TOWARDS HARMONISED COMPANY LEGISLATION – 'ARE WE THERE YET'?

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ABSTRACT

The enactment of uniform companies legislation in 1961–2 was a significant achievement for a country in which, a century earlier, multiple incorporations of the one body was the norm and a court of one colony questioned the existence of corporate personality created by the law of another. After Federation, business interests increasingly sought uniform State laws. They opposed centralised regulation which, in any event, was beset by constitutional difficulties. Commonwealth legislation eventually became the preferred model as shortcomings of uniform and co-operative mechanisms were progressively exposed. Yet fully harmonised corporations legislation still does not exist. In this paper presented to the 2011 Hartnell Colloquium at the Centre for Commercial Law, Australian National University to mark the fiftieth anniversary of the Uniform Companies Acts, the author sketches the development of Australian companies legislation over the last 150 years.

INTRODUCTION

Very few lawyers practising today experienced the transition to so-called 'uniform' companies legislation that was achieved in 1962. This colloquium[1] marking fifty years since that achievement provides an opportunity to reflect on the events that led to uniformity and to ask whether Australia yet has harmonised company legislation.

THE COLONIAL ERA

In the beginning, each colony adopted its own *Companies Act*, modelled on the English legislation of 1862 which was, in turn, an extension of the *Joint Stock Companies Act 1856*, the brainchild of the Vice-President of the Board of Trade, the brilliant Robert Lowe who had spent a decade in New South Wales public life during the 1840s.

Queensland led the way with a comprehensive *Companies Act* in 1863. Victoria and South Australia followed in 1864 and Tasmania in 1869. New South Wales moved slowly. Its legislation was passed in 1874. Western Australia adopted its own version

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1 This paper was presented to the 2011 Hartnell Colloquium, 'A Half Century of Harmonisation? The 50th Anniversary of Harmonised Company Legislation in Australia', Centre for Commercial Law, Australian National University, Canberra, 18 November 2011.

of the English Act of 1862 in 1893, having earlier enacted the *Joint Stock Companies Ordinance 1858* modelled on the English Act of 1856.

While these separate enactments were inspired by English innovation, they were passed against the background of particular preconceptions about colonial corporations.

In the mid-nineteenth century, special Acts of colonial legislatures had incorporated certain joint stock companies and put their members under a bond of incorporation. But incorporation by a statute of one colony was seen to be subject to a territorial limitation. Thus, in *The National Bank of Australasia v Cherry*[2] in 1870, for example, the Privy Council had before it as a litigant a body incorporated by a South Australian enactment[3] and described as 'The South Australian Branch of the National Bank of Australasia'. The bank of which it was said to be a 'branch' was The National Bank of Australasia, an incorporated body created by an Act of the legislature of Victoria.[4] In the same way, the proprietors of shares of the joint stock of the Bank of New South Wales were made 'one body politic and corporate' by the *Bank of New South Wales Act* of 1850,[5] a New South Wales statute,[6] and also by a New Zealand statute of 1861.[7] The colonial legislatures were subordinate legislatures and particular views were taken about their extraterritorial competence.[8]

There were two strands to this theory of territorially confined corporate existence. In the first place, the creation of a corporation by statute was generally accompanied by a statutory licence or concession to carry on a particular business. There was no doubt good reason to think that permission of that kind conferred by local legislation did not extend beyond the legislature's territory. But a second idea was at work. It had found clear expression in the United States where, by the first quarter of the nineteenth century, courts had had to come to grips with the status in one state of a corporation created by the law of another. The matter was dealt with by the Supreme Court in 1839 in *Bank of Augusta v Earle*.[9] Chief Justice Taney put the matter thus:

> It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law, and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.[10]

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2 (1870) LR 3 PC 299.

3 *An Act to regulate and provide for the management of the South Australian Branch of the National Bank of Australasia, and for other purposes* (22 & 23 Vict,. 1859)

4 *The National Bank of Australasia Act 1859* (Vic),

5 *Bank of New South Wales Act 1850*, 14 Vict.

6 The New South Wales Act later became part of the statute law of Victoria (by virtue of the *Australian Constitutions Act 1850* (Imp) 13 & 14 Vict c 59) and Queensland (by virtue of the Order in Council of 6 June 1859 establishing that colony).

7 *The Bank of New South Wales Act 1861* (NZ).

8 The proposition that colonial legislatures could not make laws having extra-territorial operation was later held by the High Court to be erroneous: see, eg, *Wacando v Commonwealth* (1981) 148 CLR 1, 21 (Mason J).

9 13 Pet 519 (1839).

10 Ibid.

It therefore became common for American companies with activities extending beyond one state to be incorporated in two or more states. Railway companies were a good example.[11]

In the British Empire, the practice of separate colonial incorporation extended also to companies incorporated in the United Kingdom itself. In *Bank of Otago v The Commercial Bank of New Zealand*,[12] the Supreme Court of New Zealand had to determine the effect of a New Zealand Act of 1864 which said that all persons who had or should in future become proprietors of shares in the capital of the New Zealand Banking Company Ltd should be one body politic and corporate by the name of the Commercial Bank of New Zealand Ltd. The proprietors of shares in the New Zealand Banking Company Ltd were already a body corporate by virtue of registration under the *Companies Act 1862* (Imp). There was thus a purported reincorporation by New Zealand legislation, under an entirely different name, of the body of persons already incorporated by the English Act.

Mr Justice Richmond held that the provisions of the New Zealand Act 'must . . . be rejected as superfluous and inoperative'; and that what that Act intended to achieve had already been done by the English Act. The framers of the colonial Act, he said, 'appear to have confounded the right to a corporate status which the Imperial Act confers independently of local legislation, with the right to do particular acts, such as issuing notes payable to bearer on demand, which may be by the local legislation restricted or prohibited'. The distinction between grant of incorporation and grant of a trading franchise or concession was thus recognised.

Acceptance of the same proposition in relation to the status in one colony of a company formed in another was slower. In 1878 and 1880, the Supreme Court of Western Australia heard two cases involving similar facts. In both *Armstrong v Wanliss*[13] and *Bateman v Service*,[14] a person in Western Australia who was owed money by a company incorporated in Victoria sued in Western Australia to recover the debt. But the chosen defendant was not the body corporate created by the law of Victoria. One of its members was sued. The argument was that the body of persons made by the Victorian legislation into a corporation through registration did not have that status in Western Australia because there was no registration of a company there. The bond of incorporation being absent under the local law, it was argued, it was open to the plaintiff to sue the individual proprietors (or any of them) on the footing that, under the law of Western Australia, they were merely a partnership.

