UNIFORM COMPANIES LEGISLATION

In Australia the last decade could well be called the "financial fifties". A widening range of industrial endeavour has been reflected in longer Stock Exchange lists and more elaborate methods of financing and dealing. For those concerned with the formation and operation of corporate business with inter-State ramifications, the absence of uniformity in Australian Company law has created needless complexity and accountants and business men, if not lawyers, have sought the passage of a uniform measure.

The Commonwealth Parliament's legislative powers extend to regulation of the formation and winding-up (albeit not voluntary) of marital partnerships[1] but its powers in relation to business associations are more limited. The Constitution[2] empowers it "to make laws for the peace, order and good government of the Commonwealth with respect to . . . (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth . . . and (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament . . ."

Early in the Commonwealth's history the High Court held that sub-paragraph (xx) empowered the Commonwealth Parliament to create corporations only where incorporation was incidental to the execution of some other power.[3] It has been argued that the Commonwealth Parliament could make laws with respect to corporations once they have been incorporated.[4] If this view were sound the Commonwealth Parliament, although unable to enact legislation comparable with those portions of the United Kingdom Companies Act which deal with the formation of companies, could at least occupy a large part of the field of securities regulation.[5] If this had occurred there would have been a division of labour between

1. Constitution s. 51.
2. *Ibid.*
3. *Huddart Parker & Co. Pty. Ltd. v. Moorehead* (1909) 8 C.L.R. 330. Instances of corporations created by Commonwealth legislation as an incident of the execution of other powers are provided by—(i) organizations of employees or of employers registered under the Conciliation and Arbitration Act—*Jumbunna Coal Mine N.L. v. Victorian Coal Miners' Association* (1908) 6 C.L.R. 309; (ii) banking corporations created as an incident of the execution of the power in Constitution s. 51 (xiii); and (iii) an air transport corporation created as an incident of the execution of the power in Constitution s.51(i)—*Australian National Airways Pty. Ltd. v. Commonwealth* (1945) 71 C.L.R. 29.
4. Holmes, *A Commonwealth Companies Act* (1934) 7 A.L.J. 372.
5. Latham, *Interpretation of the Constitution* in *Essays on the Australian Constitution* (1952) 39.

States and Commonwealth similar to that which constitutional limitations have dictated in the United States of America.[6]

Australian electors have refused to approve constitutional amendments which would authorize federal legislation on the creation of companies.[7] During the Second World War and for a period thereafter the Commonwealth, by legislation made under the defence power,[8] regulated the issue of new shares not as a matter of protection of investors but as an economic control.

It became evident that the Commonwealth could not or would not sponsor a uniform Commonwealth Companies Bill. Even if the Commonwealth Parliament had power over some aspects of companies' operations, if not their formation, a non-Labour government would probably be reluctant to act. It is unlikely that it would wish to displace the States from the field of securities regulation unless it were forced to do so by a share market crash and economic depression of the kind which in America produced federal intervention in the shape of the Securities Act of 1933. It is doubtful whether a Labour government would be any more willing, for its interest in Commonwealth power over companies has largely been in connection with economic planning rather than solicitude for members of what would be regarded as the *rentier* class.

By its recent legislation in the difficult field of matrimonial causes the Commonwealth Government has improved the climate of thought for uniform laws in other fields even if they have to be attained through State co-operation.

The need for a uniform Companies Act was heightened by the great disparity between the law of Victoria and Tasmania on the one hand and that of other States and of the Territories. The two former States had largely caught up with the legislation enacted in the United Kingdom in 1947 following the two years of deliberation by the Cohen Committee[9] which had been set up in 1943 but the other States and the Territories lagged behind. Some State statutes were still based on the United Kingdom Act of 1929.[10]

6. The Federal legislation under which the Securities and Exchange Commission of America operates is based on the U.S. Constitution, Art. 1, cl. 3—"The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." The legislation beginning with the Securities Act of 1933 is tied to the power by prohibiting the "use of any means or instruments of transportation or communication in interstate commerce or of the mails" to sell securities unless they are registered with the Commission —Loss, *Securities Regulation* (1951) 122.
7. Sawer, *Australian Federal Politics and Law* (1956) 98, 280.
8. S. 51(vi).
9. Board of Trade, *Report of the Committee on Company Law Amendment*. Cmd. 6659 (1945).
10. *E.g.* New South Wales (Companies Act 1936-1960); Queensland (Companies Act 1931-1955).

Since the consolidation of companies legislation in the United Kingdom in 1948 there have been two significant reports of committees: the reports of the Gedge Committee[11] on shares of no par value and of the Law Reform Committee on contracts of corporations.[12] At present the Jenkins Committee is carrying out a further comprehensive enquiry. It may be said that the time is not ripe for a Uniform Act until the Jenkins Committee has completed its work and the Parliament at Westminster has acted upon it. But that would involve too much delay: four years elapsed between appointment of the Cohen Committee and the passage of legislation based on its work.

Following a number of meetings of Commonwealth and State Ministers since June, 1959, a draft Uniform Companies Bill was prepared and offered as a proposal for adoption throughout the States and Territories of Australia. At the time of writing the Bill has been enacted into law in New South Wales, Victoria and Queensland.

This article is concerned with some of the more important provisions of the new measure insofar as they effect changes in the law of New South Wales and Queensland.

The Incorporators

> "Some seven men form an Association
> (If possible, all Peers and Baronets),
> They start off with a public declaration
> To what extent they mean to pay their debts."
>
> —Sir W. S. Gilbert, Bab Ballads.

When the United Kingdom legislation of the nineteenth century brought into being the machinery for registration and incorporation of companies the innovation was generally regarded as providing means whereby a combination could function as a unit. The new device in addition to being an alternative to a partnership also provided a method whereby a number of persons who desired to invest but not to trade could participate in the fortunes of an enterprise and be identified with it more closely than a creditor.

This associative character of the registered company ceased to be essential after the House of Lords decided in *Salomon's Case*[13] that although the Companies Act 1862 required at least seven subscribers to the memorandum six of those seven could be nominees of the seventh.

11. Cmd. 9112 (1954).
12. Cmd. 622 (1958).
13. *Salomon v. Salomon & Co.* [1897] A.C. 22.

With the recognition of one-man companies by *Salomon's Case* a second function of the registered company was judicially endorsed. By means of a company a sole trader could make his business a legal entity, could give it perpetual succession and could limit his liability. When the legislature in 1907[14] made the first provision for private companies it did not accept the full implications of *Salomon's Case* in that it required a minimum of two incorporators. Thus, it appeared that every company was still to be an association of two or more but because one subscriber could hold his share in trust for the other the reality was that a company need not be a combination.

The uniform law[15] requires at least two subscribers to the memorandum of a proprietary company and at least five subscribers in the case of a public company.[16] If at any time after the company is registered membership falls below these respective minimum numbers and the company carries on business for more than six months with less than minimum membership the members can become personally liable for the company's debts.[17] But these provisions do not apply in the case of a proprietary company the whole of the issued shares of which are held by a holding company that is a public company.[17] This exception is new. In its absence holding companies have been able to avoid liability to pay the debts of their wholly owned subsidiaries by having some of the subsidiary's shares registered in the names of nominees.

The new exception can be regarded as giving belated recognition to the principle established by *Salomon's Case* and it may be asked why it should be necessary for any company limited by shares to have more than one subscriber to the memorandum. When, as in the nineteenth century, it was usual to have shares of a comparatively high nominal value, such as £100, the subscription to the memorandum by a number of persons may well have been a substantial demonstration of their confidence in the new venture and the subscription to the memorandum may have been a factor influencing potential creditors. But today no prospective creditor is likely to be influenced one way or the other by the usual subscription to the memorandum which in total involves a liability of a few pounds.

One argument for the retention of the requirement of more than one incorporator and more than one member may be that a company should never have less than two members in order that its activity

14. *Companies Act* 1907 (U.K.) s. 37 (1).
15. S. 14.
16. The previous requirements were—N.S.W.: Proprietary—two; Public—seven; Queensland: Proprietary—two; Public —seven.
17. S. 36.

should not be interrupted by the death of a sole member. This, however, may be an argument for a requirement that a company should always have more than one director. Previously in some States (*e.g.* New South Wales)[18] a proprietary company has been required to have at least two directors and every other company has been required to have a minimum of three directors. Under the uniform Act[19] every proprietary company shall have at least one director and every public company shall have at least three directors.[20] As between a policy of allowing one-member companies with two directors and a policy of allowing two-member companies with one director it might be said that the continued conduct of the business is more likely to be secured by ensuring continuity of direction rather than continuity of membership. In drawing up a Companies Code Bill for Ghana Professor Gower has adopted the first of these alternatives.

