
Review of R Tomasic, J Jackson and R Woellner: Corporations [:] Principles, Policies and Process
3rd ed (Sydney: Butterworths, 1996), lxvii, 991 pp

Author: Ralph Simmonds LL.B. Hons (UWA), LL.M. (U Toronto)
Professor of Law, School of Law, Murdoch University

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1. This is one of the three major sets of teaching materials on corporations law for law students from commercial publishers in Australia [1]. Of the three, it lays the greatest initial emphasis, from its title and opening chapter, on theory, policy and context. Of the three it provides the highest proportion of text to extract from other materials, such as cases, legislative material and periodical literature. It lacks a sustained treatment of non-corporate business forms, most notably the partnership, of the sort the others provide. But it makes up for this by a particularly useful, largely textual, account of re-ordering and winding up the company in distress (in its three concluding Chapters, 13, 14 and 15). And in a fast moving area of law, this book is the least out-of-date of the three.

2. In short, there is much to like here. This is whether one is a law student, a law teacher or a person with a research problem. However, there are aspects of the book, some major, some minor, that will cause each of these types of reader various forms of difficulty. Perhaps the most substantial overall criticism that can be made of the work is, however, that it represents a promise still some distance from being fulfilled.

3. The book begins in an extremely challenging way that flows directly from the title. Chapter One "The Context of Australian Corporations Law" is nothing less than a sweep through social theory and the corporation. Ideas of legitimacy (of the corporate form), of private power, of accountability, and of economic and political theory are reviewed. The authors' aim is to see to it that the reader tackling this book as a whole - that is, law student and law teacher, at least - should be discouraged from seeing the area of corporations law as something that is just technical, value-free or objective. At the same time such a reader should be put in a position to see the law as relevant to its context.

4. This is an important point. Corporations law has a forbidding technical aspect, bound up as it is in an intricate legislative scheme that is productive of complex private documentation. For the person without experience of the world of corporate administration, this is an area of law that is extremely difficult to relate to. For such a person charged with learning such law, it might be tempting simply to move into an enterprise of mastering the linguistic intricacies.

5. Mastering the linguistic intricacies of corporations law is important, of course. That law offers marvellous opportunities to practice statutory method, and to further embed the lessons of learning the law of case [2] and statute [3]. There is also the role of an important public regulator, the Australian Securities Commission, to be understood [4].

6. However, even assuming it is possible to learn any law simply in such a fashion - something the authors of this book and I would contest - this is an inadequate response to the challenge of corporations law.

7. Corporations law shows the limits of legal language, or rather, the impossibility of specifying what one wants the law to achieve so as to make it possible not to think about anything else except the language used. Much, or perhaps all, of corporations law makes no sense without an understanding of the worlds of social fact against which it is projected and the worlds of social ideas that it reflects. This is apart from narrower, more "technical" matters that go to the ways in which corporations law represents some distinctive forms of solution of legal problems. One such problem, prominent in modern corporate law, is the perennial tension between, on the one hand, predictability and certainty in social ordering, and, on the other, proper allowance for adaptation to change in the phenomena being regulated.

8. These points can be illustrated across the whole range of the coverage of a book like this one. Perhaps the nicest illustrations are from the almost mystical area of corporate legal personality (Chapter 3), where a thing becomes a legal person; the area of accounts and audit (Chapter 9), where technical law and the language of business most obviously intersect; and the legal control of takeovers (Chapter 11), where the technical aspect of corporations law is at its forbidding, but events are often at their most exciting and highly
10. Chapter 1 itself is a rather compressed account - so many ideas are covered that the reader is left somewhat breathless, expecting that the threads will be picked up in later chapters. Large, this does not occur: the later chapters seem mostly to be about the "Principles" in the book's sub-title, and not at all or not as much as one would have hoped about its "Policies" or "Process".

11. Chapter 2 "Constitutional Aspects and Administration" is a nice framing of the basic constitutional issues in the construction and operation of the National Scheme. But it is surprising in a book about law in context that it does not review the budget of the ASC, its staffing or its role as elaborator of the ideology of the National Scheme through Policy Statement, Practice Note and less formal pronouncements.

