

Business Law Section, Law Council of Australia
Corporations Law Workshop Dinner

A Complicated Brief – The Corporations Law Adviser

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There is very little in the historical record in the way of nice things said about corporations. The most notable sayings about them are negative. One such is the often quoted statement of Sir Edward Coke in the case of *Sutton's Hospital* in 1612:

They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls.¹

Nearly two and a half centuries later, in 1864, Abraham Lincoln wrote, in what might then have seemed improbably apocalyptic terms, and now seem an almost accurate prophecy:

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country ... corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavour to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands, and the Republic destroyed.²

Trying to find balance by searching the Internet for 'nice things about corporations' is an unrewarding exercise. The first relevant entry under that heading in Google appears to derive from an aggrieved music lover. It says:

¹ (1612) 10 Co Rep 23; 77 ER 960 at 973.

² AH Shaw (ed), *The Lincoln Encyclopaedia: The spoken and written words of A Lincoln arranged for ready reference* (The McMillan Company, New York, 1950) at 40.

This is why we can't have nice things, because corporations have made it so concerts are now only for the privileged.

A narrow focus, but one perhaps indicative of wider community feeling. A search of the Internet for 'nice things about corporate lawyers' is a waste of time. The first entry in Google under that heading relates to legal practitioners in Nice in France.

There was little else I could find to light up the portals of this speech. There is, however, something of a disconnection from reality in the negative view of the modern 'corporation', which has its roots deep in history and looms large in popular culture and the media. One important reality is that corporations in the private sphere are diverse in size, purpose, culture, power and wealth. That diversity is illustrated by the very large number of small businesses and professional practices that are carried on through corporate structures. It is illustrated by corporate charities and by the large number of incorporated non-government organisations dedicated to public interest or other beneficial activities. Then there are those entities at the public/private interface incorporated by statute for public purposes, such as universities, many of which now charge fees for the services they provide to some students and also carry on ancillary trading activities.

Negative popular views of the modern corporation, particularly informed by popular culture, do not allow for that diversity when the word 'corporate' is used. Those views are no doubt informed by the high profile misdeeds of particular corporations involved in raising money from the public and then losing it, incurring debts and not paying them, misleading members of the public and potential investors about their activities, their financial health, their products and services, and carrying on business in a way that impacts harmfully on the public interest, public health and the environment.

The corporation is an artificial person created by law. It is easy to personify the artificial person and judge it. It is easy to generalise and cast a net of moral suspicion over the whole corporate sector so that the word 'corporate' becomes almost a term of disapprobation. In the end, however, particular judgments must be

about the people who direct, guide and manage corporations. And public policy judgments emanating in the regulation of corporate behaviour, while imposing sanctions on bodies corporate, must also be directed to the people behind them.

The law today creates the conditions under which corporations can be created and can raise the capital and acquire the assets necessary to undertake projects, produce goods or offer services of benefit to society. It also seeks, at great length and with great complexity, to bridle what history demonstrates can be an unruly, undisciplined and sometimes amoral beast. The facilitative and regulatory aspects of corporations law today are mirrored in centuries' old debates which continually remind us that there is nothing new under the sun.

The joint stock company which emerged in the seventeenth century was described by William Holdsworth in his *History of English Law* as 'a valuable instrument for the promotion and working of new industries, and for the mobilization of national credit'.³ But he went on to write:

On the other hand, it had also ... become clear that it could be used to perpetrate gross frauds upon the public, and to encourage wild speculation and gambling in stock and shares.⁴

The so called 'Bubble Act' of 1720 was enacted against a background of promotions and speculative investment ending in the South Sea Bubble Crash of that year. The Act⁵ was passed, inter alia, to restrict invitations for public investment in purported corporate bodies created under obsolete charters. Maitland wrote of a 'panic-stricken Parliament' issuing 'a law, which, even when we now read it, seems

³ W Holdsworth, *A History of English Law* (2d ed) (Methuen & Co Ltd, London, 1937) vol VIII at 213.

