THE HISTORICAL DEVELOPMENT OF LEGAL PRINCIPLES AND PROCEDURES EVIDENT IN MODERN AUSTRALIAN CORPORATE LEGISLATION

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ABSTRACT

This article examines the historical link between the law and managerial aspects of governance. In so doing, it sets out to establish common points of reference between the historical evolution of statute law and management practice relevant to the modern conception of corporate governance. Political and economic matters at a national level have had a close relationship in the development of company law and corporate governance procedures. The research indicates a close relationship between the evolution of corporate governance in law and political and economic priorities, and that these priorities provided an early determinant in the structure of company law. From a company board's perspective these are essential elements in management decision-making rather than separate components divorced from company operations. In pursuing research into the historical elements of legal corporate governance it is necessary to understand the reasons for the melding of political and economic considerations with the management decision process. This is crucial as the research demonstrates that the earliest enactments recognised the importance of the link between political expediency and economic realities.

I. INTRODUCTION

The earliest indications of the melding of political and economic considerations were evident from the trade policies pursued by the English when occupying their empire in the 16th and 17th centuries. The definitive event which gave effect to this occurred when the Crown decided to establish companies under royal charters granted by the monarch of the day. The royal charters in effect granted exclusive trading rights to the companies involved and were possibly the first bodies practising some form of rudimentary corporate governance. A responsibility was placed upon the charter companies to administer the countries occupied on behalf of the Crown. The Crown benefited in two ways. Firstly, the onus of providing a colonial administration was the responsibility of the charter companies. Secondly, the Crown received revenue from the charter companies for the privilege of incorporation. Charters were granted by the Crown right up until the end of the 19th century.[1]

The advent of the industrial revolution in the 18th and 19th centuries in the United Kingdom saw the promulgation of important legislation connected with the establishment of corporate bodies with separate legal identity and constitutions which set down many of the corporate governance procedures in use today. The Victorian era was without doubt the most significant period in corporate law reform and development because of the effects of the rapid growth of commercial activity due to the industrial revolution. It would, however, be a mistake to discount the importance of earlier corporate law reform as each event in its own way contributes to an unabridged understanding of the heritage of corporate governance. This is the purpose of this article.

Australian corporate law owes its genesis to early developments in the United Kingdom. There are, however, significant governance issues brought about by a lack of

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1 Queen Victoria granted a charter in 1889 to Cecil Rhodes's British South Africa (BSA) Company to occupy and develop both Southern and Northern Rhodesia. The BSA Company administered Southern Rhodesia until 1923 when the colony was granted responsible government by the British government. Northern Rhodesia became a Crown colony.

uniform company legislation, arising from an impediment in the Australian Constitution pre- and post-federation[2], which is beyond the scope of this article.

II. CHARTER COMPANIES

A. Earliest Form

In England, a select group of merchants trading abroad sought and were granted charters of incorporation for the express purpose of obtaining trading monopolies in countries where they had a sphere of influence. In the 14th century, bodies of Englishmen trading outside of the country desired and received privileges from the Crown with respect to self-government and exclusivity of local jurisdiction.[3] Whilst early charters tended to favour trading relationships with merchants in Europe, they were to be applied farther afield. The charters were developed following the same regimen applicable to the municipal or guild charters of medieval England.[4] Merchants desired the authority to govern themselves. This was a period in which it was accepted tradition to supervise production, regulate employment and exclude competition, but merchants wanted the power to meet, to elect their own officers, to make rules to bind one another, to assess common expenses and to settle their own disputes.[5] It took some time before grants to merchants contained words indicative of incorporation proper. It was only in the reign of Elizabeth I (1558-1603) that the outlines of charters expressly included incorporation.[6] The Crown was most assiduous in ensuring that the greater the privileges granted, the more important it was to define the persons privileged.[7]

B. The Levant Company

The Crown received a valuable source of income from such joint ventures, with the advantage of an orderly method of conducting foreign trade.[8] Queen Elizabeth 1 approved the granting of a charter of incorporation to the Levant Company in 1600, giving the company a monopoly for 15 years to bring goods to England from the Mediterranean and Venetian dominions.[9] The method of granting a charter was through letters patent bearing the 'great seal of England'.[10] This particular company traded until 1825, when it was dissolved by 6 Geo 4 c 33 (UK). Other notable charter companies incorporated in the 17th century were the East India Company, the Hudson's Bay Company, the Newfoundland Company and the Massachusetts Bay Company.

The charter of the Levant Company provided: That they and every of them for ever henceforth be and shall be one body corporate and politic in deed and in name by the name of the Governor and Company of Merchants of London trading in the Levant seas.[11]

The charter provided:

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2 LexisNexis Butterworths, *Ford's Principles of Corporations Law*, vol 1 (at) [2170]. Section 51(xx) of the *Australian Constitution* did not include plenary power for the Commonwealth Parliament to legislate with respect to corporations. The power to incorporate companies resided with the individual States, resulting in different companies acts.

3 Cecil T Carr (ed), *Select Charters of Trading Companies, AD 1530-1707* (1913) vol 28, xi.

4 Ibid xii.

5 Ibid xvi. William Herbert gives examples of interference with the city companies' choice of officers in William Herbert, *The History of the Twelve Great Livery Companies of London* (1836) vol 1, 167-74.

6 Carr, above n 3, xiii.

7 Ibid xvi. Charters such as the Levant Company charter listed all involved in the charter in considerable detail.

8 Ibid 31. The Crown was paid an annual sum of £4000 for the privilege of operating a company under charter. To some extent this constituted a form of registration. The Crown laid down the parameters under which the company could operate under its charter. Today, the *Corporations Act 2001* formalises the process under which a company is registered, is supervised by the corporate regulator, the Australian Securities and Investments Commission (ASIC), and is required to pay an annual fee to maintain itself on the register.

9 Ibid 30-43.

10 Ibid 30. The seal of the charter was affixed in Westminster on 7 January of the 34th year of the reign of Queen Elizabeth I.

11 Ibid 32. The charter listed the members of the trading fraternity in the City of London very much along the lines of the foundation members of a company. These members were not to be confused with the governor, deputy governor and assistant governors mentioned below in footnote 12.

1. that by that name (the Levant Company) they were to have succession;
2. that they and their successors be capable to acquire property in the corporate name;
3. that they be capable of suing and being sued; and
4. that they could have a common seal.

The above provisions indicate a strong move towards companies becoming separate legal entities. From a corporate governance perspective, this indicated an important shift in liability away from the individual to the corporate body. The essence of this was to force creditors to seek redress from the company for outstanding debt rather than from those associated with the company.

The management of the Levant Company was entrusted to a governor and 12 elected assistants. The charter document stated the name of the first governor and assistants.[12] Provision was also made for:

1. the appointment of a deputy governor to exercise and execute the office of governor during the absence of the governor;[13]
2. the company to meet annually on the last day of September or within six days thereof to elect officers for the ensuing year, requiring each to take an oath of 'faithful service';[14]
3. the appointment of assistants for the ensuing year who were required to take the oath that they aid and counsel the governor and the deputy governor in all matters affecting the company;[15]
4. the replacement of officers for the residue of a year;[16]
5. the company to make its own laws for the good government of the company and to hold courts during the period of the charter.[17]

C The Newfoundland Company

The charter for the Newfoundland Company was granted during the reign of James 1 (1603-1625) of England.[18] The charter listed some 48 members and their heirs as members of a separate body corporate.[19] The charter described in detail the boundaries of the country 'commonly called Newfound Land'.[20] The charter provided for a council of 12 members, resident in London, to govern and order all matters connected with the company.[21]

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12 Ibid 32. These were given as Thomas Smythe and the first assistants are listed as Thomas Cordell, William Garrawe, Henry Anderson, Thomas Symonds, Andrewe Baynynge, Robert Offley, Robert Coxe, Thomas Garrawaie, Nicholas Salter, Ralphe Fitche, Morrice Abbot, and Edward Collins. To some extent this bears a similarity to the foundation directors of the modern-day company as the first signatories to the company's constitution or its application for registration.

13 Ibid 33. This equates to the appointment of a deputy chairperson in modern-day companies.

14 Ibid 33. This is an annual meeting for the express purpose of electing office bearers, not unlike the modern company annual general meeting covering the election of directors. The way in which the charter is worded is suggestive of new appointments rather than the re-election of existing incumbents.

15 Ibid 33. This follows on from footnote 12 in that it spells out specific duties under oath for the assistants to provide advice to the governor and the deputy on all matters affecting the operations of the company. This is an early form of directors' duties towards one another with an oath to confirm loyalty towards the governor for the overall benefit of the company.

16 Ibid 33. This appears to be a power given to the Governor and the Merchants of London trading in the Levant to replace officers for whatever purpose. The Act does not specifically state any reasons as to why such removal might be necessary.

17 Ibid 33. The period of the charter is given as 15 years. The holding of court suggests meetings under the auspices of the governor, and in today's parlance would no doubt equate to meetings of the company board. For further discussion on courts, see below Part IV *Public Companies Act 1767* (UK).

18 Ibid 51.

19 Ibid 52. The document was worded as being 'one body or communalty perpetual, and shall have perpetual succession, and one common seal to serve for the said body or communalty and they and their successors shall be called and incorporated by the name of The Treasurer and the Company of Adventurers and Planters of the City of London and Bristol for the Colony of Plantation in Newfound Land.'

20 Ibid 53.

21 Ibid 54. The document states the council as consisting of Sir Percivall Willoughby, John Welde, Raphe Freeman, Richard Fishburne, John Stokely, Willyam Turnor, Willyam Jones, John Slaney, Humfrey, Slaney, John Weld, Thomas Juxon and Thomas Jones. The treasurer of the company was to be John Slaney. The duties of the treasurer were to 'have authority to give order for warning of the Council and summoning the Company to their Courts and

The powers of the charter gave the council extensive authority to operate as a colonial administration. A seal was given for the better government of 'the said plantation or which shall or may concern the government of any colony or colonies to be established in any said territories or countries of Newfound Land'.[22] The reference to 'plantation' is interesting and relates back to an adaptation from the first Virginia Charter of 1606 which did not expressly 'erect a corporation'.[23] It was only after the granting of a second Virginia charter in 1609, to increase the size of the colony, that 'this somewhat rough-hewn licence to colonise is supplemented with the words of formal incorporation'.[24]

The major difference between the Newfoundland Company and the Levant Company was the extent of the colonial powers conferred upon the former. The Newfoundland charter provided for authority:

1. to establish and maintain its own coinage for the benefit of the inhabitants of the colony;[25]
2. for the treasurer to appoint a deputy from one of the council members in the event of sickness or absence from the City of London;[26]
3. for the council to appoint governors, administrators and magistrates to administer the territories and inhabitants of Newfoundland;[27]
4. for newly appointed governors and principal officers to take office in the colony by giving notice of their commissions to the inhabitants of the colony;[28]
5. to admit new members into the company or remove existing members from the company;[29] and
6. to mine gold, silver, copper, iron, lead and any other minerals within the boundaries of the colony.[30]

The charter follows with authority to rule the colony in the name of the King and his heirs. Provision was made for the defence of the colony and authority to seize goods traded illegally outside the provisions of the charter. The Crown was to be paid an annual tax of five pounds *per centum* on all goods and merchandise produced or traded in the colony.[31]

D The South Sea Company

Chartered companies had fallen out of favour after the 'glorious revolution' in 1688 because of the monopolistic stigma attached to them during the Stuart period.[32] As the old chartered companies became moribund, speculators acquired the charters and invited the

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meetings.' It is apparent that the post of treasurer carried the same duties as the company secretary in companies today.

22 Ibid 54.

23 Ibid lxxxiv.

24 Ibid lxxxvi. The charter included a power to purchase lands in the United Kingdom, to elect officers, admit freemen, etc. The list of incorporated persons included no less than 56 city companies of London. It is interesting to observe that companies were recognised as separate entities entitled to be listed as members of a charter company of the day.

25 Ibid 55. The purpose of the coinage was seen as being 'limited between the people inhabiting in any the said territories or in the precincts thereof for the more ease of traffic and bargaining between and amongst them of such nature and of such metal and in such manner and form as the said Council shall limit and appoint'. The overall power granted by the Crown appeared to lack any form of limitation.

26 Ibid 55. This power was reserved for emergencies to cater for the absence of the treasurer. The deputy treasurer was clothed with same administrative duties as the treasurer. To some extent there is a parallel with alternate directors.

27 Ibid 56. The powers of colonial administration granted under the charter were to be for the benefit of both 'adventurers and inhabitants'. Charles II confirmed the colony's laws: for further reading, see *Patent Rolls*, 12 Car 2, pt xvii; see discussion in *Acts of Privy Council, Colonial Series* (1613-1680) 556, 559-63. There had been friction between planters and merchants over various matters concerning the administration of the colony.

28 Carr, above n 3, 56. The charter required that all officers, governors and ministers formerly constituted or appointed be discharged. They were further exhorted to be obedient to the new administration and to give up the privileges of office. This requirement was a constituent part of the second Virginia charter. It is still very much the practice today in the United States where a newly elected President requires the resignation of all officers of the previous administration.

