UNIFORM COMPANIES LEGISLATION: ITS EFFECT IN VICTORIA

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Lawyers concerned with the formation and operation of trading companies in Australia have had for a long time a task which was rendered unnecessarily complex by the disparity between the company laws of the various States. Victoria and Tasmania had in recent years largely caught up with the legislation passed in the United Kingdom in 1947 after the two years of deliberation by the Cohen Committee following its appointment in 1943. Some of the other States had statutes which were still based on the United Kingdom Act of 1929.

Although the legislative power of the Commonwealth Parliament over corporations[1] might possibly extend to corporations once they have been incorporated,[2] there is authority suggesting that the Commonwealth Parliament can provide for the creation of corporations only where incorporation is incidental to the execution of some other power which it possesses.[3]

Proposals for enlargement of the Commonwealth's power over companies have failed to evoke the approval of the electorate at constitutional referenda.[4]

It might be constitutionally competent for the Commonwealth Parliament to occupy some part of the field of securities regulation[5] but a body of Federal law comparable with that enacted by the Congress of the United States under its commerce power[6] has not

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[1] Commonwealth Constitution, s. 51, which empowers the Commonwealth Parliament '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'.

[2] Holmes, 'A Commonwealth Companies Act' (1934) 7 *Australian Law Journal* 372.

[3] *Huddart Parker & Co. Pty Ltd v. Moorehead* (1909) 8 C.L.R. 330 interpreting s. 51 (xx). Thus, the Conciliation and Arbitration legislation enacted under s. 51 (xxxv) of the Commonwealth Constitution can provide for the incorporation of organizations of employees or of employers registered under that legislation: *Jumbunna Coal Mine N. L. v. Victorian Coal Miners' Association* (1908) 6 C.L.R. 309. Para. (xiii) of s. 51 authorizes the creation of banking corporations. Para. (i) has authorized the creation of an air transport corporation: *Australian National Airways Pty Ltd v. Commonwealth* (1945) 71 C.L.R. 29.

[4] Sawer, *Australian Federal Politics and Law* (1956) 98, 280.

[5] In his essay on the Interpretation of the Constitution in the first edition of *Essays on the Australian Constitution* (1952), Sir John Latham speaking of s. 51 (xx) (at 39) said: 'The power, however, probably is sufficient to support some aspects of peace-time legislation with respect to the control of capital issues of companies.' This statement does not appear in the second edition.

[6] The Federal legislation under which the Securities and Exchange Commission of America operates is based on the United States Constitution, Art. 1, cl. 3: 'The Congress shall have power . . . to regulate Commerce with foreign Nations, and

emanated from the Commonwealth. The attainment of a uniform company statute has awaited the securing of agreement by the various States and Territories to enact parallel legislation.

The draft Bill produced after a number of meetings of Commonwealth and State Ministers has, at the time of writing, been enacted into law in New South Wales, Victoria, Queensland and Western Australia. The Victorian Act has been proclaimed to commence on 1 July 1962 and this article is concerned with some of the more important provisions of the new measure in so far as they change Victorian law.

I. Membership

The Uniform law[7] requires at least two subscribers to the memorandum of a proprietary company and at least five subscribers in the case of a public company. 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 the minimum membership, the members can become personally liable for the company's debts.[8] These provisions are not new but by an exception new to Victoria they 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. In the absence of this exception holding companies have been able to avoid the danger of having to pay the debts of their wholly owned subsidiaries by having some of the subsidiary's shares registered in the name of nominees. The exception will not apply where the holding company is a foreign company not incorporated in a State or Territory of the Commonwealth.

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.

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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] Companies Act 1961, s. 14. [8] S. 36.

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 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 (for example, New South Wales)[9] 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. The former Victorian requirement under the 1958 Act was a minimum of two directors for a public company and at least one director for a proprietary company. Under the Uniform Act[10] every proprietary company shall have at least one director and every public company shall have at least three directors.[11] 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 Jenkins Committee,[12] however, has rejected a suggestion for a similar change in the law of the United Kingdom.

