

AUSTRALASIAN LAW TEACHERS' ASSOCIATION

ANNUAL CONFERENCE, ADELAIDE, 11 JULY 1996

AUSTRALIAN CORPORATIONS LAW AND GLOBAL FORCES

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The Hon Justice Michael Kirby AC CMG**

FOR THEIR WORK CONTINUETH

The work of our law teachers lives on in our minds and in our work as lawyers. An English Law Lord, at an Australian law conference, once paid the ultimate tribute to law teachers. He suggested that it took most lawyers ten years to adjust to even the most fundamental change to substantive and procedural law learned at law school. Until then, the lawyer is the captive of

* Paper on which was based an address to the 1996 Annual Conference of the Australasian Law Teachers' Association, 11 July 1996, Adelaide.

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law school instruction. Some never, ever go beyond it. This demonstrates, if it is true, the fundamental conservatism of the legal profession, the profound impact of law teaching upon impressionable minds, or both.

Angus Corbett is clearly right to say that the debate about corporate governance (indeed about corporate law) in Australia is at an important turning-point¹. Curiously enough, the turn did not come with the enactment of the *Corporations Law* in 1991. In many ways, that profoundly, even overly, detailed statute was merely the continuation of the essence of the old company laws inherited from legislation enacted in England in the middle of the 19th century. But at least the final passage of as much national corporations law as could be squeezed into the permissible constitutional remit² encouraged lawyers, corporate officials, governmental officers, politicians and others in Australia to think in national terms and to contemplate a few new ideas and original approaches. That process is continuing.

1 A Corbett, "A Proposal for a More Responsive Approach to the Regulation of Corporate Governance" (1995) 23 *Fed Law Rev* 277 at 281.

2 *New South Wales v The Commonwealth* (1990) 169 CLR 482. See also *The Commonwealth v Tasmania* (1985) 158 CLR 1.

My thesis is that, just as the Law Lord said, these changes represent an overly conservative and belated response to radical challenges to corporate governance in Australia. As usual, lawyers and regulators are responding decades late to the corporate problems of earlier times. This is not an unusual position to be reached in law reform. The target moves. The reformer finds it hard to keep up.

I want to start the elaboration of this thesis with a tribute to my own law teachers. Great is my debt to them. At the Sydney Law School I fell under the spell of many fine instructors: Professor William Morison, Professor Ross Parsons, Professor Pat Lane, Dr C H Currey, Mr Gordon Hawkins and a very young Tony Blackshield. I am glad that in a few weeks the University of New South Wales Law School will be holding a symposium on the impact of Professor Julius Stone upon the jurisprudence of the High Court of Australia. As with the laying on of hands, Stone received his instruction in legal realism from Dean Roscoe Pound of the Harvard Law School. Stone inculcated his notions in generations of young lawyers. He struck a mortal blow at the declaratory theory of the judicial function which had reigned in my youth, including in the High Court of Australia. A large part of the explanation of the recent developments which have been seen in the High Court may be found in an understanding of the impact of Julius Stone upon the impressionable young minds that ultimately found their way to that court. Law teachers must be patient. But they should not under-estimate the influence of

their intellects in decades to come. In the words of Kipling's poem:

"For their work continueth
And their work continueth
Broad and deep continueth
Great beyond their knowing."

As we are meeting in Adelaide, I should also pay a tribute to the influence on my own intellectual development of three professors of law of this city. Their instruction is also relevant to the theme which I wish to develop.

Professor Alex Castles, who was one of the foundation Commissioners of the Australian Law Reform Commission, reinforced the instruction of Dr Currey. He taught something which every common law lawyer should know instinctively: the importance of legal history and legal theory. But he added to Dr Currey's elucidation an understanding of the profound importance of Australian legal history, with its distinctive characteristics.

