

# **SOCIAL HISTORY OF COMPANY LAW: BOOK LAUNCH<sup>1</sup>**

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The origins of my invitation to launch this book lie, somewhat counter-intuitively, in remarks I made when launching a book on Corporate Governance in Japan.<sup>2</sup> The audience on that occasion was bemused, at least for the first five minutes of my speech, with my focus on Robert Lowe, who I thought and think is one of the most interesting politicians in our colonial history. It was, however, his activities on his return to England in 1850, after eight years in Sydney, with which I was then concerned.

The future Viscount Sherbrooke, who would serve as Chancellor of the Exchequer under William Gladstone, was the principal promoter of the Joint Stock Companies Act of 1856 which revolutionised corporate law. That Act removed restrictions upon a company obtaining limited liability, so that from that time onwards incorporation was no longer a privilege, but in substance, a right attainable on application. Contemporary corporations legislation can be traced to this radical reform. As I noted in my

earlier address Robert Lowe has appropriately been called the “Father of the Modern Company”.<sup>3</sup>

Indeed, Lord Sainsbury said during the second reading for the new United Kingdom *Companies Act* 2006:

“One hundred and fifty years ago, my predecessor Robert Lowe, later First Viscount Sherbrooke, brought forward the Bill that created the joint stock limited liability company. It was the first nationwide codification of company law in the world, and he has recently been described as ‘the father of modern company law’.”<sup>4</sup>

Lowe held a range of views which are no longer acceptable, such as his opposition to extending the franchise and anything democratic. However, he can be forgiven much for his eloquence. I particularly like his description of the role of a Treasurer when assuming the equivalent British Office:

“The Chancellor of the Exchequer is a man whose duties make him more or less of a taxing machine. He is entrusted with a certain amount of misery which it is his duty to distribute as fairly as he can.”

His classical learning was on full display when he described his, ultimately rejected, tax of a halfpenny on a box of Lucifer matches in 1871 with the epigram *ex luce lucellum*, “out of light a little profit”. Even then not politically sensitive, but you have to admire a person who cannot suppress his wit.

Robert Lowe is one of the central figures in Rob McQueen’s new book *A Social History of Company Law*, which traces the development of English corporation legislation and its adoption in Australia. Whilst recognising his significance, our author is not content with Lowe’s laissez faire beliefs. Lowe emerges as a bit of an anti-hero.

In the debates of that time, Lowe denigrated the efficacy of detailed regulation, for example, with respect to the value of disclosure and publicity. The significance of Government regulation is a central theme of this book. Rob McQueen makes his views quite clear:

“The legislative model of 1862 continues to have important ramifications in the present day ... [T]he core features of the legislation have nevertheless remained unaltered. This is particularly the case in respect to the

core belief embedded in Robert Lowe's company legislation of 1856 that corporations are economic entities which owe their sole responsibility to their shareholders, even if by so acting the company may be acting contrary to broader social interests.

The responsibility of a company to pursue the interests of its shareholders at any cost, enshrined in the corporate legislation of 1856 and reinforced in the legislation of 1862, created an 'asocial' framework within which the modern corporation operates. ... If one were to look for the embodiment of the corporate psyche one would find it in the prescription to pursue profit and the shareholders' interests at all costs, which has been inherited from the 1862 legislation."

One of the most intriguing aspects of this book, is how decidedly contemporary many of the issues debated during the 19<sup>th</sup> century still are.

During the period covered by this volume and, of course, before and since, there have been numerous oscillations in the

intellectual zeitgeist as to whether the principal problem of the day should be regarded as arising from market failure or from government failure. We have experienced a particularly dramatic oscillation in this regard as recently as last year. These shifts in intellectual fashion are often driven by particular events, such as the bursting of bubbles of various kinds from tulips to subprime mortgages.

The broader approach to history writing, encapsulated in the concept of social history which Rob McQueen adopts, provides context of a depth which conventional legal history does not often give. With respect to so important an area of social regulation as corporations law, this broader perspective is particularly appropriate. It is a perspective that can inform contemporary debates about the role and function of this critical economic institution and about the most effective mechanisms for ensuring the fair and efficient operation of capital markets.

The recognition that earlier generations have gone through very similar debates, which led to particular legal structures, should, at the very least, instil a sense of caution if not modesty, against contemporary certitudes as to how we should respond to

the latest crisis and what the effect of a particular response is likely to be. Such a sense is particularly important in a media driven political age, where the most dominant political requirement is “to be seen to be doing something” – with precisely what is to be done, especially anything with no implications during the current electoral cycle, appearing often to have a distinctly secondary significance.