29 Ibid 56. The charter made provision for the council, or any five of them, including the Treasurer, to admit new members to the company or to remove existing members. In the case of removal, the majority were required to show 'good cause to disfranchise and put out any person or persons out of the said freedom and Company.'

30 Ibid 57. Profits derived from the mining of minerals were to be paid to planters and adventurers of the company.

31 Ibid 57-62.

32 Patrick Farrell Phillips Higgins, *The Law of Partnership in Australia and New Zealand* (1963) 5.

public to subscribe capital for more profitable ventures. Geoffrey Holmes[33] points out that a feature of the new financial world was the immense concentration of wealth, prestige and power in the hands of the directors and principal shareholders of a tiny number of privileged corporations. Three such corporations stood out as colossi of the post-glorious revolution period: the Bank of England,[34] the East India Company[35] and the South Sea Company.[36] These three giants dominated the whole arena of business and finance not merely by the overwhelming size of their share capital, but because of their commanding interest in the national debt. By 1714, the three great corporate bodies were together credited with almost half the total funded debt of £40 357 011.[37] Shares in these companies fulfilled a similar role to that played by government in later years. Although the monitoring and disciplinary mechanisms to shareholders remained very limited, they nevertheless provided investors with greater certainty than the governance structure of the country.

The South Sea Company was incorporated, in 1711, for the purpose of exclusive trade with the South Seas and the taking up of unfunded national debt. It had an initial share capital of £9 000 000 derived from the compulsory conversion of short-term government securities into company stock. The company formulated a stock-jobbing scheme for taking up the whole national debt, known as the South Sea Scheme. It was inaugurated in 1720 but collapsed in the same year.[38]

Jonathan Charkham and Anne Simpson[39] maintain that the directors of the South Sea Company agreed to pay a dividend of six per cent per annum in exchange for a monopoly of the trade in the South Seas, which was mostly slavery. The company did not earn enough to meet its dividend projection and the directors resorted to a policy of ramping up the shares to such good effect that the price reached ludicrous levels. On the way up, many speculators were handsomely enriched on paper and their success encouraged the promotion of many other dubious enterprises, including one 'for carrying on an undertaking of great advantage, but no-one to ask what it is'. The promoter collected 2000 guineas in subscriptions in a single day and decamped with the lot in the afternoon. According to Charkham and Simpson,[40] the South Sea Company did not collapse immediately. The £100 shares touched £1000 and by the end of August 1720 were still at £810. From then on the rot set in, and a month later the figure was £190. The directors tried to staunch the collapse with a promised dividend of 30 per cent for that year and 50 per cent for the next year. The end result was that the shares became valueless and thousands of investors were ruined. The collapse of the South Sea Company drew a sharp reaction from Parliament with the promulgation of the *Bubble Act* in 1720.[41]

Laurence Gower[42] claims that the immediate cause of the loss of public confidence in the South Sea Company was the commencement of *scire facias*[43] proceedings against four bubble companies, the Lustring Co, the English Copper Co, the York Buildings Co and the Welsh Copper and Lead Co, with the object of forfeiting their charters of incorporation. There was strong criticism over the rashness and stupidity of the South Sea Company

33 Geoffrey Holmes, *British Politics in the Age of Anne* (1967) 155.
34 Paul Frentop, *A History of Corporate Governance 1602-2002* (2002) 118. The Bank of England shares came onto the market in 1694.
35 Ibid 119. The East India Company lent the government £2 million in return for its new charter in 1698.
36 Ibid 121. The South Sea Company was founded in 1711.
37 Ibid 120.
38 *The Shorter Oxford English Dictionary on Historical Principles* (1972) 1953.
39 Jonathan Charkham and Anne Simpson, *Fair Shares: The Future of Shareholder Power and Responsibility* (1999) 45.
40 Ibid 46.
41 One cannot help but be struck by the similarities of the facts of the collapse of the South Sea Company and the collapse of HIH in Australia in 2001. The reaction to both collapses brought about strong regulatory responses from both Parliaments. It seems that little has changed over the centuries. Further commentary on the *Bubble Act of 1720* (UK) is covered under Joint Stock Companies in this article.
42 Laurence Gower, 'A South Sea Heresy?' (1952) 68 *The Law Quarterly Review* 214.
43 Bryan A Garner, *Black's Law Dictionary*, 1346. *Scire facias* proceedings are most commonly used to revive a judgment after a lapse of time, or on a change of parties, or otherwise to have execution of judgment, in which case it is merely a continuation of the original action. The timing suggests an attempt to alleviate a cash crisis by having subsidiaries transfer their assets to the holding company. Such a move would have certainly disturbed investors.

directors because of the panic caused amongst investors which ultimately led to its ruin.[44] Gower contends, however, that this position was not entirely correct because the research of Dr Armand DuBois[45] revealed that the four charters attacked were in fact not forfeited. Proceedings were dropped in all four cases and there was strong evidence to suggest that the South Sea Company had no direct responsibility and its directors were falsely maligned in this regard. DuBois's research seems to suggest that Parliament might have had a hand in the ultimate demise of the company. Gower[46] postulates that this occurred when Parliament, alarmed at the growth of speculation in 'bubble companies', resolved to appoint a committee of investigation in early 1719. The committee reported on 27 April 1720[47] and the House of Commons thereupon resolved:

> That for some time past several large Subscriptions having been made by great Numbers of Persons in the City of London to carry on publick Undertakings upon which the Subscribers have paid in small Proportions of their respective Subscriptions, though amounting in the Whole to great Sums of Money; and that the Subscribers having acted as corporate Bodies without any legal authority for their so doing, and thereby drawn in several unwary Persons into unwarrantable Undertakings, the said Practices manifestly tend to the Prejudice of the publick Trade and Commerce of the Kingdom.

The House further directed that a Bill be introduced to prevent such practices occurring again.[48] The *Bubble Act of 1720* (UK) was promulgated a short time later and, inter alia, included the London and Royal Exchange Assurance companies which were given a monopoly of the corporate insurance of marine risks.[49] It is important that the dual purpose of the legislation is appreciated as many of the provisions refer to insurance matters specifically but on wider application also apply to charter companies. The thrust of the Act was 'to restrain the extravagant and unwarrantable practice of Raising Money by voluntary Subscription for carrying on Projects dangerous to the Trade and Subjects of this Kingdom.' In particular, the *Bubble Act of 1720* (UK) included provisions which were the forerunners of elements of present-day corporation's law and, ipso facto, corporate governance. Classic examples are:

1. His Majesty could grant charters for the creation of companies for specified purposes;[50]
2. The companies were granted perpetual succession but subject to redemption;[51]
3. The companies could choose their own governors, directors and other officers and servants;[52]
4. The companies were permitted to purchase lands to the value of £1000 per annum and could sue and be sued in their own name;[53]
5. The companies were required to ensure that they had sufficient stock to cover the demands on their policies;[54]

44 Gower, above n 42, 215. Gower observes that Adam Anderson, *History of Commerce* (1767) 296, held that the publication of the *scire facias* in the *London Gazette* in 1720 'instantly struck so general a Panic amongst the Conductors of all the Undertakings, Projects or Bubbles, that the suddenness as well as the Greatness of their Fall was amazing. The loss of confidence affected the South Sea Stock and the Court [board] of Directors saw their mistake, but too late, in procuring the *scire facias.*'

45 Armand Budington DuBois, *The English Business Company after the Bubble Act, 1720-1800* (1938) 5-10, 48-53.

46 Gower, above n 42, 216.

47 *Journal of the House of Commons* (1720) XIX, 341.

48 Ibid 351.

49 6 Geo 1, c 18 (UK), as published in D Pickering (ed), *The Statutes at Large from the Fifth to the Ninth Year of King George I* (1765) 244-60.

50 Ibid 245. In section I of the legislation, reference is made to the 'distinct companies for assurance'.

51 Ibid 246. Section I covers the details of perpetual succession and how it may be terminated by 'such redemption or power of revocation as hereafter in this act is provided concerning the same'. Clearly perpetual succession was seen as being terminated by an act of revocation by the King or by winding up — not so different to present-day legislation which permits the Court to wind up companies as well as members and creditors.

52 Ibid 246. Section I gave power to the company to appoint officers to manage the affairs in its best interests. There is no mention as to how these appointments would be made. The first officer appointments, however, remained the prerogative of the King, and were for a period of three years.

53 Ibid 246. Section I recognises the separate legal status of these charter companies.

6. The companies were clothed with authority to raise capital from the public to meet their assurance liability;[55]
7. The companies were empowered to make calls for money from their members in proportion to their stocks held;[56]
8. The companies were given authority to invest in parliamentary securities;[57]
9. The shares issued were transferable, assignable and devisable;[58]
10. The King empowered companies to be able to make their own by-laws and ordinances for good governance;[59]
11. There was a prohibition on officers of the company being permitted to hold office in another company in which there was a danger of a conflict of interest.[60]

The term 'bubble' denoted an extravagant or unsubstantial project for extensive operations in business or commerce, generally founded on a fictitious or exaggerated prospectus, to ensnare unwary investors.[61] The Act was designed to restrict the formation of companies for the purpose of issuing invitations to the public to subscribe their capital. The Act was repealed in 1825.[62] From a corporate governance perspective, the *Bubble Act of 1720* (UK) was a retrograde step. At a time when there was a growing demand for capital to exploit opportunities for expanding trade, legislation was needed to provide some form of limited liability. From a practical point of view, the answer would have been to allow incorporation with limited liability, subject to conditions for the protection of the general public. Nevertheless, the *Bubble Act of 1720* (UK) did make important contributions to legislative corporate governance by reinforcing probity in the way that investors' funds were dealt with and delineating a code of behaviour for the officers of companies. Whilst the primary purpose was to regulate the two assurance companies, the wider implications for charter companies generally were equally important from the perspective of corporate governance provisions designed to prevent uncontrolled fraudulent behaviour by company officers.

III JOINT STOCK COMPANIES

A Causes Leading to Their Development

Joint stock companies were a feature of Britain's early expansion of trade in the 16th and 17th centuries. However, the pace of commercial developments in the 18th century

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54 Ibid 248. Section IV was designed to ensure that no policy holder would lose out through a lack of capital to meet claims. The section furthermore makes it clear that plaintiffs will have an action for double damages against the company should it fail to meet its assurance obligations.

55 Ibid 249. Section VI gave express authority to the companies to raise capital stock by either taking subscriptions from particular persons (either as members or non-members) or by calls of money from members or such other means as the general courts (boards) deem necessary. The legislation furthermore provides that the subscribers will be entitled to a share in the stock of the company.

56 Ibid 249-50. Section VII permitted the general courts to make calls upon the members based on their stock holdings. The absence of limited liability would suggest that directors could make such calls whenever deemed necessary and without limitation as to the amount. To strengthen the powers of directors in this regard, members were required to meet such calls or have their shares forfeited, dividends stopped and any share of the profits paid stopped. Furthermore, shareholders could be charged interest at the rate of eight per cent until the debt was satisfied or the share forfeited.

57 Ibid 251. Section VIII permitted the companies to invest in parliamentary securities at the appropriate rate of interest set at the time but with a term of not less than six months.

58 Ibid 251. Section IX permitted the total portability of shares as prescribed by the King from time to time. It is of interest to note that section X exempted all stocks and shares and interest or dividends paid, from all taxes, rates, assessments or impositions raised under Act of Parliament. Such a move was no doubt instigated by the need to encourage investment in the companies covered by the Act. This is no different from present fiscal policy in Australia which allows dividend imputations under present taxation legislation.

59 Ibid 252. The by-laws were designed to deal with the internal management issues of companies outside of those provided for in company charters. Specifically, these powers were applicable to assurance business of ships.

60 Ibid 253. Section XIV specifically prohibits the election of a governor, sub-governor, deputy governor, or director of either of the corporations (London and Royal Exchange Assurance Companies) to the board of its competitor. Furthermore, the prohibition extended to holding shares in their names or the names of persons connected with them in the competing corporation.

61 Bryan A Garner, above n 43, 194.

62 6 Geo 4, c 91 (UK).

necessitated the raising of large sums of capital and encouraged the solicitation of funds from the public. This led to the formation of large quasi-partnerships known as joint stock companies.[63] They represented a cheaper form of trading association than charter companies and became a popular source of investment funds. David Pitcairn and Francis Law Latham[64] define a joint stock company as follows:

> A joint stock company may be defined as an association of individuals for purposes of profit, possessing a common capital contributed by members composing it, such capital being commonly divided into shares, of which each member possesses one or more, and which are transferable by the owner. The business of the association is under the control of certain selected individuals called directors. Such an association was, in the eye of the common law, merely a large partnership, and it was not competent for the individuals composing it to constitute by their union a new *persona* distinct from the members of whom it was composed. Such a new persona could only be formed by a charter from the crown or by special act of parliament, and when formed was styled a corporation.

This early form of trading enterprise lacked the protection of separate legal identity, leaving its members and directors open to legal action by parties external to the company. Pitcairn and Latham[65] point out that increased trade led to a significant increase in joint stock companies. As these were regarded as large partnerships, it was impossible for them to be satisfactorily dealt with by courts of law or equity. The lack of separate legal identity prevented such companies from:

a) suing members of the company;
b) suing third parties;
c) adjusting the rights of members in the event of dissolution, as there was no avenue available to seek court intervention to effect such dissolution; and
d) protecting the rights of each member from being sued by creditors for company debts.

