WHY HIGH COURT JUDGES MAKE POOR HISTORIANS: THE CORPORATIONS ACT CASE AND EARLY ATTEMPTS TO ESTABLISH A NATIONAL SYSTEM OF COMPANY REGULATION IN AUSTRALIA

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1 INTRODUCTION

The recent High Court case on the Corporations Act[1] and the reliance therein by the majority on 'history' to support their reading of s 51(xx) raises the question of what were prevailing community attitudes to uniform national legislation on corporations in the late nineteenth and early twentieth century. Whilst the views of the delegates to the Conventions and the views of the justices in the High Court in the *Huddart, Parker & Co Pty Ltd v Moorehead*[2] have been selectively dusted off and resuscitated by the majority justices in the *Corporations Act* case the broader spectrum of opinion in relation to such matters, both at the time of federation and subsequently, is less well known. Nevertheless such views are also important in arriving at a proper understanding of the meaning of placitum (xx) of s 51. As Deane J stated in the course of his dissent in the *Corporations Act* case:

> [I]t is not permissible to constrict the effect of the words which were adopted by the people as the compact of a nation by reference to the intentions or understanding of those who participated in or observed the Convention Debates....[3]

The dangers associated with a court engaging in 'history' and then reaching a 'legal' conclusion on the basis of their 'historical' understanding of the particular issue in question has been recently commented upon by an Italian historian, Alessandro Portelli. Portelli, in the course of a critique of the trial of those alleged to have been active in the terrorist activities of the Brigata Rosse points to the very different nature of 'historical' and 'legal' truth and the dangers of confusing the two:

> The distinction between legal and historical truth deserves one final comment. Historical truth is hardly ever more than a descriptive hypothesis: legal truth has a performative nature. Whether things happened as the court says or not, to

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1 *New South Wales v Commonwealth* (1990) 169 CLR 482. Hereafter the '*Corporations Act* case'.

2 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330. Hereafter the '*Huddart Parker* case'.

3 (1990) 169 CLR 482, 511.

> all practical purposes they now did: a courts [decision] creates truth...legal truth, in turn has a tendency to become historical truth as well...[4]

The applicability of these comments to our understanding of the 'history' of the 'corporations power' in the Australian Constitution is clear. One of the complex variety of possible meanings of the corporations power has now been transformed from a contingent historical hypothesis to an absolute legal truth by the High Court. The views of a few key participants in Convention debates of 1891 have now been metamorphosised into the "compact of the nation" around the question of the Commonwealth corporations power at the time of federation. The first part of this essay is an attempt to recapture the historical, if not the legal, ground in the wake of the decision in the *Corporations Act* case.

The second part of the essay turns to an examination of the 'history' of the corporations power subsequent to Federation. Whilst most company law scholars are aware of landmark decisions on the corporations power and of the various legislative initiatives in relation to corporate regulation, particularly those since 1961, they are generally, if not invariably, ignorant of the initiatives taken to create a national system of corporate regulation in the period between federation and the late 1930s.

It is perhaps not so surprising that such a vacuum in historical knowledge exists when we realise that no history of Australian companies legislation and its regulation has yet been written. Our historical understanding of the trajectory of company law reform in Australia has tended to come from the leading textbooks. These texts have generally been scholarly, but cursory, in their treatment of the historical evolution of companies legislation and regulation in Australia. One of the better of these brief accounts of the 'history' of Australian company law is that of Professor Ford.[5] However, despite its scholarship, this is nevertheless a flawed and at times misleading account of the evolution of attitudes to companies legislation and regulation on the Australian continent. In his brief examination of the history of companies legislation in Australia Professor Ford fosters the impression that in the period before the States began the negotiations which led to the enactment of uniform companies legislation in 1961 little concern was displayed in relation to the establishment of national uniformity in companies legislation, whether by national legislation or otherwise. Ford speculates that the motivating factor in the late 1950s was the inconvenience which the lack of uniformity was creating for Australian business interests:

> Because of inconvenient differences between the companies legislation of the various States and Commonwealth Territories, moves were made in the late 1950s to obtain uniform companies legislation.[6]

Ford thus dates the commencement of the incremental shift towards a truly national system of companies regulation from the late 1950s. He sees this development as a consequence of the 'inconvenience to business' of a non-uniform system in which most major enterprises operate nationally rather than regionally. He also posits that there are certain factors at work which have

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4 A Portelli, Oral Testimony, "The Law and the Making Of History: the 'April 7' Murder Trial", (1985) 20 History Workshop 31.

5 H A J Ford, *Principles of Company Law* (5th ed 1990).

6 H A J Ford, *Principles of Company Law* (4th ed 1986) 14; see also H A J Ford, *ibid* 11.

continued to constrain a shift toward a truly national system of companies regulation. He speculates that the co-operative system implemented in 1981 represented "a compromise acceptable to those who would like to facilitate Australia-wide administration of companies...but without the centralized control which some people see as a prelude to complete socialization of trade and commerce".[7]

This essay takes up a number of themes suggested both by the recent excursion by the majority justices in the *Corporations Act* case into the legislative 'history' of s 51(xx) and by Professor Ford's analysis of the 'history' of uniform companies legislation.

It is contended in the following that Ford's dating of the shift in public and commercial opinion towards the necessity of a national, or at least uniform, system of company legislation to the 1950s is incorrect. The movement for either a national or uniform system began immediately after federation only to be set back by the *Huddart Parker* decision. However, a revival of interest in the enactment of uniform legislation occurred almost immediately after the decision of the High Court in *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd*[8] and continued throughout the 1920s and 1930s. The reason why it was not more successful at that stage was due to the prevailing suspicion amongst some sectors of the commercial community that uniform legislation was but a short step away from a national system of regulation, and that if such a power was wielded by a federal Labor Government it would have adverse effects on the freedom available to commercial interests under existing State regulatory arrangements. However, despite these fears, some sectors of the commercial community favoured uniform legislation so as to better facilitate their business arrangements. In the 1920s there was also a strong degree of support, both among the professional community (accountants and lawyers) and amongst the State Registrars, for the enactment of uniform legislation.

In approaching the issues outlined above the essay commences by briefly examining the importance of English companies legislation to the Australian colonies in the context of economic conditions prevailing in pre-federation Australia. The paper then proposes a number of possible reasons for the drafting changes which occurred to the 'corporations power' between the 1891 and the 1897 Constitutional Conventions, relating those changes to the corporate collapses of the early 1890s and the consequent different relationship emerging between the Australian and English economies. The essay then discusses the broader community attitudes to both national and uniform companies legislation in the period preceding the High Court decision in the *Huddart Parker* case in 1909. Particular attention is devoted to examining the reactions of key professional and commercial groups to the Commonwealth proposal for national companies legislation in 1906-1907. Finally the essay turns to an examination of the revival of interest in national and/or uniform legislation in the late 1920s and throughout the 1930s. Reasons for this latter initiative petering out in the late 1930s will be advanced. The essay will conclude with a brief discussion of the relevance of the revisionist history herein advanced to current developments in corporate regulation.