Professor James Crawford, now of Cambridge, answered my call to leave Adelaide and to take up his post at the Australian Law Reform Commission in Sydney. There he later also gained a chair of law. James Crawford helped to reinforce my growing understanding of the importance of international law upon Australia's domestic law. It is inevitable that, in our time, there should be a move towards establishing a new relationship between municipal and international law. Already the signs of

this development can be seen³. In the field of corporations law, the advance of the modern trans-national corporation and of transborder data flows affecting corporate activity necessitate both an understanding of the impact on the corporation of international law and particular international regulations for aspects of corporate activity.

The third in this Adelaide trilogy is Professor David St L Kelly. He taught law at the University of Adelaide but also came to Sydney, earlier than James Crawford, to be one of the first full-time Commissioners for the ALRC. The power of his mind and the vigour of his tongue left an indelible impression upon me, as many others. On his arrival at the Commission, which then had little in the way of resources, I proudly presented to him a draft of the report, urgently commissioned, on the breathalyser laws of the Australian Capital Territory⁴. To my astonishment, far from being pleased with my labours, he denounced them, and me, in no uncertain terms. In the process he taught me two extremely important lessons. He was critical of my approach to the legislation of other countries. I had described what the law provided in England, in Canada, in Germany and just about everywhere else. Not good enough. Kelly insisted that it was

³ eg *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

⁴ Australian Law Reform Commission, *Alcohol, Drugs and Driving*, (ALRC 4) AGPS, 1976.

concepts that were important. A conceptual framework had to be imposed on the report: not a geographical one! Ideas must be searched out. The illumination of legislation of different lands was all well and good; but only so far as it threw light upon the idea or concept in question. Because it is a problem-solving system of law, the common law is most resilient. But it tends to be resistant to grand concepts. If it stumbles upon them over the centuries it tends to do so with embarrassment and usually by accident. My period in law reform, under the tutelage of a great law teacher, David Kelly, taught me to search in the myriad of statutory provisions and case decisions for the underlying concepts at work. Imperfectly, I continue to do this in my judicial life. Naturally, it tends to puzzle or even upset those who disdain the concept and who content themselves strictly with solving the problem in hand. But if you stay long enough in this business, you tend to pick up a few converts. I am a long distance runner.

The second lesson David Kelly taught was the importance to the law of empirical data. He demonstrated this in his work on the reform of debt recovery law⁵. Not satisfied to analyse present legislation and case law, or even to scrutinise the laws from other jurisdictions, Professor Kelly gathered original

⁵ Australian Law Reform Commission, *Insolvency: The Regular Payment of Debts* (ALRC 6), AGPS, 1977.

empirical data to try to understand exactly what was the social problem with which the law was seeking to grapple. Only by doing this could a reformed law be well targeted. This was a second vital lesson for me. The lawyer's craft is words. Lawyers are comfortable in juggling words. They are less expert in the analysis of social data. This is a paradox because their discipline is ultimately addressed to societal activities.

In the Law Reform Commission, I discovered that there was relatively little writing on the differential use of sanctions and remedies as enacted by Parliament. When to use a criminal sanction? When to use civil sanctions? When to rely on licensing? When to invoke professional discipline? When to be content with self-regulation? These are questions that still deserve more attention than they generally get. Courts are shackled to the empirical data provided to them by litigants. Unlike law reform commissions, they cannot call forward (at least under present arrangements) new empirical information upon which to found their opinions⁶. But parliaments, and those who advise them, are not so bound. Nor are teachers who criticise the law so restricted. There should be more attention to the way the law actually operates. We should be less satisfied

⁶ This is the point made by Mason J in *State Government Insurance Commission v Treadwell* (1979) 142 CLR 617 at 633.

with the assumption that the enactment of a law and the provision of a criminal or other sanction, or the decision in a particular case of high authority, will have the impact that is hoped for. Especially in the vitally important area of corporations law, law teachers should familiarise themselves with how the law works on the ground.

