

‘A POSITION APPROACHING A SCANDAL’: THE PROPRIETARY COMPANY IN VICTORIA, 1896–1938

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The Companies Act 1896 (Vic) introduced the proprietary limited company, a major innovation in corporate law that emphasised private control and limited disclosure. While the Act is often associated with increasing regulatory oversight of limited liability companies, the proprietary model marked a departure from this ethos. Instead of promoting transparency and creditor protection, it created a legally sanctioned space for private economic activity resistant to state intervention. This article examines the proprietary limited company as both a legal and discursive innovation, showing how it enabled businesses to shield operations from scrutiny, sometimes undermining public interest goals such as creditor protections. We trace its development in Victoria and the tensions it generated between private autonomy and regulatory expansion.

I INTRODUCTION

The history of company law in Australia has been characterised according to a narrative trajectory in which the limited liability company is increasingly burdened by ever growing regulatory obligations.¹ For example, Graham Peirson and Alan L Ramsay note that by the 1960s it had become a ‘tradition’ in Australian company law to respond to ‘fraud, deception and investor losses’ by imposing greater accountability on limited liability companies, both public and proprietary, by means of more onerous regulatory requirements, especially relating to financial disclosure.² However, this trajectory has assumed the public

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1 See, eg, Garry D Carnegie and Brendan T O’Connell, ‘A Longitudinal Study of the Interplay of Corporate Collapse, Accounting Failure and Governance Change in Australia: Early 1890s to Early 2000s’ (2014) 25(6) *Critical Perspectives on Accounting* 446 <<https://doi.org/10.1016/j.cpa.2013.04.001>>. For a more general discussion, see Thomas Clarke, ‘Cycles of Crisis and Regulation: The Enduring Agency and Stewardship Problems of Corporate Governance’ (2004) 12(2) *Corporate Governance: An International Review* 153 <<https://doi.org/10.1111/j.1467-8683.2004.00354.x>>.

2 Graham Peirson and Alan L Ramsay, ‘A Review of the Regulation of Financial Reporting in Australia’ (1983) 1(6) *Company and Securities Law Journal* 286, 288.

limited liability company as its paradigmatic focus, often folding into or even sidelining from consideration the proprietary company.³ This is evident in John Waugh's representation of the *Companies Act 1896* (Vic) ('*Companies Act 1896*') as a 'striking reversal of the laissez faire policy of existing companies legislation'.⁴ A closer examination of the *Companies Act 1896* highlights that the status of the newly created form of the proprietary company is, in fact, an exception to this reversal and a significant counterweight to the regulatory momentum of the Act. Yet, such a reversal is less noted. In this article, we suggest that the exceptional position of the proprietary company has become lost in a wider narrative intent on tracing the progression of legislative constraint on the public corporation.

Focusing on the proprietary company, we argue instead that this narrative of legislative 'encroachment' overlooks the significance of the proprietary company as a form that, since its inception, has demonstrated remarkable resilience in the face of sustained efforts by its critics to impose greater restraints on it. As such, this article is not so much an account of the legislative evolution of the proprietary company as a legal device. Indeed, rather than understand the historical development of the proprietary company as a construct of state legislatures, we suggest that it is better seen as an element of private law that has consistently resisted states' efforts to make it a locus of public interests. That is, despite legislative change since 1896, the proprietary company form, throughout its evolution, has maintained as its fundamental function and purpose 'the promotion of interpersonal justice and individual self-determination, as opposed to public objectives'.⁵

While this article considers the 'mechanisms and dynamics of legal change',⁶ it also seeks to move toward an inquiry into the proprietary company as a device that largely defied sustained attempts at its reformation in the cause of improving the 'immoral' conduct of those who employed the device.⁷ Indeed, rather than tracing the evolution of the proprietary company as a corporate form, this article looks to what did not evolve and to what was not implemented. That is, rather than follow the linear progression of the proprietary company form from its creation into the present, this article historicises the proprietary company to give attention to the contests and discontinuities of the past; to the failed attempts to impose restraints on companies' sharp and often ethically dubious conduct that the device was thought to enable.

By concentrating our focus on the discontinuities of the past, the proprietary company – its creation and evolution – can be analysed against a backdrop of

3 Nowadays, a proprietary company may be defined as a company that operates privately and with limitations in terms of its membership and its ability to raise capital from the public: see *Corporations Act 2001* (Cth) s 113.

4 John Waugh, 'Company Law and the Crash of the 1890s in Victoria' (1992) 15(2) *University of New South Wales Law Journal* 356, 382.

5 Asaf Raz, 'Why Corporate Law Is Private Law' (2023) 25(4) *University of Pennsylvania Journal of Business Law* 981, 985.

6 Philip Handler, 'Legal History' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2nd ed, 2018) 103, 119.

7 Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009) 224 ('*A Social History of Company Law*').

historical contingency rather than inevitability. In this sense, law, or specifically, the proprietary company as a legal device, is not seen as autonomous but, as Sarah E Hamill says, as something ‘related to, constituted by, and constitutive of the social contexts in which it finds itself’.⁸ Accordingly, historicising the proprietary company benefits analysis by placing the form in its precise historical context which, we suggest, was fundamentally political; that is, it was a device subject to repeated contest over not just its legal form but its normative function. We argue that in the multitude of parliamentary debates and the various inquiries which progressively settled the legal form of the proprietary company, competing ideas about the purpose of the form can be excavated.

Specifically, we identify a discourse broadly characterised by a conflict between an idea of the proprietary company as a form properly having a social or public benefit and an emergent and ultimately dominant view of it as a vehicle expressive of and protective of individual autonomy and entrepreneurial freedom.

Consequently, Part II of this article examines the progression of the debates that ultimately shaped the proprietary company. Part III, then, highlights the evolution of a discourse of privacy that progressively shaped understandings of the proprietary company from its inception until 1938 despite the continuous misconduct of these entities. This is followed by Part IV, which considers the opening of a small window of opportunity in 1938 that resulted in a legislative move toward a more public interest regulatory approach when dealing with proprietary companies.

II THE JOURNEY TOWARDS PROPRIETARY COMPANIES ADOPTION: THE LOGIC OF CORPORATE PRIVACY

The creation by legislative fiat of the proprietary company in Victoria in 1896⁹ can be contrasted with the recognition in Britain of the private company form in 1907. As Ron Harris notes, ‘despite the fact that the private company was formally introduced only in 1907, in fact it evolved informally [in the United Kingdom] from below after 1862 and was privately ordered by shrewd lawyers’.¹⁰ The private company in Britain was an emergent form, gaining momentum for eventual recognition by the courts¹¹ and then by statute¹² from an increasing trend toward the incorporation of companies with relatively low nominal capital.¹³ This stands in contrast to the Australian context where the adoption of the corporate form was, by comparison, extremely low.

8 Sarah E Hamill, ‘Review of Legal History’ (2019) 28(4) *Social and Legal Studies* 538, 540 <<https://doi.org/10.1177/0964663918819189>>.

9 *Companies Act 1896* (Vic) s 2 (‘*Companies Act 1896*’).

10 Ron Harris, ‘The Private Origins of the Private Company: Britain 1862–1907’ (2013) 33(2) *Oxford Journal of Legal Studies* 339, 346 <<https://doi.org/10.1093/ojls/gqt001>>.

11 See, eg, *Salomon v Salomon & Co Ltd* [1897] AC 22.

12 *Companies Act 1907* (UK) 7 Edw 7, c 50.

13 Harris (n 10) 347–9.

A The Evolving Image of the Company in Australia

Rob McQueen has argued that, until the late 1880s, the limited liability company was largely shunned by small enterprises in favour of the partnership or unincorporated company. Larger operations were funded from public monies leaving the corporate form mostly to mining and related activities.¹⁴ Further, McQueen notes a prevailing business culture in Australia that was 'antagonistic to the concept of incorporation', identifying the corporation as a device to be spurned by 'respectable' business people.¹⁵ Additionally, the availability of limited liability companies was perceived in the early to mid-19th century as a 'French fallacy'.¹⁶ In fact, in Victoria, establishing companies through registration only became available through the enactment of the *Companies Statute 1864* (Vic) ('*Companies Statute 1864*').¹⁷

Even then there was little need to rely on corporations due to the small scale of most colonial businesses.¹⁸ However, with the event of the Victorian land boom, the corporate business structure became more appealing with 433 companies in Victoria incorporated in 1888¹⁹ as companies allowed for bold and, toward the end of the 1880s, often fraudulent financial speculation.²⁰ This was possible as the regulatory standards attached to these corporations were lax.²¹ As it stood, the *Companies Statute 1864* had imposed very few obligations on companies incorporated under its provisions. As Phillip Lipton notes, the existing legislation contained few disclosure requirements beyond the lodgement of the memorandum and articles of association on registration, the lodgement of the register of members and a summary of capital.²² The public and investors had no access to information about the company's financial activities or to details about the nature and value of the company's issued capital.²³ Indeed, there was a view that imposing obligations on companies may drive 'men of character and capital out of companies'.²⁴ However, the calamitous crash and severe economic depression that followed drove a popular perception of the corporate form as a vehicle for fraud and a subsequent public

14 Rob McQueen, 'Limited Liability Company Legislation: The Australian Experience 1864–1920' (1989) 5 *Law and History in Australia* 57, 65.

