Analyses / Analises

Simplification and Unification in Corporate and Insolvency Law – Are We Making Any Progress?

MICHELE HAVENGA
University of South Africa

1 Introduction

> 'We must not hesitate to innovate forcefully and fearlessly if necessary. ... We must keep abreast of company law developments in the United States, Australia, Canada and particularly the common market countries—and where appropriate, follow significant trends or developments'.

This statement was made by the Standing Advisory Committee on Company Law ('the SAC') in 1989, some thirteen years ago. At that time Canada had recently completed a very successful company-law reform project and since then Australia and New Zealand have comprehensively reviewed their company laws. At first glance, therefore, it seems that innovation in South African company law has not exactly been forceful, nor fearless. South African company law is, despite talk about a thorough review, and the announcement in 1987 by the SAC of a new Five Act approach (see par 3.2 below), lagging behind other jurisdictions with company-law systems derived from English law.

Neither has the review of our insolvency law been progressing at breakneck speed. Although the South African Law Commission ('the SALC') started reviewing the law of insolvency in 1987 and has published a number of working papers for discussion, reports as well as draft legislation, its final recommendations are still under consideration. Matters are somewhat complicated by the fact that two pieces of draft legislation have now been finalised. One, drafted by the SALC, excludes corporate insolvency provisions, while the other, drawn up on instruction of the SAC, provides for a single Bankruptcy Act which caters for both individual and corporate insolvency.

In this note the recent developments in insolvency and company law in South Africa and in other Commonwealth countries are considered with a view to making some recommendations in respect of future law reform in these fields.

* This note formed the basis of a paper read at the *Current Commercial Law* seminar held by the Unisa Centre of Business Law and its Faculty of Law in Midrand on 24 April 2001.

2 Insolvency Law

It has been stated that the law of insolvency has emerged from a backwater to become one of the foremost areas in legal practice (see J Lightman 'The Challenges Ahead: Address to the Insolvency Lawyers Association' 1996 *J for Business Law* 113 at 114, quoted in Michael Crystal 'The Company Lawyer Lecture 1997—Judicial Attitudes to Insolvency Law' (1998) 19 *Company Lawyer* 49). There has indeed been an upsurge of interest in this field of the law over the last three decades. In the United States of America, the *Report by the Commission on the Bankruptcy Laws of the United States* resulted in the enactment of the Bankruptcy Code of 1978, which was substantially amended in 1994. The Cork Report in England (see the *Insolvency Law and Practice Report of the Review Committee* Cmnd 8558 (1982)) led to the Insolvency Act of 1985, which was quickly replaced by the Act of 1986. Both the American and English statutes include corporate and individual bankruptcy and impacted strongly on insolvency-law reform in South Africa and elsewhere. In Australia, the *General Insolvency Inquiry* of the Australian Law Reform Commission, known as the 'Harmer Report', was published in 1988 and led to several statutes over a number of years. And in 1992 the Canadian Bankruptcy and Insolvency Act came into force (see further André Boraine & Kathleen van der Linde 'The Draft Insolvency Bill—An Exploration (Part 1)' 1998 *Tydskrif vir die Suid-Afrikaanse Reg* 621).

The South African statutes relating to insolvency are, to a considerable extent, declaratory of the common law. Early insolvency legislation also had much in common with the English bankruptcy law (see Catherine Smith *The Law of Insolvency* 3 ed (1988) at 7; see also *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223). The South African Insolvency Act 24 of 1936 has been in place for more than sixty years and is the main source of our insolvency law. Although it has been amended more than twenty times, it has never been reviewed as a whole. This fact, as well as the developments abroad, necessitated that this branch of the law be reconsidered and modernised (see also Boraine & Van der Linde op cit at 621). So, in 1987, the SALC was charged with a review of our insolvency law. Six interim reports, seven working papers, and two draft Bills were published before the submission, in February 2000, of its final report which included a final draft Bill. Here I will not go into detail about its individual provisions. (On the first draft Bill, see idem at 621; André Boraine & Kathleen van der Linde 'The Draft Insolvency Bill—An Exploration (Part 2)' 1999 *Tydskrif vir die Suid-Afrikaanse Reg* 38; Roger Evans, Anneli Loubser & Kathleen van der Linde 'Aspects of the Draft Insolvency Bill' (1999) 11 *SA Merc LJ* 21; David A Burdette 'Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process' (1999) 32 *De Jure* 44. Aspects of the second draft Bill are discussed by RG Evans 'Developments in the Law of Insolvency' (2000) 12 *SA Merc LJ* 109). Generally the Bill attempts to generate

