Regulating Enterprise: Law and Business Organisation in the UK edited by David Milman [1999, Hart Publishing, Oxford, xxxviii + 326 pages, ISBN 1-901362-56-6]

The collection of essays, written by several contributors and found in *Regulating Enterprise: Law and Business Organisation in the UK,* will appeal to a diverse range of commercial lawyers and others interested in the legal structure of business organisations and its impact on management and accountability. The contributions are linked by several common themes that provide a coherence in approach by the various authors in evaluating the regulation of the business structure that each of them examines. The themes include the implications of European harmonisation in the business sector, the relationship between the economic requirement to facilitate enterprise and the need to regulate against abuse, the pursuance of risk management strategies, and the protection of stakeholders of the business structure. These themes are instructive in identifying the likely appeal of the collection.

David Milman, editor of this work, explains that its purpose is as follows (at vii):

> This collection of essays seeks to analyse the diversity of regulatory structures available for the pursuit of business enterprise in the UK. There is a tendency to think solely in terms of the partnership and limited company as being the only options for collaborative business operations. Without wishing to deny the importance of these well known options the contributors illustrate that there are other possibilities which are both worthy of academic study and relevant in the practice of general commerce and in more specific spheres of commercial activity.

There is a similar tendency to circumscribe our thinking in this manner in Australia. A work that challenges this thinking is a valuable addition to libraries on business regulation. It should be noted that the book does not deal with the sole tradership as it is not an "organisation", nor structures used solely for investment purposes rather than for "active pursuit or a trade, business or profession" (at 1). Otherwise, the coverage is extensive, with a logical progression from partnership to private and then public companies, financial and insurance institutions. Co-operatives, privatised utilities, joint ventures and foreign/overseas

companies are examined in separate essays[1] as are corporate groups, which are considered by Milman to be deserving of recognition "as a form of business organisation *sui generis*, and...represent[ing] the preferred choice for the conduct of large scale commerce" (at 219).

As the title suggests, this work examines business organisations of the United Kingdom. This begs the question of the relevance of the essays contained in it to other jurisdictions, including Australia. The history and regulation of the organisations discussed are clearly those of the United Kingdom, and the focus is on United Kingdom law.[2] However, the work has additional value in "identify[ing] common themes in business regulation and [examining] how political and economic influences have impacted upon the law" (at vii). Parallels in the development of regulation in other jurisdictions are evident to readers familiar with business organisational form. The commentators adopt a highly reflective approach focussing on the impact of regulation on the operation of the business structure generally and the various stakeholders more specifically. The result is that the insights into likely future developments in many cases are of more general relevance and are equally applicable to Australia.

One of the major challenges facing the regulation of business enterprise in the United Kingdom and European Union is the harmonisation of law in the business sector. This is one of the interesting themes discussed by several of the contributors. While the implementation of the European Union Company Law Harmonisation Directives has been slow,[3] the harmonisation program has still had a significant impact on

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[1] Ian Snaith of Leicester University wrote Chapter 8, "Regulating Industrial and Provident Societies: Cooperation and Community Benefit". He is also legal adviser to the United Kingdom Co-operative Council. Cosmo Graham, Professor of Law at Leicester University is author of Chapter 9, "The Regulation of Privatised Utilities". He is also co-editor of the Utilities Law Review and Director of the Centre for Utility Consumer Law. Michael Lower of Liverpool John Moores University wrote Chapter 11, "Joint Ventures". Francis Tansinda of Manchester Metropolitan University is author of Chapter 12, "The Regulation of Overseas Companies".

[2] As at 31 July 1998.

[3] See Ebke, "Company law and the European Union: centralised versus decentralised lawmaking", (1997) 31 The International Lawyer 961. Ebke states that "[b]etween 1978 and 1988, the [European Union] Commissions company law program made relatively little progress": at 962. He states also that "[s]ince 1988, the Community company law program has not only slowed down, but has come to a virtual

the law of the United Kingdom in terms of the legislative treatment of private or "Ltd" companies and public or "plc" companies. Milman concludes that the United Kingdom has "now reached a stage where separate legislation for these two different corporate models would be welcome" (at 12), despite the fact that nearly 99 per cent of limited companies in the United Kingdom are classified as private companies.

Terry Prime[4] examines private companies in his essay entitled Structuring the Law of Private Limited Companies. The concentration here is on the small, closely held company. Prime states (at 44):

> [T]here has been a great need to adapt the impersonal structure of the company to meet the needs of a style of operation which in practice, but not in law, has been of a partnership nature.

This, he notes, has resulted in the evolution of a quasi-partnership structure, a "partnership nestling within the limited liability structure" (at 44). Here, the benefits of limited liability are obtained, but constitutional arrangements within the private company are modified to allow the business participants to enjoy the sorts of rights and protection found within a partnership structure, such as the right not to be removed from participation in management without specific cause. As such, restrictions are often placed on the ability of shareholders to transfer their shares[5] or remove directors.[6]

Prime also focuses on another stakeholder of a private company – the creditor – and proposes English law adopt provisions, with refinement, similar to German law governing the GmbH[7] in respect of minimum

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standstill": at 963.

[4] Professor of Law, University of East Anglia.

[5] Either in the form of a pre-emption clause giving the other shareholders a right of first refusal over purchase of the shares of the member wishing to sell his/her shares; or in the form of discretion given to the directors to refuse to register a transfer of shares.

