Limited Liability Company Legislation - The Australian Experience*

Rob McQueen

Introduction

Company law has recently been a subject of some interest to the Australian public. The failure of a number of large enterprises and the teetering on the brink of liquidation of a number of others has called into question the adequacy of the regulatory structures under which these enterprises operate. This public crisis of confidence in Australian companies and securities legislation has been compounded by what has seemed to be a growing incidence of practices such as "insider trading" amongst the business community. One might even go so far as to suggest that we are in the midst of a "moral panic" in respect to the ethics of the business community; a "moral panic" in which companies and securities law has been implicated due to its inability to stem the tide of wrongdoing.

This is not the first time Australian company law has been perceived as inadequate to the task of regulating malpractice in the business community. In the 1870's a number of Australian colonies introduced special legislation governing the incorporation of mining enterprises. Existing Companies Acts were seen as inadequate to ensure that shareholders discharged their financial responsibilities in regard to companies in which they had invested. Again in the 1890's major misgivings were expressed as to the efficacy of company legislation as a regulatory structure when widespread corporate abuses were exposed to public scrutiny in wake of the corporate crashes of the era.

Recurrent instances of the failure of business practices and business ethics to live up to public expectations, coupled with a mounting perception that corporate legislation and the administrative agencies charged with its enforcement have

failed to effectively check malpractice has led to a need to look afresh at many of the core principles of company law. One possible key to solving some of the conceptual and practical problems which beset company law and the agencies charged with its enforcement might lie in certain aspects of the history of company legislation and its administration in this country. Such historical investigation might, for instance, allow us to determine if there are any systematic factors which may impede the efficacy of existing company law as a regulatory mechanism. As no such historical study has yet been undertaken we attempt in the following to map out some of the principal contours of the historical evolution of company law in Australia and their potential implications for current practice.

The article is divided into four sections. The first is devoted to an examination of the factors behind the introduction of English company legislation to the various Australian colonies during the 1860's. Of particular interest is the question of whether the introduction of such legislation to the colonies was occasioned by local or Imperial needs. If the latter was indeed the case, a further question arises: how suitable was legislation designed around the needs of English business enterprises and English economic conditions to the requirements of local industrial development? If there *was* a mismatch between local requirements and the legislative structures which were adopted from England the long-term effects of this mismatch on the effectiveness of colonial regulatory structures operating in the colonies becomes a matter of considerable interest.

The second section of this paper is devoted to an examination of the diffusion of the limited liability company form once adopted in the Australian colonies. The receptiveness of local businesses to the new organizational structure made available by the Limited Liability Acts will be analyzed. The nature of the activities of businesses which did adopt corporate form will be scrutinized to determine if there were any particular factors which led some industrial sectors to prefer the corporate form and others to prefer older organizational structures. The economic factors which might be implicated in the acceptance of or resistance to the new organizational form constituted by the Limited Liability company will also be considered in light of the rate of growth of corporate registrations during the nineteenth century. Lastly the manner in which the corporate form was regarded by those who *did* adopt it will be examined to determine to what extent those converting their businesses into companies in the latter years of the nineteenth century did so without being truly wedded to the corporation as an organizational form. To what extent did those creating companies attempt to preserve elements of earlier organizational forms within the new corporate structures provided for by the Limited Liability Acts?

The third section of the paper is devoted to an exploration of the factors behind innovation in respect to corporate legislation in the Australian colonies. The precipitating factors behind the introduction in the Australian colonies of such innovations as No Liability Mining Company Legislation and compulsory financial reporting will be investigated. So too will the question of whether these divergences from English practice were genuine "innovations" arising from a considered evaluation of Australian requirements, or whether they were instead derivative of discarded English models of regulation which might have had no more relevance to Australian conditions than the legislative mode they were replacing.

The last section of the paper is concerned with examining the attitudes of particular key groups to the administration of company legislation by colonial authorities during the late nineteenth and early twentieth century. The question of whether the legislation was considered to be facilitative or regulatory in nature and how the balance between these two attitudinal axes may have changed over time will be examined. So too will the question of whether, once Federation was a reality, a national system of company law and administration was adopted. The attitudes of key players such as businessmen, public servants, and lawyers to a national system of company law at the time of Federation and in the immediately following years will be explored to determine the factors militating against its adoption.

The Introduction of Limited Liability Company Legislation to the Australian Colonies

In the Australian colonies the English Limited Liability Act of 1862 was adopted essentially unaltered by local legislatures during the mid-1860s. In each colony, when this occurred there was little, if any, debate as to the appropriateness of the legislation to local needs. Nor was any attention given to the question of how the Act might be administered within the existing colonial Civil Service establishments.

The lack of consideration given by contemporaries to the question of the suitability of English company legislation to colonial needs and administrative capacities was almost certainly due to the fact that this legislation would have seen as principally referable to the needs of British businesses with interests in Australia, rather than being related to the organizational requirements of purely "colonial" businesses. The adoption of the legislation was considered important to the maintenance of investment by British companies in the Australian colonies. The duplication of British legislation in the Australian colonies made possible the formation and operation of limited liability companies with Boards in *both* Britain and the colonies. Integration of British and colonial company legislation would also allow companies to secure listing more easily on both British and Australian share markets, thus facilitating the negotiability of their

shares. Colonial company legislation was largely conceived in the 1860s as being at the service of "home", rather than Australian interests. Little thought was given at the time to the role of the legislation in promoting purely Australian business interests. [1]

The absence of divergent thinking in respect to company legislation was, however, probably greater on the Australian continent than was the case in some other colonial settings (eg Canada) This is almost certainly due to the absence in the case of Australia of any competing regional models of corporate legislation such as was the case in Canada with the proximate examples offered by the various State legislatures of the United States as a reference point in constant competition with English legislation and practice. [2]

In addition, unlike the case in other settings, there was little involvement of local private capital in the development of railways and other infrastructure. This meant that there was no pre-existing body of shareholders in established enterprises calling for the introduction of limited liability or lobbying colonial legislatures to make company legislation appropriate to "local" requirements. [3]

Perhaps more intriguing than the mimicking of British legislation by the colonial legislatures was the lack of thought given to the administration of the Limited Liability Acts once introduced. Unlike the case in Britain the Australian colonies did not have established bureaucracies such as the Board of Trade available to administer and enforce the legislation. In most colonies the responsibility for administering the legislation was grafted on to the tasks already performed by some existing Government Office or senior bureaucrat. In South Australia and Queensland the administrative tasks associated with the Limited Liability Acts were added to the already considerable responsibilities of the Master of the Supreme Court. In N.S.W. the enforcement of the provisions of the Act was assigned to the Registrar-Generals Department and in Victoria, for at least part of the nineteenth century, the administration of the Limited Liability Act was the responsibility of the Titles Office.

As might be gleaned from the above, the administration of the Limited Liability Acts in the various Australian colonies was, throughout the nineteenth century, a relatively ad hoc affair. In most colonies the responsible officials principally saw their responsibilities as facilitating company formations and ensuring documents lodged with them were in proper form. "Regulation" was not generally considered to be one of their tasks.

In the early years of the operation of the Limited Liability Acts in the colonies the absence of genuine regulatory structures did not have any immediate implications as there was little call for incorporation amongst local businesses and those British enterprises operating offices in Australia were generally regulated under the English Limited Liability Act by the British Board of Trade.

The principal reason for the small numbers of local enterprises registering under the colonial Acts seems to have been the small scale of most colonial businesses during the nineteenth century :

> ...large-scale industrial enterprises in the towns were few. As far as can be judged from the available statistics, most establishments were quite small with less than ten employees and these contained the bulk of employees...in Sydney and Melbourne the economy was organized along the lines of small-scale capitalism. [4]

This factor, combined with the then prevailing belief that incorporation was only available to large-scale undertakings, meant that colonial businesses could only generally establish themselves as partnerships.