15 Ibid 62, 65.

16 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 1881, 1076 (Charles Pearson) ('Legislative Assembly, 7 December 1881').

17 Waugh (n 4) 358.

18 McQueen, *A Social History of Company Law* (n 7) 282.

19 Waugh (n 4) 358. For the number of companies registered in Victoria between 1874 and 1893, see McQueen, *A Social History of Company Law* (n 7) 287.

20 Waugh (n 4) 357.

21 McQueen, *A Social History of Company Law* (n 7) 301.

22 Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31(3) *Melbourne University Law Review* 805, 814–15 <<https://doi.org/10.2139/ssrn.1030196>> ('A History of Company Law').

23 Ibid 815.

24 Legislative Assembly, 7 December 1881 (n 16) 1076 (Charles Pearson).

demand for greater regulation to impose some form of accountability on those making use of the device.²⁵

The Victorian Government struggled to respond to these demands as many Members of Parliament were party to the rampant speculation that took place during the land boom.²⁶ Michael Cannon described Victorian politics of that era, noting that it was

a sort of land speculators' club, where the most blatant 'log rolling' ... became commonplace. Fantastic sums of money were borrowed and spent on extending the railway network; and when the rails reached any particular point, it was often found that syndicates of MPs and their associates had bought up the land in advance for subdivision and resale.²⁷

Public discontent with the limited government action in that regard led to the sweeping electoral victory of the Turner Liberal Protectionist party in late 1894, giving a clear mandate to the new government's proposed reforms to a company law regime that, since 1864, had been governed largely by laissez faire principles.²⁸

Shortly before the 1894 election, the Attorney-General in the Patterson Government, Bryan O'Loughlen, introduced into this ripe context an amending Companies Bill 1894 (Vic) intended to 'safeguard those who are not able to safeguard themselves from the designs of evil and dishonest persons'.²⁹ The press gave their full support to the Bill, *The Advocate* noting that:

It is eminently desirable, therefore, that the avenues for fraud, intentional or otherwise, which the past has shown to exist in connection with limited liability companies, should be blocked as efficiently as possible, and this work is more likely to be better done now than it would be in the future, when the lessons of the past are more or less weakened by time.³⁰

Building on the previous government's Bill,³¹ the new Attorney-General Isaac Isaacs introduced the first iteration of a new Bill³² promising that it would be a

25 Waugh (n 4) 356. For general information about the economic depression: see, eg, Graeme Davison, *The Rise and Fall of Marvellous Melbourne* (Melbourne University Press, 2nd ed, 2004); NG Butlin, *Investment in Australian Economic Development: 1861–1900* (Cambridge University Press, 1964) <<https://doi.org/10.1017/CBO9781316530160>>; Michael Cannon, *The Land Boomers* (Melbourne University Press, 2nd ed, 2013).

26 See, eg, 'News of the Day', *The Age* (Melbourne, 18 May 1893) 4 <<https://trove.nla.gov.au/newspaper/page/18500872>>; 'Feeling in the Country', *The Age* (Melbourne, 18 May 1893) 5 <<https://trove.nla.gov.au/newspaper/page/18500873>>; 'Statement by the Solicitor-General', *The Age* (22 May 1893) 5 <<https://trove.nla.gov.au/newspaper/page/18500905>>; 'Mr Isaacs at Chiltern: An Enthusiastic Reception', *The Argus* (30 May 1893) 6 <<https://trove.nla.gov.au/newspaper/page/301629#>>.

27 Cannon (n 25) 49.

28 'Politics: The Elections', *The Prahran Telegraph* (Melbourne, 22 September 1894) 3 <<https://trove.nla.gov.au/newspaper/page/16879139>>; Lipton, 'A History of Company Law' (n 22) 826–7; Phillip Lipton, 'The Transplant and Adaption of Company Law in Colonial Victoria 1850–1900' in Serge Dauchy et al (eds), *Colonial Adventures: Commercial Law and Practice in the Making* (Brill Nijhoff, 2021) 165, 200 ('Transplant and Adaption').

29 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 July 1894, 778 (Sir Bryan O'Loughlen, Attorney-General) ('Legislative Assembly, 12 July 1894').

30 'The New Companies Act', *The Advocate* (Melbourne, 21 July 1894) 14 <<http://nla.gov.au/nla.news-article169712344>>.

31 Legislative Assembly, 12 July 1894 (n 29) 768 (Sir Bryan O'Loughlen, Attorney-General).

32 Introduced as the Companies Act Further Amendment Bill 1895 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 30 May 1895, 95 (Isaac Isaacs, Attorney-General).

'measure that will be ... both preventive and remedial'.³³ The new, more ambitious Bill, contained the seeds of what Lipton refers to as the 'first modern disclosure provisions', proposed 10 years before similar provisions would find their way into English legislation.³⁴

B Isaacs' Bill and the Watering Down of Regulatory Standards: Privacy Concerns

Isaacs noted, when introducing the 1895 Bill, that among a suite of provisions designed along the principle 'that if directors do wrong they shall be liable to make good the extent of their wrongs',³⁵ were new proposed disclosure obligations that 'will give a very proper safeguard, in our opinion, to the general public who may be induced to apply for shares, and, at the same time, ... afford thorough facilities to the general public also who may be called upon to become creditors of the company'.³⁶ In this first unamended version, the Bill obligated companies on registration to lodge with the Registrar-General a memorandum stating:

[T]he number of shares in the company and the amount of each share, the amount paid up per share at the date of the memorandum, the number of shares subscribed for, the names and addresses and occupations of the shareholders and the number of shares held by each shareholder, and the whole amount paid up at such date.³⁷

Further, a series of provisions in the Bill provided that 'directors of companies are to keep proper books of accounts, and to have those accounts audited by competent auditors'.³⁸ In an effort to impose accountability on auditors, whose work was adjudged as slovenly in the past,³⁹ a clause in the Bill stipulated that 'any auditor who shall wilfully or through culpable negligence certify that a false or fraudulent balance-sheet or account is correct shall be guilty of a misdemeanour, and be liable to be imprisoned for a term not exceeding two years'.⁴⁰

Additionally, the Bill made provision for the 'special audit' of any company 'where, by reason of some delinquency on the part of auditors or on the part of directors, [there is] some difficulty in ascertaining the truth as to the condition of a company's accounts'.⁴¹ Significantly, it was open to creditors, shareholders, or any other persons interested to request from the Governor in Council an investigation into the books and accounts of a company.⁴² Isaacs acknowledged the breadth of this provision, noting 'while we thought at one time that the power should be limited to shareholders or creditors, we thought it better at the last that it should

33 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 June 1895, 221 (Isaac Isaacs, Attorney-General) ('1895 Bill Second Reading Speech').

34 Lipton, 'Transplant and Adaption' (n 28) 200.

35 1895 Bill Second Reading Speech (n 33) 223 (Isaac Isaacs, Attorney-General).

36 Ibid 224.

37 Ibid.

38 Ibid.

39 'Friday, February 7, 1890', *The Argus* (Melbourne, 7 February 1890) 6 <<https://trove.nla.gov.au/newspaper/article/8588133>>.

40 1895 Bill Second Reading Speech (n 33) 225 (Isaac Isaacs, Attorney-General).

41 Ibid.

42 Ibid.

be absolutely unlimited – that there should be the fullest facility for making a thorough investigation of any company's books and accounts'.⁴³

Crucially, and as Isaacs confirmed repeatedly, the provisions of this Bill applied to 'all companies' seeking incorporation and the benefits of limited liability.⁴⁴ Indeed, Isaacs was adamant that

the provisions for the protection of the public should primarily apply to all companies where they were not intended to apply to any particular class of companies [ie, insurance companies], the meaning being that when then they were intended to apply to any particular class of companies it would be expressly stated.⁴⁵

He went further, stating that 'the main object of the Bill was to protect Victorian citizens, and primarily the provisions ought to apply to all companies, but where it could be shown that the balance of advantage would lie the other way, companies might be expressly excepted'.⁴⁶ Above all, however, the intention of the Bill was 'to protect those who were unable from want of education or lack of information to protect themselves against the efforts of those who were determined to wrest from them all the money they possibly could and leave them lamenting'.⁴⁷ It was, Isaacs said, 'the people they wanted to protect, and not the companies'⁴⁸ and 'we must go as far as we can'.⁴⁹

By January 1896, progress on the Bill had effectively stalled.⁵⁰ In an effort at advancement Isaacs introduced an alternative Bill to the Assembly which, he said, was substantially the same as the previous session's Bill, except that it now had the advantage of the incorporation of measures that had been proposed in the recent English Draft Bill,⁵¹ released as an appendix to the 1895 English *Davey Committee Report*.⁵² With regard to disclosure obligations, Isaacs was now proposing 'that a private balance-sheet should be provided for as in the English Bill'.⁵³ Over the summer break, the government had engaged with the sentiment in the English Draft Bill that onerous disclosure obligations may, in some instances, be unwarranted, noting that 'information of such a private nature ... might materially injure the business of the company if it were divulged'.⁵⁴

43 Ibid.

44 Ibid 230.

45 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 November 1895, 3302 (Isaac Isaacs, Attorney-General).