⁴ Holdsworth, fn 3, at 213.

⁵ 6 Geo I c 18.

to scream at us from the statute book'.⁶ The precise meaning of the clauses of the *Bubble Act* was doubtful.⁷ However, it seems clear that acting or presuming to act as a corporate body, raising or pretending to raise transferable stock and transferring or pretending to transfer or assign shares or stock were deemed to be illegal and void, unless given legal authority by the Crown or Parliament.

The distrust of incorporated commercial entities in the eighteenth century was not limited to England. Rob McQueen in his interesting book, *A Social History of Company Law*, points to considerable scepticism about corporations in Europe quoting, by way of example, a sweeping declaration of the Revolutionary Assembly in France in 1792:

A State that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, has merited well of the country.⁸

History demonstrates, however, that the ingenuity of the legal profession knows no bounds. That ingenuity was on display by ancestral corporations lawyers in the period, sometimes called the 'Dark Age', between 1720 and 1825 when the *Bubble Act* was in force. Unincorporated associations formed by deed of settlement and most commonly operated by trustees, were used to operate enterprises without official approval.⁹ McQueen suggests that the restrictions imposed by the *Bubble Act* led to innovation by English lawyers and company promoters including new means and varieties of shareholding and capital raising and the concept of preference

⁶ HAL Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, London, 1911) vol III at 390.

⁷ A Dubois, *The English Business Company After the Bubble Act 1720-1800* (Octagon Books, New York, 1938, reprinted 1971) at 2, fn 5.

⁸ R McQueen, *A Social History of Company Law – Great Britain and the Australian Colonies 1854-1920* (Ashgate Publishing Limited, Surrey, 2009) at 20.

⁹ Dubois, fn 7, at 215-217.

shares, debentures and deferred shares.¹⁰ He also suggests that a precipitating factor in bringing about limited liability companies' legislation in mid-nineteenth century England was not so much to provide a framework for the operation of corporation enterprises, but to facilitate the development of the concept of preference shares and to enable corporations to sue and to be sued.¹¹

Legislative change after the demise of the *Bubble Act* in nineteenth century England brought about 'a new legal framework transforming incorporation from a closely-guarded privilege into a freely available right.'¹² But it seems to have been a variety of factors that led to that result. It was not universally welcomed. The rise of the limited liability company faced substantial opposition from vested commercial interests fearful of competition from corporations and others, and fearful of the impunity of owners in the event of corporate insolvency. The objection by Joseph Marryatt in the House of Commons in 1810 to the incorporation of a proposed marine insurance company has a certain modern resonance. In a gloomy prognosis of the effects of limited liability upon insolvent companies, he said:

... if that company should at any time become insolvent, the individual members would still remain in affluence, and drive in their coaches by the persons who had been ruined by such insolvency.¹³

The role of lawyers in devising structures to effect a kind of limited liability did not pass unnoticed. A correspondent to the *Morning Chronicle* newspaper in England on 16 November 1807 wrote:

¹⁰ McQueen, fn 8, at 1 and 30.

¹¹ McQueen, fn 8, at 30, citing Dubois, *The English Business Company after the Bubble Act 1720-1800* at 307.

¹² J Taylor, *Creating Capitalism: Joint Stock Enterprise in British Politics and Culture 1800-1870* (The Boydell Press for The Royal Historical Society, Woodbridge, Suffolk, 2006) at 135; quoted in McQueen, fn 8, at 21.

¹³ United Kingdom, House of Commons, *Parliamentary Debates XV* (Hansard), 20 February 1810 at 494-495.

