THE ORIGINS OF ASSOCIATIONS INCORPORATION LEGISLATION — THE *ASSOCIATIONS INCORPORATION ACT 1858* OF SOUTH AUSTRALIA

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I. INTRODUCTION

The late Professor Alex Castles has expressed the view that Australian legislatures in the nineteenth century tended to be over-reliant on British statutes and failed to develop an independent body of statutory law.[1] Whatever truth there may be in that statement as a general proposition — and even assuming that an entirely autochthonous system of Australian statutory law would have been a good idea either then or now[2] — no such accusation can be levelled at the first Parliament of South Australia. That Parliament not only enacted the *Real Property Act 1858*, as to the significance of which no further explanation is required, but also produced a second measure without any direct British precedents,[3] the *Associations Incorporation Act 1858*,[4] which provided a relatively simple and cheap method of incorporating a non-profit association formed for certain community purposes and of running the association after incorporation.

Both South Australian enactments of 1858 have been adopted across Australia, the second much more slowly than the first.[5] While great effort has been devoted to tracing the origins of the *Real Property Act 1858*,[6] much less attention has been directed to the history of the *Associations Incorporation Act 1858*.

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1 Alex Castles, *An Australian Legal History* (1982) 453–455, although note his qualifications of this general proposition.

2 The author has pointed out in another connexion some of the reasons why copying English reforms may have made very good sense in Australia, at least in the nineteenth century : 'South Australia's Judicature Act Reforms of 1853: the First Attempt to Fuse Law and Equity in the British Empire' (2001) 22 *Journal of Legal History* 55, 73, 78f. See also Justice Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47(1) *Quadrant* 9, 14.

3 The closest analogy that can be found in the British statute book is the *Literary and Scientific Institutions Act* 1854, but this did not provide for incorporation of associations (see Keith Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) 215 n 47). Sections 3 and 4 of the South Australian Act do, however, contain some provisions whose original source is s 25 of 7 & 8 Vict, c 110 (1844) (a companies statute). (Note the amendments to s 3 effected by the *Associations Incorporation Amendment Act* 1887 (SA) s 2; their origin in a letter from the Rev WR Fletcher may be pursued in the State Archives of South Australia, file number AGO 626/1887; see also AGO 667/1887.)

4 Now — after earlier consolidations in 1890, 1929 and 1958 — the *Associations Incorporation Act 1985* (SA).

5 See, eg, Fletcher, above n 3, ch. 12; Sally Sievers, 'Incorporation and Regulation of Non-Profit Associations in Australia and other Common Law Jurisdictions' (2001) 13 *Australian Journal of Corporate Law* 124, 128–135. In relation to Western Australia, see Colin Huntly, *A Most Useful Enactment: the Legislative History, Function and Legal Philosophy of the Associations Incorporation Legislation in Western Australia* (MComm Thesis, Curtin University of Technology, 1999).

6 See, for one recent contribution, Antonio Esposito, *The History of the Torrens System of Land Registration with Special Reference to its German Origins* (LLM Thesis, University of Adelaide, 2000).

To some extent this is not surprising, given the greater significance of the former enactment. But the *Associations Incorporation Act 1858* is worthy of at least some consideration by those interested in legal history. In particular, the precise circumstances of its drafting are just as mysterious as those of the *Real Property Act 1858*. Although the *Associations Incorporation Act 1858* ('the *Act*') was introduced into Parliament by the Hon Captain Bagot MLC, the identity of its drafter was kept a closely guarded secret by the politicians of the day. It will be suggested here that the most likely candidate for the honour of having drafted the second great South Australian legal innovation of 1858 was Mr Acting Justice Charles Mann. Further, an explanation will be proposed here for the sudden repeal of the *Act* in 1864 followed by its equally sudden revival in the following year.

II. Drafting, Introduction and Passage of the *Act*

The Bill for the *Act*, as laid on the Table of the Legislative Council on 21 January 1858, is preserved in the Parliamentary Library in Adelaide.[7] With some minor exceptions, it is very similar to the *Act* as finally enacted. In particular, the Bill, like the *Act*, establishes a scheme of incorporation by means of grant of a certificate by the Master of the Supreme Court[8] following the making of an application by memorial to the Court.[9] Eligibility for incorporation was to be restricted to non-profit community organisations such as churches, schools, hospitals, benevolent and charitable institutions, mechanics' institutes and institutes for the purpose of promoting literature, science and the arts.[10] The only major differences between Bill and *Act* were the deletion of the requirement in the Bill that a proposal to incorporate an association should be advertised in every newspaper in South Australia instead of every newspaper published in Adelaide;[11] the addition of further filing requirements to s 2 coupled with the threat to suspend the powers of any association which did not comply with them;[12] the addition of a section enabling existing associations' rules to be amended so as to permit incorporation and of another section to ensure the vesting of personal and real property in a newly-formed corporation;[13] the lengthening of the *Act*'s short title, which under clause 10 of the Bill was simply to be the *Incorporation Act 1857*; and, perhaps (as we shall see) revealingly, the deletion of the words 'Act of Council' from Schedule A to the Bill and their replacement by the short title of the *Act* as eventually enacted.

Like the *Act*, the Bill was mostly concerned with creating a mechanism for holding the property of associations and obviating the need for constant transfers as the trustees changed, a problem to which its preamble expressly referred.[14] This was to be achieved by creating a legal person in the shape of the incorporated association to hold the property of the association. The *Act*, like the Bill, did not confer limited liability on associations and indeed expressly provided that the liability of the members for the association's debts

7 In a volume entitled *Bills 1854–1862*.

8 In his capacity as the Registrar of Companies: see *Registrar of Companies (Miscellaneous Functions) Act 1924* (SA) and South Australia, *Parliamentary Debates*, House of Assembly, 18 November 1924, 1733.

9 *Associations Incorporation Act 1858* (SA) s 1.

10 *Associations Incorporation Act 1858* (SA) s 11; Associations Incorporation Bill 1857 (SA) cl 9.

11 *Associations Incorporation Act 1858* (SA) s 1.

12 See *Kepert v West Australian Pearlers' Association* (1926) 38 CLR 507 for a case under the equivalent provision in Western Australia.

13 *Associations Incorporation Act 1858* (SA) ss 5, 6.

14 The preamble ran: 'Whereas great inconvenience has arisen in cases where property belonging to institutions established for the promotion of religion, education, and benevolent and useful objects, has become vested in trustees, by the refusal of such trustees to act, and by the necessity for the frequent change of trustees; and great expense is often incurred by reason of such change, and the appointment of other trustees, and the transfer of property to such other trustees; and it is expedient, for the encouragement of such institutions, to facilitate the incorporation of the same'.

remained unaffected.[15] Nor did it make any 'provision for members' rights or for the termination of the association'.[16]

The fact that Captain Bagot, who introduced the Bill for the *Act* into the Legislative Council in January 1858, referred in a general way to the assistance he had received from a member of the legal profession has already been noted by other authors.[17] This in itself would be nothing remarkable given that South Australia did not at the time possess a parliamentary drafter[18] and that Bagot was not himself legally trained.[19] However, the newspaper reports of the parliamentary debates, which go beyond what is found in *Hansard* and is referred to elsewhere, make the role played by Captain Bagot's legal adviser appear quite decisive. The *Adelaide Times* states that Captain Bagot said in Parliament that 'the Bill had been placed in his hand by a member of the legal profession, who stated it was most desirable'.[20] When the Bill was re-introduced in September 1858, the Bill of January 1858 having lapsed in the meantime, the *Register* reports Captain Bagot as saying that the Bill 'had been got up under the superintendence of a legal gentleman of considerable eminence'.[21]

If these reports can be trusted — and the similar general tendency of both reports, although published in different newspapers and some months apart, suggests that they can be — then Captain Bagot's role in the enactment of the pioneering measure is quite modest. He is reduced from being the leading figure in the enactment of the innovation, (which has been called by one author 'the Bagot idea'[22] and 'Bagot's legislation'[23]), to being the mere parliamentary agent of an unnamed external mastermind who had the idea for the Bill ('who stated it was most desirable') and who drafted it himself. To Captain Bagot belongs the credit for recognising a good idea, bringing it before Parliament and persisting in it, but not, if the statements reported in the newspapers are correctly reported and true, the credit for originating the idea.

