would then have power to provide for incorporation. An alternative approach would have been for the states to transfer to the Commonwealth their constitutional powers over companies but, in addition to states being reluctant to give up their 'rights' to the Commonwealth, there was also concern that once transferred the powers could never be recovered. Further, the regulation of companies provided a source of revenue for the states.

The *Corporations Act 1989* (Cth) was based on the broader of the two views of the Constitution and so assumed a power to provide for incorporation. There were still other limitations that the Act had to provide, such as confining its scope to trading, financial and foreign corporations, but otherwise it was a comprehensive statute regulating companies. However, when it was passed, the *Corporations Act* was not proclaimed as constitutional challenge by states had already been foreshadowed. When these challenges were ultimately heard, in *NSW v Commonwealth*,[26] the High Court held that 'formed' means already formed and so the *Corporations Act 1989* (Cth) was held to be constitutionally flawed. Company law was at that stage in chaos.

There was of course still some scope for Commonwealth legislation over companies. One proposal, which received a good deal of support, was for the Commonwealth to legislate over 'national' issues, such as takeovers and securities, and allow the states to provide for incorporation and internal affairs of companies. Such a 'split' scheme operates in the United States.

Ultimately agreement was reached between the states and the Commonwealth for a 'cooperative' scheme. This scheme was based very much on the model developed during the 1980s when the Fraser Government was in power, although an attempt was made to deal with the deficiencies that had become apparent in that scheme. It is appropriate therefore to go back to that scheme.

1.4.1(d) Cooperative legislation

In 1978 all states (and later the Northern Territory) and the Commonwealth agreed to coordinate companies legislation. This agreement, reached among the attorneys-general, was designed to meet the need for national regulation of companies but was to be based on the sound constitutional bedrock of state legislation. The new scheme was the 'Code' system. The first part of the scheme was for the Commonwealth to pass comprehensive companies legislation (the *Corporations Act 1989* (Cth)) in the Australian Capital Territory. This statute presented no constitutional issues as the Commonwealth had full power over the territories under s 122 of the Constitution. The *Corporations Act 1989* was based on the then existing state companies statutes as the point of the new scheme was not to change the law but to achieve uniformity and minimise the effects of state boundaries. The next stage in the scheme was for

26 (1990) 169 CLR 482.

the states to pass legislation that 'automatically' adopted the ACT law. This was the 'application' legislation. In effect, the application legislation simply stated that the substantive provisions of the ACT *Corporations Act* were to apply to the relevant state. These provisions were referred to as the state's 'Code'.

At the head of the Code scheme was the Ministerial Council, made up of state and Commonwealth Ministers. The Ministerial Council had ultimate responsibility for the scheme. Amendments to the ACT *Corporations Act* could only be made if the Council agreed. The Council was also in charge of the National Corporations and Securities Commission (NCSC). The NCSC had a number of roles under the legislation but one of its key roles was to enforce the various Codes. In practice, the NCSC delegated much of its power to state offices.

Built into the scheme was a 'one stop shopping' feature. That is, companies incorporated in one state were 'recognised' as valid companies in other states. In this sense the scheme had 'national' features. For example, there was no need for a company to be incorporated in different states, nor was it necessary for a company that wished to raise funds in a number of states to register a prospectus in more than one state.

It can be seen from the brief outline above that the objective of the scheme was to have state companies legislation operating in a similar manner to a national statute but without the constitutional (and political) problems of a truly national scheme. Even though the thrust of the scheme was effective, it was not long before problems emerged. In particular, there were three fundamental concerns:

1 There were concerns about the efficiency and effectiveness of the NCSC both in regard to the question of whether it was adequately funded to perform its regulatory role and whether its delegation to state offices involved a loss of control and duplication of resources.
2 There were concerns about the level of accountability of the Ministerial Council to Parliament. The Ministerial Council was ultimately responsible for the cooperative scheme, including responsibility for amendments to the legislation. Nevertheless, the Council was not politically accountable to any Minister or Parliament. The Federal Parliament (by now the Hawke Labor Government) could reject proposed amendments to the legislation but not initiate amendments and saw itself as a 'rubber stamp' to the reform process.
3 Amendments to the law were cumbersome. Proposals for reform had to go through the Ministerial Council and required a majority of the states to agree. Company law is an area of law that often requires quick and flexible responses and there were concerns that the scheme was (a) too slow and (b) too conservative in that only the 'lowest common denominator' amendments were likely to be agreed to.

