Principles of Corporations Law* 12th edition Lexis Nexis Butterworths 2005 at 42 where a brief paragraph covers the evolution of company law in colonial Australia.

continued to evolve as a matter of commercial practice irrespective of legislative developments.

Limited liability partnerships were introduced in New South Wales and Victoria in the early 1850s. This legal form was short-lived, but it indicates a preparedness of colonial governments to seek innovative responses to the needs of their business communities despite the lack of equivalent English legislation. At the same time in England, the introduction of limited liability was vigorously debated and was not introduced for companies until 1855.

The introduction of companies legislation in Victoria in 1864 and in the other colonies around this time, approximately coincided with the beginning of a gold mining boom which was a major driver of economic growth and resulted in the Australian colonies becoming among the wealthiest societies in the world in the late nineteenth century. The facilitation of company formations in the gold mining industry was a significant factor in the development of this key industry and the enormous wealth it generated. The introduction of the no liability company in 1871 was an innovative response to the requirements of the gold mining industry and occurred at a time of significant expansion in gold output. This paper focuses on the Victorian legislation because it was the originator of most company law developments which were usually followed by the other colonies.

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

The only significant interpretation of the history of Australian company law is a series of articles by Rob McQueen in the early and mid 1990s which questioned whether the adoption of English company law by the Australian colonies was appropriate for the local

conditions.² He described this adoption of English company law as “company law as imperialism” serving English economic interests rather than assisting Australian economic development and he argued that the adoption of English company law was inappropriate for Australian conditions. He also considered that the introduction of the no liability company was largely brought about by the inadequate administration of the companies legislation³ This paper argues that rather than being inappropriate, the transplant of company law in Australia was inevitable because the foundations of the institutions of company law had already been laid before the enactment of legislation which formally recognised registered companies and this legal evolution was appropriate in the context of the economic circumstances which existed in the Australian colonies in the nineteenth century.

Pre-legislative development of companies

The colony of New South Wales began as a penal colony in 1788 and the development of its economy in the early years was a secondary priority to the maintenance of a prison colony. For several decades the economy was quite primitive so any private financial resources which were accumulated were utilised in small scale trading or agricultural activities. Most infrastructure was developed by the government as part of its main function as administrator of a prison colony. The first company formed in New South Wales was the Bank of New South Wales in 1817. At the time when the colony was moving away from its convict origins and a free economy was starting to develop, Governor Macquarie wished to develop a source of finance and local currency so as to reduce dependence on the Treasury in London and facilitate the further development of a free society. Macquarie sought to encourage local investment in the bank and conferred upon it a charter granting limited liability to its shareholders under which the bank

² “Company Law as Imperialism” (1995) 5 *Australian Journal of Corporate Law* 1; “An Examination of Australian Corporate Law and Regulation 1901-1961” (1992) 15 *University of New South Wales Law Journal* 1; and “Limited Liability Company Legislation – The Australian Experience” (1991) 1 *Australian Journal of Corporate Law* 22. John Waugh also wrote an historical analysis of Australian company law in terms of the deficiencies which were exposed by the crash of the 1890s and the resultant Victorian reforms in “Company Law and the Crash of the 1890s in Victoria” (1992) 15 *University of New South Wales Law Journal* 356.

³ “Company Law as Imperialism” (1995) 5 *Australian Journal of Corporate Law* 1 at 46-55.

operated for some time. This charter required approval from the government in London and ultimately this was refused largely because it was seen as undesirable for banks to be formed with limited liability as this placed depositors at greater risk. The result of this refusal to grant a charter conferring limited liability was that the Bank of New South Wales operated as an unincorporated joint stock company governed by the law of partnership and its deed of settlement which provided for transferability of its shares and management by a board of directors. The unlimited liability of shareholders did not greatly discourage investors taking up the bank's shares as the bank traded profitably from its beginnings perhaps partly as a result of depositor confidence arising from the unlimited liability of its shareholders.

Unincorporated joint stock companies operating under deeds of settlement had been formed in Britain for a long time but had increased in numbers as the railway boom occurred in the 1830s and 1840s. A similar development took place in New South Wales with the formation of several banks and other companies such as The Australian Agricultural Company (1824) and Australian Gas Light Company (1836) and others associated with the pastoral boom of the 1830s. The extent of company formations and share trading in New South Wales can be seen from newspaper commentary in 1836 which warned that there appeared to be "a sort of mania for the formation of companies".⁴ In 1835 the first share list was published by William Barton, an early stockbroker. He also published a book on New South Wales companies which is evidence of strong investor interest in share investment.⁵

A further indication of the widespread extent of colonial share trading in this period can be seen from there being 48 stock traders who advertised shares for sale during the period 1835 to 1851.⁶ Early share trading mostly arose from sales by deceased estates or when a shareholder was leaving the colony but later attained a more commercial nature.

⁴ S Salsbury and K Sweeney *The Bull, the Bear and the Kangaroo: The History of the Sydney Stock Exchange* Allen & Unwin Sydney 1988 at 10 quotes from *Sydney Herald* 11 February 1836 where the newspaper commented on the formation of the Australian Gas Company (later Australian Gas Light Company) hoping that the company would not "burn fingers".

⁵ *Particulars of Joint Stock Institutions in New South Wales* J Tegg & Co Sydney 1838 reissued in 1839.

⁶ Salsbury and Sweeney Appendix 3 at 479-481.

Newspaper advertisements expressing a desire to purchase shares became increasingly common from the 1830s onward. Prior to the formation of formal stock exchanges in the 1860s and 1870s most share trading was carried out by means of auctions conducted by auctioneers who dealt in a wide range of goods, animals, real estate and shares. Not all of those listed as share traders advertised on a regular basis and none were full time stock brokers but the large number of auctioneers who dealt in shares, together with the number of listed companies formed during the period, indicates how frequently shares were traded and their popularity as an investment.

Salsbury and Sweeney tabled companies whose shares were listed or traded in the period 1835 to 1871.⁷ In the period up to 1851, at least 71 firms⁸ were either active or promoted and about 40 of these were listed for share trading.⁹ Of these firms, 60 originated in New South Wales and the others were formed in Britain, New Zealand or Van Diemen's Land (Tasmania). Most of these firms were engaged in banking and finance, insurance and shipping or other transport. Very few were engaged in mining and those that were, were small and there was little or no record of share trading.¹⁰ Most companies of this time had a short life, as was also often the case in England, so that at any one time the number of companies whose shares were actively traded was quite small. The *Sydney Herald* share list in 1840 comprised 23 companies. This fell to nine after the depression in the 1840s.