If Captain Bagot had wanted merely to reassure members of Parliament that his Bill had not been drawn up by a non-lawyer such as himself — something which they might have been quite sensitive about in the period surrounding the enactment of the *Real Property Act 1858* and the discovery of defects in it[24] — it would have been sufficient for him to make the statement which is attributed to him in *Hansard*; there would have been no need to go further and point to the origin of the very idea in the brain of a member of the legal profession. This suggests, then, that Captain Bagot's statements, as more fully

[15] *Associations Incorporation Act 1858* (SA) s 4. Limited liability had been introduced into English law by the *Limited Liability Act 1855* (UK), so this option was probably not unknown to the drafter. The principle of the Act of 1855 was, however, quite controversial in its day (see, eg, the note in (1858) 32 LT 109; the reference there is to 21 & 22 Vict, c 91 (1858) extending limited liability to joint-stock banking companies), which may have been the reason for its omission from our Act. Despite two consolidations of the *Associations Incorporation Act 1858* (SA) in the meantime (*Associations Incorporation Act 1890* s 9; *Associations Incorporation Act 1929* s 18), the liability of members of incorporated associations for the association's debts was not excluded until the enactment of the *Companies Act 1934* s 401, on which see South Australia, *Report of the Joint Select Committee of the Legislative Council and House of Assembly on the* Companies Bill *1933*, Parliamentary Paper No 70 (1934) 4, 8; *Re Proprietary Articles Trade Association of South Australia* [1949] SASR 88, 97. From the first, the South Australian example was *not* followed elsewhere in this respect: see *Associations Incorporation Act 1895* (WA) s 8.

[16] Fletcher, above n 3, 209f. Provision for winding up was made by the *Associations Incorporation Act 1890 Amendment Act 1897* s 5, or rather once the printer's error in that section was corrected, by Act No 757 (1901).

[17] Fletcher, above n 3, 208.

[18] See below n 25.

[19] For biographies of Bagot, see Charles Bagot, *A Holograph Memoir of Captain Charles Hervey Bagot of the 87th Regiment* (1942); George Loyau, *The Representative Men of South Australia* (1883), 48f; *Observer* (Adelaide), 31 July 1880, 187 (obituary following Bagot's death on 29 July). A biography of Sir CS Bagot, Captain Bagot's son, is to be found in *Who Was Who* Vol 1 (6th ed, 1988).

[20] *Adelaide Times* (Adelaide), 22 January 1858, 3.

[21] *Register* (Adelaide), 8 September 1858, 2.

[22] Fletcher, above n 3, 219.

[23] Ibid 209.

[24] See, eg, *Register* (Adelaide), 22 December 1857, 2 (discussing appointment of parliamentary draftsman to remedy defects in the drafting of legislation).

reported in the newspapers, are likely to have been correct and not motivated merely by the need to reassure his colleagues. The question therefore immediately arises: who was the unknown drafter, the 'legal gentleman of considerable eminence'? The Bill bears no hint whatsoever about the identity of this person.[25]

The South Australian legal profession was not large in 1858. A local directory lists a total of 45 practising lawyers.[26] Furthermore, many of these persons were also members of Parliament, including almost all of the most eminent lawyers such as Messrs RD Hanson A-G, EC Gwynne,[27] W Bakewell, JT Bagot,[28] JH Fisher, and RB Andrews. It may confidently be supposed that, if one of these members of Parliament had been responsible for the Bill to the extent suggested by Captain Bagot in his speech, that fact would at least have been mentioned in the debates and, indeed, the responsible person would probably have introduced the Bill himself. Certainly there would have been no need to omit to mention the identity of the drafter.

A possible motive for so doing consistent with the hypothesis that a legal practitioner outside Parliament drafted the Bill is admittedly provided by Mr Bakewell's statement during debate in the House of Assembly that the Bill would 'cut off a large amount of revenue from the profession to which he had the honor to belong'.[29] There were in fact one or two fairly high-profile practising lawyers who were not members of Parliament, such as Rupert Ingleby and HW Parker. However, there is no particular reason to associate any of them with the drafting of the *Act*, it would have been something of an exaggeration to describe them as 'of considerable eminence', and there is no really compelling reason why they would not have been named as the drafters if that had been the case: surely the wrath of their practitioner colleagues would have been short-lived and bearable, as no-one would have derived his entire livelihood from acting for associations, and legal help would be required by those incorporating under the new *Act* anyway.[30] The Crown Solicitor, WA Wearing, might also have drafted the Bill, although he would surely have been named as its source if he had acted in his official capacity, and he would not even have to fear the wrath of his colleagues, as a private practitioner possibly might, for drafting a Bill that deprived them of fees. Any such secrets would, at any rate, have been hard to keep in the small legal profession in Adelaide in those days.

Of course, the drafter might simply have been modest and unwilling to have his name mentioned in Parliament. But the fact that there was no rush to incorporate after the *Act* was enacted — the first incorporated association, as we shall see, was formed in 1860,

[25] On 9 November 1860 (South Australia, *Parliamentary Debates*, Legislative Council, 813f), it was pointed out in Parliament that there was no official draftsman and that the names of drafters of Bills should be printed on them so that the person responsible could be easily identified. See also above, n 24. As late as 1897 it was stated that there was still no official draftsman: EG Blackmore, 'South Australia' (1897) 2 *Journal of the Society for Comparative Legislation* (OS) 289, 289; A Buchanan, 'South Australia' (1897) 2 *Journal of the Society for Comparative Legislation* (OS) 279, 284.

[26] *Howell's Directory for the City and Port of Adelaide and South Australian Almanac for the Year 1858* (1858) 95.

[27] Gwynne may also be ruled out as the source because, in the reports of parliamentary debates on 21 January 1858, both the *Register* (Adelaide, 22 January 1858), 3 and the *Adelaide Times* (Adelaide, 22 January 1858), 3 agree that Captain Bagot had said words to the effect that he would be interested to hear whether Mr Gwynne was in favour of the principle of the Bill when he returned to his seat. Unless there was some unusually elaborate coded message here, this suggests that Mr Gwynne had not seen the Bill before its introduction. It is, however, worth noting that EC Gwynne had been a partner (in a law firm) with Charles Mann, and the ostentatious enquiries about his views may be explained on this basis.

[28] Nephew of Captain Bagot: see Howard Coxon et al, *Biographical Register of the South Australian Parliament 1857–1957* (1985), 9. Although Captain Bagot and the lawyer JT Bagot MP were related, there is, as with the other members of Parliament, no reason to suppose that JT Bagot would not have introduced the Bill into Parliament himself had it been his production; or, at the very least, that some reference would have been made to that fact in the debates. As a further indication of JT Bagot's lack of interest in the subject, he was in fact absent from Parliament during a crucial week of debate on the Bill in early December 1858: South Australia, *Votes and Proceedings*, House of Assembly, 175.