46 Ibid.

47 Ibid 3287 (Charles Salmon).

48 Ibid 3302 (Isaac Isaacs, Attorney-General).

49 Ibid 3303.

50 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 January 1896, 4747.

51 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 January 1896, 4701 (Isaac Isaacs, Attorney-General) ('Legislative Assembly, 21 January 1896').

52 United Kingdom Board of Trade, *Report of the Departmental Committee Appointed by the Board of Trade to Inquire What Amendments Are Necessary in the Acts Relating to Joint Stock Companies Incorporated with Limited Liability under the Companies Acts, 1862 to 1890* (Report No C7779, 1895) ('*Davey Committee Report*').

53 Legislative Assembly, 21 January 1896 (n 51) 4702 (Isaac Isaacs, Attorney-General).

54 Ibid 4703 (Isaac Isaacs, Attorney-General).

Isaacs noted that the 'idea of the English Bill was that the private balance-sheet should be returned to the directors, because it was not fair to make it public'.⁵⁵ However, he foresaw that the English approach was problematic in that by allowing directors to have sole possession of such information, self-interest would dictate that 'if ever it was wanted it might happen that it could not be found'.⁵⁶ Instead, the revised Bill proposed the creation of two versions of the audited balance sheet: a public balance sheet to be provided to shareholders and the public, and a private, more detailed balance sheet.⁵⁷ The idea was

that the private balance-sheet should not be made public unless the necessity arose. Their provision was that a duplicate balance-sheet should be produced, that it should be handed to the auditors, sealed by them, and then lodged with the Registrar-General, and that the court, upon the application of a law officer, could direct that it should be produced.⁵⁸

Despite Isaacs' claim that the new iteration of the Bill was not much changed from the previous offering, this proposal represents an important concession. While still maintaining the necessity for all companies to produce audited accounts, the predisposition in the previous Bill to place the public interest above corporate interests in all instances was now compromised by an imported logic of corporate privacy.

Isaacs went on to say of this clause that '[t]he Government had endeavoured by these sub-sections to preserve secrecy, and, at the same time, to provide, as far as they could, that the private balance-sheet should be available if it were required'.⁵⁹ Opposition members, however, found fault with the provision arguing that the 'Attorney-General would not trust the directors to keep this document [ie, the balance sheet] lest they should falsify it, or make away with it'.⁶⁰ It was, according to Godfrey Carter, 'a gross insult and reflection upon every man who occupied the position of director of a company'.⁶¹

Indeed, resistance to the key disclosure obligations imposed by the Bill on companies was increasingly evident among members of the Opposition. Theodore Fink, who had been an enthusiastic land speculator and a member of the Legislative Assembly,⁶² perhaps understandably saw the proposed obligations as an unmerited burden on the conduct of business. He argued that 'if Parliament, merely with the desire of putting down and checking fraud, hindered the operation and formation of companies with undue restrictions, the effect would certainly be to do more harm than good'.⁶³

55 Ibid.

56 Ibid 4702.

57 Ibid 4703.

58 Ibid.

59 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 July 1896, 244 (Isaac Isaacs, Attorney-General) ('Legislative Assembly, 7 July 1896').

60 Ibid 244 (Godfrey Carter).

61 Ibid 245.

62 See Wilma Hannah, 'Theodore Fink (1855–1942)', *Australian Dictionary of Biography* (Web Page, 2006) <<https://adb.anu.edu.au/biography/fink-theodore-6171>> which references Theodore Fink's financial difficulties due to the speculations he and his family were involved in.

63 Legislative Assembly, 21 January 1896 (n 51) 4706 (Theodore Fink).

Other members opposed the rationale of public protection behind the Bill's proposals, stating that it would unnecessarily 'interfere with the proper, reasonable, and necessary development of joint stock enterprise in this country', as 'notwithstanding all the talk about swindling, from 98 to 99 per cent of the companies throughout the world were conducted for the benefit of the people at large'.⁶⁴ These and the following debates in the Legislative Council reflected the tension that existed between a public interest focused politics driving the imposition of regulatory restrictions on companies on one hand, and the private nature of corporations that demanded protection from unreasonable regulatory cost on the other hand.

In the end, Opposition demands that the Bill be sent to Committee would ultimately frustrate the government's efforts to see the Bill through to an immediate vote. Not without cause, government members accused the Opposition of seeking to 'deliberately strangle' the Bill, pointing out that the lawyers among the Opposition would most likely be 'found in the practice of their profession assisting company-mongers to free themselves from the swift arm of the law and of justice'.⁶⁵ However, even the Opposition members who stood adamantly opposed to the special audit provisions⁶⁶ proposed by Isaacs saw sense in the requirement that companies should face independent audit. For instance, future High Court judge Henry Bournes Higgins affirmed that the 'true remedy was to make the auditors independent by nominating them from some recognised body which was governed by stringent rules'.⁶⁷

Even in this concession, thoughts turned to the burden that such requirements might place on small companies with Higgins suggesting that 'there might be some small companies for which an exception could be made'.⁶⁸ William Irvine also argued that some distinction ought to be made for '[s]uch companies [as] were continually being formed, both in England and here'.⁶⁹ He defined these companies as those

incorporated by any firm, person, or persons for the purpose of acquiring the business and assets of such firm, person, or persons where such firm, person, or persons, together with such additional number of subscribers as shall be necessary to procure the registration of the company, subscribe for all the shares issued as consideration for such acquisition.⁷⁰

Irvine suggested that these types of companies 'did not come under the same heading at all as speculative companies'.⁷¹ Carter also pleaded for some consideration of these 'private' companies asking, 'what had the public got to do

64 Ibid 4714 (Robert Harper).

65 Ibid 4716 (Jonas Levien).

66 After protracted debate, the special audit to shareholders was limited to those holding not less than one-tenth in number and value of whole shares: see *Companies Act 1896* (n 9) s 37.

67 Legislative Assembly, 7 July 1896 (n 59) 254 (Henry Bournes Higgins).

68 Ibid.

69 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 July 1896, 564 (William Irvine) ('Legislative Assembly, 21 July 1896').

70 Ibid 564 (William Irvine).

71 Ibid.

with their business, and why should the outside public be allowed to see their balance-sheet?⁷²

Nevertheless, the steady refrain of the government remained that the whole purpose of the bill was to protect the public from the dishonest practices that had 'utterly ruined' thousands of people in the Colony and to bring companies 'under careful supervision'.⁷³ It was crucial that for the benefit of the public interest, all companies be subject to stringent auditing and disclosure requirements as it 'was round about the clauses affecting auditing that public security centred'.⁷⁴ Isaacs was more to the point, proclaiming that any exceptions would 'open a door to fraud'.⁷⁵ However, while Isaacs' Bill passed the Legislative Assembly, despite complaints that it had succeeded 'distinctly as a party measure',⁷⁶ the Legislative Council promised to be much less sympathetic to the idea that the public interest demanded the sacrifice of corporate secrecy. A clue as to the reason for this lack of sympathy for the proposed disclosure obligations is suggested by Waugh. He notes the controversy surrounding the Legislative Council's persistent efforts to frustrate the passage of the *Companies Act 1896* and its reputation as a 'reactionary club of company directors'.⁷⁷ Given that 30 out of a total of 48 members of the Legislative Council were also company directors, it was perhaps not unreasonable that *The Age* would castigate the Legislative Council as 'a House composed of men personally interested in maintaining loose conditions'.⁷⁸ Indeed, as Isaacs foreshadowed, Opposition complaints about key features of the Bill were effectively an invitation to the upper chamber 'to mutilate this Bill'.⁷⁹

C The Legislative Council's Bill: Introducing Proprietary Companies to Protect Privacy of Corporate Entities

To be sure, immediately upon its arrival in the Legislative Council, members there set about dismantling the broad supervisory and protective aims of the Bill, pointing to the necessity of an exception for 'private' companies. Thomas Brunton argued that

[w]ith regard to private companies, the formation of such a company is often a convenient means of distributing a business amongst a family. It does not publish any balance sheet, and I think that it would be objectionable to bring such companies under the operation of this Bill. It should be limited to companies that take public money.⁸⁰

72 Ibid 566 (Godfrey Carter).

73 Legislative Assembly, 7 July 1896 (n 59) 255 (Francis Longmore).

74 Ibid 256 (James Hume Cook).

75 Legislative Assembly, 21 July 1896 (n 69) 565 (Isaac Isaacs, Attorney-General).

76 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 July 1896, 686 (Robert Murray Smith) ('Legislative Assembly, 23 July 1896').