So these are lessons, from my law teachers, long ago and more recently, which I offer to their successors of today. Accept and understand the real way in which the law operates in society. Appreciate the importance to the law and its development of the history that has gone before. Understand the growing influence of international law upon every nook and cranny of our discipline. Strive to be conceptual in the approach to law. Base the critique and suggestions for its improvement upon empirical data that takes the debates beyond words and mere verbal formulae.

All of these lessons have instruction for the topic I have chosen to address, namely, the future direction of company law in Australia.

THE CORPORATION: A BRILLIANT LEGAL IDEA

For all my criticism of words and legal formulae, I must acknowledge wholeheartedly the impact upon my intellectual development of the writings of great judges. Most of those who have influenced me have been Australian. All of those whom I

respect accept an instructional mantle. For none is the word "academic" other than a word of praise and honour.

Lord Wilberforce is the kind of judge of a final court whom I most admire. Clear in exposition. Professional in his judicial competence. Intellectually lively. Accepting of scholarly debate, assistance and criticism. He is a law teacher's kind of judge, as he is mine.

In one of the books displayed for sale at this conference, John Tillotson's *Contract Law in Perspective*⁷ there is a quotation from Lord Wilberforce which exemplifies his approach to the law:

"If I am faced with the alternative of forcing commercial circles to fall in with legal doctrine which has nothing but precedent to commend it, or altering the doctrine so as to conform with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times, enunciatory and good doctrine can seldom be divorced from sound practice."

This puts in a nutshell the lesson which we lawyers must learn when we are concerned with so practical an area of the law as the regulation of corporate life. We must make clear the fundamental principles of honesty, integrity and regularity upon

⁷ Cavendish, 1995, 3.

which the law insists for the governance of companies. We must help the Parliament to give effect to those principles. But we must resist the ever-present tendency to turn companies into the playthings of the law, where virtually nothing can be done without having a lawyer at the elbow of the company officer.

The reason why we must resist this temptation was explained by Lord Wilberforce in his Holdsworth Lecture "Law and Economics"⁸. Delivered thirty years ago, this lecture described the way in which the limited liability company came into existence, first in England and very soon after in France in the middle of the nineteenth century. It was developed in England from the idea utilised when the Crown established charter companies for the conduct of very risky, but potentially hugely rewarding, overseas adventures in distant lands beyond the seas whose exotic produce could reap vast profits. The adaptation of the charter company by the enactment of legislation providing for the statutory corporation virtually changed England overnight from an agrarian economy into a modern commercial society⁹:

⁸ Lord Wilberforce, "Law and Economics" in P W Harvey (ed) *The Lawyer and Justice*, London, Sweet & Maxwell, 1978, 73.

⁹ *Ibid*, 75.

"The company, abolition of the laws of usury, the introduction of cheques, the formulation of Patent Law and trademarks, were all part of a movement which did not merely reflect the expansion of commercial practice; but also, perhaps more truly - gave an essential impulse to it."

According to Lord Wilberforce, our legal imagination ran out soon after this invention, as if exhausted by the brilliance and novelty of it. The maritime entrepreneurs went on with unlimited imagination. But the lawyers' ideas became fixed in stone. The concept of the limited liability company did not grow and adapt as the company tried to do. The notion of utilising the *ultra vires* doctrine, apt for a charter company but potentially devastating for a modern corporation, failed to change the "Berlin Wall between the corporate entity and its members"¹⁰ established in *Salomon's case*¹¹. This created many problems.

In short, according to Lord Wilberforce, the legal idea was brilliant and creative. But it failed to adapt and grow as its creation, the company, did. Lord Wilberforce concluded¹²:

"The thought I want to leave with you is that we lawyers need to reorient our thinking in this whole field, in the interest of the survival of capitalism as a

¹⁰ *Ibid*, 76.

¹¹ *Salomon v Salomon & Co* [1897] AC 22 (HL). Cf *Bank of New Zealand v Fieri Pty Ltd* (1992) 8 ACSR 790 (1992) 10 ACLC 1557 (NSWCA).