12. Chapter 3 "Corporate Personality" reviews the basic outline of the grant of and limits to this most distinctive feature of the corporate form. There is rather more theory reviewed here [5], although it is not consistently tied into the subsequent accounts of the legal rules, and some of the accounts of the theory are argumentative rather than illuminating [6].

13. Chapter 4 "The Incorporation Process" sets out the process and its documentary constituents in nice detail, and most notably reviews promoters and pre-incorporation contracts, the ultra vires doctrine and the difficult area of control of the power to amend the corporate constitution. But there is nothing here on such topics as the way the ultra vires idea might be understood in policy terms, as control over corporate diversification undertaken for reasons of risk minimisation or managerial empire building [7]. Nor is there anything in this chapter or elsewhere in the book on that matter of corporate context, being approaches to the valuation of a membership of a corporation [8], which is so important to a rich understanding of the principal High Court authority on articles amendments [9].

14. Chapter 5 "The Company's Dealings with Outsiders" is a review of the liability, in tort, contract and criminal law, of the corporation and its operatives. Its discussion of the principles of direct and vicarious liability in tort and crime is surprisingly uninformed by the theories that Chapter 3 "Corporate Personality" would have suggested and that are critical of the application of notions of blame, intent or even fault to the corporation. Here there is a rich Australian literature [10] that grapples both with the question of that application and with an answer's practical implications. Had some account of this been undertaken here, it could fairly readily have been broadened into a wider discussion of enterprise liability, which can connect the discussion of crime with that of the areas of contract and tort [11].

15. Chapter 6 "The Company and Its Members" has a serviceable account of how one becomes a member of a company and of related matters. This sets the stage for a review of Foss v Harbottle, the oppression remedy, and other relief avenues, including a surprisingly long account (in view of its reduced significance nowadays) of winding up on the just and equitable ground. There is no review of theories of the role of litigation in protecting members' interests, however [12]. And there is no indication of the controversy surrounding the proposals for reform of Foss [13].

16. Chapter 7 "Directors' Duties" is the longest chapter in the book, not surprisingly for a work of this kind. It has accounts of appointment to and loss of the office, the civil penalty reforms (a surprisingly short account), the fiduciary duties, the duties of care, diligence and skill (in which the somewhat misleading impression is left that Daniels v Anderson [14] has clearly set the new national standard[15]), remedies, and ratification and exculpation. However, there are no references to let alone discussion of the rich policy literature on the value (if any) of regimes of legally enforceable directors' duties. This literature is important, both on the role of the duties generally and on the role of the duty of care, especially after account is taken of the possibilities for ratification, indemnification and insurance [16].

17. Chapter 8 "Meetings" covers both directors' and members' meetings, but with greatest emphasis on the latter. It contains a most useful map of the pressure points for attacks on meeting decisions, nicely arraying the legal issues along this strategic axis. But there is no reference to the problems of collective action in such meetings, nor to the debate on whether or not institutional shareholders in fact represent or ought to represent new hope for shareholder activism [17]. And missing too is an account of the related material on the value of the vote, well worth a look in a book of this sort [18].

18. Chapter 9 "Accounts and Audit" includes a basic account of the records keeping and periodic reporting rules although the changes made by the enhanced disclosure regime get only an elliptical mention [19]. There is a much fuller treatment of the role and liabilities of the auditor. But neither here nor in the chapters on fundraising or securities regulation later in the book is there any discussion of the modern challenge to the disclosure philosophy of regulation represented by the Efficient Capital Markets Hypothesis [20]. In relation to the liability of the auditor to third parties, the area of liability that this work like its competitors particularly highlights, there is no grappling with (as opposed to repeated references to) the pragmatic objection to such liability associated with Ultramares Corporation v Touche [21].