Nevertheless, there were some areas of local industry in which corporate form was thought appropriate and/or desirable from organizational structure from an early stage. The most prominent of these areas were banking and finance on the one hand and the mining industry on the other. In respect to the former it is worth noting that most banks were not purely local affairs, nor were they incorporated under the Limited Liability Acts. It was more often than not the case that a large number of the shareholders in such banks were English or Scottish and that these investors looked to the English board and English Company law to provide them with a secure investment. It was also the case that most banks were formed under a private Act of Parliament and thus regulated along different lines than a Limited Liability company. [5] It was also quite often the case that the shareholders in banks did not have the protection of limited liability; most of the private Acts setting up Australian banks imposed a liability of twice the amount invested on shareholders.

The case of mining is quite different. Many of the earliest company formations under the Limited Liability Acts were mining ventures. Also, whilst a fair share of the larger mining ventures combined local and metropolitan capital there were also many undertakings which depended solely on locally raised capital. Indeed, such enterprises were the most common form of speculative investment entered into by local wealthholders throughout the nineteenth century. Before the introduction of colonial limited liability legislation these enterprises had either operated under private Acts of Parliament or as unregistered joint stock partnerships. In many instances unlimited liability applied to such pioneer mining enterprises, a factor which tended to discourage investment. The introduction of limited liability legislation in the Australian colonies thus represented a real boon for mining company promoters and the shareholders in such undertakings. Mining ventures could now be floated both more easily and more cheaply than had previously been the case. They were also, due to limitation of liability and the small denominations of shares, combined with the promise of high returns attractive investments for those with moderate savings.

As the first major "local" industry to utilize the newly promulgated Limited Liability Acts, the mining industry provides us with an example by which we can measure the suitability of the transplanted English company legislation to the quite different conditions prevailing in the colonies. As we will observe the legislation proved to be sorely deficient in colonial conditions. One colonial observer remarked in this regard that "...[i]n Victoria it was found almost impossible to continue to work mining companies under the ordinary Companies Act. A Bill [for No Liability Mining Company legislation] was brought in dealing with the matter". [6]

The principal factor in this "failure" of limited liability legislation in the Australian colonies appears to have been the absence of any effective regulatory structures to enforce the provisions of the Act. Legislation translated from elsewhere without a commensurate translation of the bureaucratic structures which underpin its operation, will almost certainly lead to regulatory "failure". This was the case with Limited Liability legislation in the Australian colonies and the solution devised by colonial legislatures - No Liability Mining Legislation - was a direct result of the impossibility of regulation within the meagre human and financial resources of the responsible colonial bureaucracies. Due to this failure the no liability device was introduced. It solved the problems of enforcement which was being experienced in relation to the "dummying" of shares by shifting the onus in that respect from the public to the private sphere. It, however, in doing so shifted the legal burden of corporate failure from the shoulders of investors onto the shoulders of corporate creditors. The response to the No Liability Acts in the countryside was by no means as favourable as that in the cities, from where most of the significant investors in the larger mines came from. The ambivalence, and at times hostility, towards the No Liability Acts amongst rural communities can be charted in the pages of the rural press.

The Diffusion of the Corporate Form in the Australian Colonies

Merely because legislation has been introduced there is no guarantee that it will have any significant effect on social life. Nor is there any certainty that a law, once introduced, will have the effects intended by its makers. Too often in studies of company legislation it has been assumed that its introduction in the nineteenth century led both to a relatively fast rate of diffusion of limited liability incorporation amongst business enterprises and to a consequent acceleration in the rate of economic development. [7]

The importance of studying the first of the above matters, the rate of diffusion of a new organizational structure such as the limited liability company, has been recognized by organizational theorists:

> One of the central processes of industrialization is the organizational transformation of society: the emergence of special purpose formal organizations to take over activities previously performed by other

> forms of social organization and to perform new tasks...However, there has been relatively little empirical investigation of the processes of organizational proliferation during industrialization or of the variables affecting the rates at which such processes occur. [8]

In a study of the diffusion of the corporate form amongst Japanese businesses during the nineteenth century one researcher found that "existing organizations were slow to change to the new corporate structure". [9] The adoption of the limited liability company form by established businesses in key sectors of industry was equally slow in England. Even as late as the early twentieth century the impression of many businessmen and economists was that "trading companies were a slightly improper form of economic organization which managed to succeed in spite of, rather than because of the laws of economies". [10] J.B. Jeffreys has calculated that as late as 1880 ninety five per cent of major British businesses were still operating as partnerships. [11] This pattern of disinterest in the limited liability corporate form was repeated in the Australian colonies during the nineteenth century. We can observe from tables 1-5 how slowly incorporation took root in commercial consciousness as the preferred method of organizing one's business.

In all the colonies for which registration figures have been compiled by the author the same slow rate of diffusion was observed. Registrations only really began to increase with the economic expansion taking place during the boom years of the late 1880's. The manner in which incorporation was regarded, particularly in respect to the type of venture for which it was considered most suitable, becomes clearer when we disaggregate nineteenth century colonial incorporations by industry (the disaggregations for Victoria are contained in Table 6). In many of the colonies for much of the nineteenth century mining registrations accounted for the bulk of companies. This domination of mining undertakings is underlined dramatically by the fact that in South Australia during the 1870's such companies represented between ninety and ninety five per cent of all registrations. [12]

In order to obtain an idea of the relative numbers of companies and partnerships being formed during the period under study the author calculated the total number of businesses entered on the Register of Firms for N.S.W. for 1903 (the earliest year upon which reliable data exists) and the number of N.S.W. company registrations for that year. Whilst there was in excess of 9,000 registrations of firms in 1903 there were only 157 companies formed. In other words more than ninety eight per cent of businesses formed in N.S.W. in 1903 chose a partnership over the limited liability company as their preferred organizational structure. [13]

Despite the apparent similarities between the slow rates of diffusion of the corporate form in Britain and in the Australian colonies we must be careful not to make too much of these similarities given the vastly different environments

in which they were occurring. It is important also to recognize the quite different factors contributing at work in the two contexts. As suggested earlier the predominant factor mitigating a rapid growth of incorporation amongst colonial businesses was the small scale nature of these undertakings. It was not until the late 1870's to 1880's, when it began for the first time to be thought possible to incorporate such "private" enterprises that we see for the first time appreciable numbers of small and medium sized businesses taking on corporate identity. The concentration of colonial company registrations in the mining industry was merely a reflection of lack of other sizeable undertakings which were developed with private capital in the colonies. Most large undertakings were met out of the public purse, such as was the case with colonial railway development. The slow rate of acceptance of the corporate form in Britain was possibly not so much the result of the scale of undertaking but rather more tied to the prevailing cultural prejudices amongst businessmen towards incorporation. They saw it as a somewhat improper device which allowed those in control of businesses to evade their gentlemanly and moral responsibilities. One source of "respectable" opinion lamented:

> The moral effect of all joint stock associations for mercantile objects which are properly within the compass of individual exertion is bad; they introduce in the place of patient labour and moderate expectations, ambitious hope and the practice of gambling in shares. [14]

In Britain the imperviousness of the existing business culture, with its prejudice towards any attempt to limit liability, and the almost obsessive Victorian desire to preserve privacy in respect to business matters, seem to have been the predominant factors in the slow rate at which enterprises adopted corporate identity.

However, despite the fact that the slow diffusion of the corporate form in England and Australia are largely explicable as the result of idiosyncratic local factors, in the first case the small scale of enterprises in the colonies and in the later the ingrained prejudices of businessmen, there nevertheless were also some certain factors which were common to both settings.

Firstly, despite the massive size of some British undertakings in the nineteenth century, it was also the case that much of British enterprise remained small-scale throughout the century. Many British industrial ventures would, therefore, have been regarded in the same light as their Antipodean equivalent as not being of sufficient size to allow them to incorporate. It was only after the 1880's in both England and Australia, that the idea that private companies might be an acceptable legal expedient began to gain acceptance.