[29] South Australia, *Parliamentary Debates*, House of Assembly, 3 December 1858, 752.

[30] Thus, for example, s 1 of the Act required affidavits to be sworn.

almost two years later, and very few in the first decade thereafter[31] — suggests that the *Act* was not the product of a legal practitioner's desire to solve a pressing practical issue on behalf of a particular association, but the work of someone with a longer-term interest in promoting voluntary associations. The fact that Schedule A to the Bill used the term 'Act of Council', a designation which had become out of date after the opening of the first bicameral Parliament of South Australia in 1857, also suggests that this was a project which had been in someone's top drawer for some time rather than something which was brought forward as the result of some immediate practical need.

It is suggested that the clue to the source of the *Act* lies in the combination of eminence and anonymity which are to be found in Captain Bagot's utterances. These criteria are best fulfilled by a Judge: such a person is an eminent member of the legal profession *par excellence* and is also compelled to remain anonymous, at least officially, by the constraints surrounding the judicial role. And if we examine the Bench of South Australia at this stage in its history, we can identify a prime candidate for the honour of being the drafter of the *Act*: Mr Acting Justice Charles Mann.

The other Judges seem much less likely to have been the source of the *Act*.[32] Cooper CJ was absent on leave in England from the end of 1856 to May 1858.[33] It cannot of course be ruled out that he had presented Captain Bagot with a draft of the Bill before he left or sent one by post during his absence, although it seems unlikely even having regard to his Honour's role in the formation of the first association to incorporate under the *Act* two years later.[34] If Cooper CJ had presented the Bill to Captain Bagot in late 1856, just before he left, why did Captain Bagot wait for over a year to introduce it? Furthermore, Cooper CJ appears to have adopted the more traditional method of writing to the government and making a suggestion for legislation in cases in which he felt he had something to contribute.[35] Finally, a recent biographer of Cooper CJ has been unable to find any material linking him with the *Act*[36] and points out that his suggestions for legislation 'did not reflect the mind of an inspired law reformer. Rather, they were limited to legislative housekeeping and deference to English models',[37] which excludes a statute like the *Associations Incorporation Act 1858*, for which there was no English precedent. And although a generous obituary-writer was able to say of Boothby ACJ (as his Honour became during the absence of Cooper CJ)[38] that he 'exhibited proofs of originality and acuteness' and

[31] Richard Lawley of the Corporate Affairs Commission (Office of Consumer and Business Affairs) has informed the author that association number A10, ie the tenth association incorporated under the Act, was incorporated on 21 February 1870. As late as 1887 it was said in Parliament that the Act 'had not been very largely availed of, but it had been to a certain extent, and of late years it had been availed of to a larger extent than previously': South Australia, *Parliamentary Debates*, House of Assembly, 10 August 1887, 460. As we shall see below, the one-hundredth association incorporated under the Act was incorporated in 1888, thirty years after its passing.

[32] As do other legal officials, such as Beddome PM, whose work as a Police Magistrate can have involved little contact with incorporated associations, and the Master of the Supreme Court, Henry Jickling, who by the late 1850s was becoming something of a standing joke: see Ralph Hague, *Henry Jickling: Judge of the Supreme Court of South Australia from November 1837 to March 1839* (1993) 89–94.

[33] *South Australian Government Gazette*, 12 February 1857, 142; 27 May 1858, 388.

[34] This was the Church of England Endowment Society, although it was not formed (even as an unincorporated body) until January 1860, so that Cooper CJ would have had to plan many years in advance for the prospect of the formation of such a society to be in his mind before he left for England in late 1856 and for him to propose a statute under which it could be incorporated before he left. On Cooper CJ's role shortly after the passing of the Act in Church affairs, see the Anglican *Church Chronicle* (Adelaide), 13 February 1860, 58; 13 August 1860, 137 (noting that Cooper CJ was to be consulted on the incorporation of the *Synod*, not the Endowment Society; although the special incorporation Bill of 1862 was apparently a Colonial Office idea (see below n 98), the lack of any reference to the Act of 1858 suggests that Cooper CJ was not the author of that Act); 20 September 1860, 151.

[35] See, eg, the letter from Cooper CJ to the Chief Secretary in file CSO 3045/1855; GRG 1/21/2, State Archives of South Australia, and the references in John Bennett, *Sir Charles Cooper: First Chief Justice of South Australia 1856–1861* (2002) 86–88.

[36] Personal communication with Dr JM Bennett (letter dated 7 October 2002).

[37] Bennett, above n 35, 89.

[38] *South Australian Government Gazette*, 12 February 1857, 142.

'could be a bold innovating reformer',[39] and it was not unknown for Boothby ACJ to be the anonymous author of pamphlets,[40] it seems most unlikely that a Judge with such a 'rooted dislike of colonial innovations'[41] would have contributed one to the South Australian statute book. These two Judges can therefore, it seems, be ruled out. But the case for Mann AJ does not rest merely on this process of exclusion.

Charles Mann had been one of the very first settlers in South Australia and the first Advocate-General (Attorney-General) of South Australia.[42] By 1858, the year in which the *Act* was enacted, he had attained the appointments of Justice of the Peace, Special Magistrate,[43] Commissioner of the Court of Insolvency[44] and Acting Justice of the Supreme Court (during Cooper CJ's absence).[45] Pike comments that his

> major public interest was the advancement of education, particularly by means of mechanics' institutes and libraries. . . . As a public functionary he was forbidden an active part in the struggle for civil and religious liberty, but there can be little doubt that he was discreetly active behind the scenes,[46]

which might of course include being the drafter of legislation. Pike's statement that Mann was interested in education, mechanics' institutes and libraries is correct: in the early days of South Australia, Mann had been on the committees of the Literary Association, the Mechanics' Institute and the subscription library.[47] Mechanics' institutes and institutes for promoting literature, it will be recalled, were some of the bodies eligible for incorporation under the *Act*.

The *Southern Australian*, a newspaper that Mann co-founded and edited in opposition to the pro-government *Register* in 1838 and 1839,[48] was full of exhortations to found and support societies of various sorts to improve the standard of life in early South Australia.[49] It was probably Mann himself who, in an editorial on 7 August 1839, explained that:

> [a]mong those features which distinguish our colony from every other with which we are acquainted, none is more striking than the determination evinced here to employ and keep in

[39] *Register* (Adelaide), 22 June 1868, 2.

[40] Ralph Hague, *The Judicial Career of Benjamin Boothby* (1992) 11f, 21, 190.

[41] Ibid 38.

[42] See the biography in the *Australian Dictionary of Biography* (1967) vol 2, 200f.

[43] Mann was also appointed Police Magistrate: *South Australian Government Gazette*, 10 April 1856, 267.

[44] *South Australian Government Gazette*, 6 March 1856, 164 (all three appointments mentioned in the text, the last on an acting basis); 10 April 1856, 267, and 2 March 1858, 171 (permanent appointment as Commissioner of the Court of Insolvency).

[45] *South Australian Government Gazette*, 16 April 1857, 326. Mann had also been an Acting Judge in 1849: ibid 1 March 1849, 93; 6 September 1849, 410; 4 October 1849, 445.

[46] Douglas Pike, *Paradise of Dissent* (1957) 110.

[47] Carl Bridge, *A Trunk Full of Books: History of the State Library of South Australia and its Forerunners* (1986) 6f, 10, 14. Cooper CJ, however, also supported mechanics' institutes occasionally: see *Register* (Adelaide), 15 August 1854, 3.