As joint stock companies operated more as partnerships than companies, they sought to obtain the financial resources necessary to meet the vast expansion of trade in the newly developing countries being colonised by the British as well as to develop business opportunities in the United Kingdom. This created opportunities for speculation in shares in joint stock companies which, in turn, created market boom conditions.[66]

B Their Demise

Unincorporated joint stock companies suffered from two major defects because:

1. the members had no power to exercise any substantial control over the company's business management; and
2. liability of members to the company's creditors was unlimited.

To some extent these deficiencies led to the promulgation of the *Bubble Act* in 1720. Whilst Parliament was determined to check the growth of joint stock companies and stem harmful boom conditions arising as a result, it also wished to reduce competition with the South Sea Company for investors' funds.[67] This was an early indication of the government's willingness to intervene by legislative means for purely economic motives. It illustrated the desire to protect the activities of the South Sea Company at a time when that company had secured the tender to fund the national debt of the United Kingdom.[68] The promulgation of the *Bubble Act of 1720* (UK) can, therefore, be viewed from the

63 LexisNexis Butterworths, above n 2, [2110]. 'Company' in this context was taken to simply mean an association of persons. Unlike partnerships in the strict sense, membership shares were issued on terms that they were transferable without the consent of other investors in the company.
64 David Pitcairn and Francis Law Latham, *Shelford's Law of Joint Dock Companies* (2nd ed, 1870) 1.
65 Ibid 1.
66 LexisNexis Butterworths, above n 2, [2110].
67 Ibid [2110] citing Colin A Cooke, *Corporation, Trust and Company: An Essay in Legal History* (1951) 82; Gower, above n 42.
68 Frentop, above n 34, 129-30. The South Sea Company was successful with a tender bid of £7.5 million and the King signed the *Bubble Act of 1720* (UK) into law on 7 April 1720.

perspective of introducing early corporate governance reform to protect investors, and also as an instrument of government economic intervention for the purpose of protecting its own self-interest.[69] The linking of economic considerations with the development of sound corporate governance practices was the thrust of the Howard Liberal government in Australia, with its Corporate Law Economic Reform Program.[70] The recently elected Labor government is yet to outline its policy on corporate governance reform.

IV. *PUBLIC COMPANIES ACT 1767* (UK)[71]

A. The Intention

The preamble to the *Public Companies Act 1767* (UK) indicates that it was promulgated to apply to charter companies and certain public companies and corporations involved in trade and dealing in joint stocks. The Act also vested the management affairs of such companies in their general courts,[72] composed of the members at large of such companies. From the preamble, one of the important reasons for promulgating this legislation was to counter

> a most unfair and mischievous practice [that] has been introduced of splitting large quantities of stock, and making separate and temporary conveyances of the parts thereof, for the purpose of multiplying or making occasional votes immediately before the time of declaring a dividend, of choosing directors, or of deciding any other important question; which practice is subversive of every principle upon which the establishment of such general courts is founded, and, if suffered to become general, would leave the permanent interest of such companies liable at all times to be sacrificed to the partial and interested views of a few, and those perhaps temporary proprietors.[73]

The *Public Companies Act 1767* (UK) established a number of key corporate governance precepts which are found in modern corporate law. The clauses dealing with dividends are notable in this regard.

B. General Courts

The Act made reference in a number of clauses to the operation of general courts.[74] In clause 1 of the Act, members were disqualified from voting in a general court if they had not possessed company stock for more than six months.[75] In clause 3 of the Act, the declaration of a dividend could only be made at one of the quarterly general courts. It

69 Ibid 130. From the government's point of view, the South Sea Company was a resounding success. The three conversions of government paper had turned 84% of the national debt into company shares with a face value of £26 million.

70 Brian Burnett, *1998 Australian Corporations Law* (1998) [1404]. The Corporate Law Economic Reform Program was designed to provide a business focus to the *Corporations Law*. Essentially, the role of the *Corporations Law* was to facilitate economic activity and job creation. Coincidentally, one of the principles enunciated to achieve this was investor protection. History has a strange way of repeating itself!

71 7 Geo 3, c 48 (UK).

72 The term 'general court' is interesting and seems to denote a body charged with the management of the company.

73 A part of the preamble to the *Public Companies Act 1767* (UK). The legislation appeared to be targeting a practice which involved vote rigging by splitting large holdings of stock. It is surmised that the splitting of stock was done by selling or transferring stock to other stockholders with the purpose of increasing the voting power of certain stockholders. Reference is made to preventing the practice of multiplying or making occasional votes before the declaration of a dividend, choosing directors, or deciding any other important question. The aim was to prevent the best interests of members being sacrificed by a few members.

74 *The Oxford English Dictionary* (2nd ed, 1989) 1058. This was held to apply to the designation of the legislatures of Massachusetts and New Hampshire, as colonies and as States of the American Union. In the 1628 charter granted by Charles I to the Massachusetts Bay Company, provision was made for a governor and deputy governor of the company to hold four general assemblies styled and called the four great and general courts. It is apparent that the legislators of the day made no distinction between charters granted to companies, guilds, towns, etc., as all were required to hold general courts. There is no doubt, however, that general courts equate to the boards and general meetings of modern companies.

75 The exception to this was stock acquired through marriage, or by succession to an intestate's estate, or by bequest, or by the custom of the City of London, or by any deed of settlement after the death of any person who would have had life entitlement to dividends of such stock.

further provided that dividends be paid out of the profits of the company in order to preserve its public credit.[76] The clause also made provision for the declarations of dividends to be at least five calendar months apart and that no declaration of more than one half-yearly dividend should be made by one general court. Where a proposition was made in a general court to increase the rate of the dividend, such increase would not be effective unless passed by a ballot taken over a period of three days from the adjournment of the general court at which the increase had first been proposed.

V. DEED OF SETTLEMENT COMPANIES

A. A Need Arising from the Economic Climate of the Times

To meet the needs of the economic situation of the time, many large associations believed it necessary to resort to the law of trusts. A large partnership was constituted by a deed of settlement containing the rules governing the partnership.[77] The trustees had powers of management and could sue and be sued. The shares in the partnership were freely transferable and investors were required to conform to the duties laid down in the deed.[78] The application of partnership concepts created a number of acute problems. The rapid industrial growth being experienced in the United Kingdom saw the joint stock company as the principal vehicle of business.[79] The typical joint stock company had hundreds, if not thousands, of members. However, the concept of a typical partnership saw partners enjoying a close working relationship in the enterprise they were engaged in. Application of partnership law to joint stock companies posed real difficulties where the question of creditors suing companies was concerned.[80] In the reverse situation, if joint stock companies wished to sue a debtor, all the stockholders had to be joined as plaintiffs.[81]

To overcome these difficulties the Board of Trade commissioned a barrister, Bellenden Ker, to report on the law of partnerships. He recommended the establishment of a registration system of partnerships and joint stock companies and suggested that partnerships in excess of 15 members be illegal unless formed by registered deed of settlement.[82] In corporate governance terms, this represented the first attempt at introducing a scheme of company registration.

VI. Chartered Companies Act 1837 (UK)

The *Chartered Companies Act 1837* (UK) was promulgated on 17 July 1837, after Ker's report. The purpose of the legislation was to empower Queen Victoria to issue letters patent under the great seal of the United Kingdom of Great Britain to grant any company or body of persons associated together for any trading or other purposes whatsoever with any privilege or privileges which, according to the rules of common law, it would be competent to Her Majesty to grant to any such company or body of persons in and by any charter of incorporation.[83] The legislation still pursued the notion that incorporation should

76 This appears to be an early attempt to preserve the capital base of the company for the benefit of creditors. In this regard, the Act appears to predate the doctrine of maintenance of capital held in *Trevor v Whitworth* (1887) 12 AC 409, 423 (Watson LJ) by some 120 years.

77 LexisNexis Butterworths, above n 2, [2120]. A few of the partners named in the deed were appointed trustees to conduct the business of the association on trust for the other partners in accordance with terms set out in the deed: William S Holdsworth, *A History of English Law*,(1952) vol 13, 368.

78 LexisNexis Butterworths, above n 2, [2120]. The deed provided that stockholders would be liable only to the extent of their contributed capital. This did not provide the desired protection from creditors because essentially the partnership arrangement of deed of settlement companies could not offer separate legal identity.

79 Ross Grantham and Charles Rickett, 'The Bookmaker's Legacy to Company Law Doctrine' in Ross Grantham and Charles Rickett (eds), *Corporate Personality in the 20th Century* (1998) 2.

80 Ibid 3. One of the cornerstones of corporate governance is the concept of separate legal identity. This did not exist and creditors found it impossible to sue large numbers of stockholders where the free transferability of the shares made it difficult to identify parties to a suit.

81 LexisNexis Butterworths, above n 2, [2110].

82 Ibid [2110].

83 *Chartered Companies Act 1837* (UK) s 2.

be a specially granted privilege and this resulted in few deeds of settlement companies seeking registration.[84]

Registration was to be made to an appointed Office of Enrolments[85] to which regular returns dealing with shareholdings, change of place of business, change of members, transfers of shares, issues of shares and change of officers had to be made in accordance with the legislation.[86]

Clause 3 provided for legal suits to be carried on in the name of one of the officers of the company. It further spoke of such legal action being prosecuted in the name of one of two officers specifically appointed to sue and be sued on behalf of such a company.[87] In this connection, the concept of separate legal identity was not available to the promoters of charter companies. Clause 4 did, however, limit the liability of shareholders to meet the debts, contracts, engagements and liabilities of the company according to the terms and conditions laid down in the letters patent governing their membership.

The onset of the industrial revolution and increased trading opportunities in the 18th and 19th centuries required large capital raisings from the public. These large capital raisings were needed to fund major capital works connected with the development of railways and canals throughout the United Kingdom. The legislation was a necessary step in the promotion and regulation of an orderly business regime to cope with major industrial expansion. The promotion of corporate governance in the Victorian era was predicated upon meeting the economic objectives of the day.

VII. *Joint Stock Company Regulation and Registration Act 1844* (UK)[88]

A. The Gladstone Report[89]

A select committee (the 'Gladstone Committee') was appointed to inquire into the state of the laws applicable to joint stock companies. It was hoped the committee would provide legislation giving greater security to the investing public. The committee took as its benchmark the report on the Law of Partnerships produced by Mr Bellenden Ker under the direction of the Committee of the Privy Council for Trade and presented to Parliament in 1837.[90]

The committee went about its task by identifying the reasons for company fraud and failure. They listed six different areas for investigation.[91] These included investigating the objects of companies implicated in fraud; the modes of deception adopted; the duration of companies before their fraudulent activities were identified; the amount and the distribution of fraudulent earnings; the circumstances of the victims; and the impunity of the offenders. As a result of their findings, the committee made the following resolutions related directly to corporate governance issues:

1. That all joint stock companies be registered in an office appointed for that purpose.[92] The concept of registration was adopted from Bellenden Ker's

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84 LexisNexis Butterworths, above n 2, [2130].
85 *Chartered Companies Act 1837* (UK) s 6.
86 The schedules were listed alphabetically from A to G in the *Chartered Companies Act 1837* (UK) and indicated a determination on the part of the Parliament to regulate business enterprises and prevent share speculation.
87 It is clear that the granting of letters patent did not constitute any form of separate legal identity. This is reinforced in section 4 of the *Chartered Companies Act 1837* (UK) where the individual members of a company may be restricted by letters patent. Such letters patent could declare that members could be held individually liable for the debts, contracts, engagements and liabilities of their company in accordance with their shareholdings.
88 7 & 8 Vic c 110-11 (UK).
89 Select Committee on Joint Stock Companies, *First Report of the Select Committee on Joint Stock Companies*, House of Commons (1844) ('Gladstone Report'). The Committee was under the chairmanship of William Gladstone, with 13 members drawn from the House of Lords and the House of Commons.
90 Ibid iii.
91 Ibid vii.
92 Ibid xii.

recommendations for the registration of partnerships. The committee believed that registration should occur provisionally before the public announcement of the company to commence operations. This was the forerunner of current legislative provisions which provide for a company to come into existence on registration: see section 119 of the *Corporations Act 2001* (Cth). The committee also required details of the provisional company to be submitted on registration, including its name, purpose, place of business, the names and addresses of promoters, and the names and addresses of its provisional directors, provisional officers and subscribers. Section 121 of the *Corporations Act 2001* (Cth) requires similar information on Form 201.