The uniform Act[21] continues the prohibition of unincorporated associations for gain of more than twenty members. It is noteworthy that whereas the corresponding provision of the Victorian Act of 1958 is concerned with associations "formed for the purpose of gain" the Uniform Act reverts to the formula derived from earlier United Kingdom legislation and is aimed at associations "formed for the purpose of carrying on any business which has for its object the acquisition of gain".

The occasion of the enactment of a Uniform Companies Act might well have provided an opportunity to meet the possibility of large partnerships in professions which cannot be followed by corporations. As it is, the companies legislation sets an upper limit on the number of principals in any one legal firm. It may be desirable that there should be such a limitation but should this be a side effect of a law on companies generally?

By a new provision adopted from the United Kingdom Act[22] a corporation cannot under the uniform Act[23] be a member of its holding company.[24] This does not apply where the subsidiary

18. Companies Act 1936-1960 (N.S.W.) S. 120(1).
19. S. 114.
20. In addition there is a new provision requiring at least two directors of a public company to be natural persons who ordinarily reside within the Commonwealth and requiring at least one director of a proprietary company to be a natural person who ordinarily so resides. S. 114(2).
21. S. 14(3).
22. *Companies Act* 1948 (U.K.) s. 27.
23. S. 17.
24. The Uniform Act in S. 6 adopts with some modification the definitions of a subsidiary company and a holding company contained in s. 154 of the Companies Act 1948 (U.K.). To the tests of holding company provided for by s. 154, namely (*a*) control of the composition of the subsidiary's board of directors, (*b*) the holding of more than half the subsidiary's equity share capital and (*c*) being the holding company of an intermediate company which is itself the holding company of the subsidiary, s. 6 adds (*d*) the control of more than half of the voting power of the subsidiary.

is a fiduciary for persons other than the holding company and the subsidiary. Nor does it apply where the subsidiary is a fiduciary and the holding company is beneficially interested by way of security for the purposes of a transaction entered into by it in the ordinary course of a business which includes lending of money. This legislation is designed to implement the principle of *Trevor* v. *Whitworth*[25] that a limited liability company cannot purchase its own shares even in purported exercise of an express power to do so in its memorandum. For this purpose it displaces the theory that each company is a separate legal entity and treats the holding company and the subsidiary as one company. Under sub-section 17(1):

> "A corporation cannot be a member of a company which is its holding company, and any allotment or transfer of shares in a company to its subsidiary shall be void."

If this provision stood alone it could cause difficulty where company X acquires shares in company Y but not in such amounts as to make company Y its subsidiary and later company Y takes over company X so as to make it Y's subsidiary. If sub-section 17(1) stood alone presumably once company X became a subsidiary of company Y it could not remain on the register of members and it could not exercise a member's rights such as attending and voting at meetings. But the allotment or transfer of shares in company Y to company X would not be void since it occurred when the allottee or transferee was not a subsidiary. Sub-section 17(4), however, permits company X to remain a member of company Y but denies voting rights to company X and requires company X to dispose of its shares in company Y within a specified period. Under sub-section 17(5) the prohibition on a subsidiary holding shares in its holding company extends to a nominee for a subsidiary. It is interesting that the legislature has forbidden a nominee to hold shares in the holding company for a subsidiary when recent case law permits a company to be the beneficial owner of shares held in trust for it. This question arose in *In re Castiglione's Will Trusts*[26] which concerned a testamentary trust of shares in the X company for the X company itself. Danckwerts J. held that although the X company could not call for a transfer of the legal title, the shares could be held in trust for it or as it should direct. It may be that the *ratio* of the case is limited to situations in which the trust arises otherwise than by a purchase by the company-beneficiary. In any event, sub-section 17(5) is not so limited and it would appear that the wider policy behind section 17 of preventing a company being interested in its own shares or those of its holding company requires legislation to prevent the result accepted in *In re Castiglione's Will Trusts.*

25. (1887) 12 App. Cas. 409. 26. [1958] Ch. 549.

The Capacity of the Company

The new measure makes significant changes in the operation of the *ultra vires* doctrine. In relation to registered companies the courts have not only allowed members to obtain an injunction to restrain a company from acting outside its stated objects but have also treated as void transactions between a company and an outsider where the company has been acting in pursuit of an object not referred to in its memorandum. The Cohen Committee[27] criticised the doctrine of *ultra vires* as something which had become an "illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company". They were prepared to recommend complete abolition of the doctrine but the United Kingdom legislature was content only to give a wider power to companies to alter their objects.

The uniform Act does not abolish the doctrine but by a provision based upon an American model it attempts to reconcile the need to protect members and debenture holders from the mischief of a company engaging in unexpected business activities with the need to prevent hardship to outsiders who deal with the company.

> "20. (1) No act of a company and no conveyance or transfer of property to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do such act or to execute or take such conveyance or transfer.
>
> (2) Any such lack of capacity or power may be asserted only in—
>
> (*a*) proceedings against the company by any member or when the company has debentures secured by floating charge over all or any of the company's property by the holder of any such debenture or the trustees for the holders of such debentures to restrain the doing of any act or acts or the convey ance or transfer of any property by or to the company;
>
> (*b*) any proceedings by the company or by any member of the company against the present or former officers of the company; or
>
> (*c*) any petition by the Minister to wind up the company.
>
> (3) If the unauthorised act or transfer sought to be restrained in any proceedings under paragraph (*a*) of sub-section (2) of this section is being or is to be performed or made pursuant to any contract to which the company is a party, the Court may if all the parties to the contract are parties to

27. Cmd. 6659, para. 12.

> the proceedings and if the Court deems it to be just and equitable set aside and restrain the performance of the contract and may allow to the company or to the other parties to the contract (as the case requires) compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and restraining the performance of the contract but anticipated profits to be derived from the performance of the contract shall not be awarded by the Court as a loss or damage sustained."

The new provisions in the uniform Act represent a vindication after nearly one hundred years of the dissenting judgment of Blackburn J. (as he then was) in *Taylor* v. *The Chichester and Midhurst Railway Company*.[28] He pointed to the two meanings of *ultra vires:* first, excess of authority as against shareholders and, secondly, the doing of an act prohibited by law. As to the first, those in charge of the company having acted in such a way as to cause the company to go beyond the objects on the faith of which the shareholders subscribed were liable to suit at the instance of the shareholders. On this view if a single shareholder refused to ratify the act of those in charge of the company the act would remain *ultra vires*. But the shareholders might waive their rights to restrain the company. What was given for the shareholders' protection might be waived by them. If all the shareholders ratified then nobody could impugn the transaction. Mr. Justice Blackburn's view treated this commercial company as a successor to the older form of unincorporated company. If the directors went beyond their powers and the outside party did not know of the limitation his contract was not void. If the directors went beyond their powers all the stockholders could ratify and save the contract even if the outsider should have been aware of the limitation. This is another instance of the ambivalent attitude of nineteenth century courts to the registered company. Some judges were for treating it as a continuation of the old trading partnership or unincorporated company. Others were for regarding it as a creature of Parliament subject to the limitation that it had only those powers which Parliament had expressly conferred. If, as did the majority in *Taylor's Case*, one took this latter view there was an implied prohibition on pursuit of every object not expressly sanctioned by Parliament and not even unanimous ratification could save the transaction.

Under the uniform Act the lack of capacity of a company is still legally significant but it can be asserted only in certain proceedings. Section 20 preserves the rights of members to bring action

28. (1867) L.R. 2 Ex. 356.

if the company goes beyond its powers. If the members make no move then third parties are not prejudiced.

It is noteworthy that the lack of capacity may be asserted not only by members of the company but also debenture-holders whose debentures are secured by a floating charge. This gives effect to one of the reasons advanced for the *ultra vires* doctrine in *Ashbury Carriage Co.* v. *Riche*,[29] namely, protection of the creditors of a company. The special interest which the beneficiary of a floating charge has in the day-to-day conduct of a company's business may very well explain why this particular type of creditor has been permitted to complain about his debtor's dealings. This is a significant provision for there is some authority that a creditor with a floating charge is in no better position to complain of a company's dealing *ultra vires* with its property than any unsecured creditor is entitled to control an individual debtor's use of his property. This was the view of Eve J. in *Lawrence* v. *West Somerset Mineral Railway Co.*[30] This denial of standing to the creditor with a floating charge assumed that a company as debtor is in no different position from an individual as debtor. This assumption is questionable when it is recalled that when a creditor gives credit to a limited liability company the credit is given to a fund.[31]

Under Section 20 a transaction is valid notwithstanding the lack of capacity of the company. It might have been thought that in the drafting of section 20(1) the effect of the clause would be limited to incapacity arising from the doctrine of *ultra vires*. There might be acts by a company which are denied effect under some other law and yet on the wording of section 20 another incapacity, however caused, will not invalidate the transaction. Against this, it may be said that the expression "lack of capacity or power" means incapacity in the narrow sense of want of power rather than incapacity in the sense of subjection to prohibitions in other parts of the law as, for example, the criminal law.