Several colonial companies of this time were relatively large and had large numbers of shareholders. Barton's 1835 share list showed the Australian Agricultural Company had a paid up capital of £240,000.¹¹ The largest company on the 1840 share list was the Commercial Banking Company of Sydney which had a paid up capital of £218,000 divided into 3000 shares. This indicates that the average par value of a share was over

⁷ Salsbury and Sweeney Appendix 2 at 468-477.

⁸ "firms" appears to mean companies as the term was understood before the general incorporation statutes. These were partnerships whose shares were tradable.

⁹ Salsbury and Sweeney at 13 and Appendix 2 at 468-471.

¹⁰ Salsbury and Sweeney Appendix 2 at 468-471.

¹¹ Salsbury and Sweeney at 20. Table 1.1 reproduces Barton's first share list of 1835 containing eight companies with details of amount of share capital paid up, share price and dividends.

£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.¹²

The main problem faced by the joint stock company banks was that because they were not incorporated, they were incapable of suing and being sued in their own name. This was a problem for all joint stock companies because under the law of partnership which applied to them, all members had to be named as parties to litigation by or against the company. From a practical point of view this presented considerable difficulties because it was in the nature of these companies that their memberships were constantly changing. The first “companies” legislation in Australia dealing with joint stock companies was passed in New South Wales in 1839¹³ to address this problem by validating certain contracts “entered into by banking and other co-partnerships”. In 1842 a further Act was passed to enable banks and other companies to sue and be sued in the name of an officer of the company¹⁴ and in 1848 legislation was passed which enabled joint stock companies to sue and be sued by their members.¹⁵ Unincorporated joint stock companies were prohibited after the introduction in the Australian colonies of limited liability companies legislation based on the 1862 English *Companies Act*. This is discussed below.

The collapse of the pastoral boom in the 1840s depressed the colonial economy and led to a drastic decline in company formations and the failure of several prominent companies including the Bank of Australia which was the second bank formed after the Bank of New South Wales in 1826. It was formed by interests that included the Macarthur family and was known as “the pure merino bank”.¹⁶ Its collapse was the first widely publicised and far-reaching corporate failure in Australia and as with many later corporate collapses, it revealed structural weaknesses in the company law of its time.

¹² Salsbury and Sweeney at 13.

¹³ *An Act to make good certain contracts which have been and may be entered into by certain Banking or other Co-partnerships* 3 Vic No 21

¹⁴ 6 Vic No 2

¹⁵ 11 Vic No 56

¹⁶ Salsbury and Sweeney at 9.

The absence of a charter conferring limited liability on bank shareholders came to the fore when the Bank of Australia collapsed. It had become over-extended after land values fell and borrowed money from and gave a promissory note to the Bank of Australasia which was an English bank formed by charter in 1835 and whose shareholders, who were largely British, had limited liability. The bank sought to recover its losses on the bills and sued the shareholders of the Bank of Australia. It was ultimately successful in the Privy Council for the full amount of the claim, interest and costs.¹⁷ It was held that the directors had the power under the deed of settlement to bind the company by borrowing money and under partnership law they acted as agents for the company and so bound the company and its shareholders.¹⁸

There were several bank and other company collapses at this time although none had the disastrous results for shareholders as occurred in the Bank of Australia case. These cases highlighted the risks involved in being a shareholder of an unlimited company and resulted in a marked downturn in company formations and share trading. These risks were exacerbated because plaintiffs did not have to sue all shareholders but could selectively sue wealthy shareholders for the full amount owing.¹⁹

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

¹⁷ *Bank of Australasia v Breillat* (1847) 13 ER 642

¹⁸ *ibid* at 657-658.

¹⁹ This was a major issue of concern at the time. Salsbury and Sweeney at 13 quote the *Sydney Morning Herald* of 9 August 1847 “the creditor is not obliged to look to the enrolled list of members of the Company and levy rateably and equitably upon each. He takes the shortest cut into what appears to him to be the longest pockets”.

local miners, silent partners and merchant suppliers. This soon led to active share trading in a large number of relatively small mining companies.

Early experiments in limited liability

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

The New South Wales Parliament passed several acts in the period 1848 to 1853 which incorporated some of the leading banks such as the Bank of New South Wales and later some mining, insurance and shipping companies. In most cases, the liability of shareholders was limited to twice the nominal value of shares held. This reflected the reluctance of British government authorities to authorise the incorporation of banks with limited liability while being prepared to accept liability of double nominal value. It was for this reason that banks were excluded from the English limited liability legislation of the 1850s. This double nominal value liability served as a model for incorporations in industries other than banking including the Great Nugget Vein Gold Mining Company, incorporated in 1852 despite the fact that this type of extended limited liability was rarely used in Britain.²⁰ These incorporations led to increased company activity in Sydney where investors favoured shares which paid regular dividends, especially the large banks.²¹ Melbourne investors focussed on gold mining shares and were more speculative in their share dealings.

²⁰ Salsbury and Sweeney at 33-34 quote the *Sydney Morning Herald* 21 June 1853 which opposed the double nominal share value liability and favoured liability limited to the nominal amount of the shares.

²¹ Salsbury and Sweeney note that in 1858 there were over 20 dividend-paying companies in New South Wales and this increased during the 1860s.

Sole traders and partnerships were by far the most common forms of business organisation and both New South Wales and Victoria introduced limited liability partnerships in the early 1850s.²² These early forms of limited liability were repealed by the companies Acts introduced in Victoria in 1864 and New South Wales in 1874 which provided for the incorporation of companies with limited liability. Although the limited liability partnership Acts were short-lived and not widely used, they reflected a preparedness by colonial governments to adopt business forms suited to the local economic and business environment and to respond to the demands of some sectors of the local business community for the introduction of limited liability and the political leverage able to be applied by the business community to this end. This may have been a response to community concern during the downturn of the 1840s when large numbers of shareholders were liable for company losses. The most publicised of these was the Bank of Australia collapse in 1843 noted earlier. The adoption of some form of limited liability in New South Wales and Victoria before this occurred in England indicates an early preparedness to adapt the law to suit local conditions and depart from English legislation.