2. That on absolute or complete registration, joint stock companies register the principal particulars of prospectuses issued, the purpose of the company, its principal place of business, the amount of its nominal capital and proportion paid up, the total number of shares and the amount of each share, the names, addresses and occupations of its members with shares held by each, and the names of directors, trustees, patrons, auditors and all other officers of the company with their occupations and addresses and a written consent of acceptance of office.[93] It is quite clear that the committee contemplated a dual process covering provisional and absolute registration. In the first case, the promotion of a future company required registration. This was to forestall promoters duping investors into investing funds in nonexistent ventures.[94] Secondly, once registration had been approved, a company had to register more detailed information about its operations and parties involved with its operations.
3. That charges for registration, whether they be provisional or absolute, be levied by the Treasury based on the costs of registration.[95] This was no different to the fees levied today by the Australian Securities and Investments Commission (ASIC) to defray the expenses of corporate regulation.
4. That unregistered companies would be unlawful.[96] The committee believed that registration had to be rigidly enforced to prevent the operation of fraudulent companies. The terms of reference of the committee sought to, inter alia, protect the investing public.
5. That absolute registration of a joint stock company would be necessary before share transactions would be permitted.[97] The committee sought to divide share transactions into two separate operations. It recommended that share allotments could only have legal effect if the company had been provisionally registered. Share transfers on the other hand would only be permissible once the company was absolutely or completely registered.
6. That provision be made for defining and declaring the duties of several officers of the joint stock company as well as remedies for shareholders against directors who abuse, or act in excess of, their office.[98] This was an attempt by the committee to set in place the first rudiments of corporate governance procedures. These elements can be found in the replaceable rules of the *Corporations Act 2001* (Cth) governing the internal operations of companies.
7. That a provisionally registered company shall have a number of powers and privileges, with further powers and privileges following absolute or complete registration.[99] Once again, the committee made a clear distinction between provisional and absolute registration. In the case of the former, the new company

93 Ibid xii.
94 Ibid ix. In the committee's findings, reference was made to the issue of prospectuses and advertisements with false information. The committee identified such activities as a source of fraudulent behaviour by promoters.
95 Ibid xiii.
96 Ibid xiii.
97 Ibid xiii.
98 Ibid xiii.
99 Ibid xiii.

would be able to use a common name, open subscription lists, receive deposits and perform acts necessary for the establishment of the company. In the latter case, it would be permitted to use its common name with the word 'Registered', have a common seal, perform all acts to achieve its purpose, purchase and hold any form of property or lands, enter into contracts, sue and be sued in its common name, issue shares and certificates, receive instalments for partly paid-up shares, and declare dividends out of the profits of the company. The dual registration process does not exist in current legislation although most of the powers do.

8. That it would be expedient for the accounts of a joint stock company to be open for inspection by the shareholders and the annual balance sheet, together with reports by the auditors, to be registered.[100] The shareholders of present-day companies have exactly the same rights. Registration of the accounts and auditors' report are also a requirement under the provisions of the *Corporations Act 2001* (Cth).
9. That each registered joint stock company must obtain an annual certificate within a stipulated period of time on the penalty of a fine and ultimately forfeiture.[101] This appears to be a form of 'return of particulars' required under the provisions of the *Corporations Act 2001* (Cth). The report recommended that a modest fee be charged for the issue of the certificate by the body handling the registration of companies.
10. That provision be made for winding up joint stock companies through the Court of Bankruptcy in England and other courts in Scotland and Ireland.[102] It is interesting that a distinction was made in the report between bankrupt and insolvent companies. In the case of the former, it probably refers to those companies that are unable to pay their debts as they fall due. In the latter, it is probably a less serious state of affairs where recent debts have not been met. In section 95A of the *Corporations Act 2001* (Cth) the terms solvency and insolvency are used.
11. That provision be made for prosecuting directors or officers of companies that act illegally or fraudulently when managing such companies.[103] This arose out of the apparent ease with which directors of joint stock companies escaped prosecution because creditors did not have the financial resources to mount expensive law suits against fraudulent directors. The committee saw the best way of dealing with the problem was to have a corporate regulator mounting the actions. Today, ASIC has strong powers through legislation to mount such actions. The recent prosecutions of the HIH directors are a case in point.
12. That a system of reporting joint stock company failures be instituted to identify causes.[104] This was no doubt a device to highlight causes of company failure so that investors could be better informed. Modern corporate governance practices promote corporate transparency heavily. ASIC, the Australian Securities Exchange (ASX) and provisions of the *Corporations Act 2001* (Cth) have reporting mechanisms to inform investors when companies fail.

B. The Promulgation

An Act for the registration, incorporation and regulation of joint stock companies was promulgated on 5 September 1844.[105] It was a landmark piece of legislation for the foundations of legislative corporate governance as they are known today. The legislation adopted the recommendations of the Gladstone Committee and incorporated them into the new legislation. The Act provided for provisional registration by the Registrar of Joint

100 Ibid xiii.
101 Ibid xiv.
102 Ibid xiv.
103 Ibid xiv.
104 Ibid xiv.
105 *Joint Stock Company Regulation and Registration Act 1844* (UK) in *The Statutes of the United Kingdom of Great Britain and Ireland 7 & 8 Victoria 1844* (1844) 807-44.

Stock Companies — the first time that provision had been made for a specific appointment of a corporate regulator. The provision of a certificate of registration, albeit provisional, was another first.[106] It required the promoters to name the company, give details of its capital base, make the initial appointment of officers, supply details of prospectuses, and a variety of other administrative tasks. Complete registration occurred after registration of a deed of settlement or written constitution (appointing no less than three directors and one or more auditors) signed under the hands or seals of the shareholders.[107] The constitutional document of the company provided detailed information on the company's name, its place of business, its nominal share capital, the number of shares held by each subscriber, etc. After registration, the company was permitted to commence business.

Two returns had to be lodged with the Registrar in January and July of each year.[108] The returns provided shareholder information, recording purchases, sales and transfers during each six month period. Under the *Corporations Act 2001* (Cth), shareholder details are provided annually through a company's statement of affairs. Enhanced disclosing entities are required to lodge half-yearly reports on their operations.

The 1844 Act required periodical registration of companies.[109] In January of each year, a company was required to lodge a return with the Registrar so that it could be reregistered. Failure to do so within a month attracted a penalty and, ultimately, the company being struck off the register for non-compliance. This was the forerunner of company annual returns.

Certain powers and privileges were provided under the Act.[110] The Act outlined the powers of the company to operate under both provisional and complete registration. It also stated the responsibilities of promoters and shareholders to observe the law, with appropriate penalties for failure to do so. The liability of shareholders was unlimited in the event of the company being wound up. The Act provided for the regulation of companies.[111] The Act outlined the power of directors to manage the company, appoint and remove the secretary, clerks and servants of the company, hold meetings, and appoint other persons for special services that the company may, from time to time, require. It was unlawful for directors to purchase shares or sell shares in the company. Moreover, they could not lend company funds to themselves or officers of the company without the sanction of members in general meeting. Directors with interests in any contracts were not permitted to vote or act as directors and such contracts could not be finalised without sanction of the members in general meeting. Auditors were to be appointed annually by the members in general meeting. The salary of the auditor was set by the Committee of the Privy Council and was recoverable from the company. This is in marked contrast to the present procedure under section 250R of the *Corporations Act 2001* (Cth) where the members fix the auditors' remuneration on the advice of the directors.

Charkham and Simpson[112] maintain that the 1844 Act was narrow and did not confer limited liability on shareholders. In some ways it was broad as it set out in some detail the responsibilities of the parties. Paid-up shareholders were entitled to be present at general meetings of the company. They were able to:

a) take part in the discussions thereat;
b) vote in the determination of any question thereat in person or by proxy;
c) vote in the choice of directors; and
d) vote for the auditor of their choice.[113]

106 *Joint Stock Company Regulation and Registration Act 1844* (UK) clause IV.
107 *Joint Stock Company Regulation and Registration Act 1844* (UK) clause VII.
108 *Joint Stock Company Regulation and Registration Act 1844* (UK) clause XI.
109 *Joint Stock Company Regulation and Registration Act 1844* (UK) clause XIV.
110 *Joint Stock Company Regulation and Registration Act 1844* (UK) clauses XXIII-XXVI.
111 *Joint Stock Company Regulation and Registration Act 1844* (UK) clauses XXVII-LXIV.
112 Charkham and Simpson, above n 39, 46-7.
113 Ibid 47.

The thrust of the legislation was to give shareholders a real role in the operation of the company. From a legislative point of view, it provided the foundations of modern legislative corporate governance. The next major change was the provision of limited liability.

VIII. *LIMITED LIABILITY ACT 1855* (UK)

A. The Promulgation

The *Limited Liability Act 1855* (UK) was promulgated on 14 August 1855.[114] It provided for a certificate of complete registration with limited liability under a number of conditions. From a corporate governance perspective, the Act introduced new legal precepts found in present-day legislation. To some extent the advent of separate legal identity sought to protect directors and officers of companies against actions by creditors. It is important to view the provisions of the clauses of the Act with this aspect in mind. The Act provided for:[115]

1. The directors of existing joint stock companies to alter their constitution with the consent of three-fourths in number and value of shareholders, represented in person or by proxy in a meeting called for the purpose, to alter the constitution or deed of settlement to enable the company to seek complete registration with limited liability. Once done, the Registrar of Joint Stock Companies was required to ensure compliance with the above conditions and, in addition, to arrange an audit at company expense of the joint stock company's affairs to establish its solvency before a certificate of complete registration with limited liability could be given. Thereafter, the privileges and obligations associated with complete registration with limited liability would be available to the directors, officers and shareholders of the registered joint stock company.[116]
2. Every joint stock company that had obtained a certificate of complete registration with limited liability to paint or affix the company name outside every office or place in which the business of the company was carried on. Similarly, the company name was required to appear on all seals, notices, advertisements, official publications of the company, bills of exchange, promissory notes, cheques, orders for money, invoices, letters and other writings of the company.[117]
3. No increase to the nominal capital of a company with a certificate of complete registration with limited liability until such increase had been registered with the Registrar of Joint Stock Companies. No registration would be given unless approved by a deed executed by shareholders holding shares of a nominal value of not less than £10, representing in aggregate three-fourths of the proposed increase.[118] This was obviously an early attempt to prevent companies changing the nominal or par value of a shareholder's share without sanction by the shareholder. The *Corporations Act 2001* (Cth) no longer contains provisions requiring the statement of authorised capital and the par value of shares.[119]
4. No shareholder to be liable to pay a sum greater than the unpaid portion of his or her shares upon the execution of an order under law against the property or effects of the company. There was also provision for creditors to have access to the

114 *Limited Liability Act 1855* (UK) in *The Statutes of the United Kingdom of Great Britain and Ireland 18 & 19 Victoria 1854-5* (1855) 820-5.
115 Ibid 821.
116 *Limited Liability Act 1855* (UK) clause II.
117 *Limited Liability Act 1855* (UK) clause IV.
118 *Limited Liability Act 1855* (UK) clause VI.
119 The *Company Law Review Act 1998* (Cth) which introduced s 254C into the *Corporations Act 2001* (Cth) eliminating par value of shares.

register of shareholders, at no cost, to determine the value of unpaid capital available.[120]

5. The directors to be held joint and severally liable for a declaration and payment of a dividend when they were aware that the company was insolvent. Their liability was not to exceed the amount of the dividend. Directors who could prove absence at the time of the declaration or who had filed an objection to the declaration in writing to the clerk of the company would be exempt from such liability.[121] Section 588G of the *Corporations Act 2001* (Cth) has a very similar thrust as it provides for directors to be held personally liable for debts arising from trading whilst the company is in an insolvent state. Defences are provided to directors under s 588H which, inter alia, include illness[122] or taking steps to prevent the incurring of the debt.[123]
6. The company not to accept any form of pledge or otherwise by shareholders to pay for outstanding calls on their shares. Furthermore, the company was not permitted to make loans to shareholders to meet their calls on unpaid portions of their shares.[124] The *Corporations Act 2001* (Cth) has specific provisions which cover the granting of loans for the purchase of company shares.[125] Such assistance is only permissible if there is no prejudice to the interests of the company or its shareholders or the company's ability to pay its creditors.[126]
7. The provision of limited liability and the consequent change of name provided by a certificate of complete registration with limited liability without prejudicing the rights of creditors or other persons seeking legal remedies against the company under its former status.[127] Sections 161(1)(a) and 166(1)(a) of the *Corporations Act 2001* (Cth) specifically provide that a company changing its name or type will not create a new legal identity.
8. Directors to commence the dissolution of the company upon the loss of three-fourths of the subscribed capital, as reported in the annual accounts or by the auditors.[128] The *Corporations Act 2001* (Cth) does not recognise that loss of a certain percentage of capital constitutes grounds for insolvency. Section 95A requires a company to be able to pay its debts as and when they fall due.

B. Parliamentary Disquiet

Prior to the promulgation of the 1855 Act, the concept of limited liability was keenly debated in Parliament. Mr Archibald Hastie, a Member of Parliament, had this to say about the legislation:

> It was stated that America had prospered under the law, but there capital was extremely scarce and barely sufficed to carry on great schemes; but in England where there was no want of capital they could not anticipate the same results from the application of limited liability as had been the case in America. The principle of limited liability had produced injurious effects to commercial credit both in America and in France by inducing reckless speculation and systematic frauds upon credits.[129]

120 *Limited Liability Act 1855* (UK) clause VIII.
121 *Limited Liability Act 1855* (UK) clause IX.
122 *Corporations Act 2001* (Cth) s 588H(4): the director is required to show that he or she because of illness or other good cause did not take part in the management of the company at the time that a decision was taken to incur the debt.
123 *Corporations Act 2001* (Cth) s 588H(5): a director can claim as a defence that he or she took all reasonable steps to prevent the company from incurring the debt.
124 *Limited Liability Act 1855* (UK) clause X.
125 *Corporations Act 2001* (Cth) s 260A.
126 *Corporations Act 2001* (Cth) s 260A(1)(a).
127 *Limited Liability Act 1855* (UK) clauses XI-XII.
128 *Limited Liability Act 1855* (UK) clause XIII.
129 United Kingdom, *Parliamentary Debates*, House of Commons, 26 July 1855, col 1393 (Archibald Hastie).