The Uniform Act 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, section 14 (3), 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[13] the

[9] Companies Act 1936-1960, s. 120 (1) (N.S.W.).

[10] S. 114.

[11] 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).

[12] Board of Trade Report of the Company Law Committee. Cmd 1749 (1962).

[13] Companies Act 1948, s. 27 (U.K.).

Uniform Act[14] provides that a corporation[15] cannot be a member of its holding company.[16] This does not apply where 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*[17] 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 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 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 right 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. 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 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*[18] which concerned a testa-

[14] S. 17.

[15] Under s. 5 (1) 'corporation' is defined in such a way as to include foreign corporations.

[16] 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.

[17] (1887) 12 App. Cas. 409.

[18] [1958] Ch. 549.

mentary 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, 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.*

II. 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 any transaction 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[19] criticized 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'. It was 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 (including the entering into of an agreement by the company) and no conveyance or transfer of property, whether real or personal, 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 or relied upon only in—

(*a*) proceedings against the company by any member of the company or, where the company has issued debentures secured by a floating charge over all or any of the company's property, by the holder of any of those debentures or the trustees for the holders of those debentures to restrain the doing of any act or acts or the conveyance or transfer of any property to or by the company;

[19] Board of Trade Report of the Committee on Company Law Amendment. Cmd 6659 (1945), para. 12.

(*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.[20]

(3) If the unauthorized act conveyance 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 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*.[21] 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

[20] See s. 175.

[21] (1867) L.R. 2 Ex. 356.

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 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*,[22] 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.*[23] 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.[24]

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*.[25] But he would have the remedies of a creditor which is the position he expected to attain by the transaction.

[22] (1875) L.R. 7 H.L. 653. [23] [1918] 2 Ch. 250.
[24] *In re Exchange Banking Co. (Flitcroft's Case)* (1882) 21 Ch.D. 519, 533-534, *per* Jessel M.R. [25] [1914] A.C. 398.

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 *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 authorized 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[26] 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 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

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

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 States where the rule is that no constructive notice is given by the mere filing of the articles of incorporation'.[27] 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[28] 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.

It is noteworthy that the Jenkins Committee, while rejecting suggestions for general repeal of the existing law of *ultra vires*, nevertheless recommended abrogation of the rule of constructive notice.

The language of 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 as 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.[29]

Suppose that under section 20 (3) the court sets aside a contract.

[27] Lattin, *Corporations* (1959) 194.

[28] 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.'

[29] Lattin, *op. cit.* 200-201.

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

The provisions of the uniform measure governing alteration of objects[30] effect major changes in the law of some of the other States but in Victoria the only change is that an alteration may now be impugned by holders of not less than ten per cent in nominal value of shares or of ten per cent in nominal value of debentures, whereas the 1958 Act gave this power to holders of fifteen per cent. The new Act contains nothing to dispose of doubts as to whether an *ultra vires* transaction entered into previously to the alteration is thereby validated.[31]

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 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 Victorian Companies Act 1958, 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.[32] It is noteworthy that whereas in the 1958 Act these powers were described as 'Incidental and Ancillary Objects and Powers' they are described simply as 'Powers' in the 1961 Act.

[30] S. 28.

[31] Holt, 'Alteration of a Company's Objects and the Ultra Vires Doctrine' (1950) 66 *Law Quarterly Review* 493; Gower, 'Alteration of a Company's Objects and the Ultra Vires Doctrine' (1951) 67 *Law Quarterly Review* 41.

[32] S. 19 and Third Schedule. The Uniform Act introduces more flexibility by permitting the articles to contain the excluding provision.