greater interest on the part of creditors in the administration of insolvent estates (see the SALC *Report on the Review of the Law of Insolvency* Project 63 Vol 1 (2000) in pars 4.2–4.4.6), contains proposals to curb unfair advantage to some creditors (idem in par 4.5), and endeavours to strike the appropriate balance between the rights of creditors and giving debtors an opportunity to make a fresh start, while at the same time expecting debtors to act honestly and to assist in the winding up of their insolvent estates (idem in par 4.6). Measures were suggested to address persistent complaints that some liquidators are incompetent and even dishonest (idem in par 4.7) and to ensure that the insolvency legislation does not infringe on provisions of the Bill of Rights (idem in par 4.8). The SALC has further proposed a simplification of formalities and has provided for the use of modern technology (eg, for notice by telefax and electronic mail, for information to be stored on electronic or mechanical devices, and for the electronic transfer of funds: idem in pars 4.19–4.20).

The recommendation of the enactment of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Cross Border Insolvency (published as A/CN.9/442 97-12-19) led to the promulgation of the Cross-Border Insolvency Act 42 of 2000 (for comments on the UNCITRAL legislation, see generally AL Stander "n Oplossing vir die Hantering van Transnasionale Insolvensies?' (1999) 62 *Tydskrif vir die Hedendaagse Romeins Hollandse Reg* 508). The SALC foresaw that the legislation based on the Model Law would precede new insolvency legislation, and suggested that the insolvency statute could incorporate any legislation already enacted to give effect to the Model Law (see the SALC *Report* op cit in par 6).

On the much-debated issue of uniform provisions for corporate and individual insolvencies, the SALC has retained its preference for uniform provisions for all corporate and individual insolvencies, with nuances for banks, insurance companies, pension funds, medical funds, building societies and co-operatives where such differences are justified by structural requirements (idem in par 5.1; for its earlier recommendations, see the SALC *Draft Insolvency Bill and Explanatory Memorandum* (1996) at 4 and its *Review of the Law of Insolvency Discussion Paper 86* Vol 1 (1999) in par 5). The SALC carried out its stated intention of not delaying its final report until proposals regarding uniform provisions and other corporate insolvency matters have been finalised (see SALC *Review* op cit in par 6). Nonetheless, it holds the view that the review of corporate insolvency should be finalised simultaneously with the review of provisions for individuals. In support of this position, the SALC advances several, in my view, sound arguments. These are that once a start has been made unification is surprisingly easy; that a unified Act would be more user friendly for foreign investors; that corporate insolvencies far exceed individual insolvencies in terms of value; that unnecessary differences are mostly inexplicable and complicate matters; that the opportunity to enact a unified Act may be lost if not taken now;

that it is easier to amend a single Act than separate Acts administered by different Ministers and considered by different portfolio committees; and that there will be confusion if the insolvency law relating to individuals is reformed and nothing is done in connection with corporate insolvencies (see the SALC *Report* op cit in par 5.2). The SALC also indicated that reorganisation of certain clauses in the final Bill was not attended to because it is envisaged that the Bill will in any case be re-organised before inclusion in uniform legislation to deal with corporate and individual insolvencies (see the Preface to its *Draft Insolvency Bill* at 1).

Keay suggests several advantages in addition to those just mentioned (see Andrew Keay 'To Unify or Not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals' (1999) 32 *De Jure* 62 at 71–72): many aspects of insolvency relating to individuals and corporations are, or could and should be, the same; a unified system with common procedures would be simpler and would result in greater efficiency, simplification through the avoidance of duplication, and a reduction in costs; it would simplify the Companies Act and the Close Corporations Act; a unified system would be much more readily understood by the community and by less experienced practitioners; and it would give recognition to the law of insolvency as a separate field of the law and would facilitate its further development.