Reverting back to the chronology of events, the *Corporations Act 1989* was at this stage passed by the Commonwealth Parliament. As already noted, this Act failed on constitutional grounds and so a new cooperative scheme was adopted.

1.4.1(e) The *Corporations Law*

In June 1990 at Alice Springs a new agreement was entered into by the states and Commonwealth. This new cooperative scheme was based on the same cooperative approach as the Codes but was modified in an attempt to overcome the perceived weaknesses outlined above.

The new scheme was based on a similar application device to that employed for the Codes. That is, companies legislation was passed by the Commonwealth to apply to the Australian Capital Territory[27] and the states adopted the substantive provisions of this Act as their own statute. The Commonwealth *Corporations Act* was in two parts. The first part, ss 1–82, was referred to as the 'covering provisions'. The covering provisions established the machinery of company law, dealing with such matters as how the legislation would be administered and enforced. Section 82 then set out what was referred to as the '*Corporations Law*'. This was the substantive company law.

The new scheme attempted to overcome the problems of the old cooperative scheme in the following manner:

1 The *ASIC Act* established the Australian Securities and Investments Commission (ASIC).[28] This body replaced the NCSC and remains the body responsible for administering and enforcing Australian company law, as explained below. ASIC is responsible to the Commonwealth Minister[29] and so the accountability concern under the previous scheme has been addressed. ASIC has regional offices in each state. It also has business centres in capital cities and regional centres—to meet concerns of states, although not delegation to state bodies.
2 The Ministerial Council was retained but with significantly less power than it previously had. This was again a response to the accountability issue referred to above. Reform to companies legislation was now more easily made. Amendments were classified into two types: (a) those that dealt with 'national' market, namely provisions dealing with takeovers, securities and public fundraising and (b) other amendments. If the amendments fell within the first category then the Commonwealth Parliament could introduce legislation provided only that it first consulted with the Ministerial Council. The Ministerial Council had no power of veto. The Parliament's responsibility was to table any opposition by the Council in Parliament. For other types of amendment, the Ministerial Council's approval was required. However, for this purpose voting at the Ministerial Council was by majority and the Commonwealth had four votes and a casting vote. This meant that the Commonwealth was able to approve a proposed amendment provided it could get two other states to agree.

27 The Commonwealth Act was in fact the original *Corporations Act 1989* amended so that it applied only to the Australian Capital Territory.

28 The ASIC was formerly the Australian Securities Commission. It became ASIC following the recommendations of the Wallis Report, which led to an enhancement of the ASC's powers to include responsibilities over the finance industry as well as companies.

29 This was originally the Attorney-General but is now the Treasurer.

3 The *Corporations Law* was 'federalised'. This meant that the covering provisions of the state application legislation provided that for the purposes of administration and enforcement of the state law, the state law was to be treated as if it were federal law. There were three main effects of this approach. The first was that Commonwealth administrative law, not state law, applied. This was relevant, for example, in the case of a review of ASIC decisions. Secondly, criminal offences under the companies legislation were treated as if they were federal offences rather than state offences. Thus investigation and prosecution of offences against the legislation was carried out by Commonwealth bodies, namely ASIC, the Federal Police and the federal Director of Public Prosecution. Finally, the legislation established a cross-vesting scheme and this vested jurisdiction in the Federal Court as well as state courts to hear matters under the legislation.
4 The *Corporations Law* was also national in the sense that incorporation in one state was effective in all other states. Again, the concept of 'recognised' companies was used, so that a company that was registered in one jurisdiction was recognised in other jurisdictions. The legislation also introduced a single national register of companies, in which all companies were given a nine-digit 'Australian Company Number'.