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[33] that every company shall have for the furtherance of its objects and of any business carried on by it, and authorized in its Regulations,[34] 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 new measure. Another provision[35] of the draft Ghana Bill enables a member or a debenture-holder to bring proceedings to prevent a company from carrying on an unauthorized business without altering its Regulations. Thus, if a company is acting within its authorized 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 failure to inform 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 authorized businesses within a year or has ceased to carry on any authorized business for more than a year.[36] 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 authorized business is concerned with a natural person is preferable to an attempt to list all the powers which a company might conceivably need.

Under a provision of the Ghana measure similar to section 20 (3) 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.[37]

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.[38] It may be that the promoters will be personally liable on the contracts. This will be so if they have purported to enter into

[33] Companies Code Bill 1961, s. 24 (Ghana).
[34] In the Ghanaian Bill the Memorandum and Articles have been replaced by one instrument called the Regulations. [35] S. 25. [36] S. 247 (2).
[37] Companies Code Bill 1961, s. 25 (5) (Ghana).
[38] *Kelner v. Baxter* (1866) L.R. 2 C.P. 174.

the contract on behalf of the company. However, the unsatisfactory decision in *Newborne v. Sensolid Ltd*[39] 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.
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> (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.* A recommendation for similar changes in United Kingdom law has been made by the Jenkins Committee.

III. Disclosure to Prospective Investors

The uniform measure adds to the prospectus requirements in a number of ways. Regulation of the contents of the prospectus now extends to the type size.[40] A report from directors is required in relation to the interval between the date to which the last accounts have been made up and a date not earlier than fourteen days before the issue of the prospectus.[41] They are required to report whether the business of the company has been satisfactorily maintained, whether there have arisen any circumstances adversely affecting the company's trading or the value of its assets, whether the current assets appear in the books at values which are believed to be realizable in the ordinary course of business, whether there are any contingent liabilities by reason of any guarantees given by the company or any of its subsidiaries and whether there are, since the last annual report, any changes in published reserves or any unusual factors affecting the profit of the company and its subsidiaries.

Companies legislation has for a long time contained provisions

[39] [1954] 1 Q.B. 45. [40] S. 39 (1) (a). [41] Fifth Schedule, para. 23.

designed to protect not only those who contribute risk capital but also debenture-holders. The new legislation has extended 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 may 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. The prospectus will also have to include particulars of limitation or absence of limitation on borrowing powers.

The Uniform Act continues to exclude from the obligation to issue a prospectus with a form of application for shares or debentures any form of application issued in relation to securities not offered to the public.[42] The question whether an issue is public or not can be very difficult. Under the former Victorian Act[43] it was made clear that a *bona fide* offer or invitation with respect to shares or debentures was not an offer to the public if made as an offer to a person to enter into an underwriting agreement, or as an offer to a dealer in securities, as an offer to existing members or debenture-holders,[44] or (*inter alia*) as an offer of shares as consideration for the sale of the property of another company which is in liquidation. The Uniform Act continues to exclude offers of this kind from the notion of an offer to the public but it does so only after a new provision that 'any reference in this Act to offering shares or debentures to the public shall, unless the contrary intention appears, be construed as including a reference to offering them to any section of the public, whether selected as clients of the person issuing the prospectus or in any other manner . . .'.[45]

The Act's provisions as to what constitutes an offer to the public are not definitive. They will 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*.[46] 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

[42] S. 37 (2). [43] Companies Act 1958, s. 3 (2) (d).
[44] *Quaere* whether this provision should have been read according to the maxim *reddendo singula singulis* with the result that an offer of shares to existing shareholders would not be an offer to the public, but an offer of shares to an existing debenture-holder would be outside the provisions of s. 3 (2) (d).
[45] S. 5 (6).
[46] *Oppenheim v. Tobacco Securities Trust Co. Ltd* [1951] A.C. 297.

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.[47] 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.[48] One view of the decision of the House of Lords in *Oppenheim's Case* that the 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.[49] 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.[50]

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[51] by section 5 (6) from the concept of an offer to the public confirm this approach.[52]

[47] Except, of course, the anomalous trusts for relief of poverty among relations or employees.