While the SALC was in the final stages of the insolvency-law review project, the SAC mandated a research project aimed at the merger of the liquidation provisions of companies and close corporations into the insolvency legislation (the project was undertaken by the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria). The working paper and draft Bill were discussed by the research team and various interest groups at workshops held for this purpose. The project was finalised in December 2000 with the completion of a draft Insolvency and Business Recovery Bill. The SAC will probably soon make recommendations in this regard.

It is to be expected that some obstacles will remain in the way of a unified scheme. But a better opportunity to iron them out and to achieve unification is unlikely to present itself, at least in the foreseeable future. I would suggest that only the provisions in respect of the winding-up of solvent enterprises be retained in the Companies Act and the Close Corporations Act (see also Keay op cit at 77). The unified Bankruptcy Act should contain all other provisions and must be able to stand on its own legs, so that no cross-referencing to Acts dealing with different forms of enterprise should be necessary in respect of insolvent businesses.

3 Company Law

The last comprehensive review of all aspects of company law was undertaken by the Van Wyk de Vries Commission prior to the promulgation of the present Companies Act 61 of 1973. From time to

time Amendment Acts have been promulgated on the recommendation of the SAC. (This Committee is appointed under s 18 of the Companies Act and its powers have been extended in respect of close corporations by s 11 of the Close Corporations Act 69 of 1984 which imposes the same obligations on the SAC with regard to close corporations that it has in respect of companies. The SAC must also maintain a standing sub-committee on close corporations. Its functions are to make recommendations to the Minister from time to time with regard to any amendments to the Act which appear to be advisable, and also to advise the Minister on any matter referred to it by him or her.) Amongst the most recent amendments in company law are the introduction of a new statute on insider trading (the Insider Trading Act 135 of 1998); new capital rules (see generally David Butler ''n Maatskappy se Nuwe Statutêre Bevoegdheid om Sy Eie Aandele te Verkry: 'n Vertrekpunt' (1999) 10 *Stellenbosch LR* 284; FHI Cassim 'The New Statutory Provisions on Company Share Repurchases: A Critical Analysis' (1999) 116 *SALJ* 218; Kathleen van der Linde 'A Company's Purchase of Its Own shares' (1999) 7 *Juta's Business Law* 68; PA Delport 'Company Groups and the Acquisition of Shares' (2001) 13 *SA Merc LJ* 12; JS McLennan 'Company Dividends: The New Law' (2001) 118 *SALJ* 126; and Harvey E Wainer 'The Companies Act Changes B Problems and Doubts' (2001) 118 *SALJ* 133); the mandatory office of the company secretary for public companies; and the provisions relating to uncertificated securities (see Maria Vermaas 'Dematerialisation of Listed Shares: A Synopsis of the Companies Second Amendment Act 60 of 1998' (1998) 10 *SA Merc LJ* 336). The Close Corporations Act was amended by inter alia the simplification of the legal position with regard to contracts concluded by members on behalf of the corporation and the provision of a composition procedure (see ss 13 and 17 of the Close Corporations Amendment Act 26 of 1997).

3.1 Company-law Reform in Other Jurisdictions

English company law is primarily contained in the Companies Act of 1985 (c 6). This Act is not a complete codification of company law, but reflects a consolidation of statutory provisions contained in the former principal Companies Act 1948 (11 & 12 Geo 6, c 38) and in four subsequent major Companies Acts (the Companies Acts of 1967 (c 81), 1976 (c 69), 1980 (c 22) and 1981 (c 62)), as well as in other statutes.

The Act of 1985 comprised, when it was enacted, a total of 747 sections and 25 schedules. A substantial number of the sections have been removed from the Act and placed in separate pieces of legislation (eg, in the Insolvency Act of 1986 (c 45) and the Company Directors Disqualification Act of 1986 (c 46)). It has also been amended several times and was supplemented by the Companies Act of 1989 (c 40) to give effect to the European Union's Seventh and Eighth Directives on Group Accounts and Audits (see LS Sealy 'Corporate Law Reform—The

Commonwealth Experience' (1994) 1 *Corporate Law Development Series* 1 par 12–24 for an account of the amending legislation).