Also, whilst not as hostile to the corporate form as their English counterparts many colonial businessmen considered incorporation as only being suitable for a small group of undertakings, which included railway development, mining,

gasworks and road construction. The Victorian businessmens' notion of what was and was not suitable for *corporate* development was generally derived largely from Adam Smith who, in the *Wealth of Nations* had stated that joint stock companies could only successfully carry on business in fields "where all the operations were capable of being reduced to what is called a routine or to such uniformity of methods as admits of little or no variation" [15] Smith was almost as widely read in Australia as he was in England and consequently the orthodoxies contained in the *Wealth of Nations* came to be part of the Australian intellectual landscape, if perhaps not as enduring an aspect as was to be the case in England. [16]

A colonial example of the prejudice and distrust prevailing amongst "respectable" businesspeople towards the corporate form is provided by the following letter written in 1889 by T.B. Guest, the biscuit manufacturer, to his son:

> I enclose you a prospectus of IAW & Sons concern to be floated into a company. Mr. Craig says it will go off but I have my doubts tho there are plenty of lunatics not locked up yet...Byron Moore and I.H. Were have waited on me and promised to float this business in one hour for anything I like to ask but I am not yet persuaded that it will be the correct thing to do...you know how companies are run not so much to do a legitimate business & as to do plenty of it & during the time this is going on the chances are there would be no profits to anyone...The fact is almost anything goes off now & I think before long there will be a big crash. [17]

Despite the many factors discouraging the spread of the corporate form in the Australian colonies it is undeniable that it began to become a more acceptable device by the latter years of the nineteenth century. From the available statistics on registrations in the various Australian colonies during the late nineteenth and early twentieth century it is observable that company registrations began to increase appreciably in all colonies around 1885-1886. They then reached, in all colonies their nineteenth century peak in 1888. After this peak, with some differences between colonies, registration began to drop off again in the early 1890's .

The specific nature of this rise and decline in the corporate population becomes somewhat clearer when these company registrations are disaggregated by industry. Butlin has done so for Victoria. [18] It will be noted from the accompanying table (Table 6), which has been adopted from Butlin's figures, that by far the greatest proportion of the increase in company formations in the late 1880's is accounted for by the dramatic rise in number of registrations of manufacturing enterprises (which were largely conversions of existing businesses) and the even more rapid rise in the number of land and property companies, which were largely speculative in nature.

Whilst the increase in numbers of land and property enterprises was short lived, falling off as quickly as they had risen after 1889, the same was not true for manufacturing enterprises. As more and more businessmen suffered reverses in their personal fortunes due to ill considered investments in the land boom they had to turn to the public for the capital necessary to keep their businesses afloat. They also began to more carefully consider the question of their potential liability in the case of failed business ventures, particularly in the case of speculative undertakings.

The following personal account of the reasons for adopting corporate form (and the unease generated by having to operate as a partnership for a short interim period) for a new, highly speculative, business undertaking entered into by a prominent leathergoods manufacturer, Moritz Michaelis, is an illustration of the manner in which the company form was regarded and the uses to which it was put by established businessman in the colonies during the latter half of the nineteenth century.

Moritz Michaelis had had his attention drawn by another businessman to a number of inventions developed by a "mechanic" named Fairfax. These inventions included a special type of sewing machine and a machine for turning rancid into fresh butter. Moritz Michaelis wished to patent these inventions and market them internationally, being convinced of their potential. The means for effecting this plan which suggested itself to him was "... to form a limited liability company" but when he asked his family solicitor "to make it into a limited liability company [under the appropriate colonial legislation] he advised us not, as it would be useless in England and other colonies, unless it was formed in England into a limited liability company [in which case] it would do for all the world". [19]

Moritz Michaelis continued:

> ...[however in the short term before the company could be formed some other arrangement had to be made] . . I did not like to enter a partnership, but under the circumstances it could not be avoided and I guarded ourselves as much as possible by keeping the power of the purse in our hands... [When the company is formed] our shares must be fully paid shares as I will not run the *least risk*...we have maintained the strictest secrecy regards these matters...as the smallest hint might bring other inventive minds on the track of the inventions and perhaps forestall us or prevent us from getting patents for one or other invention. [20]

Amongst those enterprises in the mainstream of Australian commercial life which were forced to incorporate after the collapse of the land boom, what is interesting is how little difference this made to the manner in which the controllers of the undertaking carried on their affairs. Once it became clear to

those in business that by incorporating they could attract outside capital, yet still retain privacy, more and more businesses sort to incorporate. The versatility of the corporation was only beginning to become apparent to those involved in commerce late in the nineteenth century. However, once that it became clear that adoption of corporate identity didn't necessarily mean a sacrifice of power or privacy for controllers many businessmen very quickly overcame their prejudice to the corporate form and incorporated their own business.

William J. Reader has noted in this regard that whilst the limited liability company was designed principally as a useful device for attracting investment "it has turned out to be a form of organization well adapted to the exercise of autocratic power". It consequently served the needs of many late Victorian businessmen who wished to attract capital from outside their immediate circle whilst "still keeping control of the business where it had always been: in the family". [21]

The assertion that little changed in the organization of many enterprises converting to limited liability in the latter part of the nineteenth century is equally true for Australian and British businesses. Whilst many colonial manufacturing enterprises converted to limited liability form in the latter part of the 1880's, little changed in terms of the actual control of these enterprises. By means of a variety of devices minority shareholders were marginalized and the same small group of individuals who had always controlled the enterprise continued to do so. The disdain with which ordinary shareholders were treated in the late nineteenth century by corporate controllers is observable in the minutes of numerous companies Annual Meetings and in the advice given to prospective shareholders by the contemporary financial press. One nineteenth century financial journal advised its readers that it was only too common for shareholders to be treated with contempt by company controllers. They then provided them with the following instructions on how to ensure that their interests were being properly addressed by company management:

> Go then to the offices of the company; get an interview with the manager; see the reports to the Board; have a peep at the minute book; and in fact everything which shows you the action of the directorate. It is true that this may not always be an agreeable mission, but you must not heed the black looks or the sardonic smile of the usually bland secretary ... [22]

However, more often than not, even the most inquisitive of shareholders didn't get very far with their probing. For example, when a shareholder in one colonial company complained of the incomprehensibility of the balance sheet he was told by the Chairman of the Board that the cryptic nature of the accounts was deliberate "as it would not be wise to divulge too much information in that matter."[23] Another shareholders' question as to the level of directors salaries in the same company was brusquely dealt with by the Chairman, who told him that

they earned their money as "they did many things". The Chairman, upon further questioning refused to reveal to the shareholder the hours of attendance of the directors or the precise tasks which they performed. [24]

These attitudes were not atypical. A late nineteenth century Australian *Treatise on Companies for the Guidance of Solicitors, Directors, Investors and Others* asserted:

> Those who have attended meetings have been bewildered by conflicting statements as to figures, and the purport of balance-sheets, which they have been unable to grasp, and could not make the subject of comment...the common knowledge which should exist respecting the nature, character, and conduct of the joint stock company is generally wanting. [25]

The adoption of corporate identity by Australian enterprises during the latter part of 1880's therefore therefore must not necessarily as turning point in organizational *methods*. Most businesses continued to operate in very much the same manner after incorporation as they had done previously. Indeed the controllers of many businesses which incorporated did all they could to preserve existing practices within the new form. Rather than management practices changing as a consequence of the adoption of corporate identity - a commonly held belief amongst social theorists - we observe quite the contrary occurring - the new organizational form being adapted to suit existing managerial and organizational practices.

