

FOREWORD

THE HON MICHAEL DUFFY
ATTORNEY-GENERAL

This special issue of the *University of New South Wales Law Journal* is devoted to the theme 'Corporate Regulation and the New Corporations Law'. The publication brings together in the one issue a range of topical, relevant and up-to-date articles on many important aspects of the law relating to companies.

The publication of this issue is timely. There has been quite a deal of change in the corporate law area in the past year and a half. In this regard, the principal focus of the Government's efforts to reform corporate regulation during its term of office has been to establish an effective national regulatory framework for the administration of companies and securities markets.

The commencement of the new *Corporations Law* in January 1991 is a significant watershed for Australian business. At last this important aspect of our national economy is being regulated on a national basis. The new national scheme marks a key change in the Commonwealth Government's capacity to control the direction of corporate regulation in the interests of national economic management. Every company now has the right to carry on business throughout Australia by the mere fact of its incorporation in Australia.

At the forefront of our new system is the Australian Securities Commission ("ASC") - there is now one regulator reporting to one Parliament. The lowest common denominator approach to corporate regulation is a thing of the past. We have for the first time an adequately funded corporate regulator. The Government has committed substantially increased resources to the ASC and associated agencies for regulation and enforcement.

There is no dispute that corporate law and administration was not capable of meeting all the challenges of corporate regulation during the 1980s. The problem in the past seems to have been one not only of lack of enforcement but also, in many respects, lack of appropriate regulation. In particular, directors of large public companies, because the law in some cases did not specifically prevent it, were able to manage companies as if they were extensions of their

own private affairs. Directors were seemingly able to borrow from their own companies, transfer assets between companies and bestow benefits on their associates out of company funds with impunity and/or without shareholder/creditor knowledge or approval. These abuses often involved significant losses of corporate funds thereby affecting investor confidence.

The rationale for the national scheme was therefore not solely to redress the lack of enforcement of corporate law. The rationale was to provide Australian business with a regulatory framework which would facilitate business by enhancing the development of the economy and improving the efficiency of our capital markets and at the same time ensuring adequate protection for investors. Added impetus for the new scheme was the need to provide confidence to overseas and domestic investors in Australia as an attractive place to invest. Indeed, the perception of Australia's regulatory environment, not only domestically but more importantly overseas, is fundamental to our economic recovery.

The reform of the substantive corporate laws which has been taking place since 1991 when the new national scheme commenced has focussed on important key areas of significance to the business and investing community. This reform program commenced with the *Corporations Legislation Amendment Act (No 1)* 1991 which contained long overdue reforms relating to consolidation of accounts for corporate groups and insider trading. These reforms were basic to the achievement of an acceptable quality of disclosure and injected a new element of certainty and reliability into the accounts of our major companies.

This Act was followed by the *Corporations Legislation Amendment Act (No 2)* 1991 which provided for the introduction of a scrip-lending system and facilitated the move by the Australian Stock Exchange to a 5 days after trade security settlement regime.

In addition to these two reform packages, the Government released a further package of proposed reforms for public comment in March this year. These proposals contain substantial reforms relating to loans to directors and related property transactions, the framework for insolvency and directors duties and the rights of shareholders. This reform package also contains proposals which will revolutionise the operation of Australian securities markets by enabling them to be fully automated in terms of both transfer, registration and settlement of securities. This will increase the efficiency of Australia's capital markets, reduce the risk in settlement of share transfers, lead to more certainty for market participants and improve the competitiveness of the Australian Stock Exchange.

The internationalisation of securities markets and the rapid transfer of funds across borders make it essential that the ASC be able to assist its overseas counterparts in the investigation and prosecution of offences against securities laws. For this reason the Government introduced the *Mutual Assistance in Business Regulation Act* 1992 which will allow Australian agencies, such as the ASC, to use their compulsory acquisition information gathering powers to

respond to requests from overseas agencies. In turn Australian regulators will be better placed to seek similar assistance from overseas regulators.

The Government has also recently foreshadowed its intention to expose for public comment later this year an enhanced statutory disclosure regime. Such a regime would be designed to ensure the timely disclosure of all material information to the market as the level of financial disclosure by major corporate entities in the 1980s was grossly inadequate. Many of the corporate regulatory problems experienced during that period may well have been avoided had there been an effective disclosure regime in place. The Government therefore firmly believes that our company laws should provide for better disclosure. All of a company's stakeholders, including its members, creditors, customers and employees, and not just its management, are entitled to sufficient information to enable them to make an accurate assessment of the commercial risks they face in the course of their on-going relationship with a company.

Further reforms to the *Corporations Law* are under longer-term consideration. For example, the Ministerial Council for Corporations has approved the drafting of a new *Close Corporations Bill* to provide for a new simplified corporate structure for small business.

Some commentators have argued that there has been too much change recently in the corporate law area, that the *Corporations Law* is too long and too complex and that we have overreacted to the corporate excesses of the 1980s. I think this criticism focuses too much on form and not enough on the substance of the law. The Government is not, of course, concerned with regulation for regulation's sake. It will reduce the complexity of the law wherever it can. It wants to make the *Corporations Law* as simple as possible given the constraints of inherently complex financial markets.

So far as the frequency of amendments is concerned we are now addressing the problems caused by years of neglect brought about by the lowest common denominator approach to reform under the co-operative scheme. The current pace of reform cannot continue indefinitely but will continue for so long as our laws fail to provide Australia with the regulatory framework it needs to enable it to take its place in the international trading community.

It is important that our companies and securities laws be subject to a process of continuing and close scrutiny, review and constructive analysis and criticism. Company law plays a vital role in the commercial life of a nation. The modern corporation is one of the major institutions shaping the performance and growth of the Australian economy. No other form of business enterprise is comparable to the modern corporation as a means of marshalling resources to produce goods and services to satisfy consumer needs.

This issue of the *University of New South Wales Law Journal* will interest not only students and practitioners of company law but also those who are vitally concerned in the administration of the affairs of companies.