In 1998 the Secretary of State for Trade and Industry and the President of the Board of Trade announced the launch of a fundamental review of the framework of company law in Britain (see Department of Trade and Industry *Modern Company Law for a Competitive Economy* (1998); Howard Trust 'Company Law at the Crossroads' (2000) 21 *Company Lawyer* 67). A Steering Group was nominated to manage the still ongoing review. Several strategic consultation documents have been issued, one of which made proposals on the key areas of governance. The review is expected to result in the publication of a Report and a White Paper later this year.

The federal Canada Business Corporations Act of 1985 (RSC 1985, c C-44), which has been followed in almost all of Canada's ten provinces, is the product of a comprehensive review of Canadian corporation law (on the Canadian law reform generally, see SM Beck 'Corporate Law Reform in Canada' (1994) 1 *Corporate Law Development Series* 23). The aim of the review team was to undertake a fundamental evaluation of the law in order to determine the purpose behind the existence of the current rules, whether that purpose was being achieved, and, where necessary, to suggest improvements to the system (see generally Robert WV Dickerson, John L Howard & Leon Getz *Proposals for a New Business Corporations Law for Canada* Vol I (1971), hereafter 'the *Dickerson Proposals*'). A scheme of law was designed that was 'clear, workable and, above all, written for the businessmen who will operate under it, not for the corporation lawyer' (see the *Dickerson Proposals* op cit in par 11).

The Canadian proposals stress the importance of the corporation in the economic system. It has been, and remains, the chief vehicle of economic advancement, and its influence in the society in which we live is pervasive. The limited liability company is described as 'unquestionably one of the most significant concepts in our system of jurisprudence'. The Canadian statute makes use of simple terminology and has done away with terminology based on English doctrines such as the doctrine of constructive notice and the *Turquand* rule. Canadian company law is based on the principles of corporate personality, managerial power, majority rule and minority protection. The new statute has been described as well-drafted and very flexible (see further Stanley M Beck 'Constraints on Pursuing Corporate Opportunities' (1988) 13 *Canada-United States LJ* 143 at 152; Janet Dine 'The European Company Statute' (1990) 11 *Company Lawyer* 208 at 209).

During the nineteenth century most of the Australian colonies passed legislation modelled on English statutes (see Phillip Lipton & Abe Herzberg *Understanding Company Law* 8 ed (1999) at 2ff for a concise account of the development of Australian company law). The lack of uniformity between the various state corporation laws was characteristic of Australian company law and arose because the Constitution did not

give the Commonwealth Parliament a clear power to make laws with respect to all companies (idem at 4). Each state therefore had its own Companies Act. The Uniform Companies Act of 1961, accepted by the various states at different times, was only partially successful in attaining uniformity. During the 1970's, the Co-operative Scheme legislation was developed to fulfill the need to improve administrative efficiency and to create a body which could regulate the securities industry on a nationwide basis. It provided for the Commonwealth to enact legislation applicable to the Australian Capital Territory. Each of the states then passed legislation applying the Commonwealth legislation as its own law.

The Co-operative Scheme was a considerable improvement on previous legislative structures but had, according to a report by the Senate Standing Committee, outlived its usefulness by 1987 (see the Senate Standing Committee on Legal and Constitutional Affairs' *Report on the Role of Parliament in Relation to the National Companies Scheme* (1987)). The Committee recommended that the Commonwealth should assume responsibility for all areas covered by the Co-operative Scheme. As a result, the Commonwealth passed a new legislative package in September 1989, consisting of the Corporations Act 109 of 1989 and the Australian Securities Commission Act 90 of 1989. However, in 1990 the High Court of Australia held that the Commonwealth did not have the power under the Constitution to pass laws providing for the incorporation of trading and financial corporations (see *New South Wales v Commonwealth of Australia* (1990) 90 ALR 355). This triggered further negotiations between the Commonwealth and the states, aimed at achieving a structure that addressed the shortcomings of the Co-operative Scheme and that would also satisfy the respective governments and the so-called Alice Springs Agreement of 1990, which led to the Corporations Legislation Amendment Act 110 of 1990 amending the Corporations Act 1989 so that it applied only in the Australian Capital Territory (the Constitution gives the Commonwealth unlimited power to make laws applicable to the Australian Capital Territory). Section 82 of the amended Corporations Act of 1989 states 'the Corporations Law is as follows: ...', and then lists more than 1400 sections and three Schedules. Fulfilling their part of the Alice Springs Agreement, the states and the Northern Territory each passed their own Corporations Acts. Section 7 of each of these Acts provides that the Corporations Law as set out in s 82 of the Commonwealth Corporations Act of 1989 applies as a law of the particular state or the Northern Territory. The respective Acts also provide for a federal system of administration and enforcement. Technically, therefore, Australian company legislation is contained in one section of the Corporations Act (Lipton & Herzberg op cit at 9).