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7 *Ibid* 23.

8 (1920) 28 CLR 129. Hereafter the '*Engineers* case'.

2 'NATIONAL ENTERPRISES' IN THE PRE-FEDERATION PERIOD

Central to any examination of incorporated enterprises which operated in more than one colony in pre-federation times is an awareness of the role performed by English companies legislation in this context. Given that all Australian colonies had, to use Alex Castles' phrase, "slavishly followed" the English model of companies legislation,[9] the degree to which that adherence to English models was not purely imitative, but intimately related to the integration of Australian and English business must be recognised. It is asserted in the following that degree of interdependence was so great for both banking and financial companies, and for larger industrial and trading undertakings, that English companies legislation *de facto* often became a 'national' system of company regulation for such enterprises. Such enterprises which operated in more than one colony and/or regularly dealt with English clients and investors often sought English, rather than colonial registration. This was in order that they might have the greatest possible recognition accorded to the their corporate status. Whilst colonial registration might be regarded with some disdain and suspicion in some quarters, English registration was 'good for all the world'. By registering in England such enterprises also facilitated the flow of investment funds into Australia.

The prevailing attitude amongst legal advisers as to the respective merits of 'colonial' and English registration of companies is clear from the following letter of an Australian businessman, Morris Michaelis, to another member of the family business. He describes the advice of his solicitor when he requested that a limited liability company be set up to manage patents for certain inventions he had obtained the rights to:

> When we came to Mr. Smith of Messrs Attenborough & Co. and asked him to make it into a limited liability company, he advised us not to register such a company locally, as it would be useless in England, whereas if it were formed in England into a limited liability company it would be good for all the world.[10]

In the case of public companies it was widely acknowledged that the presence of an English Board which superintended matters from the mother country and met with investors at the annual general meeting was more likely to inspire initial confidence in English investors than an enterprise solely with a colonial board and no mechanism whereby investors could attend meetings or discuss the business with directors. Also, there was more than a small amount of prejudice against colonial competence in management in the criticisms levelled against decisions made by Boards located in the hinterland of the English Empire. One large speculative investor, Colonel A B Wilabraham captured the essence of these concerns in a letter to his banker in Queensland in relation to the Australian Board of the company managing the Mount Morgan mine:

> I confess I think the Directors are managing matters badly - they omitted to pay a dividend at a most critical time, and this might have been provided for by a Reserve Fund - I am no advocate for hand to mouth business - It destroys

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9 A Castles, *An Australian Legal History* (1982) 456.

10 Michaelis Hallerstein Collection, National Archives of Labour and Industry, ANU, Letter from Morris Michaelis of 2 April 1889 to his nephew.

confidence, and if we had the confidence of the British Public you might get *any price you liked* for the shares.[11]

However, even if there was an English Board they had to have some substantive existence to inspire long-term investor confidence. Often this was not the case, the Board being merely a collection of names assembled for the English flotation of the company. It was in this regard that Wilabraham also directed his criticisms against the English Board of the Mount Morgan company, which seemed to be doing very little to alleviate the situation. In a letter to Shields, his Queensland banker, dated 6 June 1890 he stated that he would let Shields know about any new developments in relation to the Mount Morgan mine (Shields was also an investor in the shares) but that he fancied that Shields would hear any such information as soon as he would hear it in London.[12] On 13 June 1890 he wrote a letter which more clearly expressed what must have been a common complaint of English investors in relation to London boards of colonial enterprises when the going got tough. He stated that at the present time we "hear very little of the London Board and very little of the seven and a half million supposed to be offered for the mine".[13]

Enterprises would consequently often register in England as a 'free standing' company and operate under the extant reciprocal arrangements for English companies in those colonies where they had dealings. The requirements which English companies needed to satisfy in order to operate in the colonies were quite often minimal. This presented considerable problems for the colonial Registrars of companies who had to attempt to regulate the 'colonial' operations of such enterprises. The Queensland Registrar of Companies was given to comment in this respect as late as 1905 that as none of the English or foreign companies operating within the colony were required to submit annual returns under the provisions of the British and Foreign Companies Act this presented considerable problems in relation to the proper regulation of such entities and opened up a variety of possibilities for fraud been committed on the unwary investor.[14]

However such companies continued to be licensed to operate in Australia without too many investor complaints. This was due to the number of advantages which they held for the investor and/or incorporator over locally registered entities. In addition to the convenience of incorporating under a registration system with a single administrative body responsible for processing annual returns and other corporate documents (that is the Board of Trade rather than up to five State or colonial Registrars), there were, in addition, certain tax advantages for both public and private companies in registering in the 'mother' country, and for investors in public companies certain taxation benefits in holding shares on the English register in preference to a colonial one.[15]

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11 Wilabraham Collection, Mitchell Library, Book 4, letter of A B Wilabraham to Shields, 24 January 1890.

12 *Ibid*, Letter of A B Wilabraham to Shields, 6 June 1890.

13 *Ibid*, Letter of A B Wilabraham to Shields, 13 June 1890.

14 Reply of the Registrar of Companies to the Report of the Audit Inspector on the Books and Accounts of the Master of the Supreme Court and Registrar of Companies, 15 November 1905, Supreme Court Correspondence File 1905-1935, SCT A/54, Queensland State Archives.

15 Michaelis Hallerstein Collection, National Archives of Labour and Industry, ANU, Letter from Morris Michealis to J Isaac, 19 March 1895.

Even when the principal enterprise in a group of companies was not registered in England it was often the case that a number of its subsidiaries were so registered. If the corporation was registered in England it could, of course, operate in any of the Australian colonies. This is the reason the 'English companies' and 'foreign' corporations provisions of the various colonial Companies Acts became important in the late nineteenth century. It is also why the issue of uniformity in respect to recognition of foreign corporations was paramount in the minds of the founding fathers when they drafted the predecessor to s 51(xx) at the 1891 Convention.