Innovation in Australian Colonial Company Legislation During the Nineteenth Century

Three colonial departures from British corporate legislation are generally mentioned by textbook writers as representing significant innovations. These are (i) the introduction of No Liability Mining legislation, (ii) the introduction of a standard form of financial reporting for limited liability companies, and (iii) recognition of proprietary companies. All these departures from British practice first occurred in Victoria and then later spread to the other colonies. Ford comments on these developments:

> There were some notable innovations in Victoria. A new form of mining company, the no-liability company was provided for in 1871 and in 1896 compulsory audit and annual presentation of financial statements were legislated for at the prompting of the Victorian Attorney-General, Isaac Isaacs...The new requirements of Victorian law applied only to public companies and it was necessary to define the companies which were exempted. These were called proprietary companies. In this way Victorian law recognized the private company 11 years before similar recognition was accorded in Britain. [26]

Despite the apparent agreement amongst Australian textbook writers that these innovations were indicative of the progressive nature of colonial society there has been little serious analysis of the appropriateness of such "innovations", once in place, to deal with subsequent instances of corporate abuse. The question whether these legislative responses to "moral panics" may have been referable to a more widespread defect - that of the unsuitability of English Company legislation to Australian colonial conditions - is a matter which has never been properly addressed.

We have already suggested how in many ways the company legislation introduced in the Australian colonies during the 1860's was unsuitable to Australian conditions. This unsuitability was particularly marked in the case of mining company flotations and there was little doubt in the minds of contemporaries that this was the reason for the introduction of the No Liability Mining Company legislation:

> [I]n Victoria it was found almost impossible to continue to work mining companies under the ordinary Companies Act...A great evil is the acceptance of shares in dummy names. This dummyism was one of the reasons that the first Mining Companies Act was passed in Victoria. Dummying became such a practice that it was looked upon as lawful, and a man was considered a fool if he accepted shares in his own name when he could rid himself of liability by accepting them in a dummy name. [27]

By allowing an investor to withdraw from a mining company at any stage simply by failing to pay calls on his or her shares the No Liability Mining legislation [28] undermined the rationale for dummying shares - to avoid liability when a venture was failing. In doing so it also removed an impossible regulatory burden from the shoulders of the then ramshackle bureaucratic structures charged with enforcing the provisions of the Company Acts in the various colonies. There was no way in which these rudimentary structures could ensure the veracity of Share Registers, a necessary prerequisite for the prevention of "dummying".

Most accounts of the introduction of No Liability legislation speak of it in congratulatory terms. It was stated throughout the nineteenth century that the legislation successfully led to an increase in investment in the mining industry. It was thus considered that the legislation contributed to general economic development. Without No Liability legislation members of the monied classes had been "deterred from investing their capital...in speculations."[29] Most modern commentators have accepted the utility of the no liability company and have uncritically assumed that it was a necessary and appropriate innovation in the context of Australian colonial conditions. However, a deeper examination of

nineteenth century commentaries on the Act brings to light a significant body of opinions which regarded the No Liability Acts as, in large part, a failure.

No liability legislation was essentially an adaptation of the stock book system operating on the tin mining fields in Cornwall and Devon. These enterprises differed in two respects from the Australian variant: (i) the members of cost book companies were fixed with unlimited liability in respect to outsiders and (ii) the cost book companies generally involved only relatively small numbers of members. It is important to note that for many contemporaries no liability legislation was only ever intended to apply to the same sort of small mining enterprise which had traditionally come within the purview of the cost book system in England.

For instance, one of the participants in the debate over the introduction of the legislation in Victoria in 1871 voiced this sentiment quite clearly:

> [I]f he understood the object of the bill, it [was] to enable small parties of miners to organize themselves into small corporations, and to borrow money so as to enable them to develop their mines. [30]

This view was again reiterated in 1880-81 in the debates around the introduction of No Liability legislation in NSW. It was there suggested that such legislation would be inappropriate in due to the different scale of mining operations in that colony (ie the mining undertakings in New South Wales were all of a larger scale than those in Victoria, South Australia, and Western Australia). It was asserted that the adoption of No Liability mining company legislation in New South Wales would result in the extension of the principle of the Act to mining enterprises of a size and type different from those for which it was originally intended. Large mining companies should continue to be governed by the Limited Liability Act. [31]

However, despite these forebodings large mining undertakings *did* take advantage of the provisions of the No Liability Act at least as often as did the small tribute mining enterprises operating in the mining districts. This extension of the principle behind the No Liability Act continued to trouble contemporaries, as did the apparent regulatory vacuum in which such undertakings operated.

Rather than being seen as an "autochotonous expedient...developed to defeat fraudulent practices arising out of the mining boom", [32] the no liability company was seen by some as creating a range of new opportunities for devious practice:

> *If the statute book of any English-speaking country were searched, it would in all probability not disclose so shoddy an act of legislation as the [No Liability Mining Act]. Some of the main provisions are obscure, and therefore necessarily doubtful in their construction; there is hardly one which is not to be condemned as a clumsy means of*

> *carrying out the objects proposed, and the Act is wholly insufficient for the proper formation or working of a company*...The system may be fairly applicable to the working of alluvial deposits, or mining claims not requiring the investment of a large amount of capital; or where the capital invested is by the miners themselves, working in a particular district: but it is not suited to a company in which a substantial amount becomes invested in the mining property acquired. *Bainbridge remarks that the cost-book system arose in the natural desire to carry on small concerns by numerous proprietors with as much economy and as little partnership as possible.* A frequent drawback to the development of mining properties in the colonies is want of steady application of capital and labour. The speculative element often contemplates more the sale of shares at a profit, than the actual results of a mining venture.[33] (My emphases)

Some revision must consequently take place of the previously uncritical "histories" of Australian corporate legislation which have uncritically accepted this legislation as efficacious and original colonial contribution to company legislation.

It might be asserted that this apparently "progressive" and "original" legislation was neither. It was, rather a backward looking, short term expedient to the problems created by the lack of an effective corporate enforcement mechanism in the colonies. It could also be suggested that this perhaps had a negative long term effect on the development of distinctively Australian colonial administrative structures and corporate legislation. By taking most company registrations outside the purview of the Limited Liability Act (given that most registrations before the late 1880's were of mining companies) the introduction of No Liability legislation delayed any serious examination of the appropriateness of the Limited Liability Act to the needs of the colonies. It also prevented a proper assessment ever taking place of how best to tailor the provisions of company law to the available administrative resources in the colonies.

The next group of significant reforms to Victorian company legislation, which took place in 1896, were a direct result of the disastrous economic crash which had preceded them. The laxity of company regulation, the absence of proper financial reporting required of companies, and the disdain with which controllers treated shareholders were all implicated in the collapse of large numbers of companies in Victoria during the early 1890's. Drastic measures were apparently called for. When the matter of a new Limited Liability Act first came before the Legislative Assembly in 1895 no fewer than 173 new provisions were proposed. Most of these were aimed at increasing the responsibility of corporate controllers for financial mismanagement or in making fraudulent practices criminal offences.

However, the spirit of reform displayed by the Legislative Assembly was not shared by the unelected Upper House. The Legislative Council tried to emasculate the proposed new provisions. The reason for this obstructiveness was explained by *The Age:*

> The Council's action in the Companies Bill is one dictated by the most direct of personal interests. It is a House of company directors, and it is determined to minimize the responsibility of directors towards shareholders.... [34]

The members of the Legislative Council were not totally successful in their campaign to undermine the winds of change in company legislation. Nevertheless they did succeed in taking some force out of the more extreme of the proposed reforms.

Even in the case of these dramatic and apparently innovative reforms for proposed for Victorian company law their lineage is not, strictly speaking, a local one. Most of the new ideas which were incorporated in the 1896 Victorian Limited Liability Act were taken wholesale from the recommendations of the English "Davey Committee", which had just then issued its Report. Just as the Australian colonies, and in particular Victoria, were going through a radical reassessment of the regulatory provisions of the Companies Act, this process was also occurring in England. Even with a more developed bureaucratic apparatus to enforce its provisions the predominantly facilitative nature of the Limited Liability Act was allowing unsavoury businessmen to defraud the public with impunity. This was good for nobody except the businessmen perpetuating the frauds - the public, as investors, suffered, genuine businesses suffered as creditors, and the State suffered by being called to account for these apparent regulatory failures.