Since its introduction, the Corporations Law has undergone almost continuous reform (see, eg, idem at 12–13 for a list of the matters regulated by the Corporate Law Reform Act 210 of 1992, the Corporate Law Reform Act 31 of 1994, the First Corporate Law Simplification Act

115 of 1995, the Company Law Review Act 61 of 1998, the Managed Investments Act 62 of 1998, and the Financial Sector Reform (Amendments and Transitional Provisions) Act 54 of 1998).

The Australian Corporate Law Economic Reform Programme, initiated in 1997, resulted in the development of corporate-law reform in the context of a wider economic framework which includes other areas of reform, for example taxation, competition and the regulation of financial institutions. The Corporate Law Economic Reform Act became effective in 1999 and deals with fundraising, directors' duties and corporate governance, accounting standards, and takeovers.

Canadian law has exercised a crucial influence on the development of the Australian company law. But the biggest disadvantage of the Australian corporations laws remains their sheer volume and complexity, despite efforts to make them more user friendly. When all the provisions of the latest Amendment Act have come into effect, the Corporations Law will contain almost 1500 sections and four schedules. The Corporations Regulations and the Australian Securities and Investments Commision (ASIC) Act 51 of 2001 with its own regulations constitute additional corporate legislation.

The New Zealand Companies Act 105 of 1993, comprising less than 300 sections, stands in stark contrast to Australian reforms. The different approaches followed by the respective legislatures is apparent from their reports and discussion documents. Whereas Australia's Act, despite various refinements, is still lengthy and somewhat unwieldy, the Canadian drafting influence on New Zealand law reformers is apparent, in respect of both their general approach and their drafting style (see R Baxt 'New Zealand Companies Bill—A New Approach to Corporate Law?' (1991) 9 *Company and Securities LJ* 46; JJ du Plessis 'Enkele Internasionale Maatskappyregtelike Ontwikkelings: Moet Ons Navolg?' 1992 *Tydskrif vir die Suid-Afrikaanse Reg* 561 at 576). The New Zealand Law Commission's *Report No 9 on Company Law Reform and Restatement* (1989) was generally well received and was described as innovative (see Du Plessis op cit at 573; Ross Grantham 'Reforming the Duties of Company Directors' (1990) 12 *Company Lawyer* 27; and Len Sealy 'Reforming the Law on Directors' Duties' (1991) 12 *Company Lawyer* 175). The discussion document is brief and identifies problem issues crisply. While the New Zealand Law Commission did not hesitate in advancing its own preferred approach to certain issues, it invited comment on a continuous basis, and also facilitated such comment by posing pertinent questions. This proved to be a very successful approach (see the Commission's *Report* op cit at ix–x; Du Plessis op cit at 568). The Law Commission initially anticipated following the Australian model much more closely, but ended up describing the Australian legislation as 'outdated and dense in form', preferring instead to follow the Canadian approach (see its *Report* op cit in par 322).

3.2 South African Law Reform

It has long been acknowledged that South African company law needs to be thoroughly reviewed. (In 1993, eg, it was pointed out at a conference organised by the Co-Ordinating Research Institute for Corporate Law that such a review was necessitated by national and international developments, and that, although the Companies Act was regularly updated, a system of ad hoc amendments and modifications did not lend itself to a principled reappraisal and reform of South African company law: see JJ Henning, PA Deport & MM Katz (eds) 'The Future Development of South African Corporate Law' (1994) 1 *Company Law Development S*eries *i.*) Most commentators agree that piecemeal reviews of our company law will not suffice, and that if South Africa is to take its rightful place as an important economic role player in Africa as well as the rest of the world, our company law should be reformed as soon as is practicable (see, inter alia, JSA Fourie 'South African Corporate Law Reform—Lessons from Abroad' in: 'Selected Essays in South African Entrepreneurial Law' (1996) 2 *Company Law Development Series* 62–81 at 78). When one looks at the reform initiatives which have taken place in overseas jurisdictions, it is clear that a comprehensive reform of our Companies Act, which is steadily becoming less like its English counterpart, is long overdue (see Fourie op cit at 62; JJ Henning 'The Future of Entrepreneurial Law; The SAC's Proposed Strategic Framework for Reform' 1999 *J of Juridical Science* 58).