1.4.1(f) *Wakim* and cross-vesting

The cooperative scheme embodied in the *Corporations Law*, despite its ingenuity and strengths, was fundamentally a compromise and something of a patchwork. It ultimately proved unable to cope with the strains that it would be placed under. Its Achilles' heel proved to be the cross-vesting scheme. The constitutional validity of this cross-vesting scheme was successfully challenged by a number of companies that were the subject of winding-up applications. The most commonly cited of these decisions is *Re Wakim; ex parte McNally*[30] where the High Court held that state legislation that purported to confer jurisdiction on the Federal Court to hear matters arising under the *Corporations Law* was invalid.[31] This meant that the Federal Court had jurisdiction to hear an insolvency matter (and other matters under the *Corporations Law*) only where the matter before it involved a corporation registered in the territories or in relation to a matter that also involved a federal matter that was sufficiently related to the non-federal claim. Otherwise corporate law matters were required to be heard in the state courts. Legislation was required to be passed in order to validate previous decisions of the Federal Court.[32] In addition to these cross-vesting difficulties, the High Court in *R v Hughes*[33] cast doubt on the ability of Commonwealth officers to exercise some of the powers and functions delegated to them under the *Corporations Law*.

30 (1999) 198 CLR 511.
31 See also *Re Brown; ex parte Amann* (1999) 73 ALJR 839; *Welltina Pty Ltd v Mamone* (Unreported, Federal Court of Australia, Finkelstein J, 30 June 1999); *Amann Aviation Pty Ltd v Continental Venture Capital Ltd* (2000) 18 ACLC 277.
32 See, for example, *Federal Court (State Jurisdiction) Act 1999* (NSW).
33 (2000) 74 ALJR 802; 171 ALR 155.

1.4.1(g) Commonwealth legislation, Mark II: the *Corporations Act 2001* (Cth)

To overcome these problems, the states and Northern Territory entered into an agreement with the Commonwealth whereby the states and Northern Territory referred their own constitutional powers over corporations to the Commonwealth Parliament.[34] Under s 51(xxxvii) of the Commonwealth Constitution the Commonwealth may legislate with respect to matters referred to it by state parliaments and so this was relied upon to empower the Commonwealth to pass the *Corporations Act 2001*. The referral legislation has a 'sunset clause' that allows the states to terminate the referral of power after five years.[35] Ultimately a permanent solution will presumably need to be found. The simplest, at least in legal terms, would be an amendment to the Constitution that would give power over corporations to the Commonwealth.

The Act has reinstated the above cross-vesting schemes.[36] This means that proceedings may be heard in state or territory Supreme Courts or the Federal Court. Jurisdiction is also conferred on the Family Court and on state Family Courts. Courts are able to transfer proceedings to another Court if this is thought to be more appropriate.[37]

1.5 Administration of company law

The Australian Securities and Investments Commission (ASIC) is the primary body responsible for the administration of company law. ASIC's existence, functions and powers derive initially from the *Australian Securities and Investments Commission Act 2001* (Cth) but also from the *Corporations Act*. ASIC has regional offices in each state and territory.

ASIC has numerous functions but those of primary interest for present purposes are:

- acting as a registry. Companies are registered with ASIC, as are company auditors and liquidators. Documents are commonly required by the *Corporations Act* to be lodged with ASIC;
- providing information about companies. An important part of the Act's disclosure regime is the ability of the public to access many documents that have been lodged with ASIC;

34 The states were financially compensated for the loss of revenue involved in losing regulatory control over corporations.

