FEDERAL-STATE CO-OPERATION IN LAW REFORM: LESSONS OF THE AUSTRALIAN UNIFORM COMPANIES ACT

By Geoffrey Sawer*

The Uniform Companies Act (herein the Act) has now been enacted by the six States and the Australian Capital Territory and came into operation, on dates varying from State to State, between 1 July 1962 and 1 July 1963.[1] It is the first large-scale attempt at securing uniformity of Australian law by parallel action of the seven governments. Even now, complete uniformity has not been achieved. Some transitional differences are due to differences in the pre-existing State law. South Australia declined to adopt the provision for directors' age-limits; to preserve uniformity of section numbering, South Australia took the last sub-section of section 120 as it stands in the other States, and converted it into section 121, which in the other States deals with directors' age-limits. Victoria also has a special transitional provision on the same question, section 121 (7). This is not due to pre-existing law, but rather to a difference of policy, and its effects could be important for many years to come.[2] Differences in detail are more numerous and generally speaking less rational, and some of them might lead to important differences in legal result. For example, section 346 (5) imposes on the agent of a registered foreign company liability for contraventions of the Act for which the company is liable, subject to a defence which in all States except Queensland is thus worded: 'unless he satisfies the Court hearing the matter that he should not be so liable'. This clearly puts the onus on the defendant and makes the decision a matter of judicial discretion. But in Queensland, the agent is made liable only for contraventions of the Act 'knowingly and wilfully authorized or permitted by him', which leaves no room for judicial discretion and places the onus squarely on the prosecution. A difference likely to cause administrative incon-

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State	Date of Act or Ordinance	Date of Commencement
Vic., Qld, N.S.W.	1961	1 July 1962
A.C.T.	1962	1 July 1962
W.A.	1961	5 October 1962
Tas.	1962	1 January 1963
S.A.	1962	1 July 1963.

2 South Australia also has additional provisions (Part XIII) which prolong until 1965 the status and privileges of certain local private companies.

venience is that all States except New South Wales permit documents to be typewritten or reproduced by mechanical means other than printing, whereas no such definition of 'printing' is included in section 5 of the New South Wales Act; the practice in that State is more flexible than the letter of the law but printing is required for many purposes.

However, notwithstanding the departures from uniformity, the Act represents in this respect a remarkable achievement. If it had done no more than ensure the same numbering for the parts and sections of the Act dealing with comparable topics, it would have been a boon to the company official and his legal advisers, but it has achieved a great deal more. In nearly every substantive respect, and to an extraordinary degree in the procedural provisions as well—even down to such matters as filing fees—complete uniformity was achieved. There is an ever-present danger of departure from uniformity by future amendments, though an attempt will be made at preventing this through periodical Conferences of Attorneys-General. Actually, however, even divergent amendments could retain the substance of the present uniformity and probably it would take many years of such amendments before the divergencies became as extreme and irrational as they were before the Act.

The Acts have also had the effect of bringing the company law of all States simultaneously into a condition representing a more or less acceptable balance between the desire of company managements to do what they please and the desire of many legislators to stop them. The political dispute continues between those with the itch to reform and those who think no more can be done by legislative means to protect fools from their folly nor to keep rogues from their prey. For the reformer, Australian uniformity is a nuisance, since the usual opposition to change is now reinforced with a claim that all changes should be unanimous. Indeed, some reformers think that the Victorian and Federal Liberal governments between them carried off an astute coup; Victoria rushed through its company law reform scheme in 1958, imposing as heavy a burden of regulation as the commercial traffic of the City of Melbourne would bear; this fundamentally conservative measure, going little further than the English Act of 1948,[3] then looked a *dernier cri* for Australia and so became the main model for the Uniform Act operation. However, the Act went further than most company executives liked and has not stilled the cry for further change. Thus the crop of company failures since 1961 produced demands for increasing the responsibilities of trustees for debenture holders and for extending to such trustees the prin-

[3] 11 & 12 Geo. VI c. 38.

ciples of administrative approval which already applies to trustees for holders of 'interests' by section 79.[4]

