

COMPANY LAW AND THE CRASH OF THE 1890s IN VICTORIA

JOHN WAUGH*

I. INTRODUCTION

The great Australian boom of the 1880s, and the crash that followed it in the 1890s, have a legal dimension which deserves closer attention. It has long been said that weaknesses in company law played a part in these events in Victoria, where the boom was most intense, and the subsequent depression most severe.¹ This perception was one of the impulses behind the reform effort which led to the innovative Victorian *Companies Act* of 1896. How did this come about? What were the weaknesses, and what were their effects?

The crash also prompts some reflections on the role of law in historical events. Was the company law of the 1880s just a sign of other trends that would have taken their course and led to a crash no matter what the law said? Or did law play a part which was not entirely determined by other contemporary forces? The events of the boom, the crash and the concurrent law reform effort suggest there is truth not only in the historian's insight that law is a product of its contemporary setting, but also in the law-maker's assumption that law in itself can affect future events.

* B Comm, BA (Hons), LL.M (Melb), Faculty of Law, University of Melbourne.

1 EA Boehm *Prosperity and Depression in Australia 1887-1897* (1971) pp 265, 269; TA Coghlan *Labour and Industry in Australia* (1969) Vol III p 1712; *Economist* (10 October 1891) pp 1299-1301.

II. THE BOOM

The economic growth which dominated the 1880s in Victoria, with the exception of a brief downturn in 1886-7, reached a peak in the "insane miraculous year"² of 1888, as a silver boom in the first six months was followed by the peak of the land boom not long afterwards.³ The Melbourne *Argus* described the increase in the value of suburban land during 1888 as "simply phenomenal", as the rush in building activity and land speculation gathered strength.⁴ By the middle of the year, the rate of Melbourne bank clearances had almost doubled from its already high level of August 1887, giving a rough indication of the pace of economic activity.⁵ *The Argus* estimated stock market turnover for 1888 to have been at least three times that of 1887, itself a boom year.⁶ Gyles Turner, general manager of the Commercial Bank of Australia, later described the "carnival of extravagance and luxurious living" he saw among the wealthy.⁷

Victoria's prospects seemed to encourage the boldest financial speculation. On 26 January 1888, then known as Foundation Day, *The Argus* published the confident predictions of the Government Statist, HH Hayter, that in a hundred years Australia's population would be 117 million, greater than that of Britain.⁸ Hayter himself was a land boomer who paid his creditors threepence in the pound in a secret composition in 1894.⁹

Factors contributing to the boom included the rise of population through immigration and natural increase, and changes in the demographic structure as the children of gold rush immigrants grew up and entered the work force and the housing market.¹⁰ Writers also mentioned the prevailing gambling spirit, and the effects of the desire for speculative gains.¹¹ British capital was instrumental in the prodigious growth of the economy, as contemporaries were well aware.¹² The inflow of capital to Victoria from Britain in the second half of the 1880s was over £50 million, a sum which would have been enough to

2 G Serle *The Rush to be Rich* (1971) p 247.

3 An outline of trends in the Victorian economy in this period is found in Boehm note 1 *supra* pp 49-53.

4 *Argus* (1 January 1889) p 7; Boehm note 1 *supra* p 142 on building boom.

5 Boehm note 1 *supra* p 246 (4-week totals).

6 *Argus* (1 January 1889) p 9.

7 HG Turner *A History of the Colony of Victoria* (1904) Vol II p 264.

8 *Argus* (26 January 1888) p 4.

9 M Cannon *The Land Boomers: the Complete Illustrated History* (1972) rep O'Neil, South Yarra, Vic (1986) p 220.

10 Boehm note 1 *supra* pp 144-52 on building boom; NG Butlin *Investment in Australian Economic Development 1861-1900* (1964) pp 232-44.

11 For example Turner note 7 *supra* pp 292-3; Coghlan note 1 *supra* p 1751 (Coghlan lived in Sydney during the boom, however).

12 For example *Argus* (27 February 1888) p 6 (23 October 1888) p 8-9; *Economist* (17 March 1894) p 331; Coghlan note 1 *supra* pp 1635-7; *Victorian Year-Book* (1893) Vol 2 app B, Part I - Financial Crisis; Boehm note 1 *supra* pp 126-8.

buy all the securities in the Melbourne stock market in 1884.¹³ This capital was raised by government and private institutions; one of its most conspicuous applications was in ambitious public works programs, which included the extension of the railways.

III. INCORPORATED COMPANIES

One feature of the boom was the spread of companies incorporated by registration, displacing older forms of business organisation such as partnerships and unincorporated companies. Registered companies with limited liability were relatively new in the 1880s. Forty years before, one member of Parliament said in 1881, alluding to the long availability of limited liability in Europe, "it was the orthodox thing to regard limited liability as a French fallacy".¹⁴ Incorporation by registration had been available in Victoria only since the enactment of the *Companies Statute* 1864 (Vic). There was a corresponding trend towards wider use of the corporate form in Britain in this period, as the initial hostility to limited liability disappeared and the need arose for larger and larger sums of capital to be raised.¹⁵

In this period, companies incorporated under the *Companies Statute* 1864 and its successor, Part I of the *Companies Act* 1890 (Vic), were generally referred to as 'trading' companies, regardless of the nature of their business, to distinguish them from companies incorporated under the optional, alternative provisions for the incorporation of mining companies in the *Mining Companies Act* 1871 (Vic) and its successor, Part II of the *Companies Act* 1890 (Vic). Of these 'trading' companies, a record 433 were registered during 1888, according to the *Victorian Year-Book*; the highest previous figure was 145 for 1887, that being the first time the figure had exceeded 100.¹⁶

In October 1888, there were approximately 1500 companies on the register under the *Companies Statute* 1864.¹⁷ In 1896, according to the *Victorian Year-Book*, there were 799 'trading' companies in Victoria actively engaged in the operations for which they were formed, including 'foreign' companies; the comparable figure was 781 for 1897 and 924 for 1898. Returns to orders of the Legislative Assembly in 1888 and 1896 list, by name, trading companies

13 Serle note 2 *supra* p 247; AR Hall *The Stock Exchange of Melbourne and the Victorian Economy 1852-1900* (1968) p 169.

14 *Victoria Parliamentary Debates* ("PD") (1881) p 1076.

15 AR Hall *The London Capital Market and Australia 1870-1914* (1963) p 21-31.

16 It should be noted that Butlin note 10 *supra* table 76, p 413, gives different figures for company registrations, derived from a microfilm copy of the company registers of the Victorian Registrar-General. Butlin's figures nonetheless confirm record registrations in 1888.

17 *Report of the Board appointed to inquire into, and report upon, the Registrar-General's Office*, Appendix VI (Report of Mr Krone, acting Registrar-General), Victoria, Parliament, Legislative Assembly, *Votes and Proceedings* ("V&P, LA") (1889) Vol 2 No 6 p 585.

incorporated in Victoria since 1886, and trading companies 'or similar corporations' currently carrying on business in 1896.¹⁸

There was thus an unprecedented rate of registration of new companies during the boom. The value of assets in new companies, and companies overall, is indicated by share market values and figures for paid-up capital, all showing strong increases in this period. The paid-up capital of the 433 'trading' companies registered during 1888 in Victoria was recorded as £14,645,000, although this figure would have been inflated by boom values and the practice, common at the time, of issuing paid-up shares for doubtful consideration.¹⁹ The value of company securities in the Melbourne stock market in mid-September 1889 was over £77 million, more than twice the figure for the same period in 1884, and many times the comparable figure for 1865, even in real terms, since the period had been one of largely stable or falling prices.²⁰ The 1889 figure would, however, have been inflated by the recent share speculation. By comparison, total public and private gross domestic capital formation for the whole of Australia for 1888 (a flow, as against the stock represented by market values) has been estimated as £40.7 million,²¹ while the Victorian public debt in 1892 was approximately £47 million.²²

Not all the new companies represented new businesses, many being conversions of existing firms, but this process of conversion itself showed the accelerating spread of the corporate form through the economic system.²³ Many of the new companies undoubtedly deserved the strong language in which Michael Cannon described them in his book, *The Land Boomers*. The Imperial Banking Company Limited, for example, was floated by Sir Benjamin Benjamin, Lord Mayor of Melbourne for three years from 1887:

This incredible company structure paddled before the bemused eyes of the investing public early in 1886, and rowed away downstream bearing with it nearly £200,000 of the public's money.²⁴

In 1891, it became the first of the major land 'banks' to fail.²⁵

In this period there continued to be many companies which conducted substantial operations in Victoria but were incorporated elsewhere, usually in Britain. Some of the banks, like the English, Scottish and Australian Chartered Bank, came into this category. Several Australian land mortgage companies had previously been incorporated in Britain, especially between 1878 and 1884, but they concentrated on pastoral business; now, during the 1880s, the emphasis

18 *V&P*, LA (1888) Vol 1, paper C7; *V&P*, LA (1896) Vol 1, paper C6.

19 *Victorian Year-Book* (1893) p 459.

20 Hall note 13 *supra* pp 37, 169; price indices in Butlin note 10 *supra* p 455.

21 Butlin note 10 *supra* pp 16-17. This figure represents the flow of goods and services required in the creation, extension and replacement of fixed assets within Australia: p 9.

22 *Victorian Year-Book* (1893) Vol I p 190.

23 *Argus* (24 March 1888) p 5.

24 Note 9 *supra* p 204.

25 Boehm note 1 *supra* p 262.

changed from pastoral to urban land investment, and large new companies were floated.²⁶

Another feature of the land boom companies was the conspicuous involvement of many members of the Victorian Parliament. Cannon lists many MPs involved in such companies, although it is not clear that Parliament really became as corrupt as he suggests.²⁷ Among the leading politicians on the boards of directors of companies deeply involved in the land boom were Sir Matthew Davies (sometime Speaker of the Legislative Assembly), James Munro (Premier), Thomas Bent (Speaker), Sir Graham Berry (Agent-General in London), and Alfred Deakin (Deputy Premier), although the level of probity within this group would have varied enormously.²⁸

IV. DECLINE

Such intense speculative dealing in land could not continue indefinitely. As well as this, the Victorian economy had to cope with consequences of the very flow of overseas capital which was doing so much to stimulate it. This flow created countervailing external obligations, both to repay capital when called on and to maintain payments of interest and dividends. Victorian prosperity also contributed to a steady increase in imports. These external obligations became more onerous as the prices obtained overseas for Australian exports, and with them the net terms of trade, declined from the early 1880s to about 1895.²⁹

There were already signs of the end of the land boom in late 1888. On 22 October, the Associated Banks (a group of the banks which shared the government banking business)³⁰ increased their rates on loans and deposits by 1 per cent in response to increasing difficulty in obtaining deposits, especially overseas. They also agreed to curtail lending for speculative purposes. By the end of November, *The Argus* was suggesting that the end of the land boom was at hand,³¹ although record prices continued to be paid for some properties well after 1888.³² Direct evidence of overall trends in the real estate market for this period is scarce, but one survey of 250 land transactions in suburban Melbourne indicated that prices for different areas peaked at different times from 1888 to 1890.³³ A peak and then a decline in building and general economic activity followed a little behind trends in the property market; the general downturn was

26 Hall note 15 *supra* pp 109-11, 115-18, 168; Turner note 7 *supra* Vol II p 303-4.

27 Cannon note 9 *supra* pp 49, 55-61; cf Serle note 2 *supra* p 265.

28 Serle *ibid* pp 261-7.

29 Coghlan note 1 *supra* pp 1608-32; *Australasian Insurance and Banking Record* ("AIBR") (17 December 1892) pp 850-1; Boehm note 1 *supra* p 204-6.