To encourage investment in the mining industry, Victoria passed a Mining Company Act in 1855²³ which introduced a form of incorporation and limited liability for mining corporations and partnerships. At first it did not include the concepts of the paid up share, minimum par value and unpaid liability which were introduced in 1860. This legislation encouraged investment in mining companies as can be seen from the existence of over 500 gold companies in Victoria in the mid 1860s with a nominal share value of more than £3 million.²⁴ This legislation was adopted in New South Wales soon after although gold had much less impact in New South Wales because production was much smaller and there was much less deep lead mining.

These legislative changes provide early examples of the willingness of colonial legislatures to introduce commercial innovations even where there was no equivalent

²² *An Act to Legalize Partnerships with Limited Liability* 1853 NSW (17 Vic No 9) and *An Act to Legalize Partnerships with Limited Liability* 1854 Vic (17 Vic No 5)

²³ *An Act for the Better Regulation of Mining Companies* 18 Vic No 42.

²⁴ Salsbury and Sweeney at 65.

legislation in Britain. In Britain in the early 1850s, the introduction of limited liability was highly controversial with significant sectors of British business strongly opposed to its introduction.

By the early 1860s the utilisation of companies as an investment vehicle had already become well established despite the lack of a general incorporation procedure and limited liability. There were many companies whose shares were actively traded and several of them, especially the banks, were quite large in terms of their issued capital. It is clear that there were entrepreneurs who wished to establish pooled investment business organisations and there were also investors seeking investments which offered returns with varying degrees of risk. A major development which was about to occur was the use of the company form by a large number of mining companies which came to dominate colonial stock exchanges. This development coincided with the introduction of “modern” companies legislation.

The Transplanting of the English 1862 *Companies Act*

Soon after the consolidation of the Companies legislation in England in 1862,²⁵ much the same legislation was passed in most Australian colonies.²⁶ The main features of this legislation were that it allowed for incorporation by lodgment of constituent documents, required associations of more than 20 members to incorporate by prohibiting them from operating as partnerships or unincorporated joint stock companies and introduced limited liability of members. Within 6 months after the passing of the 1862 *Companies Act*, a version was introduced into the Victorian Parliament although it took several further months before it was finally passed. Other colonies adopted virtually the same legislation between 1863 and 1874. Prior to this, South Australia passed legislation in 1847 based on the English *Companies Clauses Consolidation Act 1845*²⁷ however this was little used and ultimately repealed in 1864 by legislation based on the English 1862 Act and

²⁵ *Companies Act 1862* (25 & 26 Vic c. 89)

²⁶ *Companies Act 1863* Qld (27 Vic No. 4); *Companies Statute 1864* Vic (27 Vic No 190); *Companies Act 1864* SA (27 & 28 Vic No.13); *Companies Act 1869* Tas (33 Vic No 22); *Companies Act 1874* NSW (37 Vic No. 19);

²⁷ *Joint Stock Companies Ordinance 1847* SA 10 & 11 Vic No 5.

Western Australia passed the *Joint Stock Ordinance* 1858²⁸ based on the English *Joint Stock Companies Act* 1856.²⁹

As the Victorian *Companies Statute* 1864 and similar colonial legislation was based on the English *Companies Act* 1862, they contained few public disclosure requirements beyond the lodgment of the memorandum and articles of association on registration and subsequent lodgment of the register of members and summary of capital.³⁰ 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 strong local demand for companies legislation and it was not for another 20 years that the company form became widely used.³¹ During the early 1860s the most important sectors for investment in company shares were in banking and mining companies and most large banks were either incorporated by Act of Parliament or were established in Britain. This slow development in the number of company incorporations outside the mining sector is consistent with developments in Britain because it also took several decades after the introduction of companies legislation for company registrations to increase appreciably in Britain. The Australian economy and business sectors were much smaller and far less diversified than was the case in Britain. Hall gives as evidence of the lack of real interest in the introduction of the 1864 companies legislation that the Act inadvertently repealed the *Mining Partnerships Act* 1860, much to the annoyance of mining interests which found the repealed Act far more suitable for their purposes than the later introduced *Companies Statute* which Hall suggests was "obviously tailored to

²⁸ 22 Vic No 6.

²⁹ 19 & 20 Vic c 47.

³⁰ *Companies Statute* 1864 ss 15 and 24.

³¹ A R Hall *The Stock Exchange of Melbourne and the Victorian Economy 1852-1900* Canberra 1968 at 43.

the requirements of relatively large-scale firms operating in England”.³² This oversight was redressed within six weeks and the regulation of mining enterprises in Victoria remained separate from the general companies legislation for the remainder of the century. Even though the *Companies Statute* had little or no impact on most business organisations, it enabled companies, especially in the mining sector, to be incorporated far more easily and with a minimum of compliance requirements, the main one of which was to require annual reports to be lodged. However there was no prescribed form which had to be used and in any case, the enforcement of compliance requirements was generally lax. This ability to incorporate and seek listing on a stock exchange was important for capital raising.

The market value of ordinary shares listed on the Melbourne Stock exchange in 1865, soon after the Victorian *Companies Statute* was introduced, was nearly £9 million of which bank shares comprised 45 per cent. There were 133 mining companies listed on the Melbourne Stock Exchange with a market value of £3,626,000 compared to 25 non-mining companies with a market value of £5,298,000.³³ In 1884, before the height of the boom of the 1880s, the market value of ordinary shares had increased threefold in twenty years.

This marked increase in the market value of listed shares shows that the transplant of company law legislation and limited liability in particular, had the effect of encouraging the promotion of stock exchange listed companies and trading in their shares. Certainly the capital markets of the Australian colonies were less developed than their contemporary equivalents in Britain but there was already by the 1860s significant and growing share market activity, especially in gold mining shares which led to the establishment of several stock exchanges. This increased share market activity both caused and fuelled the conversion of many co-operative mining companies into limited companies. The main reason for this adoption of the company form was that it allowed greater flexibility in the capital structure of the enterprise, especially by enabling the

³² Ibid.

