

Media Release

"Don't Kill Corporate Enterprise with Laws", says Kirby

Institute of Corporate Managers

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DON'T KILL CORPORATE ENTERPRISE WITH LAWS, SAYS KIRBY

SYDNEY, Wednesday: The President of the New South Wales Court of Appeal, Justice Michael Kirby, said tonight that courts and legislators had a duty to develop company law and practice in a way that preserves the honesty, care and loyalty of corporate officers but did not destroy their entrepreneurial vigour, imagination and enterprise. Getting the right balance was vital to the economic well-being of the Australian economy and to the achievement of micro economic reform. But it was not easy. And the right balance had not always been achieved in the past in Australia.

"Legislators, courts and regulators must realise that the corporation is one of the most vital inventions of our legal system. It is a major reason for the economic progress of English-speaking common law countries. Strict laws for the accountability of corporate officers against standards of honesty, care and loyalty to the corporation and its shareholders are necessary. Company secretaries and managers have a high duty to ensure that the law is properly observed within companies. But in making new laws and imposing new duties, the law-makers and regulators must be careful not to kill the goose that repeatedly lays, we hope, the golden economic egg. The company officer in Australia today is entangled in a network of complex and detailed laws which even the most senior judges and lawyers in the country cannot hope to retain their memories. It would be a tragedy for the ultimate mission of the corporation in Australia if company officers spent most of their time conforming to legislative obligations of form filling and administrative compliance but forgot the entrepreneurial purpose of the company - to make goods and supply services, employ people, serve society and reward shareholders.

Specifically, we must be careful that we do not so entangle the corporate officer in laws, regulations and new court decisions that company officers in Australia are constantly looking over their shoulders at officials or spending most of their time in lawyers offices and courtrooms. Lawyers, with their natural caution, are not the best people to run companies. Usually they lack the flair and imagination necessary. The challenge before us is to secure care, honesty and loyalty by internalising good corporate practice and avoiding as far as possible the need to resort to law.", Justice Kirby said.

Justice Kirby was addressing the annual dinner of the Institute of Corporate Managers, Secretaries and Administrators at the Tattersall's Club, Sydney. The title of his address was *Keeping Directors on the Straight and Narrow*.

Justice Kirby said that the role of the company secretary in Australia had become much more demanding in the past thirty years since he first entered the legal profession. As some of the developments which had added to the responsibilities of corporate managers and secretaries, he mentioned:

- The enactment of the *Trade Practices Act* and the passage of many Federal and State consumer protection laws;
- The enactment of the *Corporations Law* and establishment of the Australian Securities Commission;
- The substantial enlargement of the personal liabilities of directors and other officers of companies;
- The adoption of Federal and State environmental laws;
- The growing complexity of taxation law affecting corporations; and
- The radical changes in Australia's industrial laws and the alteration of the award system which had endured, until recently, for most of the history of Federation.

Justice Kirby also referred to recent developments of the law by the courts. He mentioned:

- The decision of the High Court of Australia in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 holding that a corporation does not ordinarily enjoy a privilege against self-discrimination which, it held, was a human right not apt for corporations;
- *TPC v Abbco Ice Works Pty Ltd* (Full Federal Court 19. 8.1994) which held that the Trade Practices Commission could require a company to comply with a notice to produce. Exposure to a substantial civil penalty was not sufficient to provide a privilege against self-exposure to a penalty; and
- Changes both to statute and common law imposing liabilities on company officers who had previously been liable only for gross errors of judgment amounting to negligence. *Re D'Jan of London Ltd* [1993] BCC 646 (English HC); 110 LQR 390.

Justice Kirby said that he welcomed the efforts of the Federal Attorney-General, Mr Michael Lavarch, to simplify Australian corporation law. He congratulated the Institute of Corporate Managers, Secretaries and Administrators for:

- Their offer to assist the Federal efforts by participating in, and helping to fund, a task force to advise on all aspects of corporate regulation in Australia;
- Their publication, with the law firm Corrs, Chambers, Westgarth, of a handbook *The Modern Company Secretary* launched yesterday; and
- The moves to reinforce standards of appropriate professional qualifications for company secretaries and to provide ongoing education and update of information to members.

"The strategy of internalising good corporate standards is the way to go. That does not mean pure self-regulation or an end to the role of the courts, the ASC, the TPC and other regulators. But it does involve a conscious effort to simplify the rules so that they are more conceptual and readily understood remembered and observed by trained officers, who do not need to see their lawyers about them every afternoon.

To some extent the trend to corporate super regulation in Australia was a response of the law-makers to the chaos of the 1980s. It is sad to record that a 1993 national survey of school children, concerning the ten corporate officers in Australia whom they could identify, resulted in the naming of ten company officers of whom half are now in prison or bankrupt or both. Let us hope that the lesson of the past few years has been learnt: that courts and regulators will uphold in Australia strict standards of honesty, high standards of care and stringent obligations of loyalty to the company, its employees and shareholders - not to oneself.

Pity the poor company secretary. He or she must ensure, so far as possible, that other officers, directors and employees stick to the straight and narrow path of corporate good practice. Today good manners, a good school and a knowledge of the best restaurants is not enough. The company secretary has a high responsibility in shepherding the company through the multitude of laws, practices and public relations needs which are now applicable.

The good company secretary will help keep the corporation away from lawyers and courts by scrupulously practising, and vigilantly insisting upon, the highest standards of honesty, care and loyalty in the company"

Justice Kirby concluded.

NOTE ON SPEECH

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