The first indication of a definitive reform programme came in a press statement released by the SAC through the Department of Trade and Industry in 1997. The SAC indicated a framework for the future development of South African entrepreneurial law (see HS Cilliers, ML Benade, JJ Henning, JA du Plessis, PA Delport, L de Koker & JT Pretorius *Corporate Law* 2 ed (2000) at 25–26; Henning op cit at 62–64). Five main statutes were envisaged. The first Act would be a revised Companies Act dealing with predominantly administrative matters, the major organs of a company, the relationship between the shareholders and directors, and aspects of the relationship between a company and its creditors. A new Securities Act would deal with the raising of new capital by companies, including the regulation of prospectuses. As the third principal Act, the Close Corporations Act would be retained. As the fourth Act, a new Bankruptcy Act was suggested. This Act would deal with the insolvency of individuals and corporations, as well as compromises and judicial management or similar legislation. The fifth main Act would regulate unincorporated forms of business enterprise, focusing on the law of partnership and the law of business trusts. It was further recommended to the Minister that the mandate of the SAC be extended to include all five these statutes, and that, with the possible exception of the new Bankruptcy Act, they should remain within the ambit of the activities of the Department of Trade and Industry and be

administered by the offices of the Registrar of Companies and Close Corporations. There has been an unfortunate lapse of time between the expiry of the term of the previous SAC and the appointment of a new committee at the end of 2000. The new SAC is expected to take further action on these recommendations.

4 Recommendations

The implementation of the SAC's proposal will in my view provide a sound structural base for the simplification of our entrepreneurial law. I agree with the view held by many lawyers that our existing law of partnership works well in practice and that it should not unnecessarily be complicated or tampered with. But it is imperative that the law should be accessible not only to experienced professional advisers, but also to the participants in business ventures, especially in emerging markets. I therefore welcome the idea of a new Business Enterprises Act and would suggest that the Close Corporations Act can serve as a model here, at least in respect of its clarity, brevity and simplification of the law. The American Revised Uniform Partnership Act (see generally Catherine Jorna 'The Legal Nature of Partnerships' 21 *Transactions of the Centre of Business Law* University of the Orange Free State (1994) at 98 et seq) will certainly be of comparative value, but it must be borne in mind that the American statute is aimed at larger and financially stronger undertakings than those for which the South African Act will typically be providing.

Until the new legislation has been drafted, existing statutes will of course continue to be revised and supplemented as the need arises.

Sound reform requires a re-evaluation of the core-principles on which the law is based as well as the drafting of legislation to give effect to those principles. This has to a large extent been done in respect of insolvency law. But the function of corporate law should again be considered. Its primary purpose should not be regulatory. The main objective underpinning company law must be to facilitate legitimate business activity (see S Elias 'Company Law in the 1990s' in: JH Farrar (ed) *Contemporary Issues in Company Law* (1987) at 5). Developments have been driven primarily by the need to balance the needs of commerce and industry with the need to protect investors and creditors (see Andrew Haynes 'Future Developments in Company Law' (2000) 21 *Company Lawyer* 48). Any serious attempt at company law reform must balance efficiency and fairness (see Farrar *Contemporary Issues in Company Law* op cit at *xii*). Corporation Acts should be enabling, allowing those in business to organise and operate their enterprise, whatever its size, with the advantages of the corporate mechanism. They should promote efficient business and must be able to adapt to the needs of change. They must provide the legal and financial structure of the business, and arrange the internal affairs of the organisation, as well as its dealings with the outside world. They must, furthermore, provide for changes in the

corporate structure and should seek to prevent abuses of management and the majority while protecting minority shareholders, creditors and other stakeholders.

