AN EXAMINATION OF AUSTRALIAN CORPORATE LAW AND REGULATION 1901-1961

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I. INTRODUCTION

One of the presently fashionable assumptions in respect to the regulation of the corporate sector is that there is a necessity both for more expansive regulatory provisions and for a better resourced bureaucracy to superintend corporate behaviour if the excesses of the recent past are not to be repeated. An enthusiastic, almost zealous, teleology prevails. We are moving from a 'barbaric' and unregulated past towards a better and more 'civilized' future. The past is 'written off' in such accounts - if only the legislators of the past had access to the information and resources we now have they would not have clung to their 'primitive' and unworkable notions of an effectively unregulated corporate sector for so long. It is also asserted by some that amongst the factors preventing earlier moves towards a more comprehensively regulated corporate sector was the strength of the commercial lobby and the vested interests of state governments in preserving the status quo.[1]

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1 The Senate Standing Committee on Constitutional and Legal Affairs inquiry into the 'Role of Parliament and the National Companies Scheme', which was chaired by Senator Tate and delivered its report in 1986, summed up the factors influencing the shape of corporate administration and regulation in Australia in the following manner:

A number of doubts have, however, recently emerged in respect to the trajectory of this teleology. The need for, or even the desirability of, a denser and more comprehensive legislative structure has been questioned by key industry groups, in particular the Business Council of Australia.[2] Experienced regulators have also recently voiced doubts as to the efficacy of the matrix of regulatory provisions which now comprise the *Corporations Law*.[3] Even amongst the legal profession, who no doubt will be one of the principal beneficiaries of the growing complexity of corporate law, (in the form of increased fees and a growth in references to them from commercial clients concerned not to fall foul of the new legislative provisions) there has been considerable criticism of the rigidity of many of the new provisions being currently imported into *Corporations Law*. These critics from within the profession have advanced the claims of 'fuzzy' law as an antidote to the type of malpractices common during the heady days of the 1980s boom. They suggest that 'fuzzy' law would add a greater bite to corporate law without adding to the complexity of the legislation.[4]

The current paper will critically examine the assumptions of many contemporary commentators as to the historical evolution of corporate law in Australia and the manner in which those assumptions impact on their

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Companies and securities regulation should be seen against a background of several underlying factors:

(a) The Commonwealth Constitution and the fact that company law was developed as a state function. There is a strong tradition of state involvement and experience in company law administration. Also, corporate affairs administration is a substantial revenue raiser for the states.

(b) Australian financial and business activity is distributed through widely separated centres and some differences in attitude and approach have grown up. Business communities value the possibility of dealing directly with a local office staffed by people who have local knowledge *The Role of Parliament and the National Companies Scheme* (1986) p 1.

2 In a recent report detailing the Business Council of Australia's ("BCA") response to the new proposals generated by the Companies and Securities Advisory Committee in relation to the desirability of the introduction of a continuous disclosure regime in Australia the following observations were made:

> The BCA concern is that in its zeal to ensure the extremes of the 80s are not repeated, the Government is about to burden productive businesses which did not play the market with rules which will make Australia a less competitive destination for legitimate investment... The fear is that draconian rules will simply ensure Australia loses capital to off-shore jurisdictions at a faster rate than now... As well the submission reflects a growing intolerance in senior business circles of the tide of 'black letter' regulation designed to cope with the events of the past, but which ignore the fragility of the investment climate. ("BCA hits at disclosure law changes" *The Australian* (7-8 March 1992)).

3 Both the Business Council of Australia and the Institute of Directors have expressed concerns as to the growing volume of legislation in respect to corporations. The BCA has voiced the opinion that 'the changes will simply add more statute detail in a situation where few have been able to catch up with the volume of new statutes introduced during the past two years' *The Australian*, 7-8 March, 1992. The concerns of the Institute of Directors with the growing bulk and complexity of the legislation is reported, at least in part, in Stephen Bartholomeusz's column in *The Age* of the 5th March, 1992.

4 A recent contribution to the debate was that offered by Professor John Farrar to the 2nd Australian Company Law Teachers Workshop at the University of Canberra in February 1992 in his paper 'Fuzzy Law, the Modernisation of Corporations Law and the Privatisation of Takeover Regulation'.

assessment of the future direction for corporate law and its administration in Australia. As suggested above, two key assumptions govern the interpretative framework being implicitly and/or explicitly utilised by both supporters and critics of the new corporate regulatory structure put in place on January 1990.[5] The first assumption is as to the necessity or otherwise of a body such as the ASC. Most commentators on either side of the political fence have accepted as a truism the necessity for a single Commonwealth authority to regulate and administer Australian corporations. The older regulatory and administrative structures, based as they were, around the old Corporate Affairs Commissions ("CAC's"), were seen as unworkable in an age in which both the complexity of business, and its growing national and international integration as a consequence of new developments in electronic communications, made a parochial, state-based system of regulation and administration an inefficient anachronism. Occasional conservative voices hearken for a return to the simpler and more personalised world of a State based system, most notably the West Australian Legislative Council at the time of the introduction of the new *Corporations Law*,[6] but most serious critics considered the establishment of a genuinely national regulatory body as an imperative.[7]

The second and far more contentious arena in relation to the trajectory of change in the area of corporate law is that of the nature of the legislation itself. Should it have been based, as it was, on the preceding legislative structure which has a genealogy dating back to the 1856 and 1862 English legislation. Or should the old legislative structure have been scrapped in its entirety and new legislation formulated which took into account the profound changes in

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5 The new scheme is composed of a new Formal Agreement between the States and Commonwealth which concedes much greater autonomy to the Commonwealth in the area of corporate regulation and administration, a creation of a new regulatory body - the Australian Securities Commission, and the introduction of new legislation - the *Corporations Law*. A commentary on the new scheme which contrasts it with the 'old' scheme constituted by the *Companies Code* and the NCSC and analyzes it from the perspective of its public policy implications is G Whitehouse "The Decadent Decade: Business Regulation Under the National Companies and Securities Commission", unpublished paper presented to APSA Annual Conference, Griffith University, Brisbane (July 1991).
For a somewhat different approach to the analyses of the respective schemes see S Corcoran 'The Nature and Characteristics of Companies' in Butterworths *Australian Corporations Law* (1991) at [2.1.0090-2.1.0125].

6 The attitudes of certain conservative members of the West Australian Legislative Council can be observed in the tenor of their comments made during the course of debate on the issue in that House. Perhaps more revealing is the note of ambivalence in respect of national regulation struck in the Federal Shadow Minister for Corporate Law Reform and Consumer Affairs, Peter Costello's recent remarks on the issue of corporate law reform in Australia. See P Costello "Restoring Confidence in Corporate Morality" (1990) 34 *Quadrant* 20. It should, however, be observed that Mr Costello concludes in favour of national regulation.

7 Professor Ford had, cautiously but firmly, indicated his preference for a national scheme, rather than the failed co-operative scheme of 1981 in the 4th edition of his enduring text *Modern Principles of Company Law* (1986) p 22:

> If the Commonwealth alone had clear constitutional power to pass companies and securities industry legislation to apply throughout Australia of its own force, that legislation would be truly uniform: it would be implemented by one administrative system...

corporate capitalism which have occurred in the past century and a half? The arguments for the former approach were iterated by the then Attorney-General, Lionel Bowen, when the scheme was first introduced to Parliament in 1988. The reasons then advanced for the preservation of the core of the existing legislative structure was that to abandon such a framework would create enormous uncertainty amongst the commercial community, with consequent adverse effects on the Australian economy.[8] The corollary of this was, of course, that it was not politically pragmatic for the government to quickly secure agreement for the new scheme from business and the state governments if it represented too great a departure from the preceding legislation. The government was also, so it seems, mindful to avoid a constitutional challenge to the new scheme by departing as little as possible from the well trodden path which traced a legislative history back to the 1856 and 1862 legislation. As it was, of course, the constitutional challenge was not prevented by such tactics, but this is not to dismiss the important influence the shadow of a High Court challenge held over the tactics adopted by the Federal government in respect to the legislative component of the new structure.

At the time of the introduction of the *Corporations Law* the voices in favour of the abandonment of the core of the old legislative structure were few and far between. They have, however, become more vociferous as the implications of the retention of the old structure have become more apparent. As the accretions to the legislation increase, and whatever coherence the legislation may previously have had recedes into the distant past, many have come around to the advocacy of a total abandonment of the old legislative framework and the beginning afresh with a new structure. This change however, is unlikely to occur in the build up to an election year and at a period when many Australian businesses are in a precarious state. Nevertheless, developments across the Tasman will be viewed with some interest, both by Conservative and Labour politicians alike, to assess the viability of introducing a new legislative structure, its receptivity by business and by the legal profession.