[48] Fuller, 'Positivism and Fidelity to Law' (1958) 71 *Harvard Law Review* 630, 665.

[49] Goodhart, (1951) 67 *Law Quarterly Review* 164.

[50] *Nash v. Lynde* [1929] A.C. 158, 169. See also 'What Bodies of Persons May Constitute the Public in Relation to a Prospectus' (1936) 80 *Solicitor's Journal* 785.

[51] *Supra* note 45.

[52] 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.

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[53] 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. 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.[54]

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[55] together with

[53] Clause 37 (2) of Draft issued October 1960. [54] Tenth Schedule, Part A.

[55] That corporation is for convenience referred to in s. 184 as the 'offeree corporation'. The true offeree will, of course, be the shareholder in that corporation.

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 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.[56]

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[57] 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.

The Act also introduces a new provision to protect debenture-holders against lax trustees. A 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

[56] Tenth Schedule, Part B. [57] Tenth Schedule, Part C.

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[58] that any provision in a trust deed shall be void in so far 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.[59] The Uniform Act differs from the United Kingdom Act of 1948 in requiring a trustee for debenture-holders to be a corporation.[60]

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.[61] A trust deed is also required to contain provision for annual reports by the trustee to debenture-holders.[62] 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) and protection against liability for actions or omissions in accordance with the direction of a majority of debenture-holders.[63] 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 to be 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.[64]

[58] Companies Act 1948, s. 88 (U.K.). [59] S. 75. [60] S. 74. [61] S. 77 ooo (c).
[62] S. 77 mmm. Trust Indenture Act 1939, s. 77 (U.S.). [63] S. 77 ooo (d).
[64] *Scott on Trusts* (2nd ed. 1956) ii, 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 Law Review* 89.

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 provisions for summoning of meetings of debenture-holders.

IV. Directors

One of the more controversial innovations regarding directors in the Uniform Act is the prescription of an upper age limit.[65] 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,[66] recognizes the quasi-public nature of a directorate which holds itself out as competent to employ the investing public's money. There are special provisions relating to persons who were directors before the commencement of the Act of 1961.

The 1961 Act continues to provide a power to remove a director by ordinary resolution.[67] In the United Kingdom legislation the comparable power is available in private as well as public companies[68] but the Uniform Act limits it to public companies.

Another new provision [69] requires every company to 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

[65] S. 121. [66] Companies Act 1948, s. 185 (U.K.). [67] S. 120.
[68] Companies Act 1948, s. 184 (U.K.). [69] S. 126.

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. 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.

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. The Uniform Act in section 124 (2) re-enacts the prohibition on an officer[70] making use of any information acquired by virtue of his position to gain an improper advantage. An officer who commits a breach is liable to the company for any profit made by him.[71] This confirms the existence of the fiduciary duty of a director to the company. But a director is not in a fiduciary relationship with a shareholder. Under the principle in *Percival v. Wright*[72] 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 is emerging. Even apart from statute it has been held in a number of cases 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.[73] 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.[74] These cases are part of a minority view but it is attracting increased support. In addition, section 16 (a) of the Securities Exchange Act of 1934 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 an officer of a company with an equity security registered on a national exchange and by 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 which is registered on a national exchange.

[70] Defined in s. 5 (1). [71] S. 124 (3). [72] [1902] 2 Ch. 421.
[73] *Strong v. Repide* (1909) 213 U.S. 419.
[74] *Nichol v. Sensenbrenner* (1935) 220 Wis. 165; 263 N.W. 650.

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 Jenkins Committee has recommended a change whereby a director who, in any transaction relating to the securities of his company, makes improper use of a particular piece of confidential information which might be expected materially to affect the value of those securities should be liable to compensate a person who suffers from his action unless that information was known to that person.