35 The referral was originally planned to end in 2004. However, this was first extended to 2011 and, more recently, to 2016.

36 See *Corporations Act 2001* (Cth), Pt 9.6A, 'Jurisdiction and Procedure of Courts'.

37 The Act refers throughout to both 'Courts' and 'courts'. These terms are defined in s 58AA. 'Courts' are confined to the Federal Court, Supreme Courts and the Family Court of Australia (and some state Family Courts) whereas references to 'courts' include all courts. Although s 58AA provides that, generally, proceedings under the Act may be brought in any court, some provisions, such as those dealing with insolvency proceedings, may only be brought in a 'Court'.

- administering the *Corporations Act* and investigating and prosecuting breaches of it. This includes in some instances a discretion to relieve parties from compliance with particular provisions of the Act.

In performing this regulatory function, ASIC publishes regulatory guides and media releases. These are available on the ASIC website as well as in hard copy. ASIC decisions are subject to review by the Administrative Appeals Tribunal[38] and, in the case of failure to follow proper administrative processes, by the courts.[39]

The Australian Securities Exchange Group (the ASX Group) is responsible for the regulation and administration of the financial markets. It has a key role in the corporate governance of companies that are listed on the Australian Securities Exchange (the ASX).[40] This is considered in Chapter 6.

The *Australian Securities and Investments Commission Act 2001* (Cth) created a number of bodies in addition to ASIC, which have more limited roles in the administration of company law. These are:

- the *Takeovers Panel.* This body has broad power to declare that conduct associated with corporate takeovers, although not technically in breach of the *Corporations Act*, is nevertheless 'unacceptable' and so prohibited. It can conduct proceedings for this purpose.
- the *Companies Auditors and Liquidators Disciplinary Board.* As its name suggests, this body hears claims that auditors and liquidators have acted in breach of their duties.
- the *Australian Accounting Standards Board.* This body prescribes accounting standards to be observed by companies in their reporting requirements under the *Corporations Act*.
- the *Auditing and Assurances Standards Board.* This body prescribes the auditing standards with which companies must comply and provides general guidance on auditing and assurance matters.
- the *Financial Reporting Panel.* This panel overseas financial and accounting standards.
- the *Parliamentary Joint Committee on Corporations and Financial Services.* This is a permanent parliamentary committee that oversees the workings of ASIC and the Takeovers Panel and is required to report to Parliament.
- the *Corporations and Markets Advisory Committee.* This committee acts as an advisory body on law reform in this area . See further 1.6.3.

38 See Pt 9.4A of the Act.

39 Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

40 See www.asx.com.au.

1.6 Reforming company law

Because of the social significance of companies, companies legislation has been subject to fairly constant reform. As noted above, in the past much of this reform has been directed simply to having 'national' legislation, in effect if not in form. In this process, often matters of policy have been left behind. Nevertheless, there has also been a stream of significant reform of substantive corporate law, although such reform is often piecemeal.

A number of concerns have emerged from this reform process. One concerns the pace of reform. Some consider that reform has been introduced at such a rate that saturation point has been reached. Even if problems are identified that would normally merit legislative amendment, it has been argued that the reforms should be held back, in order to promote stability and certainty in the law. Another concern relates to the complexity of the legislation. Particularly following the 'dense' legislation of the 1980s, concern grew that the law was inaccessible to those who were subjected to it, that is, businesspersons. One suggestion was that greater use should be made of so-called fuzzy law (as opposed to detailed black letter law).[41] The argument was that such was the complexity of the matters regulated by the corporate legislation that general concepts should be employed, leaving it to the courts to fill in the gaps, rather than attempting to deal with all possibilities in the traditional black letter style.[42] Finally, others argued that corporate law remains in need of fundamental reform; that it is still in important respects based on the relevant nineteenth-century English legislation.[43]

The following provides an overview of recent reform processes, where it can be seen how these processes have responded to the concerns expressed above.