As will become apparent to the reader of the instant paper as he or she proceeds the central argument is neither for 'regulation' or 'deregulation', it is rather an argument for specificity in corporate legislation. It is suggested that the failure in the nineteenth century to develop an indigenous system of corporate law, and perhaps more importantly an administrative structure suited to local needs, is related to many of the subsequent problems experienced in the field of corporate administration and regulation in Australia. Many of the current problems in the area are also related to a range of implicit assumptions which are embedded in the structures and legislation which have been inherited in the 'new' schemes of corporate law and administration adopted in Australia

8 In the course of his speech introducing the legislation to Parliament the then Attorney General, Lionel Bowen, recited as one of the significant reasons for not altering the general structure or outline of the legislation was so as not to introduce too much uncertainty into the area and thus alienate the commercial community *Hansard (H of R)* (25/5/1988) pp 2990-2997.

with increasing rapidity and urgency since the 1980s. This paper therefore asserts the vital importance of detailed historic analysis in this area, rather than the reiteration of certain sets of unexamined 'folkloric' beliefs which have masqueraded as the 'history' of corporate law in Australia in the past. It is only by means of such an analysis that an acute appreciation of the conceptual and theoretical problems which appertain to contemporary company law may be achieved. For too long legislators, practitioners and members of the business community have relied upon 'instinct' and 'experience' to guide reform. Too often the result has been short sighted and ineffective. A deeper understanding of the trajectory of evolution of company law and administration is necessary to guide us into the next century and beyond.

II. THE NATURE, ORIGINS AND DEVELOPMENT OF THE STATE CORPORATE AFFAIRS COMMISSIONS

In contemporary society we tend to regard the administrative structures charged with overlooking corporate legislation as 'regulatory' agencies. To us this aspect of the activities of such bodies appears self evident. We can observe this characteristic in the current debates as to the 'regulatory' efficiency of the ASC. This aspect of how we consider the role of such administrative agencies was, however, not self evident to our ancestors. When Robert Lowe introduced the first 'modern' *Companies Act* to English Parliament in 1856 he explicitly rejected any suggestion that the government (through the Board of Trade which was charged with the 'administration' of the *Companies Act*) had any role to play in the 'regulation' of the entities formed under the legislation. Lowe's speech criticised the naivety of the 1844 companies legislation, which had attempted to give the government a pro-active role in preventing corporate malfeasance. Lowe stated that he felt that no amount of vigilance on the part of the government could prevent corporate malfeasance, and that such state intervention was likely to mislead investors into believing that the state was acting as a 'guarantor' of those entities which were granted registration.[9]

The attitudes expressed by Robert Lowe in 1856 became an entrenched aspect of the English administrative structures set up to oversee companies legislation. Registrar after Registrar of Companies reminded committees and Royal Commissions set up to examine the operation of the companies

9 Commenting on the regulatory provisions contained in the *Joint Stock Companies Act* 1844 Lowe remarked:

> ...these acts far from having been a means for preventing fraud, have only afforded facilities for its commission, because fraudulent persons have availed themselves of the prestige which is gained amongst ignorant people by a presumed association with the Government, and have announced companies as 'established by Act of Parliament' and have thus given them a colour of respectability which their own merits would not obtain... We entirely repudiate as the basis of legislation the principle... that it is in the power of the Government to prevent the institution of fraudulent companies *Hansard (Commons)* (1/2/1856) pp 123-124.

legislation that their role was purely ministerial in nature, with no regulatory responsibilities appertaining to their office.[10]

When companies legislation, along the English model, was passed in various of the Australian colonies this was largely done to accommodate the needs of English businesses who wished to set up subsidiaries in Australia or alternatively to register as 'foreign' corporations. There was virtually no demand for companies legislation from domestic industry, which was almost universally small scale.[11] There is, however, one notable exception to this. The one form of domestic business which required corporate identity, and the capacity this gave it to raise funds from the public, was the mining industry.[12]

The colonial legislation introduced in the 1860s followed almost word for word the English model. It is not surprising that this was the case, given the integration of Australian and English business interests at the time. Even in respect to the needs of the mining industry it was not surprising that this was the case, given that many of the investors in the larger mining undertakings would

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10 For example, in the course of the deliberations of the (English) Select Committee on Companies of 1867, the then Registrar of companies, the Honourable Edward Cecil Curzon was interrogated by the Committee members. One line of questioning was in respect to the Registrar's role in the enforcement of the legislation:

> Q. What action do you take when the Act is not complied with?
> A. None at all.
> Q. But that rather assists the company sometimes if they wish to suppress information, does it not?
> A. Unless a shareholder wishes to proceed against them.
> Q. Do you know of any cases where the penalties have been enforced.
> A. Very few.

Report of the Select Committee on the Operation of the Limited Liability Acts (1867) BPP, X, 393 at 223-228.

In Australia very much the same attitudes were expressed by the South Australian Registrar of Companies in the 1890s in response to a ministerial rebuke for not acting in relation to certain malpractices engaged in by a particular company registered in that State. The Registrar, Alec Buchanan replied:

> The Act does not appear to throw the duty upon anyone other than the companies themselves and their agents, of seeing that the provisions of the Act are complied with; nor does there appear to be any machinery provided for that purpose beyond the penalty under the Act which may be applied by the justices... I may say that if it should come to my notice as registrar of companies that a company was neglecting to comply with the Act I should deem it my duty just to communicate with the company and if that proved ineffectual then to report the matter to the Minister.

(Letter 191/1893, Minute Book, Master of the Supreme Court, South Australia, 1890-1924, formerly located at CAC, Adelaide, current whereabouts unknown).

11 See, for example the comments in LJ Hume "Working Class Movements in Sydney and Melbourne Before the Gold Rushes" (1960) 9 *Historical Studies* 264.

12 Of course, in the case of the mining industry the legislation was so badly adapted to local conditions that in the 1870s No Liability Mining Company legislation was introduced to overcome many of the difficulties being experienced with Limited Liability legislation. One difficulty, which seemed to be the result of the combined effects of distance, the mobility of the population specific, and the nineteenth century practice of only calling up small amounts on shares at the time of their issue, was in locating the 'original' investors in an unsuccessful enterprise when further calls were made on their shares. The common use of 'dummies' to hold shares combined with the above factors to mean that in most instances when a mining undertaking failed it was the unsecured creditors, not the shareholders, who bore the brunt of the losses.

be English and thus want their investments in entities which were formed on the English model (ie limited liability incorporation).

This wholesale adoption of English law, of course, left open the question of the nature of the administrative structures which would be charged with administering the law in the Australian colonies. As it transpired those structures were extremely rudimentary, and even less capable of constituting a 'regulatory' authority than their English counterparts. In the two key commercial areas of Australia, New South Wales and Victoria, the administrative functions associated with company law were merely a sub-component of the overall work of a larger unit - in NSW the Registrar-Generals Department and in Victoria, for at least part of the time, the Titles Office. The officer charged with the task of enforcing the *Companies Act*, the Registrar of Companies, was in neither of the two principal colonial centres (nor in any of the others) solely responsible for corporate affairs. In most colonies the Registrar was also the Master of the Supreme Court, and fulfilled as many as ten other administrative functions.[13]

The relatively ad hoc structure of company regulation described above may be quite surprising to the contemporary observer, but was almost certainly not a matter of concern for the nineteenth century citizen of the colonies. The establishment of a denser regulatory structure would have been almost impossible to defend if an incumbent administration had have been so mindful. This was due to the fact that even in the most commercial of the colonies - NSW and Victoria - annual company registrations rarely exceeded 80 per annum before the turn of the century and usually were no more than 50 a year.[14] If one excluded mining companies (which in Victoria were separately administered from the 1870s onwards) then the number of company registrations per annum was about thirty in number.[15] Clearly a substantial bureaucracy to deal with such small numbers of companies was not necessary.

It was not until the late 1880s and early 1890s that the question of a permanent administrative structure to deal with the administration and (perhaps) the regulation of companies would have become an issue at all. The growing numbers of company registrations, which escalated to over 500 a year in Victoria during the 1880s land boom, made it necessary to staff the office of the Registrar of Companies in a more orderly manner and also made it necessary to

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13 Examples of the variety of tasks performed by the official who was responsible for superintending the administration of companies can be gleaned from the *Blue Books* issued annually in the various colonies. The role of Registrar of Companies was generally performed by the Master of the Supreme Court in all the colonies throughout the nineteenth century. The variety of other tasks for which he was responsible of course varied from colony to colony.

14 A list of the annual numbers of companies registered in each colony throughout the nineteenth and early twentieth century can be found in the series of tables appended to R McQueen "Limited Liability Company Legislation - The Australian Experience" (1991) 1 *Australian Journal of Corporate Law* 22 at 47-50.