77 Waugh (n 4) 382–3.

78 'Melbourne, Wednesday, 23rd December, 1896', *The Age* (Melbourne, 23 December 1896) 4 <<https://trove.nla.gov.au/newspaper/page/18510957>>, quoted in *ibid* 383.

79 Legislative Assembly, 23 July 1896 (n 76) 687 (Isaac Isaacs, Attorney-General).

80 Victoria, *Parliamentary Debates*, Legislative Council, 12 August 1896, 1100 (Thomas Brunton).

An answer to the question of how to define such companies was suggested by means of a lengthy quotation from the *Davey Committee Report* and by reference to the draft English Companies Bill which had included a provision exempting private companies from the disclosure obligations proposed therein. Namely, it defined a private company as being a company ‘which does not invite the public to subscribe to its shares.’⁸¹

The importance of the *Davey Committee Report* should not be underestimated. While the proposal was ultimately not adopted in the United Kingdom (‘UK’), some members of the Committee had strongly advocated for the division of joint stock companies ‘into two classes, consisting of so-called “private” companies and public companies’.⁸² In this sense, the *Davey Committee Report* and the draft English Bill provided a conceptual framework to Victorian legislators which enabled them to link the notion of corporate privacy to a legal device. The *Davey Committee Report* concluded that the attempt to define the nature of a private company had been unsatisfactory, noting ‘[c]learly the mere fact of a company not inviting a public subscription does not supply any such differentia’.⁸³ This, however, did not deter members of the Legislative Council from deploying this language as an authoritative formulation from ‘home’ that gave credence to what may be perceived as otherwise self-interested objections to the proposed disclosure requirements on all limited liability companies.

In light of the definition provided by the *Davey Committee Report*, Sir Frederick Sargood advocated for a similar exception for companies fitting this definition to be inserted into the Victorian Bill. Noting that the Assembly had deliberately omitted such an exception, he argued that ‘[t]hese extracts showed that this question of private companies had received very careful attention at home, and they afforded one reason why the proviso which was contained in the English Bill should be inserted in this measure instead of being omitted, apparently intentionally.’⁸⁴

Subsequently, on 19 August 1896, Sargood moved an amendment to the Bill which, in part, proposed that the requirement to furnish audited balance-sheets ‘shall not apply to proprietary companies as herein defined. Any company which shall at any time consist of not more than 10 members may become a proprietary company, provided ... the word “proprietary” be the last word of its name’.⁸⁵ Objecting to the amendment on behalf of the government, Henry Cuthbert pointed out that the English Lords had not favoured the giving of greater privileges to private companies over public companies. He asked, ‘why should private companies be allowed to enjoy all the advantages of limited liability and not be brought within the purview of the Act?’⁸⁶ It would, he said, lead to ‘a great evasion of the Act’.⁸⁷

81 Victoria, *Parliamentary Debates*, Legislative Council, 18 August 1896, 1238 (Sir Frederick Sargood) (‘Legislative Council, 18 August 1896’), quoting Joseph Herbert Tritton, Vice-President of the Institute of Bankers, who provided evidence to the committee of the House of Lords with reference to private companies: at 1237.

82 *Davey Committee Report* (n 52) xix [63].

83 *Ibid.*

84 Legislative Council, 18 August 1896 (n 81) 1238 (Sir Frederick Sargood).

85 Victoria, *Parliamentary Debates*, Legislative Council, 19 August 1896, 1297 (Sir Frederick Sargood).

86 *Ibid* 1298 (Henry Cuthbert).

87 *Ibid* 1298–9 (Henry Cuthbert).

Despite Cuthbert's objections, the majority of the Council was determined to carve out an exception for the vast majority of limited liability companies that would otherwise be brought under the operation of the future Act. To this end, Sargood's amendment, among many others, was sent to a select committee to hear evidence, in particular from members of the business community and from the accounting profession.⁸⁸ Unsurprisingly, the Committee resolved '[t]hat private companies shall be exempt from the operation of the clauses of the Bill relative to the publication of balance-sheets and auditing'.⁸⁹

Justification for the radical departure from the intentions of the Bill, as well as the necessity of the invention of an entirely new corporate form, was based on the view that a company's right to privacy trumped concerns for public security. Committee witnesses repeatedly dismissed the Bill's *raison d'être* of public protection in favour of a restoration of the *laissez faire* principle of *caveat emptor*. A witness before the Committee stated that:

[I]t seems to me to be a wrong to the company that it should have to expose its affairs to the extent to which this Bill makes it necessary. I do not know that the public are concerned; the public know they are dealing with an institution whose liability is limited, and they need not give the institution credit unless they choose.⁹⁰

Another witness similarly dismissed the protections extended to creditors by the Bill, asserting that the security afforded by public disclosure obligations should not disturb the right of companies to keep their affairs private:

This Bill is a Bill in the interests of the general public; private proprietary companies in nearly every case have nothing to do with the public as creditors – they do not appeal to the public for shares – they do not take deposits from the public, and their only contact with the public is as debtors.⁹¹

According to yet another witness, the state had no business exposing a company to 'drastic' public scrutiny. Referring to his own creditors, the witness affirmed that '[i]t [is] his business to find out the position of the people with whom he is trading'.⁹²

On its return to the Legislative Council, Sargood promptly accepted the recommendation of the Select Committee and moved for the insertion into the Bill a clause which proposed to create in Victorian companies law an entirely new corporate form. Perhaps aware that the exception that this new type of company was carving from the future Act would be seen as an effort to defeat the protective goals of the Legislative Assembly, the Council sought to frame this intervention in the language of public security. Cuthbert echoed the arguments of Select Committee witnesses when he made the case for the creation of the proprietary company as a device protective of the public because it had nothing to do with the public. He stated:

88 Victoria, *Parliamentary Debates*, Legislative Council, 8 September 1896, 1647 (Sir Frederick Sargood).

89 Select Committee of the Legislative Council, Parliament of Victoria, *Report of the Select Committee of the Legislative Council on the Companies Act 1890 Further Amendment Bill* (Report No D.1, 29 October 1896) xii.

90 Ibid 1 [11].

91 Ibid 15 [204].

92 Ibid 20 [297].

In order to make such a change acceptable in another place [ie, the Legislative Assembly], honorable members were determined to safeguard, as far as possible, the interests of the public. They accordingly recommended that if these companies desired to come under the Companies Statute and have special exemptions granted to them, they should undertake on their part that they would not advertise or apply to the public at large for deposits. The committee recommended that if such companies did receive such deposits, the deposits should be from their own members, and not from the public.⁹³

Additionally, to qualify as a proprietary company, a company could have no more than 25 members or shareholders and was required to have in its title the word 'proprietary'.⁹⁴

The addition of the word 'proprietary' was, however, a small concession to public security, effectively placing the burden on the individual creditor to protect his or her own interests. Adding the word 'proprietary' to a company's title was to serve 'as a warning to people who were giving them credit that they must make every inquiry, because in the case of a proprietary company they would not see the balance-sheet as in the case of other companies'.⁹⁵

The assertion of the principle of individual responsibility was the visible expression of the conviction that the role of the Legislative Council was to 'guard against interfering with the freedom of trade'.⁹⁶ Nicholas Fitzgerald, perhaps, spoke for the majority in the Council when he said '[i]t was a monstrous and grandmotherly proposal that they should seek to surround every individual with safeguards so as to keep him in the straight path. Every individual was bound to inquire for himself in what path he was travelling'.⁹⁷ The proprietary company, in this sense, was the Legislative Council's answer to what it perceived as the Legislative Assembly's unacceptable interference in private commerce.⁹⁸

Isaacs' weariness from this debate could be felt when the Bill came to the Legislative Assembly once again on 23 December 1896:

When [Isaacs] had briefly mentioned the principal points of difference, honorable members would see that there was really an impassable gulf between the two Chambers. He was sorry to have to say that, as far as he was aware, no good could be accomplished by referring these points of difference back to the other Chamber.⁹⁹

... He was putting the amendments en bloc, because he felt it was useless to send the Bill back, as it would only be returned in its present state, and time would thus be wasted.¹⁰⁰

93 Victoria, *Parliamentary Debates*, Legislative Council, 24 November 1896, 3600 (Henry Cuthbert).

94 Ibid 3599 (Sir Frederick Sargood).

95 Ibid 3600 (Nicholas Fitzgerald).

96 Ibid.

97 Victoria, *Parliamentary Debates*, Legislative Council, 25 November 1896, 3695 (Nicholas Fitzgerald) ('Legislative Council, 25 November 1896').