³³ Ibid at 58.

issue of large numbers of shares in the event of a company becoming successful. Co-operatives generally had a small number of shares and so gold mining companies registered under the *Companies Statute* were more accessible to large numbers of investors. Hall notes that in some cases the price of a company's shares rose to as much as £3,000 at which price level there was a considerable volume of transactions.³⁴ 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 contemporary Mania of the 1860s, which culminated with the collapse of Overend, Gurney & Co Ltd and was widespread in most industries, especially in the banking and finance sector. The ability of gold mining companies to make calls was particularly useful given the nature of quartz mining with its continual exploration and developmental costs. In the gold mining industry, very few mines were continuously profitable as deep leads changed course, ran into a neighbouring lease or yields fell, possibly rising again at greater depth. When a rich ore body was found, this generated speculative activity in the share market. Calls on shares would be made by companies which owned the mines where ore bodies were discovered and owners of other mines in the vicinity were also encouraged to further explore their leases and make calls on their shareholders who were often prepared to pay the calls so as to enable further exploration. Inevitably the extravagant expectations of investors would not be met and the burst of speculation would be replaced by a more cautious approach and share prices fell. Companies still required funding and so continued to make calls, the payment of which operated as a dampener on share prices as it reduced the amounts available to purchase other shares and float new companies. The money paid for calls then fell as investors chose to cut their losses or successful companies funded their development needs from profits. Eventually optimism would return and another speculative cycle would begin. Hall considers that this cyclical nature of the gold mining industry played a positive role in

³⁴ Hall at 61

encouraging investment into a key economic sector and enabled gold output to reach very high levels.³⁵

A marked shift from alluvial to deep quartz gold mining took place in the late 1860s and early 1870s. In 1868 quartz mining companies paid a fifth of total dividends paid by all public companies in Victoria. In 1871, this proportion had grown to well over half.³⁶ This move to deep mining greatly increased the complexity and scale of operations of mining companies and required the application of new technology such as dynamite, invented in the mid 1860s and more sophisticated machinery and ventilation. These developments also required companies to be able to efficiently raise capital and establish suitable management and administrative structures. The ability to tap the market for capital was particularly important because it was the nature of quartz mining that considerable expense had to be incurred and development work undertaken before any profit could be earned and dividends paid. These industry characteristics lent themselves to widely held listed companies being the most efficient means of financing.

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

³⁵ Hall at 62.

³⁶ Hall at 74.

The importance of mining shares, especially in Victoria, gave the share markets a highly speculative, high risk character.³⁷ Hall suggests that an important characteristic of the prosperity of the Victorian economy was the “speculative spirit and haste to be rich” of Victorian investors in the 1880s.³⁸ 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 necessarily displayed a considerable appetite for risk. This would probably have encouraged diversification of portfolios of gold mining companies on the expectation that for every successful company there would be several that would become worthless, making the introduction of limited liability a very important feature of the legislation.

Of course the vast majority of small businesses in the Australian colonies did not adopt the limited liability form but remained sole traders or partnerships. It was not until the 1880s, some 20 years after the introduction of companies legislation that the number of company registrations significantly increased, although from a low base. McQueen calculates that in 1903 there were over 9,000 registrations of firms (being partnerships) and 157 company registrations. On the basis of these figures he concludes that partnerships were chosen in more than 98 per cent of businesses as their preferred organisational structure.³⁹ This slow uptake does not indicate that the colonies were ill-suited to the introduction of companies legislation as there was also a slow uptake of limited liability companies by small businesses in England for most of the nineteenth century.

Mining Companies No Liability Legislation

³⁷ C White *Mastering Risk: Environment, Markets and Politics in Australian Economic History* Oxford 1992 at 124.

³⁸ Hall at 198-199.

³⁹ McQueen “Company Law as Imperialism” at 37-38.

While the Australian colonies adopted the English companies legislation in almost unchanged form, there was an early development in Victoria which marked a departure from the almost exact adoption of the English legislation. Given the importance of the gold mining industry in Victoria and the necessity to raise capital from large numbers of investors after the development of deep quartz mining, it is not surprising that legislative innovation in Victoria would address a difficulty which arose in relation to the raising of capital by gold mining companies and that it would be passed almost precisely at the time that quartz mining was becoming the dominant mining activity. The following background to the no liability legislation is based on the account by Hall.⁴⁰

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

These factors tended to discourage investment in mining companies because if the company failed, the burden of meeting the company’s debts fell disproportionately on those shareholders holding partly paid shares who were traceable. The technique which was often employed to overcome these difficulties was to include provisions in the memorandum of association to enable the forfeiture of shares on non-payment of a call.

⁴⁰ Hall at 75-77.

The forfeited shares could then be purchased by either existing shareholders or sold at auction. This provided a mining company with greater certainty of supply of capital as it received the proceeds of the sale of forfeited shares and thereby ensured that shareholders who provided calls during times of exploration or uncertainty would gain the benefit of share ownership when the company became profitable. The practice of forfeiture and sale was an effective response to dummy shareholders and those who refused to pay calls. However doubts were cast on the validity of forfeiture provisions in the company constitution by a decision in the Court of Mines which held that such provisions were contrary to the legislation under which the company was incorporated.⁴¹ The strong political influence of the mining industry is indicated by the almost immediate introduction into Parliament of a Bill to overrule this decision.

The legal uncertainty remained for another year before the introduction of the no liability legislation which sought to formalise the practice of forfeiture of partly paid shares upon failure to pay calls.⁴² This legislation still operates today⁴³ so that shareholders of mining companies registered as no liability companies under *Corporations Act* 2001 s 112 are not contractually liable to pay calls but if a call is unpaid, the shares are forfeited and must be offered for sale at an advertised public auction. The effect of the legislation was to extend limited liability to unpaid share capital. From a creditor's point of view, this was significant if the company had issued shares of high par value and large unpaid amounts. This practice was already becoming less common both in Britain and Australia as lower par value shares attracted more investors and enhanced the marketability of shares.

The *Mining Companies Act* 1871 introduced a stricter regulatory regime for mining companies in Victoria than that which applied to trading companies under the *Companies Statute* 1864. Mining companies were subject to more stringent disclosure requirements such as having to prepare a report of the company's prospects and assets and liabilities

⁴¹ Hall at 76 refers to an 1869 decision of the Sandhurst Court of Mines in *Nash v Annabella Company* where the forfeiture provisions were held to be invalid. This decision was affirmed on appeal in the Chief Court of Mines.

⁴² *Mining Companies Law Amendment Act* 1871.

⁴³ *Corporations Act* ss 112, 254M(2) and 254Q.

before a general meeting. Books of account were required to be kept and made available for inspection by shareholders and creditors and half yearly statements had to be lodged. Various criminal offences were created for breaches of duty and making false statements. These legislative provisions imposed a more rigorous statutory regulatory environment than existed in Britain and elsewhere in Australia. These stricter investor protection requirements reflected the fact that mining companies dominated the share market lists and they had the widest spread of shareholders. Despite these statutory investor protection provisions, the government offices charged with responsibility for administering the legislation were largely incapable of ensuring widespread compliance with these legislative requirements.