19. Chapter 10 "Financing the Corporation" is probably the least satisfying chapter in technical as well as policy terms. It begins promisingly by drawing attention to the difficulty of drawing sharp distinctions between equity and debt, but it does not draw out the implications of this insight. The basics of corporate finance as covered by the Corporations Law are reviewed, but with a mystifyingly long treatment of authorised capital, mystifying because the institution of par value gets little treatment by comparison, and without a hint that there is a current move to do away with both [22]. Debentures and floating charge law are reviewed, but with some surprising omissions, of which the most notable is the lack of a reference to the rule for invalidation of late registered charges in Corporations Law s 265 [23]. Collective investments are discussed, but at a number of points as if they were simply a mechanism for financing a corporation [24]. There is an account of fundraising controls through the prospectus requirement in Corporations Law charged.
At the level of policy, it would have been highly appropriate for the book to have included a discussion in Chapter 10 of the ‘Efficient Capital Market Hypothesis’ for the light it casts on recent changes to the form prospectuses for some issuers must take. And the review of the theories of the floating charge would be much improved by an account of the problem of why security is taken, particularly security of the whole undertaking kind, and whether the legal system should accommodate these creditor preferences. Both of these represent excellent opportunities to deploy policy analysis in aid both of understanding the technicalities of the law and of illuminating its socially contingent character.

Chapter 11 “The Legal Control of Takeovers” highlights the “legalism” of an area with an extremely involved regulatory scheme copped by a regulator in embryo, in the form of the Corporations and Securities Panel. The book does a good job of providing a way through the thicket of definitions and exceptions that support the basic acquisition prohibition and its ancillary provisions. But there is surprisingly little about the issues the Panel raises, of regulation by discretionary judgment. More seriously, there is only a very short account of the policies that regulation of the market for corporate control engages. The policy debates here have been among the most heated in the literature on what Australians call corporations law. Those debates have a great deal to contribute to understanding both why such markets exist with their major premia to trading market values, and why these markets for control are regulated as they are.

Chapter 12 “Securities Regulation” is about Corporations Law Chapter 7, apart from the fundraising, debenture and collective investment controls. In some ways this is the best chapter. It is largely text, and includes much material beyond case and statute, including well chosen material from the financial press. It gives some of the flavour of what it is to regulate such fast-moving and high stakes operations as securities markets. But the policy material is weak. It is not enough in this area to repeat the concern about distortion of markets by unfair practices without going into how the public interest might be seen to dictate this sort of regulation. The material in the chapter on insider trading highlights this. The basic arguments about why the area should be regulated a debate on which continues to rage in the literature are canvassed almost entirely through an extract from the principal recent government report on the area. In the chapter itself there is a nice illustration of the continuing difficulty of rationalising the regulation we have gained as a result of that report. There is rather more to the debate than that report suggests, and as that case may be indicating, further, that debate indicates the potential for a different approach to the civil remedy for insider trading that proceeds from Corporations Law s 1005 than is commonly supposed. This is an approach that would focus on the distortion of the market that flows from non-disclosure rather than on defects in the plaintiff’s trading calculus.

Chapters 13 “Receivers and Controllers of Property”, 14 “Arrangements Reconstructions and Voluntary Administration” and 15 “Winding Up” cover areas that the other corporations law teaching materials do not or to anything like the same extent. These chapters are mostly text, take good account of recent changes in the law, and represent highly serviceable introductions. They spend very little time on policy; this is more understandable than elsewhere in the book, given the relatively limited coverage to be expected of these areas in a basic set of materials.

In sum then, this book has much to offer. The authors are to be commended for their ambition, much of the text they have provided, and the coverage they have managed. However, the work falls short of its promise. Given the history of this publication, a new edition is to be expected soon. I hope the authors take that opportunity to address more fully the promise of their title.

Notes


[2] A favourite in corporations law courses in this country is to review just where the law now is on the matter of directors’ standard of care as revealed by the recent Australian cases, a matter I return to for this book below.

[3] Corporations law, as represented by the National Scheme statutes, offers many outstanding examples. For me the best is probably Corporations Law Part 3.2A “Financial benefits to related parties of public companies”: see R Simmonds, “Curbing self-dealing in corporations: Australia’s new approach”, (1993) 1 E-law (No. 1).


[5] Although some of it would be mystifying for the neophyte, such as the reference to Teubner’s "autoptotic" theory (at 93).