98 The Legislative Assembly agreed to the amendments and the Bill was passed and received assent on 24 December 1896: *Companies Act 1896* (n 9) preamble.

99 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 December 1896, 4917 (Isaac Isaacs, Attorney-General).

100 Ibid 4919 (Isaac Isaacs). This sentiment was also reflected in the press: 'Melbourne, Wednesday, 23rd December, 1896', *The Age* (Melbourne, 23 December 1896) 4.

The Legislative Assembly ended up adopting a pragmatic approach to this legislation: some changes were better than none. Accordingly, the Bill was accepted by the Assembly and passed on Christmas Eve by both Chambers. With the passage of this legislation, proprietary companies were defined as having the following characteristics:¹⁰¹

- Limited membership: the proprietary company cannot have more than 25 members;
- Members were limited from making deposits in the company which were not linked to their shares; and
- Inclusion of the term 'proprietary' in the official name of the company to advise the public that the company will not usually attract the same scrutiny attached to public companies.

The *Companies Act 1896* was a paradox as it was a product of the impulse to restrain the corporate form and the lax business morality that it was perceived to foster¹⁰² through the introduction of greater accountability. Yet it opened the door for more fraudulent conduct by protecting and even championing the privacy and secrecy of certain corporations.

III FAILURES IN HOLDING THE PROPRIETARY COMPANY TO ACCOUNT, 1897–1938

Almost as soon as the *Companies Act 1896* came into operation, a view emerged of the proprietary company as a device that had effectively defeated the public interest objectives of the legislation. *The Argus* noted that it was a 'misfortune that the definition of "proprietary companies" was made too wide, because such companies are made exempt from some of the most important and valuable provisions of the act'.¹⁰³ It observed further that those businesses that had already registered as proprietary companies 'belong to the class which might with advantage have been brought under the act. Those that cannot become "proprietary" are as a rule just those for whose control fresh legislation was hardly required'.¹⁰⁴

A The Rise in Popularity of Proprietary Companies

By March 1897, no fewer than 63 companies had registered as proprietary companies, with *The Argus* noting that by the end of the year 'it may be expected that a majority of the companies in Victoria will be "proprietary" and, therefore, unaffected by some of the best provisions of the act'.¹⁰⁵ By 1928, it was possible for commentators to speak of the 'phenomenal popularity' of the proprietary company

101 *Companies Act 1896* (n 9) s 2.

102 Waugh (n 4) 356. See also Rosemary Teele Langford, Ian Ramsay and Michelle Welsh, 'The Origins of Company Directors' Statutory Duty of Care' (2015) 37(4) *Sydney Law Review* 489, 492.

103 'Monetary and Commercial', *The Argus* (Melbourne, 10 March 1897) 4 <<http://nla.gov.au/nla.news-article9165460>>.

104 Ibid.

105 Ibid.

in Victoria.¹⁰⁶ This was not surprising as proprietary companies brought together key advantages of two business structures: namely, separate legal entity status and limited liability, key characteristics of companies; and privacy, a key benefit of running a business in the form of a partnership.¹⁰⁷

Accordingly, the popularity of the proprietary corporate form should not be underestimated. Indeed, since its inception, the number of proprietary companies incorporated had far exceeded the number of public companies (see Table 1 below).

Table 1: Number of Proprietary Companies Registered in Victoria between 1921–1927¹⁰⁸

Year ended	Proprietary companies	Public companies
1921	420	68
1922	526	67
1923	641	84
1924	684	87
1925	713	61
1926	893	84
1927 (to September 1927)	652	70

However, this reality can be contrasted with the discussion that took place during the debate on the Bill in Parliament where it appears that the enthusiastic uptake of the form may have been unanticipated. Indeed, it had been intimated that the likely demand for the proprietary form would be relatively small, especially given the differing corporate contexts between the UK and Victoria relating to the ‘private’ company. It was observed that ‘[t]here had not been more than a dozen or twenty of these private companies in the colony, but in England there were thousands upon thousands’.¹⁰⁹

Whatever the expectation, the advantages provided by the proprietary company of limited liability and corporate privacy proved to be tremendously attractive to not only new businesses, but also to existing limited companies, many of which promptly converted themselves into proprietary companies. Indeed, future Labor Premier George Prendergast recalled later that as soon ‘as the Act of 1896 was passed a great number of people, who were supposed to be

106 John Lael Donaldson and William Thomas Charge, *The Proprietary Company in Victoria: A Handbook for Directors, Secretaries, Shareholders and Other Business Men* (Law Book Company, 3rd ed, 1928) preface.

107 RN Purvis, *Dawes Australian Proprietary Companies (1961–1962 Uniform Legislation): Law and Management* (Butterworths, 2nd ed, 1964) 74–9.

108 Data consolidated from Donaldson and Charge (n 106) preface.

109 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 December 1896, 4160 (Robert Harper) (‘Legislative Assembly, 8 December 1896’).

companies, took immediate steps to carry on under proprietary names in order to avoid the restrictions'.¹¹⁰

B Concerns about Proprietary Companies: A Vehicle for Evasion of the Law?

From the outset, there was a recognition in some quarters that the exemption of this type of company from the key disclosure provisions of the *Companies Act 1896* would be attractive to many for all the wrong reasons. Even before the passage of the Act, Sir Henry Wrixon had expressed concern that 'the introduction of such a system would lead, if not to the collusive formation of proprietary companies, at any rate to a very extensive formation of such companies under the shelter of the proprietary system – companies which really ought not to be regarded as proprietary companies at all'.¹¹¹ In other words, rather than simply being a convenient option for family businesses or small partnerships, the proprietary company would be employed precisely for the purpose of evading the Act.

Somewhat wryly, Isaacs had stated that '[i]f that provision could be carried out without allowing a loop-hole for evasion of the whole Act, it would be a matter for congratulation'.¹¹² This was demonstrated by the fact that a number of companies, especially within the shipping industry, were allegedly registered as proprietary to hide their balance sheets.¹¹³ As Prendergast noted regarding reliance on the proprietary company as a vehicle, '[t]he tendency nowadays is to make secret the operations of a number of companies, which ought to be disclosed to the public'.¹¹⁴

However, despite these concerns, the rise in the popularity of proprietary companies opened the door for the loosening of some of the restrictions applying to proprietary companies when the law was reviewed in subsequent years, notably the restriction on the number of members in these entities. At the same time, there was a resistance toward introducing more regulation to restrain the excesses of this business structure.

C Changes to Membership Numbers

By 1903, the supposition that the proprietary company would be a device only of the small private business was dispensed with, and an increase in the number of shareholders was allowed from 25 to 40.¹¹⁵ This provided the facility to allow larger companies to make use of the device. A review of the parliamentary debates of that time highlights that there was no discussion regarding the change. The amendment was basically mirroring the definition of private companies in England.¹¹⁶ Furthermore, the atmosphere was changing and the *Companies Act 1896*

110 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 December 1903, 2103 (George Prendergast).

111 Legislative Council, 25 November 1896 (n 97) 3694 (Sir Henry Wrixon).

112 Legislative Assembly, 8 December 1896 (n 109) 4155 (Isaac Isaacs, Attorney-General).

113 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 September 1920, 1683 (George Prendergast) ('Legislative Assembly, 22 September 1920').

114 Ibid 1685 (George Prendergast).

115 *Companies Act 1903* (Vic) s 5.

116 See *Companies (Consolidation) Act 1908* (UK) s 121.

was even referred to as a ‘panic legislation’,¹¹⁷ inferring that the old restrictions on companies were no longer appropriate.

In 1910, this membership limit was increased to 50, but the number of members could really be larger as this limitation did not include employee members. In fact, the law set up a new exclusion of employees from this number.¹¹⁸ Furthermore, breaching the membership limit had few consequences as the law did not impose penalties on proprietary companies who breached this legislative requirement.¹¹⁹

A decade was needed before an effort was made to impose some consequence for breaching these restrictions. The amending *Companies Act 1920* (Vic) (‘*Companies Act 1920*’) stipulated that the privileges extended to proprietary companies under the principal *Companies Act 1896* would cease and the company would by default be regarded as a public company if the conditions imposed on proprietary companies were not met.¹²⁰ However, no criminal liability was attached to such a breach and no clear enforcement mechanisms were in the legislation to ensure that the proprietary company complied with this requirement. While the amendments in the *Companies Act 1920* offered a small concession to the need to hold proprietary companies accountable, other more damning behaviours of these companies were left largely unchecked.