15 I have disaggregated these figures from the raw data contained in the Register Books of the various colonies.

modernise the bookkeeping of the Registrar's Office.[16] However, despite these imperatives only partial progress was made. In Victoria the manner of operation of the Registrar's Office was still so haphazard during the late 1880s that it was possible for a clerk, over a period of years, to steam the duty stamps, off corporate documents, resell the stamps and then use the resulting proceeds to invest in the rising property market without detection. Perhaps even more surprising is the fact that the clerk in question failed to attract notice even when he destroyed the registration documents of the companies upon which he had perpetrated the above frauds; the documents so destroyed representing over 15 per cent of **all** companies then on the Register. One must, in light of such evidence, be more than a little sceptical as to the administrative, let alone the regulatory, efficiency and effectiveness of the Registrar's Office in Victoria in the late nineteenth century. Given that the system of corporate administration was similarly rudimentary in other colonies, one would consequently expect that the level of effectiveness of the Registrars' offices in those colonies was similar to that in Victoria.[17]

The manner of operation of those administrative units charged with the administration of colonial company law during the nineteenth century can also be judged by examining the Register of Companies for the period to determine the regularity with which companies provided returns to the Registrar, and the efficiency of the Registrar' Office in dealing with cases of non-compliance. For both Victoria and NSW throughout the nineteenth century there were always large numbers of companies on the Register who were at least one year in arrears in their returns. In fact, in Victoria, something like 30 per cent of companies on the Register in the late 1880s were in such a position.[18] In NSW the figure was more like 20 per cent, which is probably the best of any of the Australian colonies.[19] The meaning of this failure to ensure that current returns were being provided by companies meant that even the bare bones of 'regulation' contained in the *Companies Acts* of the era were completely ineffectual in the Australian colonies. For instance, if a third party was proposing to enter into an arrangement to supply goods to a colonial company and decided to check the Register to ascertain the directors, location of registered office, and capitalisation of the company, the chances were that they would not be able to find up-to-date information on these matters at the office of the Registrar of Companies. They might indeed be able to finds no information

16 The author of the most widely used company law sourcebook at the time, De Lissa stated after the corporate collapses of the early 1890s that "remedial legislation is urgently needed to remedy existing abuses, and to diminish losses which are now sustained". A De Lissa *Companies Work and Mining Law in New South Wales and Victoria* (1894) p 1.

17 See M Cannon *Land, Boom or Bust* (1972) ch 50.

18 I have calculated this figure from my own sampling of companies on the Register. Examining all registrations of companies at five year intervals it would appear that 30% may even be a conservative figure for the percentage of companies which were one year or more in arrears in making returns.

19 Again this figure has been calculated on the basis of a sample of all companies on the Register taken at five year intervals.

at all. In other words, even the laissez faire regulatory aspects of the nineteenth century company legislation - that outsiders should exercise vigilance when dealing with companies and make all the proper checks to ensure their credit-worthiness and respectability - could not have been done in the colonies due to the hopelessly out of date and inaccurate documentation kept at the 'office' of the Registrar.

One lesson which the colonial governments did learn however, during the 1880s when the number of registrations of companies escalated at a phenomenal rate, was the enormous revenue potential of corporate administration. For a small outlay to staff an administrative unit (and in respect of which considerable staff flexibility could occur due to the fact that it utilised staff from a larger unit - for instance, in NSW the Registrar-General's office) quite large returns could be made on that investment in the form of lodgment fees and other administrative charges. As the general view was that the Registrar of Companies was not responsible for regulation of companies, only for their administration, no financial commitments were ever made by Governments in respect to the enforcement of the legislation.

The cosy arrangements of the 1880s, with the associated high revenues earned by governments from their operations in company administration, came to end with the corporate collapses of the 1890s. Questions were asked in respect to the responsibility of the colonial governments for the enforcement of company law and in regulating corporate behaviour. Legislation (as we will observe in more detail later in this essay) was altered to accommodate some of these concerns, and housekeeping operations in relation to the backlog of non-complying companies were commenced.[20] Another area to which some attention was paid was that of foreign company registrations. The colonial *Companies Acts*, modelled as they were on the English Acts, which at this stage did not provide at all for foreign company registrations, provided inadequately for the manner in which records of foreign companies operating in Australia might be accommodated within colonial structures. This was a matter of concern in the wake of the collapses as a number of enterprises which left unsatisfied debtors in the colonies were foreign companies with no assets or shareholders in the relevant colony.

In most colonies, however, the changes resulting from the crisis caused by the corporate collapses of the 1890s were largely cosmetic and within a short period of time the Registrar's 'offices' returned to their past practices. The attitude remained that these offices had merely 'ministerial' responsibilities and could not be expected to act as regulatory agencies.

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20 M Cannon describes the response of the Victorian Government in the following manner:

> In 1894, when the Turner Government came into power, it set about drafting a comprehensive amending [Companies] bill, with no fewer than 173 clauses. All the flagrant abuses of commercial morality which had shocked the world were to be abolished by Act of Parliament. As Isaac Isaacs outlined each stringent new clause to the Assembly in 1895, he found members cheering him until the House echoed. M Cannon note 17 *supra* p 384.

The collapses of the 1890s did, however, play a role in the evolution of debates in another arena - that occurring at the Constitutional Conventions as to the appropriate powers of the proposed Commonwealth government. In the 1880s, when the issue of creating a federal power emerged, it was considered that such a body should only have the minimum of powers over companies - key figures at the first Constitutional Convention, such as Sir Samuel Griffiths, argued that only in areas such as that of 'foreign' companies should the federal government have any power over corporate administration and/or regulation. This attitude was of course, at least partly dictated by the fact that colonial governments wished to preserve their control over an area which was financially lucrative, and at the time an expanding area of revenue for them.[21]

By the 1890s we can observe, in the debates of the Constitutional Conventions, a changed attitude emerging. The collapses of large numbers of companies, which had exposed the inadequacies of the current arrangements in the colonies as to corporate regulation led to calls from at least a number of delegates for the new Commonwealth government to have power over corporate administration and regulation. It was felt that a common approach to corporate administration (ie uniformity of legislation and administrative practice), combined with a national approach to questions of regulation, would be far more effective than the existing parochial arrangements.

However, between the Constitutional Convention of 1895 and federation, the public outcry against the failure of the colonial structures to deal with corporate abuse had to a large extent abated. The delegates who had earlier pressed the case for the retention of control in this area by the colonial governments, and who had been quite muted in 1895, again raised their voices against unqualified federal power in this area. The result was the current s 51 (xx) of the Constitution, which is demonstrative in its ambiguous wording of the divisions existing between delegates in respect to this issue. Even the two contemporary commentaries, which have been accepted as definitive background material to the interpretation of the constitution, Quick and Garran on one side[22] and Harrison Moore[23] on the other, are divided in their opinions as to the true intent and meaning of s 51 (xx) of the Constitution.

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21 It appears from the Constitutional Convention debates that certain delegates (eg Isaacs and Higgins) believed that the insertion of the corporations power would give the commonwealth government powers of *regulation* over foreign corporations and power over *both the formation and regulation* of local trading and financial companies. Other delegates (eg Griffith) however believed that the 'corporations' power finally inserted in the Constitution gave only very limited powers to the commonwealth government in respect to locally based companies. Such delegates held to the view that the administration of companies legislation should remain with the states. See, in particular, *Official Record of the Debates of the Australian Federal Convention* Vol 1 (1896) pp 685-686.

22 J Quick and RR Garran *The Annotated Constitution of the Australian Commonwealth* (1901) p 607 but cf R Garran 'Memoranda on Constitutional Questions' in *Commonwealth Parliamentary Papers* 1934-1937 Vol 2 p 73.

23 WH Moore *The Constitution of the Commonwealth of Australia* (1902) p 148:
"[section 51 (xx)] authorizes the making of a Companies Law for the whole of the Commonwealth".

A further factor which emerged around the time of federation and which caused some considerable concern in relation to considering it appropriate to concede power in respect to corporations to the Commonwealth was the rise of the Labor Party as a political force. Given the uncertainties at the time as to the direction of this new political force and its avowed policies to pursue, at least in a number of industries, policies of nationalisation, an unqualified power in respect to corporations residing in the Commonwealth was seen as a potentially dangerous weapon in the hands of socialists.

As we now know, the ambiguity that existed in respect to the true meaning of s 51 (xx) was used by the High Court in *Huddart Parker v Moorehead*[24] to read down Commonwealth power in respect to corporations. The narrowing of Commonwealth power in the area was completed by the High Court relying additionally upon the metaphysical (and later discredited) doctrine of 'reserved powers'.

After this gutting of Commonwealth powers in the area of companies administration and regulation everything returned to its previous status quo. The various state bodies responsible for corporations continued to operate as purely administrative bodies, never considering that they had any significant function in respect to regulation. It is interesting to note however, that the Registrars of Companies in the various states came to be one of the key voices in the movement for uniformity in legislation in the 1920s and 1930s. They even managed to antagonise a number of professional groups when they began to be consulted regularly by governments on policy questions ahead of the professions. The professions (in particular lawyers) regarded these officials as second rate clerks who were interlopers in the policy field. The hostility generated by the 1907 meeting of Registrars with various Commonwealth officials to discuss the question of uniformity is illustrative of the difficult position these administrative units would have had, if they had so desired, in taking a pro-active stance on policy, particularly anything as potentially contentious as the need for a national body to deal with corporations.

As we will see below the creation of a national body for the administration and regulation of companies was off the agenda completely until at least the 1970s. Occasional, irregular, campaigns were begun to press for uniformity in legislation, but on the question of the administration of companies the view remained that the existing state structures were adequate for the task.