¹² Wilberforce, above n 8, at 86.

system combining modernity and obvious justice - through recognition of the completely changed function of the limited companies - recognition, one must admit, of considerable abuses to which the system, and the superstructure which lawyers has put on it, has given rise ... I want the climate of legal thinking to change."

Many other writers, in the thirty years since these remarks were offered, have made similar calls for fundamental rethinking of company law. So far, those calls have largely been ignored. Changes have occurred at the periphery; but the central features remain, unchanged.

If companies themselves had remained substantially the same as they were in the middle of the nineteenth century, a lawyer could have no complaint. One would continue to see the merit of upholding the separate legal identity of the company; the independent mandate of the board of directors; the general inability of shareholders, with few exceptions, to enjoy standing to bring an action against directors¹³ and the fiduciary character of the obligations of directors. But a number of developments in the real world in which companies operate in Australia today, suggest reasons why some fundamental rethinking may be timely in the field of corporations law.

¹³ *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189. See discussion Corbett, above n 1, at 285-286.

CHANGING TIMES FOR COMPANIES IN AUSTRALIA

The first indication of changing times is the growing globalisation of the markets within which companies typically operate and the consequence that many companies are now truly global, or at least regional, in character. Indeed, unless Australian companies accept a global perspective, it is increasingly obvious that they will enjoy diminished returns and fail to achieve the very purposes of their existence.

This point was recently made in an analysis by McKinsey Global Institute concerning Australia's relative economic performance¹⁴. The Australian economy and corporate environment was analysed along lines previously explored relative to the productivity and employment performances of other developed countries including France, Germany, Italy, Japan, Sweden and the United States. The immediate purpose of the study was to help the clients of McKinsey and Company, management consultants, to understand the performance and opportunities of Australian corporations in a global context. The study makes rather depressing reading.

¹⁴ McKinsey and Co Australia, *Growth Platforms for a Competitive Australia: Incentives, Aspirations, Innovations*, McKinsey and Co, Sydney, 1995.

Whilst acknowledging significant and extensive reform of Australia's financial system, business regulation, industrial relations environment and reduced trade protection during the previous fifteen years, the study discloses that Australia's relative economic prosperity has not risen in real terms since 1970. It has a steady level of unemployment and needs "to step up the pace of productivity growth" if it wishes to "improve its economic standard of living"¹⁵. That standard remains 30% behind the best performing country over the past 25 years, viz the United States.

Various explanations are offered for the relatively poor performance of Australia's economy, which means, in reality, the diminished performance of its corporate sector. They include less managerial innovation which is described as amongst the "primary causes of lower labour productivity in Australia"¹⁶; inefficient product market regulation relative to Australia's smaller market size; slow adoption of innovative processes developed overseas; slower product and service innovation; lower use of collaboration with suppliers to improve processes of products; and lower management aspirations when compared to overseas countries. Amongst the external factors exacerbating

¹⁵ *Ibid*, 7.

¹⁶ *Id*, 9.

these rather depressing problems are the legal restrictions imposed by market regulation and what are described as restrictive labour market regulation practices. According to the report, Australia must somehow lift the aspirations and innovation levels of its business leaders; develop better quality and effectiveness in middle management; introduce a pro-innovation culture that has been largely missing in the past and reduce the regulatory barriers and burdens that are seen as inhibiting entrepreneurship and risk-taking¹⁷.

One could be critical about various aspects of the McKinsey report. One could question some of the data and a number of the conclusions. One could question the confidence in the capacity of corporations, through market forces, to deliver all of the social objectives to which Australians aspire and be dubious about the importation of the cultural norms of other societies. But the point that is effectively made in the report is that the modern corporation can no longer retreat to fortress Australia. Increasingly, it is part of an economic world dominated by companies which know no national boundaries and owe loyalty to no particular nation state¹⁸. For such companies

¹⁷ *Id*, 49.