The effect of saying that the transaction is not invalidated by lack of capacity is that a person paying money to the company as lender loses his property in that money and cannot trace under the doctrine of *Sinclair* v. *Brougham*.[32] But he would have the remedies of a creditor which is the position he expected to attain by the transaction.

It would appear that under section 20 a person who dealt with a company in a transaction which was fully executed would be protected even if he had actual notice that the transaction was

29. (1875) L.R. 7 H.L. 653. 30. [1918] 2 Ch. 250.
31. See per Jessel M.R. in *In re Exchange Banking Co.* (*Flitcroft's Case*) (1882) 21 Ch.D. 519 at pp. 533-4.
32. (1914) A.C. 398.

ultra vires. This would be subject to the qualification that the transaction did not amount to a civil conspiracy between him and the persons acting on behalf of the company. It may seem unjust to let an outsider go unprejudiced when he has notice that the transaction goes beyond the authorised objects but unless his notice is such as to make him liable for conspiracy the balance of commercial convenience is probably in favour of leaving executed transactions undisturbed. If the transaction were still executory, notice that the transaction was *ultra vires* the company would, presumably, be a matter to be taken into account when the court comes to consider what is "just and equitable" within the meaning of sub-section (3). In a number of authorities[33] it has been said that an outsider dealing with a company is fixed with constructive notice of the contents of the company's memorandum and articles of association. Probably a court exercising the power given by sub-section (3) would not consider that an outsider dealing with the company should be prejudiced by mere constructive notice of this kind. It is possible that section 20 abrogates the doctrine of constructive notice so far as it might have been relevant to questions of the company's powers. But as a company can act only through individuals there is a primary question as to whether the transaction which an outsider is concerned to enforce was made by persons with power to attribute liability to the company. If an outsider had actual notice that the persons with whom he was dealing lacked the authority of the company section 20 would not save the transaction. Presumably section 20 is concerned with acts which, on agency doctrine, would be properly attributable to the company but which, under the *ultra vires* doctrine, are beyond corporate power. If there were no proper agency connection between the act and the company the act would not be an "act of a company" within sub-section 20(1). It then becomes important to know whether an outsider could be prejudiced by constructive notice of provisions in the memorandum or articles of association limiting the authority of the company's agents. The policy of section 20 is to protect an outsider in an executed transaction against the effect of actual notice of want of power on the part of the company. This policy requires rejection of any doctrine of constructive notice in relation to the company's powers. If a doctrine of constructive notice could still operate at the agency level the policy behind section 20 would not find full effect. Section 20 is based on an American provision and it is noteworthy that the English doctrine of constructive notice of the memorandum and articles "is contrary to the great weight of authority in the United

33. *Mahoney v. East Holyford Mining Co. Ltd.* (1875) L.R. 7 H.L. 869 at p. 893 *per* Lord Hatherley; *Kreditbank Cassel G.m.b.H. v. Schenkers Ltd.* [1927] 1 K.B. 826 at p. 837, 838 *per* Scrutton L.J.

States where the rule is that no constructive notice is given by the mere filing of the articles of incorporation."[34] Thus, section 20 is so closely connected with agency doctrine that it may be necessary to modify, or even abolish, any suggestion of a doctrine of constructive notice of provisions in the memorandum and articles in relation to agency. In this connection section 10 of the American Model Business Corporation Act 1928[35] provides—

> "10. Effect of Filing or Recording Papers Required to be Filed.—The filing or recording of the articles of incorporation, or amendments thereto, or of any other papers pursuant to the provisions of this Act is required for the purpose of affording all persons the opportunity of acquiring knowledge of the contents thereof, but no person dealing with the corporation shall be charged with constructive notice of the contents of any such articles or papers by reason of such filing or recording."

The language of sub-section 20(1) is apt to save most transactions entered into by a company deliberately. There may, however, be a question whether the sub-clause puts to rest all doubts as to corporate responsibility for torts and crimes arising out of *ultra vires* activity. The adoption of a provision such a section 20 from an American model shows the perils of legislative emulation. Section 20 needs to be supplemented by a measure under which a corporation may be made liable for wrongs committed by its employees in the course of their employment or its agents operating within the scope of their authority even though the employment or the conferring of authority was *ultra vires*. The American law did not need to include such a provision because American courts, unlike English and Australian courts, had ignored the *ultra vires* doctrine in relation to wrongs committed during the pursuit of *ultra vires* transactions.[36]

Suppose that under section 20(3) the court sets aside a contract what effect would this have on transactions into which the company has entered? If property has passed under the *ultra vires* contract with the company then presumably the situation would attract the ordinary principle that once a third party has acquired rights

34. Lattin, *Corporations* (1959), 194.
35. Uniform Laws Annotated, vol. 9, 140. Compare clause 141 of the draft Companies Code Bill 1961 for Ghana which provides—"141. Except as mentioned in section 118 of this Code, regarding particulars in the register of particulars of charges, a person shall not be deemed to have knowledge of any particulars, documents or the contents of documents merely because such particulars or documents are registered by the Registrar or referred to in any particulars or documents so registered."
36. Lattin, *Corporations* (1959) pp. 200-201.

in property obtained pursuant to a voidable contract that contract cannot be avoided.

Although the uniform legislation does not abolish the doctrine of *ultra vires* an alteration of objects will be more readily attainable than previously.[37] The older style of legislation of States such as that of New South Wales and Queensland permitted alteration by special resolution for certain specified purposes but the alteration was not to be effective until confirmed by the Court which had to be satisfied that creditors who were entitled to object had consented. The United Kingdom Act of 1947[38] relaxed the procedure by permitting alteration by special resolution which was to have effect unless holders of not less than fifteen per cent. in value of shares or fifteen per cent. in value of debentures applied to the court for cancellation of the alteration. The power to alter objects was, however, still expressed to be confined to alterations for one of the seven specified purposes but it was also provided[39] that unless proceedings were taken to cancel the alteration within twenty-one days after passage of the resolution the validity of the alteration could not be questioned on the ground that it was not for one of the specified purposes.

In Victoria[40] in 1958 the legislature adopted the United Kingdom provisions but without specifying purposes for which an alteration could be made. The uniform legislation adopts the same approach as the Victorian Act except that the alteration may be impugned by holders of not less than ten per cent. in nominal value of shares or ten per cent. in nominal value of debentures. The new measure does not contain anything to dispose of the doubts as to whether an *ultra vires* transaction entered into previously to the alteration is thereby validated.[41]

Given that a lack of capacity can be asserted by members and certain debenture-holders there is still the possibility that the objects clause of a memorandum will be so widely drawn that a company need never fear a challenge to any of its acts. It may be said that any problem of *ultra vires* arising in a young company is a reflection on the draftsman of the memorandum. But this view ignores the interest of a shareholder or debenture holder in knowing the kind of business enterprise in which he is investing. The uniform measure does not resolve this question. On the one hand it does not clearly give the registered company the capacity

37. S. 28.
38. S. 76. See now 1948 Act s. 5.
39. S. 76(10). See now 1948 Act s. 5(9).
40. S. 23.
41. Holt, *Alteration of a Company's Objects and the Ultra Vires Doctrine* (1950) 66 L.Q.R. 493; Gower, *Alteration of a Company's Objects and the Ultra Vires Doctrine* (1951) 67 L.Q.R. 41.

of a natural person; on the other hand it sets no limits on the range of objects with which the draftsman may endow the company regardless of whether the company will actually pursue those objects.