All the subterfuges and expedients that have been resorted to by plausible solicitors, of introducing clauses into deeds of settlement by which the partners are not answerable beyond the amounts of their respective subscriptions, are laughed at by real lawyers and would be scouted at by a protecting judge ...¹⁴

When a Trading Companies Bill conferring limited liability was debated in the 1830s in the House of Lords it was denounced by Lord Brougham as 'contrary to the whole genius and spirit of the English law, contrary to the genius and spirit of the constitution.'¹⁵ His Lordship and the House of Lords were in turn denounced by elements of the commercial community as having stood in the way of reform against a measure 'loudly called for by the commercial interest and warmly supported by all sides within the walls' of the Commons.¹⁶ The Bill of 1830 was defeated, but the day of the limited liability company was not far off. It came with the *Limited Liability Act 1855 (UK)*¹⁷ which provided for limited liability companies of more than 25 members. It has been with us ever since.

These snippets give us a flavour of some of the history that led to the emergence of the limited liability company, which is the source of gainful employment for so many here tonight. It would, however, probably cause some consternation among those of you who are patiently waiting for their dessert if I were to indicate that the snippets are to be followed by a comprehensive account from the eighteenth century to today of the social and legal history of company law. I do not wish to cause consternation. My remarks were directed to illustrating the complex context out of which the modern corporation and its regulatory framework

¹⁴ Hunt, *The Development of the Business Corporation in England 1800-1867* at 28.

¹⁵ United Kingdom, House of Lords, *Parliamentary Debates XLIV* (Hansard), 31 July 1838 at 840.

¹⁶ The *Morning Chronicle* quoted in Hunt, *The Development of the Business Corporation in England 1800-1867* at 84.

¹⁷ 18 & 19 Vict c 133.

have arisen. The ongoing debate about contemporary laws facilitating and regulating the operation of corporations reflects public policy rooted in ambivalence of long-standing based on what seem like cyclical learning experiences in relation to the use and misuse of corporate structures, particularly in dealings with investors and creditors.

Against that background there is, no doubt, a major challenge for the legal adviser in communicating comprehensibly to those who conduct their business, through corporations, large and small, about the law by which those structures are created and which regulates their operation. That challenge is enhanced when corporate structures are allied, as they often are, to trust arrangements.

Sometimes difficulties of comprehension emerge at a very elementary level. Many years ago in proceedings in the Supreme Court of Western Australia, I cross-examined a real estate agent and asked him what he thought his trust account was for. He replied, confidently, that it was 'a vehicle for the conveyance of money'. There are, no doubt, other people who, even today, might think that proposition to have fairly general application to trust arrangements. On another occasion, I cross-examined a businessman who controlled a number of companies, some of which operated as trustees. His modus operandi was to pay a personal bill by drawing a cheque on the account of one of the companies and to treat the drawing as a loan. One of the companies was a corporate trustee with a balance sheet showing trust assets, which included \$10,000 worth of wine. Asked whether he had consumed any of the wine, the businessman said, candidly, that he had. Asked whether it was a distribution or a loan, he displayed considerable uncertainty.

The complexity of corporations law in Australia is compounded by the federal nature of our governmental arrangements and the written Constitution under which they exist. That constitutional environment explains much of the history of attempts to put in place a national scheme for corporate regulation. The development of corporations laws after federation began with individual State Acts derived from English models and supplanted by the first national scheme, being the *Uniform Companies Acts* of 1961. That was followed by the Cooperative Scheme of 1981 and then the constitutionally abortive attempt by the Commonwealth to pass a

national law in 1989 relying upon its corporations' power. As we all know, the High Court held that 'trading or financial corporations formed within the limits of the Commonwealth' meant corporations already in existence.¹⁸ The decision led the late Paddy McGuinness to write that the only qualification necessary for appointment to the High Court was the ability to parse. The cooperative scheme that was put in place in 1989, following the High Court's decision, suffered a reverse when its provisions for the cross-vesting of jurisdiction in corporations law between State and federal courts was struck down by the High Court in 1999.¹⁹ After some anxious negotiation, the States referred the requisite powers to the Commonwealth to enable it to enact a comprehensive Commonwealth *Corporations Act* and *Australian Securities and Investments Commission Act*, whereby jurisdiction in corporations law could be conferred on both federal and State courts.