D Further Concerns Regarding Corporate Practices and the Tension between Supporting Privacy and Promoting Public Interests

It was slowly becoming evident that the proprietary company’s release from some of the protective goals of the *Companies Act 1896* was cause for concern. In particular, instances of investor and creditor disadvantage were emerging due to the exemption of proprietary companies from some key limitations imposed on ordinary limited companies.

1 Issues with Corporate Capital

One area of concern was the emergence of companies incorporated with very little genuine capital. Under the *Companies Act 1896*, a company limited by shares could not commence trading or exercise any borrowing powers until one-third of the shares had been subscribed for and one-fourth of the subscribed capital had actually been paid up in money or value received.¹²¹ However, this stipulation did not apply to proprietary companies.¹²² By 1928, the Attorney-General, William Slater, was compelled to acknowledge the mounting ‘evidences in the past ten years of the frauds and malpractices of some proprietary companies’. He noted the ‘fact that so many of these companies were bogus companies, formed with little

117 ‘Company Law: The Consolidation Proposal’, *The Age* (Melbourne, 30 November 1910) 13 <<https://trove.nla.gov.au/newspaper/page/18562109>>.

118 *Companies Act 1910* (Vic) s 130(1)(b) (‘*Companies Act 1910*’).

119 Legislative Assembly, 22 September 1920 (n 113) 1683 (George Prendergast).

120 *Companies Act 1920* (Vic) s 2(1).

121 ‘Company Law Reform’, *Dun’s Gazette* (Sydney, 18 January 1909) 1 <<https://nla.gov.au/nla.obj-754886058/view?partId=nla.obj-754891245#page/n0/mode/1up>>.

122 This was affirmed in the 1910 consolidating Act: *Companies Act 1910* (n 118) s 95(6).

or no capital, engaging so freely in trade and commerce, and having the means ... of robbing people and then avoiding responsibility by going into liquidation'.¹²³ He also recognised the challenge of dealing with this conduct 'without harassing genuine proprietary companies'.¹²⁴ Once again, this highlights the concerns of the government toward reaching the 'right' balance of regulation with the aim of both protecting the public and not imposing an unreasonable cost on businesses. The business case seemed to dominate however and, despite the public outcry,¹²⁵ the problem continued into the 1930s with the Chamber of Commerce noting that a 'considerable number of companies are actually trading with nominal capital, in some cases no more than £2'.¹²⁶ The Chamber had long noted that such companies 'were of course, instruments of fraud'.¹²⁷

2 Concerns Regarding the Issue of Debentures

Another concerning practice related to the issue of debentures by proprietary companies to their own directors as a means of defeating creditors. Even though the *Companies Act 1896* defined a proprietary company as one that 'does not receive deposits, except from its members or shareholders',¹²⁸ there was no restriction on proprietary companies issuing debentures as a means of raising capital. Accordingly, even in 1908, the press was laying blame for the sharp practices of some businesses at the feet of an overly permissive legislative regime. As one paper noted 'it is perfectly easy to turn one's business into a limited company, and issue debentures to oneself. If your one-man company gets into difficulties, and has to be wound up, you, as debenture-holder, seize all the available assets, and the creditors of the company are left lamenting'.¹²⁹

The prospect of changing this situation was raised in the evidence given to the 1910 Select Committee upon the Consolidation and Amendment of the Trading Companies law. With the goal of bringing Victorian law into line with the recent changes to the law in England, the Chairman noted '[i]n England, private companies, corresponding somewhat to our proprietary companies, cannot offer shares or debentures to the public'. He went on to ask, '[s]upposing our proprietary companies were prohibited from inviting the public to subscribe for shares or debentures, would that be an advantage?'¹³⁰ Answering this question,

123 'Pitfalls for the Unwary: Dealing with Bogus Companies', *The Age* (Melbourne, 2 August 1928) 12 <<http://nla.gov.au/nla.news-article205482093>> ('Pitfalls for the Unwary').

124 Ibid.

125 'Proprietary Companies: Loopholes for Fraud', *The Age* (Melbourne, 1 August 1928) 12 <<http://nla.gov.au/nla.news-article205466952>> ('Loopholes for Fraud').

126 'Chamber of Commerce Behind Companies Bill', *The Herald* (Melbourne, 16 September 1936) 5 <<http://nla.gov.au/nla.news-article248554900>>.

127 'Company Law Anomalies: But Says Some Clauses Go Too Far', *The Herald* (Melbourne, 25 September 1928) 8 <<http://nla.gov.au/nla.news-article244079055>>.

128 *Companies Act 1896* (n 9) s 2.

129 'Rogue-Laws: Why Wise Criminals Study the Statutes', *Healesville and Yarra Glen Guardian* (Victoria, 17 January 1908) 4 <<http://nla.gov.au/nla.news-article60289332>> ('Rogue-Laws').

130 Select Committee upon the Consolidation and Amendment of the Trading Companies Law, Parliament of Victoria, *Report of the Select Committee Upon the Consolidation and Amendment of the Trading Companies Law* (Report No D.3.12733, 9 November 1910) 10 [167]–[168].

the witness told the Committee that '[o]ne reason why we omitted it in drafting the Bill was that the words "inviting the public, or offering to the public," are extremely ambiguous'.¹³¹ Consequently, a change did not occur and section 130 of the consolidating *Companies Act 1910* (Vic) ('*Companies Act 1910*') continued to omit such language and defined the proprietary company relatively broadly as an entity which 'restricts the right to transfer its shares' and is prohibited 'from receiving deposits except from its members or shareholders'.¹³²

3 *Protective Shield Promoting Privacy of Corporations*

The proprietary company was also found to be a convenient vehicle for public companies seeking to shield their commercial and financial information from the public disclosures required by the *Companies Act 1896*. By setting themselves up as holding companies carrying on business by means of subsidiary proprietary companies, public companies were able to shield their assets and liabilities from public scrutiny. As *The Argus* noted, 'the assets of the holding company were shown as "shares in other companies" which conveyed no information whatever'. As proprietary companies were exempt from the Act's disclosure obligations, this was, the Paper argued, an effective means by which 'the provisions of the *Companies Act*, which required a public company to file a balance-sheet setting out the various classes of assets and liabilities in the prescribed form, were evaded'.¹³³

The Act's exemption of proprietary companies from the requirement to keep proper books was also found to be an effective means by which creditors could be defeated in a manner that was perfectly lawful. In the liquidation of Household Supplies Pty Ltd, for instance, the liquidator stated 'that the books of the company show very little information, and no details of purchases or receipts can be traced, and no creditors' or debtors' accounts are shown'.¹³⁴ The consequence was that the Court was unable to ascertain what amounts were owed to whom, leaving creditors demanding a special investigation into the company. Amendments to the *Companies Act 1896* had, however, limited the availability of a special investigation and audit of companies to the initiation of members holding not less than one-tenth of the issued shares.¹³⁵ In another case, the shareholder-directors of a proprietary company 'paid nothing' to creditors, pleading that 'neither could they keep books and none had been kept', leaving the creditors 'entirely without redress'.¹³⁶

Furthermore, in 1919, proprietary companies were singled out by the Royal Commission on High Prices. The Royal Commission recommended that the *Companies Act* be amended to require companies suspected of profiteering 'to

131 Ibid 10 [169].

132 *Companies Act 1910* (n 118) ss 130(1)(a), (c).

133 "'Holding" Companies: Accountant's Criticism', *The Argus* (Melbourne, 25 January 1924) 8 <<http://nla.gov.au/nla.news-article1900007>> ("Holding" Companies'). See also JS Wilson, 'Company Creations', *The Argus* (Melbourne, 23 September 1920) 6 <<http://nla.gov.au/nla.news-article4582156>>; Robert W Gibson, *Disclosure by Australian Companies* (University Press, 1971) 134.

134 'Household Supplies Ltd: Deficiency of 25,356', *The Argus* (Melbourne, 19 May 1923) 30 <<http://nla.gov.au/nla.news-article2009973>>.

135 *Companies Act 1915* (Vic) s 117(1)(ii).

136 'Loopholes for Fraud' (n 125) 12.

furnish certified copies of balance-sheets, fully disclosing their financial position'.¹³⁷ The recommendation was not adopted.¹³⁸ In September 1920, the Opposition moved an amendment to the Companies Bill then before the Parliament providing that 'all proprietary companies shall cease to be entitled to the privileges and exemptions conferred on proprietary companies under the provisions of the *Companies Act 1915*',¹³⁹ arguing that 'proprietary companies have been brought into existence deliberately to evade company legislation, thus getting out of the conditions that company legislation imposes upon companies'.¹⁴⁰ However, the demands fell on deaf ears and the government remained opposed to this amendment stating that to allow it would 'effectively kill the proprietary provisions of the *Companies Act 1896*, and the Government could not, in those circumstances, proceed further with the Bill'.¹⁴¹ Consequently, the Bill passed without this amendment.