It is essential that any wholesale reform initiative should not take place in isolation, but that it should consider related fields of the law, not only to avoid contradictory provisions in the respective pieces of legislation, but also in the interest of policy co-ordination. For corporate law, developments in competition, labour and tax law, for example, are of particular importance. Reviews should be comprehensive and must avoid piecemeal amendments. The relatively new constitutional dispensation in South Africa will undoubtedly also influence the development of our corporate law (see my 'Corporations and the Right to Equality' (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 495 at 507). One of the biggest challenges to corporate-law reform must of necessity be constitutionality.

Various commentators have pointed out that English company law is cumbersome and no longer provides an attractive model (see Du Plessis op cit at 563 and authorities cited there; Sealy 'Reform' op cit par 13). Further factors counting against English law as a model for South African reform are the considerable influence exercised on it by the Directives of the European Economic Union and the fact that English company law is itself under current and comprehensive review. By contrast, Australian corporate legislation remains 'hopelessly long and complex' (see Vanessa Mitchell 'Company Law Reforms in Australia and the United Kingdom' (1999) 20 *Company Lawyer* 98 at 104). The corporation statutes of New Zealand and Canada are approximately a quarter of the length of the Australian legislation and these systems are likely to provide most guidance for local reformers.

Law reform, especially on the scale envisaged by the SAC's five Act plan, requires the involvement of academics, practitioners and stakeholders from the outset. It is therefore important that research should be co-ordinated. I believe that the Department of Trade and Industry has established a mechanism for this purpose. This step is to be welcomed and I would suggest that the incentive of adequate compensation for research undertaken will ensure the required quality of research. The approach followed by the SAC to appoint a small but dedicated research team for the drafting of a Uniform Bankruptcy Act was, in my view, very successful. The team accomplished a lot in a relatively short time, and the regular workshopping of their proposals with various interested parties ensured that many contentious areas received due attention at an early stage. Following this procedure will also enable different dedicated research teams to work on various aspects of the proposed plan simultaneously, so enabling faster progress.

The promulgation of new statutes resulting from major law review is, of course, not the end of the road for law reform. The new provisions have to be tested in practice and flaws and unforseen eventualities are

likely to occur. With that in mind the Canadian Bankruptcy and Insolvency Act povides that when three years have lapsed after the reforms have come into force, a committee must be established to undertake a comprehensive review of the provisions and the operation of the Act and that a report must be submitted to Parliament one year later (s 92 of the Canadian Bankruptcy and Insolvency Act of 1992). And in America, the National Bankruptcy Conference was established in 1988, ten years after a major review of the federal bankrupcy law, with the object to examine the first decade of operation of the Bankruptcy Code and to decide on a possible agenda for its reform. The Conference issued a final report in 1994. The Australian Company Law Economic Reform Program has greatly influenced the ongoing reform of corporate law in that country. The SALC's recommendation that a standing advisory commitee should review our insolvency law on an ongoing basis (see its *Report on the Review of the Law of Insolvency* Vol 1 (2000) in par 1.4) is thus in line with current practice and should, in my view, be supported. I would suggest, on the premise of one Act regulating corporate and individual bankruptcy, that the SAC might be enlarged to carry out this function. This would serve the interest of co-operation between the two government departments that are likely to retain control over the bankruptcy and corporate legislation.

One must bear in mind that law and politics go together. South Africa is unlikely to experience the problem faced by some other jurisdictions that corporate-law reform initiatives fall by the wayside because of a change in government. Nonetheless, law reform will only succeed if the ministries charged with it are well disposed to reform and are able to secure acceptance by the government of proposals in that regard.

At first glance it might seem as if progress with corporate and insolvency law reform has been rather slow. But on closer consideration it appears that quite a lot has in fact already been achieved. A framework has been put forward, the Bankruptcy Act is close to finalisation, and the recent amendments to the Companies and Close Corporations Acts have already incorporated some much needed reforms. Some of the recommendations made by the King Committee on *Corporate Governance* have also been enacted (see, eg, s 268 of the Companies Act in respect of the mandatory appointment by public companies of a company secretary). The release of the second King Report is expected soon. It will undoubtedly contain further compelling suggestions. We have a sound basis from which to work, and we must now seize the opportunity.