The introduction of the no liability legislation in 1871 coincided with a period of intense speculative fervour surrounding the sudden dominance of the Bendigo quartz mines which resulted in a marked increase in gold mining company registrations. The total nominal capital of new registrations increased nearly three-fold in one year from £6 million in 1870 to nearly £17 million in 1871.⁴⁴ Either the legislation encouraged the increased capital raising activity or reflected the growing importance of the industry to the Victorian economy. Certainly extreme fluctuations in investment in the mining industry occurred from time to time and the timing of a speculative boom increased the urgency of legislation designed to assist capital raising. The wild fluctuations of the speculative mining boom can be seen by the decline in 1872 when capital raised by new mining company registrations declined back to near 1870 levels in 1872. This raises the possibility that the boom in 1871 was directly related to the introduction of the no liability legislation or it at least encouraged mining company investment.

Hall considers that the no liability legislation encouraged a regular supply of investment in an inherently risky but very important industry and its continued existence for more than a century confirms its success in achieving this objective.⁴⁵ 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

⁴⁴ Hall at 81.

⁴⁵ Hall at 77.

while calls made were a little over £600,000.⁴⁶ The weight of this overhang of unpaid liabilities operated as a dampener to new fundraising especially if it is borne in mind that relatively few companies paid dividends but almost all issued partly paid shares and made calls when finance was required.

McQueen considers the practice of “dummying” by mining company shareholders provides an example of regulatory failure because there were no administrative means of preventing such malpractice. He argues that the introduction of no liability legislation was a direct result of this failure of enforcement and inability to ensure compliance.⁴⁷ Even if the practice of dummying was more common in Australia than in Britain, this may have been due to a more transitory population and large geographic area from which investors came rather than regulatory failure. In this era when there were relatively low expectations of government regulation and enforcement action, it would not have been expected that it was a role of government administrative agencies to ensure that the members’ register of a company was accurate and false names were not used. It was and still is a private matter for companies to enforce calls made on their shares. It is therefore an incomplete explanation of the no liability legislation to attribute its introduction to a regulatory failure to ensure all shareholders used their real names or could be readily found in the event of non-payment of a call. As discussed above, the introduction of this legislation coincided with a boom in gold mining share market activity and probably played a beneficial and significant role in encouraging this growth of investment in a critically important colonial export industry which depended for finance upon listed company capital raising.

The Reforms of the 1890s

The investor protection reforms of the 1890s were a response to the frauds and malpractices of the boom of the 1880s and depression of the 1890s. The latter half of the 1880s saw a major speculative boom, especially in Melbourne, in shares of land companies and finance companies which speculated in mostly urban land as well as

⁴⁶ Hall at 89-90.

⁴⁷ “Company Law as Imperialism” at 30.

mining shares in companies operating at Broken Hill and in Queensland and Tasmania. The land and mining booms were fuelled by heavy investment in public infrastructure works such as railways, irrigation works, roads, tramways, water and sewerage. The land 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.⁴⁸ This unprecedented investment activity demanded more capital than was locally available and was financed by large amounts of British capital inflow attracted by higher interest rates than were available in Britain, which flowed into both the public and private sectors.

During the boom of the 1880s there was a major increase in the number of Victorian registered companies. From 1871 there had been two separate administrative schemes under which companies were incorporated and regulated. Mining companies were under the *Mining Companies Act 1871 (Vic)* and other companies, described as "trading" companies were under the *Companies Statute*. Trading company registrations were below 100 per year until the late 1880s when they jumped to 145 in 1887 and 343 in 1888 of which about a half were land and finance companies.⁴⁹ Relatively few 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.

In 1888, there were approximately 1500 companies registered under the *Companies Statute* in Victoria.⁵⁰ This figure understates the size of the corporate business sector because a large number of companies carrying on business in Victoria were incorporated

⁴⁸ The best known history of the personalities and their activities of this period is M Cannon *The Land Boomers: the Complete Illustrated History* Lloyd O'Neil South Yarra 1972.

⁴⁹ R McQueen "Limited Liability Company Legislation – The Australian Experience" (1991) 1 *Australian Journal of Corporate Law* 22 at 50

⁵⁰ E A Boehm *Prosperity and Depression in Australia 1887-1897* Oxford 1971 at 248; J Waugh "Company Law and the Crash of the 1890s in Victoria (1992) 15 *UNSW Law Journal* 356 at 358.

in Britain or other Australian colonies. The value of shares listed on the Melbourne Stock Exchange increased from £7 million in 1865 to £65 million in 1889.⁵¹ This nearly ten-fold increase in 24 years reflects the rapidly expanding economy and increasing maturity of the share market of colonial Victoria in the period following the introduction of the companies legislation. This increase in share market activity was particularly pronounced in 1888 when share turnover was three times that in 1887 which was itself a boom year.⁵²

During this period of strong growth in the number and value of listed companies, the administration of companies by government bodies was haphazard. McQueen draws attention to the *ad hoc* and undeveloped nature of colonial administrative bodies charged with the responsibility of administering the companies legislation. He considers 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.⁵³ The Board of Trade in England had a long history of overseeing commercial legislation with a specialised and experienced bureaucracy. In Australia, there were relatively few registered companies so administrative arrangements were made almost as an afterthought being added to the responsibilities of existing functionaries. In South Australia and Queensland, administrative responsibility was given to Masters of the Supreme Court, in New South Wales, it was the responsibility of the Registrar-General and in Victoria for a time, it was the responsibility of the Titles Office.⁵⁴ Lacking expertise and resources due to inadequate funding, these functionaries concentrated on raising revenue from incorporations and lodgment fees rather than the more expensive and difficult task of enforcing compliance. This was also much the case in England where non-compliance with lodgment requirements was very widespread in the nineteenth century. The role of nineteenth century government regulators was far less developed than is the case today as 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.

⁵¹ Hall at 37 and 169.

⁵² Waugh at 357 quoting *The Argus* 1 January 1889.

⁵³ McQueen "Limited Liability Company Legislation" at 30.

⁵⁴ McQueen *ibid* at 25.