In the Victorian Act of 1958 following the lead given in the New Zealand Act of 1955 the need to set out a long list of incidental powers in the objects clause of the Memorandum of Association was to some extent obviated; under the Companies Act 1958 (Vic.) section 15(3) a number of powers set forth in the Third Schedule to the Act were to be implied into the memorandum except so far as they were expressly excluded or modified by the memorandum. The uniform Act contains similar provisions.[42]

The provisions of the draft Companies Code Bill 1961 for Ghana drafted by Professor L. C. B. Gower are of interest in this context. That Bill has not gone so far as to permit a company to carry on any activity which it thinks fit as if it were a natural person. But there is a provision[43] that every company shall have for the furtherance of its objects and of any business carried on by it and authorised in its Regulations,[44] all the powers of a natural person of full capacity. Thus, it has not been necessary to include the long list of ancillary powers provided for by the Australian measure. Another provision[45] of the draft Ghana Bill enables a member or a debenture-holder to bring proceedings to prevent a company from carrying on an unauthorised business without altering its Regulations. Thus, if a company is acting within its authorised business it will have all the powers of a natural person. This would still leave open the possibility that a draftsman would draft an "objects" clause which included many different types of businesses in which the company might conceivably engage. This would carry with it the mischief of not informing the investor of the type of business in which he is placing his money. To meet this mischief the draft Code provides that it shall be a ground for winding up that a company has not commenced *all* its authorised businesses within a year or has ceased to carry on any authorised business for more than a year.[46] If a company wishes to change its business it may do so but this will require the approval of its members. There seems little doubt that the equating of a company so far as its authorised business is concerned with a natural person is preferable to an attempt to list all the powers which a company might conceivably need.

42. S. 19 and Third Schedule.
43. S. 24.
44. In the Ghanian Bill the Memorandum and Articles have been replaced by one instrument called the Regulations.
45. S. 25.
46. S. 347(2).

Under a provision of the Ghana measure similar to sub-section 20(3)[47] of the uniform Act a third party who has dealt with a company in regard to a matter which is outside its authorized business is liable to find the transaction set aside if it is still executory but if it has been executed he could not be prejudiced.

It is surprising that although the uniform Act relaxes the doctrine of *ultra vires* it fails to give companies a power to ratify pre-incorporation contracts. The conduct of business necessitates many contracts of this kind and yet the present legal position relating to pre-incorporation contracts is most unsatisfactory. A company cannot effectively ratify pre-incorporation contracts so as to sue or be sued on them.[48] It may be that the promoters will be personally liable on the contracts. This will be so if they have purported to enter into the contract on behalf of the company. However, the unsatisfactory decision in *Newborne* v. *Sensolid Ltd.*[49] indicates that if the promoters instead of contracting "on behalf of" the company cause a contract to be entered into ostensibly "by" the company no contract results and neither the company nor the promoters can sue on it. Nor, presumably, can they be sued on it.

To meet this problem the new Ghana Companies Code Bill provides as follows:

> "13. (1) Any contract or other transaction purporting to be entered into by the company prior to its formation or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of such contract or other transaction and had been a party thereto.
>
> (2) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof."

It is to be noted that this provision in sub-section (2) brings it about that those who acted ostensibly for the company, are to be bound by the transaction unless and until the company ratifies. This disposes of the distinction drawn in *Newborne* v. *Sensolid Ltd.*

Informing prospective investors

> "The pernicious Art of Stock-Jobbing hath, of late, so perverted the End and Design of Companies and Corporations, erected for the introducing or carrying on, of Manufactures to be

47. S. 25(5)
48. *Kelner v. Baxter* (1866) L.R. 2 C.P. 174.
49. [1954] 1 Q.B. 45.

the Private Profit of the first Projectors, that the Privileges granted to them have, commonly, been made no other use of, by the first Procurers and Subscribers, but to sell again, with advantage, to ignorant Men, drawn in by Reputation, falsely raised, and artfully spread, concerning the thriving State of their Stock."

—Report of Special Commission
on which was based 8 & 9 Wm.III c32 (1697).

Opinions differ as to the extent to which the state should regulate the issue of company securities. The approach in the United Kingdom and in the Australian States has been for the state to establish minimum standards of disclosure of facts likely to influence a prospective investor. These minimum standards are contained in the case law regarding deceit and innocent misrepresentation and in companies legislation. If the minimum standards have not been attained and an investor has acted the state will assist him to obtain recompense. The basic assumption of this system is that the investor in shares who deserves protection is a person with a high degree of business knowledge who will be able to tell a bad from a good proposition once he is given certain basic information.

This is in contrast to the more paternalistic approach in the United States of America where the Securities and Exchange Commission can act to have questionable prospectus statements verified and can prevent an issue if it is not satisfied as to the truth of those statements. It may seem paradoxical that a country which is thought to contain the most extreme exponents of the theory of private enterprise, should have resorted to a greater degree of public control than Great Britain and Australia. One explanation why the United States of America should have gone beyond a philosophy of disclosure has been essayed by Professor Loss. He says: "The financial problems in a compact country with a relatively small investor class like England, cannot be compared with those faced by a vast country like the United States, with a continually expanding economy and an investing public which is much larger in both absolute and relative terms."[50] While this explanation may serve for the United Kingdom it may not explain the matter in relation to Australia. Commonly stated objections to a regulatory system are exemplified by a comment of Lord Davey's Committee on whose report the United Kingdom Companies Act of 1900 was based: "It would be an attempt to throw what ought to be the responsibility of the individual on the shoulders of the State, and would give a fictitious and unreal sense of security to the investor, and might also lead to grave abuses."[51]

50. Loss, Securities Regulation 120. 51. Cmd. 7779 (1895) s. 42.

With the emergence of a large number of mutual funds and unit trusts a new class of investor who may have very little business knowledge is providing capital for companies at one remove. The question whether additional protection for this type of investor should be provided by the state will be more properly considered in relation to the uniform Acts provisions relating to unit trusts.[52]

At this stage it is sufficient to note that the uniform measure does nothing to establish any Australian equivalent of the Securities and Exchange Commission. In the United Kingdom the Jenkins Committee has taken evidence as to the working of the American regulatory system.

Keeping within the object of requiring full disclosure the new legislation adds to the list of matters upon which the prospective investor must be informed.

It will suffice to point out the changes made in relation to State Acts which were based on the United Kingdom legislation of 1929.[53]

Regulation of the contents of the prospectus now extends to the type size.[54] Among the new matters to be included in a prospectus is a statement that no shares or debentures will be allotted on the basis of the prospectus more than six months after its issue[55] and a statement explaining whether reports of experts referred to in the prospectus were prepared for incorporation in the prospectus.[56] The name of a person as a trustee for debenture-holders, auditor, banker, solicitor, or stock broker is not to be included in a prospectus without his written consent.[57] Where the prospectus offers shares or debentures in a foreign company the prospectus is to provide certain particulars as to the constitution of the company and its place of business in the State.[58]

In any issue of shares or debentures the time of the opening of the subscription lists must be specified.[59] Details of property to be acquired out of proceeds of the issue will have to include particulars of any transaction relating to the property in the previous two years in which the vendor and any director or promoter of the company had an interest.[60] The duty to provide details of property to be acquired out of the proceeds of the issue is extended to the case where the property is purchased by any subsidiary of the issuing company. The names of directors, promoters, experts

52. *Infra.*
53. *E.g.* New South Wales, Queensland.
54. S. 39(1) (*a*).
55. S. 39(1) (*f*).
56. S. 39(1) (*g*).
57. S. 39(1) (*h*).
58. S. 39(1) (*i*).
59. Fifth Schedule, para. 6.
60. Fifth Schedule, para. 10.

or proposed directors interested in commission paid within the two preceding years must be disclosed.[61] The persons who have paid preliminary expenses are to be named.[62] Whereas previously it was enough to give an address at which contracts other than those entered into the ordinary course of the company's business could be inspected, it is now necessary for the prospectus to set out the general nature of such contracts. This extends to contracts entered into not more than two years before the issue of the prospectus.[63] The interest of every expert in the promotion or in property to be acquired by the company is to be disclosed in addition to the similar interest of a director.[64] It is not enough for the required financial reports to be made by the company's auditor or accountant; they must be prepared by a registered company auditor.[65] Financial reports must cover the five financial years immediately preceding the issue if the company has been trading so long.[65] If the company has a subsidiary, separate financial reports are required in respect of the subsidiary and the holding company.[65] If the proceeds of the issue are to be applied in the purchase of a business or of shares in a company which will become a subsidiary a financial report on the business or company is required.[66]

Companies legislation has for a long time contained provisions designed to protect not only those who contribute risk capital but also debenture holders. The new legislation extends this protection. A corporation is not to accept amounts over-subscribed unless its prospectus has reserved the right to do so and has specified a limit on the amount of over-subscriptions which might be retained. Where it does reserve the right to retain over-subscriptions the only statement to be made about asset backing is a statement of the total assets and total liabilities.[67] The prospectus will also have to include particulars of limitation or absence of limitation on borrowing powers.[68]

Invitations to the public to lend money to a corporation otherwise than on a mortgage of realty are not to be made unless a debenture is intended to be issued.[69] This has the effect of attaching all the provisions about issue of a prospectus to any invitation to the public to lend money to a corporation. Invitations to the public to deposit money with a banking corporation are excluded.