The regulation of foreign companies was a particularly vexed question. Whilst it was widely recognised that some provision needed to be made to constrain the worst excesses perpetrated by such undertakings, it was also understood that to impose too strict a regime on such operations would be merely to discourage overseas investment in the colonies. A further problem for colonial legislators in regard to 'overseas' (that is English) and 'foreign' companies was that no legislative or administrative mechanism for dealing with such legal entities was suggested by English experience. The difficulty in dealing with the problem of 'English' and 'foreign' companies at the colonial level is illustrated in the following speech by Sir John Mc Intyre in the course of debate on proposed amendments to the Victorian Companies Act in 1896:

> [H]onourable members must recognise that the House was legislating for a colony which was in a somewhat different position to the old country. The English Parliament practically legislated for domestic companies, and ignored foreign companies. The Victorian Parliament could not do that without placing Victorian companies at a disadvantage, by reason of foreign companies being under provisions that did not apply to Victorian companies. There were many foreign companies...as to which it was desirable to make some requirements that could not apply to Victorian companies, for the simple reason that the foreign companies were constituted under their own Acts, and could not possibly comply with all the requirements affecting local companies without great inconvenience. But, so far as protecting the public was concerned, he felt sure it would be within the skill of the House to practically provide for all possible security being given, without subjecting companies, either domestic or foreign, to any unnecessary amount of inconvenience. He admitted, of course, that it was a matter of great difficulty.[16]

Therefore, for a variety of reasons, many Australian companies, particularly substantial financial and trading enterprises, registered in England in preference to under one of the colonial Companies Acts. In the late nineteenth century it was consequently the case that English company law *de facto* operated as Australia's first 'uniform' system of company registration. It was with this prevailing 'system' in mind that the first draft of what was to become s 51(xx) was prepared. The 1891 draft of the 'corporations' power was accordingly concerned with recognition of the status of 'English','foreign' and interstate corporations.[17] The necessity of establishing some uniform national provisions on the status of such enterprises was becoming compelling by the late 1890s with the enormous rise in the numbers of 'foreign' companies operating in the colonies.

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16 Vic Parl Deb 1896, Vol 79, 4705 (21 January 1896).

17 See G Craven (ed), *The Convention Debates 1891-1898: Commentary, Indices and Guide* (1986) 440.

The urgency with which the proper regulation of 'foreign' companies was regarded in the early 1890s is reflected in an exchange of correspondence on the matter between the South Australian Registrar of Companies and Attorney-General in 1892 and 1893. In a series of letters to the Attorney-General, the Registrar indicated a need to revise the foreign company provisions of the Companies Act so that proper coverage of such enterprises could occur. In a letter to the Attorney-General dated 18 April 1893, Alex Buchanan, the Registrar of Companies, was so concerned at the inability of current arrangements to ensure compliance by 'foreign' companies that he not only suggested amendments to the Companies Act, but also advocated the use of information from the Commissioner of Taxation. Upon draft legislation being submitted to him, along with an alternative proposal for dealing with local representation of 'foreign' companies from the law firm, Symon & Co, Buchanan replied to the Attorney-General:

> At first sight there does not appear to be any serious objection to the adoption of the suggestion contained in the letter so long as the complete chain in the appointment of the South Australian Attorney is deposited in this office with *each* link duly authenticated. If, however, Messr. Symon & Co. would submit a draft clause embodying exactly what these companies desire it will be easier to see whether their wishes can be acceded to with safety. It may be a question of policy whether the colony should waive the (requirement) that the home representative of of (sic) Foreign Companies be *directly* accredited - so far as it is I, of course, offer no opinion, but there can be no doubt that to allow of the appointment of Local Attorneys under delegated powers will detract from the simplicity of the proof of agency which at present obtains. [18]

The statements made by Sir Samuel Griffith to the 1891 Convention must thus be understood in light of the difficulties being experienced by the colonial Registrars in dealing with the phenomenal growth of 'foreign' company registrations in that period. Also, the differences in the practices of the various colonies in regard to the recognition of 'foreign' companies led to unnecessary confusion and competition. It was with these and other related matters in mind that Griffith iterated to the Convention:

> What is important...is that there should be a uniform law for the recognition of corporations...I think the States may be trusted to stipulate how they will incorporate companies, although we ought to have some general law in regard to their recognition.[19]

3 THE CHANGES IN THE PROPOSED CONSTITUTIONAL PROVISION ON THE COMMONWEALTH'S CORPORATIONS POWER BETWEEN 1891 AND 1897 - WHAT WERE THE REASONS?

Crawford has recently commented in his analysis of the *Corporations Act* case:

> The argument from the Convention Debates failed to face the crucial difficulty that the corporations power underwent a major change between 1891, when Sir Samuel Griffith rejected its extension to cover incorporation, and 1897.[20]

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18 Minute Book of Master of Supreme Court, South Australia, Letter of 18 August 1893, Corporate Affairs Commission Office, Adelaide.

19 Official Record of the Debates of the National Australasian Convention Debates, Sydney 1891, 332 (3 April 1891).

20 J Crawford, "The High Court and the Corporations Power" (1990) 3 ACL Bull 33.

The key to explaining the changes between the two dates is what had happened to public attitudes to corporate regulation in the interim. The largest spate of corporate collapses in Australian economic history occurred between 1891 and 1897. Trevor Sykes has stated in relation to this period that the "magnitude and severity of the...financial collapse cannot be overstated...54 of the 64 Victorian based banks closed in 1891, 34 forever....Land values plummeted, unemployment rose and thousands of workmen saw their life savings swept away in building society crashes".[21]

Public confidence in colonial companies legislation and the colonial administrations which administered the legislation was at a low ebb. *The Age* was given to comment in this respect that company law in Victoria was "foully encrusted with the hoary rogueries of [the last] three decades".[22] Much of this growing scepticism as to the existing company legislation to prevent malpractice to the perceived inability of colonial Registrars of companies to deal with the 'problem' of 'foreign and overseas' companies. Without effective channels of communication between themselves, let alone with the Board of Trade in England, no coordinated approach could be taken to prevent malpractices amongst this category of enterprise. Not even the most rudimentary information was available on the public record in respect to such companies in most instances. It was considered in some circles that the only way in which to prevent fraud and malpractice on the part of such companies was to establish a national system for the registration and regulation of 'foreign and overseas' companies.[23]

The clamour for a national system of registration and regulation of 'foreign and overseas' corporations was at its height in the early 1890s. This was overtaken, however, by events in the years that followed. With investment in the Australian colonies becoming anathema to British and other foreign speculators and investors due to the crisis, the 'problem' of all foreign companies disappeared. These external factors made the establishment of a national system for the registration and regulation of such enterprises less of pressing political issue

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21 T Sykes, *Two Centuries of Panic* (1988) 176-178.