Indeed it was the case in most states that the Registrar of Companies 'office' was not regarded as sufficiently important to warrant a separate administrative existence or independent resourcing. In NSW it remained throughout the period from federation to the early 1960s a subsection of the Registrar-General's office. In Victoria, the Registrar of Companies did not have a separate office until the enactment of the 1958 *Companies Act*. In other states the same pattern applied. The bodies charged in the various states with the administration of companies remained small, were usually sub-components of a larger administrative unit,

24 (1909) 8 CLR 330.

had no more than a few full time staff, and did not consider that they had any role to play in the 'regulation' of companies.

Some of the flavour of company law administration in the period 1901-1961 can be gathered from the debates conducted in the various states in respect to the introduction of uniform legislation in 1961-1962. In introducing the Victorian *Companies Act* of 1958 the then Chief Secretary, Sir Arthur Rylah, commended to the legislative assembly Part 1 of the new legislation. He continued:

> Part 1 of the legislation is largely new. It provides for the establishment of the proper machinery for the administration of the *Companies Acts*. It will set up within the Registrar-Generals office a Registrar of Companies charged with keeping the register and generally administering the legislation. It is not intended to establish any organisation comparable with the English Board of Trade, but an appropriate organization is essential.[25]

It is important to reflect on this, particularly if we wish to understand the relationship between the administrative structures charged with administration of companies legislation and the legislation itself. As late as 1958, in the then financial centre of Australia, no permanent administrative body was charged with the administration of companies legislation. It does not take great analytical skills to deduce from this information why 'regulation' of companies was not considered a task for which the existing administrative structure was either designed or fitted for. Most in commercial life would have been aware of the complete ineffectiveness of these administrative structures to deal with anything but the most routine of tasks. One of the participants in the parliamentary debate on the *Companies Bill* 1958, Campbell Turnbull, noted the establishment of the Registrar of Companies Office under Part 1 and remarked that he considered it 'a very good innovation' as in the past the section within the Registrar-General's Office which was devoted to company matters was limited 'in the main with the filing of documents', even being unable under the preceding legislation to refer troubling cases to the Attorney-General or the Supreme Court. Turnbull concluded that the establishment of an autonomous administrative unit with greater powers of reference in respect of regulation was 'a great improvement on the current position'.[26]

As suggested earlier the situation in Victoria was by no means unique. In NSW there was also no separate office of the Registrar of Companies until the 1960s with the introduction of the *Uniform Companies Act* ("*UCA*") in that state. The only discernible difference between companies administration in the two largest Australian states was the slightly more thorough and precise record keeping in the NSW Registrar-General's office as compared with that applying under the Victorian arrangements. This might reflect slightly different levels of resourcing of corporate administration as between the two states or alternatively slightly different 'cultures' in the civil services of the two states. It is also worth

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25 *Victorian Parliamentary Debates* Vol 255 Session (1958-1959) at 320.

26 *Ibid* at 604.

observing that the administration of companies in Victoria had not, throughout the period of its history remained within the Registrar-Generals department, but rather had been moved between departments on a number of occasions. This may have resulted in a somewhat different attitude towards company administration amongst those civil servants charged with the responsibility in Victoria. Perhaps, in conclusion, it might also be noted that quite different practices in relation to the application of particular provisions of the company legislation grew up in the two states during the period between the turn of the century and the new arrangements put in place in the late 1950s and early 1960s. An example is provided by the different practice between the two offices regarding the question of granting licenses to companies limited by guarantee exempting them from various provisions of the *UCA*. In NSW licenses were generally only granted in order to exempt such charitable and non-profit organisations from being required to refer to themselves as 'Limited' companies. In Victoria many licenses with more sweeping exemptions were granted. This was not only different practice to that operated by the NSW office, but was different from that in force anywhere else in Australia. Broad exemptions from many of the key provisions of the companies legislation - the requirement to provide annual audited accounts, the requirement to provide annual directors returns, and so on - were granted in Victoria.[27] This more favourable practice towards companies limited by guarantee, of course, led in turn to many more such companies registering in Victoria than elsewhere in Australia. Perhaps there was some competition amongst the various states for registrations, at least during the period before the enactment of the *Companies Code* (and indeed probably afterwards). However, one would not want to make too much of such distinctions in practice as evidence of competition between CAC's, as Victoria was by no means the Delaware of Australian company law in this period. Rather such differences in practice are more likely reflective of the different 'cultures' which grew up in different CAC's, which at times had incidental effects on the attractiveness or otherwise of particular states to company promoters.

The reforms in company administration brought about by the enactment of the *UCAs* in 1961-1962 were, however, minimal in nature and certainly did not equip the various CAC's with a significantly expanded investigatory and/or enforcement staff. The device of appointing special investigators, rather than that of using the CAC's own staff, was deployed in the 1960s to deal with the more noteworthy collapses of the period, such as that of the Reid Murray group of companies and the Korman group of companies. The inability of the existing state structures to properly protect the Australian investing public against the range of methods used by company promoters to defraud was commented upon by Justice Hardie of the NSW Supreme Court at the 13th Legal Convention of the Law Council of Australia in 1962 in his response to a paper given by J McI

27 See M McGregor-Lowndes *A Survey of Queensland Companies by Guarantee*, unpublished M Admin thesis, Griffith University, 1989.

Young QC on the question of the reforms brought about by the introduction of the *UCAs*. In referring to the Uniform Acts Mr Justice Hardie stated:

> I would throw into the ring the suggestion that the best thing we could do with the [*UCA*] at this stage is to repeal it, and exert our efforts to ensure that this very active commercial, legal and social problem in the community is dealt with on the only basis it can be dealt with - that is, a federal basis... The fact is that at the moment we have no teeth in our company law. Under [the current legislation] we have very little prospect of anything even being done for the defrauded public.[28]

Of course these suggestions were not acted upon at the time. The shift towards a national body charged with the administration and regulation of companies, whilst accelerating after the 1960s, was still painfully slow in coming. This was due, at least in part to the still extant case law which effectively prohibited the Commonwealth from entering the field. It was also in part due to the reluctance of the various states to give up the revenue which they earned from their CAC's. Business interests and professional bodies also played a part in the preservation of the status quo, despite the fact that they knew existing structures were patently incapable of dealing with deliberate abuses on the part of corporate promoters and corporate managements. When it was finally decided to pass 'national' legislation in the field, the *Companies Code*, this was done by means of an arrangement between the states and the Commonwealth, under the banner of co-operative federalism, which meant that the existing CAC's would be preserved for a while longer. The 'national' body set up to deal with corporate regulation in co-operation with the state bodies under this scheme, the NCSC, proved to be hopelessly inadequate in dealing with the corporate malfeasances of the late 1980s. This was unremarkable, given the discouragingly small budget allocated to it, the discretionary style it thus adopted in dealing with malfeasances, and the lack of clarity of the demarcation in responsibilities between it and the CAC's (which had been preserved in the new scheme as 'Regional Offices'). The weak position of the NCSC meant that much of the 'culture' of the past was preserved in the day to day administration of company law. A mindset which regarded the main role of corporate administrators as being facilitative and their duties as being 'ministerial in nature' was preserved. So too were many of the inconsistencies in practice, and even the competition between different state offices, which had prevailed in pre *Companies Code* days.

Some commentators on companies administration and regulation in Australia have devoted their attention to comparing the styles of the NCSC to that of the ASC. Quite often this has boiled down to a comparison of the personal styles of Henry Bosch and Tony Hartnell respectively. This, however, is beside the point. The ASC is a necessary and important step in the evolution of the administration of company law in Australia. The only way in which a particular 'culture' may often be broken in an entrenched organisation is by replacing it

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28 Reported in (1962) 36 *ALJ* 345 as an addenda to J McI Young "Companies in Uniform" (1962) 36 *ALJ* 330.

with a totally new structure. This will, of course, often be a painful process and carries with it no guarantees that the 'culture' which grows up in the new structure will be any 'better' than that which preceded it. However, such a schism with past organisational structures is often the only way in which the undesirable aspects of a pre-existing organizational 'culture' might be extirpated. By finally ridding us of the vestiges of the CAC's the current arrangement between federal and state governments at least offers us the prospect, if not the guarantee, of a more effective regulatory future.

In the next section I will examine the manner in which the nature of corporate legislation, as distinct from its administration, may limit or complement the effectiveness of regulation. The current controversy as to the relative effectiveness of a 'dense' legislative structure as compared to 'fuzzy' law and simpler legislation will be briefly examined. So too will the conceptual and theoretical unity of current legislation. The practical worth (and possible acceptance amongst vested interests) of completely 'new' companies legislation will also be explored.

III. A BRIEF HISTORY OF COMPANIES LEGISLATION IN AUSTRALIA 1901-1961

As suggested in the previous section the emergence of the Labor Party as a political force between the period of the Constitutional Convention of 1895 and the proclamation of the Australian Constitution meant that the likelihood of the Federal government being given an unchallenged right to legislate in respect of companies was unlikely. As it turned out the federal government was not given an opportunity to introduce a bill attempting to 'cover the field' in respect to company regulation and administration. The *Industries Preservation Act* 1906, the key provisions of which were struck down as unconstitutional by the High Court in the *Huddart Parker* case,[29] was not a broad based *Companies Act.* It was a much more limited anti-trust measure.