Many parliamentarians were concerned that the legislation would open the floodgates to unscrupulous promoters. Limited liability would eliminate risk for investors, and creditors would only be able to pursue shareholders for the unpaid portions owing on their shares. The counter to this was that shareholders with unlimited liability were likely to resist such promotions and would have had a direct incentive to monitor the company's solvency and, therefore, its progress if they were held liable for the company's debts.

IX. *THE JOINT STOCK COMPANIES ACT 1856* (UK)

A. The Promulgation

The *Joint Stock Companies Act 1856* (UK) was promulgated on 14 July 1856. This Act marked a new era in company law. The principle of the Act was to allow the greatest possible freedom in both the formation and the provision of a working limited liability company together with the means of notifying the outside world of its limited liability status.[130] This was done in an era of economic liberalism and laissez faire commercial practices, and the Act was necessary to throw open to all the coveted privilege of carrying on business with limited liability. Charkham and Simpson contend that the Act was also considered necessary to consolidate and amend existing company law.[131]

B. The Advent of a Formal Company Constitution

The Act also introduced the concept of a memorandum and articles to replace the deed of settlement. These two documents formed a constitution for companies which were extensively incorporated into company law for the first time. The memorandum of association was the document that notified the world at large as to the purpose of the company, whilst the articles of association were the internal rules governing its management. For the purposes of corporate governance they provided, in legal form, the basis of a comprehensive method of governing companies. In the parliamentary debate on the Bill, Mr Robert Lowe,[132] the vice-president of the Board of Trade, had this to say about the documents in question:

> We abolish the present system of registration, and every company affected by the Act is to sign a document which they call in America "a certificate of registration," but which we propose to call "a memorandum of association." That document is to be signed by at least seven shareholders; it is to contain the name of the proposed company; to state the object of the company; whether it is to be limited or unlimited as regards liability; the number of shares into which the capital is to be divided; and, if the company is limited, the word "limited" is to appear. The document is to be filed with the Registrar; and upon its being filed the company is to be entitled to registration, from which it follows that it is incorporated and possesses all the privileges of a corporation, with the right of suing and being sued. …We have prepared and appended, in the schedule of the Act, the by-laws of a company, which we call the "articles of association." We have taken them from the ordinary rules adopted in joint stock companies and have applied them to the principles of the *Railways Consolidation Act.*[133]

A significant difference between the *Limited Liability Act 1855* (UK) and the *Joint Stock Companies Act 1856* (UK), alluded to by Mr Lowe, was the elimination of the concept of provisional registration. The 1856 Act required the lodgement of the memorandum of association and articles of association for registration with the Registrar of Joint Stock Companies.[134] After registration, the company was issued with a certificate of incorporation and was able to commence business from the date of incorporation.[135] The

130 Clive M Schmitthoff, Maurice Kay and Geoffrey K Morse, *Palmer's Company Law* (22nd ed, 1976) [2-07].
131 Charkham and Simpson, above n 39, 49.
132 George M Young and William D Handcock, *English Historical Documents 1833-1874* (1956) 278.
133 United Kingdom, *Parliamentary Debates*, House of Commons, 1 February 1856, col 133 (Robert Lowe).
134 *Joint Stock Companies Act 1856* (UK) clause XII.
135 *Joint Stock Companies Act 1856* (UK) clause XIII.

shareholders were required to sign covenants that they would observe the constitution of the company.[136] The *Corporations Act 2001* (Cth) requires the lodgement of an application with ASIC giving details of the proposed company, encompassing: its type; the proposed name; the name and address of each person who consents to be a member; numerous personal details of persons agreeing in writing to be directors; the personal details of a person agreeing to be a company secretary; the addresses of the directors and company secretary; the address of the proposed company's registered office; and details of business hours for public companies only.[137] At the conclusion of the registration process, a company is issued with a certificate of registration[138] a mere 51 years after such a certificate was first issued.

Without exaggeration, the rules or by-laws constituted the first attempt to provide a viable legislative corporate governance structure by which public companies could be governed. The *Joint Stock Companies Act 1856* (UK) was the first piece of legislation to promulgate these under the title 'Articles of Association', representing the internal rules governing a company's day-to-day operations.[139] These are here examined side by side with comparable provisions in the *Corporations Act 2001* (Cth). In essence, there is a striking similarity between both pieces of legislation, illustrating that the fundamental structure of the Victorian-era legislation was sound and has stood the test of time. The Australian legislation, whilst adhering to the basic structure, has made significant changes to cater for technology and circumstances specific to the jurisdiction.[140] The appropriate articles are listed as follows:

1. *Shares*

Under the *Joint Stock Companies Act 1856* (UK), share ownership was to be on the basis of written application under the direction of the company. The company could make calls for unpaid monies on shares when it saw fit and in a manner approved by it. The date of the call was tied to the date of the resolution authorising the call and provision was also made for calls paid in advance. Joint holders of shares were provided for, particularly in respect of payment of dividends. The company could decline to register transfers on unpaid calls of shares. For the payment of a fee not exceeding one shilling, a shareholder was entitled to a share certificate under the common seal of the company which was replaceable for a fee if lost. The transfer books would be closed 14 days preceding the ordinary general meeting of the company. The company could deal with the transmission of shares occasioned by death, bankruptcy or insolvency. Forfeiture of shares was provided for if calls remained unpaid on the outstanding balance owing to the company.[141] The *Corporations Act 2001* (Cth) has not changed to a great extent except that articles of association were abolished with the promulgation of the *Corporate Law Reform Act 1998* (Cth), which substituted replaceable rules in their stead. The advent of technology, through the operation of the ASX's CHESS program, has eliminated the need for share certificates for listed companies.[142] The Act specifically provides for the transmission of shares on death,[143] bankruptcy,[144] and mental incapacity.[145] The Act also provides for the issue of partly paid shares.[146] Shareholders have a liability to meet a payment on partly paid

136 *Joint Stock Companies Act 1856* (UK) clause VII.
137 *Corporations Act 2001* (Cth) s 117.
138 *Corporations Act 2001* (Cth) s 118.
139 *Joint Stock Companies Act 1856* (UK) clause IX and Table B.
140 The *Australian Constitution,* in s 51(xx), permitted the Federal Parliament to make laws for 'trading corporations formed within the limits of the Commonwealth.' In *Huddart, Parker & Co v Moorhead* (1909) 8 CLR 330, the Court ruled that the Commonwealth did not have power to legislate for the incorporation of companies. This led to the promulgation of a series of national scheme laws which, inter alia, require companies to have an Australian Company Number (ACN), which also indicates the home jurisdictions in the States and Territories of Australia.
141 *Joint Stock Companies Act 1856* (UK) Table B, ss 1-9a.
142 *Corporations Act 2001* (Cth) s 1071H(2).
143 *Corporations Act 2001* (Cth) s 1072A.
144 *Corporations Act 2001* (Cth) s 1072B.
145 *Corporations Act 2001* (Cth) s 1072D.
146 *Corporations Act 2001* (Cth) s 254A(1)(c).

shares,[147] or face the possibility of forfeiture of the shares.[148] No-liability companies[149] are uniquely Australian and have a legislative procedure covering forfeiture under the provisions of the Act.[150]

2. Increase in Capital

The *Joint Stock Companies Act 1856* (UK) provided that the increase in the company's capital was by way of a sanction of the general meeting of shareholders. Any capital raised would be considered to be part of the original capital of the company with the same rights and liabilities applicable to the original capital.[151] Under the provisions of the *Corporations Act 2001* (Cth), increases in capital are the sole prerogative of the directors as managers of the company.[152] The amendments under the *Company Law Review Act 1998* (Cth) eliminated the memorandum of association and the need for authorised capital. There is no requirement for issues of shares to have the same value, as the Act eliminated par value of shares.[153]

3. General Meetings

Under the *Joint Stock Companies Act 1856* (UK), general meetings of the company were to be held at such times and places as prescribed by the company in general meeting. If no determination was made, meetings would be held on the first Monday in February each year, at a time and place determined by the directors. Such meetings would be named ordinary meetings and other meetings extraordinary meetings. The directors were conferred with the power to convene extraordinary meetings. Moreover, they were required to convene extraordinary meetings on written requisition from shareholders holding in aggregate not less than one-fifth part of the shares of the company.[154] With respect to meeting procedure, the quorum requirements were calculated on the basis that if 10 shareholders attended, the quorum would be five, and above that number, one for every five extra members with a maximum of 40 shareholders. The chairman of the board of directors (if any) would preside at every meeting of the company. Provision was made for a poll to be demanded by at least five members.[155] The *Corporations Act 2001* (Cth) has similar provisions regarding general meetings of companies. Public companies and large proprietary companies, if they have a constitution with an annual general meeting (AGM) provision, are required to convene an AGM each year. Public companies are required to convene an AGM at least once in each calendar year and within five months after the end of the financial year.[156] Directors[157] and members[158] have the power to convene general meetings of the company. In the case of members, section 249D of the *Corporations Act 2001* (Cth) requires directors to convene a general meeting of members when requisitioned by members with at least five per cent of the votes that can be cast at the meeting, or at least 100 members who are entitled to vote at the meeting. The members can call a meeting at their own expense provided they hold at least five per cent of the votes that may be cast at the general meeting in terms of section 249F(1). A quorum for general meetings is set at

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147 *Corporations Act 2001* (Cth) s 254M.
148 There is no specific section in the *Corporations Act 2001* (Cth) that makes provision for the forfeiture of shares. Section 258D provides for the cancellation of forfeited shares, which presupposes a constitutional power permitting forfeiture in the first place.
149 The no-liability company was an optional form of corporate structure provided in the Victorian-era *Mining Companies Act 1871* (UK). They were introduced to overcome investor reluctance to invest in highly speculative ventures when calls were made on unpaid shares after the venture was judged to be unsuccessful. For further reading, see LexisNexis Butterworths, above n 2, [5120].
150 *Corporations Act 2001* (Cth) ss 254P-254R.
151 *Joint Stock Companies Act 1856* (UK) Table B, ss 20-1.
152 *Corporations Act 2001* (Cth) ss 124(a), 254A.
153 *Corporations Act 2001* (Cth) s 254C.
154 *Joint Stock Companies Act 1856* (UK) Table B, ss 23-5.
155 *Joint Stock Companies Act 1856* (UK) Table B, ss 31, 33, 36.
156 *Corporations Act 2001* (Cth) s 250N(2).
157 *Corporations Act 2001* (Cth) s 249C.
158 *Corporations Act 2001* (Cth) ss 249D, 249F.

two, or more if the company wishes to amend the replaceable rule.[159] The quorum has to be present throughout the meeting. The directors can elect the chairperson of the company,[160] as can the members if the directors fail to do so.[161] A poll can be demanded by five members or members with at least five per cent of the votes that can be cast on the resolution, or by the chairperson.[162]

4. Votes of Shareholders

Under the *Joint Stock Companies Act 1856* (UK), shareholders were given one vote for every share held, up to 10 shares. Thereafter shareholders were given additional votes on a sliding scale, giving an additional vote for every five shares held up to 100 shares and an additional vote for every 10 shares held above the first 100 shares. A person who was a lunatic or idiot required legal assistance from a curator bonis or other legal curator. A minor required assistance from his or her guardian to vote. In the case of joint holders of shares, only the first named on the register could vote. A shareholder who had not paid all the calls on his shares was not permitted to vote. Proxy voting was permitted under the written hand of the shareholder and if the holder was a corporation under its common seal. The proxy had to be lodged 48 hours before the meeting at the registered office of the company and was only valid for one month after the date of its execution.[163] The *Corporations Act 2001* (Cth) only provides for one vote for each share held and has no sliding scale based on the number of shares held.[164] The Act does not specifically provide for legally incapacitated shareholders. They would be dealt with under the auspices of a trust instrument in which the shares would be registered in the name of the trustee.[165] In the case of joint holders of shares, it is the first named that is permitted to cast a vote.[166] There is no restriction in the Act to prevent a partly paid shareholder from casting a vote. Section 250E (replaceable rule) states that every shareholder has a vote either on a show of hands or by poll. The Act has detailed provisions for the appointment of proxies by members,[167] the rights of proxies being equated to those of members,[168] the form of appointment giving requisite details,[169] the lodgement of proxy documents 48 hours before the meeting,[170] proxies affecting listed companies in which technological lodgement is used,[171] the validity of proxy voting in certain circumstances covering death, mental incapacitation, revocation, share transfer,[172] and a proxy to represent a body corporate.[173]

5. Directors

Under the *Joint Stock Companies Act 1856* (UK), the number of directors and the names of the first directors were to be determined by the subscribers to the memorandum of association. Until specifically appointed, the subscribers were held to be the first directors of the company.[174] The *Corporations Act 2001* (Cth) requires that both public and proprietary companies must be named in the application to register the company with

159 *Corporations Act 2001* (Cth) s 249T: replaceable rule.
160 *Corporations Act 2001* (Cth) s 249U(1): replaceable rule.
161 *Corporations Act 2001* (Cth) s 249U(3): replaceable rule.
162 *Corporations Act 2001* (Cth) s 250L(1).
163 *Joint Stock Companies Act 1856* (UK) Table B, ss 38-43.
164 *Corporations Act 2001* (Cth) s 250E(b): replaceable rule.
165 *Corporations Act 2001* (Cth) s 169(5A) requires a non-listed company to indicate on the company register that the share is held non-beneficially.
166 *Corporations Act 2001* (Cth) s 250F: replaceable rule.
167 *Corporations Act 2001* (Cth) s 249X: replaceable rule for proprietary companies only.
168 *Corporations Act 2001* (Cth) s 249Y.
169 *Corporations Act 2001* (Cth) s 250A.
170 *Corporations Act 2001* (Cth) s 250B.
171 *Corporations Act 2001* (Cth) s 250BA.
172 *Corporations Act 2001* (Cth) s 250C(2): replaceable rule.
173 *Corporations Act 2001* (Cth) s 250D.
174 *Joint Stock Companies Act 1856* (UK) Table B, ss 44-5.