30 G Blainey *Gold and Paper: A History of the National Bank of Australasia Limited* (1958) p 146 n 2.

31 *Argus* (28 November 1888) p 6.

32 Turner note 7 *supra* Vol II p 292; Blainey note 30 *supra* p 139; but cf *Economist* report (5 April 1890) p 428, that property activity was practically at a standstill in February 1890 throughout the colonies, and was especially low in Melbourne.

33 R Silberberg "The Melbourne Land Boom" (1977) 17 *Australian Economic History Review* 117 at 120.

exacerbated by the maritime strike of 1890,³⁴ but good seasons were a steady influence from about mid-1889 to mid-1891, and a new round of speculation in silver shares stimulated the financial markets from about mid-1889 to mid-1890.³⁵

Notwithstanding the continuance of some high prices for real estate, the difficulties for those most involved in the boom, and their backers, began to mount. The decline in the real estate market at the end of 1888 was sufficient to cause one major building society collapse in 1889, that of the Premier Permanent Building, Land and Investment Association.³⁶ Land companies now tried to relieve their difficulties by raising further deposits, especially from British investors, and met with some success.³⁷ In its review of the year 1889, *The Argus* reported:

From a national point of view the effects both of a season of reaction after a great speculation and of a singularly unproductive year have been largely neutralised by an importation of capital from the United Kingdom amounting to twice that of the previous year.³⁸

Gyles Turner later described the activities of the land companies after the end of the boom:

The newly established land banks, building societies, and hybrid finance and investment companies took themselves off to London, opened offices or appointed agents throughout Great Britain, and raked in many millions sterling to keep the ball rolling until 'better times' for selling should arrive.³⁹

This must, however, be tempered by Butlin's estimates, which suggest that 1888 saw the peak of British investment both in Australia as a whole and in Australian finance companies.⁴⁰ What is more, it is clear that British investors were growing increasingly cautious about Australian investments from at least early 1889. J McAlister Howden, a Melbourne accountant, travelled to London in 1889 as part of the money-raising efforts of the Mercantile Finance Trustees and Agency Co, and associated companies in the group controlled by BJ Fink. Howden reported to the Melbourne manager of the company in May:

Unfortunately for us the Company opened here at the very worst time. Australian matters and especially Melbourne interests were all under a cloud and every statement in connection with them were [sic] regarded with suspicion. [R]umours were current about our company which were even more exaggerated than in Melbourne.⁴¹

34 As to which, see Coghlan note 1 *supra* Vol III pp 1591-1607.

35 Boehm note 1 *supra* pp 50-3, 247; Hall note 13 *supra* pp 122-3.

36 *Argus* (16 December 1889) p 9, (21 December 1889) pp 8-9.

37 Boehm note 1 *supra* pp 256-7.

38 *Argus* (2 January 1890) p 9.

39 Turner note 7 *supra* Vol II p 292.

40 NG Butlin *Australian Domestic Product, Investment and Foreign Borrowing 1861-1938/39* (1962) pp 424, 429

41 Howden & Lyell, Accountants, Papers, University of Melbourne Archives, Letterbook (1889) p 42 (Howden to Ellison, 10 May 1889).

A personal letter from Howden to Fink in April 1889 has many references to the necessity of raising money in Britain, and the difficulties of doing so in the face of the London brokers' scepticism about the value and security of the investments offered.⁴² Howden was asked for better financial information about one of the companies for which he was handling an issue of securities, including revaluations of properties. He said it practically meant that the issue would fail, if the information were provided, so he 'finessed in such a way as to avoid it all and get it through'. He was nevertheless able to report that deposits were beginning to come in 'fairly freely'.⁴³

In 1890, the Baring crisis in London and losses on South American speculations made British funds increasingly difficult to obtain.⁴⁴ Australian land-mortgage companies had large Scottish deposits,⁴⁵ and an Edinburgh correspondent of James Balfour, director of several land boom companies, explained the difficulty of obtaining more in December 1891:

The subject of investing in Australia I brought before the Trustees of the Scott[ish] Investment Trust and it was duly considered. They did not see their way to send money there at present. The depressed state of the whole financial world at present and the amount of capital locked up if not lost in South America make it the most judicious course for such a company quietly to hold on their investments till things improved [sic].⁴⁶

The London *Economist* noted the sensitivity of the boomers to revelations which could affect British deposits:

At every new evolution of the liquidation of the land mania, the first thing suggested by these people is, that information likely to reach the British depositor should be suppressed.⁴⁷

However, the British financial press was warning investors about the affairs of Australian boom ventures, and continued to report the scandals and failures as events developed.⁴⁸ The London *Financial World* noted that company law in Victoria and New South Wales was more lax than in Britain.⁴⁹ The retort of

42 *Ibid* pp 8-13 (Howden to Fink, 26 April 1889).

43 *Ibid* pp 70, 74 (Howden to Fink, 31 May 1889).

44 Boehm note 1 *supra* pp 166-8, 256-7; Coghlan note 1 *supra* Vol III pp 1643-4; Turner note 7 *supra* p 292; *Argus* (18 November 1890) p 4, (24 November 1890) p 4, (1 January 1891) p 4.

45 Hall note 15 *supra* p 117.

46 James Balfour, Papers, La Trobe Collection, State Library of Victoria, MS 12237, Box 2875, folder GC (7), letter from John Gifford, 23 December 1891. Gifford nevertheless included a request of his own for a list of good Australian investments. Balfour's business interests are listed in Andrew Lemon *The Young Man from Home: James Balfour 1830-1913* (1982) pp 175-6.

47 *Economist* (10 May 1890) p 587. The article came from the *Economist's* Melbourne correspondent.

48 For example *Statist* (12 January 1889) reproduced in *Argus* (25 February 1889) p 10; *Economist* (9 March 1889, 5 April 1890, 26 April 1890, 10 May 1890, 22 August 1891, 29 August 1891, 12 September 1891, 10 October 1891) etc; *Times* (15 January 1892); *Financial Times* (21 January 1892). These warnings were added to those about excessive borrowing by Australian governments, which had been appearing in the British press throughout the 1880s: Boehm note 1 *supra* p 161.

49 9 January 1892; in Street & Co, *Press Notices* (extracts from British newspapers provided to the Victorian Agent-General and forwarded to Melbourne for the information of ministers), La Trobe Collection, State Library of Victoria, volume for 1892.

The Argus to one of the first of these articles, in 1889, would eventually make sad reading:

The prediction of the ruin of the Victorian banks only provokes a smile...⁵⁰

V. COLLAPSE

Following 1888, the picture gradually emerged of a profound, long-term fall in the value of real estate. This depreciation reduced the net worth of companies which had invested in land, deprived them of speculative gains they would otherwise have made in holding and selling that land, and forced on them large realised and unrealised losses. For companies with large debts, this inevitably led in some cases to insolvency.

The effect of the depreciation in values, gathering strength as it went, spread through the financial structure. By the end of 1890, several significant personal insolvencies and company liquidations had resulted from the fall.⁵¹ A series of sensational collapses of land companies occurred in New South Wales in late September 1891, and a sudden rush of failures followed in Victoria at the beginning of December.⁵² The failures of Victorian companies directly involved in the land boom, as developers or providers of finance, were concentrated in the period from November 1891 to March 1892.⁵³ Building societies were also badly affected.

The failures and the general downturn in economic activity fed on each other.⁵⁴ In April 1892, the *Australasian Insurance and Banking Record* noted that 21 financial institutions receiving deposits from the public had suspended payment in Melbourne since the previous July, of which seven were building societies. Their total liabilities were stated at £13,222,543.⁵⁵ In December, the *Record* estimated the assets affected by declared suspensions since the collapse of the land boom at about £26 million.⁵⁶ The magnitude of this figure can be gauged by comparing it with the total value of stocks listed on the Melbourne stock market in September 1889, which was approximately £80 million; that value itself declined by some £35 million by 1892.⁵⁷ The *Record* was no doubt correct in saying that a large proportion of the wealth of the city of Melbourne was involved in the collapse.⁵⁸

50 *Argus* (25 February 1889) p 6.

51 Turner note 7 *supra* Vol II p 292; *Economist* (26 April 1890, 10 May 1890).

52 *Argus* (30 September 1891), (1 December 1891) and following editions; *Economist* (6 February 1892) p 176.

53 Boehm note 1 *supra* p 262.

54 *Ibid* p 269. Boehm points out the effect of the land company failures on general business activity, especially on business expectations.

55 *Australasian Insurance and Banking Record* ("AIBR") (18 April 1892) pp 247-8.

56 *Ibid* (17 December 1892) p 866.

57 Hall note 13 *supra* pp 168, 170-1, 174.

58 *AIBR* (17 December 1892) p 866.

Parliament reacted in December 1891 with the *Voluntary Liquidation Act*, which made orders for compulsory winding up harder to obtain, hence protecting many companies from court scrutiny as they were wound up voluntarily. The effects of the Act have been described elsewhere.⁵⁹ Many land boomers also took advantage of secret compositions with their creditors under s 154 of the *Insolvency Act* 1890 (Vic). This section, a copy of s 126 of the English *Bankruptcy Act* of 1869, allowed creditors to agree to a composition in satisfaction of their debtor's obligations without any proceedings in insolvency; the composition was registered with the Court of Insolvency, but was open to inspection only by creditors themselves.