Chief Justice Burt dealt with the first case on the basis that the plaintiff had, to his knowledge, contracted with an agent of the incorporated body created by registration under the Victorian legislation, not an agent of any of the individual corporators. There was therefore no liability of the defendant member actually sued. In the later case, the Acting Chief Justice, George Leake, preferred a different view — that, even if the authority of the local agent was only to contract in the name of what he called 'the so-called "Limited" company' existing under the law of Victoria, the true status of the body in Western Australia, in the absence of incorporation there, was that of an

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11 For example, *Muller v Boston & Maine Railroad* 9 F Supp 802 (D NH, 1935); *Manufacturers Hanover Trust Co v United States* 300 F Supp 185 (SD NY, 1969).

12 [1867] Mac 233.

13 'Supreme Court – Civil Side', *The Western Australian Times* (Perth), 8 March 1878, 2.

14 'Law Intelligence', *The West Australian* (Perth), 24 February 1880, 2.

unincorporated partnership with unlimited liability for individual members. Having reached that point, however, the Acting Chief Justice held back: he considered himself 'bound by precedent' to follow the earlier decision of 'His Honor the late Chief Justice, Sir Archibald Paull Burt, whose place I temporarily fill'. With obvious reluctance, he found for the defendant individual member.

In the course of argument in *Armstrong v Wanliss*, Chief Justice Burt said that the case 'was likely to go home'. In fact, it was *Bateman v Service*, not *Armstrong v Wanliss*, that went to the Privy Council[15] where it was heard by a committee consisting of two former chief justices of courts in India (Sir Barnes Peacock and Sir Richard Couch) and a former judge of the Court of Common Pleas (Sir Montague Smith). They dismissed the appeal, holding that the Victorian corporation was recognised by the law of Western Australia and did not exist there only as the collection of its corporators; and that the argument that they did not have limited liability in Western Australia entailed 'disintegrating the company, and making it cease to be, as far as Western Australia is concerned, a corporation at all'. The Privy Council thus proceeded on the basis that the Victorian company was, in the eyes of the law of Western Australia, a foreign corporation, complete and existing under the law of Victoria, and meriting recognition accordingly as a matter of comity.[16]

VICTORIA TAKES THE LEAD

In the closing decades of the nineteenth century, Victoria was particularly progressive in its approach to company law. This was no doubt because of the concentration of commercial activity and economic influence there in the wake of the gold rushes. By 1890, Victoria had adopted a consolidated Act which O'Dowd and Menzies[17] tell us was 'largely the same in language and principles as the English statute law of that time'. A year later, Victoria adopted the *Voluntary Liquidation Act 1891* (Vic) the purpose of which was to put decision making on winding up into the hands of creditors as a body but which, on one view, undermined creditors' rights because it put winding up beyond court supervision and scrutiny.[18]

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15 (1881) 6 App Cas 386.

16 Such recognition had also been accepted by the United States Supreme Court in *Bank of Augusta v Earle*, above n 9, notwithstanding the view taken as to territorially confined existence. The possibility that one body might be incorporated under two Australian enactments has been firmly rejected in modern times: *Australian Securities and Investments Commission v Medical Defence Association of Western Australia Inc* (2005) 143 FCR 125 [22]–[23] (Emmett J). In *Russian Commercial & Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112, 149, Lord Wrenbury was prepared to consider the possibility denied by the Privy Council in *Bateman v Service*, at least where the foreign corporation had been dissolved. He ultimately found it unnecessary to answer the question 'whether the association of persons which is in the foreign country bound together by a nexus of corporation is not in this country an association of natural persons bound together by a nexus of partnership but not corporate . . . whose existence is not terminated by the death of the foreign corporation . . .'.

17 Bernard O'Dowd and Douglas I Menzies, *Victorian Company Law and Practice* (Lawbook, 1940) 1–2.

18 Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31 *Melbourne University Law Review* 805. 825–6.

In 1896, Sir Isaac Isaacs, as Attorney-General in the Turner Government, obtained amendments to the Victorian legislation concerning accounts,[19] audit and disclosure designed to impose more stringent controls. These came in the wake of the crash of 1891–1893 which had shown up weaknesses in investor protection. Compulsory audit and filing of accounts were introduced. United Kingdom models were adopted, including recommendations of the Davey Committee that had not yet been adopted in that country itself. Some measures were based on New Zealand and Canadian precedents. Isaacs' reforms were said to impose the strictest controls in the British Empire.[20]

An exemption from this stringent regime was provided for closely-held trading companies. The 'proprietary company' was thus born. Provision was also made for no liability trading companies, modelled on the concept of the no liability mining company that had been introduced in Victoria in by the *Mining Companies Act 1871* (Vic) to stimulate capital raising by mining concerns. Proprietary companies survived and were copied throughout Australia; but the no liability company, although retained for mining concerns, was abandoned for trading companies through legislation introduced by Attorney-General John Mackey in 1910.

The main purpose of the Victorian Act of 1910 was to harmonise the company law of Victoria with that of England, while maintaining the Victorian innovations of no liability mining companies and proprietary companies. There was a new *Companies Act* in Victoria in 1915 and, by 1929, Sir Leo Cussen had co-ordinated the preparation of a Bill incorporating most of the amendments to the English legislation in 1928 and 1929.

Yet another new *Companies Act* was adopted in Victoria in 1938. This followed an in-depth examination of the existing legislation, Sir Leo Cussen's draft, the legislation of other states and English reforms. The review was undertaken by a committee of representatives of accounting and secretarial bodies, the chamber of commerce and the Melbourne stock exchange, as well as unofficial 'all-party' committees of members of the Victorian Parliament.