ASIC.[175] After the company is registered, the named directors must provide written consents to the company.[176]

Under the *Joint Stock Companies Act 1856* (UK), the business of the company was to be managed by the directors. They were required to exercise all such powers other than those reserved, under the provisions of this Act or the company's articles of association, for the members in general meeting.[177] The *Corporations Act 2001* (Cth) provides for the business of the company to be managed by, or under the direction of, the directors.[178] The Act also makes provision for the execution of negotiable instruments;[179] the appointment of a managing director;[180] delegation by the board of some of its powers to committees of directors, a single director, an employee, or any other person;[181] single-director companies;[182] and right of access to all the company books (excluding financial records) for the purposes of instituting legal proceedings against the company.[183]

The office of director, under the *Joint Stock Companies Act 1856* (UK), was vacated if the director held another office or place of profit under the company, or became bankrupt or insolvent, or participated in the profits of any contract with the company, or participated in the profits of any work done for the company. There were exemptions which permitted a director to be a shareholder of a company that had a contractual arrangement with the director's company. He or she was, however, precluded from voting for such a contract at a board meeting. A penalty not exceeding £20 was incurred for a breach of this duty.[184] Under the *Corporations Act 2001* (Cth), there are a number of individual sections which disqualify directors from managing a corporation if: they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of a corporation; they exercise the capacity to significantly affect the corporation's financial standing; or they communicate instructions or wishes to directors knowing these will be acted upon.[185] Automatic disqualification occurs if a director is convicted on an indictment that concerns decision-making that affects the whole, or a substantial part of, the business of a corporation, or concerns an act that has the capacity to affect significantly the corporation's financial standing. This also includes a director who is an undischarged bankrupt.[186] On application from ASIC, the Court has the power to disqualify a person from managing a corporation where such a person has been guilty of contravening a corporation/scheme penalty provision, and the Court is satisfied that such disqualification is justified.[187] Where a company becomes insolvent and is unable to pay its debts, the Court, on application from ASIC, can disqualify a person from managing a corporation for up to 20 years if it is proved that the manner in which the company was managed contributed partly or wholly to its failure.[188] The Court can disqualify a director, on application from ASIC, where the director has been guilty of repeated contraventions of the Act. Two or more contraventions by a director are sufficient for prosecution if the director failed to take steps to prevent the contraventions. Contravention of certain directors' duties[189] will also lead to disqualification.[190] ASIC has the power to disqualify directors for up to five years on the basis of a liquidator's report lodged with ASIC in

175 This is done on a Form 201.
176 *Corporations Act 2001* (Cth) ss 117(f), 120(1).
177 *Joint Stock Companies Act 1856* (UK) Table B, s 46. The division of powers doctrine was to follow some considerable time after the promulgation of this legislation.
178 *Corporations Act 2001* (Cth) s 198A: replaceable rule.
179 *Corporations Act 2001* (Cth) s 198B: replaceable rule.
180 *Corporations Act 2001* (Cth) s 198C: replaceable rule.
181 *Corporations Act 2001* (Cth) s 198D.
182 *Corporations Act 2001* (Cth) s 198E.
183 *Corporations Act 2001* (Cth) s 198F.
184 *Joint Stock Companies Act 1856* (UK) Table B, s 47.
185 *Corporations Act 2001* (Cth) s 206A.
186 *Corporations Act 2001* (Cth) s 206B.
187 *Corporations Act 2001* (Cth) s 206C.
188 *Corporations Act 2001* (Cth) s 206D.
189 *Corporations Act 2001* (Cth) ss 180(1), 181.
190 *Corporations Act 2001* (Cth) s 206E.

which the director's conduct in the management of the corporation contributed to its inability to pay its debts.[191]

Under the *Joint Stock Companies Act 1856* (UK), at the first ordinary meeting of the company after incorporation, all the directors were required to retire. Thereafter, one-third of the directors, or the nearest multiple of a third, were required to retire from office. Retiring directors were eligible for re-election. The election was by members of the company, conducted annually at the ordinary meeting of the company. If no election took place at an ordinary meeting or a subsequent adjourned meeting, the retiring directors would remain in office until new directors were appointed at the first ordinary meeting called in the following year. The members had the power in general meeting to increase or decrease the size of the board, and the rotational requirements would take account of such changes. In the case of casual vacancies occurring on the board, the directors could make an appointment to fill the vacancy. The new director would serve out the term of the director replaced and would be available for re-election under the rotational arrangements of the company.[192] The *Corporations Act 2001* (Cth) does not have any provision for the rotation of directors. Directors, once appointed by members, hold office until death, replacement, retirement or removal.[193] Listed companies are required, under the ASX Listing Rules,[194] to rotate their directors every three years. The Act provides for a minimum number of directors to be appointed to public[195] and proprietary[196] companies. Members may approve new appointments to the board by passing a resolution in a general meeting.[197] The board has the power to appoint new directors,[198] usually to make up a quorum. In the case of proprietary companies, such appointments must be approved by members within two months.[199] In the case of a public company, appointments must be ratified at the next annual general meeting.[200]

The *Joint Stock Companies Act 1856* (UK) gave directors the authority to meet for the purposes of the despatch of business. With this went the power to regulate their meetings regarding adjournment and the determination of a quorum. All questions were to be determined on a majority of votes and, in the case of an equality of votes, the chairman was granted a casting vote. All directors were empowered to summon a meeting of directors.[201] The *Corporations Act 2001* (Cth) provides the basis for directors to conduct their business by way of board meetings. This is done by allowing a director to call a directors' meeting by giving reasonable notice individually to all directors.[202] Decisions must be made by majority vote,[203] the chairperson is to have a casting vote in the event of a tied vote,[204] and the quorum of directors is to be two, unless otherwise determined by directors.[205]

Under the *Joint Stock Companies Act 1856* (UK), the directors were given the power to elect a chairman of their meetings and to determine the period he or she should hold office. In the event of no chairman being elected, or the chairman being absent at the time that meeting was to be held, the directors were empowered to choose one of their number to

191 *Corporations Act 2001* (Cth) s 206F.
192 *Joint Stock Companies Act 1856* (UK) Table B, ss 48-54.
193 *Corporations Act 2001* (Cth) s 201G: replaceable rule. There would be nothing to prevent a company amending its constitution to introduce a rotational provision.
194 *ASX Listing Rules*, Australian Securities Exchange, r 14.4 <http://www.asx.com.au/supervision/rules_guidance/listing_rules1.htm> at 1 January 2009.
195 *Corporations Act 2001* (Cth) s 201A(2) provides for three directors, two of whom must be resident in Australia.
196 *Corporations Act 2001* (Cth) s 201A(1) provides for one director who must be resident in Australia.
197 *Corporations Act 2001* (Cth) s 201G: replaceable rule.
198 *Corporations Act 2001* (Cth) s 201H(1): replaceable rule.
199 *Corporations Act 2001* (Cth) s 201H(2): replaceable rule.
200 *Corporations Act 2001* (Cth) s 201H(3): replaceable rule.
201 *Joint Stock Companies Act 1856* (UK) Table B, s 55.
202 *Corporations Act 2001* (Cth) s 248C.
203 *Corporations Act 2001* (Cth) s 248 G(1).
204 *Corporations Act 2001* (Cth) s 248 G(2).
205 *Corporations Act 2001* (Cth) s 248F. In this connection, it is worth noting that the Act requires the quorum to be present throughout the meeting.

chair the meeting.[206] Under the provisions of the *Corporations Act 2001* (Cth), the directors have the power to elect a chairperson from one of their number and may determine the period of such election. The directors must elect a chairperson if a director has not been elected to chair the meeting or a previously elected chair is not available or declines to act for the meeting or part of the meeting.[207]

The directors were permitted by the *Joint Stock Companies Act 1856* (UK) to delegate any of their powers to committees consisting of a member or members of their body as they thought fit. Any such committee exercising the powers delegated would do so in accordance with the regulations imposed by the directors. The committee was empowered to elect its own chairman and to do so from within their own ranks in circumstances where the chairman was unable to attend the meeting. The committee was able to adjourn its meetings whenever necessary and to pass resolutions on a majority of votes. The chairman was given a casting vote to deal with an equal division of votes. [208] The *Corporations Act 2001* (Cth) has provisions dealing with committees appointed by directors. The Act provides for the board to be able to delegate its powers to a committee of directors, a director, an employee of the company or another person.[209] The delegate is required to exercise the powers delegated in accordance with the directions of the directors.[210] The exercise of power by the delegate is as effective as if the directors had exercised it.[211] The Act does not provide for detailed meeting procedures of committees and it would be left up to the directors to set the operational parameters of the committee.[212]

Under the *Joint Stock Companies Act 1856* (UK), all acts performed by any meeting of directors, or of a committee of directors or any person acting as a director, would, notwithstanding any defect of any such appointment of directors or persons or disqualification of them, be valid as if they had been duly appointed and were qualified to be directors.[213] The *Corporations Act 2001* (Cth) provides that an act executed by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the director or the company did comply with the company's constitution (if any) or any provision of the Act.[214]

Under the *Joint Stock Companies Act 1856* (UK), the company in general meeting could, by means of a special resolution, remove any director before the expiration of his or her period of office and appoint another qualified person in his stead. Any replacement would hold office for the unexpired period of the director that had been removed.[215] Under the provisions of the *Corporations Act 2001* (Cth), the members of a public company[216] and a proprietary company[217] can remove a director by ordinary resolution in general meeting. Appointment of new directors under the Act has already been addressed and would not change.

6. Minutes

The directors were required by the *Joint Stock Companies Act 1856* (UK) to keep minute books for both directors' and members' meetings. In the case of directors' meetings, special provision was made to record all appointments of officers, the names of each

206 *Joint Stock Companies Act 1856* (UK) Table B, s 56.
207 *Corporations Act 2001* (Cth) s 248E.
208 *Joint Stock Companies Act 1856* (UK) Table B, ss 57-9.
209 *Corporations Act 2001* (Cth) s 198D(1).
210 *Corporations Act 2001* (Cth) s 198D(2).
211 *Corporations Act 2001* (Cth) ss 198D(3), 190(1).
212 *Corporations Act 2001* (Cth) s 198D(2) which requires the committee to exercise the powers delegated by the board. Anything outside the powers delegated would require the delegates to seek further direction from the board.
213 *Joint Stock Companies Act 1856* (UK) Table B, s 60.
214 *Corporations Act 2001* (Cth) s 201M(1).
215 *Joint Stock Companies Act 1856* (UK) Table B, s 62.
216 *Corporations Act 2001* (Cth) s 203D(1).
217 *Corporations Act 2001* (Cth) 203E(a): replaceable rule. There has to be a constitutional power or adherence to the replaceable rules for removal by resolution to be effective. It is important to remember that the concept of a proprietary company had not been conceived at the time of the promulgation of the *Joint Stock Companies Act 1856* (UK).

director present at each meeting, all orders made by directors and committees of directors, and all resolutions and proceedings of meetings of the company and of directors and committees of directors. Such minutes would be signed by the person purporting to be chairman and would be receivable as evidence without further proof.[218] The *Corporations Act 2001* (Cth) requires companies to keep minute books in which it records, within one month, proceedings and resolutions of meetings of the company's members; the proceedings and resolutions of directors' meetings (including meetings of committees of directors); resolutions passed by members without meeting; resolutions passed without a meeting of directors; and, if the company is a proprietary company with only one director, the making of declarations by the director.[219] The minutes have to be signed by the chair of the meeting or the chair of the next meeting.[220] The company has to ensure that the minutes of the passing of a resolution without meeting are signed by a director within a reasonable period.[221] The sole director of a proprietary company must sign the company minutes on the making of a declaration by the director within a reasonable time after the declaration is made.[222] It is important to understand at such declarations would be in the form of a resolution. The location of the minute books must be either at the company's registered office, its principal place of business or at another place approved by ASIC.[223]