22 Cited in M Cannon, *Land Boom and Bust* (1972) 383.

23 Support for a national and uniform system of both company and bankruptcy law was formalised in a motion unanimously agreed to at the Conference of Commonwealth and State ministers held in Hobart in February, 1905. In the Report of the Proceedings of this Conference, immediately after the statement by the President that 'We all agreed that there should be one Bankruptcy law', the following motion proposed by Mr Price and agreed to by those at the Conference is recited:

...in the option of this Conference, there should be uniformity of legislation in respect to the Bankruptcy Law, as well as to Companies Acts, and that the Federal Parliament be asked to legislate to that end at an early date.

(NSW Parliamentary Papers, 1905, Report of Proceedings of the Conference between the Commonwealth and State Ministers, p 71).

In 1906 the desire for the enactment of uniform, national legislation relation to bankruptcy, companies and other commercial activities was reiterated at the Premiers Conference. The Prime Minister, at that Conference expressed the following view in relation to commercial legislation:

We desire to bring the laws of the Commonwealth relating thereto into a uniform state. In some of the States there are old laws, and a large number of discrepancies, and the uniformity I propose will make the Australian laws less uncertain. (NSW Parliamentary Papers, 1906, Report of Premiers Conference, 1906, p 85).

after the mid 1890s. Sykes has commented on the erosion of British investor confidence in Australian investments at this time:

> The experience of Argentina and Victoria in the 1880s shows that Britain had a very large supply of gullible investors in that decade. The supply was not, however, inexhaustible. When the holders of the most respected offices in a government - the Premier, the Speaker and the Agent-General - are all involved in allegations of fraud, dishonesty and manipulation, even the widows in Bournemouth must begin to suspect that somewhere, somehow, something is wrong.[24]

With the collapse of the economy, and thus its appeal to foreign promoters and speculators, capital raising for both existing and new undertakings became a more strictly local affair. Local investors wanted to invest their money in local companies with the Board of Directors and financial information relating to the enterprise available for scrutiny. This, it is suggested, led to a revision of attitudes in regard to the appropriateness of registration in England for companies operating in the Australian colonies.

In the period after the collapses of the 1890s we can observe many existing companies which had weathered the financial storm abandoning their English registration and/or Boards and converting to exclusively colonial enterprises. Cost reductions were often cited by many enterprises as the reason for shutting down their English offices, disposing of their Boards of Directors in the 'home country' and transferring remaining English shareholders to colonial registers. This was not the only reason for this new policy. Another factor animating changes in the structures of Australian companies were new provisions introduced into English tax law at the time. These alterations to tax legislation in the old country meant that from a tax management point of view it had suddenly become far more attractive to hold shares on a colonial register than to hold them in England. This collateral incentive made the transition to purely Australian companies much easier than might otherwise have been the case. English shareholders who might otherwise have protested at having their shareholding moved to the colonies were quite compliant in the face of the potential tax benefits which would flow from the new arrangements.

One consequence of the corporate crisis of the 1890s was that colonial legislatures began to take the question of company regulation more seriously. In Victoria the depth of public disquiet was such that the local Parliament felt compelled to introduce a tighter legislative regime than that which applied in England. In 1896 the Victorian Parliament adopted a number of the recommendations of the (English) Davey Committee. These included the requirement that a registered company make available annually an audited balance sheet in prescribed form.[25] A concomitant of the introduction of this reporting regime was that companies were divided into categories - public companies (which were required to provide an annual balance sheet) and private companies (which were not required to submit an annual balance sheet). Neither of these recommendations had been adopted in England at the time of there introduction in Victoria. The latter reform - division of companies into public and private -

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24 T Sykes, *supra* n 21, 192.

25 An Act to further amend the Companies Act 1890 and for other purposes, 60 Vict no 1482, 1986. In relation to the nature of the annual balance sheet and the circumstances of its availability to shareholders note particularly ss 23-25 and Form B, Third Schedule.

was not adopted in England until 1907 and the former reform - annual balance sheets in standard form - was not required in England until 1923.

It should be noted that the above alterations to legislation were at first confined to Victoria. Rather than increasing co-operation between the various States it seems that in the years following the crisis of the 1890s there was a degree of competition between the colonies to attract company registrations and the accompanying revenue. This may explain why the changes in companies legislation following the crisis were not accompanied by substantial reforms in the structure or functioning of the Registrar of Companies department in Victoria or in any of the other Australian colonies.

The reasons for changes in the wording of the proposed Commonwealth 'corporations power' between 1891 and 1897 are thus incomprehensible removed from the economic events of the intervening years.[26] A major financial collapse in Victoria, brought on by corporate malfeasance on a large scale, and compounded by collusion on the part of members of the colonial government, meant that attitudes towards colonial (that is, State) autonomy in respect to corporate regulation after federation began to change. A national system of regulation had a certain appeal in the context of the then recent past. The prevailing sentiment of the time is captured in the words of one commentator who stated that "remedial legislation is urgently needed to remedy existing abuses, and diminish losses which are now sustained".[27] By the middle of the 1890s it was beginning to be believed in some circles that the only effective remedial legislation would be national legislation.

Despite this drift of opinion towards support for the necessity of a national system of regulation in the years preceding federation it was nevertheless the case that significant interest groups continued to oppose such initiatives. The ambiguity of s 51(xx) is no accident, nor the result of poor drafsmanship, but rather reflects the contemporary division of opinion in respect to the appropriate role for the Commonwealth in corporate formation and regulation. The provision, as finally drafted, must be seen as a distillation of the variety of opinions in relation to the regulation of companies in circulation at the time of the 1897 Constitutional Convention. The views of key members at the 1891 Convention debates are no help at all in understanding the historical meaning of the 'corporations power' as finally drafted. As suggested by Crawford "the truth is that the Founding Fathers had no clear idea of the scope of the corporations power as amended".[28] Many different interpretations can be placed on what

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26 The concern for a co-ordinated national approach to matters of commerce and finance in the wake of the commercial crisis of the 1890s is also reflected in the reasons advanced by those in the banking industry for conducting a National Conference in 1895. Turner (of the CBA) stated that one of the key factors lying behind the Conference was the desire of bankers "to secure federal legislation if possible; that is uniform legislation throughout the colonies". Cited in H Nunn, Select Documents, National Bank of Australia, Sydney, 1988, p 681. It has been suggested by at least one historian of the banking industry in Australia that attitudes emerging from the experience of the 1890s crisis were crucial in the final shape of the 'banking power' in the Constitution. R Holder, *The Bank of New South Wales* (1970). It does not seem unlikely that the same forces were at work in relation to the 'corporations power'.