¹⁸ See for example on the issue of legal globalisation R T Nimmer and P A Krauthaus "Globalisation of Law in Intellectual Property & Related Commercial Contexts" (1992) 10 *Law in Context*, 80.

capital resources are shifted from one economy to another in such ways as advance the profitability of the corporation. Early in the century it might have been Australia. But more lately it became Korea and Taiwan. Today it is Thailand and Malaysia. Tomorrow it may be Vietnam and South Africa. Somehow, our corporations must operate in this global economic environment. Our corporations law must be conducive to successful operations in that environment. It must become part of the solution which assists corporate managers of intelligence and perception to meet the valid criticisms of corporate performance contained in the McKinsey report. The law must not become part of the problem.

A second feature of the modern corporation which empirical analysis would oblige us to take into account is the growth in the 30 years since Lord Wilberforce's Holdsworth Lecture of the power of institutional investors. Such investors, with huge funds at their disposal, have relatively little motivation to be concerned about "good corporate citizenship" or corporate attention to social values. Their interests are safety and maximum returns. In the United Kingdom, institutional ownership of shares has risen from 35% in 1963 to 75% today. In Australia 60% of publicly listed companies are owned by

institutions. Sixty percent of this ownership is in the hands of the top ten fund managers¹⁹.

Just at a time when, rather belatedly, company law theory was developing in common law countries towards the notion that the modern corporation owes duties not just to its shareholders but also to employees, the community and the country in which it is established, economic developments are occurring which tend to discourage these notions. The only way they can effectively be reintroduced is by an appreciation that, in the long haul, the companies which do best tend to be those which exhibit concern about their employees and about their chosen community²⁰. Sadly, institutional investors, which can shift huge funds overnight and are not generally limited to domestic investment, may not be overly concerned about the long run. They may be relatively impervious to the idealistic

19 M Blair and I Ramsay, "Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies" (1994) 19 MULR 153; J Hill and I Ramsay, "Institutional Investment in Australia: Theory and Evidence" in G Walker and B Fisse (eds) *Securities Regulation in Australia and New Zealand*, 1994, 289 at 293-297; D Macken, "The Soulless Corporations" in *Sydney Morning Herald*, 13 April 1996 at 65.

20 P Wildblood, *Leading from Within* citing *Built to Last*, a book which examined 18 companies in the United States which had survived for 50 years to discern the common traits which they demonstrated. All of them put emphasis upon their staff and their chosen community as well as their shareholders. See Macken, above n 18.

opinions of small shareholders whose voices are muted in the clamour of powerful institutional investors. This is a second reality in which the Australian corporation today operates.

Thirdly, there is the phenomenon of corporate "down-sizing" which is usually associated with the introduction of new labour-saving technology at the hands of executives who are often themselves paid huge salaries for their achievements. Although the Australian position here remains modest by global standards (where top executives' salaries are sometimes expressed in multi-million dollar terms) there are many familiar examples where thousands of employees have been laid off but where executive earnings have risen substantially²¹. This reality must also be understood as a feature of the empirical environment in which lawyers begin to suggest that directors' duties extend to the best interests of employees and of the community, as well as the traditional notion of pursuing the best interests of shareholders and investors. There is not much point speaking idealistically about the larger mission of the corporation in Australia if, in the real world, the Australian corporation, under

21 Macken, above n 18, cites Coles Myers Australia Limited whose profits between the years 1990 to 1995 dropped 18% in real terms. The group shed 24,000 employment positions. The number of employees earning over \$100,000 a year reportedly quadrupled. The salaries of executives and directors reportedly more than tripled.

pressure from overseas competitors and local fund-managers, is retreating from such concerns.

