PRAGMATISM, LAW AND ECONOMICS, AND CORPORATE LAW

A Review of: *An Economic and Jurisprudential Genealogy of Corporate Law*

By Michael J Whincop

Ashgate, Dartmouth, 2001, ISBN 1840147733, 266 pp.

I first read this book for a panel that was convened as part of the Corporate Law Teachers' Conference in 2002.[1] The panel was convened to review the contribution made by this book to corporate law scholarship in Australia. In this review, I want to pursue some of the comments that Michael made in the panel discussion about his contribution to the development of a form of pragmatic corporate law scholarship. Michael's role in developing this form of scholarship is subtle and elusive but will on reflection, I think, be one of his enduring contributions as a scholar.

When discussing the comments that each of the panellists intended to make, I remember clearly making undertakings not to mention the title of this rather difficult book. A full 30 seconds before I was to speak, I knew that it was not possible to discuss the book without some reference to the title. At the time, the best that I could come up with was that the title was something that readers should ignore — or at least was something that they should look past when deciding whether to read this book. Both then and now, I think that this is a book that contains many thought-provoking insights into the structure of Australian corporate law. My concern was that many scholars who could learn something from this book would not look beyond its title.

On reflection, this comment about the title was the easy way out and it is deserving of more close analysis. The title conveys a sense that it is possible to tell the story of the emergence of corporate law in Australia as the result of the interaction between two bodies of knowledge and practice: on the one hand, the style and content of legislative and judicial decision-making in the United Kingdom and Australia;[2] on the other, an economic theory of the company as a proxy for the economic and commercial forces seeking to fashion the corporate form to meet the needs of shareholders, managers and the other stakeholders of corporations.[3]

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1 CLiDE-CLTA Conference, *Corporations and Financial Regulation in the Digital Economy*, 10–12 February 2002. The members of the panel were Professor Ian Ramsay (Chair), Melbourne University; Professor Michael Whincop, Griffith University; Professor John Farrar, Bond University; Professor Stephen Bottomley, Australian National University; and Angus Corbett, University of New South Wales.

2 Whincop (2001), pp 12–27.

3 Whincop (2001), pp 3–12. Economic theory does play a central role to the argument in this book — see, for example, 'Economics is the key to understanding this body of law [corporate law]', p 3.

The interaction between these two streams of practice and knowledge is complex. On the one hand, it is the fashioning of a body of law by courts which is internally oriented and responsive to the need for courts to maintain continuity and coherence within a body of law. Equally, there is the need for legislatures to respond to perceived problems arising out of the use of the corporate form by shareholders and directors. On the other hand, there is the need for corporate law to connect with investors, managers and other stakeholders who were seeking to use the law to develop organisations to maximise their welfare.

The bridge between these two bodies of practice and knowledge is the law of contract. There is nothing novel in this. The use of contract law to support private ordering between participants in the company lies at the heart of law and economics scholarship. The novel feature of this book is the attempt to outline the interaction between the economics of the firm and corporate law in an Australian and English institutional context. This follows from a recognition that much law and economics scholarship in the United States is implicitly cast against the background of American legal, economic and political institutions.[4] This step is an important one because there is a growing view that the institutional context in Australia may have some significant characteristics that have an impact on corporate law and corporate governance.[5]

One institutional feature which is different in the United Kingdom and Australia on the one hand, and the United States on the other, is the various countries' approaches to law-making and adjudication. In the United States, there tends to be greater reliance on functional or consequentialist analysis of law — that is, law is judged on its capacity to meet instrumental goals. In Australia and the United Kingdom, there is a tendency for the style and mode of reasoning to be formal and legalistic in nature. Scholars in many fields of law have experienced the difficulties of using consequentialist theories of law to enhance our understanding of law in legal systems where the style and mode of legal reasoning are more formal and legalistic in nature.[6]

The process of integrating a functional analysis of law with a body of law which is highly formal and legalistic requires a form of pragmatic analysis. It is necessary to imagine the ways in which a particular body of law can directly and indirectly achieve particular goals and outcomes. Equally importantly, this form of analysis is often pragmatic in the sense that it recognises that a particular body of law accommodates, with varying degrees of success, competing and sometimes conflicting, goals and interests. This focus on how effectively a body of law accommodates competing interests and goals, and on how this capacity to accommodate competing interests and goals is being developed and sustained is an important form of legal scholarship. It seeks to

4 Whincop (2001), pp 1–3, 23, 28–30.

5 For example, Cheffins (2002), p 13. See also Coffee (2001).

6 For example, there are difficulties in integrating an economic analysis of accidents into our understanding of the law of torts — see generally Luntz and Hambly (2002), Ch 1; Deakin et al (2003), Ch 1.

