

Books

REINVENTING ARISTOCRACY: THE CONSTITUTIONAL REFORMATION OF CORPORATE GOVERNANCE by Andrew Fraser, Ashgate Dartmouth, Aldershot, 1998, ix + 146pp, ISBN 1 84014 061 5

Reinventing Aristocracy presents an intriguing thesis. Contemporary corporate governance needs a new foundation. Not a red brick-and-mortar slab fashioned from the economic rationalism that has informed our perception of the corporation for most of this century, but an edifice of polished marble, quarried from the politics of republicanism, and the mythology of '*noblesse oblige*'.

It is time, the author claims, that the modern corporation is recognised as the powerful, political entity that it is, and is 'civilised' so that it shoulders its share of social responsibility for 'the fate of the common world in which we live'.¹

The call for corporate governance laws to take account of the social responsibility of corporations is not new. In the wake of the Great Depression, E. Merrick Dodd Jr championed a view that the management of large companies bore a duty (after ensuring no more than a 'fair' rate of return to stockholders) to ensure that the corporation operated 'in the public interest', 'as a great and good citizen should'.² As laudable as it seemed, the view attracted stiff criticism from the law and economics school. In a comment on Dodd's thesis, Adolf Berle warned against handing over the 'economic power now mobilised and massed under the corporate form' to a few thousand directors and controllers, with nothing more than 'a pious wish that something nice will come out of it all'.³ A healthy scepticism lay at the base of this criticism. Why should a managerial elite be trusted with such power?

To whom, precisely, would they be accountable for their decisions 'in the public interest'?

Reinventing Aristocracy re-enlivens this debate, and takes it several steps further by proposing a fundamental reformation of our concept of corporations and corporate law. The author proposes that corporations law be relocated from the 'world of commerce and economics', into the 'realm of politics and government'.⁴ It is an appealing proposition, and one argued with great erudition and considerable stylistic flair. It is certainly a timely proposition, particularly in Australia as we contemplate the prospect of a new republican form of government,

1 Fraser A, *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance* (1998) at vii.

2 Merrick Dodd Jr E, 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harv LR* 1154, discussed in Allen WT, 'Our Schizophrenic Conception of the Business Corporation' (1992) 14 *Cardozo Law Review* 261 at 271.

3 Berle AA, Jr, 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 *Harv LR* 1365 at 1368.

4 Fraser, n1 at vi.

and particularly in the light of the precipitate privatisation of many public utilities and the corporatisation of our ancient mutual societies. Whether the author satisfactorily answers the sceptics' questions about why we should trust a new managerial aristocracy, is, however, doubtful.

At the core of the author's proposal is a revision of the 'one share, one vote' corporate constitutional framework. Just as wealth no longer plays any role in determining the weight of the citizen's political voice, so should it be irrelevant to the shareholder's voice in the corporation. A 'one voice, one vote' rule would allow the natural emergence of an elite class of public-spirited leaders who would perform 'the civic functions of a senatorial elite' and 'engender a renewed sense of *noblesse oblige*'.⁵ In the world the author envisages, the present managerial elite would not continue to operate purely in their own economic self-interest, nor in the interests of an invisible mass of wealth-holders, sheltering from their civic responsibilities behind the veil of incorporation and limited liability. This can happen only if the constitutional arrangements for the governance of corporations are founded on principles of civic responsibility, rather than on the basis of economic utility.

I have two reservations with this thesis, and it is as well to deal with them first, before setting out in more detail the scope of the work.

My first reservation is this. The author dismisses, in a reference to the 'heavy hand of the nanny state', an established alternative model for ensuring that corporations meet their social responsibilities: public regulation.⁶ The Corporate Law Economic Reform Program (which proceeds apace)⁷ is premised on the assumption that public regulation can promote both economic efficiency and ethical business practice.⁸ Likewise, the existence of extensive legislation in areas such as environmental protection and workplace safety suggests that the risks of corporate irresponsibility can be addressed by the imposition of external controls. These legislative controls arise ultimately from public and parliamentary debate, in an arena in which all citizens are enfranchised, not only those who participate in the ownership and management of corporations. Nevertheless, the author claims that the revitalisation of the notion of aristocracy in the corporate arena offers a viable and preferable alternative to this type of interference from the 'nanny state'.

My second reservation is more serious. For those uncomfortable with the connotations of 'aristocracy' (and I confess to be one of them), the author distinguishes between a present conception of aristocracy which 'conjures up the nasty spectre of an oppressive ruling class set over and above the common herd'⁹ and an ancient concept of aristocracy as 'a metaphor for the civic virtues that a free

5 Fraser, n1 at 133.

6 *Id* at 21.