The Davey Committee had principally concentrated in its report on making a series of recommendations regarding the improvement of the regulatory provisions of the Limited Liability Act. In England these recommendations were only accepted piecemeal over the twenty five years following the tabling of the Report. The need to seize on these reforms in the colonies was somewhat more pressing due to public clamour in respect to the failings of existing company law, which was seen as at least partially responsible for the ensuing economic crash. However, whilst one might see this as "progressive" it is perhaps too easy to confuse legislation with a primarily symbolic function with measures that have a practical effectivity. For at the time the legislation was introduced in Victoria the Registrar of Companies Office was unable to ensure that companies provided the rudimentary Annual Returns required by the Act, let alone enforce the new provisions requiring audited financial statements. The lack of compliance by companies with the provisions of the Act in the colonies was so common that in a debate in the South Australian Parliament one Member was given to remark:

"He did not believe that any one of the companies under the (Companies) Act had complied with the conditions regarding limited liability". [35]

After the introduction of the 1896 Act the levels of routine compliance with the Companies Acts did not appreciably improve. Nor did the resources which the colonial governments were prepared to commit to the various colonial administrative bodies charged with enforcement of the legislation. As the work of these bodies increased with the substantial growth in proprietary company registrations in the 1890's the chances of these bureaucracies ever becoming effective enforcement agencies faded further into the background.

The adoption of the Davey Committee recommendations, whilst apparently creating a more formidable regulatory climate than that prevailing in the Mother country, in reality was yet another instance of Australian company legislation following imported models without a realistic assessment taking place of the means available to ensure that the ideal of the legislation could even partially be realized. A realistic appraisal of the administrative structures responsible for enforcement of Company legislation in the colonies would have led to quite different solutions than those which were offered during the "moral panic" regarding commercial practices in the mid 1890's.

Regulation or Facilitation: The Enforcement of the Limited Liability Acts in the Colonies 1864-1920

Amongst lawyers the history of the administrative agencies charged with the enforcement of particular Acts has tended to take second place to the travails of the legislation. This is unfortunate, as it has tended to prop up the common tendency towards teleology amongst legal historians. In this Whiggish "vision" of legal history legislation is seen as being replaced by later enactments which are "better" by reason of the more informed basis upon which they are drafted. Depending upon the prejudices of the historian concerned courts are cast either as reactionary or progressive forces in this constant progressive development of the law. They are seen as either undermining the "proper" intentions of the framers of particular legislation, or they carry the intentions of the legislation forward, adapting it to new social and economic conditions. In this process the role of the agencies charged with administering legislation is often glossed over or ignored. These agencies are often assumed to be relatively "neutral" in development of the law. Due to the pioneering efforts of a number of researchers this past marginalization of the role of bureaucracies in the unravelling of legislation and "legal regimes" is fortunately now beginning to be reassessed. [36]

In respect to the administration of company legislation in the nineteenth and early twentieth centuries little work has yet been done. No literature yet exists which specifically concentrates on the bureaucratic structures charged with administering company legislation during this period. This may, at least

partially, be a consequence of the indifferent primary sources available. The fragmentary nature of the following preliminary account is indeed partially as a consequence of this lack of easily accessible sources.

As suggested earlier, no consistent pattern emerged in the various colonies in respect to the administrative mechanisms employed to deal with registration under and enforcement of the Limited Liability Acts. New South Wales seems to have had the most efficient of the colonial bureaucracies responsible for the Act. The location of the responsibilities for the administration of the Act in the Registrar General's Department, rather than creation of a new special purpose Department seems to have been propitious. One of the reasons why the introduction of No Liability Mining company legislation was not regarded as pressing by the NSW legislature appears to have been the much lower incidence of dummying of shares. This was due to the stricter enforcement of the provisions of the Act by the Registrar General's Department than had been the case in other Australian colonies under different administrative regimes. In fact administrative procedures were so lax in Victoria in the late 1880's that one public servant employed by the Registrar of Companies office was able, over a period of time, to abscond undetected with the registration documents of a substantial number of companies, steam off the duty stamps on the documents and then sell these duty stamps to finance investments in the land boom and destroy the original documents of the companies concerned. In Queensland the fear of fraudulent practices on the part of public servants led to the following Memorandum from the Attorney-General to the Registrar of Companies/Master of the Supreme Court:

> Sir,
>
> I have the honour to request that you will be good enough to direct the attention of the officers of your Department to the Notice that appeared in the Gazette of 13th ult., in which it is estimated that no officer in the Government service is to be allowed to hold office in any Public company or society whatever and I have to request that you will make it clearly understood that any officer who disregards this notice, or in any way acts contrary to its true intent and meaning will subject himself to the penalty of dismissal from the public service. [37]

In all colonies the backlog of companies which had not submitted their annual returns for some time was always quite substantial, as too was the number of defunct companies littering the register.

In no colony did the administrative apparatus charged with the Act seem to regard its duties as being principally of a regulatory nature. The various Departments and Government officials responsible for the Act saw their role as being of a facilitative nature, providing advice in respect to registrations, ensuring paperwork submitted to them was in proper form and that the Register

was maintained. The prevailing attitude towards the nature of the administrative duties owed by the responsible colonial department in respect of the Act is reflected in the following interchange between the South Australian Attorney-General and the Registrar of Companies in 1889. The Attorney-General had been questioned in Parliament in regard to a number of frauds committed by a particular company and had referred these matters to the Registrar of Companies "whose duty it is to see the Act is complied with". [38] The Registrar, Alex Buchanan, replied in the following manner in his letter of the 18th April, 1893:

> The Act does not appear to throw the duty upon anyone other than the Companies themselves and their agents, of seeing that the provisions of the Act are complied with; nor does there appear to be any machinery provided for that purpose beyond the penalty under the act which may be applied by the Justices imposing the same on or towards the informant. I may state that if it should come to my notice as Registrar of Companies that a Company was neglecting to comply with the Act I should deem it my duty just to communicate with the company and if that proved ineffectual then to report the matter to the Minister. [39]

There was even a reluctance in some colonies on the part of the responsible body to answer routine enquiries in regard to the Limited Liability Act. For example one Warwick business house wrote to the Registrar of Companies in Queensland to establish if it was:

(i) their duty to file a copy of their annual balance sheet with the Registrar of Companies and

(ii) if they were so required which section of the Act required them to do so.

The Registrar replied:

> I have to refer you to ss 25-33, 39,53, & 87 of the Companies Act 1863 for information as to returns, etc to be forwarded to this office and to inform you that in future when similar information is required it will be necessary for you to consult your legal adviser, as it is no part of the Registrar's duty to advise companies as to their duties. [40]

The fact that in many areas of Queensland no legal adviser might have been available [41] or that copies of the Companies Act might have been impossible to obtain [42] seems to have not deterred the Registrar from maintaining a narrow interpretation of his Departments' tasks. If we are to assume that the opinions expressed by the South Australian and Queensland Registrars of Companies were commonly held, then it appears that the Departments responsible for administering the Companies Acts did not regard enforcement of the penal provisions of the Act or the provision of routine advice in regard to the Act as

part of their responsibility. This only really left routine administrative tasks, such as the processing of applications to register a company and the acceptance of other documents required to be filed with the Registrar as those things which the Registrar, or other responsible Department, did regard as within their allocated functions. All other aspects of enforcement or management of the Companies Act were seen to be the responsibility of the private individuals involved.