Over 130 debtors took advantage of this provision in 1892 and 1893. This was only a small number compared with the number of those becoming formally insolvent in the same period, which was over 2000, but the debts involved in the secret compositions were considerably greater. Amounts accepted in satisfaction ranged from one farthing to almost twenty shillings in the pound. In all, declared liabilities under insolvencies, liquidations by arrangement and secret compositions for 1892 and 1893 totalled more than £12 million, much of which would have been lost to creditors altogether, increasing their own difficulties in turn.⁶⁰ Information about the compositions leaked out, spreading uncertainty in Melbourne business affairs.⁶¹

As the wave of insolvency spread, it moved from land companies and building societies to the true trading banks, the business conduct of most of which (with the notorious exceptions of the Mercantile Bank, the Federal Bank and the City of Melbourne Bank) seems to have been far removed from the dishonest practices of the worst of the companies involved in the land boom. The trading banks were facing the consequences of a long-term trend for them to give credit on the security of land rather than in the traditional form of discounting, while some became involved with the speculative urban land companies themselves.⁶² Some of the banks turned particularly to British investors from 1888 to 1891, and, because of their size and standing, were able to raise far greater sums than the land companies.⁶³ Banks and land companies alike were caught with the problem of having borrowed at short terms to invest at long - or at what had become long terms, now that land could be realised immediately only at disastrously low prices.⁶⁴ The Colonial Superintendent of the Bank of Australasia was well aware of the danger in May 1892:

59 J Waugh "The Centenary of the Voluntary Liquidation Act 1891" (1991) 18 MULR 170.

60 Details of the secret compositions of 1892-3 are found in *Victorian Year-Book* (1893) pp 818-19 and (1894) p 317; Cannon note 9 *supra* pp 391-4.

61 Cannon *ibid* p 50.

62 Boehm note 1 *supra* pp 218-24, 277, 285, 311.

63 *Ibid* pp 277-9, 310; Coghlan note 1 *supra* Vol III p 1655; Butlin note 40 *supra* pp 424-5.

64 Boehm note 1 *supra* pp 224, 264; DT Merrett "Australian Banking Practice and the Crisis of 1893" (1989) 29 *Australian Economic History Review* 60 at 71.

Banks have become more or less huge Mortgage Companies with assets for the moment unrealisable and yet liable to be called upon for payment of deposits at call or on comparatively short notice.⁶⁵

At least one of the banks, the Commercial Bank of Australia, had made its position worse by giving still more advances in vain efforts to prop up boom companies among its clients.⁶⁶

To the compounding effects of losses in land and on loans to land investors, and the continuing decline in overall economic activity, was finally added loss of confidence by the major banks' own depositors. Each problem exacerbated the others. Arrangements for mutual support between the banks were bungled and inadequate; the government, itself committed to reductions in expenditure in response to the colony's economic difficulties, felt it was beyond its power or responsibility to come to a general rescue, although it did join in planning an abortive scheme worked out with the Associated Banks.⁶⁷ The banks were losing local deposits, and feared the withdrawal of British funds.⁶⁸ In retrospect, most of the banks were probably solvent in the long term, but they were unable to withstand the short-term strain of a run.⁶⁹

The first Melbourne bank of issue to suspend payment in the collapse was the Metropolitan Bank, in December 1891. It was not well-established as a bank of issue, having only just begun issuing notes, but it was followed in March 1892 by the Mercantile Bank, a bank of issue since 1885.⁷⁰ The first of the Associated Banks to go was the Federal, on 28 January 1893.⁷¹ The Commercial Bank of Australia, the biggest Victorian bank, suspended normal trading on 5 April 1893, and immediately announced reconstruction plans and reopened for special trust account business. Reconstruction was promptly approved by meetings of shareholders and creditors.⁷² The trust accounts provided a safe haven for worried depositors in other banks, which were accordingly undermined by the flow of deposits away from them to guaranteed

65 Confidential letter from John Sawers, Superintendent, to P Selby, Secretary, London (17 May 1892) A/129/5, Confidential Letters Inward from Superintendent, Bank of Australasia, ANZ Group Archive.

66 Boehm note 1 *supra* pp 278, 289-90; Turner note 7 *supra* Vol II p 311.

67 SJ Butlin *Australia and New Zealand Bank: the Bank of Australasia and the Union Bank of Australia Limited 1828-1951* (1961) pp 296-7; Blainey note 30 *supra* p 152; Boehm note 1 *supra* p 296-8; Turner *ibid* pp 311-12.

68 The suggestion was sometimes made (for example by Sir George Dibbs, Premier of New South Wales, in his paper "Australian Crisis of 1893", in New South Wales, *Votes and Proceedings of the Legislative Assembly* (session 1894) Vol I, p 1021 ff) that the bank crash was brought on by withdrawal of British funds. In fact it seems withdrawals before the banks suspended payment were mainly by local depositors, and it was the fear of similar withdrawals by British depositors, rather than its realisation, which was a strong incentive to the banks to suspend and reconstruct. See Boehm note 1 *supra* pp 292-3, 302-3; Coghlan note 1 *supra* p 1656; *Bankers' Insurance Managers' and Agents' Magazine* London Vol 55 (1893) p 43.

69 Boehm note 1 *supra* p 306.

70 *Ibid* pp 263, 281.

71 *Ibid* p 286.

72 Proceedings for approval of the scheme by the Court are reported in *Re Commercial Bank of Australia Ltd* (1893) 19 VLR 333.

trust accounts in the partially-reopened CBA. This was repeated as other banks suspended payment, the apparently successful example of the CBA's reconstruction providing another incentive for them to do so.⁷³ The CBA scheme was favourably received by most shareholders and depositors, and it promised a great increase in capital for the bank. At the height of the crisis, at the beginning of May, without consulting most of the banks, the Victorian government declared a five-day bank holiday to slow the accelerating run:

the principle being unconsciously adopted that in order to put out a fire the right thing is to shower petroleum upon it...⁷⁴

Some banks ignored the holiday from the start, and others joined them as the week went on.⁷⁵

Banks collapsed around Australia, including all but one of those with head offices in Melbourne.⁷⁶ Most eventually reopened for normal business, but only after remaining closed for at least a month.⁷⁷ During this period, deposits made before suspension were inaccessible, and normal services unavailable.⁷⁸ After reconstruction, depositors were liable to find part of their funds converted into capital.⁷⁹ Some Australian banks were incorporated in England, and undertook the process of reconstruction through the courts there; two of those banks, and five others incorporated locally, were aided by Victorian legislation facilitating the transfer of their businesses to the reconstructed companies.⁸⁰ Both the English and Victorian courts had power to wind up companies which were incorporated elsewhere but conducted business within the jurisdiction.⁸¹ Liquidators were appointed for some Victorian companies, not in Victoria alone, but also in other Australian colonies and in England, in order to administer their assets there.⁸²

73 Butlin note 67 *supra* p 300.

74 *AIBR* (May 1893) quoted in Boehm note 1 *supra* p 307; *Argus* (2 May 1893) p 4, noted that most of the banks had apparently not been consulted.

75 The legal position of banks opening despite the holiday was unclear. The banks took certain precautions in transacting business during the holiday to ensure they did not breach the bank holiday provisions of the *Banks and Currency Act* 1890 (ss 17-23), which provided that bank holidays 'shall be kept as close holidays' but were somewhat ambiguous as to whether they prohibited banking business or merely permitted closure. See Butlin note 67 *supra* p 303; *Argus* (2 May 1893) p 5.

76 Hall note 13 *supra* p 157; 54 out of the 64 'banks' in Australia in mid-1891, so describing themselves and taking public deposits, had closed temporarily or permanently by mid-1893: Butlin note 67 *supra* p 279.

77 Butlin note 67 *supra* p 301; Boehm note 1 *supra* p 272.

78 Blainey note 30 *supra* p 176, notes that the National Bank made considerable advances to customers whose deposits were locked up in the reconstruction process, but these advances would presumably have been made only after reopening for normal business.

79 Bank reconstruction schemes are reproduced in Alfred De Lissa *Companies' Work and Mining Law in New South Wales and Victoria* (1894) p 244 ff.

80 *Reconstructed Companies Act* 1893 (Vic); the schedule to the Act lists the companies involved, which included two land 'banks', the Standard Bank of Australia Ltd and the Australian Deposit and Mortgage Bank, and one other company, Goldsborough Mort & Co Ltd.

81 *Morrison v New Zealand Loan and Mercantile Agency Co Ltd* (1896) 22 VLR 209 at 218.

82 For example *Federal Bank: In re Federal Bank of Australia Ltd* (1894) 20 VLR 199 at 200-1; see also companies considered in *Re City of Melbourne Bank (in liq) & Ors* (1897) 19 ALT 80.

The disruption of the financial system by the bank closures inevitably made the economic downturn worse, as did the effects on confidence in the Victorian economy locally and overseas and their influence on spending and investment.⁸³ The combined result of these problems was widespread distress. Unemployment for Victoria is hard to gauge for this period, but has been estimated at a little over 28 per cent for 1893.⁸⁴ Melbourne, then Australia's most populous city, lost as much as a tenth of its population,⁸⁵ and a whole class of small and large investors lost their capital and faced substantial liabilities for calls on partly paid-up shares.

The miseries of shareholders forced to pay calls are well described in a series of letters included in the report of one of the liquidators of the Colonial Investment and Agency Company, and printed in *The Argus*. These letters were received by the liquidators from the old, the sick and the disabled, who had lost their savings and now received legal demands to pay their uncalled capital.⁸⁶ With severe economic depression and the domino effect of multiple insolvencies, the uncalled capital of many companies was revealed as next to worthless. The large number of shares held by directors and their associates often made this problem far worse. Henry Bourmes Higgins, then at the bar in Melbourne, recalled being consulted in the case of a lady of over 80, a spinster, who had been bequeathed shares in banks, had no idea of uncalled liability, and was now faced with having to sell her other shares (in a gas company) and her cottage to meet the calls made on her. Higgins advised that the lady should not reply to the letters sent to her demanding payment, and the liquidator, knowing her circumstances, did not sue.⁸⁷

It was little wonder that the whole system of finance seemed to some to be discredited. As the *Imperial Review* put it:

We attack Building Societies, Insurance, Limited Liability, and all the apparatus of bladder-bag trade.⁸⁸

The same magazine satirised the pretensions of the boomers, and the evangelical leanings of many of them, in a piece on the 'Capricornian Bank' (apparently the Commercial Bank of Australia in disguise):

Meanwhile, the gentlemen we cacophonously delineate as Goldbug and Giltgore were busy with the Permanent Evanescent Building Society, the Garden of Eden

83 Boehm note 1 *supra* pp 312-18; Hall note 13 *supra* p 207.

84 PG McCarthy "Wages in Australia, 1891 to 1914" (1971) 10 *Australian Economic History Review* 56 at 69.

85 The *Victorian Year-Book* for 1894 p 37, estimates the decline in the population of Melbourne from the census of 1891 to the end of 1893 at 46,000, and records the 1891 census figure for the city, 490,896. Graeme Davison gives a figure of 56,000 for the decline from 1892 to 1895: *Rise and Fall of Marvellous Melbourne* (1978) p 172. The *Victorian Year Book* 1973 shows a fall of 42,580 by 1894 from an 1891 peak of 486,620 in the population within ten miles of the GPO p 1070.

