

AN ADDITIONAL CONTRIBUTION BY SENATOR COONEY

THE COMMUNITY'S NEED FOR GOOD LAW

Good law is made when Parliament or the court respond truly to an issue which confronts the Community.

Parliament has before it the Corporate Law Economic Reform Program Bill 1998 and must decide whether that legislation is a proper response to the current issues to do with companies.

The Parliamentary Joint Committee on Corporation and Securities is now reporting on that Bill and in particular on four specific matters, namely:

1. directors duties and corporate governance.
2. takeovers
3. fundraising
4. accounting standards

RESERVATIONS ABOUT THE BILL

I have reservations about the overall tenor of the Bill and about specific provisions in it.

DEFICIENCIES IN THE OBJECTIVES OF THE BILL

The main report in paragraph 6.1 quotes the stated objectives of the Corporate Law Economic Program which gives rise to the Bill. Those objectives stress the need for “economic outcomes including increased employment”. They highlight the aim of “encouraging businesses large and small to create wealth, prosperity and jobs”. They seek to enhance “market efficiency and integrity

and investor confidence.” In paragraph 6.2 the main report “concludes that this Bill will make a significant contribution to achieving these objectives.”

In my view the Corporate Law Economic Reform Program and the consequent Bill give insufficient emphasis to fundamental matters other than monetary accumulation and financial gain.

They do not place enough weight on the obligation those who are in control of companies have to act ethically, on the want investors at risk have for adequate protection, and on the need to have in place a proper regime to regulate companies particularly where there is a risk that the corporate sense of decency may wan.

ETHICS AND REGULATION

To a marked degree the well being of the Community is determined by the way companies conduct themselves. High ethics or strict regulation or both are necessary to ensure good corporate behaviour.

BRITAIN AND THE UNITED STATES

Britain places great emphasis on ethics as a means of achieving proper conduct by companies. The United States of America gives more weight to regulation in achieving that end.

Accordingly the Panel on Takeovers and Mergers in England has worked successfully for over thirty years as a non-statutory body unequipped with legal sanctions (see paragraphs 3.52 to 3.59 inclusive of the main report). In the United States the Securities and Exchange Commission holds and exercises rigorous powers over companies.

NEED FOR CLEAR UNDERSTANDING

All this must be clearly understood by Parliament as it debates the Corporate Law Economic Reform Program Bill 1998. Whether it enacts legislation to establish the Corporations and Securities Panel and with what powers it equips that body are questions it must resolve with a true appreciation of how things work both here and overseas.

COMPANIES AND THE COMMUNITY

The way companies conduct themselves affects the Community in general and some sections of it in particular. Corporate law should develop and change on that basis.

INVESTMENTS GOVERNMENT AND THE VULNERABLE

During the nineties Government has been central in persuading Australians to invest now to produce funds for their retirement. It has suggested that within the foreseeable future consolidated revenue will be unable to meet the cost of the old age pensions which then became payable under the present social security system.

Already there is an increasing number of retired people who are not on social security who seek to maximise their income but are inexperienced in making investments. Akin to these people are those who receive a substantial sum of money on being made redundant and invest it in companies.

Accordingly a variety of influences including the Government are guiding people in large and rapidly growing numbers towards investing in companies and in superannuation even though they have scant knowledge of the corporate world and limited ability to participate in it.

More and more Australians are becoming shareholders. Government in large part is responsible. The privatisation of the Commonwealth Bank and of a

third of Telstra is evidence of this. Companies themselves consistently seek capital from investors.

There are a large number of people who while not holding shares in companies are members of superannuation funds which invest huge sums in the corporate sector.

NEED TO PROTECT THE VULNERABLE

Given all this it is essential that company law give adequate protection to those with an inherent vulnerability to the vicissitudes of the corporate sector. This is particularly so in the case of people who are vulnerable and are encouraged by Government to participate in it as a means of securing their future.

Laws determining what the responsibility of directors is to be, the way companies are to raise funds, the process by which mergers and takeovers are to happen are of vital importance to such people.

SPECIFIC ISSUES

Paragraph 2.11 concludes with the words: “[T]he business judgement rule and statutory derivative action.... will serve to clarify and add certainty to this area of the Law “. The statement is probably overoptimistic. It is likely that the Courts will need to set some precedents in respect of the relevant amendments before they became fully clarified and certain.

The main report endorses the nature and powers with which the Corporations and Securities Panel is to be endowed. It “strongly supports” the objective of making the Panel, rather than the courts or the Administrative Appeals Tribunal (AAT) the primary forum for resolving takeover matters.” I do not give the same endorsement to the Panel as does the main report in paragraphs 3.49, 3.51 and 3.52. The Panel is unlikely to have the success the British model has had if Australian corporate life is less ethical than the English one.

The main report considers the issue of compulsory acquisition of shares in paragraphs 3.56 to 3.74 inclusive. It takes into account the interests of minority shareholders but in my view does not give enough weight to them.

THE COURTS

I consider the courts should not be limited in the way proposed by sections 661E and 664F of the Bill (see paragraph 3.62 of the main report). It will take time to establish the effectiveness of the Panel and it is premature to endorse it with the enthusiasm expressed in paragraph 3.63 of the main report.

The courts have been crucial to the development of good corporate law and their ability to do so should not be curtailed.

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