27 De Lissa, *Companies' Work and Mining Law in New South Wales and Victoria* (1894) 1.

28 J Crawford, *supra* n 20, 33.

constituted the 'compact of the nation' in respect to the 'corporations power' at the time of federation. The division of responsibility between the States and the Commonwealth in relation to matters of registration and regulation of companies was not clearly articulated in the Constitution - the words of the 'corporations power' are consistent with the view that the Commonwealth has regulatory, but no registration powers in respect to companies; they are also apparently consistent with the view that the power in respect to both registration and regulation of companies is divided between the Commonwealth and the States;[29] they may even be read as being consistent with the view that the Commonwealth has exclusive power both in respect to registration and regulation of companies.[30] All of these interpretations are plausible as 'historical' hypothesis as to the nature of the compact of the nation at the time of federation, even if they have not all received the High Court's *imprimatur* as accurate constitutional interpretations.

4 WHAT ATTITUDES WERE HELD BY CONTEMPORARIES AS TO THE PROPER ROLE OF THE COMMONWEALTH IN THE REGULATION OF COMPANIES AT THE TIME OF FEDERATION? THE 1907 MEETING ON COMMONWEALTH CORPORATIONS LEGISLATION.

The Commonwealth Government began exploring ways by which to introduce national companies legislation in 1906. They were further encouraged to pursue such a course by the Colonial Conference of 1907. It was resolved at that Conference "[t]hat it is desirable so far as circumstances permit to secure greater uniformity in Company Laws of the Empire...".[31]

As a result of this invocation and their own desire to secure more effective regulation of Australian corporations the Commonwealth Government called a meeting to discuss the prospects for national companies legislation in 1907. The correspondence relating to this meeting are an invaluable source in relation to the views of many of the significant interest groups - the Law Institutes, Accounting bodies, professional bodies of Company Secretaries and Chambers of Commerce - as to the appropriate role of the Commonwealth in corporate regulation. The factor animating much of this correspondence was that the Commonwealth Government had only invited public sector officials involved in corporate regulation to this first meeting. 'Commercial' and 'professional' bodies were not invited. However, they were permitted to represent their views through the public officials who were attending. It is clear from reading the exchanges of letters amongst groups claiming some special interest in the matter of the Commonwealth's role in the regulation of corporations that by confining representation at the 1907 meeting to public officials the Commonwealth antagonised most 'commercial' and 'professional' groups, who considered their views far more important than those of mere public functionaries. The Victorian Law Institute fulminated in this regard in a letter to corresponding bodies in other States:

> 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

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29 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 488 *per* Barwick CJ.

30 See Deane J's remarks in *New South Wales v Commonwealth* (1990) 169 CLR 482, 511.

31 Colonial Conference, 1907, Minutes of Proceedings, 491.

composed of what are called 'experts' from the 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 of documents and papers in connection with the formation and management of companies.

In the opinion of the Council expert opinion on company legislation cannot be obtained in this way. Practising Solicitors with experience of company formation, managers and auditors with company experience, it is considered alone will furnish advice likely to be a safe guide to legislation.

I am directed to ask for an expression of opinion of your Committee or Council on this matter and whether it thinks joint representation should be made to the Federal Government on the matter.[32]

The Commonwealth was perturbed by such responses as they had intended this initial meeting as purely an opportunity to obtain a clearer view of the considerable *administrative* and *legislative* difficulties which stood in the way of achieving a uniform national system of company regulation. This intended purpose of the 1907 meeting is elaborated upon by Mr Groom, the then Federal Attorney-General, in his reply to a question from Mr Bruce Smith as to why the Chambers of Commerce had not been invited to attend the meeting to discuss their views on Federal Companies and Bankruptcy legislation:

Mr. Groom - When the decision was arrived at to frame [Bills relating to these matters] the Government were confronted with this difficulty: that the six States had six different administrative systems, which had originated in their own peculiar conditions. Consequently, before we considered the foundation for a Bill - although we had the Bill in draft - it was deemed highly advisable to invite all the expert officers who had been administering the State...Acts, to hold a preliminary consultative conference with the Commonwealth authorities. When that step was decided upon inquiries were made from New South Wales and other States, whether outside bodies could make representations...In fact I received a deputation to that effect, and my reply was that we should only be too pleased to consider representations that were made to us by any representative bodies concerned. The only thing that we asked them to do was, to put their representations specifically in writing, so that we might appreciate their points.[33]

Despite their antagonism to the manner in which the Commonwealth had sought to proceed in relation to the preparation of Federal legislation on companies it is nevertheless clear from the exchange of letters between commercial and professional bodies that there was some considerable support for *uniform* companies legislation. Such considerations had become more pressing since the drafting of the 'corporations power' due to the unprecedented growth of the Labor party as a political force since the Convention debates in the 1890s. Whilst the existing political groupings at the time of the Convention debates could have been trusted to use a Commonwealth corporations power with some circumspection and consideration for commercial interests this was certainly not considered to be the case with the Labor Party. Whilst it had been relatively implausible in the 1890s that a political party representative of the interests of

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32 Letter of Honorary Secretary of the Law Institute of Victoria to Hon Secs of Law Institutes/Associations in other States, dated 19 June 1906.

33 Com Parl Deb 1907, Vol XXXVII, 1088 (30 July 1907).

labour might gain national political office it was a very pressing reality by 1907.

Consequently, by 1907 commercial and professional bodies regarded the threat of augmenting the power of the Commonwealth in respect to the regulation of companies to such a degree that they were willing to suffer the inconvenience of non-uniform legislation, rather than allow the Commonwealth a foothold in the area. Commercial and professional bodies considered, with some justification, that Companies legislation would be the thin edge of the wedge in respect to Commonwealth intervention. Anti-trust legislation with 'teeth' would almost certainly follow, as would a number of other equally unpalatable regulatory incursions into commercial life. It is clear from correspondence between 'commercial' and 'professional' interest groups in 1906 and 1907 that commercial and professional organizations were virtually unanimous in regarding the Commonwealth's intervention into corporate regulation as undesirable. However, it should be noted that the reason they were hostile to such intervention was precisely because they believed the Commonwealth *did* have power to pass legislation relating to the regulation of companies under s 51(xx) of the Commonwealth Constitution.