This writer is not mainly concerned with the political problem just mentioned. Attempts at legislative regulation of commercial practice undoubtedly involve the risk of what Karl Renner called 'decretinism'. For example, the requirements of section 40 of the Act, which severely restrict the contents of advertisements for share or debenture subscriptions, tend in their present form to produce a 'Gresham's law' situation. The conservative and sound promoter or directorate will keep well within the letter of such provisions and by so doing make little public impact; the less sound concern will take the risk of stretching the letter of the law, and of using subterfuges such as a course of 'goodwill' advertising preceding the appeal for money, a distribution of 'burley' among the little fishes, relying on the unwillingness of Crown Law authorities to prosecute on marginal cases and the likelihood that on prosecution the provisions will be strictly construed. However, the outcome of such speculations is either to abolish regulation, which will make matters no better, or to set up a powerful administrative agency required to approve all such matter, which business men would like even less and which would be a further burden on the general taxpayer or require higher company fees. Company law is bound to be to some extent a political football, since it has come to be one of the main methods for exerting social control not so much of companies as of business and financial practice.

The main purpose of this paper is to question the adequacy of the methods by which the Act was brought into being, and to suggest that when future changes in the Act are contemplated and when similar exercises in other fields are undertaken, less improvization and more systematic inquiry and control of drafting will be desirable. If the Act had turned out better from the point of view of drafting and arrangement and 'lawyer's law' content, this would have been some evidence that the improvized attack on the particular problem had by happy chance been successful and that similar methods might be sufficient for other purposes. Actually, however, the Act from a technical point of view is disappointing; it has not cleared up ancient and familiar puzzles which could have been cleared up and it has added new puzzles.

This is not said in any spirit of criticism of the small groups of overworked ministers and government legal officers who had to add to their existing burden the task of mastering the modern company law—a task which several English judicial commissions have performed with only moderate success—and of reaching a draft on which

[4] The Companies (Trustees for Debenture Holders) Act 1963 (No. 7007) amends s. 74 (1) of the Victorian Act with a view to meeting these demands.

seven governments of diverse political views, six professions with varying degrees of mutual jealousy, seven company registries fond of their accustomed procedures, and business men tending to resent the whole process, could agree. The present writer was briefed at an early stage of the procedure to carry out a survey of the differences between the existing laws on the relatively minor question of registration of foreign companies, and to see how far a highest common denominator or lowest common factor principle might be used to bridge gaps. This involved no policy decisions and no drafting, but was quite sufficient to indicate the knowledge of relevant branches of law and the capacity for highly detailed, and at times exceedingly boring, work which such an enterprise involves. It was inevitable that the main emphasis should have been on securing uniformity and, so far as policy was concerned, on the sort of political problems mentioned above. Even the English, with a more elaborate machinery of inquiry and many more technical specialists available for the work, had made little attempt in the Acts of 1947 and 1948 at clearing up old puzzles. Hence to have expected not only a uniform but a model Act would have been absurd.

But now that the truly heroic task of reducing the problem to manageable proportions has been performed, more attention can and should be paid to technical problems; to improving arrangement, clarifying language, reducing to order the consequences of the historical accretion of sections dealing with similar problems, removing the consequences of judicial legislation based on the Act where it has proved unfortunate or rescuing such legislation from the possibility of judicial repeal where it has proved satisfactory. In performing this task, there is one feature of the Act which needs to be kept constantly in mind; namely, that it is used very widely by non-lawyers. The members, directors, secretaries and creditors of companies, and their accountants and auditors; the staffs of company registries; liquidators; stock-brokers; banking staff concerned with company matters; the tens of thousands of students training for such occupations—all are potential readers of the Companies Act. The number of these who need to have a fairly comprehensive knowledge of the Act far exceeds the tally of lawyers concerned with it.

Since this is a code, in a field of law where certainty and security is more important than adaptability or individuation, it should be the case that the ideal textbook takes the form of a commentary on the Act. L. C. B. Gower has essayed an arrangement of the material different from the order of the Act, and from that which is usually followed in outline by the more elementary textbooks.[5] Gower's

[5] Gower, *The Principles of Modern Company Law* (2nd ed. 1957).

arrangement is stimulating for advanced students, but I have found it of limited value for standard courses, almost useless for secretarial and accountancy students, and inconvenient to use in practice when the problem is to locate speedily the specific hard law on a particular point. The sociological movement has brought great advances in the study and application of law, but it sometimes carries the danger of an attempt at organizing legal materials by reference to social and economic criteria which are not the most convenient or appropriate for legal professional purposes. It should be regarded as a serious reproach to a Companies Act that its classifications and order of treatment are not also the most convenient for the purpose of teaching the subject and of ready reference in practice.