86 *Argus* (1 October 1892) pp 7-8.

87 HB Higgins, Papers, National Library of Australia, Manuscript Collection, MS 1057, series 3, box 7, autobiography, p 77-8.

88 *Imperial Review* (Melbourne, March 1892) p 61.

Land Bank, and all their other schemes for turning the Paris of the South into the New Jerusalem.⁸⁹

VI. WEAKNESSES IN COMPANY LAW

A. CONTEMPORARY LEGISLATION

The *Companies Statute* 1864 (Vic) and the *Mining Companies Act* 1871 (Vic) formed the basis of Victorian company law in the 1880s. They had remained largely unchanged since their enactment. At the end of the decade, the various principal Acts on trading and mining companies were consolidated with previous amendments, and with life assurance company and trustee company legislation, to form the *Companies Act* 1890. The Act was part of the general consolidation of the Victorian statutes carried out in 1890. Only a few minor drafting amendments were made in forming the consolidated *Companies Act*; the *Companies Statute* 1864 was reproduced as Part I, and the *Mining Companies Act* 1871 as Part II.⁹⁰

B. DISCLOSURE; BANKING REGULATION

The *Companies Statute* 1864 was based on the English *Companies Act* of 1862. By 1862, the controls found in earlier English companies legislation had been abandoned, and the 1862 Act was facilitating rather than regulatory in character.⁹¹ So far as public disclosure was concerned, the main requirements in the 1864 Statute were for companies to lodge their memorandum and articles with the Registrar-General, as part of the process of registration, and file an annual list of members and summary of capital.⁹² All documents filed with the Registrar-General in this way were open for public inspection.⁹³ Companies were also required to notify the location of their registered offices, and keep their registers of members open for public inspection.⁹⁴ Companies whose capital was not divided into shares were required to notify the Registrar-General of the names of their directors.⁹⁵

On the other hand, there was no general statutory requirement for disclosure of directors' names, or of financial information apart from particulars of capital. There was no means of discovering, at least from registered documents, whether shares had been paid up in cash or had been deemed to have been paid up in consideration of property supplied to the company by the promoters, or even

89 *Ibid* (July 1893) p 54.

90 *Victorian Statutes* (1890) Vol 1 p xv (Explanatory Paper).

91 Cf 7 and 8 Vict c 110 (1844 UK).

92 *Companies Statute* 1864 (Vic) ss 15, 24.

93 *Ibid* s 17.

94 *Ibid* ss 30, 37.

95 *Ibid* ss 42-3.

merely in consideration of the promoters' own services to the company.⁹⁶ Listing requirements of the Stock Exchange of Melbourne were also minimal, although they were tightened somewhat during the 1890s.⁹⁷ Any coercive effect they may have had was weakened by the chance to have shares traded on the other stock exchanges which operated in Victoria in this period. The quality of disclosure of company affairs thus depended largely on the attitude of the directors and principal shareholders (who were often the same people, as in the Davies group, for example), but in some cases they were the keenest of anyone to avoid scrutiny.

Banks, trustee companies, life assurance companies and mining companies were subject to special controls.⁹⁸ All banks, whether incorporated or unincorporated, and whether incorporated under the *Companies Statute* 1864, private Act or Royal Charter, were required by the *Banking and Currency Statute* 1864 (Vic) to make regular reports to the government on their assets and liabilities and the names of their shareholders. Banking companies with limited liability, along with insurance companies and 'deposit provident or benefit' societies under the *Companies Statute*, were also required to swear out and display six-monthly declarations of their capital, debts and assets.⁹⁹

Some banks were incorporated under the *Companies Statute* or the *Companies Act*, and were thus also subject to their controls; others were incorporated by private Victorian Act, or outside Victoria (whether elsewhere in Australia or overseas), and were not affected by the *Companies Statute* for most purposes. Of the nine banks which were given the benefit of the *Reconstructed Companies Act* 1893 (Vic), which facilitated reconstruction after the crash, seven were incorporated under the Victorian *Companies Act*; the other two were incorporated under English law. Of these seven, three were originally incorporated by private Victorian Act, but had converted to incorporation by registration for the reasons mentioned below.¹⁰⁰

Statutory controls, liquidity standards and other matters concerning banking in Victoria were investigated by a Royal Commission in 1887. It was chaired by Matthew Davies, perhaps the most notorious of the land boomers.¹⁰¹ The Commission did nevertheless recommend certain amendments, concerning financial reporting, the issue of bank notes, and advertisements of capital by banks. It also recommended the enactment of provisions making it possible for banks incorporated by Royal Charter or private Act to register under the

96 De Lissa note 79 *supra* p viii.

97 Hall note 13 *supra* pp 189-90.

98 *Trustees Companies' Act* 1888 (Vic); *Life Assurance Companies Act* 1873 (Vic); *Mining Companies Act* 1871 (Vic), discussed further below.

99 *Companies Statute* 1864 (Vic) s 41.

100 See *Reconstructed Companies Act* 1893 (Vic). The three banks originally incorporated by private Act were the Bank of Victoria (17 Vict 1854), the Colonial Bank of Australasia (19 Vict 1856) and the National Bank of Australasia (22 Vict No 74 1859).

101 *Report of the Royal Commission appointed to inquire into and report upon the operation of the Companies Acts 1864 and 1881 in relation to the business of banking in Victoria, V&P LA (1887) Vol III No 65.*

Companies Statute without having to go through the formalities of winding up and re-registration.¹⁰² Incorporation under the *Companies Statute* offered the banks the advantage of freeing them from the restrictions commonly found in their Charters and private Acts, such as those controlling the value of their note issues and preventing them from opening branches outside their home colonies.¹⁰³ A bill had once before been introduced into Parliament to facilitate the registration of existing banks under the *Companies Statute*, but it had lapsed without being debated.¹⁰⁴

The Commission recommended that all banks should be allowed to lend directly on the security of land, regardless of prohibitions in their Charters or incorporating Acts. This restriction had long been included in private bank Acts and Charters, but banks which were incorporated under the *Companies Statute* were not subject to it, and even banks to which it did apply had reduced it to a nullity by well-established practices of evasion. A bank could validly take real security for an antecedent debt,¹⁰⁵ and therefore money was customarily lent by a bank in advance of a mortgage of land being given, but really as part of the same transaction.¹⁰⁶ Recommending the removal of the old restriction, the Commission gave what might stand as an epitaph for the banks which failed in 1893:

In England, the provision might be a prudential one. But here a landed estate is always marketable, subject only to the rise and fall in value.¹⁰⁷

The recommendations of the Commission were embodied in two Acts passed in 1888.¹⁰⁸ The evasion of the old rule against a bank lending on security of land makes it difficult to determine the effect of the 1888 provision permitting such loans. The measure finally and clearly removed any legal obstacles to direct participation by the banks in lending on such security, but it commenced operation only in December 1888, after the peak of the boom had passed.

C. ADMINISTRATION

The Registrar-General's office, responsible for maintaining the register of companies under the *Companies Statute* and keeping the information the Statute required companies to file, had become hopelessly mismanaged by 1887. A board was appointed to investigate irregularities in the control of duty stamps in the Office, and its report in 1889 revealed, in addition to other bungling and speculation, the disappearance of 74 memorandums of association, including those of the National Trustees, Executors and Agency Co Ltd and the Stock

102 *Ibid* pp vi-viii.

103 *Ibid* p 31.

104 Victoria, Parliament Bills Introduced ("BI") LA (1882-3) Companies Statute 1864 Amendment Bill.

105 *National Bank of Australasia v Cherry & Ors* (1870) 3 LR (PC) 299.

106 Report of Royal Commission on Banking note 101 *supra* evidence pp 31-2 (FG Moule), and similar evidence from other witnesses.

107 *Ibid* p vi.

108 *Banks and Currency Amendment Statute* 1887 (so entitled by s 1, although enacted 1888); *Banking Companies' Registration Act* 1888.

Exchange of Melbourne Co Ltd.¹⁰⁹ Legislation was eventually passed to allow the substitution of copies for documents which had gone missing from the Office.¹¹⁰

In these circumstances, filing of such information as had to be provided by companies under the *Companies Statute* was also likely to be lax, and a question was asked in Parliament in December 1888 prompted by complaints that companies were not complying with the requirements of the Statute. The Attorney-General replied that 286 companies were in default under these provisions.¹¹¹ The issue was not pursued further at this stage, but an unpublished return to the Legislative Council in 1893 showed that, of the 1163 companies registered from the beginning of 1887 to the middle of 1893, only 466 complied with the reporting requirements of the companies legislation, while 153 afterwards lodged 'some returns'.¹¹² Some of the companies not complying had doubtless become defunct since registration, but it is evident that serious shortcomings remained in the enforcement of the statutory disclosure requirements, such as they were.

D. FORMATION

The facts which lay behind the formation of a company were easily concealed from those who were invited to invest in it. In particular, land companies were sometimes formed to acquire properties from their directors or promoters at large profits, the facts of the directors' interest not being revealed to investors at the time or even at all. A leading article in *The Argus* in June 1888 described this practice, suggesting that it had developed only within the last twelve months. As the year went on, *The Argus* became more specific, giving details of one transaction by the Land Investment and Building Society of Melbourne Limited as an example.¹¹³ With the decline of land prices, these transactions took on the added aspect of relieving directors of their 'bad bargains'.¹¹⁴ This might well involve breaches of the duties of directors and promoters under existing law, as *The Argus* pointed out at the time:

The promoter or intermediary is entitled to no secret recompense, but his remuneration, whatever it may be, is to be given openly.¹¹⁵

A sobering note in *The Argus* was its warning for the future if these abuses got out of hand:

¹⁰⁹ *V&P LA* (1889) Vol 2 No 6 pp vii-viii, 189-91.

¹¹⁰ *Companies Documents Act* 1895 (Vic); *PD* (1894-5) pp 2161, 2237-8.

¹¹¹ *PD* (1888) pp 2594-5.

¹¹² *PD* (1896) p 1637.

¹¹³ *Argus* (20 December 1888) p 6; and (7 January 1889) p 4 gives another example, from the Royal Standard Investment Company.

¹¹⁴ *Ibid* (7 January 1889) p 4.