The most significant impediment to the introduction of Commonwealth corporations legislation in 1907 was the concerted opposition of professional and commercial interest groups to the introduction of such legislation, not lingering doubts as to the nature of the Constitutional power invested in the Commonwealth under s 51(xx). The nature of this opposition is clearly enunciated in a series of letters sent to the Attorney-General in 1907 by Law Institutes, Accounting bodies, and Chambers of Commerce. Typical is the following letter from the President of the Sydney Chamber of Commerce to the Commonwealth Attorney-General:

> [We] submit for the consideration of the Acting Prime Minister of the Commonwealth...the following suggestions of a general nature:...
>
> 2. That uniformity of the bankruptcy or company law can best be obtained by legislation by agreement in identical terms by the Parliaments of the individual States.
>
> 3. That in view of the great distances between places in the Commonwealth, it is not expedient to have Federal legislation on these subjects unless such legislation can be so adapted to the circumstances as to avoid difficulties in dealing with real property in business transactions.
>
> 4. That it is desirable on both subjects, legislation should follow the lines of the latest English legislation.
>
> 5. 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.[34]

The same advice is repeated word for word in a letter dated 15 July originating from the Incorporated Law Institute of New South Wales. Whilst the Queensland Law Association offered no opinion on the substantive question of the form of the legislation it too expressed misgivings about the manner in which the Commonwealth had proceeded. It stated that the Council of the Queensland Law Association were of the opinion that "the best interests of all concerned would be

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34 Copy of letter of the 9 June 1907 in Law Institute of Victoria Collection, 2nd accession, Melbourne University Archives, 2/42/3.

best served by seeking the opinion and advice of the legal profession generally".[35] The Queensland body expressed the view that the role of Company Registrars in the development of any new scheme should be strictly limited. This was due to the fact that whilst these "gentlemen are doubtless well versed in the ordinary routine work of registration and so on" they could have "little or no practical experience of the actual working and effect of the Acts".[36]

Chambers of Commerce were largely opposed to Commonwealth legislation because of their fear of greater regulation. Law Institutes opposition, however, seemed to be principally animated by their professional affront at not being one of the first groups to be consulted in relation to the drafting of the proposed legislation. The affront so strongly felt by the Law Institutes on the eastern seaboard was, however, not shared by all. The South Australian Law Institute voiced the opinion that it considered the Commonwealth had acted properly in the manner it had proceeded. In the course of correspondence with his Victorian counterpart the Honorary Secretary of South Australian Law Institute stated:

> My Council Have caused careful enquiries to be made, and it appears:
>
> (1) that the conference recently held in Melbourne on the subject of Federal Company and Bankruptcy legislation was a consultative one, called together at the instigation of the Federal Ministry with a view to the Commonwealth authorities informing themselves as to the difference existing in the legislation of the various States and as to the experience of the states in administering their respective laws.
>
> (2) that the Conference was composed of Officials nominated by the Commonwealth and by the governments of all States except Victoria and Tasmania..
>
> (3) that the Officials referred to not only submitted to the Conference their own views on the matters for consideration, but also the views of various State representative bodies such as Chambers of Commerce and Institute of Accountants.
>
> (4) that altho' your own State was not formally represented at the Conference by separate officials, a long statement was submitted thereto embodying the views on the subjects under consideration of independent Conferences held in Melbourne at which there were represented the Law Institute of Victoria, the Melbourne Chamber of Commerce, the Incorporated Institute of Accountants (Victoria) and the Society of Accountants and Auditors (England)....
>
> My Council further understand that the Federal Government are by no means limiting their investigations to the views of the main Melbourne Conference, but that they are also taking further advice based on the opinions and experience of representatives of the commercial community. As far as can be ascertained it appears to my Council that the greatest care has been taken to ensure that the proposed Federal Company (and Bankruptcy) legislation shall rest on a proper foundation; and under these circumstances my Council cannot see that there is any necessity at the present time for making a joint representation to the Federal Government on the matter.[37]

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35 Law Institute of Victoria Collection, 2nd Accession, Melbourne University Archives, letter of Queensland Law Association to Law Institute of Victoria, 9 July 1907.

36 *Ibid.*

37 Law Institute of Victoria Collection, 2nd Accession, Melbourne University Archives, Letter of South Australian Law Institute to Victorian Law Institute, 3 July 1907.

The South Australian Institute was, however, a lone voice amongst professional bodies interested in the legislation. The inappropriateness of the Federal Government seeking advice in the first instance, at least in the eyes of the professions, from such petty officials as the Registrars of Companies was the first sign that the 1906 proposal to establish a national system of corporate law would fail. Representations adverse to such legislation from commercial bodies were its death knell. The tyranny of distance and the need for existing arrangements in respect to commerce to remain undisturbed were no doubt significant factors in dissuading the Commonwealth from proceeding with their plan to draft national companies legislation to ensure uniformity within the Commonwealth in the treatment of both foreign and local companies.

The *Huddart Parker* case was thus really no more than a legal confirmation of the practical impossibility of the Commonwealth enacting a national Companies Act due to the considerable opposition to such a measure on the part of significant interest groups. The fact that the case turned on the validity of legislation introduced under the companies power which purported to regulate monopolies was a clear indication of the dangerous potential of a wide interpretation being placed on that particular constitutional provision. An relatively unfettered Commonwealth corporations power would open up all sorts of possibilities for a ideologically driven Labor Government. The 'political' nature of the *Huddart Parker* decision is inescapable. The judgements in that case reflect the prevailing views in the legal profession and the commercial community as to the undesirability of the Commonwealth arrogating any power in relation to the incorporation and/or regulation of companies under the ambiguously worded power contained in s 51(xx) of the Constitution. As the dissenting justice, Isaacs J exclaimed, the majority had reached a decision which asserted that "[t]he distinct unambiguous words of the power, couched in language quite unequivocal, do not... mean what they say"....[38]

5 THE TWENTIES AND THIRTIES — THE DESIRE FOR UNIFORMITY

After the decision in the *Engineers* case in 1920, which rejected the reserved powers doctrine which had so animated the decisions of the majority in *Huddart Parker*, the way was again open to reinterpret the scope of the 'corporations power'. The presence in Canberra of a Conservative Government in the 1920s also meant that the threat of a widened scope for the power would not be used in a manner adverse to business interests.

One of the largest complaints of the business community in relation to companies legislation was the lack of uniformity existing between the different States. This caused considerable difficulty for that expanding group of companies which operated nationally. A single piece of legislation was one option, but at the very least commercial interests favoured uniformity. Those in the legal profession were also advocates of a uniform system. However, they did not favour national legislation, perhaps because the existence of 'one stop' shopping would mean a reduction in legal work associated with the registration of companies and the filing of appropriate documentation. Perhaps their opposition was more principled. From surviving documents it is difficult to tell.

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38 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 388.