Tracing, as he does, the development of English company law and then its adoption and adaptation by the Australian colonies, Rob McQueen has provided us with an understanding of the different forces and ideas that have always impinged upon this area of the law. This improves our understanding of why those same forces and ideas are still of significance.

For example, during the period to which this book relates there was a fluctuation of views on key aspects of the law: as

- the extent to which shareholders could be expected to control corporations;
- the significance and efficacy of disclosure requirements about the financial position of corporations;

- the comparative effectiveness of government regulation and market or commercial pressures as a mechanism for ensuring proper conduct;
- the costs imposed by different regulatory regimes.

The continued significance of our institutional inheritance has been emphasised by the school of institutional economics, one of the founders of which, Douglas North said:

“History matters. It matters not just because we can learn from the past, but because the present and the future are connected to the past by the continuity of a society’s institutions. Today’s and tomorrow’s choices are shaped by the past. And the past can only be made intelligible as a story of institutional evolution.”<sup>5</sup>

This insight has transmogrified into a considerable literature on what has come to be called “path dependence”.

The volume I am launching today traces how the path, upon which we remain dependent, was trod. It traces the commercial, political and social pressures as they emerged from time to time. Its principal contribution is to enhance our understanding of the

political processes which have had long term consequences and which were always the subject of deliberate choice. We are not dealing with natural law here.

The later chapters also confirm the fact, often overlooked in the past, that our adoption of English legal models always involved adaptation. Whatever the proclivity of Australians of the era to call England “Home”, our legislators did respond to local needs and conditions. The best single example is how the needs of the mining industry led to the invention of the “No Liability” company.<sup>6</sup> Nevertheless, one of Rob McQueen’s themes is the failure to recognise the inappropriateness of the British model in some respects, specifically by reason of the comparative inadequacy of local regulatory authorities.

A knowledge of the history of corporations law is, at least in the Australian context, a matter of high constitutional significance. One does not need to be a strict “originalist” on constitutional interpretation to recognise that the words “trading or financial corporation” in 51(xx) of the Constitution of the Commonwealth have a historical context. Even the approach to the Constitution as a living document – as intended by the framers to change with the

times, as all Constitutions must – also requires attention to what the concept meant at the time the Constitution was framed.

On the latter approach, it is pertinent to note that the nature of a “trading or financial corporation” was understood in the 1890’s to be subject to change. Indeed, the entire history of corporations law in the 19<sup>th</sup> century indicates that there were such changes, driven by legislation, by commercial development, by social ideas and by political disputation.

Nevertheless, the words are words of limitation.

When the High Court decided the definitive contemporary case on the corporations power – the *Work Choices* case – it did not need to define the concept of a trading or financial corporation. The *Work Choices Act* used the concept of a constitutional corporation defined in terms of the Constitution itself. Nevertheless, the issue was clearly regarded as a live question by the High Court, as the exchange with counsel in the course of argument clearly showed.<sup>7</sup>

The High Court will need to revisit the unsatisfactory state of the case law as to precisely where the line is to be drawn with respect, for example, to the trading and financial activities of incorporated schools, universities, local government entities and State statutory corporations. In this regard the history of corporations law will be of significance. The Court hinted at this in the Work Choices case itself. The joint judgment contained a long passage under the heading “Relevant 19<sup>th</sup> Century Developments”, outlining the history of the Corporations Acts in England and Australia.<sup>8</sup>

Although the joint judgment did not recognise the particular significance of the 1856 Act, its essential provisions were repeated in the 1862 Act which the Court said: “marked a watershed in the development of modern corporations law”.<sup>9</sup> It is not without significance that that Act primarily focuses on corporations created for the purpose of profit making. Indeed, its long title was “An Act for the Incorporation, Regulation and Winding Up of Trading Companies and other Associations”. One of the basic texts of the 1890’s was entitled *The Law of Trading and Other Companies*.<sup>10</sup>

The 1862 Act distinguished a company “that has for its object the acquisition of gain”, from a company that “is formed for the purpose of promoting commerce, art, science, religion, charity or any other useful object”. The former may prove to be the defining characteristic of the constitutional concept of a “trading or financial corporation”.