On the whole, the order of arrangement of the Act is satisfactory; it corresponds to operational steps in the life and death of a company. However, it is open to criticism in detail. For example, there is no section pulling together in one place all the documents required to be lodged in order to incorporate a company. The provisions in Part XI concerning special types of company might with advantage be distributed among the appropriate subsantive Parts of the Act—Shares, Winding Up, *et cetera*—but with references in section 14, the introductory statement concerning them, so as to provide an internal index. It is difficult to see why so fundamental a provision as the prohibition of large partnerships should be a sub-section of section 14; the provision ought to be in a separate section immediately preceding section 14. Sections 270 and 273 present a difficulty in arrangement which also illustrates the problem of historical accretion. These, placed under the heading of 'Winding Up' in Part X, were devised in relation to liquidation and require a liquidation for their operation. But as a matter of teaching and to some extent of practical use, they fit better under the heading of 'Arrangements and Reconstructions', Part VII. When so placed, they disclose odd differences in policy and procedure as between them and section 181. Probably it would now be better to have this group of provisions together, re-drafted to eliminate anomalies and to remove liquidation as a central feature of sections 270 and 273; the procedure need then merely be made available in a winding up, as indeed section 181 already is. There are no perfect taxonomic schemes for such legislation and to a considerable extent marginal problems can as well be settled by tossing a coin. However, the tendency to solve difficulties by lumping a vast miscellanea under the heading of 'General' into Part XII ought to be resisted; for example, sections 374 and 376 surely should be in Part IV.

Clarification of drafting can never be final, but drafting can always be improved. Professor Ford and Messrs Young Q.C. and J. M. Rodd

have elsewhere discussed a number of problems under this head.[6] An already celebrated example is the new and in Anglo-Australian law revolutionary provision, section 20, modifying the operation of the *ultra vires* doctrine. To the difficulties mentioned in the above papers may be added the grammatical or semantic objection that the first sentence of section 20 (2) is badly expressed. Literally interpreted, it allows only a plea or an argument referring to an absence of power or capacity in the company in the proceedings mentioned; the *rule* that the transaction is void or voidable on that account is not saved, and it would follow that under section 20 (1) the plea or argument should fail. This is the consequence of adopting loose American drafting which has a different background of substantive law and interpretation. Sub-section (2) should run something like this:

> Notwithstanding sub-section (1), lack of power or capacity in a company shall be a ground for restraining an act, conveyance or transfer [and so on with the kinds of remedy, proceedings and parties intended].

The force of paragraph (b) of sub-section (2) is particularly obscure.

While revising a set of students' notes on company law, the present writer found difficulties of understanding or application in relation to some fifty-nine sections. The points involved were of very varying importance and as to some of them it is likely that because of the nature of the problem and the limitations of the English language or of all language nothing appreciably better could be expected. For example, company officers find it exasperating to be told that under section 5, the expression 'debenture' covers nearly every document evidencing indebtedness, whether the loan is secured or not, with consequences as to prospectus, registration and trustees, among other things,[7] but that the company must not *call* a debenture a debenture unless the loan is in some way charged on the assets.[8] This double sense of the word 'debenture' in the one Act is, to say the least, inelegant, but the resources of the English language provide few unambiguous expressions which by common usage would avoid the difficulty, and it is not desirable in such matters to rely on wholly synthetic names. Nevertheless, a small prize might be offered for suggestions to overcome the difficulty.

The following are some examples of difficulties arising mainly from drafting, additional to those mentioned by the commentators cited above.

Section 48 deals with the requirement of minimum subscription, which is defined in sub-section (1) of section 5. Sub-section (2) (a) of section 48 prescribes that the minimum subscription shall be 'calcu-

[6] (1962) 4 *University of Queensland Law Journal* 133; (1962) 3 *M.U.L.R.* 461; (1963) 36 *Australian Law Journal* 330; (1962) 4 *University of Malaya Law Review* 48.