7. Dividends

Under the *Joint Stock Companies Act 1856* (UK), the directors could, with the sanction of the general meeting, declare a dividend to be paid to the shareholders in proportion to their shareholdings. The directors were required to set aside out of profits enough funds to create a reserve fund for the purposes of meeting contingencies, equalising dividends, repairs and maintenance connected with the operation of the business, and providing for investments in securities as the directors, with the sanction of company, would have selected. Directors were permitted to deduct such sums from dividends owing by shareholders to the company for outstanding calls on shares and other related debts. Shareholders were to be given notice of dividends declared sent by post or otherwise to the shareholder's registered place of abode. Unclaimed dividends for a period of three years could be forfeited by the directors for the benefit of the company. No dividend could bear interest against the company.[224] Under the provisions of the *Corporations Act 2001* (Cth), the directors may determine that a dividend is payable and fix the amount, the time of payment and the method of payment.[225] A dividend may only be paid out of the profits of the company.[226] Interest is not payable on a dividend.[227] A company does not incur a debt by fixing the amount and time for the payment of the dividend. The debt arises only when the time fixed for payment arrives and may be revoked at any time before that.[228] If the constitution of a company provides for the declaration of dividends, the company incurs a debt when the dividend is declared.[229] Shares in a public company provide for the same dividend rights unless a company's constitution provides for different dividend rights or different dividend rights are provided for by special resolution.[230] In the case of no-liability companies, a shareholder is not entitled to a dividend if a call has been made on the share and is due and unpaid.[231] Dividends are paid to shareholders in a no-liability company in

218 *Joint Stock Companies Act 1856* (UK) Table B, s 61.
219 *Corporations Act 2001* (Cth) s 251A(1).
220 *Corporations Act 2001* (Cth) s 251A(2).
221 *Corporations Act 2001* (Cth) s 251A(3). The concept of a resolution without a meeting was not a feature of Victorian-era legislation.
222 *Corporations Act 2001* (Cth) s 251A(4).
223 *Corporations Act 2001* (Cth) s 251A(5).
224 *Joint Stock Companies Act 1856* (UK) Table B, ss 63-8.
225 *Corporations Act 2001* (Cth) s 254U(1): replaceable rule.
226 *Corporations Act 2001* (Cth) s 254T.
227 *Corporations Act 2001* (Cth) s 254U(2): replaceable rule.
228 *Corporations Act 2001* (Cth) s 254V(1).
229 *Corporations Act 2001* (Cth) s 254V(2).
230 *Corporations Act 2001* (Cth) s 254W(1).
231 *Corporations Act 2001* (Cth) s 254W(3).

proportion to the number of shares held, irrespective of the amount paid up or credited as paid up.[232]

8. Accounts

The directors were required by the *Joint Stock Companies Act 1856* (UK) to keep true accounts covering the stock in trade of the company, the sums of money received and expended by the company and the matter in respect of which such receipt and expenditure took place, and of the credits and liabilities of the company. The accounts had to be kept according to the principles of double entry in cash books, journals and ledgers. The books were required to be kept at the principal office of the company and be open for inspection by members during normal hours of business.[233] The *Corporations Act 2001* (Cth) requires a company to keep written financial records that correctly record and explain its transactions and financial position and performance, and enables true and fair financial statements to be prepared and audited.[234] A company may decide where its financial records will be kept. If kept outside its home jurisdiction, there must be sufficient information in the home jurisdiction to enable true and fair financial statements to be prepared and ASIC must be informed in writing where the information is held.[235]

Once at least in every year, the directors were required by the *Joint Stock Companies Act 1856* (UK) to lay before the general meeting a statement of income and expenditure made up to a date not more than three months before such meeting. The statement was required to show the amount of gross income (distinguishing the various sources) and every item of expenditure, so that an accurate profit-and-loss account could be laid before the general meeting. Apportioning of expenditure against income needed detailed explanation. A balance sheet was required every year to be laid before the general meeting. A printed copy of the balance sheet was required to be delivered or sent by post, seven days before the meeting, to the registered address of every shareholder.[236] The *Corporations Act 2001* (Cth) requires consideration of the annual financial report at the AGM of the company.[237] The contents of the financial report shall consist of the financial statements for the year. The financial statements include a profit-and-loss statement, balance sheet and statement of cash flows, and are required to be sent to every shareholder on 21 days' notice.[238]

9. Audit

The accounts of a company were required by the *Joint Stock Companies Act 1856* (UK) to be examined and the correctness of the balance sheet ascertained by one or more auditors elected by the company in general meeting. In the case of a single appointment, all the provisions would apply to that auditor. The auditors were not required to be shareholders, although holding shares in the company did not preclude them from being auditors. Specific exclusions applied to persons with a business interest in the company and directors and officers of the company.[239] The *Corporations Act 2001* (Cth) provides for the appointment of an auditor at the first annual general meeting of a company.[240] The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) sought to amend significantly the *Corporations Act 2001* (Cth) by providing for complete auditor independence. In this connection, a shareholding by an auditor in the

232 *Corporations Act 2001* (Cth) s 254W(4).
233 *Joint Stock Companies Act 1856* (UK) Table B, s 69.
234 *Corporations Act 2001* (Cth) s 286(1).
235 *Corporations Act 2001* (Cth) ss 289(1)-(2).
236 *Joint Stock Companies Act 1856* (UK) Table B, ss 70-3.
237 *Corporations Act 2001* (Cth) s 250R(1)(a).
238 *Corporations Act 2001* (Cth) s 295(1). It should be noted that the terms 'profit and loss', 'balance sheet' and 'statement of cash flows' are not defined in the Act, and the law relies on these terms as defined by the Australian Accounting Standards Board. The Act requires that all company meetings be called on 21 days notice: s 249H(1).
239 *Joint Stock Companies Act 1856* (UK) Table B, ss 74-6.
240 *Corporations Act 2001* (Cth) s 327B(1).

audited company is seen as representing 'a conflict of interest situation' and is not permissible.[241]

Under the *Joint Stock Companies Act 1856* (UK), the election of auditors was made at the ordinary general meeting of the company, and in the case of the company having had more than one ordinary general meeting, the election would be at the first ordinary general meeting in each year. The remuneration of auditors was fixed by the company at the time of their election. Any auditor quitting office would be eligible for re-appointment. In the case of a casual vacancy, the directors were required to call an extraordinary general meeting for the purpose of appointing a new auditor. If no election of auditors was made by the company, the Board of Trade could, on the application of one-fifth in number of the shareholders, make an appointment for the current year and fix the remuneration.[242] The *Corporations Act 2001* (Cth) requires the directors of a public company to appoint an auditor within one month of the registration of the company. Thereafter, the auditor holds tenure until the first AGM.[243] The directors of a public company have to fill a casual vacancy within one month after the vacancy occurs. The auditor holds office until the next AGM.[244] Where there has been a failure to appoint an auditor, ASIC has the power to make an appointment. The auditor appointed holds office until the next AGM.[245] There is no provision for members to require ASIC to make the appointment. An auditor appointed by members holds office until death, removal or resignation from office, or until they cease to be capable under various provisions of the Act.[246]

Under the *Joint Stock Companies Act 1856* (UK), every auditor was to be supplied with a copy of the balance sheet together with accounts and vouchers for examination. Every auditor was to be supplied with a list of all the books kept by the company. The auditor was to have access to all the company books and accounts at reasonable times. The auditor was permitted to employ accountants to assist with investigations of the accounts at the expense of the company. The auditor was also empowered to examine directors and company officers in relation to such accounts.[247] Under the provisions of the *Corporations Act 2001* (Cth), all public companies have to appoint an auditor and provide the auditor with right of access at all reasonable times to the books of the company, and may be required to provide the auditor with information, explanations or other assistance for the purposes of the audit or review.[248]

The auditor, under the *Joint Stock Companies Act 1856* (UK), was required to report to the shareholders regarding the balance sheet and accounts. The auditor had to state that the balance sheet was full and fair and had been drawn up in accordance with the regulations, and in the auditor's opinion reflected a true and correct view of the state of the company's affairs. The auditor was required to comment on what explanations and information had been supplied by the directors and whether this was satisfactory. The auditor's report was to be read in conjunction with the directors' report at the ordinary meeting.[249] The *Corporations Act 2001* (Cth) provides for an auditor of a public company to report to the members for the financial year and form an opinion that the financial report is in accordance with the Act, is in compliance with accounting standards and reflects a true and fair view of the company's operations. The report must also state whether the auditor has been given all information, explanations and assistance in the conduct of the audit, and that the company has kept the necessary financial and other records required by the Act to enable the financial report to be prepared and audited.[250]

241 *Corporations Act 2001* (Cth) s 324CH(1): Table of relevant relationships, Item 10.
242 *Joint Stock Companies Act 1856* (UK) Table B, ss 77-81.
243 *Corporations Act 2001* (Cth) ss 327A(1)-(2).
244 *Corporations Act 2001* (Cth) ss 327C(1)-(2).
245 *Corporations Act 2001* (Cth) s 327F.
246 *Corporations Act 2001* (Cth) s 327B(2).
247 *Joint Stock Companies Act 1856* (UK) Table B, ss 82-3.
248 *Corporations Act 2001* (Cth) s 310.
249 *Joint Stock Companies Act 1856* (UK) Table B, s 84.
250 *Corporations Act 2001* (Cth) s 307.

10. Notices

A company was required, under the *Joint Stock Companies Act 1856* (UK), to serve notices on the members, either personally or by post at their registered address. Notices were only issued to shareholders whose names were recorded in the share register of the company. In the case of joint ownership, notices would only be sent to the first mentioned on the register. All notices required under the *Joint Stock Companies Act 1856* (UK) were to be given by advertisement in a newspaper circulating in the district where the company had its registered office.[251] In the *Corporations Act 2001* (Cth), written notice of a meeting must be given individually to each member entitled to vote at the meeting. In the case of joint ownership of shares, notice need only be sent to one member. Notice can be delivered personally, by post to the member's address as recorded in the register of members, by fax or electronic address nominated by the member, by email, or by other means provided for in the company's constitution.[252]

C. Parliamentary Activity on Some Aspects of the 1856 Bill

There was wide-ranging debate on the Bill before the House regarding important elements connected with corporate governance. For instance, Mr Lowe spoke about the object of the Bill with respect to the identification of company shareholders. He explained that:

> To prohibit the transfer of shares until the whole amount was paid up would be to introduce an element of uncertainty, as the register would not show whether any calls were due at the period of transfer. It was very important that the register should be conclusive evidence of who were shareholders.[253]

Of significance was a requirement in the articles of association for shareholders to seek the written consent of directors to a transfer of shares. Shareholders aggrieved by a refusal by directors could seek arbitration to settle their dispute.[254] The *Corporations Act 2001* (Cth), as a concept, provides for the free transferability of shares within companies. Directors of proprietary companies can refuse transfer of shares if they have been empowered under rights of pre-emption in which a shareholder has agreed in writing to be bound by the alteration.[255] Proprietary companies did not exist as a corporate entity at the time of the promulgation of the *Joint Stock Companies Act 1856* (UK).

On the question of limited liability, which was by no means a popular corporate governance concept, Lord Stanley of Alderley had this to say in its defence in the House of Lords:

> If a scheming body of directors wished to form a company for fraudulent purposes, they would prefer a company composed of men unlimitedly liable, rather than one conducted on the principle of limited liability, because they could not avail themselves of the funds of the latter to the same extent; while from the fact of its being supposed that limited liability gave less security to the public, everyone who dealt with such a company would feel it necessary to inform himself of its real character; the effect of which would be that, instead of those wild and extravagant schemes which had been so rife under the existing system, there would be much greater caution in the establishment of trading concerns, as well as greater circumspection in those who transacted business with them.[256]

Three different select committees made cautious recommendations in favour of limited liability.[257] They were not so much interested in its application to normal business. They

251 *Joint Stock Companies Act 1856* (UK) Table B, ss 85-7.
252 *Corporations Act 2001* (Cth) s 249J(3).
253 United Kingdom, *Parliamentary Debates*, House of Commons, 26 May 1856, cols 638-9 (Robert Lowe).
254 *The Statutes of the United Kingdom of Great Britain and Ireland 19 & 20 Victoria 1856* (1856) Form C, 211.
255 *Corporations Act 2001* (Cth) s 140(2)(c).
256 United Kingdom, *Parliamentary Debates*, House of Lords, 16 June 1856, col 1482 (Lord Stanley of Alderley).
257 Young and Handcock, above n 132. The select committees in question were *The Select Committee Report on the Savings of the Middle and Working Classes*, Parliamentary Papers, 1850/XIX; *The Select Committee Report on the Law of Partnership*, Parliamentary Papers, 1851/XVIII; *The Royal Commission Report on Mercantile Law*, Parliamentary Papers, 1854/XXVII.

were more concerned that limited liability would make it easier for people of substance to lend financial support and their experience to cooperative societies to prevent working-class people losing all their savings in the event of financial failure. Unlimited liability was no doubt seen as a big danger in the circumstances. In 1867, a select committee[258] sat to consider the working of limited liability and made no drastic recommendations, although some evidence showed that apprehension still existed, and personal liability was seen as an appropriate safeguard against company maladministration. Philosophically speaking, modern corporate governance owes its existence to the separation of powers doctrine[259] in which the concept of limited liability is an essential feature. Unlimited liability would invite greater management participation by shareholders, which was the argument used by many Victorian-era opponents of limited liability.