An advertisement calling attention to an offer of shares or debentures is to be deemed to be a prospectus unless it contains

61. Fifth Schedule, para. 12.
62. Fifth Schedule, para. 13.
63. Fifth Schedule, para. 15.
64. Fifth Schedule, para. 17.
65. Fifth Schedule, para. 20
66. Fifth Schedule, para. 23
67. S. 41.
68. Fifth Schedule, para. 5.
69. S. 38.

no information other than certain prescribed particulars. The statement that an advertisement is not a prospectus is not to affect the operation of this provision.[70]

Under the State Acts based on the United Kingdom Act of 1929[71] the obligation to issue a prospectus with a form of application for shares or debentures does not apply if the form of application is issued in relation to securities not offered to the public. The uniform law contains a similar limitation.[72] The question whether an issue is public or private can be very difficult.[73] Under the former New South Wales and Queensland provisions it was made clear that the obligation to issue a prospectus with a form of application for securities did not apply to an issue to existing members or debenture holders of the issuing company.[74] This was so whether the prospective applicant for securities would or would not have the right to renounce in favour of other persons. Whether this is desirable may be debatable. If the potential purchaser of rights to a new issue is to be regarded as being in no better position than a purchaser of existing securities on the Stock Exchange the issue of a prospectus will not be considered necessary. But if one emphasizes the fact that the company is altering its capital structure and that this provides an occasion for the general investing public to assess the worth of the company a prospectus may be called for.

Under an earlier draft of the uniform Bill members or debenture holders of the issuing company could constitute a section of the public but if the offer were made to them on terms that they could not renounce in favour of other persons the offer was not to be deemed to be an offer to the public.[75] The withholding of the right to renounce by the terms of a new issue could not of course ensure that the existing shareholder would not dispose of the new shares to an outsider as soon as they were allotted to him. It may be that what is in substance an offer renounceable in favour of anybody may be made by a company in the form of a provisional letter of allotment to its existing members or debenture holders. The allotment would not be effective until the allottee accepted it, but if the terms of the provisional allotment are explicit enough, acceptance need not be notified to the company.[76] If the provisional

70. S. 40.
71. Companies Act 1936-1960 (N.S.W.) S. 137(3); Companies Act 1931-1955 (Q'ld.) S. 47(3).
72. S. 37(2).
73. This question also has to be answered in determining whether a document is a prospectus when it is sought to impose liability for a false statement in a prospectus. A common feature of the definition of "prospectus" in the companies legislation of the United Kingdom and of the Australian States is that it must contain an invitation or offer to the public.
74. N.S.W. S. 137(5); Qld. S. 47(5).
75. Cl. 5(5) of draft issued in October 1960.
76. *Clarke v. Earl of Dunraven* P1897p A.C. 59.

allottee were to "renounce" in favour of another person he would be tacitly accepting the allotment and would be assigning his rights under the contract between him and the company. The provisional letter of allotment would have been an offer only to the member or debenture holder and would not have to be accompanied by a prospectus. Perhaps, because in most jurisdictions stamp duty would be payable on the provisional letter of allotment and on the subsequent transfer to the "renouncee" the revenue law would discourage avoidance of the prospectus provisions in this way. But the location of a register in the Australian Capital Territory would have removed even that deterrent. Be this as it may, the Uniform Bill in its final form abandoned the distinction between renounceable and non-renounceable offers. Under the Act a *bona fide* offer with respect to shares or debentures shall not be deemed to be an offer to the public if it is made to existing members or debenture holders of a corporation and relates to shares in or debentures of that corporation.[77]

The uniform Act also excludes from the notion of an offer to the public an offer to enter into an underwriting agreement, an offer made to a dealer in securities and an offer of shares as consideration for the sale of the property of another company which is in liquidation.[77] The Act's provisions as to what constitutes an offer to the public are not definitive. They will still leave to the Courts the problem of determining what range of dissemination marks off a private from a public offer.

One is tempted to seek aid from the House of Lords analysis of the concept of public benefit in connection with the legal definition of charity in *Oppenheim's Case.*[78] The majority drew a distinction between, on the one hand, a group of potential recipients of benefits under a trust linked together by a personal criterion (such as employment by a common employer or by blood relationship) and, on the other hand, a group linked together by an impersonal criterion (such as common residence in a particular town). The second, but not the first, would be a section of the community so as to provide the element of public benefit required of every charitable trust.[79] But consideration of the meaning of public benefit in the definition of "charity" and of the meaning of "public" when used in a securities regulation statute provides a good example of a word taking its colour from the purpose of the rule.[80] One view of the decision of the House of Lords in *Oppenheim's Case* that the

77. S. 5(6).
78. *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297.
79. Except, of course, the anomalous trusts for relief of poverty among relations or employees.
80. Fuller, *Positivism and Fidelity to Law* (1958) 71 Harv. L.R. 639 at p. 665.

employees of a particular private employer were not a section of the community is that it is based on the unexpressed major premise that charity should not begin and end at home.[81] An educational trust for one's employees is not a charitable trust because it does not contain the necessary element of public benefit but would an offer of shares by a company to its employees be an offer to the public? The number of buyers is not determinative.

Speaking of the phrase "offering to the public" in the statutory definition of "prospectus" Viscount Sumner said *obiter:*

> "The public . . . is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve; perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole."[82]

The mode of choice may be a factor to be considered. Selection at random may point to the offerees as the public. Suppose the offerees are not stated at random but by reference to an employment relation with the offeror as their employer. Employees need the protection of prospectus provisions as much as any other group. The purpose of the provision indicates that the class to be protected, or in other words, the "public" are persons other than professional dealers in securities and those who have previously had dealings in securities with the offeror. The categories of offer excluded[83] by section 5(6) from the concept of an offer to the public confirm this approach.[84]

Perhaps the most important change is the extension of the disclosure principle to "take-over" bids. The provisions in the various State Acts requiring the issue of a form of application for shares to be accompanied by a prospectus in proper form have all referred, in common with the United Kingdom Act, to the issue of "any form of application for shares in or debentures" of a company and have not applied to take-over bids. An earlier draft[85] of the uniform Bill required every offer to acquire shares in the course of a "take-over" bid to be accompanied by a prospectus in proper form.

81. Goodhart, 67 L.Q.R. 164.
82. *Nash v. Lynde* [1929] A.C. 158. See also *What Bodies of Persons May Constitute the Public in Relation to a Prospectus* (1936) 80 S.J. 785.
83. Supra, n. 77.
84. The Board of Trade adopted a rule pursuant to the Prevention of Fraud (Investments) Act 1939 under which a licensed dealer may not offer certain securities unless the offer is accompanied by certain information. Prevention of Fraud (Investments) Rules, S. R. & O. 1939 No. 787, Rule 2. This rule does not apply to an offer to—(*a*) a professional or his authorized representative, (*b*) a person with whom the dealer has effected at least three securities transactions in the seven preceding years, or (*c*) existing shareholders or debenture holders in regard to the securities of their corporation—See Rule 5.
85. Clause 37(2) of Draft issued October 1960.

In the uniform measure as finally enacted, however, the attempt to regulate take-overs by means of the prospectus provisions was abandoned and a new provision was framed.

The provisions of section 184 of the uniform Act dealing with take-overs are largely a legislative adoption of disclosure requirements which had been worked out by the Associated Stock Exchanges. The provisions are concerned with offers to acquire a substantial holding of shares in one corporation by another corporation. In order to show the scale of acquisition aimed at the legislation employs the concept of a "take-over scheme". This is defined as one involving the making of offers for the acquisition by a corporation of (i) all the shares in another corporation; or (ii) all the shares of a particular class in another corporation; or (iii) any shares in another corporation which with shares already held by the offeror (or any holding or subsidiary company) carry one third of the voting power.

No take-over offer under a take-over scheme is to be made unless the offer complies with certain statutory requirements.[86]

These include statements in the offer as to whether it is conditional upon receipt of a minimum number of acceptances and, if so, the latest date on which the offeror can declare the offer to have become free from that condition and a further period of not less than seven days during which the offer will remain open. If shares are to be acquired for cash, the offer is to state the period within which payment will be made and the method of payment. If shares are to be acquired for a consideration other than cash, the period within which the offeree will receive that consideration is to be stated. The offer is to state that except that it may be totally withdrawn, it will remain open for at least one month. The offer is not to be conditional upon the offeree approving payment to any director of the offeree corporation of compensation for loss of office or retirement.