The 1938 Act, consisting of 583 sections and 32 schedules was one of the most voluminous ever passed by the Victorian Parliament. A conservative member said that the name of the Attorney-General, Mr Bailey, 'would for long be connected with the bill, which would provide the most advanced legislation in the world dealing with laws relating to companies'.[21] Not everyone was so complimentary. Mr Outhwaite, chairman of the Victorian branch of the Institute of Chartered Accountants in Australia, criticised the provisions on accounts for their imprecision and vagueness, noting, in relation to one matter, that 'two legal opinions have already been given on the subject completely repugnant one to the other'.[22]

There is no need to trace like developments in other parts of Australia. Victoria remained for many decades at the centre of company law innovation. The other states

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19 The rule that dividends must not be paid except out of profits – now abandoned in Australia by amendments of 2010 – was introduced by Isaacs' 1896 legislation: Trevor R Johnston, Martin O Jager and Reginald B Taylor, *The Law and Practice of Company Accounting in Australia* (Butterworths, 5th ed, 1983) 125.

20 John Waugh, 'Company Law and the Crash of the 1890s in Victoria' (1992) 15 *University of New South Wales Law Journal* 356.

21 'Companies Act Amendments Passed', *The Argus* (Melbourne), 23 November 1938, 13.

22 A H Outhwaite, 'Companies Act Criticised', *The Argus* (Melbourne), 23 May 1939, 6.

tended to be reactive and to take their cue from legislative developments elsewhere. Victorian inventions such as the no liability mining company and the proprietary company were copied. Particular English initiatives were also copied.

BETWEEN THE WARS

Britain was, of course, the main source of unimaginative inspiration among Australian lawmakers. England's *Companies Act* of 1862 grew out of the Acts of 1855 and 1856 allowing for the creation of limited liability by registration. There were sixteen amending Acts during the next 46 years, followed by the *Companies (Consolidation) Act 1908* which was itself amended in 1913, 1917 and 1928 and was the basis for the *Companies Act 1929*.[23] It was to that precedent that Australia mainly looked in the 1930s.

An idea of attitudes to uniformity in companies legislation in the years following the First World War may be gleaned from press articles. In 1924, the New South Wales branch of the Australasian Institute of Secretaries was reported[24] to have expressed 'strong views' on the necessity for the complete re-modelling of that state's legislation.

In Adelaide, representatives of the Chamber of Commerce, the Law Society and the Accountants Society waited on the Attorney-General in 1928 to request that the *Companies Act* 'be brought up to date', noting that 'an amending Act was imperative'; and that the existing Act was 'so far behind the times that the whole of its provisions should be brought under review'.[25]

The executive of the Chamber of Manufactures of New South Wales passed a resolution in 1934 'urging the Government, for the protection of the public, to expedite the passing of the legislation necessary to bring the New South Wales Companies Act into line with the British Act'.[26]

In 1935,[27] Western Australia's Acting Minister of Justice promised to receive and consider 'a report from the conference of various associations which recently met to urge that the State Act should be brought into line with company legislation elsewhere'.

At the annual meeting of the Australasian Institute of Secretaries in the same year, 1935, members from two states — New South Wales and Tasmania — stated that the South Australian Act was being followed in their jurisdictions.[28]

In 1937, a deputation from the Perth Chamber of Commerce asked the Minister of Justice to bring the local legislation 'into line with legislation of the kind in the Eastern States':

> The deputation stated that legislation relating to companies had been considerably amended in the Eastern States recently, and it was the considered opinion of the chamber

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23 Sir Francis Gore-Browne, *Handbook on the Formation, Management and Winding Up of Joint Stock Companies*, (Jordan & Sons, 38th ed, 1933) 1–2.

24 'Companies Act Remodelling Urged' *The Sydney Morning Herald* (Sydney), 26 August 1924, 10.

25 'The New Companies Act', *The Advertiser* (Adelaide), 8 May 1928, 13.

26 'Companies Act', *The Sydney Morning Herald* (Sydney), 20 September 1934, 6.

27 'State Companies Act Proposed Amendments', *The West Australian* (Perth), 8 March 1935, 20.

28 'Secretaries Holding Annual Meeting', *The Advertiser* (Adelaide), 4 December 1935, 16.

> that the Companies Act in Western Australia should be brought into line. Extensive amendments had also been made to companies legislation in England. It was appreciated that the request would involve the carrying out of a big task, but the Perth Chamber of Commerce was prepared to give the Government every assistance it could in the matter.[29]

This press coverage bears out the thesis of Rob McQueen[30] that the desire for uniformity in company legislation did not question but, rather, sought to reinforce the position of company law as a concern of state parliaments. There was a clamour for uniformity, but not for Commonwealth legislation.[31]

In 1907, Littleton Groom, Attorney-General in the liberal protectionist Deakin Government and a strong advocate of Commonwealth legislative powers, proposed the introduction of a Commonwealth Companies Act.[32] The decision in the *Huddart Parker Case*[33] intervened. The legislative capacity of the Federal Parliament was then judged insufficient to support legislation for the creation of companies, as distinct from legislation regulating existing companies. This was in line with the view of Sir Samuel Griffith, expressed at the 1891 Federal Convention, that incorporation of companies should be left to the states, but recognition of existing companies might be a proper concern of the Commonwealth Parliament.[34]

Proposals to alter the *Constitution* to give the Commonwealth full legislative powers in relation to corporations were submitted to referenda by Andrew Fisher's Labor Government in 1913 and later, as a temporary post-war measure, by William Hughes in 1919 after his break with Labor.[35] On each occasion, three of the six states failed to approve the measure. New South Wales was among the dissenting states.

McQueen's thesis is that, as the desire for uniform legislation strengthened in the 1920s and 1930s, influential sections of the commercial community were suspicious that it was only a short step from uniform legislation to centralised legislation. The fear was that, if power over companies legislation were in the hands of a Labor government, it would have adverse effects on the freedom available to commercial interests existing under state regulatory arrangements.[36] The 1907 proposal for Federal legislation had been opposed by law societies, accounting bodies and chambers of

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29 *The West Australian* (Adelaide), 13 August 1937.

30 Rob McQueen, 'Why High Court Judges Make Poor Historians? The Corporations Act Case and Early Attempts to Establish a National System of Company Regulation in Australia' (1990) 19 *Federal Law Review* 245.

31 Revised and updated Acts were adopted in Queensland in 1931, South Australia in 1934, New South Wales in 1936, Victoria in 1938 and Western Australia in 1943.

32 *The Barrier Miner* (Broken Hill), 27 May 1907, 4, stated that such a measure was being prepared for submission to Parliament.