It is interesting to note that the Company Registrars were in the forefront of the campaign for uniformity. They were believed they were accurately representing, in advocating these views, the views of the commercial community. J W Stuart, the South Australian Registrar wrote to the State Attorney-General in 1923 of the urgency of action being taken in regard to uniformity:

> I have no doubt there is a strong desire on the part of the commercial community to obtain uniformity in company law. I understand representations have been made to the Commonwealth Government - but it appears that the Constitution has to be altered to effect such a purpose. The South Australian Acts differ in important particulars to those in other parts of the Commonwealth and it may be of great service to the commercial world of our Act was brought into line with those of Victoria and Tasmania which are replicas of the most modern legislation on the subject. South Australia would thus be assisting towards uniformity, which trades consider essential for the encouragement of trading but this is a matter of policy and is only thrown out as a suggestion.[39]

The Adelaide Chamber of Commerce had been pressing along with its corresponding bodies on the eastern seaboard for a uniform Companies Act for some time. The meeting for 20 January 1924 was advised that the Greene Committee on company law had been set up in England and requested that evidence of that Committee and its report "be obtained for use of this chamber in connection with the proposed adoption of a uniform Company law for Australia and which would largely be on the lines of the British legislation".[40]

The interest in obtaining uniformity was indeed so great during the early twenties that a resolution was passed at the 1924 meeting of the Associated Chambers of Commerce that:

> A committee of the Associated Chambers be formed, consisting of a member from each of the State capitals, for the purpose of drafting a Uniform Company Bill with a view to getting it adopted by the State parliaments of Australia.[41]

After this initial dalliance with the idea of securing the agreement of the State Parliaments to uniform legislation it was recognised by the Chambers that the best method of consolidating uniformity was by ensuring that Federal legislation was obtained on the matter of companies. The approach that was considered most feasible in securing such legislation, considering the still substantial doubt that hung over the head of s 51(xx), was a reference of legislative power on this matter from the States to the Commonwealth. At a meeting of the Uniform Company Law Committee of the Associated Chambers in Melbourne on 19 August 1924 it was resolved that :

> Chambers of Commerce might take steps to ascertain from leaders of all parties in State Parliaments their ideas on referring to the Commonwealth Parliament - under section 51 of the constitution, subsec. (xxxvii) the power to legislate in the direction indicated. It was asked that this Chamber would advise its opinion as to whether the reference of the required powers to the Commonwealth was advisable.[42]

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39 Minute Book of the Master of the Supreme Court, South Australia, Letter of 11 February 1923

40 Reported in Adelaide Chamber of Commerce, General Council Minutes, 1924

41 *Id.*

42 Minutes of Parliamentary and Industrial Committee Meeting, Adelaide Chamber of Commerce, 28 November 1924.

Support for the enactment of federal legislation was however still not forthcoming from the Chambers of Commerce at this stage. The Minutes of the meeting of 22 June 1925 state that "in connection with the question of uniform company law - to come before the forthcoming Conference of the Associated Chambers of Commerce it was resolved to recommend to Council that the Adelaide Chamber is not in favour of the introduction of uniform company law as a federal measure".[43] The much more limited objective of obtaining a consistency between the South Australian legislation and that in Victoria and Tasmania was, however, achieved. The collaboration existing between the Chamber and the Registrar of Companies in achieving this objective is evidenced in the following Minute of the Parliamentary and Industrial Committee of the Adelaide Chamber of Commerce:

> Chairman stated that meeting had been called to consider Report of Mr. S. Mc Gregor Reid in regard to modernising the South Australian Companies Act, which had been referred by the Council to this Committee....
>
> The recommendations made in the report were -
>
> (1) That a completely new Act should be framed, based on the latest statutes available, and
>
> (2) In event of this not being acceptable to the Government, that certain suggested amendments and additions, considered to be important and vitally necessary, be made to the Act.
>
> Mr. Reid then dealt separately with each of the recommendations made by him in amendments and additions to the Act, and in so doing stated that he had the unofficial collaboration of the Registrar of companies, who approved of the report in its entirety.
>
> Resolved to recommend to Council that before approaching the Government, a copy of the Report be submitted to the Law Society of South Australia, and to the joint Council of Associated Accountants Institutes with a request for their early consideration of same.[44]

The close liaison between commercial and professional opinion in the formulation of legislation before its introduction was a new development. The Registrars were now, apparently, as concerned as those in business and the professions to retaining a State based system of company regulation. This was different from the situation existing in 1906 when the private sector groups - Chambers of Commerce, lawyers professional bodies and accounting professional bodies - and the public sector group - Registrars of Companies - had been set at loggerheads. In the nineteen twenties the movement for uniformity in legislation was one which had co-opted the Registrars of Companies. They were now considered by professional groups, particularly those most directly concerned with the day to day working of business, to be a vital part of any movement for uniformity. Snobbishness could no longer be countenanced in so important matter as the establishment of uniform companies legislation for the whole of Australia.

Agreement was not rapidly forthcoming on these suggested reforms in regard to uniformity. Nevertheless a number of factors meant that the movement for uniformity in legislation continued to be regarded with a certain urgency. One

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43 Minutes of General Council, Adelaide Chamber of Commerce.

44 Minutes of Parliamentary and Industrial Committee, Adelaide Chamber of Commerce, 23 February 1928.

such factor was the introduction of new companies legislation in England in 1929. The momentum which the passing of new legislation in England provided for the uniformity movement in Australia is apparent from the following report of the Proceedings of the Queensland Law Society for 1930-1931:

> Many complaints have been made concerning the antiquity and obsolescence of the laws in force in Queensland relating to corporations, and many have expressed the view that the difference in the laws of different States on the subject are unwarranted....
>
> It is of interest to note that this subject came up for discussion at a conference of the State Premiers, held some months ago, and it was then decided that it was most desirable that the law throughout the Commonwealth should be uniform.
>
> The Commonwealth Parliament being unable to pass the necessary legislation to bring about the desired uniformity, it was agreed that each State should pass a uniform Act, to be drafted by the Parliamentary draughtsman of New South Wales, founded upon the English Act of 1929.
>
> Up to the present, nothing further has been heard of the proposal, and, while 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.[45]

The discussion continued to rage throughout the early thirties. The second factor why reform in companies legislation was considered so necessary was the inability of the existing provisions in preventing corporate malfeasance. The prevailing lack of uniformity in the legislation of the Australian States was also seen to encourage corporate immorality. The following is a typical comment of the time:

> Within recent years a great deal of commercial immorality has been carried on under the cover of company law...It was during the last great period of depression ...that any serious attempt at reform in corporation legislation was made; perhaps the present time will force another serious measure of reform to be undertaken.[46]

The predominant sentiment of the time in favour of company law reform led to renewed suggestions in support of Commonwealth companies legislation. It was stated that this was the only means by which uniformity could be preserved over the long term. An article in the Australian Law Journal advocated a reappraisal of the Commonwealths potential role in this regard:

> It seems clear then that the Parliament may legislate with respect to the companies described in pl. (xx) once they have ben incorporated; that the ambit of the power is bounded on the one side by incorporation and on the other by the trading of the company. Within these limits the Parliament may legislate with respect to the internal management of the company and with all respect to all matters peculiar to companies as such. if this is so, as it is submitted it is, the Parliament might validly legislate for the whole of Australia, providing substantially the same company legislation as the English Companies Act, 1929. Measured in quantity, as space will not permit of an exhaustive application of the above principles, over 320 sections of an Act consisting of 385 sections, are within the legislative power of the Parliament. Of the remainder, it will be found that there is already practical uniformity in all the

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45 Proceedings of Queensland Law Society (1931) 5 LIJ 81.