7 Consider, for instance, the *Corporate Law Review Act 1998* and the *Corporate Law Economic Reform Bill 1998*, passing through the House of Representatives within 12 months of each other.

8 See the *Corporate Law Economic Reform Program Policy Framework Paper* (Canberra: AGPS, 1997).

9 Fraser, n1 at vii.

people might expect of their leaders in politics, business and intellectual life'.¹⁰ He laments the 'passing' of *noblesse oblige*, claiming that 'to political realists and economic determinists' it belongs to a past which is 'dead and buried'.¹¹ But was *noblesse oblige* ever more than a myth, constructed by a ruling class to disguise or perhaps justify its self-serving politics? I fear that in the real world aristocracy has always been synonymous with an oppressive and self-interested ruling class. If we can now look back to glorious republics of the ancient world and find praiseworthy civic virtue, we do so only because history – recounted invariably by the ruling classes – has filtered out much of the grubby truth. Perhaps I am so steeped in the rhetoric of a post-Marxist democratic ideal, that it is difficult to conceive of a selfless lordly class. The author answers this in part by reminding us that he is not seeking simply to exhort an existing elite to behave more conscientiously, but is proposing a reconstitution of the corporate body politic which separates voting power from economic self-interest and breaks the stranglehold of 'the capitalist logic of economic efficiency'.¹²

Reinventing Aristocracy is organised around four chapters:

1. Aristocracy and Democracy in the Era of Reflexive Modernisation
2. Corporations and the Economic Logic of Efficiency
3. Corporations and the Political Realities of Power
4. Corporations and the Constitutional Genesis of Civic Authority.

In the first of these chapters, the author describes what he sees as the evils of corporate capitalism and the weaknesses in present conceptions of the role of corporations, and establishes an historical and philosophical foundation for his thesis. He admits to having been much influenced by the work of Hannah Arendt. He also betrays considerable disaffection with the law and economics analysis.

The law and economics literature and theory is dissected in greater detail in the second chapter. It is in this chapter that he asserts and explains the 'one voice, one vote' rule. He places this discussion in the context of an analytical description of a current trend to recapitalise stock of some large public corporations into 'dual class common stock', which divides shareholders into voting and non-voting members.

Only the voting shareholders would govern the corporation, and they would meet as 'natural persons and political equals'¹³ under a one voice, one vote system. From these, the author expects that a class of 'corporate notables' would arise who would undertake the governance of the corporate, in the public interest. The non-voting stockholders would still need to be satisfied by that their investment provided an adequate return:

But even the coupon-clippers may have a social conscience. More private investors might be prepared to enter the share market if they were confident that the uses to which their capital would be put were subject to careful oversight by

10 *Id* at 1.

11 *Ibid*.

12 Fraser, n1 at 45.

13 *Id* at 47.

a self-selecting class of active investors experienced in the art of balancing private and public, individual and corporate interests.¹⁴

At this point I hear the echo of Adolf Berle's scepticism. What will motivate these notables? To whom will they be accountable? Can we trust them? Those of us who do not share the author's faith in the selflessness of a noble elite need more information about precisely how corporate governance laws would be framed to control the potential abuse of such power.

The chapter concludes with a suggestion that this radical new model be tested first by experimenting on corporate enterprises whose businesses have 'an obviously public service dimension'.¹⁵ He suggests media corporations (because freedom of communication is 'an essential feature of every functioning democracy'),¹⁶ any body which straddles the boundary between the public and the private (hospitals, universities, prisons, banks and insurance companies are suggested), and also tobacco, liquor and gambling interests because of the 'notorious risks to public health and safety associated with their products'.¹⁷

The third chapter convincingly elaborates the theme that the modern corporation is governed not only by economic rationalism but by 'the political realities of power'. The modern corporation has been shaped by politics, and it wields considerable political power. That power, claims the author, needs to be 'civilised'. The final chapter, 'Corporations and Constitutional Genesis of Civic Authority' further expounds the vision of a new corporate republicanism.

The book concludes with an Epilogue entitled 'The Rebel in Paradise Ltd', which reads like the final exhortation in a sermon from the pulpit of a reformist church. Indeed, the style and tone of the book as a whole is fervently religious. Although a relatively short work (only 137 pages), it is a time-consuming read, largely because so many ideas are packed into each chapter and verse. If this radical reformation is to take place, says the author, it will happen either here in Australia, or in the United Kingdom. The United States Inc is already lost, irretrievably, to the economic rationalists. If it is to take place anywhere, I suggest, the sceptics will need considerably more pragmatic detail about the mechanics of this new constitutional form of corporate governance. Conversion of Australian corporate law, I fear, is still far off.

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14 Ibid.

15 Fraser, n1 at 50

16 Ibid.

17 Ibid.