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.[75]

The Uniform Act continues the provisions requiring the approval of a general meeting of any payment to a director as compensation for loss of office.[76] This provision is not confined to loss of office arising from 'take-overs' but the main mischief at which it is aimed is related to 'take-overs'. That mischief has been the possibility that an outsider desiring to acquire the company might seek to obtain the co-operation of the directors by means of a 'golden handshake' and the directors might derive benefit without the approval of the shareholders.

[75] *Re North Australian Territory Co.* [1892] 1 Ch. 322. [76] S. 129.

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.[77]

The Uniform Act introduces a provision[78] adopted from the United Kingdom legislation[79] 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.[80] 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.

V. Issue of Shares and Use of Funds

The Uniform Act[81] continues the restriction on companies in the use of funds arising from a premium issue. Before the 1958 Act money received as share premiums could be used to pay a dividend provided the company's share capital would be matched by assets after payment of the dividend.[82] Under the 1958 Act a sum equal to the value of the premiums had to be transferred to a 'share premium account'. It could 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 was to be subject to all the restrictions on reduction of share capital. The provision applied whether the premium was received in cash or kind. This is still the law under the 1961 Act. If the consideration in kind is worth more than the value of the shares issued an amount equal to the excess value of the consideration must be transferred to share premium account. This may lead to inconvenient results following a take-over. The English case *Henry Head & Co. Ltd v. Ropner Holding's Ltd*[83] held that if the transferee company issues shares of a total *nominal* value less than the value of the shares acquired by it the difference in value must be taken to share premium account. In *Henry Head & Co. Ltd v. Ropner Holding's Ltd* the value of the shares acquired was determined by considering the value of the acquired company's assets.

[77] Companies Act 1948, s. 194. [78] S. 125. [79] Companies Act 1948, s. 190.
[80] *Infra.* [81] S. 60.
[82] *Drown v. Gaumont-British Picture Corporation Ltd* [1937] Ch. 402.
[83] [1952] Ch. 124.

There was no suggestion in that case that the shares acquired were listed on a Stock Exchange. If the Stock Exchange valuation of shares acquired in a take-over differs from the asset value of the shares, which value is to be chosen? Future legislation might be desirable to clear up what must be a common difficulty. The problem may not be a real one if there is any way of distributing the premium to shareholders. One way 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.

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.[84] An innovation of this kind would probably have been so controversial as to prejudice the chances of getting agreement on uniformity. The Jenkins Committee has recommended that companies be permitted to issue shares of no par value.

VI. 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 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 limited companies should not be required to file accounts. The rule that companies need not make good losses of fixed capital before de-

[84] Cmd 9112 (1954).

claring 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. Nevertheless, the Jenkins Committee has recommended that all limited companies should be required to file accounts.

However, Australia maintains the view 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'[85] 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.

There is no requirement that the public company should have a controlling interest in the proprietary company before the latter is outside the exempt category: the owning of one share, or, indeed, of a part interest in one share, is enough. Ownership of a share in this context means the holding of a beneficial interest.[86] If X Public Company has a beneficial interest in shares in Q Proprietary Company, the Q Company is not exempt.[87] A proprietary company may be denied exempt status even though there is no public company holding a beneficial interest in its shares as shareholder or beneficiary. It has been necessary to look behind proprietary companies which hold shares in the company in question. Thus, if X Public Company has a beneficial interest in shares in Y Proprietary Com-

[85] Ss. 5 (1), 5 (7). [86] S. 5 (7). [87] S. 5 (7) (a).

pany (itself non-exempt) which in turn has a beneficial interest in shares in Q Proprietary Company, the Q Company is on that account denied the status of exempt proprietary company.[88] Furthermore, in the last example if another company, the Z Proprietary Company, were interposed between Y Company and the Q Company, the latter would still not be exempt.[89] There may be a situation in which no public company is involved and yet a proprietary company will not be exempt. This is the case where there is a chain of five or more proprietary companies.[90]