Fourthly, there is the phenomenon of privatisation of government services which is such a feature of the economy in our time. Former governmental corporations are privatised. Activities once performed by governments are sold, to non-governmental corporations. The extent to which this is occurring is well documented. The legal problems which it brings in its train are beginning to attract the attention of law teachers²². Legislators may add "social responsibilities" to the duties of state-owned corporations²³. Scholars may castigate the judicial failure to enforce a sense of social obligation upon the activities of state-owned corporations²⁴. However, if the very purpose of corporatisation and privatisation is to take the government out of the marketplace, can courts really be blamed for giving full effect to this policy? As Nicholas Sedden points out in his recent book the shift of formerly governmental functions to the private sector presents large challenges to the law in developing effective

22 Nicholas Sedden, *Government Contracts: Federal State and Local, Federation*, 1995. See review (1996) 70 ALJ 498.

23 Cf *State Owned Corporations Act* 1989 (NSW), s 20E(1). There are similar provisions in the Acts of Victoria, Queensland and South Australia.

24 eg M Taggart, "Corporatisation, Privatization and Public Law" (1991) *Public Law Review* p 77-108.

mechanisms to protect the individual dealing with the corporation, where once public administrative law could have been invoked²⁵.

RESPONSES TO THE CHANGES

The responses of Australian society and its legal system to the foregoing changes (and others) may be various.

Some will retreat to the notion that a sovereign state, like Australia, has a right and a duty to enforce its own commercial morality. This approach will take us further down the track of traditional company law. Directors' liabilities for wrongful and negligent conduct will be increased, generally to a squeal of voices asserting that this does not happen in those competing economies of the region that are most successful. Directors will complain that lawyers are intruding too much and too often into the board room and casting their depressing spell over legitimate risk-taking. Without going the whole way with this special pleading, it is important always to remember what the fundamental purpose of the corporation is. It is to take risks with other people's money. Those who take risks will, inevitably, sometimes fail. If they fail without illegality,

25 Above n 21.

dishonesty or neglect of fundamental duties, the law should be slow to impose personal or corporate sanctions. I think that Ipp J in the Supreme Court of Western Australia was right to warn in *Vrisakis v Australian Securities Commission*²⁶:

"The management or direction of companies involve taking decisions and embarking upon actions which may promise much, on the one hand, which are, at the same time, fraught with risk, on the other. This is inherent in the life of industry and commerce. The legislature undoubtedly did not intend ... to dampen enterprise legitimate but unsuccessful entrepreneur activities."

It is timely for judges and other lawyers (including law teachers) to remember the basic purpose of the corporation. Once law begins to approach the point of destroying, or seriously discouraging, the achievement of that purpose, it has begun to fail in the performance of its function. We in Australia need to recognise this given the vulnerability of our economy and the reportedly mediocre performance of our corporations, in a region of the world where other economies and their corporations are doing spectacularly well. The law which should be the servant of society and a sustaining force for its institutions, should examine its own performance when its application deflects

²⁶ (1993) 11 ACLC 162 (SCWA), 212. See note R Baxt, "Have the Courts Been Too Generous in Excusing Directors for Breaches of Duty? Not in Respect of Financial Matters!" (1994) 22 ABLR 211.

attention from "the main game of wealth creation which is, in turn, the driver of new investment and job creation"²⁷.

Another response may be to retain current doctrine but to chip away at the edges. This is basically what lawyers in Australia have been doing in recent years. The passage of the first *Corporate Law Simplification Act 1995* (Cth), and the promise of stages 2 and 3 of that process, represent a serious effort on the part of the Federal Government and Parliament to address many particular concerns which have been voiced about the detail, complexity, unintelligibility and inefficiency of Australia's national regulation of corporations.

But it is not only in legislation that there has been inconsistency. Many court decisions in the field of company law have been inconsistent. A collection of some of the inconsistencies has been usefully made by Justice G F K Santow and Mr M Leeming²⁸. The High Court of Australia has urged appellate courts throughout the nation, and single judges, not to depart from an interpretation placed upon national or uniform legislation by another court "unless convinced that the

²⁷ F Hilmer, *Strictly Boardroom, Improving Governance to Enhance Company Performance*, 1993.

