Business, Society and the Law

Andrew Terry and Des Giugni

Foreword.

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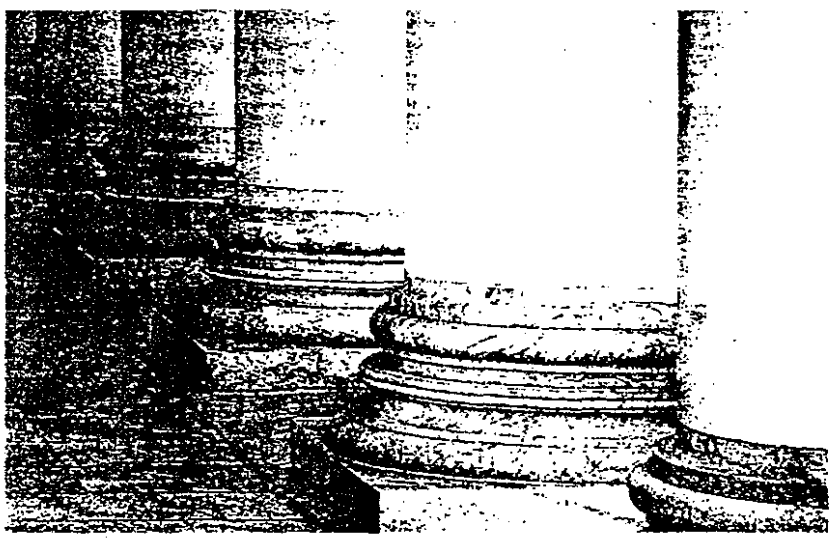
BUSINESS, SOCIETY & THE LAW



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HARCOURT BRACE
Sydney Fort Worth London Orlando Toronto

Senior Editor: Nick Kent
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Designer: Pamela Horsnell
Production Editor: Fiona Sim
Cover and page design: Pamela Horsnell

Harcourt Brace & Company, Australia
30–52 Smidmore Street, Marrickville, NSW 2204

Harcourt Brace & Company
24–28 Oval Road, London NW1 7DX

Harcourt Brace & Company
Orlando, Florida 32887

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National Library of Australia Cataloguing-in-Publication Data

Terry, Andrew, Date — .
Business, society and the law.

Bibliography.
Includes index.
ISBN 0 7295 1227 4.

1. Business law — Australia. 2. Commercial law — Australia.
3. Law — Australia. I. Giugni, Des, Date — . II. Title.

346.9407

Typeset in Times Roman 10/12 by Megan Edwards
Printed in Australia by Australian Print Group

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Foreword

The Hon Justice Michael Kirby AC CMG*

This book is primarily addressed to tertiary students studying Commerce and Economics. No one can venture upon business activities in Australia today without at least a general grounding in the law.

In the closing chapter, the authors reproduce Bronwyn Bishop's graph, which shows the rapid growth of business law and governmental regulations of commerce in Australia. It shows that the output has leapt from 100 Bills a year in the early 1960s to more than twice that by the 1990s. Instead of 600 pages of legislation annually, there are no fewer than 6900 pages. And this is just the federal legislation; and only the legislation made by Parliament. It says nothing of the state legislation, the by-laws regulations and other subordinate instruments. And of course it ignores the pages of the law reports which contain the binding decisions of the courts. As *Mabo v The State of Queensland [No. 2]*[1] demonstrated, the courts of Australia make decisions which, in effect, introduce new legal rules with large ramifications for citizens and for business.

Mrs Bishop's complaint, and her suggested moratorium on federal law making is not new. Jest has it that Moses, producing the tablets of the Lord's instructions boasted that he had 'got Him down to ten. But adultery stays.' Montesquieu, the French political philosopher, wrote 250 years ago that 'just as useless laws weaken the necessary ones, those that can be evaded weaken all legislation'.

Various suggestions are made, short of a moratorium on law making, to improving Australia's laws as they affect business[2]. The difficulty of securing parliamentary time for the proper consideration of matters, and the executive dominance of Parliament (the 'executive dictatorship' noted in chapter 2) may lie at the heart of some of the ill considered, hurriedly drafted and poorly thought-out legislation which emanates daily from the law makers.

In the later parts of the book the authors specifically focus on business, the competitive environment and the corporation. Readers see the way the Australian legal system attempts to solve the age old problem of the law. This is to secure a high measure of perceived justice and fairness at the same time as offering a high level of certainty. The boast of the Australian legal system is that it searches for justice and provides the infrastructure for a community which submits great power to detailed legal regulations. 'Be you ever so high, the law is above you.' It was this message which was carried by the courts of the United States to President Nixon. More recently, it was the lesson which the House of Lords gave to the Government of the United Kingdom.[3] This is what the High Court of Australia, upholding the Constitution has regularly done to Australian governments of differing political complexion.[4] There is an interesting symbiosis here between the responsive, accountable democratic elements in our government (the elected Parliament and ministers) and the stable continuous elements of government (represented by the Crown and the judiciary).

Responsiveness and instability interact with elements of certainty and predictability in the law. The Australian legal system is, in its origins, the gift of the common law of England.[5] But from the earliest days of the colonial

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legislatures we have been adapting and modifying that law to the perceived needs of our own society. As well, the courts have gradually thrown off the intellectual blinkers which for so long fixed their sights on the decisions of the English courts. The intellectual fascination of the decisions of those courts, representing one of the great legal traditions of the world, was reinforced, until recent times by the answerability of the Australian courts to the Privy Council in London. By the 1980s the last formal and institutional legal link had been severed. Executive, legislative and judicial independence was fully secured. The last step in this process was taken when the Queen of Australia, acting at the time with the advice and consent of the Senate and House of Representatives and of the other governments and legislatures of Australia, put her signature to the *Australia Acts 1986* at Parliament House, Canberra.