Calls for proprietary companies to be subject to the same disclosure obligations as public companies continued throughout the 1920s and into the 1930s. In 1924, *The Argus* reported that 'as a result of this abuse of the proprietary companies' sections of the Act, it was only a question of time before proprietary companies would be compelled to file copies of balance-sheets'.¹⁴² Despite this prediction, public complaints continued into 1928 about the abuses perpetrated by proprietary companies. A letter to the editor published in *The Age* argued that 'the law should compel the annual filing of a balance sheet, certified to by a public auditor, an audit at least once in twelve months being compulsory. The company's position should be stated, as is required of a public company'.¹⁴³ Such change was necessary, the writer argued, to give traders sufficient information to be able to distinguish between reputable companies and those formed with less reputable intent:

At the present moment a company may register with paid-up capital, for instance, £2, and beyond that fact invariably little or no information is obtainable. There are many sound and financial concerns so constituted, and this only makes the position harder for the trader, as it is almost impossible to discriminate.¹⁴⁴

Governments, however, continued to resist the building pressure to bring proprietary companies into the remit of the disclosure obligations of the *Companies Act 1896* for the benefit of public protection.

4 Avoidance of Tax Obligations

Critics of the *Companies Act 1896* also raised questions about the ease with which proprietary companies could be employed to evade or reduce the payment of taxation obligations. As early as 1908, a loophole in the *Companies Act 1896*

137 *State Royal Commission on High Prices: The Reports of the Inter-State Commission* (Report No 1, 1919) 9 [27] <<https://webresource.parliament.vic.gov.au/VPARL1919No13.pdf>>.

138 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 August 1920, 1016 (Edmond Hogan).

139 Legislative Assembly, 22 September 1920 (n 113) 1690 (George Prendergast).

140 Ibid 1691 (George Prendergast).

141 Ibid 1692 (Harry Lawson, Premier).

142 "'Holding" Companies' (n 133).

143 'Proprietary Limited Companies', *The Age* (Melbourne, 4 August 1928) 27 <<http://nla.gov.au/nla.news-article205476704>>.

144 Ibid.

relating to directors' remuneration was marked as a particular problem. With heavy sarcasm, one newspaper advised 'wise criminals' to study the statutes to find the means to run 'a one-man company without risk of unpleasantness'. All that needed to be done was to 'make yourself managing-director at a salary large enough to absorb all the profits' to avoid the company rate of taxation.¹⁴⁵ It was only with the intervention of the Federal Commissioner of Taxation in 1932 that this device was curtailed with the High Court determining that such manoeuvres could be disallowed and counted as a distribution of profits rather than as deductible salary.¹⁴⁶ A legislative response to this issue was finally introduced, not through an amendment of corporate law, but through the uniform *Income Tax Assessment Act 1936* (Cth) which provided that it 'shall not be allowed for deduction of amounts from the company's assessment, which are ostensibly remuneration for directors who are shareholders and fix their own salaries, and which deductions are obviously distributions of the companies' profits, and should be so taxed'.¹⁴⁷

5 Further Calls for Change

Overwhelmingly however, calls for reform of the *Companies Act 1896* as it related to proprietary companies were prompted by the frequency with which the advantage of limited liability conferred by the proprietary company was exploited by so-called 'one-plus-one companies' to shield personal assets from the claims of cheated creditors.¹⁴⁸ In Parliament, John Cain argued that the law relating to proprietary companies needed 'much more consideration', noting that: '[t]wo men, or a man and his wife, can go into business as a proprietary company and protect their private assets. They can defraud people from whom they purchase goods, and then they can go bankrupt and their personal belongings cannot be disposed of for the benefit of their creditors'.¹⁴⁹

The ease with which such companies could be formed and the privilege of limited liability provided by the companies law was perceived increasingly as an invitation to engage in nefarious conduct. The ability of individuals to form proprietary companies and thus have their personal assets preserved was considered to be a situation in which 'the road was made clear to wholesale fraud'.¹⁵⁰

The press noted that 'traders are repeatedly experiencing big losses, because, when settlements of their accounts become due, they discover that they have been doing business with concerns whose cash funds at no time amounted to more than a few pounds'. Such individuals were able to '[shelter] under the *Companies Acts*' and remained therefore 'outside of the reach of any law by which their creditors can

145 'Rogue-Laws' (n 129) 4.

146 *JP Sennitt & Son Pty Ltd v Federal Commissioner of Taxation* (1932) 1 ATD 387, 388 (Starke J).

147 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 November 1935, 4477–8 (Albert Dunstan).

148 'One Plus One', *The Record* (Emerald Hill, Victoria, 27 April 1912) 4 <<http://nla.gov.au/nla.news-article162602589>>.

149 Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 1936, 619 (John Cain) ('Legislative Assembly, 28 July 1936').

150 'Pitfalls for the Unwary' (n 123) 12.

secure redress'.¹⁵¹ Clamouring for reform, the press argued that existing companies law, especially as it related to the limitation of liability, meant that 'fraud may be perpetrated with impunity'¹⁵² through the vehicle of the proprietary company by unscrupulous individuals 'with a perfect knowledge of the law'.¹⁵³

IV AMENDING THE *COMPANIES ACT*: A RADICAL SHIFT TOWARD PUBLIC INTEREST?

Despite the escalating perception of the proprietary company as a convenient and legal vehicle for conduct that would otherwise be considered fraudulent, until 1938 few legislative concessions were made to the public interest, and the *Companies Act 1896* remained remarkably permissive in the privileges afforded to the form.

A Privileges Attached to Proprietary Companies

In relation to disclosure obligations alone, commentary published in 1928 was able to offer a long list of the advantages and privileges that the most numerous form of company enjoyed over the public company.¹⁵⁴ As the law stood at that time under the *Companies Act 1928* (Vic) ('*Companies Act 1928*'), a proprietary company did not need to provide a list of consenting directors before registration (section 79), it need not file any statement in lieu of a prospectus before allotting shares or debentures (section 90), it did not need to file the statutory report required of other companies to the required statutory meeting (section 91), it was not liable to have its affairs investigated by inspectors (section 130), it was not compulsory for it to have its accounts audited, and it was exempt from provisions relating to the filing of a private balance-sheet (section 130). Further, it was able to commence business and exercise borrowing powers immediately after incorporation without complying with the statutory requirements imposed on other companies (section 95) and without the necessity of keeping proper books, or posting or circulating a public balance-sheet to shareholders. No creditor was entitled to demand a copy of the balance-sheet and, indeed, it was not even necessary for a proprietary company to prepare a balance-sheet at all (section 115).¹⁵⁵

B Increased Pressure for Greater Accountability

Momentum for action against proprietary companies only increased with the onset of the Great Depression and the election of a Labor government in Victoria. In 1931, William Slater, the Attorney-General, noted that '[t]he time was ripe for reconsideration of the law in regard to proprietary companies,' reiterating his

151 Harold Burston, 'Company Law Reform', *The Herald* (Melbourne, 22 May 1929) 8 <<http://nla.gov.au/nla.news-article244449707>>.

152 'Loopholes for Fraud' (n 125) 12.

153 Ibid.

154 Donaldson and Charge (n 106) 10–11.

155 Ibid.

view ‘that the proprietary company provided a cloak for fraudulent practices by unscrupulous persons’.¹⁵⁶ The privacy afforded to the proprietary company by the *Companies Act 1928* was also questioned by the *Labor Call*, which surmised that there ‘must be some very powerful reason for taking refuge under a section of the *Companies Act* which permits a joint stock company to carry on business without publishing a balance-sheet or having its affairs audited’.¹⁵⁷ Indicative of the scale of the problem and the urgency for action, *Labor Call* noted that ‘[a]bout 600 private companies a year are struck off the register, every one of them having robbed their creditors and enriched their promoters’.¹⁵⁸

Ongoing public pressure for some response to the problem was reflected in the bipartisan support for action against proprietary companies. In the succeeding United Australia Party government, the new Attorney-General, Ian Macfarlan, noted in 1934 his long-standing effort to introduce a ‘monumental’ bill containing ‘a complete new system as to proprietary companies, which is a very essential thing’.¹⁵⁹ Even proto-fascist Esmond Kiernan recognised that the ‘private’ business of proprietary companies was operating against the public interest. He stated that

it is altogether wrong to give to private companies – to private enterprise – an unbridled right to exploit the community. It is becoming every day more and more necessary that business should be controlled and regulated in the interests of the community generally. The public is recognizing that business as carried on to-day is entirely divorced from Christian concepts of right and wrong.¹⁶⁰

C 1936–1938: Move Toward Greater Accountability?