[7] Ss 37, 38, 70, 74, *etc.*

[8] S. 38 (2).

lated on the nominal value of each share, and where the shares are issued at a premium, on the nominal value of, and the amount of the premium payable on, each share'. No such provision appeared in the preceding State Acts nor in the English Act and it is difficult to see what it means. The minimum subscription is a gross sum of money, the amount required in cash to start the company in business, and no question of computing it by reference to the nominal value of or premium payments for shares can arise. It is of no importance how the gross sum is subscribed by different individual shareholders. The provision may be at worst surplusage, perhaps a survival from an earlier draft in which a different conception of minimum subscription was tried out, but it should be deleted.

Section 58 (3) preserves the power of a company to pay brokerage, subject to restrictions, notwithstanding the prohibition of payment of commissions *et cetera* for disposal of shares, in section 58 (2). The provision is derived from section 8 of the English Act of 1900,[9] and continues the original wording—'such brokerage . . . as it has hitherto been lawful for a company to pay'. Such expressions become decreasingly intelligible with the passing of time; one tends to ask 'What has been lawful and what made it lawful?' and even in 1900 the answer to those questions was not pellucidly clear. This reliance on ancient practice should now be abandoned and independent substantive provision made for the payment of brokerage.

Section 66, a new provision from the Victorian Act of 1958, has the laudable purpose of solving an 'old puzzle' in relation to preference shares by compelling companies to define the rights of holders exhaustively, so eliminating the dubious learning of *Re Savory Ltd*,[10] *In Re Isle of Thanet Electricity Supply*[11] and other similar cases. But the method adopted is unfortunate; companies are prohibited from issuing such shares unless the necessary definition of rights occurs in the memorandum and articles, and breach is made an offence. Is an issue in breach void? Would such an issue be validated by section 20? Such questions could be avoided if instead section 66 set out a presumptive code of provisions as to rights of preference holders, to apply unless memorandum or articles made different provision and to be incapable of exclusion excepting by positive different provision as to each point to be covered. A penalty could then be eliminated; the Act has far too many of them.

Section 118, taken from the English Act of 1948[12] is intended to prevent a weak candidate for directorship in a public company from being elected on the coat-tails of a strong candidate by the two being nominated in the same motion; such nomination requires previous

[9] 63 & 64 Vict. c. 48; considered in *Hilder v. Dexter* [1902] A.C. 474.
[10] [1951] 2 All E.R. 1036. [11] [1950] 1 Ch. 161. [12] 11 & 12 Geo. VI c. 38 s. 183.

permission by motion carried unanimously. The policy is sound but the drafting needs re-examination. It is absurd to require the mumbo-jumbo, apt to be forgotten, of unanimous consent where as often happens there are only so many nominations as there are vacancies. What the policy requires is not a restriction on *nominating*, but a requirement that where there are more nominations than vacancies, each *vacancy* shall be *voted on* individually. The force of sub-section (6)—'Nothing in this section prevents the election of two or more directors by ballot or poll'—is obscure. Does it mean that joint nomination is valid provided there is to be a secret ballot (in the parliamentary sense of ballot)? If so, there is an unjustified assumption that such a ballot must involve voting on the vacancies individually. For this reason and also for other purposes in the Act, it is desirable to define 'ballot'; it is in any event a word the meaning of which, in relation to company law, is ambiguous.[13]

In the jurisdictions other than South Australia, the section on age-retirement of directors, section 121, is likely to give rise to some questions, though in view of the experimental nature of the section it may be desirable to wait on experience of its working before making any amendments. However, here are two queries which the present writer was not able to answer with complete confidence. Sub-section (3) provides express protection for acts done by a director whose office becomes vacant under sub-section (2) at the Annual General Meeting following his attaining the age of seventy-two and who wrongly continues in office, but there is no express protective provision for the case of persons who after reaching the age of seventy-two are then for the first time irregularly appointed. Probably the view was taken that expiry of office under section 121 (2) would not be covered by the general protective provision for acts of irregularly appointed directors contained in section 119, whereas irregular initial appointment would be so covered. But having regard to the narrow construction of section 119 in some decisions, and in particular to the trap lurking in the expression 'afterwards . . . discovered' in that section, this confidence in the application of section 119 may be misplaced.[14] Under sub-section (6) of section 121, provision is made for valid appointment or re-appointment of 'over seventy-twos' by three-fourths majority of members. Is it intended that this can be done year by year, provided it is done only for a year at a time, or can the faculty be exercised once only? The present writer thinks repeated annual re-appointment is probably intended, but having regard to the inter-relation between sub-sections (1), (2) and (6) the point is not beyond doubt.