The *Huddart Parker* decision actually occurred at a time when the Commonwealth government was well advanced in considering the manner in which they might legislate or otherwise intervene in the corporate area. In May, 1907 the federal government had set up a conference to discuss the question of federal company legislation. The Federal government got off to a bad start in this project by failing to invite representatives of the various interested professions. Instead of proceeding in this manner the Commonwealth was

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29 In his dissent in the *Huddart Parker* case Isaacs J noted with some surprise that the majority justices had reached a decision whereby "the distinct unambiguous words of the [corporations] power, couched in language quite unequivocal, do not... mean what they say" (1909) 8 CLR 330 at 388.
The full implications of the decision in relation to the future prospects of the exercise of any commonwealth power in the area were quite clearly apparent to Isaacs J and the majority justices. It might be noted that the decision was handed down at the precise moment when the Commonwealth was considering introducing a Companies Bill into the House of Representatives.

proposing to arrange a meeting between the various Registrars of Companies to discuss the possible strategies which might be pursued. Upon getting wind of this meeting the Victorian Law Institute sent the following letter to the various other states' Law Societies/Institutes:

> As doubtless you are aware a conference is being held in Melbourne at the present time on the subject of federal company legislation. This conference is composed of what are called 'experts' from the various states. It appears however that these experts are gentlemen from the various Registrar-Generals offices whose duties are almost wholly of an official and administrative character relating mainly to the filing and management of companies... In the opinion of the council (of the Law Institute of Victoria) expert opinion cannot be obtained in this way. Practising solicitors with experience in company formation, managers and auditors with company experience, it is considered, alone will furnish advice likely to be a safe guide to legislation.[30]

All these bodies supported the Victorian Institute in their outrage at not being invited to the 1907 Conference; all except the South Australian body, who felt that the Commonwealth was acting in good faith in proceeding in the manner in which it had. It stated that it understood that consultation with the Law Societies was but a preliminary step before taking "further advice based on the opinions and experience of the commercial community".

The view of the various commercial interests was, however, far more hostile to federal legislation than the various Registrars. The concern which the Commonwealth government was raising in commercial circles by moving swiftly towards the introduction of a *Federal Companies Act* can be gauged from the tenor of a letter of 8th June 1907 from the president of the Sydney Chamber of Commerce to the Commonwealth Attorney General in regard to the proposed federal companies legislation. He submitted for consideration the following points:

- That uniformity of Bankruptcy or company law can best be obtained by legislation by agreement in identical terms by the parliaments of the various states.
- That in view of the great distances between places in the Commonwealth, it is not expedient to have federal legislation on these subjects....
- That it is desirable on both subjects that legislation should follow the lines of the latest English legislation.
- That any attempt to centralize the administration of either of these branches of law must result in grave interference with business interests throughout the Commonwealth.[31]

Despite the blow dealt to any purported exercise of federal power in respect to companies by the *Huddart Parker* decision interest nevertheless remained

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30 Law Institute of Victoria Collection, 2nd Accession, University of Melbourne Archives, Group 2, draft copy of letter to secretaries of Incorporated Law Association, NSW, Southern Law Society, Tasmania, Queensland Law Association, Queensland, and South Australian Law Society, May, 1907.

31 Letter from GM Merivale, President, Sydney Chamber of Commerce to Acting Under-secretary, Department of the Attorney General and of Justice, 8 June 1907 in Law Institute of Victoria Archives, 2nd accession, University of Melbourne Archives, Group 2 (Correspondence - General 1897-1908).

high after 1909 in the question of achieving at least some level of legislative uniformity between the *Companies Acts* of the various states.

The reference by the states of their legislative power in this area to the Commonwealth was advocated by various commercial interests during the 1920s. The Associated Chambers of Commerce set up a Uniform Company Law Committee in the early 1920s, which recommended at its meeting of the 19th August 1924 that the various state Chambers of Commerce should lobby their state political leaders on the question of obtaining uniform companies legislation. The specific recommendation read:

> It was suggested that the Chambers of Commerce might take steps to ascertain from leaders of all parties in the State Parliaments their ideas on the subject of referring to the Commonwealth Parliament - under section 51 of the constitution, sub-sec XXXVII - the power to legislate in the direction indicated.[32]

Whether it was appropriate to achieve the objective of uniformity by way of federal legislation, upon reference from the states, or whether the states should collectively act on the matter was hotly debated amongst a variety of interest groups throughout the 1920s and 1930s. Business interests generally supported the view that uniformity could (and should) be achieved by agreement amongst the various state governments. They felt federal intervention in the field (and particularly when there was the ogre of a Labor government wielding considerable powers in relation to the regulation of corporate activities waiting in the aisles) was too high a price to pay for the convenience of uniformity of legislation. In this regard the South Australian Chamber of Commerce had responded to the suggestions of the Associated Chambers of Commerce Uniform Company Law Committee in the following terms:

> After carefully considering the matter, it was resolved to report to Council that this Committee is of the opinion that while uniform company law under conditions satisfactory to trades might be desirable, there is no such pressing necessity or urgency as would justify conferring jurisdiction upon the Parliament of the Commonwealth and abandoning the possibility of the state Parliaments adopting a uniform bill.[33]

In their attempts to attain uniformity of legislation, business interests 'captured' at least some of the Registrar's, who in turn lobbied on their behalf with the government(s) of the day. Despite their earlier hostility to these 'minor' officials bodies such as the various Chambers of Commerce were pragmatic enough to see how such officials could aid their objective of achieving uniformity in companies legislation, whilst at the same time being staunch advocates for the retention of a state-based system. An example is provided in the following Minute from the South Australian Registrar to the State Attorney-General:

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32 Report of the Parliamentary and Industrial Committee, South Australian Associated Chambers of Commerce (28 November 1924) in Records of the South Australian Associated Chambers of Commerce p 16 (Archives of Business and Labour ANU).

33 *Id.*

> I have no doubt there is a strong desire on the part of the commercial community to obtain uniformity in company law... it may be of great service to the commercial world if our Act was brought into line with those of Victoria or Tasmania... South Australia would thus be assisting towards uniformity, which trades consider essential for the encouragement of trading [34]

Despite this apparent 'capture' by commercial interests of key administrative officials dealing with corporate law, those business and commercial interests pressing for more uniform legislation were nevertheless spectacularly unsuccessful in overcoming the inertia of the various state legislatures and achieving their objective of uniformity. The problem was largely one of this group's own making. Their outright rejection of Commonwealth legislation in the area as a solution (assuming the Constitutional problems in this regard could be overcome) meant that even if the various state Attorneys-General could agree on a particular form for the *Companies Act* the difficulty would remain of how to ensure that uniformity was subsequently retained. State governments, whilst sympathetic with commercial interests in respect to the need to achieve uniformity, were relatively disinterested in committing themselves to some form of on-going machinery by which that uniformity might be retained.

The growing impatience of business and commercial interests around this question is reflected in a brief article on the matter in the *Law Institute Journal* (which was the main source of such information for practitioners in Victoria and Queensland) for 1931. Apparently the issue had been discussed at the Premiers Conference of 1930 and a procedure agreed upon for proceeding with the matter. The subsequent delay in finalising the issue drew the following response:

> Up to the present nothing more has been heard of the proposal, and whilst realising the enormity of the task, one cannot help feeling that valuable time and money are being wasted by the delay, and hoping that the measure will, in the near future, be in shape to submit to the respective legislatures for their sanction.[35]

The clamour for reform continued throughout the 1930s. The two factors which were most prominent in motivating these calls for change were, firstly, the fact that a revision of the English *Companies Act* had occurred in 1928 and, secondly, that it was felt that less inconsistency between the states could lead to tighter regulation of what was widely perceived as a growing incidence of corporate malpractice. The *Law Institute Journal* of 1st July, 1931 commented on both these matters. In respect to the latter the *Journal* observed that one measure of the failings of the existing legislation was the fact that 'a great deal of immorality' had been carried on under the cover of corporate identity in the immediately preceding few years. The author of the 'Editorial Comment' in the *Journal* then concluded that 'perhaps the present time will force a serious

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34 Minute Book, Master of the Supreme Court of South Australia (1923) formerly located in NCSC Regional Office Adelaide (1989), present whereabouts unknown.

35 *Law Institute Journal* (1 April 1931) p 81.

measure of reform to be undertaken' just as the last great economic depression in Victoria had done so.[36]

The debate in respect to the need for and best means by which to establish uniformity in Australian companies legislation continued. In an article in the *Australian Law Journal* of 15th February, 1934 JD Holmes asserted that despite the common belief that the Federal government did not have the power to legislate in regard to companies this was not the case at all. Whilst admitting there were certain obstacles which would be encountered by the Commonwealth if they attempted to legislate in the field, Holmes optimistically concluded his paper with the following words:

> It is submitted the [Federal] Parliament for the whole of Australia [can enact] substantially the same legislation as the English *Companies Act* 1929... Should the Federal Parliament desire to incur the responsibility of entering the sphere of Company legislation the way appears to be open.[37]

Whilst these debates were raging a semblance of uniformity was, nevertheless, maintained by the close adherence of at least the key financial and commercial states to the legislative model provided by the latest English legislation. However, this was unsatisfactory as a solution for those enterprises which operated on a national basis, as whilst some states introduced new Companies legislation on a regular basis (following the provisions of the 'latest' English legislation), others retained Acts based on outmoded versions of the English legislation (eg Western Australia continued to have its legislation largely modelled on the 1856 Act well into the twentieth century).