The inconsistencies which began to occur between the provisions of the various colonies Companies Acts, the differences in administrative practices between the various colonial Departments charged with overseeing the Act, and the different interpretation the Courts in each colony had placed on the Act all led to considerable inconvenience for the business community. These factors were also perceived to be implicated in encouraging the less savoury elements in the commercial community into perpetrating frauds by playing one system off against another. These unpalatable consequences of colonial parochialism led to a fairly strong lobby amongst the business sector to have a national, or at the very least, a uniform system of company law under Federation. A number of meetings and exchanges occurred in the early years of the Commonwealth to formulate plans respecting the implementation of such proposals. Interestingly enough one can observe in correspondence relating to these meetings a mounting fear on the part of the legal community that company law had been "taken over" by the bureaucrats. In a letter written by the Secretary of the Law Institute of Victoria in 1907 to his counterparts in NSW, Tasmania, South Australia and Queensland he stated:

> *As doubtless you are aware a conference is being held in Melbourne at the present time on the subject of Federal Company legislation.* This conference is composed of what are called 'experts' from the states. It appears however that these experts are gentlemen from the Registrar-General's Offices' whose duties are almost wholly of an official and administrative character *relating mainly to the filing of documents and papers in connection with the formation and management of companies.*
>
> In the opinion of Council expert opinion on Company legislation cannot be obtained in this way. Practising Solicitors with experience of company formation, managers and auditors with company experience, it is considered alone will furnish advice likely to be a safe guide to legislation [43] (My emphases.)

The Queensland Attorney-General expressed the prevailing sentiment in 1913:

> For 15 or 16 years there has been a movement afoot in Australia with a view to providing a comprehensive Commonwealth law relating to companies: various conferences have been held in connection with this matter, and plans have been agreed upon from time to time by various Premiers. [44]

Of course by the time this statement was made the chances of any such Federal scheme being implemented had diminished somewhat due to the decision of the High Court of Australia in the *Huddart Parker* case [45], in which they had given a narrow interpretation to s 51(xx), the 'corporations' power, in the Commonwealth Constitution.

Despite the negative contribution of the High Court in respect to the attainment of a national system of companies' administration and regulation, hopes of achieving some level of uniformity in legislation and administrative practice were kept alive for some time. These hopes were expressed in a letter from the South Australian Registrar of Companies, J.N. Stuart to the State Attorney-General in 1923:

> I have no doubt there is a strong desire on the part of the commercial community to obtain uniformity in Company law...the South Australian Acts differ in important particulars from those in other parts of the Commonwealth and it may be of great service to the commercial world if our Act was brought into line with those of Victoria or Tasmania which are the replicas of the most modern legislation on the subject. South Australia would thus be assisting towards uniformity, which trades consider essential for the encouragement of trading but this is a matter of policy and it is only thrown out as a suggestion. [46]

The business community always envisaged that a uniform Australian Companies Act would be a replica of the latest English Act rather than a uniquely "Australian" product. The reason they considered this as imperative was because of the then prevailing level of integration between Australia and English businesses. This made any legal divergence in matters of commerce a difficult proposition. Evidence of the perceived need to keep the companies legislation in the two contexts as consistent as possible can be found in the Minutes and correspondence of various commercial bodies at the time. For instance, we find the President of the Sydney Chamber of Commerce writing in 1907 to the Under Secretary of the Federal Department of the Attorney General and of Justice in the following terms:

> [The Council of the Chamber of Commerce] submit for the consideration of the Acting Prime Minister of the Commonwealth, should the Honourable the Attorney General be good enough to submit them, the following suggestions of a general nature:
>
> 2 That uniformity of Bankruptcy and Company Law be best obtained by legislation by agreement in identical terms by the Parliaments of the individual States.
>
> 3 That in view of the great distances between places in the Commonwealth, it is not expedient to have Federal

legislation on these subjects unless such legislation can be adapted to the circumstances as to avoid difficulties in dealing with real property and in business transactions.

4 That it is desirable that on both subjects, legislation should follow the lines of the latest English legislation.

5 That any attempt to centralize the administration of either of these branches of the law must result in grave interference with business interests throughout the Commonwealth. [47]

The Minutes of the Adelaide Chamber of Commerce for 1924-1925 are also replete with references to the reform of Company Law. On 28 November 1924 the Parliamentary and Industrial Committee of the Adelaide Chamber of Commerce considered a letter from the Melbourne Chamber of Commerce which was suggesting a reconsideration of the question of formulating a national system of regulation rather than simply considering tactics in relation to the adoption of uniform legislation:

> [I]t was suggested that the Chambers of Commerce might take steps to ascertain from leaders of all parties in the State Parliaments their ideas on the subject of referring to the Commonwealth Parliament under Section 51 of the Constitution, sub-sec xxxvii - the power to legislate in the direction indicated. It was asked that this Chamber would advise its opinion as to whether the reference of the required powers to the Commonwealth was advisable.
>
> After carefully considering the matter, it was resolved that this Committee is of opinion that while uniform company law under conditions satisfactory to traders might be desirable, there is no such pressing necessity or urgency as would justify conferring jurisdiction upon the Parliament of the Commonwealth and abandoning the possibility of the State Parliaments adopting a Uniform Bill. [48]

Of course, despite this continuing concern to establish uniformity in Company Law it was not until 1961-1962 that such agreement was reached amongst the States that a uniform Act was passed in all jurisdictions. [49]

Despite the recent establishment of the Australian Securities Commission, the decision of the High Court in the *Corporations Act* case which was the result of a Constitutional challenge to the new scheme, has for the foreseeable future considerably limited the capacity of the Commonwealth to introduce a *truly national* scheme of corporate regulation. It should perhaps not be forgotten that this new impediment to a national regulatory scheme has delayed yet again the adoption by the Commonwealth of a full range of powers in respect to companies, some eighty five years after the idea of a national system of corporate registration and regulation was first mooted. This new scheme, despite the significant advance constituted by the establishment of the Australian Securities

Commission, is nevertheless largely a reworking of the pre-existing co-operative legislation, thanks to the High Court's intervention. [50]

Despite the considerable pessimism which must attend the possibilities for success of a "new" scheme which is, in essence, merely a window dressing of its unsuccessful predecessor, the new corporations scheme does offer some hope for a "better" future. The establishment of the ASC, with a relatively adequate budget, may yet to be one of the single most significant developments in the history of corporate regulation in Australia. It is an important development not only because of the commitment of resources to enforcement but also due to the break it represents with the pre-existing administrative structures and the "culture" which went with them. Such a dramatic break with the past is significant for the renewal of "failed" bureaucracies due to the possibilities it presents in reaction to the creation of a new attitudinal climate within the agency. As many recent studies of the historical development of administrative agencies have emphasized the "culture" of administrative agencies, whether they be the police or a regulatory body, is one of the single most significant factors in the "efficiency" and effectiveness' of those agencies. A bureaucratic department which historically has not seen its role as "regulatory", such as was the case with the pre-existing Corporate Affairs offices, would have had considerable difficulty in altering its "culture" to accomodate this task at some later stage:

> [R]egulatory agencies can often be seen as being victims of the forces at work during their formation. The ambiguity of their goals, their unstable popular base and their continued relationships with the regulated all serve to undermine and neutralise their sense of purpose. [51]

Conclusions

Further study of nineteenth and early twentieth century company regulation is required. Many of the contemporary problems relating to "regulatory failure" might be better understood if more was known of the historical evolution of the corporate form and the administrative structures charged with its regulation. In the Australian context we have observed that historically one of the key factors which contributed to the recurring regulatory crises in the colonies was the failure to adapt English legislation to the extant colonial administrative structures. The mismatch between legislative enactment and administrative capacity led to a prevailing ethos antipathetic to the discharge of regulatory functions amongst the colonial agencies charged with overseeing the operation of the Companies Acts. Enforcement of the regulatory provisions of the Companies Acts was seen to be a matter for private initiative, rather than a question of State intervention.

Intermittent "moral panics" in respect to the efficacy of company legislation did little to remedy this deficiency, as regulatory failures were perceived by legislatures as matters to be remedied by means of amendments to the relevant legislation. Revisions to the administrative structures charged with enforcement of the legislation were not generally perceived as integral to the solution of regulatory deficiencies. Nor, quite often, were they politically feasible.

When the possibility arose to initiate a more effective regulatory structure after federation, State parochialism and the fear amongst those in commerce of what a Federal Labor Government might do if they exercised total control over corporations, both stood in the way of establishing a national body charged with the regulation of corporations. The High Court reinforced this prevailing sentiment when it gave a narrow interpretation to the "corporations power" in the *Huddart Parker* case.

