

COMPANY LAW IN AUSTRALIA: PRINCIPLES AND APPLICATIONS

By Associate Professor Peter M McDermott

FOREWORD

The Hon Justice Michael Kirby AC CMG*

The company is a brilliant legal invention. Lawyers, alas, are not always so inventive. It is especially rare that they conceive of something metaphysical. Yet that, undoubtedly, is what a company is. It is a legal person that is distinct from, and greater than, the shareholders, officers and employees who give the company daily life. The author describes the way in which this invention, so important for modern society, was adapted from medieval predecessors in England and France. Little could those who gave birth to this legal fiction have imagined the dominance that companies would come to enjoy in the national economy, in global markets and world power.

Not only was the company brilliant in its conception. Its success can be attributed to the ongoing endeavour to expand and adapt the initial idea to a world of remarkable changes to which the company itself has contributed. This book is the story of the origins

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and history of company law; of the adoption in Australia of comprehensive legal regulations to ensure the integrity of corporate governance; the meandering path by which Australia moved to national control of companies and the consequential regulations of corporate finance, the securities market and the charge of company administration where, as inevitably happened from time to time, the company failed with large consequences for shareholders, directors, employees and creditors. The book finishes with a review of the law on non-profit associations which nowadays assume, in some respects, features of corporate regulation, in recognition of the growing part that such associations play in the success of any nation's civil society.

Teachers of law and students will like this book for many reasons. It is written simply. It has lots of headings and subheadings, so beloved of people in a hurry. The layout is attractive. Each chapter starts with a statement of objectives. The case notes are short and punchy, reducing the endless toil of judges to the bare bones of holdings and the principles of law for which the case stands as binding authority. Each chapter finishes with a résumé of its main points and a summary of the chief legal propositions that have been established. There are even review questions, to help readers check their understandings of the main points and, if they are students, to prepare for the evil day when they will be tested on their knowledge. If this is not a perfect presentation of a student text, I have yet to see a better one.

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Perhaps judges, writing their reasons, could learn from Professor McDermott skills of composition. That would make life easier not only for law students but for lawyers generally and for citizens.

The fact remains that company law is inescapably complex. Indeed, its complexity is treacherous. When I studied the subject at the Sydney University Law School in 1958 under Professor Ross Parsons, the *Companies Act* 1936 (NSW), still modelled on the nineteenth century statutes of England, covered but 248 pages in the consolidated statutes. It had 380 sections and 13 schedules. Now the popular compilation of Australian corporations and securities legislation covers nearly 2,400 pages, including index. The *Corporations Act* 2001 (Cth) comprises 2,550 pages. Including the sections added since the original enactment, there are nearly 1,500 sections. And this says nothing of the substantial schedules to the Act, the detailed provisions of the Corporations Regulations and the companion statutes that must be known and applied, especially the *Australian Securities and Investments Commission Act* 2001 (Cth) and the Regulations made under it.

In 1958, when Murray Gleeson and I shared our labours in company law notetaking, it was conceivable that a law student (not to say a practitioner and judge) would have a good idea of the detail of all applicable companies legislation. However, it is now next to impossible to expect our successors (still less non-lawyer officers and ordinary citizens) to keep so much detail in their heads.

Company law has become a province of the expert. Experts there must be, because the law is constantly being changed. The changes arise from demonstrated cases of statutory omission and from numerous instances of abuse and misuse of company power to which the lawmakers seek to respond.

Whilst such responses are natural, lawmakers must be careful that they do not exceed tolerable levels. In particular, they must keep an eye firmly fixed on the reasons for the economic success of the corporation. This is that it is designed to take risks with other people's money. The company, as an invention of law, would not have succeeded in the way that it has, if the law had not recognised, and upheld, its existence separate from its investors and officers. This book explains the ways in which Australian law has attempted to maintain this brilliant concept of the company whilst protecting investors, employees, creditors and the economy as a whole, from the risks inevitable in this legal creation: that people will sometimes deliberately or negligently misuse their trust, necessitating clear rules to discourage, prevent and sanction such abuse where it happens.

The author has illustrated many of the points he makes by reference to recent decisions of the courts, some of which have come to the High Court of Australia and in a few of which I have participated. The names of several of the cases remind readers of the litany of dishonest and careless management of corporations in

Australia in recent decades. To some extent, the adoption of the federal *Corporations Act* was an outcome of the resolve of the Federal Parliament to establish modern national laws to govern corporations and the securities market so as to establish the governing rules and to provide a "pyramid" of graduated responses where the law was shown to have been broken.

Although, inevitably, the cases in this book reveal many instances of failure and abuse of power, it is important to realise that these are exceptions. For the most part, company officers and employees are honest and competent. Companies are not only the backbone of the Australian economy. As I pointed out in *Rich v ASIC* (2004) 78 ALJR 1354 at 1379 [119], a national companies law today must operate in a regional and global context that inevitably has an impact on corporate governance. International bodies in which Australia participates have developed principles designed to improve corporate regulation and behaviour. The teacher and student of today must prepare for the next phase in company regulation. As I explained in *Rich*:

"Such developments respond, in a transnational way, to publicised cases of corporate failures which now often have economic significance far beyond national borders. They emphasise managerial and directorial responsibilities and community expectations of a more proactive regulation of corporations, aimed at the steady maintenance of standards of integrity and competence in corporate governance. They reflect the view that participation in corporate governance is a privilege enjoyed by individuals subject to compliance with conditions. It is not a private right to be defended, as such ...".

The next phase of law reform concerning the operation of Australian companies, and the securities market, will involve responses to these global phenomena. The catchwords of much international debate today, are "good governance". Under this rubric, a lot of attention is being addressed, to good governance in the public sector. But with the growth and significance of corporations, including transnational corporations (some of which are now performing functions hitherto carried out by the public sector), we are entering a new world. It will change the Australian national law described in this book at least as much as that law has already been changed from the Act of 1936 which I first studied nearly fifty years ago.

A great portion of world trade is now conducted within huge corporations. Equally significant is the multinational trade among such corporations. One of the major issues of "good governance" for the next fifty years will be how domestic law on corporate governance can be effective in a world where so many transnational companies enjoy an economic significance transcending that of many nation States. In future revisions that Professor McDermott writes for this excellent text, I have no doubt that each decade will oblige him to address corporate regulation beyond the Australian nation State. Lawyers of the future, including company lawyers, will have to think globally upon the subjects of this book. This is a far cry from the company law that I

learned. It will present new and different challenges to which effective regulation will have to respond.

In an area of the law now regulated by so much detailed legislation, it would be all too easy to lose one's way. The special merit of this book is that it helps the reader to see the major signposts. It assists in identifying the big themes of companies and securities law. It explains what must happen in the lawful governance of a company, in the raising of its finance, in its participation in the securities market, in takeovers and where the company collapses.

Anyone with a little training can look up the detail, so long as these broad contours of the subject topic are known, understood and remembered. In my years in the Australian Law Reform Commission and my years since as an appellate judge, I have learned the importance of conceptualising the law, perceiving its main rules, understanding its great themes and knowing where to go to fill in the details. This book is a rich resource for law teacher, student and practitioner alike. Indeed, even for an ancient warrior in the law like myself, it is a source of delight in reinforcing the brilliant idea of the corporation, offering reminders of the way it must operate in a legal forest and illustrating how courts struggle to uphold the integrity of the company without destroying the corporate risk-taking that has been the key to its success.

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One thing is sure. The future will offer new and more challenging developments. Those who have a good understanding of the past, and a firm grounding in the fundamentals of the present, will be well prepared to face the changes yet to come.

High Court of Australia
Canberra

18 March 2005

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