1.6.1 Simplification process

In the 1980s the Commonwealth Attorney-General[44] established a 'simplification' task force. The task force included a 'plain English' specialist and business advisor. The objective of the task force was stated as being to simplify the manner in which the existing legislation was expressed rather than to introduce policy changes. Inevitably, however, changes to the language brought changes also to the substance of the law. The intention was to work through the corporations legislation in stages. In fact the project, as will be seen, was subsequently superseded.

41 J Green, 'Fuzzy Law: A Better Way to Stop "Snouts in the Trough"?' (1991) 9 *Company & Securities Law Journal* 144.

42 An illustration is s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) which prohibits 'conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive'.

43 One criticism, for example, is that the Act draws no fundamental distinction between small and large corporations.

44 At that stage company law fell within the portfolio of the Commonwealth Attorney-General. As noted immediately below, responsibility for corporations was transferred to Treasury in the 1990s.

The *First Corporate Law Simplification Act 1995* (Cth) amended parts of the then *Corporations Law* and the results of these reforms can still be seen.[45]A Second Simplification Bill was prepared but at this stage there was a change of government and company law moved from the portfolio of the Attorney-General to Treasury and a new reform agenda took over. Nevertheless, this Bill was ultimately passed essentially intact, as the *Company Law Review Act 1998* (Cth). Again, in addition to simplifying language, the amending Act made some fundamental changes to the then *Corporations Law*.[46]

1.6.2 Corporate Law Economic Reform Program (CLERP)

Responsibility for corporate law was moved from the Attorney-General's office to Treasury so that company law could be part of the broader micro-economic reform process being undertaken by Treasury in other areas, such as in competition law. The general concern was that company law was not sufficiently efficient now that it was operating in a global market. There was particular concern expressed over the regulation imposing unnecessary costs. Treasury thus undertook to review the substantive provisions of the corporations legislation. This program is referred to as the Corporate Law Economic Reform Program (CLERP). A series of significant statutory reforms have come from CLERP and these will be referred to in the course of the book.

1.6.3 Other reform proposals

In addition to the reforms emerging from CLERP, the Corporations and Markets Advisory Committee (CAMAC) has proposed a number of important reforms. CAMAC was established in 1989 to provide the government with independent advice on corporate law issues that arise from time to time. It has released various reports and discussion papers.[47] The former include *Rehabilitating Large and Complex Enterprises in Financial Difficulties* in October 2004, which led to significant insolvency amendments to the *Corporations Act*. These are considered in Chapter 21. Other recent reports include *Managed Investment Schemes* (2012) and *Executive Remuneration* (2011).

1.7 Theories of corporate law

By 'theories' of corporate law we mean the way in which the nature of the corporation is viewed. These theories are useful not just to clarify our thinking on what a corporation is but they also affect the way we assess the regulation of companies and proposals for reform. For example, how we view the corporation will affect how we approach the following questions: whether criminal liability should be imposed on corporations

45 See, for example, the *Small Business Guide*, contained in s 111J of the Act.

46 For example, in relation to the constitutions of companies: see further Chapter 4.

47 The reports and discussion papers can be found at www.camac.gov.au/CAMAC/camac.nsf.

themselves, or whether, on the other hand, it should be confined to the individuals 'behind' the corporation; in what circumstances shareholders and officers should be liable for a corporation's debts; whether managers should be required to be 'socially responsible'; how a corporation should be governed; and generally the extent to which legal rules should be imposed on corporations. Thus the brief outline below will be revisited when we get to these contexts.

Although the terminology of corporate theory varies, a common classification is as follows.