[6] As where the authors say that "[s]ome, like the members of the contemporary law and economics movement, would seek to reintroduce simplistic contractual principles to deal with complex social policy and organisational dimensions of the legal regulation of business”. While I have some sympathy with this critique for reductionism (see R Simmonds, "Juridical Personality in Canada: The Case of the Corporation" in Canadian Comparative Law Association, Contemporary Law/Droit contemporain (Cowansville (Quebec): Yvon Blais, 1990), 60, at 62 - 64), I think it identifies a unity in the law and economics movement that is not there, and does not account for the subtlety of what for the
members so identified counts as a contract.


[8] For a short introduction to this aspect of the case, see Michael J Whincop, "An Economic Analysis of Gambotto" in Ian Ramsay, ed Gambotto v WCP Ltd Its Implications for Corporate Regulation (Melbourne: Centre for Corporate Law and Securities Regulation, Faculty of Law, University of Melbourne, 1996), 102, at 112 - 113.


[10] Best represented I think by the work of Professors Fisse and Braithwaite: see B Fisse and J Braithwaite Corporations, Crime and Accountability (Cambridge: CUP, 1993).


[18] These issues provide a valuable entry to consideration of such as the role of voteless shares and cumulative voting arrangements, as well as a richer appreciation of proxy voting: there is little on the first two in this book. See Klein & Coffee, supra note 16, at 119 125.

[19] Thus, the concept of the "disclosing entity" in Corporations Law Part 1.2A gets only an introductory treatment.


[21] 255 NY 170 (1931): the point I am making here derives particular piquancy from the extensive (for an Australian court) review of the policies that that objection instantiates in Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg) (1997) 71 ALJR 448, especially per McHugh and Gummow JJ.

[22] At the time of their book, the Second Corporate Law Simplification Bill 1996 (June 1996); see now Company Law Review Bill 1997 (December 1997), Schedule 5 read with Explanatory Memorandum para 1.9 (requirement for authorised capital and possibility for par value shares to be abolished when proposed consequential amendments to income tax legislation commence).

[23] A less substantial point, but an important one, is the clear understanding this chapter conveys that only corporations can grant floating charges. For how misleading that impression is, see John Chandler, "The Modern Floating Charge" in Michael Gillooly, ed, Securities over Personality (Sydney: Federation, 1994), 1, at 4 6 (discussing practical implications).

[24] To see most clearly how they are not, consider Corporations Law s 92 (1) (c) read with s 9 "prescribed interest" and "participation interest", especially para (g) of the latter.

[25] See now Part 7.12 Divison 3A: the only reference to this change I could find in the book was in the chapter on takeover regulation.

[26] See the proposed legislation referred to in note 22 supra.

[27] See text at and reference in supra note 20; and see Corporations Law s 1022AA.

[28] Perhaps the best current account of the empirical question, with references to the normative one, is Ronald J Mann, "Explaining the Pattern of Secured Debt" (1997) 110 Harvard Law Review 625.

[29] This is a challenging area to explore, not least because it evokes such strong rule of law objections. For my own views on this sort of regulatory technique in the area of securities regulation, see the references supra note 5.

[30] Perhaps the best collection of essays (if now somewhat out of date) covering the field here is John C Coffee, Jr, Louis Lowenstein and Susan Rose-Ackerman, eds, Knights, Raiders and Targets: The Impact of the Hostile Takeover (New York: Oxford, 1988). For one particularly useful essay (for understanding what is at stake in the partial bid rules in Corporations Law ss 635 (b) and 671) see Lucian Arye Bebchuk, "The Pressure to Tender: An Analysis and a Proposed Remedy" in ibid, 371.
Closely Held Corporation: A closely held corporation is a corporation that has only a small number of stockholders with no public market for its stock. 

Limited Liability Company: Unlike a corporation, an LLC is a pass-through type of business. Pass-through businesses are those in which the profits and losses of the business pass through to the owners. 

C Corporation: A "C Corporation" is a business entity that can have an unlimited number of shareholders, with each shareholder being taxed on their share of the profits and losses.

In nuclear astrophysics, the rapid neutron-capture process, also known as the r-process, is a set of nuclear reactions that is responsible for the creation of approximately half of the atomic nuclei heavier than iron; the "heavy elements", with the other half produced by the p-process and s-process. The r-process usually synthesizes the most neutron-rich stable isotopes of each heavy element. The r-process can typically synthesize the heaviest four isotopes of every heavy element, and the two heaviest...