This faithfulness of the various Australian states to English legislative models was almost certainly not an instance of 'cultural cringe', in which Australian individuality and innovation was placed second to the time worn structures of the 'mother country'. Rather, the close adherence of the various Australian states to English legislation was simply a reflection of the fact that most of the overseas trade of the Australian colonies (and later the states) was with England. Compatibility of commercial legislation with that of one's principal trading partner was a virtual necessity in the nineteenth century and first half of the twentieth century. (Today, of course, international compatibility of commercial legislation is of equal importance). The ambivalence of many towards the need for Australian legislatures to follow the English legislation closely is reflected in the following extract from an 'Editorial Comment' in the *Law Institute Journal* of 1st December, 1931:

> It does not follow necessarily that all the innovations of the English Act should be adopted here without question or inquiry. It is evident from a perusal of the English Act that there is still room for many important reforms. It is also doubtful whether in these times of uncertainty we should adopt [certain of the] new English provisions.[38]

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36 *Law Institute Journal* (1 July 1931) p 130.

37 JD Holmes "A Commonwealth Companies Act" (1934) 7 *ALJ* 375.

38 *Law Institute Journal* (1 December 1931) p 217.

The following of English legislative models for the *Companies Acts* of the various states, whilst a virtual necessity, created some conceptual problems which had began to become apparent in the 1930s, and continued to become more glaring as time wore on. The first of these problems was that the conditions prevailing in the Australian colonies was vastly different than those existing in England, both at the time of the introduction of the first limited liability legislation in the home country (that of 1856), and at any subsequent period during the nineteenth and twentieth centuries. The scale of companies being formed was different, the administrative structures charged with enforcing the legislation were vastly different, the composition of local industries requiring corporate identity was different, the distribution of the population was different, and the characteristics both of those promoting and of those investing in companies were different.

To a certain degree these differences were recognised in the nineteenth century with the enactment of the No Liability Companies provisions in a number of the colonies. So too were they acknowledged with the early recognition of proprietary (private) companies in certain of the Australian colonies. However, despite these measures *the simple fact of the matter was that companies legislation introduced into Australia was not the most suitable or appropriate model for Australian conditions.* Most domestic industry in Australia was small scale and continued to be so well into the twentieth century. The legislation adopted by the Australian states was, of course, never principally intended for such enterprises. It was introduced into England to provide a facilitative framework for large scale flotations, particularly those with long amortisation periods, such as railways, water works, gas companies and the like. It was also intended to facilitate the flotation of riskier speculative undertakings, which would provide an investment outlet (with potentially high earning rates) for Home county investors. In Australia, it might be suggested, neither was a pressing need. Most infrastructural investment, after early unsuccessful attempts at public flotations of shares, was conducted by the colonial (and later the state and/or Commonwealth) governments. The English answer to the problem of encouraging investment in infrastructure with long amortisation periods - limited liability companies legislation - was a non sequitur in the Australian context. In terms of the need to provide an outlet for savings which would offer greater returns than investment in existing enterprises (which asked for a premium from new investors) or 'blue chip' securities such as Consols, this was certainly not a necessity in the colonies, nor demanded by a discernible class of investors. Investment in established small to medium sized business was readily available in the colonies, with the promise of excellent returns. So too was investment in mines, which was far riskier, but which offered those prepared to take a risk the opportunity of earning considerable dividends.

A critic of the above assertion, as to the unsuitability of English legislation to Australian needs might well ask 'if the legislation in force in the various states

was so unsuitable why was it so readily accepted'? The answer to this question must be that for the most of the nineteenth century (and for that matter for the period up to at least the end of the First World War) it wouldn't have mattered to most participants in domestic industry what form Australian companies legislation took, as long as it provided on the one hand a facilitative framework within which companies might be easily and readily formed when necessary, and on the other relatively uncomplicated mechanisms by which such companies might be wound up if and when they failed. This lack of domestic interest in companies legislation is clearly reflected in the fact that very few companies were formed annually in *any* of the states until after the Second World War. Most domestic industry chose to remain as partnerships. Also, when Australian enterprises did decide to incorporate, it was most commonly as a proprietary limited company, rather than as a public company. In such instances the reasons for adopting corporate status might be better looked for in the *Income Tax Assessment Act* than in the *Companies Act* itself. Tax planning was a principal factor precipitating adoption of corporate status, rather than factors intrinsic to the companies legislation itself, such as limited liability or perpetual succession.

As a consequence of the low level of domestic demand for incorporation few requirements were placed on the prevailing system of companies formation and regulation by commercial interests, other than that the system permit the ready formation, registration and liquidation of companies as and when necessary. It was also the case that the various state governments were not particularly interested in examining the operation of companies legislation and administration too closely. All they were generally concerned with was that the various administrative duties associated with the Acts provided a steady financial flow into state treasury coffers and that no major regulatory crisis, such as that which had emerged in Victoria in the 1890s, occurred.

Little or no thought was, or even needed to be given, during this long interregnum, as to the necessity of tailoring Australian companies legislation to the peculiar requirements of Australian economic and social conditions. Nor was any serious thought given to the question of the most effective manner by which to achieve regulation of corporate behaviour. The problems associated with simply inserting regulatory provisions into a legislative structure designed for the principal purpose of facilitating corporate formation were never seriously examined. Nor was the question of how such regulatory provisions could be enforced, even if there was a political will to do so, within the constraints of the existing complement of staff responsible for the administration of company law. It was simply assumed that by inserting a variety of new provisions into the legislation public opinion would be mollified and that the legislation would be more 'regulatory' in tenor. Many of the current provisions in the *Corporations Law* owe their existence to this ad hoc process of dealing with the issues of regulation as and when they occurred. These regulatory accretions to the legislation, however, often did not make any

difference whatsoever to the day to day practices of those responsible for companies administration. This was due to the fact that, in addition to having few resources available to them, these administrators still maintained (with some authoritative support) that their tasks were purely ministerial in nature. They denied that they had any regulatory responsibilities whatsoever. The addition of further regulatory measures into the legislative fabric of company law was, therefore, virtually meaningless. These statutory provisions had little, other than symbolic, import in a context in which all the major players knew that they would (and could) never become operative other than on a voluntary basis (eg the 'better class' of companies voluntarily providing their shareholders with an annual balance sheet in the early twentieth century). The more unscrupulous would continue to flaunt the regulatory requirements of the companies legislation knowing that the chances of prosecution were extremely slim.

This failure to treat 'regulation' as other than of symbolic import meant that the growing conceptual incoherence of companies legislation did not need to be seriously examined. The potential difficulties inherent in introducing regulatory provisions into a legislative structure which represented the high point of laissez faire dogma was not apparent to those responsible for this conceptual travesty. They simply did not have to examine the conceptual issues in a context in which the newly imported regulatory provisions would in all likelihood ever be enforced or litigated. Indeed, it was probably considered (whether rightly or wrongly) that to resolve these conceptual difficulties would be to detract from the attractiveness of incorporation and result in concerted opposition from the commercial community. Therefore, the *Companies Acts*, even after the decline of laissez faire as a ruling dogma, effectively continued to operate as purely facilitative legislation.[39] Even though, on the face of it, the legislation now appeared to be more regulatory in emphasis than its predecessors it was, in effect, still saturated with laissez faire notions of the inappropriateness of the state as a regulator in what were considered to be purely commercial arrangements. The continuing liberality of companies legislation and its corrosive effect on the establishment of a discourse which accorded 'public' interest a role in corporate decision-making has been well documented in England by WJ Reader. He has suggested that the appeal of the *Companies Act* of 1856 and its legislative successors was both its versatility and the secrecy which it afforded to the controllers of those enterprises which adopted corporate identity:

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39 The late M Finer, QC remarked in this respect:

> In its attitude toward the control of company fraud, the legal system has not made a truly effective break from the 1856 philosophy. Despite all the potentialities for chicanery deriving from the separation of ownership from control, the complexity of the market, and the refinement of technical devices by the company lawyers: despite the sheer amount of public money at risk; and adding to the inherent practical difficulties of detection, *laissez faire* - which may for this purpose be translated as the liberty to be done - remains embedded in the very parts and processes of the law which aims at regulation. (M Finer "Company Fraud" *The Accountant* (5 November 1966) at 584).