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

34 See *New South Wales v Commonwealth* (2006) 229 CLR 1, 94 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

35 Labor faced a dilemma in finding a basis on which to oppose in 1919 a measure it had itself promoted only six years earlier. A special federal conference eventually decided to contest the proposal as 'a sham and delusion' because of the temporary nature of the legislative power: Tommy Khashoba and Michael Lyons, 'Politics, Pragmatism and the Platform: The ALP and federal industrial relations power' (Paper presented to the Tenth National Labour History Conference in 2007, University of Melbourne, 4-6 July 2007) <http://www.historycooperative.org/proceedings/asslh2/khoshaba.html>.

36 McQueen, above n 29, 247.

commerce in several states.[37] That attitude continued. The professional and commercial bodies were state based and their interests and influence centred on state governments. In his 1928 submissions to the Royal Commission on the Constitution on behalf of the Victorian Bar Association, Owen Dixon KC said that company law was not a suitable concern of Commonwealth legislation.[38]

TOWARDS UNIFORM LEGISLATION

Writing very soon after the 1961–2 uniform Acts had been passed, Professor Harold Ford suggested that Federal governments on both sides of politics had been, at best, ambivalent about embracing the concept of a comprehensive companies Act. Non-Labor governments, he said, would not want to displace the states unless forced by a share market crash or economic depression; Labor's interest in the possibility had been mainly 'in connection with economic planning rather than solicitude for members of what would be regarded as the *rentier* class'.[39]

What, then, were the forces that brought about the 1961–2 Acts? As at earlier points in history, Victoria showed the way. The Victorian *Companies Act* of 1958 introduced a number of new provisions that are today taken for granted but were then innovative, progressive and in some cases controversial:

- Directors were for the first time subjected to statutory duties of honesty and diligence, with the threat of penal sanction.
- A director was also forbidden to make use of information acquired by virtue of his position to gain a benefit for himself or to cause detriment to the company (this was later described as perhaps the 'earliest manifestation in Australia of legislation directed against insider trading').[40]
- The making of payments to directors for loss of office was regulated.
- At least one director was required to be a natural person ordinarily resident in Australia.
- Motions for the election of directors of public companies had to be voted on individually, not en bloc.
- Members of a public company were given the power to remove a director by resolution, despite any contrary provision in the constitution.
- Provision was made for the Attorney-General, after a report of an inspector, to bring civil proceedings in the name of a company to recover damages for fraud, misfeasance or other misconduct.
- The matter of self-incrimination in the context of company investigations was addressed.
- Employees' priority in a winding up was extended to amounts for annual leave and long service leave.

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37 Ibid 258.

38 Commonwealth, Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution* (1929) 209–211

39 H A J Ford, 'Uniform Companies Legislation' (1962) 4 *University of Queensland Law Journal* 133, 134.

40 T E Bostock, 'Australia's New Insider Trading Laws' (1992) 10 *Company and Securities Law Journal* 165.

Patterson and Ednie, in the introduction to their annotated treatment of the 1958 Act,[41] said that it was 'largely modelled on the Companies Act 1948 of England, but we have not been afraid to take an independent line where such a course was considered desirable.' The 'independent line' was, in some areas, a product of local experience. Provisions regulating the offering of unit trust and similar interests to the public, first enacted in Victoria in 1955,[42] were carried into the new Act. The introduction of statutory directors' duties was a result of consideration of a report of Victoria's Statute Law Revision Committee following the investigation by P D Phillips QC, as an inspector[43] into certain takeover activity of Freighters Ltd and associated issues of shares.[44]

The Victorian legislation of 1958 thus reflected modern trends and up to date thinking — so that, as Sir Douglas Menzies observed in the following year, it was 'being currently scanned by the other states with a view to seeing whether uniformity might possibly be achieved'.[45] It is instructive to consider how that 'scanning' process played itself out in New South Wales in the lead-up to uniform legislation.

In November 1959, the Assistant Minister of Justice introduced into the New South Wales Parliament a short amending Bill to improve the protection of employee entitlements in winding up. He said:

> At this stage I can assure hon. members that the principles of the measure conform to those already adopted by Victoria and proposed to be adopted by the other States whose company legislation is presently under review.

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41 W E Paterson and H H Ednie, *Companies Act 1958* (Butterworths, 1960) 77.

42 As a result of recommendations of the Statute Law Revision Committee in 1954.

43 Victoria, *Victoria Government Gazette*, No 718, 6 July 1956, 3867.

44 See the description by Gummow and Hayne JJ in *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507, 528-9:

> The provision was introduced as a result of the report of the Statute Law Revision Committee of Victoria, which examined the provisions of the *Companies Act* 1938 (Vic) with respect to certain actions taken by the directors of Freighters Ltd. The impugned actions arose from Freighters' acquisition of Australian Machinery Co and the directors' formation of companies that would re-sell products produced by Freighters. First, in order to raise the necessary moneys to fund the acquisition of Australian Machinery, Freighters issued shares. However, rather than offering the shares pro rata to existing shareholders for the market price of 50s, the directors of Freighters, without informing the shareholders, themselves took up the necessary shares at a reduced price of 40s. Secondly, the board of directors took over personal responsibility for distributing some of the products of Freighters by forming separate companies for this purpose. This action was taken also without informing the shareholders. The net result was that the directors fixed the prices at which Freighters' products were to be sold to the newly formed companies for resale by them. Thus the directors dealt with Freighters through the cloak of those companies.
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> It also later transpired that the inspector appointed by the Attorney-General of Victoria to investigate these activities faced difficulties ascertaining the full facts because of his limited powers. Thus, the Statute Law Revision Committee's primary focus was on recommending provisions regarding disclosure of interests and provisions regarding powers of investigation with respect to preventing what is now called 'insider trading'.

45 Sir Douglas Menzies, 'Company Directors' (1959) 33 *Australian Law Journal* 156, 169.

The Assistant Minister continued:

> As hon. members know, comparatively recently a new Companies Act has become law in Victoria. The House may be interested to learn details of the progress that is being made in the discussions among the States on a uniform bill.