open up a space in which it is possible to carry on a discussion about how law can, or should, be transformed to meet the needs of the twenty-first century.[7]

In this sense, this book adopts a pragmatic account of corporate law. It identifies a number of features of predominantly English corporate law which allow this formal and legalistic body of law to accommodate the needs of those concerned with developing effective business organisations. The attributes which the book identifies are contractibility, doctrinal pragmatism, adjudicatory passivity and conservatism. Contractibility refers to the willingness of the law to enforce contracts. Doctrinal pragmatism refers to the capacity of the law to gravitate to principles that are internally generated but are also consequentially justifiable. Adjudicatory passivity refers to the capacity of the courts to define a level of involvement in settling disputes that corresponds to the degree of the complexity of those disputes. Finally, conservatism refers to the disinclination of courts in particular to alter the status quo.[8]

These attributes allowed courts and legislators to be responsive to the need to develop and maintain an internally cohesive and rational body of law. But they also provided a way for courts and legislatures to respond to the external needs of those interested in developing effective business organisations. This analysis of Australian and English corporate law does open up a space in which it is possible to carry on a more informed debate about how corporate law should be transformed to meet the needs of Australia in the twenty-first century. In particular, this analysis opens up questions concerning the role of private ordering in corporate law and the potential for corporate law to accommodate a range of diverse and sometimes competing public policy goals.

In the panel discussion of this book, I raised this question with Michael. On my first reading of the book, I thought that Michael was trying to find a way to prove the legitimacy of law and economics scholarship dealing with corporate law. I thought that the thoughtful and incisive analysis of many areas of corporate law doctrine was to show the non-believers that law and economics really had something to offer teachers, students and practitioners in this area of law. My guess is that many potential readers may have such an impression of this book.

Michael replied to my comment by saying that he did not mind whether the book was read as an account of how law and economics scholarship found its way into the law or an account of how the law accommodated the needs of business. At the time, I thought his answer was interesting but a little disingenuous. On reflection, I think I misunderstood the project Michael was engaged in — which was developing a pragmatic account of corporate law. In developing this account, it did not matter which of these two views the reader used as a starting point.

Scholars and students will gain something important from reading parts of this book. There are sections which are incisive, imaginative and thoughtful. In

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7 For an example of this form of scholarship, see Collins (1999); Parker et al (2004).

8 Whincop (2001), pp 31–38.

its detail, the book does carry forward the project to develop a pragmatic account of corporate law. This is evident in the analysis of the separate legal entity doctrine,[9] fiduciary duties and the duty of care,[10] the role of external regulators,[11] members' rights,[12] the authority of corporate officers to enter into contracts,[13] and duties to creditors.[14] In each of these areas, the analysis is effective in sketching out the central themes of the book and allows the reader to reflect on how corporate law accommodates competing goals and interests.

This book is not without its flaws, however. At times, the writing is too compressed with too much detail and nuance squeezed into single sentences. At other times, the argument moves from the pragmatic to the didactic. In these instances, material being discussed will feel foreign to all but those who have a close affinity with law and economics scholarship. But these flaws, though sometimes annoying, do not intrude too greatly on the attention of the reader.

There is, however, one important flaw which is also evident in other parts of Michael's scholarship. At one level, this book sets out to be a true 'genealogy' of corporate law. It seeks to construct a matrix setting out the pathways along which legal institutions and the economic system have interacted to produce corporate law.[15] I found myself unable to map the arguments made throughout the book on to the matrix. In this sense, I found this meta-theoretical level of the book unhelpful and confusing. More significantly, the use of this 'genealogy' is perhaps inconsistent with the project of developing a pragmatic account of the law. The need to develop this meta-theoretical structure seems to sit uneasily with the strong strain of pragmatism that runs through this book. The imbalance between these two features of Michael's scholarship was one which he did not resolve in this or later work.

This book makes an important contribution to corporate law scholarship in Australia. At a detailed level, it provides insights into the operation of particular areas of corporate law doctrine. At a broader level, it makes a contribution by developing a pragmatic account of corporate law that will encourage discussion of the interests and goals which corporate law accommodates and the those it excludes. In seeking to systematically develop this pragmatic account of law, Michael leaves an enduring legacy for future corporate law scholars.

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9 Whincop (2001), pp 45–55.

10 Whincop (2001), pp 86–108.

11 Whincop (2001), pp 108–14.

12 Whincop (2001), pp 122–47.

13 Whincop (2001), pp 169–78.

14 Whincop (2001), pp 184–92.

15 Whincop (2001), pp 39–40, 209–11.

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