The severity of the depression in the 1890s led to strong calls for legislative responses to address the perceived deficiencies in company law regulation.⁵⁵ Share market activity on the Melbourne Stock Exchange after the banking crisis in 1893 was significantly below that which occurred in the late 1880s and took some years after that to recover. The market value of ordinary shares listed on the Melbourne Stock Exchange declined from £65 million in 1889 to £47 million in 1900 and the number of listed companies declined during this period from 231 to 130.⁵⁶ Bank reconstructions, the prospects of paying calls and the bad experiences of shareholders discouraged investment in bank shares for a number of years and the dominant investment activity during the period between 1893 and 1900 was in mining, especially in companies operating the newly discovered gold fields of Western Australia and copper mines of Tasmania. This compensated for the fall in silver prices which led to a temporary decline in the value of Broken Hill shares in the early 1890s.⁵⁷ Apart from high risk mining speculation, Hall notes that local private enterprise was hesitant and there was little capital formation financed through the stock exchange.⁵⁸ 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.⁵⁹ 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. Boehm quotes *The Economist* which

⁵⁵ Waugh at 381 footnote 175. See Waugh article generally for a detailed discussion of the deficiencies of company law in addressing the malpractices of this period.

⁵⁶ Hall at 230.

⁵⁷ Hall at 221-240.

⁵⁸ Hall at 233.

⁵⁹ 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.

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.”⁶⁰

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

The *Voluntary Liquidation Act* made it difficult to put a company (including a building society) into compulsory liquidation against the wishes of its directors by requiring the consent of a majority of creditors by number and value of debts to consent to the winding up proceeding in cases where the company was not already being wound up voluntarily.⁶¹ Where the company was in the process of a voluntary winding up and had no creditors outside Victoria, a court order to wind up the company could not be made without the consent of one third of creditors by number and value of debts. Where the company did have creditors outside Victoria, the proportion of creditors required to approve a court order for winding up was one quarter by number and value of debts.⁶² The lower creditor threshold where there were creditors outside Victoria was intended to placate British investors.⁶³

The Preamble of the Act stated its purpose as being “to prevent injury and loss to creditors by the compulsory winding up of companies and building societies against the

⁶⁰ At 266 footnote 1.

⁶¹ *Voluntary Liquidation Act 1891* s 4.

⁶² *Voluntary Liquidation Act 1891* s 3.

⁶³ J Waugh “The Centenary of the *Voluntary Liquidation Act 1891*” (1991) 18 *Melbourne University Law Review* 170 at 172. An example of the operation of the Act is provided at 173 in *Re Phillip Island Company Limited* (1892) 13 ALT 269 where a creditor bank which was owed £9343 was prevented from petitioning for the compulsory winding up of the debtor company in the face of opposition from other creditors who were owed £628

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”.⁶⁴ This seems to contemplate unworthy winding up applications being brought by creditors who sought to acquire a company’s assets cheaply in a sharply falling market in circumstances where the company could realistically regain its solvency in the not too distant future and thereby ensure a better return to creditors as a whole. While other attempts to introduce remedial legislation over several years were unsuccessful, this statute was brought into the Legislative Assembly without notice and immediately passed both Houses within a day with only minor technical amendments and the Act commenced from its date of passage.

The *Voluntary Liquidation Act* was widely condemned by the business community who were not provided the opportunity to have input into the legislation. In practical terms it was difficult to meet the creditor approval requirements so that the creditor safeguards built into compulsory liquidation were effectively suspended. The main effect of the Act in preventing compulsory liquidations was that it enabled companies to go into voluntary liquidation without court supervision or control. This enabled greater secrecy and concealment of mismanagement, breaches of duty and fraud and the liquidator could be appointed from the directors or their associates who had most to conceal. It greatly reduced the role of creditors as supervision of voluntary liquidations was with shareholders and it took away the protection of court supervision and the possibility of binding compromises. At the conclusion of the liquidation, the books and records of the company could be destroyed if so directed by the shareholders’ meeting.⁶⁵ This legislation may ultimately have been self-defeating in that far from encouraging greater investment, it may have further undermined fragile investor confidence which was to be further shaken with the bank collapses over the next few years.

⁶⁴ T Sykes *Two Centuries of Panic* Allen & Unwin 1988 at 151.

⁶⁵ *Companies Act* 1890 (Vic) s 140.

New South Wales also passed legislation at about the same time which was aimed at assisting companies to arrive at compromises with their creditors and reconstructions.⁶⁶ Where a numerical majority of creditors holding three quarters of a company's liabilities agreed to an arrangement with the company, this arrangement was binding on all creditors. This had the effect of preventing a single or small number of creditors forcing the company into compulsory liquidation. This legislation was based on similar English legislation⁶⁷ and was more widely accepted than the Victorian legislation.⁶⁸

After a prolonged period of deadlock between the Victorian Houses of Parliament, a change of government in 1894 resulted in Isaac Isaacs⁶⁹ becoming Attorney-General with a strong commitment to company law reform to address the misconduct which arose during the land boom and crash. He introduced a comprehensive Companies Bill in 1894 and after the usual protracted debates and deadlock between the Houses, it was ultimately passed in a reduced form at the end of 1896.⁷⁰ Isaacs introduced the legislation to deal with the types of cases of "deliberate and widespread fraud" which were evident during the period leading up to the crash and which caused "widespread ruin upon the people".⁷¹ This indicates the broad based nature of share ownership throughout the community. The main impediment to the passage of the legislation was in the unelected Legislative Council where, according to *The Age*, 30 out of 48 members were themselves directors.⁷²

The 1896 legislation introduced compulsory audit by certified auditors under a statutory duty to verify the accuracy of the accounts; requirements for sending to shareholders and filing an audited balance sheet in the prescribed form; prohibitions on misleading statements in prospectuses; misleading company names (the use of the word "bank" had misled many land company depositors and investors); loans by a company secured by its own shares; and detailed winding up provisions.

⁶⁶ *Joint Stock Companies Arrangement Act* 1891 (NSW).

⁶⁷ *Joint Stock Companies Arrangement Act* 1870 (UK)

⁶⁸ Boehm at 268.

⁶⁹ Later Sir Isaac Isaacs, Governor-General of Australia and Justice of the High Court of Australia.

⁷⁰ *Companies Act* 1896 No 1482. Waugh at 382-385 describes the passage of the legislation through the Houses and the various political alignments which formed during the debates on the legislation.

⁷¹ *Victoria Parliamentary Debates* 1896 Volume 81 at 123.