He then referred to meetings already held in Melbourne and Brisbane and about to be held in Perth, adding:

> [I]t has been openly stated that the degree of uniformity being achieved has been more than heartening, and it is expected that drafting of the bill will be well under way in the early part of 1960.[46]

A comprehensive model Companies Bill was drafted by a standing committee of Commonwealth and state ministers which first met in Canberra in 1956.[47] On 9 November 1960, the New South Wales Minister of Justice, when seeking leave to bring in a Companies Amendment Bill, said:

I am sure that every hon. member is only too well aware of the attempts made since the turn of the century to achieve a uniform company law for this Commonwealth. It has been referred to at Premiers' Conferences on numerous occasions. New South Wales first pressed for uniformity at the 1946 Premiers' Conference, and no dissentient voice has been raised to the claim that uniform legislation relating to companies throughout Australia has long been sought by commercial, financial, legal and other interests. The difficulty has always been in the implementation.

> Previous conferences had been mooted or, having been held, failed dismally in their purpose. Why then was the 1959 conference able to proceed from strength to strength, culminating in the present measure? The spirit of the times has had much to do with this result, and one need only look to the hire-purchase discussions that immediately preceded the 1959 conference to find the solution.[48]

The Commonwealth Attorney-General had earlier said in the House of Representatives:

> An endeavour has been made from as long ago as 1943, with the assistance of the Commonwealth and its officers, to induce the States to enter into this particular activity [that is, to 'negotiate and reduce their company law into a common form']. I should say that recently a conference of the Attorneys-General of the States was called by the Attorney-General of Victoria and was attended by a representative of my department. . . . I am pleased to be able to inform members of the House that substantial progress was made—and made with the assistance of the Commonwealth—at that conference.[49]

It is thus suggested that the Commonwealth — no doubt mindful that it had itself no legislative capacity or, at best highly questionable capacity — played an assisting role in the endeavours of the states; and that it was Victoria that took the initiative. The New South Wales Minister, however, said that it was his state that had first pressed for uniformity; and that it had done so as long ago as 1946. There may have been some vying for position to be seen as the leader of the movement. Professor Geoffrey Sawer,

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46 New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 November 1959, 1757 (Norman Mannix).

47 Ross W Parsons, 'Uniform Company Law in Australia' [1962] *Journal of Business Law* 235.

48 New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1960, 1860 (Norman Mannix).

49 Commonwealth, *Parliamentary Debates,* House of Representatives, 26 August 1959, 565 (Sir Garfield Barwick).

writing in 1963, described one theory that saw the achievement of the particular form of uniformity as a clever outflanking of Labor states by conservative politicians in Canberra and Melbourne so as to avoid more onerous regulation that might have commended itself to Labor policy-makers:

> [S]ome reformers think that the Victorian and Federal Liberal governments between them carried off an astute coup; Victoria rushed through its company law reform scheme in 1958, imposing as heavy a burden of regulation as the commercial traffic of the City of Melbourne would bear; this fundamentally conservative measure, going little further than the English Act of 1948, then looked a *dernier cri* for Australia and so became the main model for the Uniform Act operation.[50]

The initial reaction of the New South Wales non-Labor Opposition to the Bill tabled in 1960 was cautious. The Shadow Attorney-General, Mr McCaw, said in response to the minister's speech:

> The call for uniform company laws throughout Australia is by no means a unanimous call by commercial and business interests. Some people believe that a difference of laws between the states is better than a somewhat depressing uniformity. They contend that uniformity for its own sake is not necessarily a virtue: something may be lost by achieving it.[51]

The Minister made conciliatory noises:

> Of course, our hands, as a sovereign parliament, are not tied. In principle we seek to do as much culling as possible in this process to attain unformity [sic]. However, I do not want any hon. member to think that we shall sacrifice our sovereignty or take away our freedom to legislate as we please. At the same time we should not be helping if we departed from the basic principle of uniformity.[52]

The 1960 bill lapsed. The Minister of Justice brought in a new bill in October 1961. It had been prepared with the assistance of 'a highly skilled draftsman' provided by the Commonwealth,[53] and was adopted by ministers at their then most recent meeting in Adelaide — the culmination, it was said, of meetings and consultation involving 'about 1,200 amendments to the uniform bill, submitted by twenty-eight organisations and twenty-one individuals and corporations', all of which were 'given very careful consideration', with a 'large proportion' being adopted.[54]

Again, the opposition was wary. Mr Ellis, the Liberal member for Coogee, and later Speaker of the Legislative Assembly,[55] warned that adoption of uniform legislation would bring 'a natural reluctance to amend the legislation lest it break down uniformity'. He suggested that this might be overcome

> [I]f the states agreed to set up some sort of standing committee representative of the Attorneys-General of all states, empowered to meet periodically to examine and to report upon the working of the Act in their own separate States and to advise and recommend

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50 Geoffrey Sawer, 'Federal-State Co-operation in Law Reform: Lessons of the Australian Uniform Companies Act' (1963) 4 *Melbourne University Law Review* 238, 239.

51 New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1960, 1862 (Kenneth McCaw).

52 Ibid 1868 (Norman Mannix).

53 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 August 1960, 410–11 (Sir Garfield Barwick).

54 New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 October 1961, 1956 (Norman Mannix).

55 Later Sir Kevin Ellis, Speaker of the Legislative Assembly.

> upon the need for any changes. Uniformity is being achieved by conference and consultation between the states. I suggest that it may be preserved in precisely the same way.[56]

This aspect of the fragility of uniformity was also apparent to Sir Garfield Barwick. Answering a question in Parliament in October 1961, he said:

> There is no constitutional means by which we can prevent any one of the legislatures concerned from making changes in the law that is adopted, but the Attorneys-General of the States and I have formed a standing committee and have undertaken that we shall submit to one another changes in the company law proposed from time to time. It is quite true that that arrangement rests on the basis of Ministers being responsible and gentlemen.[57]

A test of the New South Wales commitment to uniformity came when the 1961 Bill reached the committee stage.[58] Amendments that had been agreed nationally in advance were sponsored by the government and adopted. One proposed amendment, although considered desirable, was not made because the Western Australia Bill had passed the point at which it could be amended. It was said that that matter would be 'included in the first amendment of the Act'. Mr Ellis, however, was successful in securing acceptance of an amendment by which the words 'or if no such shares are so held' became 'or if no such share is so held'.

UNIFORMITY UNDER STRAIN

From the very beginning, there was only partial uniformity. The Acts and ordinances of the several jurisdictions were not in fact identical. Answering a question in the House of Representatives in October 1962 when the legislative processes were almost complete, Sir Garfield Barwick said[59] that no detailed analysis had been made of departures from the model Bill but that those departures fell into three classes: variations to cater for particular state circumstances; 'small variations in drafting form to adapt the language of the model bill to the drafting practice employed in the State concerned'; and 'variation arising out of policy decisions made in the various States'.