As Jessel MR put it, the distinction between the latter and the former is that “the objects mentioned” (with respect to the latter) “are such as prima facie would lead to expenditure as distinguished from profit ... [R]ather a company ... formed to regulate the spending of the members’ money than the acquisition of any money by the members ... [A] company for giving away or spending as distinguished from a company for getting or acquiring anything”.<sup>11</sup>

This kind of distinction may soon, on the basis of a historical survey, form part of our Constitutional law. Detailed investigation of the history of the concept of a “trading” and a “financial” corporation is clearly in the offing. This will be of particular significance in determining the extent to which the *Work Choices* case did, in the long run, shift the balance of authority between the

Commonwealth and the States. In terms of our federal balance this is the next important High Court case and an understanding of the history of English corporations legislation, and its adoption in Australia, will be at the heart of the argument when it occurs.

For those of us like myself, who have developed a certain affection for Robert Lowe, by reason of his extraordinary achievements both in Australia and in England, I regret to say that there is an unfortunate proposal likely to be adopted in the near future. The Australian Electoral Commission, in a report published only a few weeks ago, has proposed that the seat of Lowe, named after Robert Lowe, will be renamed after a former member for that seat. It is to be called McMahon.<sup>12</sup>

One does not have to know much about political history to realise that to prefer the name of this most insipid of characters over that of a fascinating individual such as Robert Lowe, is a step backwards. Billy McMahon may have been Prime Minister but this idea is “silly”, to deploy the adjective so often attached to his first name.

In the same report, the Electoral Commission proposes to abolish the adjoining seat of Reid, named after Sir George Reid, again manifesting the short term memory that is unfortunately characteristic of our celebrity dominated era. In the future someone will have to resurrect the name of Reid for the purposes of naming a seat after one of our more substantial founding fathers, a Premier of this State and a Prime Minister of significance. Much more substantial than McMahon will ever be regarded. These misjudgements reflect an inadequate understanding of our history which those who recognise that our heritage matters must combat.

Until 1969 there was a seat called Parkes. It was abolished in 1969. The last member of the seat was Tom Hughes QC. This was the first time since federation that the person often called the Father of Federation did not have a seat named after him. Eventually someone recognised just how idiotic this was and the seat was recreated as a rural seat in New South Wales in 1984. I have, no doubt, the same will happen to the seat of Reid. Unfortunately, I doubt if the seat of Lowe will experience the same resurrection. This is regrettable as, to repeat an observation I made in my earlier address, by reason of the global influence of

the British Companies Acts, no Australian figure has had a greater influence on world history than Robert Lowe.

I am, however, sure that the seat named McMahon will have a short shelf life.

Unfortunately, there is no conventional symbolic act for the launching of a book – such as smashing a bottle of champagne on the bow of a ship or cutting a ribbon at the entrance of a new road or bridge. All I can do is to say, and I do say, this book is launched.

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<sup>1</sup> Rob McQueen *A Social History of Company Law: Great Britain and the Australian Colonies 1854-1920*, Ashgate, Farnham 2009.

<sup>2</sup> See J J Spigelman “Australian Business Law in an International Perspective: Remarks on launch” 2009, 32 *Australian Bar Review* 133.

<sup>3</sup> J Micklethwait and A Wooldridge *The Company, a Short History of the Revolutionary Idea* Modern Library, New York, 2003 p 51.

<sup>4</sup> As quoted in the Wikipedia entry for Robert Lowe.

<sup>5</sup> Douglas North *Institutions, Institutional Changes and Economic Performance* 1990 p vii.

<sup>6</sup> See McQueen *supra* at 297-300; see also Phillip Lipton “A History of Company Law in Colonial Australia: Economic Development and Legal Evolution” (2007) 31 *Melbourne University Law Review* 805 at 818-822.

<sup>7</sup> See the exchanges set out in Nicholas Gouliaditis “The Meaning of ‘Trading or Financial Corporations’: Future Directions” (2008) 19 *Public Law Review* 110 esp at 120-122.

<sup>8</sup> See *The Work Choices Case* (2006) 229 CLR 1 at [96]-[107].

<sup>9</sup> *Ibid* at [100].

<sup>10</sup> Edward Mason *The Law of Trading and Other Companies* London, William Clowes, 1891 and 1893 (2<sup>nd</sup> ed).

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<sup>11</sup> *In Re Arthur Average Association for British, Foreign and Colonial Ships Ex parte Hargrove & Co* (1875) 10 Ch 542 at 547.

<sup>12</sup> See [www.aec.gov.au/about\\_aec/media\\_releases/2009/08-07.htm](http://www.aec.gov.au/about_aec/media_releases/2009/08-07.htm).