[48] George Pitt, *Press in South Australia 1836–1850* (1946) 14, 30.

[49] See, eg, the issues of 30 June 1838, 3 (welcoming the establishment of the Mechanics' Institute); 7 July 1838, 3 (three separate articles on voluntary associations); 14 July 1838, 2 (recording that the rules of the Mechanics' Institute could be inspected at the newspaper's offices); 4 August 1838, 2 (noticing the election of the officers of the Mechanics' Institute, including Charles Mann); 11 August 1838, Supplement, 1 (establishment of South Australian Club); 18 August 1838, 2 (Mechanics' Institute to open shortly); 1 September 1838, 4 (proposal to establish a hospital; notice signed by Charles Mann, among others) and Supplement, 1 (reports on opening of Mechanics' Institute); 22 September 1838, 3 (lectures given at Mechanics' Institute, including one by Charles Mann; also, clubrooms of South Australian Club almost complete); 29 September 1838, 2 (clubrooms now ready); 22 December 1838, 3 (formation of Natural History Society of South Australia); 27 March 1839, 3 (formation of South Australian Church Building Society); 24 April 1839, 3 (first anniversary meeting of South Australian School Society about to be held, urges attendance); 1 May 1839, 4 (reports on that meeting); 26 June 1839, 3 (report on difficulties of the Mechanics' Institute and personal liability of several persons involved in it for its debts); 24 July 1839, 3 (urging attendance at a meeting to consider the future of the Mechanics' Institute); 31 July 1839, 3 (similar); 7 August 1839, 2f (reports on unification of Mechanics' Institute with Scientific and Literary Association; committee includes Charles Mann); 14 August 1839, 2 (financial contributions including that of Charles Mann); 28 August, 4 September and 18 September 1839, each at 3 (reports of lectures at unified society); 16 October 1839, 3 (rejoicing at establishment of Agricultural Society, Charles Mann being one of the committee members); 13 November 1839, 3 (reporting that the value of a Mechanics' Institute, 'we rejoice to perceive, is every day becoming more apparent, and more fully appreciated by the public').

active operation every known engine for moral, mental and social improvement. This characteristic ensures future greatness.[50]

As far as law reform generally is concerned, Mann had called in his newspaper for the introduction of a system for registration of dealings in land as early as 1838,[51] earning him a sharp rebuke from the *Register*.[52] So there is every reason to associate Mann AJ with the drafting of the *Act* given his natural sympathy for its aims, concern for the welfare of South Australia and belief that voluntary associations contributed to it, and willingness to contemplate law reform, even reform which resulted in the reduction of lawyers' incomes. It might well have been the debates on what became the *Real Property Act 1858* which led Mann AJ to pull the draft of the *Act* out of his top drawer and to have it debated in Parliament as an adjunct to the real property legislation and as a means of enabling associations to hold property in a convenient manner.

Also eligible for incorporation under the *Act* were religious bodies. Mann had been a trustee of the first church to be built on South Australian soil (Holy Trinity Church, North Terrace),[53] in which capacity he had been faced with the consequences of the trustees' personal liability for debts incurred on behalf of the organisation they represented.[54] Mann was also an opponent of state aid to religion (one of the major controversies in early South Australia), believing that all denominations should provide for their own sustenance and government.[55] Here he had a good deal in common with Captain Bagot. Captain Bagot, like Mann,[56] was an Anglican, and, also like Mann and despite their membership of what in England was the established Church, an opponent of state aid to religion[57] (as a result of which Bagot 'fell out with many Anglicans').[58] It is quite consistent with their shared view to wish to provide legal facilities for religious bodies to set up their own self-administering corporations — especially when we remember that the alternative is the passing of an incorporation Act for individual denominations on an ad hoc basis. This might be thought — as the Church of England found when it attempted to have a special incorporation Act passed for itself in the early 1860s[59] — to carry a whiff of state endorsement of those denominations favoured with such measures as against those that are not. Furthermore, personal relationships between the two may be assumed to have been at least cordial. Captain Bagot had gone on the public record in appreciation of Mann AJ's earlier services as an Acting Judge in 1849, something which the latter had not forgotten in 1852 when he used the former's opinion of his services as a Judge in support of his application for the judicial vacancy which had arisen on the death of Crawford J (and which, most unfortunately as it turned out, was given to one Benjamin Boothby).[60] It is therefore

[50] *Southern Australian* (Adelaide), 7 August 1839, 2f.

[51] *Southern Australian* (Adelaide), 15 September 1838, 3.

[52] *Register* (Adelaide), 22 September 1838, 3, which is the basis for the statement about Mann's views in Douglas Pike, 'Introduction of the *Real Property Act* in South Australia' (1960) 1 *Adelaide Law Review* 169, 176. Mann's views should however also be read in the original (see the previous footnote for reference).

[53] Brian Dickey, *Holy Trinity Adelaide 1836 – 1988: the History of a City Church* (1988) 24f, 200; Pike, above n 46, 265.

[54] Ibid 47; Pike, above n 46, 268f.

[55] Pike, above n 46, 272.

[56] Although Mann later attended the Rev TQ Stow's independent church (*Australian Dictionary of Biography* (1967) vol 2, 201), and that gentleman officiated at his funeral (*Observer* (Adelaide), 2 June 1860, 3).

[57] Pike, above n 46, 435.

[58] *Australian Dictionary of Biography* (1967) vol 1, 47f.

[59] See below, n 99.

[60] On Mann AJ's earlier service as an Acting Judge, see above n 45. Mann's application for the Judgeship may be found in the Colonial Office files, CO 13/78 (AJCP reel 786), as the Governor forwarded it to Downing Street attached to despatch no 54 of 2 October 1852. Appendix 2 of Mann's job application reproduces a resolution passed by the Legislative Council in 1849 thanking Mann AJ for his services; Captain Bagot is shown as supporting it. For the contemporary report, see the *Register* (Adelaide), 15 December 1849, 2. The resolution, but not Captain Bagot's support of it, is recorded in the *Votes and Proceedings of the Legislative Council*, 12 December 1849, 28. The petition in favour of appointing Mann AJ to a permanent Judgeship is attached to the Governor's Despatch of 23 October 1849 (State Archives of South Australia, GRG 2/5/11, despatch no 145), but unfortunately there is no indication of who signed it.

probable that Mann AJ would have been willing to have Captain Bagot do his parliamentary work for him.

Mann, whilst Advocate-General, had rather notoriously quibbled over the enacting words of legislation, on which he had particularly strong dissenting views,[61] and this resonates with a statement in *Hansard* that the enacting words of the *Act* had to be changed to what had become the usual South Australian form during the Bill's passage through the Legislative Council.[62]

Mann's interest in the sort of public institutions that could be incorporated under the *Act* had not ceased by the 1850s. He gave a well-received lecture to the Mechanics' Institute in the late 1840s;[63] he gave evidence to a select committee of the Legislative Council in 1853 which considered the question of the future of literary, scientific and similar institutions in South Australia;[64] he developed in 1853 a plan for rescuing the Mechanics' Institute involving the provision by it of a free public library in return for government grants;[65] and he provided answers to questions proposed by the 'General Committee of the Adelaide Library and Mechanics' Institute appointed at the General Quarterly Meeting on the 15th day of January 1853' on the history of attempts to establish libraries and public institutes in South Australia.[66]

All this advocacy and agitation would have been very well known to the members of Parliament considering the Bill for the *Act*; indeed, in 1853, RD Hanson, the Advocate-General, had said rather wearily in a legal opinion that Mann had 'long urged'[67] the creation of a national institution. Thus, those who had not already been initiated might well have been able to guess that the eminent legal gentleman to whom Captain Bagot referred was none other than Mann AJ. Given that the quality of legislative drafting was, as noted, already a matter of some concern to South Australian politicians at this time, it is unlikely that they would have been satisfied if the drafter of the Bill had been truly unknown to them — a modest private practitioner, or one fearing the censure of his colleagues, for example — and much more likely that they would have taken a hint which, given Mann AJ's well-known positive attitude towards voluntary associations and his agreement with Captain Bagot on the question of state aid to religion, might well have been quite easily understood by leading citizens of the late 1850s. The identity of the drafter was, it might be thought, not really a secret at all to those who heard Captain Bagot's words.