Necessary differences dictated by local circumstances (such as the identity of the state official to whom unclaimed moneys were to be paid) were understandable. But, as Sir Garfield Barwick noted, there was also divergence on matters of policy. New South Wales departed from the uniform provisions regarding the constitution of the Company Auditors Board, preferring to give the functions to the existing Public Accountants Registration Board. In Victoria, the new age limit of 72 for directors of public companies did not apply to those over 65 at the commencement of the new law, while South Australia never adopted the age limit (the gap that would otherwise have been left in the South Australia Act was filled by removing the last sub-section of the immediately preceding section and making it a section in its own right).

There were amending Acts in 1964 and 1965. These dealt mainly with fundraising by means of issues of debentures to the public and were a reaction to debenture

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56 New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 October 1961, 1960 (Kevin Ellis).

57 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1961, 1544 (Sir Garfield Barwick).

58 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1961, 2959-62.

59 Commonwealth, *Parliamentary Debates,* House of Representatives, 17 October 1962, 1659-60 (Sir Garfield Barwick).

defaults by companies such as Reid Murray and Cambridge Credit. Uniformity was maintained. The new provisions commenced in all states and territories on dates between 1 February 1964 and 1 January 1967.[60] Acts dealing with streamlined processes for the transfer of shares followed in the period 1967– 1971.[61]

The fact that adoption of these amending Acts was spread over three or four years was symptomatic of the challenges facing uniformity.[62] In 1970, a Securities Industry Act was enacted. It dealt with various aspects of trading in securities, the regulation of securities exchanges, the enforcement of stock exchange listing rules, the licensing of securities dealers and the curbing of certain forms of abuse, including insider trading and market manipulation. But this legislation was adopted only in New South Wales, Victoria, Queensland and Western Australia.

From the inception of the uniform legislation, there was a question about surveillance and enforcement. The respective Registrars of Companies were, as the title implies, keepers of records. They were part of the state departments concerned with enrolling of deeds and registration of land titles.

There was never in Australia an equivalent of the Board of Trade. There was no separate government department that had broad powers in relation to companies, such as power to appoint an auditor if the company itself failed to do so, power to inquire into the affairs of certain classes of companies and power to supervise and regulate liquidators.[63] When English provisions empowering the Board of Trade in matters of company law and administration were transplanted to Australia, there was no readily available repository of powers designed to be exercised by a sophisticated bureaucratic

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60 W E Paterson and H H Ednie, *Australian Company Law* (Butterworths, 2nd ed, 1972) vol 2, 1627-8.

61 *Marketable Securities Act 1967* (NSW), *Marketable Securities Transfer Act 1967* (Vic), *Marketable Securities Transfer Act 1970* (WA), *Marketable Securities Act 1971* (Tas), *Marketable Securities Transfer Act 1967* (SA), *Marketable Securities Transfer Ordinance 1967* (NT), *Australian Capital Territory Tax (Sales of Marketable Securities) Act 1969* (ACT), *Australian Capital Territory Tax (Purchases of Marketable Securities) Act 1969 (*ACT).

62 Some of the recommendations of the Company Law Advisory Committee appointed by the Standing Committee of Attorneys-General in August 1967 were adopted on a uniform basis but many were not. The committee's task was to inquire into the extent of the protection afforded by the uniform legislation to the investing public. The committee was chaired by Sir Richard Eggleston and became known as the 'Eggleston Committee'. Its remit was very broad. Seven so-called 'interim reports' were delivered between October 1968 and July 1972: see New South Wales, *Accounts and Audit*, Parl Paper No 143 (1970)(first); Commonwealth, *Disclosure of Substantial Shareholdings and Takeover Bids*, Parl Paper No 43 (1969)(second); Commonwealth, *Investigations Provisions of the Uniform Companies Act*, Parl Paper No 23 (1970)(third); Commonwealth, *Misuse of Confidential Information Dealings in Options Disclosures by Directors and Summary of Recommendations*, Parl Paper No 24 (1970)(fourth); Commonwealth, *Fundraising by Corporations*, Parl Paper No 99 (1971)(fifth); Commonwealth, *Share Hawking*, Parl Paper No 56 (1972)(sixth); Commonwealth, *Registration of Charges*, Parl Paper No 230 (1972)(seventh). These are conveniently collected at <http://www.takeovers.gov.au/content/Resources/eggleston_committee_reports.aspx>. There was apparently no final report.

63 These are among the powers of the Board of Trade noted in Gore-Browne, above n 22. The functions of the Board of Trade extended into many aspects of British commercial life beyond the administration of companies (such as patents, trade marks, merchant shipping, regulation of factories, mines and agriculture).

body with expertise in commercial regulation. The power was given sometimes to the minister administering the *Companies Act*, sometimes to the Supreme Court and sometimes to the registrar of companies;[64] and the approaches of the several colonies were not uniform in this respect.[65]

Concern about surveillance and enforcement under the new uniform legislation was apparent from the beginning. It was voiced by Russell Fox[66] at the Thirteenth Legal Convention of the Law Council of Australia in January 1963:

> The amendments introduced by this Act were designed to protect investors and creditors. For that purpose a great number of requirements have been introduced, some providing for penalties, some simply laying down standards of conduct. The Act will only be successful to the extent to which there is compliance with these requirements. And, one asks, how is compliance to be ensured?[67]

After referring to the fact that the Act created mechanisms by way of reports and certificates by company officials, Fox said that there was no other system of check that he knew of, 'except that which comes too late in the course of a winding up' — and then that stakeholders are not willing to hazard their own money in funding recovery proceedings against defaulting officers.

This concern was well placed. Before the uniform legislation, the registrars operated as administrative bodies and did not consider themselves to have any real regulatory function.[68]

Matters of supervision and enforcement were brought into sharp focus by market misconduct during the mining share boom of the late 1960s. The Securities Industry Acts of 1970 were passed to deal with those excesses. There was, at the same time, an enhancement of the role of company registrars. In New South Wales, the registrar's functions were transferred to a new Corporate Affairs Commission. By the middle of the decade, the major functions of the Commission involved registration of companies and business names, receiving, examining, registering and making available to the public documents required to be lodged with the Commission, investigating instances of non-compliance with the companies, securities industry and business names legislation and cases of possible misconduct in relation to corporate activity and the securities industry.[69]

On 18 February 1974, New South Wales, Victoria and Queensland[70] — all non-Labor states at the time — entered into a formal written agreement entitled the '

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64 Hence, for example, the uncharacteristically inquisitorial role of Australian courts in relation to inquiries into the conduct of liquidators: see, eg, *BL & GY International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558 (Barrett J).