¹¹⁵ *Ibid* (27 June 1888) p 6; also (28 November 1888) p 6: "it is probable that some of the practices we have mentioned are outside the law as it stands"; and (20 December 1888) p 6. See also De Lissa note 79 *supra* pp 17-20; HB Buckley *The Law and Practice under the Companies Acts, 1862 to 1893, and the Life Assurance Companies Acts, 1870 to 1872* (6th ed, 1891) p 577.

the exposure of one or two bad cases will then cause a reaction against the system. ...ugly risks are run when we allow enormous profits to be passed on secretly to the promoter.¹¹⁶

In the case of the Land Investment and Building Society, the details of the transaction were revealed, and the directors accounted for their clandestine profit. However, the difficulties of discovering the facts, making out all the elements of a cause of action, and avoiding subsequent ratification by a majority of shareholders, could be insuperable for any shareholder attempting legal proceedings in reliance on these duties. The capacity of shareholders to sue as individuals was limited by the rule in *Foss v Harbottle*,¹¹⁷ itself a case of alleged wrongdoing by directors in which individual shareholders were denied relief. In *Nankivell v Benjamin*,¹¹⁸ a shareholder in the Imperial Banking Company brought an action on behalf of himself and all other shareholders other than the defendants, against the directors, a vendor of land to the company, and the company itself. He claimed restitution, declarations and an injunction, in connection with two land transactions carried out by the company without proper authority and one instance of shares being paid up by means of an 'advance' from the company. The action failed on each point for procedural reasons, although at least one of the transactions alleged, the payment of capital by book-entry, was clearly invalid. The claims for the declarations and injunction failed because other parties to the transactions were not made parties to the action, while the claim for restitution failed because the proper plaintiff was the company, not the individual shareholder.

Another problem was the freedom of companies to call themselves 'banks', no matter what the true nature of their business. The British Bank of Australia, the Anglo-Australian Bank, the Melbourne Joint Stock Bank and the Imperial Banking Company were all land companies, as were many others which called themselves 'land banks' or 'mortgage banks'.¹¹⁹

The 1864 Act contained no section corresponding to the later requirement for a statutory report and meeting of shareholders after the formation of the company, although it did require shareholders' meetings to be held at least once every six months.¹²⁰ In some cases, outrageous transactions were carried out in the name of the company immediately after its formation without the shareholders' knowledge. The Royal Standard Investment Company, for example, was reported to have purchased £330,000 worth of properties from its directors, and companies managed by them, on the day after it was registered, its shareholders being 'totally ignorant' of the transactions.¹²¹

116 *Argus* (27 June 1888) p 6; also (20 December 1888) p 6: "conduct which, if allowed to continue unchecked, is likely to bring incalculable loss upon the community".

117 (1843) 67 ER 189.

118 (1892) 18 VLR 543.

119 *AIBR* (18 April 1892) pp 247, 266; Boehm note 1 *supra* p 263; Cannon note 9 *supra* p 254; Turner note 7 *supra* Vol II p 305.

120 *Companies Statute 1864* (Vic) s 47.

121 *Argus* (7 January 1889) p 4.

E. MISREPRESENTATION

Civil and criminal actions could lie in some circumstances for misstatements by directors and promoters. The English law concerning civil actions for misstatements, which was followed in Victoria, allowed an action for deceit to be brought against the maker of the statement, in which damages could be claimed. Where a contract was involved, it was also possible for a party to the contract to bring an action for rescission on grounds of misrepresentation.¹²²

Proof of several elements was required before an action for deceit could succeed. The action was not available for failure to state relevant information, unless that failure rendered a positive statement false.¹²³ The plaintiff had to demonstrate the defendant's intention that the plaintiff should act on the statement as he or she did in fact act. It had also to be shown that the misstatement was material according to an objective standard, and that it had in fact induced the plaintiff to alter his or her position in reliance on it. One of the most important requirements was proof of the defendant's actual dishonesty, or fraud, in the form of knowledge of the falsity of the statement made or recklessness as to its truth. A merely negligent misstatement was not actionable. There had been a tendency in some English decisions to reduce the stringency of this rule, but it was clarified and entrenched by the decision of the House of Lords in *Derry v Peek* in 1889.¹²⁴ As the *Australian Law Times* said of actions for fraud in prospectuses:

although this is law, in practice it is difficult for a solitary shareholder, or even for a number of them, to set it into operation; the defendants in these cases have, as a rule, all the best of it.¹²⁵

The dangerous narrowness of the law, and the difficulty of bringing a successful action against a dishonest director or promoter, were well recognized at the time in England, even in *Derry v Peek* itself, and remedial legislation was passed there in 1890.¹²⁶ Even then, the legislation applied only to misstatements in prospectuses, and, like the action for deceit, it gave no remedy in cases of mere omission to state information. It did, however, introduce important changes, by making some misrepresentations actionable in the absence of fraud and creating statutory presumptions which the defendant had to displace in order to succeed.¹²⁷ This legislation was not followed in Victoria until 1896, with the result that the strict rule in *Derry v Peek* governed actions for deceit throughout the worst excesses of the boom and its aftermath.

122 *Ballantyne v Raphael* (1889) 15 VLR 538, illustrated the remedy of rescission for misrepresentation, and its limitations, in a case of a speculative sale of land to an unincorporated syndicate.

123 GS Bower *The Directors Liability Act 1890* (1890) pp 32, 45.

124 (1889) 14 App Cas 337; Bower note 123 *supra* p 34.

125 *Australian Law Times* (30 March 1889) p CXXXIX.

126 Note 123 *supra* pp 40-1; *Directors' Liability Act 1890* (UK).

127 Note 123 *supra* pp 4-5, 41-2. Buckley and Clanson's opinion in 1897 was that the act of 1890 had proved a dead letter, its only apparent result being to add a few words to the standard waiver clause for prospectuses: HB Buckley and AC Clanson *The Law and Practice under the Companies Acts* (7th ed, 1897) p iii.

The remedy of rescission could be available if a misrepresentation induced a shareholder to enter a contract to subscribe for shares.¹²⁸ However, the shareholder had to satisfy the ordinary requirements for rescission of contract in order to gain the advantage of this remedy, which could be difficult in the circumstances of company flotation. Since the contracting party was the company, a misrepresentation not made on the company's behalf gave no grounds for rescission. So, for example, it was held in the Supreme Court that where the misrepresentation was by provisional directors who advised the shareholders to apply for shares, posing as disinterested advisers and concealing the fact that they were vendors to the company, the shareholders' only remedy, if any, was against the provisional directors, not the company, and rescission was unavailable.¹²⁹ Even if the misrepresentation were made on behalf of the company, rescission was subject to equitable restrictions, and could be refused because of delay, for example, or the commencement of winding up.¹³⁰ The company itself might be able to rescind contracts made by it for the purchase of property from promoters, but this was strictly the remedy of the company and not the individual shareholders, and the right to rely on it was restricted accordingly.¹³¹ Even when available, rescission provided only restitution, not damages.

F. CAPITAL

Abuses in connection with the capital of land boom companies were also reported. Paid-up capital was sometimes created by a series of book entries, in the form of a notional advance to shareholders, either from the company itself or from another in the same group, which was then notionally received back from the shareholders as a contribution of capital. The Land Credit Bank provided one of the most notorious examples of this practice.¹³² It was also an easy matter for the capital of a company, often advertised as a high figure to indicate the venture's security, to be issued in consideration of property supplied by the promoters at a dubious valuation, or in consideration of their services.

It was established by the decision of the House of Lords in *Trevor v Whitworth* in 1887¹³³ that a company could not legally purchase its own shares, even if its memorandum and articles expressly purported to authorise it to do so.

128 See generally Bower note 123 *supra* pp 4-5, 188; a subsidiary remedy was rectification of the company's register under s 35 of the *Companies Act* 1862 (UK) (s 36 of the *Companies Act* 1890 (Vic)).

129 *Whittlesea Land Co v Gutheil* (1892) 180 VLR 557 at 558-9.

130 *Ibid* at 560-2.

131 *Ibid* at 559-60; A'Beckett J doubted whether rescission of the contract for purchase of property and the contract for shares could be available together in the same case, because it was difficult to see how the company could be both deceiver (in the case of the contract for shares) and deceived (in the case of the purchase contract). See also Buckley note 115 *supra* p 577.

132 *Argus* (26 October 1891) p 4, (27 February 1892) p 6, (24 May 1892) p 4; Turner note 7 *supra* Vol II p 306. See also the example in *In re Colonial Investment and Agency Co (in liq)* (1893) 19 VLR 381 at 382-3, 387.

133 (1887) 12 App Cas 409.

This rule was based on various grounds, among them that such a purchase would amount to a reduction of capital without the necessary court approval.¹³⁴ However, only a civil action would lie for breach of the rule. Such an action would be subject to requirements of standing, and the practical limitations on the plaintiff's ability to obtain information and make out a case. There was also great difficulty in taking timely action to deal with a case of breach and obtain a worthwhile remedy. The result was the widespread flouting of the rule, if not directly, then by the use of 'dummy' purchasers who carried out dealings in the company's shares on its behalf. The Mercantile Bank and the Federal Bank both traded in their own shares through nominees, in order to bolster falling prices.¹³⁵

G. MANAGEMENT, ACCOUNTS AND AUDIT

Any general duties of care owed by directors were left to common law under the 1864 Statute. These duties were not easy to enforce, and their content was obscure. Directors were fiduciaries, but they were under much less stringent duties than ordinary trustees.¹³⁶ In principle, directors could be held liable for negligence, but as one Australian text observed in 1894, the negligence would have to be of a 'gross character', and the cases which had come before the courts on this ground had involved not just negligence, but breaches of the company's articles as well.¹³⁷ Where a company was wound up under Part I of the *Companies Act*, the court was empowered, on the application of any liquidator, creditor or contributor of the company, to make an order for restitution and damages against any director or officer of the company who had misapplied or become accountable for any company moneys, or was guilty of misfeasance or breach of trust in relation to the company.¹³⁸

Of special concern were loans made to directors, which were subject to virtually no restrictions, and the payment of dividends from dubious profits. There was no express statutory prohibition of the payment of dividends other than from profits, but it was common for a provision to this effect to be included in articles of association; case law also established that such a payment, as a depletion of the capital of the company, was a breach of trust and could be restrained by injunction regardless of the provisions of the articles.¹³⁹ As with other clearly-established common law controls on companies at this time, like those concerning secret profits by directors, problems of enforcement greatly

134 Buckley note 127 *supra* pp 584-6; FB Palmer *Company Law: a Practical Handbook for Lawyers and Business Men* (2nd ed, 1898) p 46; De Lissa note 79 *supra* p 23.

135 *Economist* (8 October 1892) p 1266; *In re Federal Bank of Australia Ltd* (1894) 20 VLR 199 at 203-4. See also *In re Colonial Investment and Agency Co (in liq)* (1893) 19 VLR 381.

136 Buckley note 115 *supra* pp 495-9.

137 De Lissa note 79 *supra* p 25; cf Buckley *ibid* pp 497-8.

138 *Companies Act* 1890 (Vic) s 152.

139 *PD* (1895-6) p 43 (Isaacs); *Companies Act* 1890 (Vic), Second Schedule, Table A, art 73; Buckley note 115 *supra* p 499; *Phillips v Melbourne and Castlemaine Soap and Candle Company Limited* (1890) 16 VLR 111.

reduced the effect of this rule, which was also dependent on accounting standards and auditing practice in defining and identifying profits.