²⁸ G F K Santow and M Leeming, "Refining Australia's Appellate System and Enhancing its Significance in our Region" (1995) 69 ALJ at 348.

interpretation is plainly wrong"²⁹. If this injunction to respect the uniformity of decisions in the interpretation of uniform national legislation, such as the *Corporations Law*, is not effective, a graded response must follow. The Australian Securities Commission could take a more active part in intervening (as by statute it may) in proceedings in the courts to help promote uniform and informed decisions. The Federal Court, which is accepting an ever-increasing proportion of cases under the *Corporations Law* could institute, internally, arrangements to secure appellate benches likely to provide consistent and informed authority³⁰. An even bolder development, raised for consideration by the final report of the Constitutional Commission in 1988³¹ would be the establishment of a national general appellate court, under the High Court of Australia. This would recognise the constitutional responsibilities of the High Court and the practical reality that that Court can accept only a small proportion of cases which would come to it, including in the field of corporations law.

29 *Australian Securities Commission v Marlborough Goldmines Limited* (1993) 177 CLR 485 at 492.

30 For the growth of the jurisdiction of the Federal Court see Federal Court of Australia, *Annual Report 1993-4*, AGPS, Canberra, 38 (Figs 5 & 6).

31 Vol 1, 1988, AGPS, 368-369.

A further possibility is that we should learn from non-traditional sources of company law and practice and keep our minds open for the lessons for us in the buoyant economies of the world, so far as their approach is tolerable to our economic and social culture. Their law in the books may be very similar. But how and why has it provided a more supportive legal environment and does this have any lessons for us?

We can continue to approach company law by playing with words and adjusting time-honoured models of corporate regulation. But in my opinion, this is not good enough. I turn back to the law teachers of Australia the lessons which distinguished law teachers gave to me. Above all, we should be looking at company law, with the benefit of empirical data concerning the reality of the economy and society in which corporations in Australia today must operate. Any study of company law which ignores globalisation, institutional dominance of investment funds, the impact of technology and down-sizing of employment and the growth of privatisation of formerly governmental corporations, is bound to come up with artificial and ineffective responses.

Governments and those tackling corporations law simplification should familiarise themselves with the actual corporate environment in Australia. Beyond the bleating and generalities of complaint, they should particularly address the criticism of Australia's corporate performance. They should consider whether, and in what way, the current *Corporations*

Law is part of the problem³². To the extent that it is, that *Law* should be reformed to the fullest measure consistent with other national goals.

Courts, at least in a general way, should be aware of this backdrop of economic reality which I have sketched. I have myself been most stern in my approach to the understanding of the duties imposed upon corporations and their officers by the law³³. Perhaps it is necessary, from time to time, to remind one's self (as Lord Wilberforce does) in his Holdsworth Lecture that the corporation began as a speculative adventurer. When it loses entirely the spark of adventure and risk-taking entrepreneurship, it has lost its *raison d'être*.

Law teachers should be bold and critical in their analysis of corporations law. Starry-eyed idealism must be placed in the context of the empirical realities of our economy and the urgent need for job generation if our society is to avoid a permanent

³² For the current efforts at statutory simplification, see I Govey, "Simplifying the Corporations Law - the First Stage" in Law Institute of Victoria, *Journal*, January 1996, 29. See also I Govey, "Corporate Law Simplification: Major Changes Expected" in *New Directions in Bankruptcy* (4) November 1995, 2.

³³ See eg *Metal Manufactures Pty Ltd v Lewis* (1988) 13 NSWLR 315 (CA); *Woolworths Limited v Kelly* (1990) 22 NSWLR 189 (CA) and *Darvall v North Sydney Brick and Tile Co Limited* (1989) 16 NSWLR 260 (CA), 276ff.

under-class. A more empirical foundation for the future analysis of corporations law is urgently needed.