65 Rob McQueen, 'Limited Liability Company Legislation – The Australian Experience' (1991) 1 *Australian Journal of Corporate Law* 22, 25.

66 Afterwards Fox J of the Federal Court of Australia.

67 Russell W Fox, extracted in J M Young and J M Rodd '"Companies in Uniform": Observations on the recent legislation' (1963) 36 *Australian Law Journal* 330, 346.

68 Rob McQueen, 'An Examination of Australian Corporate Law and Regulation 1901-1961' (1992) 15 *University of New South Wales Law Journal* 1, 11.

69 State Records Archives Investigator, Government of New South Wales, *Agency Detail*, <http://investigator.records.nsw.gov.au/Entity.aspx?Path=%5CAgency%5C78>.

70 Western Australia became a party the following year.

Interstate Corporate Affairs Agreement'. The parties to the agreement began by reciting the desirability of uniformity and the success that had been achieved:

> Whereas it is generally acknowledged that in the interests of the public generally and of persons and authorities concerned with the administration of the law relating to companies and the regulation of the securities industry and trading in securities that there should be substantial uniformity in that law in the States and Territories of the Commonwealth of Australia:
>
> And whereas the Governments of the Commonwealth and of the States of the Commonwealth of Australia have been concerned to achieve such uniformity:
>
> And whereas as a result of conferences between Attorneys-General and Ministers of Justice of the Commonwealth and the States particularly since 1960 considerable uniformity has been achieved

Then came a sharp departure:

> And whereas it is the intention of the Governments of the States of New South Wales Victoria and Queensland –
>
> to achieve greater uniformity in the law relating to companies and the regulation of the securities industry and trading in securities;
>
> to establish reciprocal arrangements and common standards and procedures in the administration of that law;
>
> to co-ordinate administration and avoid unnecessary duplication for the greater convenience of the public and greater efficiency in the overall administration; and
>
> to increase the protection the law affords to the investing public.[71]

The three states then went on by themselves to agree to form an Interstate Corporate Affairs Commission and to accept obligations of 'uniformity in administration and reciprocal arrangements' with respect to the incorporation of companies, the regulation of the securities industry and trading in securities, registration of prospectuses, approval of trust deeds for the issue of what we would today call 'prescribed interests', requirements concerning accounts and audits, and class and individual exemptions concerning fundraising and debentures.

The three states also agreed to form a Ministerial Council. One of its functions was to recommend new legislation 'to achieve the objects set out in the preamble to this Agreement'. The contracting states agreed to submit to their respective parliaments legislation thus recommended. For the first time in the corporations and securities field, therefore, each of the three states had, by formal agreement, undertaken to submit to its legislature measures developed otherwise than by the government of the state. Failure of two states and the territories to join this scheme meant that, in less than a decade, uniformity had become fatally compromised.

The mining boom and the market misconduct it spawned not only inspired the ICAC agreement but also came under close scrutiny by the Senate Select Committee on Securities and Exchange. It was formed in March 1970 on a motion of Senator Lionel Murphy[72] and chaired first by Sir Magnus Cormack and later by Senator Peter Rae. Professor Paul Redmond has given an account of the atmosphere in which the committee went about its work:

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71 The text is set out in W E Paterson and H H Ednie, *Australian Company Law* (Butterworths, 2nd ed, 1976) vol 1, 1136-1136.3.

72 Commonwealth, *Parliamentary Debates*, Senate, 19 March 1970, 489-500 (Lionel Murphy).

> The committee held its hearings amidst spectacular crashes of share traders, revelations of false and misleading statements to the market by public companies, and defaults by brokers.[73]

The committee's comprehensive report of 1974, entitled *Australian Securities Markets and Their Regulation*, became a blueprint for future regulation. The report's very first paragraph was as follows:

> The main finding of this Committee is that the regulation of the securities markets, of the intermediaries which operate in these markets, and of some of the activities of public companies and investment funds, is in need of fundamental reform. Our essential recommendation is that an Australian Securities Commission be established forthwith by the Federal Government to carry out this reform. Securities markets have an important part to play in the development of Australia and effective regulation is required to ensure that the markets are functioning to achieve this objective.[74]

In an interim statement of 9 December 1971, Senator Rae had said that 'there must be, for the whole of Australia, a Commonwealth regulatory body which will have a broad responsibility to oversee the securities industry'.

This represented a clear break with the gentlemanly basis of uniformity to which Sir Garfield Barwick had referred in the warm afterglow of the initial success of 1961–62. Sound regulation of corporations and the securities industry had become a matter of national importance warranting national legislation. The major calamity that Professor Ford had predicted might bestir a non-Labor government at the federal level had now seen both sides of politics embrace the need for a national approach, although philosophical differences remained. The ICAC states had tried to fashion that approach out of the old uniformity method and thereby to pre-empt centralization. That was the preferred approach of non-Labor governments to national coverage. The fact that the ICAC scheme failed to find favour with several states underscored the inherent weakness of that method and the strong need for national legislation supported by centralized regulation and surveillance.

Moves towards adoption of such a regime came in April 1975 when the Whitlam government introduced into the Commonwealth Parliament a Corporations and Securities Bill to create a national securities commission; and later in the same year with the planned introduction of a National Companies Bill. Both these initiatives lapsed when the Parliament was dissolved after the government was dismissed on 11 November 1975.

THE CO-OPERATIVE SCHEME AND BEYOND

In the following years, the ICAC model became the basis of the co-operative scheme adopted by the Commonwealth and all states through the agreement of 22 December 1978.[75] Again, there were recitals about the desirability of uniformity in company and securities law. The chosen mechanism was one by which proposed laws unanimously

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73 Paul Redmond, *Companies and Securities Law Commentary and Materials*, (Lawbook, 5th ed, 2009) 43.

74 Senate Select Committee on Securities and Exchange, Parliament of Australia, *Australian Securities Markets and their Regulation* (1974) 1.1.