The Mercantile Bank and the Federal Bank provide the best-known examples of these abuses. Both were incorporated under the *Companies Statute 1864*.¹⁴⁰ The directors of the Mercantile Bank, whose chairman was the Speaker of the Legislative Assembly, Sir Matthew Davies, presented accounts showing an 8 per cent dividend from healthy profits only a fortnight before the bank's suspension with enormous accumulated losses. It was reported that the bank had advanced £600,000 to other companies in the Davies group, or on security of their shares.¹⁴¹ In the Supreme Court, Holroyd J found that the Federal Bank had made advances to its directors and their associates on insufficient, worthless or purely speculative security, that some of the directors speculated 'largely and recklessly' with the bank's money, and that there was a system of 'mutual accommodation' by which directors approved advances to each other. He concluded:

On the whole, a careful perusal of the evidence must induce a strong impression that the bank was used by a majority at least of the directors for their own convenience and that of their friends.¹⁴²

The directors and their associates also inflated the apparent deposits of the bank, and reduced their overdrafts, by paying in large sums of money before balance day and drawing them out almost immediately afterwards.¹⁴³

The practices of boom companies represented attempts both to profit further from the land boom while it was still proceeding, and to stave off financial collapse when land prices fell. A common scenario was reported by *The Argus*, in recounting the history of the Colonial Investment and Finance Company. During the course of the land boom, the company bought properties, revalued them upwards as the general rise in land prices continued, and counted these unrealised gains as profits, which were distributed in dividends. When land prices fell, the properties were not revalued downwards, and the declaration and distribution of profits continued. These dividends were paid from new deposits received from the public. As its position finally became hopeless, the company mortgaged everything it owned 'to the hilt' and collapsed.¹⁴⁴

The Economist described the affairs of the Freehold Investment and Banking Company of Australia for the benefit of English readers after a progress report was published by the company's liquidators. The directors, *The Economist* said:

have systematically manufactured profits by forming subsidiary companies to take properties at greatly enhanced prices, and by charging interest upon the unpaid purchase money. In four instances large transactions were completed on the very day of the balancing, and profits were anticipated. The rottenness proves to have

140 See *In re Mercantile Bank of Australia* [1892] 2 Ch 204; *Re Federal Bank of Australia Ltd* (1893) 68 LTR (NS) 728.

141 *Argus* (19 August 1892) pp 4-5, (7 October 1892) p 4.

142 *In re Federal Bank of Australia Ltd* note 135 *supra* at 203-4.

143 *Ibid* at 203, 207.

144 *Argus* (1 September 1892) p 4.

been something beyond conception, and the money of shareholders and depositors has been recklessly lost in the hopeless attempt to bolster up inflation.¹⁴⁵

The liquidators judged that the company had made losses during the last five half-years before suspension, and that the healthy dividends paid during that time had come from deposits. £67,000 of the £111,000 paid in dividends in this way had gone to the directors.¹⁴⁶

The effect of deficiencies in controls on management went hand-in-hand with weaknesses in the system of audit, and many of the cases mentioned reflect a combination of the two. There was no statutory requirement for companies to keep accounts, still less for them to be audited, although audit was customary.¹⁴⁷ In *Leeds Estate, Building and Investment Co v Shepherd*, in 1887,¹⁴⁸ Stirling J, in the Chancery Division, stated auditors' obligations in wide terms, saying that it was their duty not to confine themselves to the arithmetical accuracy of the balance sheet, but to inquire into its substantive accuracy, and to ascertain that it contained the particulars required by the articles of association and was properly drawn up so as to contain a true and correct representation of the state of the company's affairs. The Court of Appeal endorsed similar principles in *Re London and General Bank (No. 2)*, in 1895.¹⁴⁹

Auditing practice in Melbourne was a far cry from this ideal, and was widely condemned after the deceptions of boom companies were revealed.¹⁵⁰ One of the auditors of the City of Melbourne Bank, a company whose balance sheets were so misleading as to give rise to criminal charges in 1896, said:

we were always satisfied with the manager's explanations as to securities, because we had no power concerning them.¹⁵¹

Too often auditors failed to do more than check the arithmetical accuracy of the books and balance sheet, or were incompetent, or associates of the directors, or even debtors of the company. Many important facts about the management of boom companies were discovered by shareholders, not in annual meetings or reports, but only through newspapers (such as *Table Talk*), rumour, or disclosures when the companies collapsed.

Some of the working of the system of audit is illustrated by the example, admittedly extreme, of the Mercantile Bank. When it collapsed, the liquidators discovered a discrepancy of over £800,000 between its actual net assets and those stated in the latest balance sheet. It turned out that the auditors, solicitors and accountant were all substantially in debt to the bank.¹⁵² This was a

145 *Economist* (12 November 1892) p 1419.

146 *Argus* (21 September 1892) p 5, (22 September 1892) p 4, (26 September 1892) p 4.

147 *PD* (1892-3) p 529; cf *Companies Act* 1890 (Vic), Second Schedule, Table A, arts 78-94.

148 (1887) 36 Ch D 787 at 802.

149 [1895] 2 Ch 673; see generally Buckley note 127 *supra* pp 687-8.

150 *Argus* (7 February 1890) p 6, (7 November 1895) p 4; *PD* (1892-3) pp 529, 792-5, (1895-6) p 2609.

151 *Age* (7 April 1896) p 4.

152 *Argus* (19 August 1892) p 4, (7 October 1892) p 4; *Economist* (8 October 1892) p 1266.

company which *The Argus* described on its suspension as having the standing and reputation of a properly-organised bank.¹⁵³

H. CRIMINAL LIABILITY

Criminal liability of company officers rested on the general criminal law, as supplemented by special legislative provisions. Mining companies aside, the relevant special provisions were brought together in the consolidated *Crimes Act* of 1890. This Act created an offence of falsification by a clerk, officer or servant (whether of a company or not) of accounts belonging to his or her employer, and separate offences applying specifically to directors, members, managers and officers of companies. These offences covered embezzlement, falsification of books, publication of fraudulent statements, and failure to call meetings required by law or company rules.¹⁵⁴ There was also a general offence of falsification of company accounts affecting any pecuniary obligation.¹⁵⁵ These sections applied in addition to civil remedies,¹⁵⁶ and the general law of theft. The *Companies Act* contained a separate offence of falsification of company books, which applied where companies were being wound up.¹⁵⁷ The court was authorised to institute criminal proceedings against directors, officers and members of companies wound up by the court or under its supervision, while the liquidators could bring such proceedings where a company was being wound up voluntarily, the costs to be borne in both cases by the assets of the company.¹⁵⁸

The Mercantile Bank prosecutions illustrated some of the weaknesses of the law imposing criminal liability on directors. Despite the gross abuses which marked the running of the bank in the period leading to its suspension of payment, including the falsity of successive balance sheets, none of the charges against officers of the company succeeded.¹⁵⁹ There was particular difficulty in bringing the responsibility for misstatements home to individual controllers of a company. In addition, where a company did not go into liquidation under the supervision of the court, it could be very difficult for anyone outside the company to get the initial evidence from which an investigation and prosecution might proceed.

I. WINDING UP

When a company was wound up voluntarily, the *Companies Act* imposed few direct controls on the actions of liquidators. Although shareholders retained overall control of the process, there was no statutory requirement for any

153 *Argus* (7 March 1892) p 4.

154 *Crimes Act* 1890 ss 143-4, 156-62.

155 *Ibid* s 163.

156 *Ibid* s 161.

157 *Companies Act* 1890 (Vic) s 153.

158 *Ibid* ss 154-5.

159 Cannon note 9 *supra* p 330 ff.

meeting of shareholders or report by liquidators during the progress of the winding up until a year had elapsed, although meetings had to be held at the commencement and completion of liquidation.¹⁶⁰ Nor was there any limit on the time the winding up could take.¹⁶¹

Supervision of the voluntary winding up by shareholders was hindered by lack of information. Liquidators in a voluntary winding up could be officers of the company, with an interest in concealing those parts of its affairs which would attract criticism. In the case of the Metropolitan Bank, for example, in which directors held over one-third of the shares, the liquidators were two directors, the manager and a large shareholder; a motion for an investigation into the affairs of the company was defeated at the initial meeting; the liquidators called a meeting to report only after a year, and then without circularising shareholders; and the financial statements shown at the meeting were unaudited, and shareholders who could not attend were refused permission to see them.¹⁶² In the Freehold Investment and Banking Company, the liquidators were initially the managing director, the company secretary, the company's London manager, and the managing director's private secretary:

the power was therefore placed in the hands of men who were but certainly more or less responsible for the company's failure.¹⁶³

At the end of the liquidation, the entire body of the books and records of the company could be destroyed with impunity. Under the *Companies Act*, if a company was wound up voluntarily without court supervision, the books were disposed of as an extraordinary meeting directed.¹⁶⁴ In the case of the Royal Financial Property Company Limited, one of the Davies companies, the liquidator destroyed all records of the company and the liquidation, on the authority of a meeting at which he was the only person present, holding proxies from the five shareholders. The records destroyed included the minute-book and proxies for the meeting itself.¹⁶⁵

J. INVESTIGATIONS

Existing law allowed the Governor in Council to appoint investigators into a company's affairs on the application of shareholders holding at least one fifth of the issued shares. However, the *Companies Act* stated that applicants for such an investigation could be required to show good reason for the application, satisfy the Governor in Council that they were not actuated by malice, and produce security for costs, which were to be borne by the applicants unless the Governor in Council ordered them to be paid from the company's assets.¹⁶⁶

160 *Companies Act* 1890 (Vic) ss 114, 119, 125, 128.

161 De Lissa note 79 *supra* p 284.

162 Cannon note 9 *supra* p 220.

163 *Economist* (8 October 1892) p 1265.

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

165 *Argus* (4 April 1895) p 4.

166 *Companies Act* 1890 (Vic) ss 57-60.