[13] See *Eyre v. Milton Pty Ltd* [1936] Ch. 244.
[14] See Gower, *op. cit.* 155-156.

Section 156, developing further an idea from the 1958 Victorian Act, authorizes a departure from the earlier English principle that beneficial interests in shares were not to be noted on registers; it enables an executor or administrator to be registered as such, and it also enables shares to be marked in the register as belonging to a particular trust. Then a safe-guarding provision, sub-section (4), saves the corporation from 'notice' of any trust so indicated, that is from being treated as itself a constructive trustee. But going further than the Victorian original, sub-section (5) *requires* that where shares in a proprietary company are held on trust for another corporation, this trust shall be notified to the secretary of the proprietary company. Presumably this has some connexion with enabling proprietary companies to decide whether they can claim to be 'exempt' under section 5 (7). But would not this fix the proprietary company with 'notice' of the trust, and if so does not the policy of the protective sub-section (4) require that it apply to (5) as well as (1), (2) and (3)?

The Act continues the pre-existing English and State provisions for appointment by Governors of inspectors of the affairs of a company at the petition of specified proportions of members.[15] To this has now been added the new provision for appointment of inspectors at the discretion of the Governor, without application from members—section 172 and following sections—and this to some extent incorporates the machineries and powers of the older provisions and to some extent adds further powers and provisions such as stay of actions and ministerial petition for winding up.[16] It is not obvious why the armoury of inspectors and ministers under the older provisions should be any less powerful than under the new. The general objectives to be sought are similar, and in view of the flavour of politics which can surround proceedings under Division 4, it is desirable to encourage use of Division 3 at the initiative of members. Divisions 3 and 4 might well be consolidated into a single Division with common machinery and powers sections.

Section 194 deals with accounts to be submitted to receivers, and section 234 with accounts to be submitted by liquidators, and in each case an identical provision as to verification of such accounts has been adopted from the English Act of 1948.[17] This verifying provision is poorly drafted. It is not clear whether the receiver or liquidator has to choose between existing directors-and-secretary as one group of 'verifiers' on the one hand, and the other group mentioned in subheads (a) to (d) on the other, or whether the latter are alternatives only to the existing *secretary;* the former construction seems more

[15] Ss 168, 169, 171. As a matter of logical arrangement, it might be neater to have the provision for appointment of an inspector by the company itself—s. 170—before instead of after s. 169. [16] Ss 174 and 175 respectively. [17] 11 & 12 Geo. VI c. 38.

likely. But it is also an impracticable provision. It is unlikely that the second group of 'potential verifiers' would be able to certify to all aspects of the accounts, and likely that a receiver/liquidator would want some matters certified to by present directors and others by the second group or some of them; this the sections do not seem to contemplate. They should be re-drafted so as to give the receiver/liquidator a clear choice of any one or combination of the persons mentioned and to require certification of *parts* of accounts by designated persons. Contemplating the wide implications of such a power, it may be desirable, as in the English parent section, to put the process under Court supervision.

Part IX of the Act introduces, from a South African model, provision for 'official management'—a misleading title, since it is actually an attempt at putting an ailing company on its feet by replacing the directors with an assumably more competent manager, who is no more 'official' than is a receiver and in some respects less so. For example, the manager is not subject to the qualifying and disqualifying provisions applicable to receivers and liquidators. Section 203 permits the termination of the appointment of an official manager (as distinct from termination of the *state* of official management), but there does not appear to be any provision for the appointment of another manager in his place.

Section 218 (2) and (3) regulate the liability of a director with unlimited liability in a limited liability company. Inquiry from old company hands has failed to elicit examples of a director so foolish as to expose himself to this risk, so the matter may have ceased to have any practical importance. However, for what the point is worth these provisions presume a power in limited liability companies to impose unlimited liability on directors, and this power is expressly conferred by the parent English legislation[18] and in the earlier Australian Acts,[19] but no corresponding provision has been included in the Uniform Act. It may be doubted whether section 218 (2) and (3) are apt to apply to a purely contractual liability, having regard to the history of the legislation, and in any event it is difficult to see why the legislature should want to regulate such a liability in this manner. Was it deliberate omission or an oversight?