The strength of State parochialism is further reflected in the failure of those involved in commerce to even achieve uniformity of company legislation until the 1960's. This was despite a strong desire on the part of the business community to realize this goal. The hostility of the business community towards any level of Federal control over corporations may, however, have significantly weakened their capacity to achieve this goal, due to the ambivalence it introduced into their arguments for uniformity.

A combination of factors, inherited from their very inception, combined with the limited commitment amongst colonial, and later on, State governments, to the resourcing of their enforcement and regulatory branches, meant that the administrative agencies charged with overseeing the operation of company law were both unpredisposed towards, and practically incapable of, discharging their "regulatory" functions. These bodies were truly victims of the forces operating at the time of their inception in the mid nineteenth century. To overcome the crippling weight of the historical legacy we need to begin afresh. This means in essence, both the establishment of a new national regulatory body, not built around the pre-existing state bureaucracies, and the rewriting of corporate legislation ab initio. The first part of this process has already been achieved in large part with the establishment of the Australian Securities Commission. Nevertheless, the process of constituting corporate law an effective regulatory mechanism requires more than the establishment of an administrative agency. It also requires legislation which is designed around the concerns of the moment, not the laissez faire intimations of the past. The process of transformation of corporate law and administration in this country beyond the first important stage, constituted by the establishment of the ASC, has been significantly hampered by the decision of the High Court in the *Corporations Act* case (*NSW and Others* v *The Commonwealth*). Whether the second and subsequent stages of transformation can now occur is in considerable doubt.

Whether the new regime of corporation law, in its current form, represents a significant enough departure from the past, and has enough flexibility to adapt to changing circumstances in the future, must remain a matter of some considerable doubt. [52]

Table 1: Company Registrations NSW 1875-1894

Year	Number of Companies	Year	Number of Companies
1875	13	1890	122
1876	7	1891	117
1877	12	1892	77
1878	20	1893	86
1879	18	1894	88
1880	24	1895	77
1881	29	1896	70
1882	73	1897	62
1883	57	1898	87
1884	69	1899	90
1885	84	1900	92
1886	105	1901	94
1887	122	1902	105
1888	227	1903	157
1889	150		

Source: NSW PRO 11/11782-11/11783.

Table 2: South Australian Company Registrations 1865-1885

Year	Number of Companies	Year	Number of Companies
1865	16	1876	8
1866	23	1877	18
1867	19	1878	20
1868	11	1879	13
1869	36	1880	12
1870	13	1881	34
1871	8	1882	43
1872	25	1883	23
1873	139	1884	9
1874	24	1885	11
1875	15		

Table 3: South Australian Company Registrations 1886-1906

Year	Number of Companies	Year	Number of Companies
1886	333	1897	121
1887	56	1898	67
1888	128	1899	94
1889	45	1900	82
1890	26	1901	63
1891	27	1902	69
1892	19	1903	117
1893	112	1904	54
1894	108	1905	73
1895	148	1906	112
1896	203		

Table 4: Queensland Company Registrations 1875-1890

Year	Number of Companies	Year	Number of Companies
1875	13	1883	57
1876	7	1884	69
1877	12	1885	84
1878	20	1886	105
1879	18	1887	122
1880	24	1888	227
1881	29	1889	150
1882	73	1890	122

Table 5: Victorian Company Registrations 1874-1893

Year	Number of Companies	Year	Number of Companies
1874	34	1884	70
1875	27	1885	98
1876	19	1886	85
1877	35	1887	145
1878	35	1888	343
1879	32	1889	131
1880	35	1890	64
1881	77	1891	126
1882	86	1892	117
1883	74	1893	76

Table 6: Registrations by Industry 1874-1893 (Victoria)

Year	Manufac-turing	Mining	Land	Banks/ insurance.	Pastoral	Entertain-ment	Others
1874	14	6	1	1	3	5	4
1875	11	9	1	1	0	3	2
1876	9	3	1	2	0	1	3
1877	14		3	5	4	4	5
1878	10	2	3	3	2	7	8
1879	13	1	2	2	0	7	7
1880	13	3	1	0	5	2	10
1881	27	18	6	5	10	2	9
1882	32	21	3	1	14	5	10
1883	24	11	0	1	12	19	7
1884	30	11	4	5	6	5	9
1885	47	12	14	4	10	7	4
1886	34	11	9	5	9	5	12
1887	55	8	40	6	10	13	13
1888	99	21	150	3	22	28	22
1889	70	6	33	0	4	8	10
1890	27	5	10	0	8	4	10
1891	75	4	9	0	15	8	15
1892	95	0	6	1	5	2	8
1893	56	2	1	0	2	7	8

Source: Butlin, N G , p 413.

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* Department of Legal Studies, LaTrobe University, Bundoora, Victoria.

1 Castles, A, in *An Australian Legal History*, Law Book Company, Sydney, 1982, 485-486 draws attention to the essentially imitative nature of Australian colonial company legislation. However, in contrasting the "strong reliance" in this area on British models with divergences from Home country practice in other areas of law Castles omits mention of the strong economic incentives which lay at the heart of imitative practices in the commercial area.

2 Risk, R C B , "The Nineteenth Century Foundations of the Business Corporation in Ontario", *University of Toronto Law Journal*, vol 23, 1973, pp 281-282 discusses the manner in which in Ontario the general incorporation statute of 1860 followed the terms of the 1850 New York Statute. He also mentions that this emulation of an American model was approved of by the Colonial Office.

3 Butlin, N G, *Investment in Australian Economic Development 1861-1900*, Cambridge University Press, Cambridge, 1964, pp 302-303.

4 Hume, L J, "'Working Class Movements in Sydney and Melbourne Before the Gold Rushes", *Historical Studies*, vol 9, 1960, 264.

5 Certain proposals by the Victorian Government in 1887 to bring the provisions applying to the Chartered Banks into line with those applying to Limited Liability Banks became a source of concern for the managements of the Chartered Banks. In a letter to the Victorian Attorney-General, Sir Bryan O'Loghlen Bart, the solicitors for the Bank of NSW and the National Bank stated:

> The Bill introduced by the Government to amend the Companies Statute and which has been read a first time, will be of no utility to either of the Banks on whose behalf we have the honour to address you. It is not practicable that the [Bank of NSW] should come under the provisions of a local Victorian Statute namely the Companies Statute 1864 whose provisions are quite inapplicable to it. Nor does the Bank desire to alter its liability in any way which would be the case if it were registered under the companies statute, the liability being limited to the amount unpaid on the shares, whereas the shareholders in the Bank of NSW are limited to double the amount of their shares. Cited in Nunn, H W, (ed) *Select Documents of the Nineteenth century*, vol 2, National Bank of Australia, Melbourne, 1988, p 215.

6 Mr Hunter, *Queensland Parliamentary Debates* (Legislative Assembly), 16 July 1889, 663-664.

7 For example Sutton, A and Wild, R, "Companies, the Law and the Professions" in Tomasic, R (ed), *Legislation and Society in Australia*, Allen & Unwin, Sydney, 1980, at p 217 state:

> The law seemed to 'lag behind' commercial developments, merely being revised when a spate of frauds highlighted inadequacies in the existing legislation. Although the state was initially able to exploit its power to grant charters, economic forces eventually compelled it to concede to business an unconditional right to incorporate, and the state confines its role merely to safeguarding the mechanisms for corporate self regulation. Thus the state finally tailored its laws to the interests of private capital.

8 Westney, D Eleanor, "Patterns of organizational development in Japan: the spread of the incorporated enterprise 1888-1918", *Yearbook of Organization Studies*, 1979, 142.

9 *ibid*, p 147.

10 Hadden, T, *Company Law and Capitalism*, 2nd edition, Weidenfield & Nicolson, London, 1977, p 28.

11 Jeffreys, J B, *Trends in business organization in Great Britain since 1856*, unpublished PhD thesis, University of London, 1938, p 105.

12 These figures are calculated from the Register of Companies, South Australia, Corporate Affairs Commission Office, Adelaide.