Partly, no doubt, because of this, and partly because of the difficulty of getting together the requisite proportion of shareholders, it appears that no inspectors were ever appointed under the Act.¹⁶⁷

Such investigations as there were into company affairs after the land boom were carried out in connection with winding up rather than under such provisions as these. The work was done by committees of investigation under the supervision of shareholders (as in the case of the Mercantile Bank, at one stage in its winding up),¹⁶⁸ by the liquidators, or by the court, when winding up was being conducted by the court or under its supervision. In the case of the City of Melbourne Bank, for example, the Supreme Court commissioned Judge Molesworth of the Insolvency Court to enquire into the company's affairs, while, in the case of the Federal Bank, the parties to proceedings for the removal of the liquidator gave their consent to an investigation by an independent accountant, at the suggestion of the judge hearing the removal proceedings.¹⁶⁹

K. MINING COMPANIES

The directors of mining companies were required to prepare a full report of the "state and prospects and of the assets and liabilities of the company" before each general meeting, and make it available for creditors and members to inspect.¹⁷⁰ These companies were also required by statute to keep books of account, to file half-yearly statements with the Registrar-General, and to keep their accounts open for inspection by shareholders and creditors.¹⁷¹ They were expressly prohibited from paying dividends except from profits, and their directors were fixed with criminal and civil liability if they wilfully permitted a dividend to be paid in contravention of this rule.¹⁷² A series of offences created criminal liability for breaches of liquidators', managers' and directors' duties under the legislation, and for the making of certain false statements in company affairs.¹⁷³

Taken together, and compared with the state of controls on companies generally in this period, these provisions are a striking early example of stricter company regulation. Most were introduced by the *Mining Companies Act 1871* (Vic), and went well beyond general company law in Australia and the United Kingdom at the time. It may even be that these controls contributed to a lower level of maladministration among mining companies. Certainly by far the majority of the abuses in company administration complained of in the 1880s and 1890s concerned companies other than mining companies. This was

167 *PD* (1896) pp 250-1.

168 *Argus* (19 August 1892) pp 4-5.

169 *Argus* (18 March 1896) p 4; Cannon note 9 *supra* p 225; cf *Companies Statute 1864* (Vic) s 106; *In re Federal Bank of Australia Ltd* note 135 *supra* at 202.

170 *Companies Act 1890* (Vic) s 212.

171 *Ibid* ss 223-5.

172 *Ibid* s 236.

173 *Ibid* ss 324-33.

despite the large number of mining companies in Victoria, and the occurrence of at least two periods of intense speculation in mining shares during the worst of the dishonesty and sharp practice among land and finance companies. This is not to say that there were no abuses in the operation of mining companies; the abortive attempts made by the new Minister for Mines to reform mining company law in 1891 indicate that there were.¹⁷⁴ However, the extent and effects of these abuses were slight by comparison with events in connection with trading companies.

VII. THE REFORM OF COMPANY LAW

Comments made in 1888 and the following years showed awareness of many of the practices of boom companies, and called for remedial legislation. Discussion included the problems of disclosure of relevant facts and promoters' interests in prospectuses, misleading advertisements of capital, the issuing of shares to vendors, secret profits by promoters and directors, the prices paid for property acquired by new companies (especially for goodwill), and the system of company audit.¹⁷⁵

It was in 1891 that steps began in Parliament towards a general reform of company law in response to the events of the boom and its aftermath, after abortive questions and suggestions in earlier years.¹⁷⁶ In 1891, the Legislative Council passed a Directors' Liability Bill increasing the liability of directors (modelled on the English Act of 1890). The Legislative Assembly, through the influence of land boomers or for other reasons, allowed it to lapse.¹⁷⁷ In 1891, 1892 and 1893, the Council also debated more general companies bills which significantly increased controls on company promoters and management. In 1892 and 1893, these bills were passed by the Council with their regulatory provisions substantially intact, but they failed to make any progress in the Assembly.¹⁷⁸ The last of these was reintroduced into the Assembly as a government bill in 1894, but proceeded no further than the motion for its second reading.¹⁷⁹

174 *Argus* (21 January 1891) pp 4-5, (2 February 1891) p 6, (4 March 1891) p 6, (4 April 1891) p 9, (1 January 1892) p 7; *AIBR* (17 February 1891) p 77, (19 October 1891) pp 740-1; *PD* (1892-3) p 444; *BI LA* (1892-3) p iv.

175 For examples see *Argus* (20 Apr 1888) p 6; (27 Jun 1888) pp 6-7; (29 Jun 1888) p 6; (14 Sep 1888) p 6; (28 Nov 1888) p 6; (7 Jan 1889) p 4; (19 Feb 1889) p 6; (13 Mar 1889) p 6; (7 Feb 1890) p 6; (11 Jun 1890) p 6.

176 *PD* (1888) pp 1077-8, 1311; (1890) pp 308, 593.

177 *PD* (1891) pp 1777, 2044, 2957, 2961. *Table Talk* (18 Sep 1891) p 4 reported that the bill had earlier been circulated by another MP, Frank Stuart, but it seems Stuart's bill was never formally introduced into Parliament.

178 The relevant Legislative Council bills were, in 1891, Companies' Act 1890 Amendment Bill (No 2); 1892-3, Companies Act 1890 Amendment Bill; 1893, Companies Act 1890 Further Amendment Bill. See also *PD* (1891) pp 2885, 3429; (1892-3) pp 3021, 3075, 4369.

179 Companies Act 1890 Further Amendment Bill (LA); *PD* (1894) pp 768-76.

In 1894 the Turner liberal government took office, and the Attorney-General, Isaac Isaacs, the future High Court justice and Governor-General, began a wide program of law reform which included new legislation on company law. Isaacs had shown his support for company law reform in his maiden speech in the Legislative Assembly, in 1892:

The country, I feel sure, will welcome any amendment of our laws which will effectually prevent a repetition of those shameful and barefaced frauds which have disgraced the community. We know that hundreds of deserving men, and hundreds of families, have been reduced to poverty and distress by frauds that ought never to have been permitted in any community...¹⁸⁰

In 1893, Isaacs had resigned as Solicitor-General in the Patterson ministry over its refusal to proceed with prosecutions of the officers of the Mercantile Bank, including Sir Matthew Davies, in connection with the management of the bank's affairs in the period before its collapse in 1892.¹⁸¹

The first companies bill Isaacs introduced, in 1894, made little progress; protracted debate and amendment of further bills ground on through 1895 and 1896.¹⁸² The Assembly and the Council reached deadlock over disputed clauses of the bill, not for the first time, at the very end of 1896, on 23 December, just before Parliament was to be prorogued. Failure to pass now would mean starting the whole process yet again, at least in the Council.¹⁸³ Isaacs recommended agreeing to the Council's amendments, and the bill became law as the *Companies Act* 1896.¹⁸⁴

The Act of 1896 represented a striking reversal of the laissez-faire policy of existing companies legislation. Among the changes it introduced were compulsory audit by certified auditors under a statutory duty to verify the substantive accuracy of the accounts; requirements for the audited balance sheet to set out prescribed information and be filed with the Registrar-General, posted up and sent to every shareholder; new statutory duties and liabilities for directors and auditors, set out at length; special audit by court order on the application of shareholders; controls on misleading statements, company names (including the use of the word 'bank'), advances on a company's own shares, company mortgages, allotment of shares, and transfers to avoid liability; the registration of companies formed in other jurisdictions; and lengthy new provisions on winding up.

The passage of the 1896 Act was marked by a fierce dispute over the actions of the Legislative Council. Because of its opposition to the Turner government's companies bills, the Council was branded by some as a reactionary club of

180 *PD* (1892-3) p 17.

181 Z Cowen *Isaac Isaacs* (1967) pp 30-6; Cannon note 9 *supra* pp 331-43.

182 The principal bills in the Assembly were, in 1894, Companies Act 1890 Further Amendment Bill; 1895-6, Companies Act 1890 Further Amendment Bill (No 1) and Companies Act 1890 Further Amendment Bill (No 3); 1896, Companies Act 1890 Further Amendment Bill.

183 Legislative Assembly Standing Orders would have allowed the bill to be restored to the stage it reached at the end of the session. See what is now Standing Order 167, whose predecessor was approved on 27 February 1896.

184 *PD* (1896) pp 4918-21, 4954, 4956.

company directors who would do everything in their power to frustrate reform. The number of company directors it contained was cited angrily by *The Age*, which railed against the obstructiveness of the Upper House:

thanks to a House composed of men personally interested in maintaining loose conditions, the Victorian people have to see their law continue in the old state of disreputable insecurity to the investing public.¹⁸⁵

Friends of the Council replied in kind,¹⁸⁶ but there were indeed many company directors among the members of the Upper House: 30 out of the total of 48, according to a list published in *The Age*.¹⁸⁷

The Council did contain die-hard conservative opponents of statutory controls, such as Nicholas FitzGerald, whose indignation ran away with him when debating one clause:

he thought the clause cast a slur, which was entirely undeserved, upon the directors of companies in this city, by saying that they should only declare dividends out of profits.¹⁸⁸

Some controls introduced with recent abuses in mind were weakened by the Council's many amendments. For example, the Council removed the requirement for a prospectus to give particulars of the nature and effect of contracts relating to the company, and all other material facts.¹⁸⁹ A requirement for six-monthly returns of advances to company officers was restricted by the Council to banks, and a clause prohibiting advances to bank officers was amended so as not to apply to advances to directors.¹⁹⁰ The number of shareholders needed for an application for special audit was increased, and creditors were no longer able to apply.¹⁹¹

Notwithstanding this, however, political attitudes to company law reform were more complex than the dispute over the Council's actions suggested. For example, one of the company directors listed in *The Age's* indictment of the Council was Agar Wynne, the leader of the early effort to reform company law. Putting aside the unsuccessful attempt to reform mining company law in 1891, it was in the Council that the first major steps were taken towards new companies legislation in this period.

185 *Age* (23 December 1896) p 4, written before the Assembly capitulated to the Council's demands.

186 Australasian National League (Victorian Section) "A Few Facts about the Legislative Council and the Companies Bill" (1896); *Id* "Does the Legislative Council Obstruct Useful Legislation?" (1896).

187 *Age* (16 March 1896) p 5.

188 *PD* (1895-6) p 6152.

189 Companies Act 1890 Further Amendment Bill, printed for the information of members of the Legislative Assembly, showing the effect of amendments made by the Legislative Council, in Legislative Assembly, *Bills Introduced* (1896) p 387 f ("1896 Bill Information Copy"), cl 102(1)(b); Companies Act 1896 s 104(1)(b).

190 1896 Bill Information Copy cll 45-6; *Companies Act 1896* (Vic) ss 45-6. The Associated Banks worked behind the scenes to achieve the latter amendment, and others: letter from John Sawers, Superintendent, to Manager, London (1 December 1896), A/8/80, no 3444, p 5, Superintendent's Letters, Bank of Australasia, ANZ Group Archive. See also *ibid* nos 3409, 3477, 3449 and 3451.

191 1896 Bill Information Copy cl 37; *Companies Act 1896* (Vic) s 37.

While this was partly the work of Legislative Councillors with liberal sympathies, such as Wynne,¹⁹² one aspect of the conservatism of some other members was a commitment to conservative commercial morality, even to the extent of statutory regulation. This is reminiscent of the hostility in some English commercial circles to limited liability in the 1850s. The Manchester Chamber of Commerce, for instance, opposed limited liability as being 'subversive of that high moral responsibility which has hitherto distinguished our Partnership Laws'.¹⁹³ The Victorian bills also included facilitating provisions which appealed to commercial interests, such as the clauses on no liability trading companies, alteration of company constitutions, reductions of capital, and branch registers.