Section 268, designed to protect dealings by an irregularly appointed liquidator or under an irregular liquidation, is mainly new; a small part comes from section 175 of the Tasmanian Act of 1959. Subsection (1) of section 268 is open to the same criticism as section 119, mentioned above; it repeats the 'old puzzle' of protecting only where a defect is 'afterwards' discovered. There is some overlap between

[18] *Ibid.* s. 202.

[19] *E.g.* N.S.W.—Companies Act, no. 33 of 1936.

sub-sections (1) and (2) which could cause trouble; the second sub-section protects certain transactions only on named conditions, whereas (1) does so unconditionally. If it is intended that (1) shall be available only to liquidators, this should be stated. It may be more satisfactory to adopt as a main distinction one which now runs through the three sub-sections of section 268, namely defects or lack of qualification or disqualifications affecting liquidators on the one hand, and on the other defects or irregularities affecting the state of liquidation. Protection in respect of the first might well be unconditional and available to all persons dealing with the liquidator as well as to the liquidator himself, whereas more selective protection may be desirable in the case of the second type of defect. But it is doubtful whether invalidation of transactions on a 'notice' basis is satisfactory and a general exception of fraudulent transactions might be sufficient.

Section 292, dealing with priorities in an insolvent winding-up, involves several difficulties, some of which can be settled only by federal legislation to overcome the effects of the unfortunate and unnecessary decision of the High Court in *Commonwealth v. Cigamatic Pty Ltd*,[20] in which it was held that the States may not regulate the priority of federal claims. Section 292 is too large a subject to open up here, but one small drafting point may be mentioned. Section 292 (1) (a) excludes 'overriding commissions' from the salary claims given priority. Probably this refers to commissions paid on all the sales made in a concern or one of its departments, irrespective of the direct contribution to a particular sale made by the person receiving the commission. But it is not a term of legal art and on inquiry among merchants the present writer did not find that it roused glad cries of immediate recognition, even in Sydney where it originated, so a statutory definition might be desirable.

Section 295 is a new section embodying the desirable principle that in a winding up, directors may have to account for undue profits made in sales by them to the company or in purchases by them from the company. But difficulty arises from the restriction of the section to transactions involving a 'cash consideration', which is defined in sub-section (4) as consideration payable 'otherwise than by the issues of shares'. Does this mean the issue of shares by the company now in liquidation? There is no obvious reason why it should. If it includes the issue of shares by another company, then both under sub-section (1) and under sub-section (2), dealing respectively with sale by a director to the company and sale by the company to a director, the application of the sections might be evaded if shares form a *part* of the consideration paid, at least if the consideration is not severable.

[20] (1962) 36 A.L.J.R. 97.

If only an issue of shares by the company now in liquidation is covered by sub-section (4), then this possibility of evasion would probably arise only under sub-section (1).

Elements in the definition in section 344 of a foreign company required to be registered derive from earlier English and Australian Acts but the new definition is much elaborated. Sub-section (3) sets out a list of things a foreign company may do without having to register, and the provision is open to two comments. First, the practice of the Commonwealth Parliamentary Draftsman has been adopted, under which a succession of alternatives or additions is indicated by placing 'or' or 'and' at the end of the second last item in the list. This is neat and economical, but when the list of categories is long and the statute is going to be used by large numbers of laymen not accustomed to reading statutes, there is some advantage in adopting the practice of other draftsmen who put an 'or' or 'and' after each item in the list except the last. Second, is it intended that a foreign company could do every one of the things indicated in the list of nine activities mentioned, without having to register, or that it can do only one of them?

Section 376 goes back a long way in the history of the Victorian Companies Acts, but is unknown elsewhere; it puts in statutory form the judge-made rule that dividends can be paid only out of profits, and requires directors in certain circumstances to pay to creditors an amount equal to profits improperly paid. No difficulty arises where, as is likely to be the most frequent case, the company is in liquidation and the claim against directors is prosecuted by the liquidator. But the section contemplates that even before liquidation creditors may be able to press this claim against directors; if the number of creditors is large and the sum to be recovered small, formidable difficulties of procedure and distribution could arise, and in any event some attention to the machinery problems of such a claim is desirable.