> For those in charge of business activities the limited company has been found serviceable not only for its original purpose of attracting investment but also for providing, for those running the business: secrecy of deliberation and decision-making; control of information and privileged access to it; wide executive powers; no compulsion, over wide areas of policy-making, to consult, explain or seek consent within the company; and power to delegate executive authority to a small committee or to an individual... in the constitution of the limited liability company... is every facility a dictator could desire and very little scope for industrial democracy, which is no doubt why it has proved to be adaptable to so many forms of business enterprise but not to the exercise of authority from below which democratic practice requires. [40]

Over the years the necessity of preserving the versatility and secrecy which had come to be associated with corporate identity began to be accepted as a dogma. Augmenting the regulatory functions of corporate administrators was generally regarded as fraught with innumerable dangers; in particular it was regarded as a considerable disincentive to business investment and initiative. By the time of the post Second World War boom the structure and shape of Australian company law was therefore more or less set in concrete. The factors suggesting a preservation of the status quo were compelling. Despite occasional public outcries against this or that malpractice, no great collapse occurred which might have led to a re-examination of the appropriateness of the imported English legislative provisions to Australian conditions. Nor was there any crisis which could conceivably have led to an examination of the conceptual unity and logical sustainability of the premises of the legislation. Change was slow and incremental in nature. It resulted in sedimentation after sedimentation of new provisions upon the original legislative structure. It, however, led to no substantive change. Responses to emerging problems were ad hoc in nature, and as the resulting structure seemed to work relatively satisfactorily, no serious questions were ever asked as to the nature of the conceptual whole which emerged from these piecemeal reforms.

Rather than a searching conceptual analysis of the companies legislation of the various states taking place, there was instead a revival of interest in the much narrower question of achieving uniformity amongst their legislative provisions. The considerable expansion of domestic industry in the 'financial fifties' and the growing 'national' character of many businesses meant that what before was a desirable reform for the commercial sector had now become a virtual necessity. At the Premiers Conference in 1952 it was agreed that the states should aim to achieve uniformity in companies legislation in the next few years. This initiative was the result of some considerable pressure being brought to bear on the politicians by leading business and financial interests. Those in industry and commerce were finding it more and more difficult to negotiate the legal minefield resultant upon the variety of Australian companies legislation, let alone the equally dangerous quagmire of different administrative practices prevailing in each of the states. An article in the inaugural volume of

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40 WJ Reader "Versatility Unlimited: Reflections on the History and Nature of the Limited Liability Company" in T Orhnial (ed) *Limited Liability and the Corporation* (1982) p 196.

the *Tasmanian University Law Review* in 1959 captured the concerns of the period:

> The post-war economic boom experienced in Australia has brought with it the necessity for a review of existing legislation aimed at *regulating* the activities of those associations most intimately concerned with, and, in some instances responsible for such commercial expansion.[41]

The limited nature of the concerns of the period in respect to the shortcomings of corporate legislation and administration meant that discussions of reform to companies legislation at the time never touched on broader issues, such as the continuing appropriateness of legislation based on the English model of 1856 at a time of vast economic and structural change in the Australian economy. Nor did the reformist spirit of the fifties address the issue of the rapid change in Australia's trading partners at the time. This structural change in Australia's trade of course, at least in retrospect, begged the question of the need to perhaps begin to shift Australian companies legislation closer to that of its new trading partners and away from the English model. Finally, none of the debates of the period seriously considered the implications of the growing conceptual rift in the existing legislation between its twin roles of facilitation of economic activity on the one hand and regulation of business practices on the other. It was only on the odd occasion that the whole question of regulation was raised in the public arena. The attitude towards fraud and the means of dealing with it through tighter regulatory supervision is reflected in the following passage from the Victorian Statute Law Revision Committee's Report on Company Law in 1955:

> The Committee at all times had to keep very carefully in mind the undesirability of amending the law in a way which, whilst perhaps acting as a deterrent to a few unscrupulous people, would constantly interfere with the affairs of well conducted companies and firms and cause hardship to small trading concerns.[42]

Caution in relation to corporate law reform prevailed. The *Uniform Companies Acts* of 1961-1962 would have been quite recognisable to a time travelling legal practitioner from the English home counties of 1862. Even though our time traveller may have found some of the specific provisions of the twentieth century legislation puzzling, the general outline of the statute would have still been quite recognisable to such a mythical persona. The principal source of puzzlement for our home county practitioner of the nineteenth century in regard to the 'modern' legislation would not have been in respect to its general outlines, but rather in relation to the importation of a number of ad hoc regulatory measures into the statute. The inclusion of such provisions would appear to run counter to the whole thrust of Robert Lowe's speech introducing the *Companies Act* of 1856, in which he scathingly criticized state regulation of corporate activities. In particular Lowe had reserved his wrath for those

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41 JA Munnings "The Companies Act: 1959 Model" (1959) 1 *Tas Univ L Rev* 303.

42 Reported in the speech of Mr Clancy supporting the second reading of the Companies Bill 1955 *Victorian Parliamentary Debates* Vol 247 (1955-1956) at 1646.

'regulatory' measures which had been included in the 1844 Companies legislation. (Provisions such as those which required the lodgement of an audited balance sheet with the registering authority were subject to particular scorn). What would be puzzling to our nineteenth century practicioner would be that the 'modern' regulatory provisions included in the *UCA* of 1961-1962 would look very much like those which, in the name of modernity, had been rejected by Robert Lowe as overly restrictive of commercial initiative and thus inappropriate for inclusion in 'modern' limited liability companies legislation. To the laissez faire mind the mixture of regulatory and facilitative measures embodied in companies legislation such as the *UCA* would be anathema, as it would be fatal to the conceptual unity of such legislation. 'Regulation', our nineteenth century visitor would insist, should be a private matter as between those belonging to a company. The state should play no part in attempting to enforce commercial morality. In the case of misbehaving directors, shareholders are given considerable formal powers to appropriately deal with dishonesty or negligence. In the last resort shareholders can deal with such directors by using their voting power at a general meeting to remove them from office.

A twentieth century practicioner would, of course, attempt to explain the increased role of the state in corporate regulation to his or her antiquarian predecessor as being a consequence of the 'failure' of shareholder democracy to prevent and/or check the malfeasances of directors and other corporate officers. The difficulty with such an undoubtedly correct assertion is that its admission of the failure of shareholder democracy opens to question many other theoretical assumptions upon which corporate law is supposedly founded. In particular, it brings into question the sustainability of the notion that a corporation should be exclusively run for the 'benefit of shareholders' and that others (ie 'outsiders') have no legitimate claim on corporate decision-making. As Mary Stokes has recently remarked in a much discussed article:

> One of the traditional defences of private property which states that an optimal allocation of resources results from owners (who it is assumed control their property) pursuing their own self-interest could be invoked to justify insisting that the company was run in the interests of shareholders alone. Clearly that justification collapsed once it became clear that shareholders in large public companies no longer exercised any real control or responsibility over their property... A different vision of the company might draw upon the democratic ideal which inspires the relation of the citizen to the state. The democratic ideal asserts that those who are substantially affected by the decisions made by political and social institutions in our society should be involved in the making of those decisions.[43]

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43 M Stokes "Company Law and Legal Theory" in W Twining (ed), *Legal Theory and the Common Law* (1986) pp 179-180. For an extended discussion of the issues raised by Stokes and a number of other recent theoretical contributions to the debate on corporate personality and corporate regulation see S Bottomley "Taking Corporations Seriously: Some Considerations for Corporate Regulation" (1990) 19 *Federal Law Review* 203.

Elsewhere in her analysis Stokes remarks that the ad hoc nature of the development of 'modern' company law has meant that company lawyers and legislators have become stuck in an 'atheoretical mire', with no framework from which to construct a purposeful critique.[44] She asserts that 'company lawyers lack an intellectual tradition which places the particular rules and doctrines of their discipline within a broad theoretical framework which gives meaning and coherence to them'.[45]

The theoretical integrity of company law was clearly not the principal motive activating the reformism of State legislatures in respect to Australian company law in the 1960s. The need to address the theoretical incoherence of company legislation was not an issue for the legislators of the 1960s. As far as they were concerned company legislation had generally worked well, providing an efficient facilitative framework within which new enterprises could be formed. It also was, from their perspective, an extremely efficacious mechanism by which substantial revenues might be earned for the respective state governments, without at the same time placing onerous obligations on those administrations to expend resources on the regulation of the activities of corporations. The reformers of the 1960s were indeed immersed in an atheoretical tradition, their main concern in reforming the legislation being to enhance the ease with which 'Australian' corporations could operate nationally. The state governments wanted to act in this area so as to pre-empt the entrance of the Federal government in the area, with consequent loss of revenue to the states.

Beginning with such limited aims the 'reformers' of the 1950s and early 1960s were consequently not likely to examine the continuing suitability of English legislation to Australian needs. Even less so were they likely to question the desirability of continuing with a state rather than a federally based, system of corporate administration and regulation. Larger issues, such as that of the progressively diminishing theoretical sense and conceptual unity of the legislation were not considered at all. Nor were other important questions asked, such as the potential need for separate statutes dealing with the administration and regulation of proprietary limited and public companies, to better deal with the very different needs of such diverse entities.