The most important of the changes forced by the Council in 1896, the exemption of the new category of 'proprietary' companies from many provisions of the new legislation, left intact the strict new requirements on large companies and companies receiving money from the public.¹⁹⁴ The requirement for the filing of an annual financial statement by directors was struck out, but the substance of the information required, set out in a schedule, was required to be given instead in the balance sheet prepared for shareholders, which had to be audited, verified by the manager by statutory declaration, certified by the directors to give a correct view of the state of the company's affairs, and filed with the Registrar-General; the end result was therefore much the same, except that the balance sheet, unlike the statement, was not required to be prepared as at a date fixed by statute.¹⁹⁵

Political alignments on the companies bills thus cut across the contemporary division between conservatives, on the one side, and liberals and radicals, on the other. For example, the MLC who introduced the Directors' Liability Bill of 1891 was WA Zeal, a prominent businessman and a director of many companies including the National Bank.¹⁹⁶ In later debates, he advocated statutory regulation of auditors' duties, but opposed compulsory filing of accounts and statutory prohibitions on loans on the security of a company's own shares and payment of dividends other than from profits.¹⁹⁷

John Hancock and Henry Bournes Higgins, respectively labor and radical-liberal members of the Legislative Assembly, illustrate the mixed response which different provisions of the successive bills could evoke. Hancock, a determined supporter of reform, made the connection between company law and Victoria's economic disasters:

He believed that prosperity could be brought back to the colony if the people could only be got to believe that Parliament, having regard to the mistakes of the past, had placed on the statute book such legislation as would render it almost

192 *Australian Dictionary of Biography* Vol 12 p 591.

193 CA Cooke *Corporation, Trust and Company, an Essay in Legal History* (1950) p 156.

194 Cf *Companies Act* 1896 ss 2, 21(5), 23, 27, 36.

195 1896 Bill Information Copy cll 24, 25, 30; *Companies Act* 1896 (Vic) ss 24, 29, 33.

196 Note 192 *supra* pp 605-6.

197 *PD* (1892-3) pp 527, 795, 805, 1732.

impossible for a false balance sheet to be issued by a company, or for men who were nothing more than professional spielers to take the positions of directors of banks, dragging down their fellow directors with them, and trying to throw the glamour of finance over the whole thing.¹⁹⁸

In 1896, he was one of the four MLAs who voted against agreeing with the Council's amendments.¹⁹⁹

However, two of the most frequent critics of the bills in the Assembly were also supporters of the liberal Turner government: Higgins (the future High Court judge) and Theodore Fink. Higgins' radical-liberal views led him to oppose some provisions, as in the case of the no liability trading company clauses, which he stigmatized as merely creating another opportunity for commercial gambling. Where some of the other provisions of the bills were concerned, his professional familiarity with company affairs, through his work at the bar, seems to have given him some unexpected sympathy with directors and promoters. Some of his remarks about company directors would have been worthy of a dogmatic laissez-faire conservative:

They were entitled, if they were stupid, to be stupid; if they were negligent, to be negligent, as between themselves and the company, and the company must look out for themselves.²⁰⁰

His argument, though, was that of a radical, portraying shareholders as speculators who should guard their own interests:

Parliament was not going to nurse and coddle companies, and to legislate for the protection of people who went into speculations.²⁰¹

He had earlier declared his support for other reforms in company law, including the use of public auditors appointed by the state and controls on the investments of companies taking deposits from the public.²⁰²

The drafters of the 1896 Act drew on many sources in framing its 176 sections. Many of the facilitating or machinery provisions, most importantly those on winding up, came from English legislation. Some of the regulatory provisions were also adopted in this way, notably those based on the *Directors' Liability Act* 1890 (UK) and ss 25 and 38 of the *Companies Act* 1867 (UK). Provisions were also adopted from the draft companies bill of 49 clauses included in the 1895 report of the British committee chaired by Lord Davey.²⁰³ This draft bill provided models for new clauses and for new drafts of clauses which had already appeared in the earlier Victorian bills. In the case of accounts and audit, for example, the Victorian bills since 1891 had all included

198 *PD* (1896) p 199.

199 *Ibid* p 4920.

200 *PD* (1895-6) p 6235.

201 *Id.*

202 *Geelong Advertiser* (6 April 1892).

203 *PD* (1895-6) p 2572; United Kingdom, Board of Trade *Report of the Departmental Committee appointed by the Board of Trade to inquire what amendments are necessary in the Acts relating to Joint Stock Companies incorporated with limited liability under the Companies Acts, 1862 to 1890* (1895) Eyre & Spottiswoode for HMSO [C 7779].

requirements for accounts to be kept, audited and disclosed to shareholders, but the Davey report now provided a new model for clauses to achieve the same purpose. Of the clauses of the English draft bill which could have been applied in Victoria, the great majority were reflected in the 1896 Act in one form or another. Some were made stricter in the Victorian Act; for example, the Victorian legislature added requirements for mortgages of uncalled capital to be approved by a special resolution, and provided for a system of caveats in the registration of company charges.²⁰⁴

The optional articles of association in Table A of the Second Schedule to the *Companies Act* provided models for several provisions, reflecting the way in which the 1896 Act gave force of law to some requirements which had long been found in the articles of many companies. Among these were the prohibition of the payment of dividends other than from profits, the bar on directors acting as auditors, and the requirement for copies of the balance sheet to be circulated to shareholders.²⁰⁵ There were also clauses inspired by legislation in other jurisdictions, including New Zealand (on liability of experts)²⁰⁶ and Canada (limiting the companies which could call themselves banks, and preventing a company from dealing in its own shares).²⁰⁷ In all of these cases, the models used for the Victorian provisions were freely adapted and amended. Finally, there were sections unique to the Victorian legislation, some cobbled together from other Victorian Acts, others drawn up from scratch; examples include the provisions on special audit and advertisement of reserve funds.²⁰⁸

The regulatory controls in the 1896 Act were for some time the strictest in the British Empire.²⁰⁹ It was not until 1907 that the filing of balance sheets became compulsory under English law, for example, and not until 1929 that balance sheets and profit and loss statements had to be circulated to shareholders.²¹⁰ In Australia, requirements similar to those in force in Victoria for the publication of balance sheets did not apply in Tasmania until 1920, Queensland until 1931, South Australia until 1934, New South Wales until 1936, and Western Australia until 1943.²¹¹

204 *Ibid* draft bill p 171 cl 20; *Companies Act* 1896 (Vic) s 53.

205 Cf *Companies Act* 1890 (Vic), Second Schedule, Table A, arts 73, 82, 86.

206 *Promoters' and Directors' Liability Act* 1891 (NZ) s 7; cf *Companies Act* 1896 (Vic) s 118.

207 *Bank Act* 1890 (Canada) ss 64, 100; cf *Companies Act* 1896 (Vic) ss 44, 51.

208 *Companies Act* 1896 (Vic) ss 25, 36-43.

209 See United Kingdom, Board of Trade, *Comparative Analysis of the Company Laws of the United Kingdom, India, Canada, Australia, New Zealand and South Africa* (submitted to the Imperial Conference of 1907) [Cd 3589]; also 1911 [Cd 5864].

210 TR Johnston, MO Jager and RB Taylor *The Law and Practice of Company Accounting in Australia* (6th ed, 1987) p 10.

211 RW Gibson *Disclosure by Australian Companies* (1971) p 44.

VIII. CONCLUSION

There is always a certain amount of fraud, sharp practice and mismanagement in business, and it must not be thought that all the events of the 1880s and 1890s in this connection are attributable to the land boom or the state of company law. There had been bank failures before in Victoria, as with the Oriental Bank in 1884 and two small banks in 1879. Also, many of the worst misuses of depositors' and shareholders' funds were blatantly illegal even at the time, and reform of company law could not make them more so. This was the case with the Matthias Larkin frauds at the South Melbourne Building Society and GN Taylor's embezzlement from the Land Credit Bank, to take two of the most widely publicised financial scandals of 1891 as examples.²¹² Civil duties under existing law were also breached where a company purchased its own shares or paid dividends from capital, where directors took secret profits on transactions with the company, and in other transactions of the boom companies.

This said, however, it can also be seen that cases of outright illegality, sharp practice and mere bungling alike were exacerbated by features of existing law. The rudimentary statutory controls, the technical and practical restrictions on the remedies available, and the absence of effective requirements for audit, disclosure and keeping of records must have made easier the way of those tempted towards outright dishonesty in company affairs, and must sometimes have allowed other forms of mismanagement to continue.

It is not intended to make these comments a judgement on all companies of the time, or even all land and finance companies. It may well be that most companies were properly conducted in accordance with the existing law and the terms of their constitutions. However, it was sufficient to contribute to the economic events of the time that a significant number of companies, even if only a minority overall, were implicated in these abuses. These companies controlled and owed large sums, the loss of which would itself have significant economic effects, and revelations about their practices stood to have considerable influence on public confidence and investment patterns in Victoria and overseas. Hence the contemporary perception that company law contributed to the depression of the 1890s.

Could things have been different? "The theory of legal history", according to Friedman, "is that the architect of contemporary law is always contemporary fact".²¹³ As he wrote in his *History of American Law*:

despite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups.²¹⁴

212 These cases were covered in *The Argus* (December 1891).

213 LM Friedman *A History of American Law* (2nd ed, 1985) p 201.

214 *Ibid* p 19.

If, as such an approach would imply, company law in Victoria during the boom and the crash was mainly just a reflection of prevailing conditions and attitudes, it would be too much to hope that it could have made any difference to the course of events. Effect rather than cause, it would have manifested the mentality and patterns of influence of the boom years, not guided or restricted their expression in the practices of the boom companies.

Yet it is easy to see how technical weaknesses in the companies legislation inherited from the 1860s influenced the activities of companies in the 1880s and 1890s. What is more, the efforts of those who worked to reform the Victorian *Companies Act* after the boom were predicated in part on a belief that company law could in itself affect commercial practices and the life of the colony. There were those on both sides of politics who asserted that many disasters would have been avoided if the law had been different, and implied that disasters could be avoided in future if the law were changed now.²¹⁵

Some may see law as merely a particularly stylized form of politics, a continuous and transparent expression of contemporary social forces which, by implication, is incapable of having any effect of its own on anything. The history of company law in this period suggests that this would be only a partial truth at best. The effect of legal rules, and of the legal culture in which they are embedded, is not purely determined by current social or economic conditions, but sometimes influences them in turn.

215 See *PD* (1894-5) pp 159, 166; *Argus* (18 June 1896) p 6; *Age* (13 July 1894) p 4; *Australian Law Times* (20 July 1895) p XIII.