1.7.1 The corporation as an artificial entity: the concession theory

On this view, the corporation is seen as an artificial entity whose privileges have been granted by the state. The emphasis is on the separate legal status accorded ('conceded') to the corporation by the state. One of the major implications of holding this view is that it sees a primary role for the state, representing the public interest, in regulating corporations. Critics of this view of the corporation see it as outmoded, that is, as being more appropriate to a time when the state played a significant role in the creation of corporations. They contrast that with the ease in which corporations are now created, effectively as a private 'right'. However, those who argue for a more interventionist approach to corporate regulation might be seen as at least partially adopting the concession theory.[48]

1.7.2 The corporation as a group of individuals: the aggregate theory

Another view of the corporation is that it is essentially a group ('aggregate') of individuals. The artificial legal entity that is created by the state, and corporate regulation generally, is seen as a convenient and efficient means of regulating the dealings[49] among the individuals who make up the corporation and those who deal with them. This is how most economists view the firm.[50] The law and economics movement has been extremely influential in the legal theory of corporations. It is doubtless true to say that this is now the predominant view of the corporation,[51] although it also has

48 See, for example, R Green, 'Shareholders as Stakeholders: Changing the Metaphors of Corporate Governance' (1993) 50 *Washington & Lee Law Review* 1409. See generally P Mahoney, 'Contract or Concession? An Essay on the History of Corporate Law' (2000) 34 *Georgia Law Review* 873.

49 These dealings are referred to by economists as 'contracts' and so the theory is often referred to as 'contractarian'. The term 'contract' in this context can be confusing to lawyers as it is not referring to a contract in the legal sense.

50 There are, however, other approaches. See, for example, Blair and Stout who suggest a company is most appropriately viewed as a 'team production' enterprise: M M Blair and L A Stout, 'Team Production Theory' (1999) 85 *Virginia Law Review* 247–328.

51 There is a voluminous literature on this, deriving initially from the United States of America. For a helpful general discussion of the issues, see 'Symposium, Contractual Freedom in Corporate Law' in (1989) 89 *Columbian Law Review* 1395.

its critics.[52] More attention will be given to this in the next chapter in the context of the arguments for limited liability of shareholders, but for now it can be noted that the primary implication of this approach is that, as the corporation is essentially the product of private dealings, the state's role is properly limited to assisting the efficient implementation of these dealings.

1.7.3 The corporation as a real entity: corporate realism

This theory sees the corporation as a 'real person' with a life of its own.[53] Like the concession theory, the realist approach acknowledges a significant role for the state in regulating corporations but also sees the corporation as a real person with real rights. This view of the corporation would suggest, for example, that it is appropriate that criminal liability and criminal sanctions should be imposed on the corporation itself[54] but also that it is appropriate for corporations to have certain rights, such as the right against self-incrimination.

1.8 Conclusion

The corporate form has proved to be the pre-eminently suitable form to conduct business, from closely-held companies conducting a simple family business through to the largest public companies listed on the securities exchange engaging in a diverse range of business activity. Of the various legal features of the corporate form, its separate legal personality and the availability of limited liability for its owners are its most often cited attractions. In relation to the latter, however, we saw in this chapter that limited liability is not an inevitable attribute of the corporate form and subsequent chapters will examine key areas where the protection of limited liability is removed.

The social significance of companies together with their artificial and abstract nature have resulted in a high level of regulation. One of the problematic aspects of this regulation in Australia has been the tension between the states and territories, on the one hand, and the Commonwealth on the other, in undertaking this regulatory role. At present there is an uneasy compromise. These same factors have also led to the development of different theoretical explanations of the company, with the predominant theories currently based on an economic perspective of the form. These theoretical views of the company are useful as an aid not only to explain the nature of the corporate form, but also, as we will see in subsequent chapters, as a policy basis to assess potential legal reform.

52 See, for example, W Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407; M Eisenberg, 'The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm' (1999) 24 *Journal of Corporate Law* 819.

53 See, for example, H Laski, 'The Personality of Associations' (1915–16) 29 *Harvard Law Review* 405.

54 It will be seen in Chapter 3 that this will generally be in addition to, not in replacement of, sanctions imposed on the individuals involved.