It was not until 1936, however, that ‘[o]wing to the numerous recent criticisms of the uses to which the Victorian innovation of proprietary companies has been put, and to the frauds with which the formation or operation of some of them has been associated’,¹⁶¹ provisions relating to the reform of the proprietary company were added to the draft consolidating Bill that had been circulating since 1929.¹⁶² A formative inquiry of the Bill was the following question: ‘[i]n so far as those clauses deal with the type of control and the type of protection to the community, are they sufficient?’¹⁶³ This was viewed as a ‘safe test’ and is indicative of a shift in the attitude of government toward public interest at the expense of the previously entrenched privacy ideology. In addition to a more stringent prohibition

156 ‘State Parliament: Minor Legislation’, *The Age* (Melbourne, 18 November 1931) 11 <<http://nla.gov.au/nla.news-article203721965>>.

157 ‘Startling Statement: Victoria’s Proprietary Companies’, *The Labor Call* (Melbourne, 24 August 1933) 13 <<http://nla.gov.au/nla.news-article249470829>>.

158 Ibid.

159 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 August 1934, 1394 (Ian Macfarlan, Attorney-General).

160 Victoria, *Parliamentary Debates*, Legislative Assembly, 5 September 1934, 1581 (Esmond Kiernan).

161 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 July 1936, 224 (Albert Bussau, Attorney-General) (‘Legislative Assembly, 7 July 1936’).

162 See Joint Statute Law Revision Committee, Parliament of Victoria, *Report from the Joint Statute Law Revision Committee of the Legislative Council and the Legislative Assembly on the Consolidation of the Laws: Together with the Minutes of Evidence* (Report No D.2, 21 August 1929).

163 Legislative Assembly, 28 July 1936 (n 149) 597–8 (Ian MacFarlan).

on invitations to the public to subscribe for shares or debentures and on public deposits, the new bill sought to impose a requirement on proprietary companies to provide notice of their intention to register. Further, it sought to make provision for caveats to be lodged against registration, and significantly, the provisions relating to the keeping of accounts and inspection were to be applied to proprietary companies. The auditing provisions of the Bill were also to be made applicable to proprietary companies with over £10,000 of capital.¹⁶⁴

However, resistance to the Bill's intrusion into the privacy of proprietary companies was quick to emerge. In Parliament, Trevor Oldham foreshadowed the nature of the emerging opposition to these provisions, arguing that '[i]t seems ... that first of all we must try to avoid getting ourselves into the frame of mind when we feel that all company problems can be solved by publicity being given to the internal transactions we seek to control'.¹⁶⁵ Further, Harold Cohen observed the benefits of privacy available to companies as it protects their affairs from being exposed 'to competitors, some of whom may not be Victorian companies, and so put it at a disadvantage'.¹⁶⁶ The Bill was then sent to a committee and came back to the Legislative Assembly in December 1936.¹⁶⁷ However, it was viewed that the task of approving the Bill was too huge before the close of Parliament¹⁶⁸ and the Bill was subsequently withdrawn.¹⁶⁹

Reintroduced in slightly revised form in July 1937, the Bill's proposed changes to the law relating to proprietary companies were strenuously objected to by the Melbourne Chamber of Commerce. According to the Chamber, the proposal to impose auditing requirements on companies with an authorised capital of £10,000 or more, 'struck at the root of the proprietary idea in the formation of companies'. While conceding the likely benefits of the new requirement for proprietary companies to keep proper books, the Chamber of Commerce held that 'there seemed to be no good reason for prevailing upon proprietary companies to the extent of submitting accounts for audit, and making the voluminous disclosures, as was required in the case of public companies'.¹⁷⁰

On this matter, the Chamber of Commerce ultimately got its way, with a successful amendment to clause 122 of the Bill providing that 'as long as proprietary companies kept their books in good order there should be no need for them to furnish elaborate sets of accounts'.¹⁷¹ The impetus to impose auditing and disclosure obligations on proprietary companies as a mechanism of accountability that might prevent the form being used for 'improper purposes' was, in this instance,

164 Legislative Assembly, 7 July 1936 (n 161) 224–5 (Albert Bussau, Attorney-General).

165 Legislative Assembly, 28 July 1936 (n 149) 607 (Trevor Oldham).

166 Ibid 601 (Harold Cohen).

167 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 December 1936, 3698.

168 Ibid 3698–703.

169 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 December 1936, 3951.

170 'New Companies Bill: Commerce Chamber's View', *The Age* (Melbourne, 17 July 1937) 21 <<http://nla.gov.au/nla.news-article205564948>>.

171 'Bill to Control Companies: Good Progress Made', *The Argus* (Melbourne, 19 August 1937) 10 <<http://nla.gov.au/nla.news-article11085494>>. For the debate on this clause, see Victoria, *Parliamentary Debates*, Legislative Assembly, 18 August 1937, 707–8 (Harold Cohen) ('Legislative Assembly, 18 August 1937').

not able to withstand the logic of privacy and the insistence that ‘the great majority of proprietary companies arise from small partnerships or family businesses’.¹⁷²

The new *Companies Act 1938* (Vic) (‘*Companies Act 1938*’) finally passed in December 1938. As Robert W Gibson noted, ‘[t]he legislation had been under more or less continuous action for eight years and it was more than 10 years since Sir Leo Cussen had commenced the preparation of amended legislation’.¹⁷³ For those advocating for reforms to the law relating to proprietary companies in the public interest, there were some wins, despite the loss of the proposed audit and disclosure obligations. In addition to the requirement to keep proper books (section 123(1)), members were now entitled to be furnished with a copy of the balance-sheet and any available auditor’s report (section 130). Proprietary companies were also for the first time brought within the provisions relating to inspection (sections 136–8).¹⁷⁴ Creditors were to be protected by the new requirement that a proprietary company must give 31 days’ notice and advertise its intention to register (section 26(6)) alongside the provision made for the lodging of caveats by persons ‘alleging that the incorporation of the Company is likely to hinder defeat or delay a claim against any person’ (section 26(7)).¹⁷⁵

Perhaps the greatest concession to public interest and a fix for one of the larger loopholes of the *Companies Act* was the new requirement that holding companies prepare separate statements for each subsidiary or prepare consolidated accounts for the group (section 125).¹⁷⁶ As Gibson noted, the *Companies Act 1938* became the first companies legislation in the common law world to implement consolidated financial statements, providing that ‘every holding company should annex to its financial statements either a separate profit and loss statement and balance sheet for each subsidiary, or a consolidated profit and loss statement and a consolidated balance sheet of the holding company and its subsidiaries’.¹⁷⁷ While the *Companies Act 1938* exempted holding companies that were themselves proprietary companies, this provision represented a significant, albeit limited, reassertion of Isaacs’ original conception that the accountability measures provided by disclosure obligations should apply to all companies provided with the advantage of limited liability.

V CONCLUSION

By recalling the origins of the proprietary company as a carve-out that went against the regulatory grain of the original reforms of Victorian companies law, it

172 Legislative Assembly, 18 August 1937 (n 171) 708 (Harold Cohen).

173 Gibson (n 133) 106.

174 Victorian Division, Commonwealth Institute of Accountants, *The Victorian Companies Act 1938: A Summary of the Principal Changes in the Law, with Special Reference to the New Provisions Relating to Accounts* (1939) 41.

175 John Bloomfield, *Company Law Amendments Effected by the Companies Act 1938 (Victoria)* (Law Book, 1939) 72.

176 Peter Walton, ‘The Export of British Accounting Legislation to Commonwealth Countries’ (1986) 16(64) *Accounting and Business Research* 353, 354 <<https://doi.org/10.1080/00014788.1986.9729335>>.

177 Gibson (n 133) 143.

becomes possible to recognise it as both a product of and a site of competing ideas about companies and the public interest. Indeed, it becomes evident that the idea that private companies with limited liability should exist in distinction from public companies with limited liability was not within Isaacs' original contemplation of the necessary reforms to companies law prompted by the economic crises of the 1890s.

The concept of corporate privacy, assured by the late-stage exemptions for the newly invented form of the proprietary company, was an imported logic imposed against the reformist and regulatory grain of the late nineteenth century. To be sure, it was a logic that remained in tension with the impetus toward public interest reforms into the twentieth century as the proprietary company became the dominant company form and was persistently beleaguered by the scandal and exploitative conduct that the form appeared to foster.

Glasbeek has argued that '[a] good deal of intellectual and ideological massaging is needed to maintain the standing of the corporation, a pivotal economic actor, as an acceptable legal/political institution'.¹⁷⁸ In this sense, the proprietary company and its logic of corporate privacy have taken on a partisan task of asserting corporate rights above the public interest, continuing to operate, even today, as a bastion of private law against the broader public interest.

178 Harry Glasbeek, 'The Corporation as a Legally Created Site of Irresponsibility' in Henry N Pontell and Gilbert Geis (eds), *International Handbook of White-Collar and Corporate Crime* (Springer, 2007) 248, 249 <https://doi.org/10.1007/978-0-387-34111-8_12>.