75 The text of the agreement appears in the schedule to the *National Companies and Securities Commission Act 1979* (Cth). It is unlikely that this agreement or the ICAC agreement was binding except by way of political obligation: see *South Australia v The Commonwealth* (1962) 108 CLR 130.

agreed by a council of ministers of the Commonwealth and all states were passed by the Commonwealth Parliament so as to apply of their own force in the Australian Capital Territory,[76] while statutes of the several states[77] caused the Commonwealth provisions as in force from time to time to apply as laws of the states, with minor modifications dictated by local circumstances.

Surveillance and enforcement were put into the hands of the National Companies and Securities Commission, a body created by Commonwealth legislation. This was, in concept and on paper, a truly national regulator. But the state agencies continued and many of the functions of the national body were performed by those agencies as delegates under a structure that proved unwieldy and produced dispute and friction about demarcation and administrative matters.

The cooperative scheme was consistent with the political philosophy of the Liberal government of Malcolm Fraser by which it was coordinated. After the Labor administration of Bob Hawke took office, the Senate Standing Committee on Legal and Constitutional Affairs inquired into the role of Parliament in relation to the cooperative scheme. The findings were unfavourable.[78] The 'collegiate' decision-making structure was said to 'disperse' Ministers' and officials' responsibility and their accountability to parliament. The relationship between the NCSC and the state commissions was seen as entailing 'administrative duplication and general inefficiency'. There was a concern that the structure produced 'lowest common denominator decision making'.

The Commonwealth then entered the field in a fully comprehensive way.[79] The Federal Parliament enacted the *Corporations Act 1989*, the *Close Corporations Act 1989*,[80] and the *Australian Securities Commission Act 1989*. The last of these created the Australian Securities Commission, a new and separate administrative and enforcement agency divorced from the old state bureaucracies.

We have now entered modern times and there is no need to dwell on the generally familiar events that led us from that point to the present day. The successful High Court challenge to the Commonwealth legislation in 1990 by New South Wales, Western Australia and South Australia[81] brought about a hasty retreat to a modified form of the cooperative scheme grounded in the ICAC methodology and based on adoption by the states of legislation enacted by the Commonwealth Parliament for the

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76 See especially *Companies (Acquisition of Shares) Act 1980* (Cth), *Securities Industry Act 1980* (Cth) and *Companies Act 1981* (Cth).

77 And later the Northern Territory.

78 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Role of Parliament In Relation to the National Companies Scheme* (1987).

79 The narrow view of Commonwealth legislative power in relation to corporations that had stood largely unchallenged *since Huddart, Parker & Co. Pty. Ltd v Moorehead* (1909) 8 CLR 330 was called into question in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 488-9 (Barwick CJ, with whom McTiernan, Owen and Walsh JJ agreed), 512-3 (Windeyer J), 525 (Gibbs J).

80 Providing for a species of closely held corporation recommended by the Companies and Securities Law Review Committee in its report of September 1985. This proposed legislation did not form part of the package ultimately adopted after the successful constitutional challenge.

81 *New South Wales v Commonwealth* (1990) 169 CLR 482.

Australian Capital Territory.[82] But the shift back to the old model left as an embedded virus a feature that would have been unobjectionable in Commonwealth legislation but, after almost a decade, was exposed by another High Court challenge as fatal to a scheme based on state enactments: the purported vesting of jurisdiction in Commonwealth courts by state laws.[83] Each state eventually made a referral of legislative power to the Commonwealth to allow the creation of the exclusively federal legislation that has prevailed since July 2001.[84]

THE ELUSIVE GOAL

'Are we there yet?' Does Australia today have harmonized company legislation? The temptation is to say 'yes': we have a Commonwealth *Corporations Act* that operates nationally without regard for state differences.

The reality is otherwise. It is true that ASIC operates as a single national regulator. It is true that there is a *Commonwealth Act*. But there are not fully uniform laws. Part 1.1A of the *Corporations Act 2001* (Cth) contemplates and accommodates the possibility that a state enactment may declare a particular matter to be an 'excluded matter' in relation to the whole or some specified portion of the *Corporations Act*. In such a case, the *Corporations Act* causes its own provisions to recede so as to allow state legislation to operate in an unhindered way[85] in relation to the 'excluded matter'. The same kind of rolling back of *Corporations Act* provisions occurs in relation to certain state provisions that were in force before the advent of the *Corporations Act* and took precedence over the former Corporations Law.[86]

State laws intervene at several points to change what would otherwise be the effect and operation of the *Corporations Act*. A few examples will illustrate the point. In the insolvent winding up of an insurance company, state laws may cause assets to be applied towards creditors' claims otherwise than in accordance with the order of application directed by the *Corporations Act*.[87] State legislation may invalidate, in the absence of the consent of a state minister, action by the members of a particular *Corporations Act* company that, under that Act itself, would cause the company's constitution to be altered.[88] State legislation may preclude the appointment of anyone other than a particular office-holder as the auditor of a *Corporations Act* company.[89] State legislation may allow certain court proceedings to be brought against a company

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82 The so-called National Scheme based on adoption by legislation in each state of the 'Corporations Law' set out in s 82 of the *Corporations Act 1989* (Cth) as amended by the *Corporations Legislation Amendment Act 1990* (Cth).

83 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

84 New South Wales referred legislative power to the Federal parliament by the *Corporations (Commonwealth Powers) Act 2001* (NSW). The reference was in relation to particular Commonwealth bills, supplemented by an amendment power also related to those bills. The initial references were for a period of five years only. The resultant federal legislation is the *Corporations Act 2001* (Cth).

85 Unhindered, that is, by s 109 of the *Constitution*.

86 These matters were examined in *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* (2003) 188 FLR 153.

87 Ibid.

88 *Australian Jockey and Sydney Turf Clubs Merger Act 2010* (NSW).

89 *Irrigation Company Act 2011* (Tas).

in liquidation even though leave to proceed has not been granted under the *Corporations Act*.[90]

In these and other ways, state parliaments retain power at the edges of corporate legislation.

Australia's companies legislation and corporate regulation have come a very long way since the days of multi-colony incorporations and doubts about the true status of a company incorporated somewhere in our continent beyond an invisible line in the desert. But we have not reached and will probably never reach a point of perfectly harmonised uniformity.

90 *Dust Diseases Tribunal Act 1989* (NSW).