Within a prescribed period before the offer is made, the offeror corporation must give particulars of the terms of the proposed offer to the corporation to whose shares the scheme relates[87] together with certain prescribed information as to the management and activities of the offeror, as to the number of shares of the kind sought to be acquired which are already held by the offeror, as to any pre-emptive rights clauses affecting the shares of the offeree corporation, and the proposed means of enabling the shares to be transferred pursuant to the take-over scheme, as to arrangements for payment

86. Tenth Schedule, Part A.
87. That corporation is for convenience referred to in section 184 as the "offeree corporation". The true offeree will, of course, be the shareholder in that corporation.

of consideration, as to proposals for any payments to directors of the offeree corporation and as to the offeror's knowledge of any material change in the offeree corporation's financial position since its last balance sheet. If the take-over is to be in consideration of the issue of the offeror's shares and they are listed on a Stock Exchange the statement is to include information as to their market sale price: if they are not listed the statement is to contain details of sales within the previous three months.[88]

Within fourteen days after receipt of notice of a proposed offer the offeree corporation is required to indicate its attitude to the take-over scheme by giving a written statement complying with statutory requirements[89] to the offeror corporation and to each holder of shares to which the take-over scheme relates. The statement is required to indicate whether the directors of the offeree corporation desire to make a recommendation and, if so, the nature of the recommendation, the holdings in the offeree corporation of the directors thereof, the intentions of directors of the offeree corporation in relation to their own shares, and the proposed offer, the holdings of directors of the offeree corporation in the offeror corporation, the interest of directors of the offeree corporation in any contract made by the offeror corporation, details of any material change in the financial position of the offeree corporation since the last balance sheet and, if the shares sought to be acquired are not listed on a Stock Exchange, details as to sales within the previous six months.

When the offer is made to shareholders of the offeree corporation it must be accompanied by the statement required to be given to the offeree corporation.

For a long time the protection of investors provided by the state has been supplemented by the listing requirements of the Stock Exchanges. The uniform Act,[90] adopting provisions enacted in the United Kingdom, Victoria and Tasmania, recognizes the existence of these unofficial controls. Where a prospectus indicates that application is being made for permission for Stock Exchange listing any allotment made in pursuance of the prospectus will be void if listing is not applied for before the third day of Stock Exchange business after the date of issue of the prospectus or if permission is not granted within a prescribed period. In that event money received from applicants is to be refunded. So long as a company may become liable to make that refund the money is to be kept in a separate bank account. This last provision would presumably make the company a trustee rather than a debtor.[91].

88. Tenth Schedule, Part B.
89. Tenth Schedule, Part C.
90. S. 44.
91. *In re Nanwa Gold Mines Ltd.* [1955] 3 All E.R. 219.

The Act also introduces a new provision to protect debenture holders against lax trustees. The trustee under a debenture trust deed is under a duty to see that the company meets its obligations and to set in motion the machinery for enforcement of the charge conferred by the debenture if the company should make default. But the trust deed is drawn up and the trustee appointed before the issue of debentures. There is, therefore, a danger that the people drawing the trust deed will at the request of the trustee include wide exculpatory clauses in the deed. On general equitable principles there is no limit to the protection which a trustee may be given by the inclusion in the trust deed of exculpatory provisions. Those principles developed, however, mainly in regard to donative rather than commercial transactions. Moreover, they emerged before the development of professional trustees holding themselves out as skilled managers. If the issue is underwritten the solicitors for the underwriter may provide a check which benefits those who apply for debentures. Complaints were made in England to the Cohen Committee that trustees had not always been as effective watch- dogs as they might have been.

The United Kingdom Act of 1948 introduced a provision[92] that any provision in a trust deed shall be void insofar as it would exempt a trustee from liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions. The Uniform Act adopts this provision.[93] The Uniform Act differs from the United Kingdom Act of 1948 in requiring a trustee for debenture-holders to be a corporation.[94]

In the United States there is much more rigorous control over the contents of debenture trust deeds than in the United Kingdom. This is mainly provided for by a federal Act, the Trust Indenture Act 1939. That Act provides that a trust deed shall contain provisions requiring the trustee to exercise in case of default such of the powers given it by the deed, and to use the same degree of care and skill in their exercise, as a prudent man would exercise under the circumstances in the conduct of his own affairs.[95] A trust deed is also required to contain provision for annual reports by the trustee to debenture holders.[96] Some exculpatory provisions are permitted but these are limited to protection against liability for error of judgment made in good faith (in the absence of proof that the trustee was negligent in ascertaining the pertinent facts)

92. S. 88.
93. S. 75.
94. S. 74.
95. S. 77 ooo.(c).
96. S. 77 mmm.

and protection against liability for actions or omissions in accordance with the direction of a majority of debenture holders.[97] This strict control of exculpatory provisions is in line with the doctrine which has grown up in the United States that an exemption provision may be held ineffective to protect the trustee if it is against public policy to give him that protection: however wide the provision may be, a trustee will be liable if he commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust.[98]

In Australia some institutional investors have been concerned about the form of debenture trust deeds and it may be that the problem of securing adequate responsibility on the part of the trustee is a question of business politics and the use of bargaining power by a combination of institutional investors. The uniform Act following recent legislation in New South Wales, Victoria Queensland and Tasmania makes obligatory the appointment of a trustee for debenture-holders whenever a company issues debentures. The debentures or trust deed are to contain covenants by the borrowing company giving the trustee the rights to inspect the company's accounts and to obtain accounting information and they must also contain provision for summoning of meetings of debenture-holders.

Directors

One of the more controversial innovations regarding directors in the uniform Act is the prescription of an upper age limit.[99] In public companies and subsidiaries of public companies no person who has attained seventy-two years shall be appointed a director. A director's office is to be vacated at the conclusion of the annual general meeting commencing next after he attains seventy-two years subject to a power of extension by resolution passed at a general meeting by a three-fourths majority. Statutory prescription of retiring ages in respect of public offices is commonplace. This innovation, based on broadly similar United Kingdom provisions,[100] recognizes the quasi-public nature of a directorate which holds itself out as competent to employ the investing public's money.

97. S. 77 ooo(d).
98 Scott on Trusts, 2nd ed. s. 222.3. In New York the Decedent Estate Law, s. 125, requires any attempted grant to an executor or testamentary trustee of immunity from liability for failure to exercise reasonable care, diligence and prudence to be deemed contrary to public policy. Note (1936) 6 Brooklyn L. Rev. 89.
99. S. 121.
100. Companies Act 1948 (U.K.) S. 185.

A power to remove a director of a public company by ordinary resolution has been introduced.[101] The power is exercisable notwithstanding anything in the articles or in any agreement between the company and the director, but any right to damages is preserved. The comparable provision in the United Kingdom applies equally to private companies.[102]

There are special provisions relating to persons who are directors immediately before the commencement of the uniform Act.

The uniform Act[103] provides that every company shall keep a register showing in respect of each director the number of shares or debentures of the company or a related corporation which are held by him or for him or over which he has an option to purchase. The register is to be open to inspection by any person representing the Minister and during certain periods by any member or debenture holder. The obligation to register shareholdings in respect of a director applies in relation to shares held by another corporation if that corporation or its directors are accustomed to act in accordance with his directions or if the director is entitled to control one-third or more of the voting power at its general meeting.

Although the register has to show the equitable interests of directors in its shares and debentures this is not to constitute notice to the company.[104] The register is to show any dispositions by a director and the price which he obtained. Any disclosure that a director can get a higher price than other shareholders could be an indication that the directors had withheld information from shareholders. The register is to be open for inspection by members or debenture-holders during a period beginning twenty-one days before the annual general meeting and ending five days after the date of conclusion of the annual general meeting. It has been suggested by the Jenkins Committee that the similar register provided for by United Kingdom legislation should be open all the year as is the register of members[105] and that a summary of directors' dealings should be sent out with annual accounts.[106]

The new provision will reduce the advantage of inside knowledge possessed by directors to the extent that shareholders' knowledge of a director's dealings may affect his chances of re-election. Under the principle in *Percival* v. *Wright*[107] directors have been permitted to use inside knowledge for their own investment purposes without being accountable to shareholders. In the United States a different doctrine has operated. Even apart from

101. S. 120.
102. Companies Act 1948 (U.K.) S. 184.
103. S. 126.
104. S. 126(5).
105. Para. 5260.
106. Para. 3691.
107. [1902] 2 Ch. 421.

statute it has been held that directors must disclose all facts in their knowledge which may seriously affect the value of the shares. Thus, a prospective sale of the company's undertaking has been held to be a fact to be disclosed.[108] So also an offer by an outsider to purchase one quarter of the company's issued shares has been held to be liable to disclosure.[109] In addition, s. 16(a) of the Securities Act imposes liability on insiders to account to the company for profits made through the abuse of inside knowledge. The Act requires details of holdings and dealings in shares to be filed both with the Securities and Exchange Commission and the Stock Exchange not only by any director but also by any officer and any person who is directly or indirectly the beneficial owner of more than ten per cent. of any class of equity security of the company. It has been suggested before the Jenkins Committee that the register kept under the United Kingdom Act should disclose the dealings of not only directors but also other officers.