If the *Act* was Mann AJ's work, he did not live long to see it in operation. He died on the Queen's Birthday, 24 May 1860, 'after an illness which had for some time past compelled him to retire from the active duties of the Court [of Insolvency] over which he presided',[68] but which clearly did not affect him in early 1858 (when the *Act* was first proposed in Parliament) to an extent which prevented him from being re-appointed as Commissioner of Insolvency.[69] Captain Bagot did not attend his funeral,[70] but this is easily explained by the fact that he was in England at the time.[71]

[61] Pike, above n 46, 226. For further details, see the *Register* (Adelaide), 6 January 1838, 1.

[62] South Australia, *Parliamentary Debates*, 21 September 1858, 176; similar *Advertiser* (Adelaide), 22 September 1858, 3. Unfortunately, there is nothing in any other source (including the Bill referred to above n 7) which might make the precise nature of the amendment made here clearer. Although the *Parliamentary Debates* refer to the 'preamble', it seems quite clear that the enacting words are meant given that the preamble (see above, n 14) contained no words even remotely like those referred to in the *Parliamentary Debates*.

[63] Pike, above n 46, 504.

[64] South Australia, *Report from the Select Committee of the Legislative Council of South Australia to Report if it be Expedient that a Bill to Establish a National Institute should be Introduced*, Parliamentary Paper No 80 (1854) 7–10; Bridge, above n 47, 24f, 29.

[65] Michael Talbot, *A Chance to Read: A History of the Institutes Movement in South Australia* (1992) 28.

[66] State Archives of South Australia, GRG 19/320.

[67] State Archives of South Australia, GRG 1/21/158 (opinion dated 2 November 1853).

[68] *Register* (Adelaide), 25 May 1860, 2.

[69] *South Australian Government Gazette*, 2 March 1858, 171.

[70] See above n 56.

[71] *Australian Dictionary of Biography* (1967) vol 1, 47.

Of course, the conclusion that Mann AJ was the real author of the *Act* is based on circumstantial evidence only. Research is handicapped by the apparent failure of Charles Mann to leave any papers to posterity.[72] There is no ruling out the possibility that, at some later time, conclusive proof might be produced to show that someone else was the drafter. But on the state of the evidence currently available, the credit for the *Associations Incorporation Act 1858* and for the second great South Australian legal innovation of that year should be given to Mann AJ.

Other candidates cannot, however, be ruled out. In this respect, it is very interesting to note that Charles Mann worked together for a short time in the early 1850s as Crown Solicitor with William Smillie (one of his successors in the office of Advocate-General), that Smillie had been to New York,[73] and that the State of New York had enacted associations incorporation legislation in 1848.[74] Smillie, too, had shown interest in bodies such as the Mechanics' Institute.[75] Indeed, on 26 February 1851 Smillie and Mann collaborated on an opinion about the need for a church to have its fee simple vested in trustees before grant money could be paid by the Treasury.[76] That was almost seven years before the Bill for the *Act* was introduced, and Smillie died in December 1852,[77] but could it be that Smillie mentioned the New York solution to these problems when the two worked together[78] and that Mann AJ, as he was by then, acted on it after a South Australian Parliament had been formed?

Another outside candidate is Dr Ulrich Hübbe, whose name has long been put forward as the possible true source of the *Real Property Act 1858* in place of Sir RR Torrens, its nominal author. It is striking that Sir RR Torrens also referred in a mysterious way, as did Captain Bagot, to assistance he had received in drafting his work from an unnamed legal authority.[79] However, it seems unlikely that Dr Hübbe would have been the source of the *Associations Incorporation Act 1858* as well. Although the method of incorporation required by it involved, as does modern German law,[80] procedures before a Court,[81] this feature of German law cannot be traced back much further than the beginnings of modern German associations law in the late 1860s, over ten years after the South Australian Act was enacted.[82] Furthermore, Dr Hübbe had not written a book advocating reform of the

[72] Efforts by the author in the usual places to find Mann's papers were fruitless.

[73] For references, see Taylor, above n 2, 63–65.

[74] 1848 c 319; this legislation was however quite different in wording to the South Australian legislation. See also Katz, Sullivan & Beach, 'Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777–1893' (1985) 3 *Law & History Review* 51, 71. New York also had an earlier statute (1813 c 60) dealing specifically with the incorporation of religious societies. A copy of this was not available to the author at the time of writing, but what can be gleaned from modern law and old cases, together with the fact that the law applied to religious corporations only, suggest that the law was at least not copied verbatim by the South Australian drafter.

[75] Thus, for example, the *Register* (Adelaide) of 30 July 1842, 2, records that he delivered the opening lecture of its season.

[76] State Archives of South Australia, GRG 1/21/1/63f.

[77] See Taylor, above n 2, 64.

[78] Neither the Supreme Court nor the Parliamentary Library kept copies of statutes of New York at this time (personal communication between the author and Messrs R Elson and H Coxon respectively), so it seems unlikely that Mann could have obtained any knowledge of the New York legislation in any other way. The Supreme Court Library does hold the Civil Code of the State of New York from 1865 which (in §§ 386ff) provides for incorporated associations, but of course that is too late to have influenced the South Australian innovation.

[79] See Esposito, above n 6, 75, quoting Torrens in the *Register* (Adelaide), 13 November 1857.

[80] § 55 of the Civil Code.

[81] Although the Master of the Supreme Court of South Australia was really acting as the Registrar of Companies: see above n 8.

[82] Laws such as the Prussian *Ordinance relating to the Prevention of the Misuse of the Freedom of Assembly and of Association calculated to endanger Public Freedom and Order* of 11 March 1850 (Prussia, *Gesetz-Sammlung für die Königlich Preußischen Staaten*, 30 March 1850, 277ff), for example, are pre-modern in the sense that they do not provide for any form of incorporation and are principally concerned, as the title suggests, with public order. See, eg, Hauser, 'Die neueste Bayerische Gesetzgebung über Vereine, Erwerbs- und Wirthschaftsgenossen schaften sowie über Nicht-Handels-Actiengesellschaften' (1870) 14 *Zeitschrift für das gesamte Handelsrecht*

law relating to voluntary associations, as he had in relation to real property law;[83] and, if Torrens did receive much of his inspiration from Dr Hübbe, it is probably unlikely that he would have desired to risk sharing that knowledge with Captain Bagot by passing on a further suggestion of Hübbe's to Captain Bagot. On the state of the evidence, therefore, Mann AJ is clearly the best candidate for the honour of originating the *Act*.