What this shows is that a corporations lawyer needs to know not only the *Corporations Act* and the *ASIC Act*, but also needs to know something about the Constitution. The corporations lawyer also needs to know something about public law given the ongoing interaction between corporations and the Australian Securities and Investments Commission, and a number of other regulators. These other regulators are engendered by national and State laws relating to such things as taxation, competition, consumer protection, the environment, town planning, workplace relations, and occupational health and safety. They constitute part of the operational environment for most corporations of any size.

To speak in this context of a corporations lawyer, is therefore to speak of someone who is familiar with the *Corporations Act* and the *ASIC Act* and the regulations and guidelines made under them. It is also to speak of a lawyer who is at least able to identify legal issues arising in any of the areas of legal regulation which can have an impact upon the decisions and choices which confront a corporate

¹⁸ *New South Wales v Commonwealth* (1990) 169 CLR 482.

¹⁹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

client. It is in considering this legal diversity that the practising lawyer is conscious of the tension, affecting many areas of the law, between the acquisition and maintenance of specialist knowledge, which is seen as a prerequisite for efficient service delivery, and the level of generalist knowledge, which is needed to help any client to navigate the large and thickly vegetated legal landscape which it must traverse on a day-to-day basis.

To acquire the appropriate suite of skills in the core areas of so-called 'specialist practice' is no mean feat. To keep abreast with the ever changing content of the law in that core area and in the wider areas relevant to client decision-making, is an ongoing and relentless obligation. It is well illustrated by the range of recent amendments to the *Corporations Act* and related legislation, a number of which appear to respond to events concerning corporate conduct. The so-called Modernisation Act²⁰ covers the regulation of margin lending, trustee corporations and the issue of debentures and promissory notes. It appears to have been engendered, in part, by the Westpoint collapse in 2006. Another recent amendment, no doubt inspired by publicity connected with corporations performing badly, are those dealing with termination payments for company executives.²¹ Corporate reporting requirements have been changed with effect from 28 June 2010.²² The supervision of domestic financial markets has been the subject of recent amendment which empowers the Australian Securities and Investments Commission to set market integrity rules.²³ Then there are the amendments, yet to come into force, named after the company which gave its name to a High Court decision²⁴, the

²⁰ *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth).

²¹ *Corporations Amendment (Improving Accountability on Termination Payments) Act 2009* (Cth).

²² *Corporations Amendment (Corporate Reporting Reform) Act 2010* (Cth).

²³ *Corporations Amendment (Financial Market Supervision) Act 2010* (Cth).

²⁴ *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160.

Corporations Amendment (Sons of Gwalia) Bill 2010. Another pending amendment relates to an area litigated in the Federal Court concerning access to share registers.

Apart from keeping up his or her own body of knowledge about the law, an important challenge for the legal adviser to corporations and particularly large corporate businesses, is to translate the dynamic complexity of the law into advice and, if an in-house lawyer, the formulation of compliance systems comprehensible to those who have the day-to-day conduct of those businesses. We speak sometimes of a culture of compliance as a matter to which regard is had when fixing penalties for breaches of the law by, and within, corporations.²⁵ In areas where the legislation does not always speak with moral clarity or any clarity at all, that is not an easy goal to achieve. I venture to suggest it is best achieved in an environment of some ethical sensitivity. By that I mean an educated instinct which, even if it does not know the detail of what the law requires, knows enough to sense when questions should be asked or advice taken before a decision is made or acted upon.

The demands upon each of you as legal advisers in the field of corporations law are intense. They relate to facilitation and regulation. They have their roots in a long, rich, legal and social history stretching back over centuries. The regular workshops which you conduct in a collegial environment, make a great contribution to meeting them. I thank you for the opportunity to speak to you, and wish you well for the balance of the sessions.

²⁵ *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076; *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) ATPR ¶41-763 at [47] per Goldberg J; *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (2003) ATPR ¶41-937; *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-833; *Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511.