In addition, under United States law, profits made by insiders in dealings with the company's shares within a period of six months must be accounted for to the company. This obligation exists regardless of whether there has been a misuse of inside knowledge. Thus, short-term dealings by insiders in their company's shares are discouraged.

The draft Bill for Ghana contains the following provision:

> "214. (1) If a director of a company, having acquired as such director any special information which may substantially affect the value of the shares or debentures of the company or any associated company, shall buy or sell any such shares or debentures without disclosing such information to the seller or purchaser thereof the purchase or sale shall be voidable at the option of the seller or purchaser within twelve months after the date of the agreement to sell or buy."

The uniform Act[110] adopts a provision which was first enacted in Victoria in 1958[111] and which requires a director at all times to act honestly and with reasonable diligence in the discharge of the duties of his office. This is probably merely declaratory of existing non-statutory law. In addition, however, there is a legislative prohibition, also adopted from Victoria, that "any officer[112] of a company shall not make use of any information acquired by virtue of his position as an officer to gain an improper advantage for himself or to cause detriment to the company." It is doubtful whether this

108. *Strong v. Repide* (1909) 213 U.S. 419.
109. *Nichol v. Sensenbrenner* (1935) 220 Wis. 165.
110. S. 124.
111. Companies Act 1958, S. 107.
112. Officer is defined in S. 5.

is sufficiently specific to impose a fiduciary duty on an officer vis-a-vis shareholders in the matter of use of inside knowledge as distinct from the fidiciary duties which he owes to the company.

Section 126 of the uniform Act requires the register of directors' holdings to show not only the shares or debentures held by a director but also the shares or debentures over which he has an option to purchase. Since put and call options have appeared on the Australian financial scene it might be desirable that the register should also disclose holdings of options to sell shares or debentures. The policy of section 126 is to enable shareholders to learn whether their directors are obtaining more advantageous sales than the shareholders. The inclusion of options to sell could be called for by a different policy. A director who had an option to sell his qualification shares would probably be in breach of his fiduciary duty to the company since the insurance provided by the option would lessen the incentive to good management which, in theory, articles providing for qualification shares seek to encourage.[113]

Under the uniform Act[114] a payment as compensation for loss of office or retirement from office shall not be made unless the proposed payment has been approved at a general meeting.

Under previous New South Wales[115] and Queensland[116] law there has been provision to meet a situation which can arise in connection with a "take-over" bid. If company X wishes to take over company Y it may mean that the present directors of company Y will have to retire. The outsider may desire to obtain the co-operation of the directors of company Y in assisting him to gain control and to do that he may offer the directors recompense for loss of office. This "golden handshake" could be by direct grant or by offering the directors a higher price for their shares than would be offered to the other shareholders. Under the law previously in force any proposal in connection with the transfer of the whole or part of the undertaking for payment of compensation for loss of office or as consideration for retirement had to be disclosed to and approved by an ordinary resolution before the payment could lawfully be made. Particulars of payments to be made to directors in connection with take-over bids had also to be sent with any notice of any offer sent to shareholders. If the price for a director's shares was higher than that for other shares the excess was deemed to be for loss of office. Payments received without approval were to be held in trust for the company. The uniform Act contains all these provisions but also requires approval by a general meeting of

113. *Re North Australian Territory Co.* [1892] 1 Ch. 322.
114. S. 129.
115. N.S.W. S. 130.
116. Qld. S. 158.

any payment to a director as compensation for loss of office regardless of wh ther it is connected with the transfer of any part of the undertaking. The uniform Act, however, excludes from its regulation certain payments as bona fide payments under a superannuation scheme.

The provisions of the uniform Act are still not as strict as those in the United Kingdom Act under which any payment to a director made within one year before or two years after an agreement for transfer of the undertaking or shares of the company is to be deemed to be a payment requiring approval, except so far as the contrary is shown.[117]

The uniform Act introduces a provision[118] adopted from the United Kingdom legislation[119] which has not previously been in force in Australia under which a company may not make a loan to its directors. But this is not to apply to a number of transactions including loans by an exempt proprietary company.[120] The uniform Act clears up one doubt left by the United Kingdom Act of 1948 by providing that the section does not prevent the company from recovering the amount of any loan thus excluding a possible defence of illegality.

Issue of Shares and Use of Funds

The power to issue shares is subjected to further restraints by the new measure.

Under the uniform Act rights of preference shareholders are to appear in the memorandum or articles, and not merely in the terms of issue.[121] It would seem that if the rights appear in the memorandum and the memorandum does not provide for variation of those rights they may not be varied[122] except possibly in the course of a compromise under section 181.

The uniform Act restricts companies in the use of extra funds arising from a premium issue. At common law money received as share premiums may be used to pay a dividend provided the company's share capital would be matched by assets after payment of the dividend.[123] Under the uniform Act[124] a sum equal to the value of the premiums is to be transferred to a "share premium

117. Companies Act 1948 S. 194.
118. S. 125.
119. Companies Act 1948, S. 190.
120. *Infra.*
121. S. 66.
122. Under S. 21 the memorandum may be altered only to the extent provided by the Act. There appears to be no provision specifically authorizing variation of rights set out in a memorandum. Contrast s. 23 of the United Kingdom Act empowering companies to alter conditions in the memorandum which could have been contained in the articles but withholding power to vary the special rights of any class of members.
123. *Drown v. Gaumont-British Picture Corporation Ltd.* [1937] Ch. 402.
124. S. 60 adopting U.K. s. 56, Vic. s. 50, and Tas. s.49.

account". It may be used for bonus issues, for discharging liability on unpaid shares, for payment of dividends to be satisfied by the issue of shares, for writing off preliminary expenses or expenses of issues or for providing the premium payable on redemption of debentures or redeemable preference shares. Otherwise the share premium account is to be subject to all the restrictions on reduction of share capital. The new provision applies whether the premium is received in cash or kind. If the consideration in kind is worth more than the nominal value of the shares issued an amount equal to the excess value of the consideration must be transferred to share premium account.[125] This may lead to inconvenient results following a take-over. One way around the inconvenience could be an issue of redeemable preference shares under section 61 with small nominal value on terms that there is to be a substantial premium on redemption. The amount in the share premium account could then be distributed as the premium on redemption.

In New South Wales, Victoria and Tasmania it has not been possible to issue share warrants. The uniform Act[126] provides that a company shall not issue a share warrant. This will remove one means by which the identity of shareholders could remain secret. It will also mean that stamp duty on transfers of shares cannot be avoided by means of share warrants.

The uniform Act makes no provision for the issue of shares of no par value. In the United Kingdom a majority of the Gedge Committee recommended that there should be provision for the issue of shares of no par value if companies so wished.[127] An innovation of this kind would probably have been so controversial as to prejudice the chances of getting agreement on uniformity.

Disclosure of accounts to the public

For over half a century the companies legislation of the United Kingdom has drawn a distinction between public and private (proprietary) companies in recognition that the registered company has come to serve two functions: first, as a device whereby professional managers of other people's capital may organize a business for which the public provides the capital and, secondly, as a means whereby a single entrepreneur or small group of traders may secure perpetual succession for their business and limited liability for themselves.

Because the investing public cannot participate in a company of the second type it has been assumed that the public has no interest

125. *Henry Head & Co. Ltd. v. Ropner Holdings Ltd.* [1952] Ch. 124.
126. S. 57. 127. Cmd. 9112, 1954.

in the internal affairs of such a company sufficient to justify compulsory disclosure of the company's account. Whether this is a valid assumption may be open to question.

Many of the rules of company law applying to limited liability companies such as those dealing with reduction of capital and prohibition of payment of dividends out of capital are based on the notion that the share capital of the company is in some ways the object to which the creditor looks: the members have not pledged their credit; they have merely hazarded a fund.

These considerations suggest a question as to why all trading companies should not be required to file accounts. The rule that companies need not make good losses of fixed capital before declaring a dividend could make creditors interested in the extent to which depreciation has been written off. Perhaps the answer is that there is nothing to prevent a prospective creditor from asking for copies of accounts before he gives substantial credit.