46 Editorial Comment (1931) 5 LIJ 129, 129-130.

States. Should the Federal Parliament desire to incur the responsibility of entering the sphere of Company legislation , the way appears to be open.[47]

However the prevailing attitude to federal intervention into the corporate arena was one of ambivalence. Even when, as is the case with the analysis in the abovementioned article, there was a predisposition towards federal action on uniformity, the possibility of federal intervention is concentrated around the question of *legislative uniformity*. No mention was generally made by contemporaries of the possibility or desirability of obtaining *administrative uniformity* in company regulation. The vested interests of the State bureaucracies had presumably become so entrenched that an abdication was becoming less plausible. The numbers of company registrations exploded in the post World War I period, particularly those of proprietary companies. The revenue which flowed to State Governments as a consequence of administering companies legislation had grown from a modest amount to quite a large annual sum by the nineteen thirties. The collusion of Company Registrars and those interests not in favour of federal intervention ensured that the establishment of a single administrative body responsible for companies regulation was kept well off the agenda.

6 DEVELOPMENTS AFTER THE 1930S - FROM UNIFORM COMPANIES LEGISLATION TO THE *CORPORATIONS ACT* CASE

As it turned out a certain level of uniformity was achieved amongst the various States during the 1930s, only to disintegrate again during the 1940s and 1950s as each of the States amended their various enactments. Discussion of federal legislation was taken off the agenda again, not to reappear until the 1970s. However, uniformity was a somewhat more pressing problem and was again considered in the late 1950s. Our history, in essence, ends where Ford's begins, with the enactment of the Uniform Companies Act in 1961-1962. The enactment of such legislation was merely part of a movement which had existed since the earliest days of the federation - to achieve uniformity, not only within Australia, but also with the English legislation, by means which did not involve federal intervention. A constellation of vested interests comprised of professional associations, commercial bodies and the State bureaucracies charged with administering companies legislation acted in concert for most of existence of the Commonwealth to prevent it from playing a significant role in company regulation. The decision in the *Huddart Parker* case provided them with a convenient legal peg on which to hang their arguments, even though it was highly suspect as authority after the decision in the *Engineers* case.

After the entry of England into the EEC with consequent alterations to its company legislation, and the decreasing relevance of English capital to Australian business and financial interests the use of English legislation as a model became less important. The business of developing of 'national' legislation could begin. The first measures in this regard occurred in the 1970s. The pace of change was, however, snail like, due to the obdurate nature of the vested interests which had traditionally opposed Commonwealth intervention in the field. It was really only with the flotation of the Australian dollar and deregulation that these forces began to be broken down. The sharemarket collapse

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47 J D Holmes, "A Commonwealth Companies Act" (1934) 7 ALJ 372, 375.

of 1987 and the corporate collapses of 1989 and 1990 put sufficient backbone into the Commonwealth's resolve to proceed with federal legislation. The need for an effective national regulatory body, for administrative, as well as legislative, uniformity had become irresistible. It is in this context which one must read the High Court decision in the *Corporations Act* case and Deane J's comment that Constitutional provisions not be read solely in the light of what delegates to the Constitutional Conferences thought they meant. To interpret the corporations power in the Constitution in as perversely a restrictive manner as that which the High Court took in the *Corporations Act* case is both an illustration of the independence of the judiciary and an indication of the negative potential of that independence in certain contexts. It is a clear illustration of the dangers of translating a conditional historical 'truth' into an absolute legal 'truth' with a definite performative function. In the current climate of international mistrust of Australian business regulation the translation of the views of a few of the key actors at the 1891 Constitutional Convention into 'legal truth' the majority justices in the *Corporations Act* case have significantly erred. They have fallen into the trap of 19th century historiography in which the contingent nature of documentary evidence was forgotten and such 'evidence' was regarded as 'reality'. Paul Thompson's assertion that 19th century historiography operated under a "macabre gothic delusion"[48] is peculiarly apt to the historiography engaged in by the majority justices in the *Corporations Act* case. The justices, in their haste to invoke 'history' forgot that writings such as the reports of the Convention debates don't document facts but rather represent their authors' ideology and dreams.

By slipping into historiographical error and translating their 'bad' history into legal 'truth' the majority in the *Corporations Act* case slowed down the introduction of the new federal arrangements in respect to corporate regulation and have added to international perceptions that Australia is incapable of controlling corporate malfeasance. The High Court may have therefore done irreparable damage to Australian business interests and the Australian economy.[49]

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48 P Thompson, *The Voice of the Past:Oral History* (1978) 43.

49 Note, for example, the comments of Ed Blackadder, chairperson of the Australian Merchant Bankers Association, to the effect that "if the drift goes on much longer, there is a danger of considerable capital outflows from Australia" cited in "A blinkered view from the Bench", *Sydney Morning Herald*, 9 February 1990. See also the comments of Gough Whitlam on the *Corporations Act* case in the *Sydney Morning Herald*, 15 February 1990.

Whilst the decision in the *Corporations Act* case has not significantly impeded the establishment of a national regulatory scheme (with the exception of the farcical by play provided by the WA Legislative Council in its attempt to impede the introduction of the new scheme) it is nevertheless the case that it has prevented the Commonwealth from assuming undisputed control over matters relating to incorporation, and has resulted in the retention of a modified version of the arrangements prevailing under the Companies Code regime rather than permitting the Commonwealth to make a clean break with the immediate past. The retention of the Ministerial Council, albeit with reduced powers, the 'co-operative nature' of the Corporations Law, rather than it being truly national legislation, and numerous other aspects of the new regime of corporate law which arise from the restricted reading given to the Commonwealth's power in the *Corporations Act* case all have and will continue to have a potentially corrosive effect on the effectiveness of Federal administrative and legislative initiatives relating to corporations.

Ironically enough, in their attempt at 'historical' authenticity in the interpretation of s 51(xx), the High Court has run counter to the interests which the Founding Fathers and the decision in *Huddart, Parker* sought to protect. The High Court, by returning to *Huddart Parker* in the vastly different social and economic conditions now prevailing, rewrote effectively the 'meaning' of that case for those most closely effected by it. *Huddart Parker*, as revived by the majority in the *Corporations Act* case, is no longer a bulwark against socialist intervention in corporate affairs, but rather now constitutes an impediment to international confidence in the Australian commercial sector.