[6] Through a contract of service or a "Bushell v Faith clause" as established in Bushell v Faith [1970] Appeal Cases 1. The House of Lords upheld a provision in the company's articles providing weighted voting rights for any director sought to be removed at a general meeting, with the effect that such a director would have three votes for every share held by that director. The effect was to make any director effectively irremovable.

[7] The GmbH is the German private company. The public company in Germany is the

capital requirements. He recommends that statutory obligations be imposed on shareholders and directors in the private company to ensure that the operations of the company are commercially prudent by requiring the company to maintain its capital if it is to be allowed to continue trading. If the capital is reduced to less than the minimal capital requirement through its trading activities, the directors should take action to ensure the company ceases trading; the shareholders contribute further capital to re-establish the minimum; or the shareholders, in respect of any further trading, become jointly and severally liable (at 68).

The danger noted for trade creditors of these companies is that of the company running into cash flow problems, leaving unsecured creditors to rely on the capital resources of the company, which may be non-existent (at 59), a situation considered to be a "patent injustice" (at 66). Prime appears to suggest that, in relation to the closely held company, the time has come to challenge the assessment in *Trevor v Whitworth*:[8]

> Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent.

The limitations of this proposal must be noted, as the recommendation seems incapable of implementation where a close corporation or private company regime has not been established.[9]

Further similarities between Australia and the United Kingdom are evident in the regulation of banking companies. 1998 saw significant change in the regulatory structure of supervision of the banking sector in both countries, with new bodies established in both cases. In the United Kingdom, the Financial Services Authority (FSA) was established to assume responsibility for banking supervision. Anu

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AG, and the two forms are governed by separate codes: at 12. The law governing the GmbH requires a minimum of 50,000 DM as capital: at 66-67.

[8] (1887) 12 Appeal Cases 409, 423 per Watson LJ.

[9] There is no such regime in Australia. Section 6 of the (Cth) 1989 Close Corporations Act would have permitted a "close corporation" of 1-10 natural persons as members with minimal procedural and reporting requirements. However, this Act has never been proclaimed. Sections 45A and 201A of the (Cth) Corporations Law have since introduced the small and large proprietary company and the single person proprietary company respectively. There has been little further discussion on a close or private corporation.

Arora[10] in the essay entitled Banking Companies describes this body as a "super-regulator" and considers that while there are substantial benefits to be had, there is also the danger that the new body could become a "bureaucratic nightmare" (at 142-143).

In Australia, 1998 saw the implementation of the Wallis Inquiry recommendations,[11] with the establishment of the Australian Prudential Regulation Authority (APRA) to assume the role of prudential regulator of the banking sector from the Reserve Bank. In addition, the Australian Securities and Investments Commission, commonly known as "ASIC",[12] was to assume responsibility for market integrity and consumer protection in the financial system, including payments transactions, as well as administering the Corporations Law and regulating the securities markets. These United Kingdom and Australian regulatory bodies are still in the early days of operation, so time will tell if Arora's warning turns out to be prophetic.

As a final illustration of the relevance of *Regulating Enterprise* beyond the United Kingdom, Milman's essay on corporate groups is instructive. Milman discusses the reasons for their emergence and the legal problems associated with their regulation. In this respect, the chapter is of general relevance and corporate groups are shown as a common feature of developed economies. In a section entitled "New Perspectives on the Problem", the problem being the allocation of responsibility for liabilities undertaken by just one group member, Milman refers to legislative developments in New Zealand in the 1980s, substantially adopted in Ireland in 1990 (at 229-230).

The above developments allow a court to make contribution orders, by which one company in a group could be ordered to contribute towards the assets of another company in the group to improve the prospects of creditors of the latter. New Zealand pioneered a further strategy, useful where the group as a whole has failed, of pooling assets and liabilities of the group. Milman notes that the implementation of both strategies is heavily influenced by judicial discretion[13] *(ibid)*.

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[10] Professor of Law, University of Liverpool.

[11] Financial System Inquiry, Final Report, March 1997 (Australian Government Publishing Service, Canberra).

[12] Replacing the Australian Securities Commission (ASC).

[13] Milman discusses the "more subtle" approach of the United States to the problem

Regulating Enterprise concludes with an essay by Janet Dine[14] on the theoretical models available to provide a framework for analysis of corporate law, and the justifications for regulation of corporations. Dine leaves the reader with the challenge of replacing "the traditional external penal model of regulation [which] has comprehensively failed" with "a model of regulation which looks to the regulated institution to design its own rules, leaving the regulator to assess the quality of those rules" (at 311). While not drawing together the common threads throughout the essays of the various contributors to *Regulating Enterprise*, this final chapter does prompt thought about the perspective from which the regulation of corporations should be analysed.

The collection of works in *Regulating Enterprise* is indicative of Milman's suggestion at the outset of the book (at vii):

> As we approach the new millennium there is a feeling that significant changes may be on the horizon which may transform the regulatory topography of business enterprise law in the century to come.

The extent of the anticipated transformation will be borne out by time but the experience of the final years of the twentieth century does indeed suggest that we are in a period of significant development. We approach this era of change more informed for the evaluations provided in *Regulating Enterprise*.

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and, briefly, the experience of Germany since 1965 when legislation was enacted to deal with public company groups. He notes that this issue has not generated harmonised action in the European Union, although an attempt, so far unsuccessful, has been made to promote a coordinated approach based on the German legislation through the Draft Ninth Directive: at 231.

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