The definition relies on the holding of a beneficial interest. A person (including a corporation) is deemed by the statute to hold a beneficial interest in a share if that person is entitled to receive dividends in respect of that share or to exercise, or to control the exercise of any rights attaching to the share.[91] But a person so entitled as trustee is not deemed to hold a beneficial interest.[92] Thus, the holding of a beneficial interest in shares in the Q Proprietary Company by the X Public Company, where the latter holds as trustee for B, will not normally take the Q Company beyond the exempt category. But if B were a company the Q Company might be rendered non-exempt by the B Company's beneficial interest in its shares. This would depend on the considerations dealt with earlier. A corporation is deemed to hold a beneficial interest in a share if that corporation holds any beneficial interest in a share of another corporation which holds, or a subsidiary of which holds, any beneficial interest in that share.[93] This latter provision does not specifically exclude the situation in which one corporation holds shares in another corporation in a fiduciary capacity and the exclusion of that case would have to depend on the ordinary meaning of the expression 'holds . . . any beneficial interest'. That meaning would not cover a fiduciary holding of that kind.

The policy behind this new dichotomy of proprietary companies is concerned with public companies as holders of equity in proprietary companies rather than as creditors. The mere holding of debentures by a public company in a proprietary company would not make the latter non-exempt. Consistently with this idea the statute provides that the holding of a beneficial interest in a redeemable preference share carrying only limited voting rights shall be treated as if the beneficial interest were held by a natural person.[94]

The concern of the framers of the Uniform Act has been with only one type of control: the control attached to shares. It is not necessary that a director should hold shares and it is perhaps surprising that, unlike the United Kingdom provision,[95] the Uniform

[88] S. 5 (7) (b). [89] S. 5 (7) (c) (i). [90] S. 5 (7) (c) (ii).
[91] S. 5 (8) (d) (i). [92] *Ibid.* [93] S. 5 (8) (d) (ii). [94] S. 5 (8) (c).
[95] Companies Act 1948, s. 129 (2) (U.K.).

Act does not deny a proprietary company exempt status on the ground that a corporation is a director of the company. The United Kingdom legislation also withheld exempt status from a company where it or its directors had entered into any arrangement by which the policy of the company might be determined by persons other than its directors, members, debenture-holders or the trustees for its debenture-holders.[96] This has not been copied in the Uniform Act.

How effective are the provisions of the Uniform Act to carry out the policy of ensuring that public company's accounts will be public? Various expedients for getting around them have been canvassed. One of the less bizarre expedients involves the incorporation of a company limited both by shares and guarantee. The parent public company would secure control in the capacity of a member rather than as shareholder while it could finance it by means of redeemable preference shares carrying limited voting rights.[97] It might be thought better to form a company limited simply by guarantee in the first place and to have subscribers for the redeemable preference shares after incorporation and conversion to a company limited both by shares and guarantee under section 25. This would avoid any doubts as to whether redeemable preference shares can serve as the shares which under section 18 (2) are required to be subscribed for by subscribers to the memorandum of a company which is to have a share capital.

But it would be necessary to incorporate as a company limited both by shares and guarantee for the reason that a company limited simply by guarantee cannot be incorporated as a proprietary company since section 15 is limited to companies having share capital. Moreover, while the definition of 'proprietary company' in section 5 (1) includes a company having a share capital which has converted to a proprietary company under section 26 (1) it does not include a company limited by guarantee which has converted under section 25.

The foregoing survey has not dealt with a number of other changes in the law brought about by the 1961 Act. The survey is an attempt to draw attention to changes related to major issues of legal control of companies.

It is likely that the report of the Jenkins Committee will stimulate suggestions for further reform of Australian company law. In the meantime, the passing of the uniform legislation represents a considerable improvement in the legal processes provided for commercial endeavour.

[96] *Ibid.* This gave rise to a question whether membership of a trade association would prevent it being an exempt company.

[97] The voting rights would have to be limited in the manner required by s. 5 (8) (c).