III. The Repeal and Revival of the *Act*

One of the most striking things in the early history of the *Act* is its repeal in 1864 by s 184 of the *Companies Act 1864*. If Mann AJ was the true author and drafter of the *Act* it is not surprising that the repeal went through virtually unchallenged, as Mann AJ (unlike Cooper CJ and Dr Hübbe, but like Smillie) was no longer alive to defend his creation. His *Act* was, however, revived the next year by Act No 12 of 1865 ('the *Revival Act*'). What is going on here?

Although a change of government intervened between the repeal and revival of the *Act*, there is nothing to suggest that any real political differences led to this about-face by the legislature. Rather, the surviving sources suggest a number of reasons for the passage of the *Revival Act* in 1865; it was stated in the second reading speech for the *Revival Act* that the repeal of the *Act* had affected the trustees of educational establishments and religious bodies injuriously, that the repeal had been 'inadvertent',[84] and that the Port Adelaide Grammar School had found that it could not incorporate 'except it underwent all the formula[e] of the *Joint-Stock Companies Act*'.[85]

The repeal-and-revival episode is best understood, it is suggested, as a reflection of the tension between the role of colonial legislatures in the nineteenth century as mere transmitters of English reforms to the colonies and their role as innovative law reformers in their own right. For the *Companies Act 1864*, which repealed the *Act*, was (in its substantive provisions) 'nearly a reprint of the English Act',[86] 'in all its essential provisions a copy of an English Act',[87] namely, the *Companies Act 1862*. It is not known who added the *Associations Incorporation Act 1858* to the list of Acts which were to be repealed in favour of the English import which became the *Companies Act 1864* (SA). Whoever it was, however, probably did not do so 'inadvertent[ly]', in the sense of by accident or through inattention — although the full implications of repealing the *Act* may not have been apparent to all the legislators of 1864. At all events, it is difficult to escape the conclusion that the repeal of the *Act* in 1864 occurred because the person responsible for drafting the *Companies Act 1864* came to the conclusion that the South Australian innovation could be abandoned now that English legislation had arrived and that the English legislation, being more elaborate, was correspondingly better.

As was shown the next year, however, the South Australian legislation did in fact fill a need which the companies legislation catered for less well — the need for a simple and cheap method of incorporation available to non-profit entities such as the Port Adelaide Grammar School. The companies legislation was too complicated for them and was drafted on the assumption that those incorporating under it were aiming to make a profit,

und Wirtschaftsrecht 341, 341–347; Peter Kögler, *Arbeiterbewegung und Vereinsrecht: Ein Beitrag zur Entstehungsgeschichte des BGB* (1974) 11–14, 47–49; Hugo Oppenheimer, 'Die beiden Vereinsklassen des Bürgerlichen Gesetzbuches (§§ 21, 22)' (1904) 47 *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 99, 99–115; Thomas Vormbaum, *Die Rechtsfähigkeit der Vereine im 19. Jahrhundert: ein Beitrag zur Entstehungsgeschichte des BGB* (1976) 44–93; Günter Weick in Staudinger et al (eds), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* 1. Buch, §§ 21–103 (13th ed, 1995) 67–69.

[83] Ulrich Hübbe, *Voice of Reason and History Brought to Bear Against the Present Absurd and Expensive Method of Transferring and Encumbering Immoveable Property* (1857).

[84] South Australia, *Parliamentary Debates*, 19 July 1865, 840.

[85] *Advertiser* (Adelaide), 21 July 1858, 3 (Parliamentary debates, reporting the utterances of the Hon A (later Sir A) Blyth MP).

[86] *Advertiser* (Adelaide), 5 November 1864, 3.

[87] *Register* (Adelaide), 2 November 1864, 2.

which the Port Adelaide Grammar School was not. There was therefore no need for mechanisms such as shares and safeguards for investors. The revival of the *Act* was not therefore so much the correction of an 'inadvertent' error as it was a belated realisation by the South Australian Parliament that it had in fact created a legal innovation in 1858 which was worth keeping and was not to be discarded in favour of English legislation which was less well suited to the purpose at hand.

It is quite fitting that the debate on the *Revival Act* should have occurred in the same month that the judgment of the Supreme Court of South Australia in *Dawes v Quarrell*[88] brought the issue of the independence of the colonial legislature from English law and its competence to shape the new polity of South Australia to a head, and in the same year that the *Colonial Laws Validity Act 1865* (Imp)[89] confirmed the wide-ranging powers of colonial legislatures to deviate from the law of England. No-one showed any awareness of this in the debates on the *Revival Act*, but the real significance of the *Revival Act*, involving as it did a small but important assertion of the capacity for colonial legislatures to innovate outside the law of England at a time in South Australian legal history when this was at the centre of everyone's attention, cannot have escaped those members of Parliament who could see what was really going on when the *Revival Act* was debated.

To round off the story: the Port Adelaide Grammar School, a more or less Church-affiliated school established in 1862,[90] was indeed incorporated under the *Act*,[91] although its incorporation was cancelled in 1938 after the school had ceased to function.[92] By that time, however, it had played its part in South Australian legal history. And when South Australia came to adopt the English *Companies Act 1867*, it omitted s 23 of that Act relating to the incorporation of not-for-profit entities as companies from the South Australian version.[93] As was stated in Parliament,[94] this was because South Australia already had its own indigenous statute for this purpose — a statute that was better suited to the needs of non-profit associations than the English one. Despite the existence of later English legislation attempting to deal with the same area of law, then, the South Australian legislature stood by the decision it had made in 1865 to prefer its own statute to possible imports.

IV. Why South Australia?

Why was incorporated associations legislation first enacted in South Australia?
One could of course point to the Province's general reputation for legislative innovation which also produced such legislation as the *Real Property Act 1858* and the *Accused Persons Evidence Act 1882*.[95] One writer suggests, however, that the *Act* was meant to serve 'the then dominant liberal economic and political ideology of *laissez-faire* individualism' and that it was 'formulated by the upper class in colonial South Australia, and it was used for the immediate benefit of that same class'.[96] However, this rather heavy-

[88] (1865) 0 SALR 1.

[89] This had received the Royal Assent in late June 1865, a fact which was not known in South Australia until later in the year (see *South Australian Government Gazette*, 18 September 1865, 843ff); but the legislators knew, of course, of the agitation for such an Act, as they had been among the chief agitators.

[90] See Graham Ross, *Private School Education at St Paul's, Port Adelaide, 1846–1927* (1992).

[91] The Master's certificate to that effect, dated 30 August 1867, is filed in the Lands Titles Office: GRO 190/1867. Further information may be found in the Anglican Archives, Adelaide, file no. 272 (D179).

[92] On 28 July 1938 according to a note in file no 272 (D179), Anglican Archives, Adelaide; *South Australian Government Gazette*, 28 July 1938, 219.

[93] The English legislation, minus s 23, was adopted in South Australia by Act No 22 of 1870–71. A provision similar to s 23 of the English Act was not included in South Australian legislation until the enactment of the *Companies Act 1934* s 28. See now *Corporations Act 2001* (Cth) ss 150, 151. Registration under the companies legislation was long the only available means of achieving incorporation in those States that adopted the South Australian idea only after many decades: Sievers, above n 5, 128.

[94] South Australia, *Parliamentary Debates*, Legislative Council, 29 November 1870, 1499.

[95] See Greg Taylor, 'The *Accused Persons Evidence Act* 1882 of South Australia: A Model for British Criminal Law?' (2002) 31 *Common Law World Review* 332.