However, the assumption to date has been that the privilege of non-publicity is to be accorded only to the companies in which the public has not been invited to invest. But how are these to be defined? Prior to the English Act of 1947 the privilege was given to companies which were private within the meaning of that Act. The definition of private companies involved the elements of limitations on the membership of the company and provision in the company's memorandum and articles prohibiting invitations to the public to subscribe for shares and debentures. This dichotomy of private company as against public company did not meet the need to limit the privilege of non-publicity to companies in which the public had no interest. It was possible for public companies to keep a lot of their financial details private by choosing to operate through subsidiary private companies.

In order to meet this problem the Cohen Committee subdivided private companies into "exempt" and "non-exempt" private companies. The privilege against publicity was to be accorded to the exempt private company. In the English legislation of 1948 an extremely complicated definition of an exempt private company was essayed. This has been regarded as an unsuccessful definition and the framers of the uniform Companies Act have not adopted it. The substance of the Act's definition of "exempt proprietary company"[128] is a proprietary company no share in which is owned beneficially by a public company but the full working out of this idea has required elaborate definition provisions in the Act.

128. Ss. 5(1), 5(7).

Regulation of Investment Companies and Unit Trusts

Since 1938 Victorian companies legislation has made special provision for the regulation of investment companies. The uniform Act contains comparable provisions.[129] Any corporation which is engaged primarily in the business of investment in marketable securities for the purpose of revenue and for profit and not for the exercising of control may be declared by proclamation to be an investment company. The regulation of investment companies recognizes their close affinity to fiduciaries by restricting their borrowing powers, requiring their investments to be diversified, limiting their underwriting powers, forbidding speculation in commodities, requiring disclosure of dealings in securities and forbidding the distribution of capital profits in payment of dividends.

Some trading and mining companies have built up large investment portfolios and it might be thought that their shareholders require protection as much as shareholders in companies which have never purported to be anything else than investment companies. There may be a question as to whether such companies can properly be declared to be investment mcopanies when they have ceased to trade or operate otherwise than as an investment company. As a matter of policy it might be thought that the investor who puts his money into a company which has power to trade is not to be regarded as requiring as much protection as one who has not ventured so far.

In the United States one of the several definitions of a company required to be registered under the Investment Company Act of 1940 is a company which "is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities" and which owns "investment securities" exceeding forty per cent. of its total assets (exclusive of Government securities and cash). The expression "investment securities" is defined to exclude securities of majority-owned subsidiaries and of other investment companies. But a company which comes within this definition of "investment company" can get itself excluded if the Securities and Exchange Commission upon application declares that it is primarily engaged in a business other than that of investing, owning or trading in securities either directly or through majority-owned subsidiaries or through controlled companies conducting similar types of businesses.[130]

The regulation of investment companies would, on principle, seem to be akin to the regulation of unit trusts. From the standpoint of protection of investors the two forms have much in common

129. Ss. 334-343.
130. Loss, *Securities Regulation* 1951, 98, 457.

and it is surprising that the provisions of the uniform Act dealing with them both do not reflect this affinity.[131] The Act does not limit the borrowing powers of trustees and it does not require diversification of investments. The Statute Law Revision Committee of Victoria in December 1960 recommended that a unit trust deed be required to provide that no more than ten per cent. of the trust funds be invested in any one organization.

The Act's provisions[132] on unit trusts and similar arrangements, based mainly on recent New South Wales legislation, permit units to be issued only by a public company and require, before issue, a trust deed approved by the Registrar to be in force and an approved trustee to be appointed. Prescribed covenants are to be included in the trust deed. These are designed to ensure (*inter alia*) that the management company will conduct its business efficiently, that it will re-purchase units in accordance with the trust deed and that it will not publish advertisement of units unless the trustee has approved them. The covenants are also to ensure that the trustee will exercise due diligence, to provide that the unit-holders may direct the exercise of voting power attached to the trust's investments for the election of directors and to facilitate meeting of unit-holders.

Section 82 requires the company offering units to provide certain information and this statement is to be deemed to be a prospectus. Because many of the people approached with information about units are unskilled in investment it may be doubted whether adaptation of the prospectus provisions provides sufficient protection. The statutory information hitherto required is not likely to be within the understanding of many of these people.

It was suggested to the Victorian Statute Law Revision Committee that protection could be devised along the lines of that afforded by legislation in relation to hire-purchase agreements. Section 3 of that Act provides that an owner or dealer must supply

131. An important question in Income tax law which appears to depend for its answer on whether an investment company is more akin to a unit trust than a trading company arises in relation to casual profits arising from the sale by an investment company or a unit trust of investments not acquired for the purpose of profit-making by sale. If these profits arise from a sale of securities of a unit trust in which the trustee has no power to traffic in securities and the sale is made for the purpose of preserving a profit which would otherwise be lost the casual profit is not assessable income.—*Charles v. Federal Commissioner of Taxation* (1954) 90 C.L.R. 598. The High Court held that the situation was analogous to that where a trustee under a settlement was "performing a fiduciary duty to preserve for beneficiaries as far as practicable the assets comprising the trust fund and any increments in the value of those assets which might appear from time to t.me to be in jeopardy" (90 C.L.R. at p. 612). In an earlier case (No. C.105 (1953) 3 T.B.R.D. 612) a Board of Review held that profits made on the sale of securities by an investment company were assessable income.

132. Ss. 76-89.

to the prospective hirer, before any hire-purchase agreement is signed, a written statement in accordance with the statutory schedule which gives a summary of the hirer's financial obligations under the proposed agreement. Failure to comply means a reduction in the pecuniary liability of the hirer. After the agreement has been signed the owner must also serve the hirer with a notice of "Advice to Hirers" setting out his rights and privileges conferred by the Act. This may be compared with section 127 of the *Life Insurance Act* 1945 (Cth.) which requires every industrial policy to contain an endorsement in distinctive type setting forth (a) whether the policy is or is not a participating policy; and (b) a short statement in a form approved by the Commissioner as to—

(i) the right of the policy owner to be granted a paid up policy;
(ii) the right of the policy owner to surrender his policy and to receive in cash the surrender value of the policy; and
(iii) the forfeiture of the policy.

Any analogy drawn between the sale of units in a unit trust and the sale of life insurance has to be accompanied by the reflection that in a life assurance policy the insurer enters into a personal obligation to pay a certain amount of money which it is liable to perform regardless of what may happen to its own investments. By contrast, in a unit trust, whether it be of shares or of land, the value of the unit will fluctuate according to the value of the investments held by the trustee. It is doubtful if this fact is appreciated by many prospective investors without the matter being clearly put to them.[133]

The Victorian Statute Law Revision Committee recommended that in addition to the information already required to be given, a potential investor should be supplied with a separate statement indicating the actual amount of money to be deducted from his investment for management fees, his right to sell or transfer his

133. Any analogy with the sale of life insurance should also be tempered by the thought that the Commonwealth Life Insurance Act provides that companies carrying on life insurance business shall make deposits with the Commonwealth Treasurer as laid down in that Act. They are also subject to investigation by the Commissioner who, under section 54 of the Act, may demand in writing, from any company information relating to any matter in connection with its business. In this context it is noteworthy that under section 12(1) of the *Prevention of Fraud (Investments) Act* 1958 (U.K.), the Board of Trade is given power to appoint one or more inspectors to report on the administration of any unit trust scheme if it appears to the Board that it is in the interest of the unit holders to do so and that the matter is one of public concern. By section 12(2) the provisions of the *Companies Act* 1948 (U.K.) relating to the production of documents and evidence and to inspectors' reports on investigation into the affairs of a company under the Act (section 167, 168(1), (2) (a)) are applied with adaptations to such an investigation.

units and bringing to his attention the fact that his return of capital is governed by whether he sells on a rising or falling market, or within a limited time.

The foregoing survey has omitted consideration of a number of changes in the uniform Act. In being selective an attempt has been made to draw attention to changes related to major issues of legal control of companies. The Act does not deal with a number of important matters on which case law is confused or inadequate. Among these are the questions whether the memorandum and articles constitute a contract between the members *inter se* as well as a contract between each member and the company, whether dividends may be paid out of unrealized increments in value of fixed assets, whether shares issued for a consideration other than cash may be treated as not fully paid in a liquidation when the consideration was not the full equivalent of the value of the shares and the operation of the rule in *Royal British Bank* v. *Turquand*.[134] Doubtless, after the Jenkins Committee issues its report, there will be suggestions for reform of Australian company law and the time will be opportune for consideration of the basic legal theory in a way which was not possible in the proceedings aimed at producing a uniform measure. In the meantime, the securing of agreement as between the Commonwealth and the States on a form of uniform companies measure is a considerable achievement and will provide commerce with a much more efficient legal process.

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134. (1855) 5 E. & B. 248.

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