The constraints which applied to the reformers of the 1960s, however, would not appear to have had the same hold on the architects of the new 'national' scheme of companies introduced in the 1980s. First in the form of the 'co-operative' arrangements applying under the *Companies Code* and overseen by the NCSC, and then later replaced by the *Corporations Law* and the ASC. As we have already noted the severance with the past represented by the creation of the ASC constituted a significant and important development in the administration of corporate law in Australia. The same cannot be said for the

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44 C Stanley "Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law" (1988) 19 *Cambrian Law Review* 99.

45 M Stokes note 43 *supra* 155.

'new' *Corporations Law*. In their determination to both secure the passage of the legislation and to prevent (if possible) constitutional challenges to the legislation, the Commonwealth government followed the 'safe' course of only making cosmetic alterations to the existing legislation. It was thought that the less the substantive changes in the legislation, the less contentious it would be. This, of course, meant the retention in large part of the ageing and conceptually confused legislative structure which had existed before the introduction of a 'national' system of companies administration and regulation.

Whilst one might endlessly debate the political astuteness or otherwise of the Government's tactics in departing as little as possible from the pre-existing legislation at the time of the introduction of the new scheme, it is nevertheless the case that the retention of the previous statutory structure has been a practical failure. The 'new' legislation is not up to the task of handling the numerous regulatory issues which have been raised by the post October 1987 commercial failures. Nor is it adequate to the task of dealing with the numerous problems raised by the increasingly complex corporate structures being thrown up by large international enterprises. No amount of redrafting of existing provisions or the addition of new sections will overcome many of these problems. The great strength of the nineteenth century English company legislation - its versatility - has now become its greatest weakness. What is required today is far more specific legislation than that of the past. The age of generality is past. A statute dealing specifically with corporate groups is required. As Teubner and others have asserted[46] these are not simply larger versions of the traditional holding-subsidiary company relationship, they are rather new forms of entity which are structurally and functionally different from traditional corporate structures.

At the other end of the spectrum it is clearly undesirable to continue to regulate small trading enterprises under the same legislation as that which deals with large public companies. The package for the new scheme in fact did include a *Close Corporations Bill*. Despite being accepted by Parliament this legislation has not been proclaimed. Recent assurances by those close to the Attorney-General's Department, that it has not been indefinitely stalled, whilst literally true may give rise to some scepticism, particularly in the build up to an election year.

The difficulty being currently experienced in regard to achieving the right regulatory mix in the *Corporations Law* is a reflection of the conceptual problems which beset the current legislation. It is not simply obstruction on the part of vested interests or an over-commitment to legalism on the part of officials in the Attorney-General's Department which stands in the way of

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46 See in particular the articles collected in D Sugarman and G Teubner (eds) *Regulating Corporate Groups in Europe* (1990) published by Nomos Verlagsgesellschaft, Baden-Baden.

reform. It is the legislation itself. As has been suggested by Professor Baxt[47] and others the only constructive way in which the legislature might now proceed, if it wants an effective regulatory and administrative structure which does not overly impede genuine entrepreneurial endeavour or add unecessary costs to business activity, is to start 'ab initio' and introduce a totally new legislative package. The conceptual problems besetting our inherited legislative structure could be resolved. The legislative specificity necessary to deal with particular varieties of enterprise in the complex markets of today could be achieved. Finally, a new legislative initiative would allow companies regulation and administration in Australia to be moulded around the economic realities of today, rather than the past trading relationships and Imperial ties with England.

IV. CONCLUSION

The conclusions of this survey are relatively straightforward. The first is that one of the great 'weaknesses' of Australian company administration in the period before the *Uniform Companies Acts* of 1961-1962, and even to a certain degree after that watershed, was the virtual absence of any commitment towards the regulation of corporate behaviour. The 'cultural' inheritance of the Corporate Affairs Commissions ensured that this was the case. The conviction which these bodies inherited from the nineteenth century was that they were not primarily in the business of regulating corporations. The 'culture' of the purely 'ministerial' nature of the functions of the CAC's was almost impossible to eradicate or transform. Hence, when the CAC's were transposed into Regional Offices of the NCSC they brought these attitudes with them. The cultural baggage of over a century was inherited by the NCSC when the new co-operative arrangements were set in place in the early 1980s. Professor Tomasic has noted that 'regulatory agencies can often be seen as being victims of the forces at work during their formation'.[48] In the case of the CAC's those forces were crippling in terms of their regulatory effectiveness. These values infested the 'new' co-operative scheme of the 1980s due to the preservation of the older structures within the new scheme. This retention of the old within the new was one of the real limitations of the NCSC as an effective regulatory agency. The only manner in which past habits could be properly eliminated was to engineer a complete break with the past. This never occurred in the case of the NCSC. The creation of the ASC, however, represents just such a rupture with the past. The schism with the administrative culture of the past constituted by the

47 Professor Baxt referred to the need to 'begin again' in drafting the legislation around which the new scheme is constructed in his opening address to the Corporate Law Teachers Workshop, University of Canberra (7 February 1992).

48 R Tomasic "Business Regulation and the Administrative State" in R Tomasic *Business Regulation in Australia* (1984) p 45.

establishment of the ASC is a significant event in the history of companies regulation in Australia. However, this does not guarantee that the new system will be any more effective than that which it has replaced. This will depend upon a whole range of factors, most of which have little to do with the level of resourcing or the culture of the administrative agency responsible for enforcing companies legislation. Nonetheless, it is true to suggest that the creation of the ASC has created the *preconditions* for a more efficacious system of corporate regulation than that which has previously applied in Australia.

One of the factors which will potentially undermine the effectiveness of this new regime of corporate administration is the failure of the legislature to properly re-examine the statutory edifice upon which it is founded. Whilst the need to develop special forms of corporate legislation to regulate specific types of corporate entity has been recognised to some extent, the implementation of such species-specific legislation has not been without considerable opposition on the part of significant interest groups. (Witness the tortured history of close corporations legislation). The governmental response to such resistance has generally been to take the line of least resistance and retain the pre-existing structure of corporate law, rather than risk conflicts with important and influential interest groups. They have done so in the name of 'certainty', invoking the undesirability of disrupting the expectations of those engaged in commercial activity.

Whilst the accommodation of commercial interests views is a pre-requisite for the effective implementation of any new policy of corporate administration, it is also the case that the short-term interests of commercial players are not always the most appropriate basis upon which to construct a system of corporate administration and regulation. In the case of the new *Corporations Law* the retention of the theoretically incoherent legislative structure which we have inherited from the nineteenth century is not in the long-run going to be in anyone's interests. Bodies representing commercial interests are, of course, not going to be greatly interested or concerned with the underlying theoretical coherence of company law. Their principal interest will be in ensuring that company law provides a facilitative framework for business and that its regulatory component doesn't hamper genuine commercial transactions or result in the addition of significant costs to such transactions. However, the pragmatic concerns of commercial lobby groups and the apparently more prosaic concerns of academics concerned with the theoretical coherence of company law may in the present conjuncture coincide. Recent developments in Australia indicate such a convergence of interests. The increasing density of corporate legislation since the adoption of the new *Corporations Law* and the frustration of business interests with these innovations is a case in point. Rather than being indicative of the inability of the parliamentary draftsman to 'get it right', the present crisis of confidence in company law is instead a reflection of the fundamental difficulties appertaining to the 'old' legislative structure in large part retained when the new scheme was adopted. The statutory superstructure upon which

the new scheme has been constructed is obsolete. If corporations law is to continue to serve a useful facilitative and effective regulatory role we must begin afresh with the legislation around which the system is constructed. We must take account of the specificities of the environment in which the law is operating. We must also develop regimes of regulation and administration which are specifically adapted to the peculiar needs of the institutional structures which they superintend. The current dissatisfaction with corporate legislation should be used in a positive manner to re-examine the fundamentals of company law and of corporate personality. Rather than 'papering over' the cracks in corporate law in an ad hoc manner we should approach the current crisis in a more systematic manner. We should begin again and redraft the legislation with specific goals in mind. In this way we will achieve a response which will serve the long-term interests of both the commercial sector and of the general public. If the objectives of contemporary companies legislation are made explicit, and the manner of best achieving those objectives is based upon a reasoned and theoretically coherent basis, we will arrive at a far more creative and versatile solution to the current problems being experienced in respect to corporate regulation and administration than if we simply try to turn the clock back (which seems to be the thrust of the Coalition's policy on corporate law) or if we try to eliminate the fissures in the legislation as and when they appear by increasing the complexity and density of the suspect provisions (the Government's current response).

Whether the solution here being advocated to the current problems of corporate law in Australia will be adopted is a matter of considerable doubt. Nevertheless there is some momentum developing in favour of a totally new legislative structure. Influential figures have begun to stress the advantages of recasting the legislation around which our regulatory system is constructed. Many commentators praise the merits of beginning such an exercise with a clean slate and drafting the legislation 'ab initio'. The greater simplicity and coherence thereby obtained is often advanced as a compelling reason for adopting such a solution.

However, despite the apparent advantages of such a solution neither of the major political parties have shown much interest in beginning afresh. They see such a policy initiative as a potential minefield. Nevertheless, if, as seems likely, a 'new' and theoretically informed corporations law does not emerge from the current critiques of corporate legislation and regulatory practice, then we are almost certain to face recurring dilemmas in this area for some considerable time to come.