[96] Steve Bottomley, 'The Corporate Form and Regulation: Associations Incorporation Legislation in Australia' in Roman Tomasic and Ric Lucas (eds), *Power, Regulation and Resistance: Studies in the Sociology of Law* (1986) 44, 53.

handed and ideological — indeed almost Marxist — conclusion is not really supported by the facts which the author concerned refers to earlier in his analysis. Nor is it obviously correct, as, on the face of things, people of virtually any social class can form and join associations of one type or another; and, as we shall shortly see, the view expressed does not tally with the types of associations which were incorporated under the *Act* in its first years of operation.

Finally, an explanation such as that referred to cannot explain why South Australia was the first to enact such legislation. It is also inconsistent with the fact that the legislation spread so slowly throughout the rest of Australia (the three largest States did not enact such legislation until the 1980s, about a century and a quarter after the South Australian innovation).[97] After all, other colonies also had upper classes which might have been expected to adopt the legislation if it really did offer such great advantages to the upper class. The comparatively rapid adoption throughout Australia of the *Real Property Act 1858* suggests that that piece of legislation did indeed serve the interests of those who held the levers of power — who were very often landowners or well connected to landowners — although of course that statute also served the interests of the large and growing class of more humble landowners,[98] and this broad appeal doubtless explains its popularity and rapid adoption throughout Australia. But the *Associations Incorporation Act 1858* was not adopted as rapidly throughout Australia, as we might expect if it were really such a boon to those in power. In fact, it serves, at least judging it on its face, no identifiable class of people (other than people in associations, who can be of any social class).

What was it, then, about South Australia which led to its being the pioneer in this field — other than its general record for legislative innovations? Part of the answer may be found in the spirit of religious freedom and absence of state interference in religious matters that has already been mentioned. Such a climate was hostile to special Acts incorporating religious bodies — as the Church of England found when it petitioned for its own special incorporation Act in 1862[99] and the cry went up that its petition 'shewed the desire of the Church to become an Established Church'.[100] On the other hand, nineteenth-century South Australian society was not in any way irreligious and was quite content to promote religion on an equal basis for all by providing a general incorporation Act open to all comers.

Another reason why the *Act* was first enacted in South Australia rather than elsewhere may be found in the marked sense of difference from — even superiority to — the other Australian colonies which existed in South Australian public life until well into the twentieth century. As one amateur historian explained in 1911, 'the Province [of South Australia] was founded by a superior class of men and women'[101] — the implicit contrast here is with the other Australian colonies, which were founded by convicts[102] — and the superior nature of the founders of South Australia, the author continued, was proved by the formation, early on, of such elevated bodies as the South Australian Literary Association. Charles Mann, as

97 Sievers, above n 5, 129. The *Religious Education and Charitable Institutions Act 1861* (Qld) was more limited in purpose than the *Associations Incorporation Act 1981* (Qld), a descendant of the South Australian statute of 1858 which replaced it. See Keith Fletcher, above n 3, 211–215.

98 See Moerlin Fox, 'The Story behind the Torrens System' (1950) 23 *Australian Law Journal* 489, 491; Douglas Pike, 'Introduction of the Real Property Act in South Australia' (1962) 1 *Adelaide Law Review* 169, 169.

99 South Australia, *Report of the Select Committee of the Legislative Council on the Church of England Incorporation Bill*, Parliamentary Paper No 179 (1862); Pike, above n 46, 486. See also South Australia, Parliamentary Paper No 49 (1862). The despatch of 19 September 1861 referred to there may be found in the State Archives of South Australia, GRG 2/6/9. The special Bill for the Church of England seems to have been an idea of the Colonial Office: see further State Archives of South Australia, GRG 2/38 PSO file no 566 (1861); GRG 2/2, despatch of 15 January 1861.

100 South Australia, *Parliamentary Debates*, Legislative Council, 29 July 1862, 550. For a similar objection connected with the Church of England, see South Australia, *Parliamentary Debates*, House of Assembly, 18 November 1891, 2064.

101 John Blacket, *History of South Australia : A Romantic and Successful Experiment in Colonisation* (2nd ed., 1911) 122.

102 Or, in the case of Western Australia, later accepted convicts.

has already been mentioned, also referred to the difference between South Australia and the other colonies he knew, which was manifested in 'the determination evinced here to employ and keep in active operation every known engine for moral, mental and social improvement. This characteristic ensures future greatness.'[103] Thus, official encouragement was given (by separate legislation)[104] to the formation of the South Australian Institute in Adelaide and, later, to equivalents in the country districts. It was therefore entirely in accordance with the Province's self-image as a beacon of freedom and high-mindedness in a sea of convict settlements that a statute should be passed facilitating the formation of further voluntary associations among its free and high-minded citizenry in order to ensure the continued edification and improvement of the 'superior class of men and women' who had settled in South Australia. This does not, of course, mean that voluntary associations in early South Australia always lived up to the hopes of their founders,[105] but this was all the more reason to attempt to encourage their formation and to secure their rights of property by passing the *Act*.

This does not mean that the *Act* was intended to serve the purposes of the upper class (whatever that may be). The 'superior class of men and women' did not form a society consisting solely of an upper class, but also of honest artisans and labourers untainted by the convict stain. As we have seen, one of the chief concerns of the time — and of Charles Mann — was the establishment of a Mechanics' Institute and equivalent institutes for country districts, which were designed to serve the educational/recreational needs of those with little formal education — even if some of them doubtless would have been expected to belong to the artisan class, and thus to the aristocracy of labour.[106] Mechanics' institutes and similar bodies were specifically mentioned in s 11 of the *Act* as the sort of association that might be incorporated under it,[107] as were benevolent and charitable institutions, which at most might be the recipients of money from the upper class but would be unlikely to provide anything to them other than an outlet for their charitable instincts. Thus, the *Act* seems to be quite neutral, at least on its face, towards all classes of society.

Admittedly the very first society to incorporate under the *Act* was the Church of England Endowment Society,[108] the trustees of which all called themselves Honourables or Esquires in the notice which, as required by the *Act*, they published in the *Government Gazette* on 24 May 1860[109] (coincidentally the day of Charles Mann's death). Later successful applications in the 1860s and 1870s came, however, from the ranks of artisans,

[103] *Southern Australian* (Adelaide), 7 August 1839, 2f.

[104] Act No 16 of 1855–56. See also such later enactments as the *Suburban and Country Institutes Act 1874*. Note, too, the invitation to apply for grants in the *South Australian Government Gazette*, 18 February 1858, 141, on which see South Australia, *Parliamentary Debates*, House of Assembly, 15 October 1857, 598f; Talbot, above n 65, 62.

[105] See, eg, Pike, above n 46, 504ff.

[106] See generally Talbot, above n 65, ch 1 and p 13.

[107] Although, once the legislative framework for suburban and country institutes had become somewhat more elaborate and the advantages of having all institutes under the one legal umbrella had become apparent (see South Australia, *Parliamentary Debates*, Legislative Council, 19 July 1887, 243f; State Archives of South Australia, GRG 19/12a/3/569; GRG 19/12a/5/270; GRG 19/355/4/414; GRG 19/355/4/418f, 421), institutes were prohibited from incorporating under the Act: *Suburban and Country Institutes Act 1874* s 9; South Australia, *Parliamentary Debates*, Legislative Council, 1 July 1874, 746. This prohibition survived a number of legislative 'paradigm changes' until it was eventually repealed by the *Libraries and Institutes Act Amendment Act 1950* s 4; see further *Williams* v *Coulthard* [1948] SASR 183, 190f.