⁷² Waugh at 383 citing *The Age* 16 March 1896.

Some of the provisions of the 1896 legislation adopted English legislation. This included s 38 from the 1867 *Companies Act* (UK) which required prospectuses to contain details of contracts entered into by the company with its directors and promoters and the *Directors' Liability Act* 1890 (UK) which overruled *Derry v Peek*⁷³ by allowing an action in deceit by shareholders against directors whose misstatements fell short of fraud. Most of the disclosure provisions of the 1896 *Companies Act* came from the recommendations of the 1895 report of the English Davey Committee. It is a strong reflection on the willingness of the Victorian Parliament to improve its company law regulation and respond to calls to overcome weaknesses apparent in the land boom period that its legislation contained the first modern disclosure provisions some ten years before similar requirements such as compulsory filing of balance sheets were incorporated into the English legislation. The concept of the proprietary company was introduced and such companies were exempted from laying an audited balance sheet before members in general meeting. A proprietary company was defined as having no more than 25 members, not being able to borrow from non-members and meeting certain prohibitions on raising funds from the public. It also had to have the word “proprietary” in its name.

The *Companies Act* 1896 was a very progressive and far-reaching response to the abuses of the previous decade and marked a significant change in regulatory policy towards greater investor protection after the relatively *laissez-faire* approach which had previously prevailed. It sought to guard the public “on the one hand against ignorance and on the other hand against misrepresentation”.⁷⁴ A strong criticism of the legislation was that it did not apply to mining companies when they were the most common type of company formed at the time.⁷⁵ The exclusion of mining companies was repealed in 1910. These reforms were enacted because of the spectacular nature of the boom and bust which occurred in Victoria. The consequent widespread losses throughout the community had the effect of galvanising political support for the reforms put forward by Isaacs.

⁷³ (1889) 14 App Cas 337.

⁷⁴ Isaac Isaacs *Victoria Parliamentary Debates* 1896 Volume 81 at 124.

⁷⁵ *Victoria Parliamentary Debates* 1896 Volume 81 at 150.

Did the evolution of company law institutions in Australia facilitate economic development?

It appears that the adoption of English company law legislation by the Australian colonies in the 1860s and 1870s occurred with little debate.⁷⁶ Perhaps the adoption of English legislation was a natural response by colonial societies intent on adopting the recent legislative developments of a more sophisticated society because of the inherent complexity of legislation which provides for the formation of companies and their subsequent regulation. For this reason most company law regulatory schemes around the world are derived from a small number of originating models. It would be unrealistic to expect the Australian colonies of the mid nineteenth century to develop their own legislative regimes governing important aspects of business regulation that were supposedly better adapted to the local conditions than was the existing English model.

Large business enterprises with large numbers of shareholders had for some time before the introduction of company legislation been formed as joint stock companies which possessed many of the characteristics of companies formed under the legislation despite not having formal corporate status. They attracted investment capital, conducted large businesses and their shares were tradable. While it may have been the case that a less developed economy and business community had less need for the registration of companies, there did not appear to be any such local practices or forms which would have been more appropriate and it is hard to see why partnership law and the law of contract, as examples of transplanted English law, were ill-adapted to Australian circumstances. Certainly the “frontier” nature of the Australian economy resulted in a lack of financial sophistication compared with London and other large British and European cities. Therefore the uses to which the limited liability company could be put by small business were not as widely known in Australia.⁷⁷ This is not surprising considering that despite

⁷⁶ R McQueen “Limited Liability Company Legislation – The Australian Experience” (1991) 1 *Australian Journal of Corporate Law* 22 at 24.

⁷⁷ McQueen “Company Law as Imperialism” (1995) 5 *Australian Journal of Corporate Law* 1 at 10 footnote 7 quotes the leading text of the time, A De Lissa *Companies’ Work and Mining Law in New South Wales and Victoria* George Robertson and Co London 1894 at 4 who described the lack of commercial sophistication in the following terms: “It is not too much to say that the common knowledge which should exist respecting the nature, character and conduct of the joint stock company is generally wanting.”

the greater sophistication of British business, the limited liability company was also not widely adopted by family businesses until late in the nineteenth century.⁷⁸

In Britain there was a growing need for an effective means of registration of limited liability companies which encouraged the raising of capital in railways, finance and other sectors while in Australia, especially in Victoria, a similar need arose in the gold mining industry which required large amounts of capital from the 1860s. There can be little doubt that the introduction of limited liability companies provided a stimulus to the floating of gold mining companies and a major increase in the output of the gold mining industry. It is difficult to see how investment in gold mining companies would have been as widespread without the protection of limited liability as the industry was particularly high risk and therefore relatively unattractive to conventional lenders compared to the wool industry for example. The relative ease of incorporation encouraged promotions of companies which sought large numbers of investors.

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

⁷⁸ P Ireland "The Rise of the Limited Liability Company" (1984) 12 *International Journal of the Sociology of Law* 239 at 247.

riskier than railways, indicating the unusual gambling character of a large part of Australian investment.

Lynn Stout and Margaret Blair have observed that the public company form is particularly appropriate for those businesses in industries that require large amounts of “enterprise specific” assets, meaning assets that cannot be withdrawn from the enterprise without destroying most of their value. Mining and railways typify these types of industries because of the large amount of development costs which must be expended on assets specific to the enterprise before any return can be gained. Further, in the case of mining, there is uncertainty of a return even after the sinking of development costs. Once profits are earned, the machinery and equipment is of a highly specialised nature so as to be virtually worthless in other uses apart from as scrap. In these types of industries, incorporation serves the necessary purpose of locking in investors’ capital so that it cannot be withdrawn by the investors, their successors or creditors as could be the case with partnerships. Investor contributions belong to the company as a separate entity under the control of its directors.⁷⁹ This analysis explains why mining companies were the main form of listed company investment after the introduction of companies legislation in Australia and why the introduction of this legislation was a necessary precursor for the growth of the mining industry after the change from alluvial to deep lead mining with its far greater demands for capital.