A striking feature of the history of the Companies Acts has been the timidity of legislatures in the face of difficulties created by judicial interpretation. It is a branch of the law in which judicial adjustment to changing circumstances and new problems is bound to be prominent and some of the 'old puzzles' may be incapable of legislative solution. For example, the early decisions which restricted the operation of the statutory rule, now section 33, that the memorandum and articles constitute a contract were an interesting illustration of the occasional inability of judges to believe what they read; consequential decisions seeking to construct 'extrinsic contracts' out of articles are also in conflict with each other.[21] Do articles constitute a contract be-

[21] See Gower, *op. cit.* 251 ff; *Glass v. Pioneer Rubber Works Ltd* [1906] V.L.R. 754; *Re Standard Salt and Alkali Ltd* [1934] S.A.S.R. 168.

tween member and member?[22] Possibly this serbonian bog could be drained by re-phrasing section 33, but to continue the metaphor, such an operation might unexpectedly affect the foundations of other structures.

But this Savigny-like resignation is not always justifiable. The following are some old puzzles which deserve legislative attention.

What are the profits from which alone dividends may be paid? The Courts have properly been anxious to leave this and a related range of questions to the judgment and practices of business men and accountants, but in this and other connexions they tend to congeal in a rule of law that which is the practice of a particular time, and the rule then requires legislative change. This may have happened in relation to a key element in the 'profits' question—namely provision for depreciation and for replacement of past trading losses. Insofar as the present law probably does not require either, it departs from generally accepted standards of good business practice and exposes investors to risks beyond those created by their own natural cupidity.[23] A related question is that of un-realized capital gains disclosed by re-valuation; some accountancy students are taught that these cannot under any circumstances be made a basis for the payment of dividends, and probably such a rule is desirable, but it is doubtful whether existing law imposes any such restraint.[24] In all these respects, the Courts are failing to tend an animal of whom in other respects they have made a sacred cow—namely the capital of the company. Indeed, the whole concept of the capital of a company needs re-thinking. When shares are fully paid up, the mere fact that the number of shareholders or the voting power of holders is reduced at a particular time by retirement of shares is of no importance to the commercial credit of the company; what matters is the origin of the money used to carry out the retiring, and the consequences for the control of the company—its politics and government, so to speak, as distinct from its finances.

These speculations as to the nature of capital and of profits have a bearing on the debated question whether the redemption of redeemable preference shares under section 61 (inherited from the English Acts) requires (omitting the case of a substitutionary issue) an amount of profits available for dividends equal to twice the amount payable to the holders—half being to pay the holders and half to pay into the capital redemption reserve under section 61 (5).[25] The present writer believes that if the capital structure of the company is sound, the re-

[22] *Cf. Welton v. Saffery* [1897] A.C. 299, 315.

[23] Gower, *op. cit.* 109 ff.

[24] *Cf.* Yorston and Brown, *Company Law in Victoria* (1962) 250.

[25] *Cf.* Spender and Wallace, *Company Law and Practice* (*N.S.W.*) (1937), 243; *cf.* (1940) 84 *Solicitors' Journal* 264-265.

paying operation can result in an equivalent *capital* surplus which the accounting procedures should reflect in the profit and loss appropriation account, so providing the source of the required reserve; hence trading profits need only supply the amount required for the redeemable preference holders and not twice that amount. But if the capital structure is not sound, or unrealized capital gains may not be used to pay dividends, that happy result may not be possible and the trading profits may have to provide up to twice the amount to be repaid. However, the whole argument, on which widely differing opinions and practices exist among company accountants, could easily be ended by legislation. This seems to be a case where the legislature has made 'capital' too much of a sacred cow, and the provision for a substitute reserve might well be abolished.

The Courts should have power to rectify a memorandum and articles of association on ordinary principles. The reason given for refusal in *Scott v. Frank F. Scott Ltd*,[26] that these can be altered by the machinery of the Act, is unsatisfactory, since that machinery cannot operate unless the requisite majorities agree that there has been a mistake, and that it should be rectified. It is clearly not a matter coming under the power to cure errors in section 366 of the Act, wide though that section is.

