

Law of COMMERCIAL COMPANIES

by

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LAW OF
COMMERCIAL COMPANIES

SOME SEASONABLE
CONSIDERATIONS

For THOSE Who are Desirous,
By SUBSCRIPTION, or PURCHASE,
TO BECOME
PROPRIETORS
OF
South-Sea STOCK.

With REMARKS

On the Surprising Method of Valuing *South-Sea* Stock,
Publish'd in the *Flying Post* of Saturday, April the 9th, 1720.

By a Member of the HOUSE OF COMMONS.



L O N D O N,

Printed in the YEAR MDCCXX.

PREFACE

The registered company has a fair claim to be the most fertile concept ever developed by the common law, in the wider sense in which law includes equity. Certainly the explicit statutory recognition in 1844 of incorporation by registration and final unification with its natural relative limited liability in 1862 are together an intellectual landmark of the law.

Nowadays the registered company serves several main purposes. It is an item of property in itself which can be bought and sold through the mechanism of the takeover. It is an investment producer in that it creates property in the form of its shares and other securities which can be bought and sold, characteristically through the mechanism of the stock exchange. In each of these capacities it has given rise, primarily through the concept of the share, to an entire industry, the securities market. From the legal standpoint these are what may be seen as the 2 major external significances of the registered company at the present day.

Internally the main purpose served by the registered company is as a framework for the initiation, development and management of a commercial enterprise. It is in this context that the related concept of limited liability is at its most conspicuous, the chief practical expression of it being the rules for terminating the life of a company by winding it up. In addition to the foregoing 3 major functions, the registered company plays also an important role in schemes for the minimization of taxation.

This book deals with the 1st 3 of these but not the last. Neither does it deal with such other applications of the corporate concept as statutory corporations and corporations sole, or, except in passing, with the utility of the registered company in variant forms to such institutions as clubs. Similarly, specialized areas like banks, friendly societies and partnerships are left out of account and the futures industry code and the Trade Practices Act 1974 (Cth), ss.50-50A, receive only a passing mention. Also, the functions of registered companies from the legal point of view produce an analysis which is not necessarily relevant to such other standpoints as economics, fiscal or employment policy, or sociology.

The book is about the general run of commercial companies, particularly, although by no means exclusively, those which are not only frameworks for entrepreneurial management but function also as significant investment producers and as attractive properties in their own right. There is no preordained sequence of topics for the presentation of the basic law of companies and securities. The one which has been adopted in this book is the one which best serves its purpose. This is to depart from the traditional by placing initial emphasis on the 2 most conspicuous areas of modern

development, companies as property in themselves and companies as investment producers.

Hence, after an introductory chapter for those unfamiliar with the terminology and concepts of company law, there follow chapters on takeovers, takeover related situations, the securities industry and company securities and public issues. Thereafter the transition to matters which relate more to the internal affairs of the company is made by way of a consideration of the procedures for altering its capital structure, followed by management, administration, dealings with 3rd parties in the ordinary course of business, member and creditor remedies and winding up. Such topics as the registration of companies, the types available, their constitutions and, in general terms, their powers, the system of regulation in outline and a brief historical sketch of the development of the main concepts are left till last because, in relation to any particular company, that is not where the action is.

Another departure from the traditional needs mention. Although it is true that company law developed through case law, and that the 3 major Australian codes on the subject, the companies, takeovers and securities industry codes, all presuppose the common law, the very familiarity of preexisting case law has sometimes retarded ready acceptance of the implications of the comprehensive character of the statutory codes. The fact is that much formerly indispensable case law has been swept away either by statutory reformulations of familiar rules or, especially in the conspicuous instances of the powers of a company, the ultra vires doctrine and dealings with 3rd parties, by emphatic statutory changes.

Moreover some of the most beloved of the common law concepts were never, in the present writer's opinion, much use because they tended to obscure the law rather than illuminate it. The so-called rule against reduction of capital, which never got around to explaining in precisely what sense the word capital was being used or why there were so many exceptions, is an example. The uncertainties of application of the so-called rule in *Turquand's Case* are another. And, with the exception of this sentence, no reference will be found in the entire book to the corporate veil or the lifting thereof. The latter ought to make any short list of the most confusing irrelevancies ever introduced into legal discussion. Also it has always sounded to me slightly improper. That it was adopted at a time when the concept of corporate personality distinct from the legal personalities of shareholders had long since become familiar only makes the case more sad.

The book is written therefore on the basis that although case law is of continuing relevance where the codes leave a gap or do not define their terms, or where their terms have themselves become the subject of judicial interpretation, the primary source for the present law is the codes, which are to be understood by reference primarily to their own wording. On the amendment front, with a wide variety of changes of detail coming into operation on different dates, 1985 and 1986 have not been good years in which to write a restatement of the law. Nevertheless the hope, naturally, is that

the efforts which have been made to keep accurate track of what has been going on have been successful.

My thanks go, as always, to The Law Book Company, on this occasion not only for their usual care, courtesy and expedition in producing this book but also for asking me to write it in the 1st place. Individually I thank Berna Collier for excellent research assistance; Deirdre Pirro for the index; my much loved secretary Julie Hincks, particularly for her unparalleled mastery of the neuroses of word processors; and my son Mervyn for illumination of many practicalities of the codes at the workplace.

My intermittent commendation for concise judicial wit is awarded on this occasion to The Right Honourable Sir Ninian Stephen, as His Excellency then was, for contriving in *Permewan Wright Consolidated P/L v. Trewwhitt* (1979) 145 CLR 1, 29, to encapsulate the essential character of the egg in the single word enigmatic. If I had an award for nomenclature it would go to the Almost Managing Co P/L for so perfectly expressing in its very name what company law is all about.

The law is stated as available to me on 1 September 1986.

CH

*Melbourne, 1986,
upon Grand Final Day
plus one, in the consciousness
that the stars rotate
once more in their proper orbits*

ADDENDA

1. *Page 49*: withdrawal of offers. The 2 sentences of text accompanying footnotes 76 and 77 state the pre-31/3/1986 position. Under the new TC 21 takeover offers may be withdrawn only with the written consent of the NCSC on such conditions, if any, as the NCSC specifies.
2. *Page 346*: change of incorporated status. It was held in *Re Bamboo Gold Mines Ltd* (1986) 10 ACLR 513 that the categories of status change permitted under CC 69(1) are not exclusive. Vincent J. in the Supreme Court of Victoria ruled that a proposed change from limited company to no liability company might properly be included in a CC 315 scheme of arrangement.

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