X. *COMPANIES ACT 1862* (UK)

A. The Promulgation

The *Companies Act 1862* (UK) was promulgated on 7 August 1862. Following almost 20 years of reform since the 1844 Act, the promulgation of the 1862 Act was a recognition that consolidation of these reforms was necessary.[260] Despite many amendments and consolidating acts, the fundamental framework of the legislation was that inherited by the Australian colonies.[261]

The 1862 Act was a masterpiece of legal draftsmanship and arrangement and introduced a number of amendments.[262] The articles were extensively redrafted from the original Table B in the *Joint Stock Companies Act 1856* (UK) and appeared in Table A of the First Schedule of the 1862 Act. These remained an important element of the corporate governance requirements of Australian public companies for 136 years.[263]

Specifically, the 1862 Act introduced a number of new corporate governance provisions. These assist in identifying the relevant provisions in the *Corporations Act 2001* (Cth) and enable comparative commentary as a continual historical record of the early development of corporate governance in public companies. They are specifically matters connected with the application of the memorandum and the articles of association to the operational procedures of companies.

B. Mode of Limiting Liability

Limited liability under the *Companies Act 1862* (UK) was associated with the memorandum of association and represented either the unpaid amount on a member's shares or such amount as members might undertake to contribute to the assets of the company in the event of it being wound up.[264] The concept of limited liability is defined in the *Corporations Act 2001* (Cth) as 'a company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them.'[265] A member of a limited company may agree separately with a creditor to assume responsibility for the company's debts. In similar vein, a major creditor such as a

258 Young and Handcock, above n 132, 196. *The Select Committee Report on the Operation of the Limited Liability Acts*, Parliamentary Papers, 1867/X.
259 This article shows that the steady erosion of shareholder power over directors occurred especially with the promulgation of the *Joint Stock Companies Act 1856* (UK). Reference to Part IX(B)5 *Directors* gives a clear indication of the division of management power between the shareholders and the directors.
260 LexisNexis Butterworths, above n 2, [2150].
261 Brian Burnett, *Australian Corporations Law 2001* (2001) [101].
262 Schmitthoff, Kay and Morse, above n 130, [2-08].
263 Table A was removed from Australian corporate legislation in 1998 with the promulgation of the *Company Law Review Act 1998* (Cth).
264 *Companies Act 1862* (UK) ss 7, 38(4).
265 *Corporations Act 2001* (Cth) s 9: see companies limited by shares.

bank may require the shareholders to provide a guarantee for the amount of the loan to the company.[266] Young CJ summarised the purpose of limited liability as follows:[267]

> Up until 1855 in England, when the *Limited Liability Act* was enacted, British business was at a distinct disadvantage because people were not prepared to take the risk of being liable for unlimited contributions where an entrepreneurial scheme failed. There were some avenues open to secure limited liability, such as registering in France and including a complex limited liability clause to the deed of settlement … The *Limited Liability Act* … the forerunner of the modern law, set up a system whereby people could simply by registering with the appropriate official, create a new corporate entity with limited liability, trade and take risks in advancing the economy of the nation without the consequences of losing everything if the venture failed.
>
> The purpose of the *Corporations Act* and its predecessor was for permitting the economy to be advantaged by such entrepreneurial ventures with limited liability and to regulate the rights of members *inter se* [and] the rights between members and creditors of corporations. As time went on, it was realised that fraudsters could manipulate the system so as to perpetrate fraud and exceptions were placed against limited liability such as liability for trading while insolvent. Nonetheless the essential purpose of the Act remains.

C. Amending the Constitution

The *Companies Act 1862* (UK) permitted the modification of a company's constitution if authorised by its regulations as originally framed, or by special resolution. The changes envisaged under the legislation involved increases to authorised capital for the purposes of new share issues, the conversion of shares into stock and change of company name, provided none of the provisions of the memorandum were altered.[268] The *Corporations Act 2001* (Cth) requires a special resolution to alter the constitution of a company.[269] The inclusion of replaceable rules[270] and the elimination of the par value of shares[271] make the need for constitutional amendment only necessary when a company wishes to deviate from the legislative provisions.

D. Application of the Constitution

Under the *Companies Act 1862* (UK), on registration, if the memorandum of association of a company limited by shares were not accompanied by its own articles of association, then Table A would apply.[272] In a similar manner, the *Corporations Act 2001* (Cth) also permits companies either to adopt the replaceable rules in their entirety, partially or not at all.[273] In the latter case, it is incumbent upon the company to register its constitution when making application for registration.[274]

E. Protection of Creditors

The *Companies Act 1862* (UK) provided a number of sections for the protection of creditors. Ostensibly these were concentrated on: having a registered company office to which all notices and communications could be sent;[275] notifying the Registrar of Joint Stock Companies of the situation of such office and any changes thereto;[276] the affixing of such name to the premises of the company and on all public documents used by the

266 Pamela Hanrahan, Ian Ramsay and Geofrey Stapledon, *Commercial Applications of Company Law* (2001) [18-540].
267 *Edwards v Attorney-General of New South Wales* [2004] 50 ACSR 122, 133.
268 *Companies Act 1862* (UK) s 12. The proviso obviously refers to a situation where a change of name was contemplated to alter the liability to members or creditors.
269 *Corporations Act 2001* (Cth) s 136(2).
270 *Corporations Act 2001* (Cth) s 141.
271 *Corporations Act 2001* (Cth) s 254C.
272 *Companies Act 1862* (UK) s 15. The Act did not preclude companies from adopting the provisions of Table A with some amendment thereto.
273 *Corporations Act 2001* (Cth) s 134.
274 *Corporations Act 2001* (Cth) s 117(3).
275 *Companies Act 1862* (UK) s 39.
276 *Companies Act 1862* (UK) s 40.

company;[277] the prohibition of the use of a common seal and company stationery for anything but company purposes;[278] maintaining a register of mortgages and charges specifically affecting the property of the company open for inspection by creditors and members at reasonable times;[279] the fraudulent making, accepting, or endorsing of bills of exchange by the company or person acting under authority of the company;[280] and prohibiting the company from operating below the statutory limit of seven members for a period of six months. As far as the *Corporations Act 2001* (Cth) is concerned, very little has changed. This Act does not specifically identify the different provisions as solely for creditor protection. Instead the thrust is part of the internal governance of companies at the time of registration and following through to the company's subsequent operational life. The registration process requires the address of the company's proposed registered office.[281] This is reinforced by various provisions requiring a registered office for the service of notices, display of the name at the registered office, and the opening hours for business.[282] The Act requires that a company must set out its name on all its public documents and negotiable instruments. A unique feature of the legislation is the inclusion of an Australian Company Number (ACN) as well.[283] It is no longer mandatory for a company to have a common seal. However, if it does, both the company name and ACN must appear on the seal.[284] Chapter 2K of the Act provides extensive coverage of charges encompassing registration and order of priority.[285] Specific areas of the Act provide protective provisions for creditors through reporting and disclosure requirements. These include record keeping,[286] information to be lodged with ASIC and the ASX,[287] periodic financial reporting,[288] audit,[289] and continuous disclosure.[290]

XI. ANOTHER MAJOR STEP IN THE PROTECTION OF INVESTORS

A. Derry v Peek *and its Consequences*

Another important milestone in the legislative process of corporate governance was occasioned by the *Derry v Peek*[291] case. In this case, the Plymouth, Devonport and District Tramways Company had authority to construct tramways under a special Act of Parliament. The Act provided for carriages used on the tramway to be moved by animal power and, with the consent of the Board of Trade, by steam or mechanical power. A statement in a prospectus issued by the directors claimed:

> One great feature of this undertaking, to which considerable importance should be attached, is, that by special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by

277 *Companies Act 1862* (UK) s 41.
278 *Companies Act 1862* (UK) s 42.
279 *Companies Act 1862* (UK) s 43.
280 *Companies Act 1862* (UK) s 47.
281 *Corporations Act 2001* (Cth) s 117(2)(g).
282 *Corporations Act 2001* (Cth) ss 142, 144-5.
283 *Corporations Act 2001* (Cth) ss 153(1)-(2).
284 *Corporations Act 2001* (Cth) s 123(1).
285 *Corporations Act 2001* (Cth) ss 261-82.
286 *Corporations Act 2001* (Cth) s 121 (registered office); s 286 (maintenance of financial records); s 254A (minute books); ss 169-71 (registers of members, option holders and debenture holders).
287 *Corporations Act 2001* (Cth) s 346A (annual review information); ss 142, 146 (change of address of registered office or principal place of business); s 205B (change of director or secretary, including personal details); s 263 (creation of registrable charge); s 136(5) (public company modification/repealing constitution); s 157(2) (change of company name); s 162(3) (change of company type); s 226 (related-party transaction approval for public company); s 254X (new share issue); s 246F(2) (division or conversion of shares into classes); s 254H (conversion of shares into larger/smaller number); s 254Y (cancellation of shares).
288 *Corporations Act 2001* (Cth) s 285 (preparation of an annual financial report and directors' report); s 111AD (determination of disclosing entity); s 309 (half-yearly reporting).
289 *Corporations Act 2001* (Cth) s 301 (requirements for audit); ss 308-9 (contents of audit reports and half-yearly reports for members); s 311 (reporting to ASIC).
290 *ASX Listing Rules*, above n 194, rr 3.1, 3.1A, 3.1B.
291 (1889) 14 App Cas 337.

> means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses.

The plaintiff subscribed for shares relying on these representations. The company proceeded to make tramways. However, the Board of Trade refused its permission to use steam or mechanical power except on certain portions of the line. This resulted in the company being wound up. The plaintiff brought an action against the directors for deceit, claiming damages on the ground that the prospectus contained fraudulent misrepresentations. It was held that the directors had made careless statements in the prospectus without reasonable grounds for believing them to be true, but had an honest belief that they were true. Their Lordships found that an action for deceit did not lie.[292]

XII. *DIRECTORS' LIABILITY ACT 1890*

Palmer[293] claims that in the last years of the 19th century the weakest part of company law was that dealing with the liability for misleading statements in prospectuses. To overcome this defect it was necessary to promulgate the *Directors' Liability Act 1890* (UK). This Act was drafted to make promoters and directors liable to investors induced to apply for securities by a false statement in a prospectus, unless the promoter or director could prove that there were reasonable grounds to believe that the statement was true.[294] Under the provisions of the *Corporations Act 2001* (Cth), any misleading or deceptive statements by promoters and directors in disclosure documents soliciting investment funds from the public will render them civilly liable for damages sustained by investors.[295]

XII. CONCLUSION

This article concentrates on the evolution of statutory corporate governance. It maps out the early forms of corporate governance principles promulgated in the charters of the charter companies. These address questions pertaining to perpetual succession, separate legal identity, internal governance by way of general courts, meetings, and the election and replacement of officers. The article also highlights the impact of economic matters of the day and the need to counter unsavoury business practices arising from poor regulation. The response has inevitably been to provide a legislative framework to regulate the operations of companies. Very often these were tied closely with the Crown's desire to raise additional revenue and to provide a method of administering a growing trading empire in various parts of the world. The advent of the industrial revolution in Great Britain gave rise to the promulgation of numerous acts seeking to create and regulate new forms of trading enterprises which included joint stock companies and companies with limited liability.[296] Again, unprecedented economic expansion required a more sophisticated legislative framework to regulate the vast increase in venture capital and provide adequate safeguards for investors.

Statutory corporate governance owes its genesis to the Gladstone Report[297] and to the *Joint Stock Company Regulation and Registration Act 1844* (UK), the *Limited Liability Act 1855* (UK), the *Joint Stock Companies Act 1856* (UK),[298] the *Companies Act 1862* (UK),[299] and the *Directors' Liability Act 1890* (UK).[300] These pieces of Victorian-era legislation provided the structure for legal corporate governance procedures which are still an integral part of present-day Australian corporate legislation. They are important to the internal

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292 LexisNexis Butterworths, above n 2, [13.4].
293 Schmitthoff, Kay and Morse, above n 130, [2-09].
294 LexisNexis Butterworths, above n 2, [13.5].
295 *Corporations Act 2001* (Cth) ss 728-30.
296 Carr, above n 3.
297 Gladstone Report, above n 89.
298 Schmitthoff, Kay and Morse, above n 130, [2-07].
299 LexisNexis Butterworths, above n 2, [2150].
300 Schmitthoff, Kay and Morse, above n 130, [2-09].

governance of all companies and encompass the company constitution, the board, the members and miscellaneous external matters.

This article significantly demonstrates the important role that history has played in the evolution of corporate governance. This is particularly illustrated in the way the fabric of the company constitution has evolved from the time of the first charter companies to the development of a memorandum and articles of association as the primary constitutional documents governing both internal and external operations of companies.[301] It is only recently that these two documents have been superseded in Australia, with the promulgation of the *Company Law Review Act 1998* (Cth) significantly altering the constitutional structure of companies through the introduction of replaceable rules.[302]

301 *Joint Stock Company Regulation and Registration Act 1844* (UK).
302 *Corporations Act 2001* (Cth) s 141 provides a table of the replaceable rules.