Liens in favour of a company on its own shares has become another favourite subject for the ingenuity of teachers and examiners, which is *prima facie* evidence in favour of legislative intervention. It may be desirable to confine the possibility of such a lien to providing security for unpaid calls.[27]

As previously mentioned, section 119 requires re-drafting. The Tasmanian draftsman departed from uniformity and improved a little on the other States and the English model[28] by substituting 'after his appointment' for 'afterwards', but this does not go to the root of the difficulty. It will nearly always be the case that at least the facts which constituted an irregularity or a disqualification were known to the persons concerned at the time of the appointment. The Australian section 366 may now sometimes provide another safeguard, but at the expense of an application to the Court. Evidently the reason for insisting on the 'afterwards' element in section 119 is a desire to prevent companies from going ahead with irregular appointments, to the knowledge of the people concerned. However, the policy of protecting transactions for the benefit of subsequent parties should override that consideration, and the penal sections of the Act should be sufficient to ensure regularity of appointments.

Difficulties of the kind here mentioned cannot readily be handled

26 [1940] Ch. 794. 27 See Gower, *op. cit.* 377-381.
28 11 & 12 Geo. VI c. 38 s. 180 (1948).

by the diffuse sort of negotiation and preparation of drafts which was necessarily adopted, in the absence of any standing procedures, in the case of the Uniform Companies Act. But the success of that enterprise is likely to encourage further such activities and the Commonwealth and the States might well now consider a more regular procedure which would facilitate consultation, centralize the making of necessary contacts with interested social groups and concentrate the responsibility for drafting. The obvious model is the scheme for uniform law revision adopted in the United States of America, which has led to the creation of the Chicago Clearing House.[29] It is characteristic of the American system that the States have carried it on in complete independence of the federal government. Probably a lead from the federal government will continue to be necessary in Australia, but it is doubtful whether Canberra is the best centre for such activities; most of them concern areas of lawyers' law as to which the States have exclusive or predominant legislative and administrative responsibility in their own areas. The most experienced and learned specialists on such questions, both legal and nonlegal, are to be found in the State rather than Federal capital, and desirable collaboration by Universities is also likely to be more readily organized in such centres.

In the United States of America, the work of the Chicago Clearing House has been further facilitated by the establishment of the magnificent headquarters and library of the American Bar Association in that city. Similarly here, consideration might be given by the Australian Law Council to some form of collaboration with the Commonwealth and the States in a 'Uniform Law Centre', to which the Law Council might contribute research staff in return for assistance in obtaining a suitable building which could also be used for its other purposes. This too is an activity more appropriate to the State than to the Federal capital.

A weakness of the American system is that the Commissioners who represent the States at the Clearing House are usually not what we would call responsible law officers in State governments and are frequently not even members of the legislatures. That is one of the reasons why the record of adoption of uniform laws in the United States of America is patchy. The continued participation of the Australian Attorneys-General in any such exercise is highly desirable, so as to ensure that uniformity and reform are promoted only when likely to be adopted and that Bills once adopted will be pressed vigorously in the respective legislatures with the support of the executive Governments. It would also be highly desirable to maintain the closest liaison between the projected Uniform Law Centre and the

29 Pound, *Jurisprudence* (1959) iii, 593 ff. and references there given.

Parliamentary Draftsmen, especially the State Parliamentary Draftsmen who are likely to be most familiar with the areas of law in question. Perhaps this could be achieved by seconding State Parliamentary Draftsmen to the proposed Centre for short periods, at least in the last stages of any particular exercise.

Unless some such method is adopted, there is a danger that uniformity will be achieved at the cost of abandoning any possibility of progressive improvement in the sort of content which is important to the legal profession. There will be 'reform' (as in the current case of trustees for debenture holders) when there is political pressure for some change in substance corresponding to a mainly non-professional demand. Uniformity with inattention to professional standards may be an improvement on the pre-existing situation, since in that situation also the provisions made by individual States for detailed improvement in the form and intelligibility of law were unsatisfactory. But it should not be impossible to achieve both the advantages of uniformity and the advantages of a closer consideration of 'lawyers' law' desiderata than has hitherto been achieved.