Intellectual freedom, on the other hand, has been more slow in coming. The judges and the lawyers still have the English books on their shelves. Those books remain a great treasure store of legal principle. Yet it is my hope that in the next edition of this work there will be as many Canadian, New Zealand, United States and other common law cases cited by the authors as decisions from the distinguished English judges quoted throughout the text. We must keep the best of the legal system and methodology which we have inherited from England. But we must now set about reconsidering the suitability of some of the inherited rules for the very different society which we have built, and are building, in Australia. This process has begun. It adds a dynamic to the law which is bound to introduce elements of uncertainty into it.

If this book teaches its readers nothing else, it should be that the law of a society such as ours is not a clear set of rules. It is far from set in stone. It is a vast, amorphous, ever-moving body of rules and principles. Because it is expressed in language, and because language (particularly the English language) is irretrievably obscure and ambiguous, our law necessarily lacks precision. Lawyers guiding business people must try to offer precision and good predictions in their advice. But the choices will not readily go away. In the end, then, it falls to the judges to determine what a statute means. And if there is no statute, to declare what the common law says on the subject. The way in which this remarkable system of law operates is described in the opening chapters.

Lawyers brought up in the civil law tradition of Europe usually regard our legal system as primitive, unconceptual and unforgivably uncertain. And yet it is a system which continues to operate for a quarter of humanity. The basic reason why this is so, decades after the Union Jack was hauled down and the last viceroy departed with his feathered helmet, is that the system is an intensely practical problem-solving one. That generally makes it a system suitable for business. It is the point of this book that, in so many areas, legislation of great complexity has been enacted. The business executive and the would-be corporate giant ignore the imperatives of such legislation at their economic peril.

One solution to the burden of too many laws ensnaring the business operations of Australia is a moratorium on law making. Because it seems unlikely that such a solution will be adopted in the near future, we must explore other, more feasible, options. One of these is the reform and simplification of the law. For instance, I believe that the *Insurance Contracts Act 1984* (Cth), which originated in a report of the Australian Law Commission[6], is a good illustration of the feasibility of collecting the basic principles, reforming them on the way and stating them in an accessible statute in comparatively simple language which can then be used to instruct business and citizen alike. We need more projects of this kind.

Another solution is that suggested by Lord Denning, noted by the authors in chapter 26. It is the adoption by judges of the 'purposive' construction of statutes.[7] In the past, the pernickety, narrow and overly technical construction of legislation drove distracted parliamentary counsel and determined politicians into the

cumbersome and wordy statutes that have filled the books. The price of simpler, clearer laws will be a new judicial approach to the task of statutory interpretation which furthers the achievement, and not the frustration, of the parliamentary purpose.

A third solution, closely allied to the second, is specially relevant to the area of business law. A reflection upon the many shocking business failures in Australia in the 1980s, and the losses which ordinary citizens (shareholders, employees and investors) suffered should teach the courts a lesson on the need to enforce of high ethics in business (especially corporate) life. It is not so much the law which has been found wanting in this regard but, sometimes, the enforcement by the courts of the high standards which Parliament expected when the laws were enacted.[8]

I will not, like Lord Denning, endlessly reagitate my dissenting opinions in book forewords. Those views are in the case books. Readers can make up their own mind. It is a strength of our legal system, that dissenting opinions, which acknowledge the independence of each judicial decision maker, are published. The lesson of our legal system, is that, in the long run, dissenting ideas sometimes come to be accepted. Heresy becomes orthodoxy. I believe that Australian courts in the future will increasingly insist upon much higher standards on the part of corporate officers and business entrepreneurs.[9]

The fourth way in which the law can operate more simply is by the inculcation of stronger self-regulation and a culture of more effective business ethics. The law governing business in Australia is highly complex. It can not be reduced to a simple moral code. But a lot of the problems in recent years, in this area of the law's operation, have arisen from the failure of those entrusted with the money of others to act honestly, faithfully and diligently in the performance of their duties. As many cases demonstrate, the adoption of higher ethical standards, would usually have kept the parties out of court. It would have safeguarded the investments of ordinary citizens whose losses have inevitably shaken the community's faith in business and its confidence in the law.

It is to be hoped that the new generations of business leaders of Australia, and those who advise them, will learn from the errors of the past. To revive our flagging economic fortunes, we need a rebirth of the entrepreneurial spirit which lay behind the initial conception of the limited liability company. That spirit must be tempered by the ethical rules which, as this book shows, now permeate so many applicable areas of the law: both statute and judge made. Entrepreneurial flair, undisciplined by honesty, integrity and diligence will land us back in the mire of the 1980s.

Excess regulation and interference in the market to redress the wrongs of the few may, on the other hand, dampen unduly the spirit of innovation and risk-taking which creates jobs and promotes vital economic growth.

The challenge for business, society and the law in Australia in the coming years is to get the right mix of certainty and flexibility, rules and discretion and entrepreneurship and regulation. They are not in good harmony at this time. Perhaps the starting place for developing a better harmony is in the minds of the corporate leaders and their advisers of the years to come. My hope is that this book will contribute to that internal process of reform.

Michael Kirby
2 May 1994