[108] Association no A1 in the records of the Corporate Affairs Commission, incorporated on 25 September 1863 (according to the records of the Commission, although the date may be too late having regard to the certificate referred to below, n 109; it is however the same as that found in the *Church of England Endowment Society Act* [1891] (SA) s 2). See further above, n 34. The Dean and Chapter of the Diocese of Adelaide also applied in 1863 for incorporation under the Act after their request for a special incorporation Act for the Church had been rejected in 1862. See the certificate of incorporation preserved in the Anglican Archives, Adelaide, file no 124 (D178); records of the Corporate Affairs Commission, association no A3. See also *South Australian Government Gazette*, 29 September 1870, 1309.

[109] *South Australian Government Gazette*, 24 May 1860, 475. The certificate of incorporation may be found in the Lands Titles Office, GRO 321/1860.

working men or what today would be called small business-people. Thus, a machinist and brewer sought the incorporation of the Gawler Institute[110] and two store-keepers and one telegraph station-master applied for the incorporation of the Mount Gambier Institute.[111] Further early applications were received and approved from such non-Establishment, even 'outsider' bodies as the German Club,[112] the Adelaide Hebrew Philanthropic Society,[113] the Jesuits,[114] the Penola Mechanics' Institute[115] and the Prince Alfred Sailors' Home, the object of which was (in part) 'to provide board and lodging for seamen frequenting or resorting to the Port of Adelaide at as low a charge as possible'.[116] Even the Port Adelaide Grammar School, which had saved the *Act*, was, although a Church-affiliated school, not exactly in the most salubrious part of the city, nor could it be expected that most of its scholars would be the sons or daughters of the upper class.

A survey of the first 100 associations incorporated under the *Act*, which takes us to 1888, 30 years after its passing,[117] indicates that exactly half were religious. (The high number is explained by the fact that many of these were individual parishes.) Of these 50, 37 were of the dissenting denominations, or 41 if the established Church of Scotland is included, and only six from the Church of England. The six employers' and professional associations were outnumbered by the seven philanthropic societies, eight institutes and nine clubs of various types (two ethnic and one each musical, youth, bushman's, gardeners', freethinkers', yachting and lodge societies). The rest were a miscellaneous assortment including schools (three), show societies (three), hospitals and health institutes (five) and Aborigines' benefit organisations (two).

Clearly the *Act* was designed to facilitate the holding of property, and in particular real property, by voluntary associations, and thus presumed that the associations which would be its beneficiaries would have at least some assets. However, associations such as country and mechanics' institutes, which were not generally patronised by the very well-off but received their funds from government grants and numerous small contributions from the strata of society below the upper class, were wont to purchase a small piece of land and erect a modest building for their needs which, together with their books, constituted virtually the whole of their assets. The same applies to institutions such as the German Club. It is precisely this sort of association, which might have one fairly large asset (its building) but be income poor,[118] that was in need of a means of ensuring that its real property could be held in a simple and cheap manner which avoided ongoing expense caused by repeated

110 *South Australian Government Gazette*, 13 August 1863, 680f; incorporated on 15 September 1864 as association no A4 (records of the Corporate Affairs Commission) and apparently still incorporated under the Act.

111 *South Australian Government Gazette*, 10 January 1867, 39; incorporated on 26 April 1867 as association no. A5 (records of the Corporate Affairs Commission).

112 *South Australian Government Gazette*, 21 February 1867, 189; incorporated on 9 December 1886 as association no A91 (records of the Corporate Affairs Commission).

113 *South Australian Government Gazette*, 9 December 1869, 1765. This organisation is stated to be incorporated in Boothby, *The Adelaide Almanac and Directory for South Australia 1872 together with Official, Ecclesiastical, Legal, Banking and Mercantile Directory* (9th ed, 1872) pt II, 40. It is shown as incorporated in the State Archives of South Australia, GRS 885/3, no A11. The association's file, preserved in the State Archives of South Australia, GRS 885/1, indicates that it was wound up in 1974 and the property transferred to the Jewish Welfare Society (SA Division) pursuant to a resolution of the association.

114 *South Australian Government Gazette*, 24 October 1872, 1533; association no A18, State Archives of South Australia, GRS 885/3 (which notes that the name of the association, originally the Society of Jesus Inc, was later changed to the Manresa Society Inc.).

115 *South Australian Government Gazette*, 11 December 1873, 2138; incorporated on 12 May 1874 as association no A19 (records of the Corporate Affairs Commission).

116 *South Australian Government Gazette*, 30 September 1875, 1846; shown as incorporated in *Sands and McDougall's South Australian Directory for 1884* (21st ed, 1884) 773 and succeeding editions; association no A22, State Archives of South Australia, GRS 885/3. For the cancellation of the incorporation, see *South Australian Government Gazette*, 28 July 1938, 219.

117 And is based on the register of associations held in the State Library of South Australia, GRS 885/3.

118 On the general poverty of institutes in this period, see Sydney Ryan, *The Development of State Libraries and their Effect on the Public Library Movement in Australia* (MA Thesis, Graduate Library School, University of Chicago, 1964) 39; Talbot, above n 65, 15.

transfers consequent on changes of trustees. The upper class would be able to look after itself in this respect much more easily than could middle- and lower-class institutions, which might often struggle to raise the money necessary for the upkeep of their buildings, let alone for legal fees. And the upper class had much more to lose from the personal liability of members of associations for the associations' debts, something which the *Act* expressly preserved.[119] The *Act* therefore would have appeared something of a failure or an irrelevance from the point of view of an upper class person.

Now it might possibly be said that promoting the education of the artisan and working classes (in mechanics' institutes and the like) as well as of their children (in institutions such as the Port Adelaide Grammar School) might assist the upper class in keeping a lid on the discontent of the lower classes — although this seems rather a long bow to draw in nineteenth-century South Australia, which was hardly a seething cauldron of revolutionary thought. But it is difficult to see that even this aim could be pursued by facilitating the establishment of the German Club or the Adelaide Hebrew Philanthropic Society. The *Act*, by doing this, did not serve the upper class, but rather enhanced the ability of all classes of people, including those multicultural groups which were present in early South Australia, to have their associations recognised by the law as legal persons, and thus promoted and facilitated the exercise by them of the right to associate.

Although the number of associations incorporated under the *Act* in its early years was small,[120] the fact that there was such a mixed and in part humble set of associations incorporated under it makes the failure of the upper class in other parts of Australia to seize on the South Australian innovation as a means to promoting their own interests less than surprising. As we have seen, the South Australian legislation was originated in South Australia because of the unique origins and pretensions of that society as a free settlement, not because of any characteristics it shared with other Australian colonies such as the existence of an upper class.

V. Conclusions

Rather than being the product of an upper class determined to serve its own interests, the *Associations Incorporation Act 1858* can be seen as the product of, and as beneficial to, an entire society which prided itself on its difference from the convict colonies and its higher moral and intellectual tone as a free colony, all of which, it was at least hoped, would express itself in a lively network of private societies devoted to high-minded pursuits such as charity, education, religion and the general improvement of the populace. No doubt it is this difference, or sense of difference, which in part also explained the willingness of the South Australian legislature to break ranks even with the Imperial Parliament and to enact reforms of its own without precedent elsewhere — an attitude which was vindicated when it was discovered in 1865 that the *Act* did in fact make a valuable contribution to society beyond that embodied in the English companies legislation, and should be revived.

No better candidate for giving legislative expression to this sense of difference can be found than Mann AJ, who expressly referred to it and took action to encourage it on numerous occasions during his life in South Australia. The evidence that he was the real inspiration for the *Act* seems to be quite convincing, even if it is not conclusive.

[119] Section 4 (referred to above).
[120] See above n 31.