13 The figures are from the Register of Companies, NSW, 11/11782 & 11/11783, NSW State Archives, Kingswood Repository and the Register of Firms, NSW, 1903, 2/8526, 2/8527, 2/8528, 2/8529, Globe Street Office, NSW State Archives.

14 *Circular to Bankers,* 17 August 1844.

15 Adam Smith, *The Wealth of Nations*, Norman S Berg, Dunwoody, Georgia, p 713. Smith then goes on to state that, except in the case of an exclusive privilege there are only four trades in which it is reasonable to establish a joint stock company - these are banking, insurance, canal development and waterworks, ibid., pp 713-716.

16 So enduring were these notions that Alfred Marshal, the great English economist, in his *Principles of Economics* (Book IV, Ch 12), which was first published in 1890, stated emphatically that incorporation was only suitable in a few industries, and that the key figure in English industry was still the entrepreneur, operating either alone or (more usually) in a partnership. In the same view, Napier, T B, in his *History of Joint Stock and Limited Liability Companies,* Macmillan & Co, London, 1901 could state at p 400:

It is tolerably certain that the management of joint stock companies (excluding private companies) is not equal to that of individuals or partnerships, and many things have doubtless been badly done by joint stock companies, which if joint stock companies had not existed would have been well done by a firm or individual.

17 Guest Collection, University of Melbourne Archives, Guest Letter Books, 1886-1891, Letter No 179, 29 March 1888.

18 Butlin, N G , *op cit*, p 413.

19 Michaelis Hallenstein Collection, National Archieves of Business & Labour, ANU, Item 36/10/1, Moritz Michaelis Letterbook, Letter from Moritz Michaelis to his nephew, 2 April 1890.

20 *ibid.*

21 Reader, W J , "Versatility Unlimited: Reflections on the History and Nature of the Limited Liability Company" in Orhnial, T, (ed), *Limited Liability and the Corporation*, Croom Helm, London, 1982, p192.

22 *Shareholders Circular,* vol 1, no 1, 1863.

23 Swallow and Ariell Collection, Melbourne University Archives, Swallow & Ariell Ltd, Minutes of 4th Annual General Meeting, 1892, Box 1/3/1.

24 *Ibid*, Minutes of 2nd. Annual General Meeting 1890, Box 1/3/1.

25 De Lissa, A, *Companies' Work and Mining Law in New South Wales and Victoria: A Treatise For The Guidance of Solicitors, Directors, Investors, and Others*, George Robertson & Co, London, Melbourne & Sydney, 1894, pp 2-3.

26 Ford, H A J, *Principles of Company Law,* 4th edition, Butterworths, Sydney, 1986, pp 13-14.

27 Mr Hunter, *Queensland Parliamentary Debates* (Legislative Assembly), 16 July 1889, 663-664.

28 Mining Companies Act 1871 (Vic). The best discussion of the background to this legislation is contained in Hall, A R, *The Stock Exchange of Melbourne and the Victorian Economy 1852-1900*, 1968, pp 75-77.

29 Mr R Walsh, *VPD,* vol XII, 17 August 1871, 915.

30 Mr Stephen, *VPD,* vol XII, 1871, 283.

31 Mr Ryrie, *NSWPD*, 1880-1881 Session, 163.

32 Redmond, P, *Companies and Securities Law: Commentary and Materials,* Law Book Co, Sydney, 1988, p 31.

33 De Lissa, A, *op cit* , pp 192-193.

34 *The Age*, March, 1896, cited in Cannon, 384.

35 Sir Henry Ayres cited in *The South Australian Register*, 8 August 1878.

36 One of the most significant contributions to the literature in this area is Arthurs, H W, *Without the Law: Administrative Justice and Legal Pluralism in the 19th Century England*, first published in 1985. It is also worth noting the recent critique of Arthurs by Field, S, "Without the Law? Professor Arthurs and the Early Factory Inspectoriate", *Journal of Law and Society*, vol 17, no 4, 1990.

37 Correspondence, Supreme Court, Queensland State Archives, SCT A/12, Letter from Attorney-General to Registrar of Companies/Master of Supreme Court, Mr John Branston, 12 August 1872.

38 Letter 190/1893, Minute Book, Master of Supreme Court, South Australia, 1890-1924, Corporate Affairs Commission Office, Adelaide.

39 Letter /1893, Minute Book, Master of Supreme Court, South Australia, 1890-1924, Corporate Affairs Commission Office, Adelaide.

40 Correspondence, Supreme Court, Queensland State Archives, SCT/ A 30, Letter from Barnes, Archibald & Co Ltd, Merchants & Milkers, Warwick, 14 February 1890 to Registrar of Companies and reply from Registrar 17 February 1890.

41 The Mining Registrar and Acting Local Registrar of Joint Stock Companies for Ravenswood complained of the 'quality' of men advising others on company matters in a letter to the Queensland Registrar of Companies in 1890:

..Such men undertake duties, they do not know anything of, and are 'quite out of sorts' as to the Rules and requirements of the Supreme Court in 'winding up' affairs.

We have one solicitor here (Mr Mc Cullen) who is not always engaged in such affairs. Why, I do not know beyond such is the fact.

Hoping the accompanying paper is something near what you demand as necessary to make the matter perfect.

W.G. Kelly Cusack

Supreme Court Correspondence, Queensland State Archives, SCT A/31, Letter Number 669, 1890, 21 July 1890.

42 In a letter to the Queensland Registrar of Companies the Secretary of one Company registered the following complaint after been told that his company had not complied with the Act:

Sir,

.....It is difficult to know what the provisions of the Companies Act are as repeated applications have been made at the Government Printing Office, Brisbane for copies of the Act, but without success.

As far as we know they will be complied with.

Yours sincerely,

J. Call

Secretary,

Yoolboonda Copper Mining Company

Supreme Court Correspondence, Queensland State Archives, SCT A/12, Letter of 20 July 1872.

43 Law Institute of Victoria, General Correspondence 1897-1908, Law Institute Collection (Second Accession), University of Melbourne Archives, Item 2/32.

44 Hon N F MacGroarty, *QPD*, 3 September1913, 671. I am indebted to Myles Mc Gregor-Lowndes, Department of Business, Queensland University of Technology, for drawing my attention to this reference.

45 *Huddart, Parker & Co. Pty Ltd* v. *Moorehead*, 1909, 8 *CLR* 330.

46 Supreme Court Minute Book, South Australia, Memorandum of 20 February 1923 regarding amendments to the Companies Act.

47 Law Institute of Victoria, General Correspondence.

48 Adelaide Chamber of Commerce, Minute Books, P/16, National Archives of Business & Labour, ANU.

49 Some of the difficulties involved in establishing uniformity in Company legislation are discussed in Ford, H A J, *op cit*, p14.

50 In his Second Reading Speech to the Corporations Bill, *Hansard*, House of Representatives, 25 May 1988, the Attorney General, Lionel Bowen, explained the reasons for the lack of innovation in the new national legislation:

> ...Because the highest priority attaches to the establishment of a national regime for the regulation of companies and the securities and futures industry, the Corporations Bill, for the most part, re-enacts the existing legal requirements. I do not consider it appropriate to introduce extensive reforms to much of the existing law without consultation with interested sectors of the community. Nor do I consider it desirable for the introduction of the national legislation to be accompanied by a plethora of changes that would unnecessarily disrupt the business community.

51 Tomasic, R, "Business Regulation and the Administrative State" in Tomasic, R, (ed) *Business Regulation in Australia*, CCH Australia, Sydney, 1984, p 45.

52 See Mc Queen, R, "The New Companies and Securities Scheme: A Fundamental Departure?" *Australian Quarterly*, Summer, 1989, vol. 61, no 4, pp 481-497; Mc Queen, R, "Why High Court Judges Make Bad Historians: The Relevance of Early Attempts to Establish a National System of Corporate Regulation in Australia to the Corporations Act case", (1990) 19 *Federal Law Review*, 245-265.