McQueen saw the transplantation of company law as a means of serving the interests of the colonial power so the transplanted legislation in the Australian colonies enabled English companies to operate more conveniently in the Australian colonies.⁸⁰ The most important businesses in the colonies mainly originated in Britain and were British owned or had predominantly British shareholders. These are described as “free-standing” companies because they did not maintain a significant business presence in their country of origin in the sense of a multinational corporation as it is understood today but were

⁷⁹ L Stout and M Blair “Specific Investment and Corporate Law” downloadable from the SSRN website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869010

⁸⁰ R McQueen “Company Law as Imperialism” (1995) 5 *Australian Journal of Corporate Law* 1 at 10-14.

formed to enable British investors to invest in overseas business opportunities.⁸¹ Such companies grew rapidly in number and the amount of capital raised as investment opportunities became scarcer in Britain in the last decades of the nineteenth century. These companies saw significant opportunities in providing finance for the development of the Australian and other British colonies and various countries and in Australia were prominent in banking and finance and the pastoral industry. The introduction of English companies legislation so soon after its introduction in England may have been at least partly because of these free-standing companies and designed to serve their needs. They were able to be jointly floated in both England and the colonies under the same legislation, could be listed on both British and colonial stock exchanges and boards of directors could be established in both countries. This dual board structure may have been desirable to overcome some of the management problems inherent in situations where the board of a free standing company in London tried to impose policies on colonial managers in an era of difficult communications.⁸²

McQueen suggests that English company law was ill-suited to the colonies where the economy was considerably less developed than in Britain and also the bureaucracies charged with the responsibilities of administering the legislation were more poorly equipped to enforce the necessary statutory compliance. He argues that the possibility was never considered that there were pre-existing local commercial traditions or existing organisational forms that were better suited to the Australian context.⁸³ 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.⁸⁴ This approach to analysis of Empire was first articulated by Brian Fitzpatrick who expressed a strong sense of nationalism in his analysis of the historical economic interrelationship of Australia and Britain in his groundbreaking book *The British Empire in Australia* where he wrote “The reservoir of

⁸¹ M Wilkins “The Free-Standing Company, 1870-1914: An Important Type of British Foreign Direct Investment” (1988) 41 *Economic History Review* 259 at 263.

⁸² S Ville “Business Development in Colonial Australia” (1998) 38 *Australian Economic History Review* 16 at 33.

⁸³ McQueen “Company Law as Imperialism” at 8.

⁸⁴ McQueen “Company Law as Imperialism” at 10.

Australian labour and industry has never failed to provide a stream tributary to the broad river of English wealth.”⁸⁵

This “company law as imperialism” interpretation is in line with economic and cultural critiques of the colonialist era that assert imperial domination was often presented in terms of conferring benefits on the colonised country when in fact its main purpose was exploitative.⁸⁶ For example, the operation of the English origin corporate form in the colonial setting of India raises a number of these imperialism issues because mid nineteenth century India already possessed a highly developed local business setting based upon a long-established body of traditional business practice. The introduction of alien English commercial practices for the purpose of serving the main imperialistic purpose of the domination and exploitation of India and the facilitation of trade between Britain and India on terms favourable to the colonial power, may well have had a negative impact on traditional Indian business practices.⁸⁷ The situation in Australia was quite different largely because there was no pre-existing commercial tradition which was displaced by the importation of foreign commercial institutions and practices and in any case, the economic participants were almost entirely Anglo-Celtic settlers and therefore culturally versed in English business practice, structures and institutions.

Increasing importance is being given to the role of growth-enhancing institutions as the main determinant in explaining why some countries are wealthy and others poor and therefore may explain a significant reason for why Australia was economically successful in the period prior to World War I and why the transplant of English company law may have facilitated this development. Acemoglu et al argue that differences in colonial experience could explain variations in effectiveness of institutions such as expropriation risk, rule of law or property rights enforcement. The authors claim that European colonial powers adopted different colonization strategies in places such as Australia and Canada where they settled and replicated institutions that enforced the rule of law and encouraged

⁸⁵ *The British Empire in Australia: An Economic History 1834-1939* 2nd edition MacMillan 1969 at 348.

⁸⁶ For example McQueen refers to Edward Said *Culture and Imperialism* Chatto and Windus London 1993.

⁸⁷ R S Rungta analyses the impact of English companies legislation in a colonial setting in *The Rise of the Business Corporation in India 1851-1900* Cambridge University Press 1970.

investment thereby creating conditions which were conducive to rapid economic development. In other places, the purpose of colonization was purely extractive and exploitative so the transplanted institutions were detrimental to the overall economic progress of the colony. The strategy which was adopted largely depended on whether European settlement was feasible. European settlement generally did not occur in tropical areas where Europeans faced high mortality rates and they were more likely to establish extractive colonies. According to this perspective, whether Europeans could settle in a particular area in colonial times is an important determinant in explaining the nature of the institutions which exist today.⁸⁸

Conclusion

The Australian corporate law transplant experience indicates that there was a demand for public fund raising and the corporate form from around the 1830s but particularly so from the 1860s as a result of strong investment in the mining sector. The institutions necessary to facilitate company formation and investment were already established before the introduction of the English limited liability companies legislation in the 1860s and 1870s. Therefore the introduction of this legislation did not mark the beginning of company share investment but did provide a stimulus to company formations, capital raising, widespread share ownership and the development of the stock exchanges.

It was the pressing need for capital by mining companies in Victoria which led to the introduction of legislation which created the no liability company. The shortcomings of company law in dealing with the excesses of the land boom later led to further innovative reforms which gave Victoria the most advanced disclosure requirements and investor protection legislation in the common law world and can be seen as an example of transplanted law having successfully taken root when adaptations are made in response to local circumstances.

⁸⁸ D Acemoglu, S Johnson and J A Robinson “The Colonial Origins of Comparative Development: An Empirical Investigation” (2001) 91 *The American Economic Review* 1369 at 1373-1376. See also by the same authors “Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution” (2002) *The Quarterly Journal of Economics* 1231.

A study of the evolution of companies and the transplant of company law indicates that far from being inappropriate for Australian conditions, these developments were in fact instrumental to the growth of the mining sector which was an important driver of the rapid economic development of the Australian colonies. The introduction of the English legislation was probably inevitable in the light of the important economic role played by several companies, most notably the large banks, which developed prior to the introduction of the legislation. This legislation essentially formalised developments that were already well in train. The main importance of the adoption of the English *Companies Act* was that it became easier to float companies and raise capital and registered companies were no longer regarded by the law as a form of partnership in the same sense as unregistered joint stock companies.

However after these innovative and responsive changes in the 1890s, Australian company law lay relatively stagnant with little or no local innovation until the late 1960s when the recommendations of the Eggleston Committee were adopted and significant amendments of local origin were introduced into the companies legislation.