

**CORPORATE GOVERNANCE AND INTERNATIONAL**

**BUSINESS LAW:**

**BOOK LAUNCH**

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Robert Lowe was one of the most interesting politicians in our history. As an albino, suffering from the nickname “pink eyes”, it is no doubt politically incorrect to describe him as one of our more colourful politicians, but his intellect and personality were such that as a politician, barrister, orator and journalist he exerted considerable influence during his eight years in Sydney (1842-1850). That influence extended to a range of matters of considerable significance in the formative years of our institutions including, perhaps most notably, responsible government and public education.

The strength of his intellect was such that he held opinions on a range of issues which, even at that time, did not appear to cohere naturally with each other. It was not inappropriate for the

biographer of his time in New South Wales to adopt an inherently contradictory title: *Illiberal Liberal*.<sup>2</sup> For a man widely regarded as a progressive, one of the contradictory elements of his makeup is the censorious approach he took to questions of morals and of moral fibre.

The incident that led to his departure from Australia, leaving behind Bronte House as one of his permanent contributions to this city, arose in the context of the foundation of this University. He objected to the proposed appointment of Dr William Bland as one of the original senators of the University of Sydney. This may not have been unrelated to the fact that, upon his arrival in Sydney, Dr Bland had given him entirely inappropriate medical treatment and told him that he would be blind within a few years and that there was no point in pursuing his career – a diagnosis which he decided, after some hesitation, to ignore.

His main objection was that Dr Bland was an emancipated convict. The fact that he was transported after being convicted for murder, was enough for Lowe. The fact that the murder occurred in a duel fought on a matter of honour, when he and the deceased were serving in the Royal Navy, was of no account, perhaps

because Bland was later imprisoned in the colony after being found guilty of criminal libel for criticising Governor Macquarie.<sup>3</sup>

Lowe uttered the taboo word “convict” when questioning Bland’s qualification for appointment. This was a violation of the rigorously enforced politesse of the time.<sup>4</sup>

Lowe returned to England. His hostility to emancipated convicts, who had acquired wealth when, as he suggested, it was extremely easy to do so in Sydney, led him to successfully advocate in the House of Commons the adoption of a low property qualification for New South Wales, so that the more recent free migrants would be enfranchised. This led to the establishment of a democratic basis for government in this State long before it was the case in England.<sup>5</sup>

Some of you are no doubt wondering what this has to do with either of the books that I am launching today. The significance is in Lowe’s subsequent career in England, where he would ultimately serve as Chancellor of the Exchequer under Prime Minister William Gladstone. His relevance to tonight’s occasion arises because he was the principal promoter of the Joint Stock

Companies Act of 1856 which removed all restrictions upon a company obtaining limited liability, so that from that day onwards incorporation was no longer a privilege but, in substance, a right attainable on application, together with an automatic conferral of limitation on the liability for the incorporators. It was this legislation, soon replicated in substance by the Joint Stock Companies Act of 1862, to which the corporations legislation of the world can be directly traced. This has led historians to confer upon Robert Lowe the title of “Father of the Modern Company”.<sup>6</sup>

No Australian figure has ever had a greater influence upon world history than Robert Lowe did by this means.

The significance of the corporation, as one of the great contributions of Victorian England to global prosperity, was widely recognised in the decades thereafter, although, like so many things, we tend to take it all for granted today. From the Gilbert and Sullivan repertoire, one does not frequently hear of a revival of their operetta *Utopia Limited or The Flowers of Progress*, no doubt because a paean of praise for the limited liability joint stock company does not have the resonance that it once did.

In that operetta the residents of the south sea island of Utopia sing a chorus which could well be an introduction to the volume on corporate governance in Japan which is launched today. This has accurately been described as “one of the most improbable choruses ever set to music”.<sup>7</sup>

“All hail, astonishing Fact

All hail, Invention new

The Joint Stock Companies Act

The Act of Sixty-Two.”

Perhaps the most interesting feature of the book on corporate governance is how the range of issues that are being addressed in Japan are generally the same as those which other nations, including our own, are facing. Of course, there are particular matters that reflect the culture of Japan, for example the chapter on the Japanese tradition of life long employment. Nevertheless, most of the issues raised are quite familiar to an Australian lawyer. This can be attributed to the success of the innovation which Gilbert and Sullivan celebrated.

It is a little difficult to comment on the content of the book, because most of what I know about corporate governance in

Japan is derived from this book. I did, however, meet the judges of the Commercial Division of the Tokyo District Court in the judicial exchange that I organised to commemorate the 30<sup>th</sup> anniversary of the signing of the 1976 Treaty of Friendship and Co-operation between Australia and Japan. I wish to acknowledge the assistance that Luke Nottage gave in the preparations for that visit.<sup>8</sup>

My knowledge of Japanese corporate law was extended by the participation of the Chief Judge of that Commercial Division in the Judicial Seminar on Commercial Litigation which the Supreme Court of New South Wales organised in conjunction with the High Court of Hong Kong in Sydney in April 2008 and which attracted senior commercial judges from throughout the region. The Seminar will be repeated in Hong Kong next January.

However, it was in the context of the original judicial exchange with Japan that I first researched and articulated the significance of a comparative law approach to commercial and corporate matters, particularly by reason of the expansion in cross-border issues which requires co-operation and understanding between the lawyers, including the judges, of different

jurisdictions.<sup>9</sup> This is a matter which has become a theme that I have developed on a number of subsequent occasions.<sup>10</sup>

It is this interconnectedness of global commerce that links the two books being launched today. The requirements of corporate governance, particularly in major commercial nations such as Japan, represents an essential basis for the facilitation of international trade and, perhaps more particularly, capital flows. The volume by Robin Burnett and Vivienne Bath sets out the range of legal issues that can arise in such transactions and does so in a comprehensive manner.

The collection of essays edited by Luke Nottage, Leon Wolff and Kent Anderson will enhance the understanding of the basic institutional framework for commerce in one of the most important global economies on the part of all lawyers who have to advise their clients when dealing with Japanese corporations, particularly with respect to investment in, providing credit to and creating or conducting joint ventures with Japanese corporations.

The principal focus of Robin Burnett and Vivienne Bath's book is the range of international regimes which regulate the sale,

and carriage of goods in international trade as well as the financing of international transactions. They discuss the requirements for effective operation in foreign markets and the systems for the settlement of disputes that inevitably arise with respect to both trade and investment. The volume will be of considerable assistance to legal practitioners asked to provide advice in any context with an international commercial dimension.

These volumes manifest the central significance for Australia's future prosperity of an understanding of global trade and investment. I understand that this event occurs under the auspices of Caplus, the Centre for Asian and Pacific Law at the Sydney Law School. A global perspective on commercial matters is, I am aware, a central concern of this law school, as manifest in the activities of Caplus of which, at least in part, the two books are a product.

This global perspective, and specifically an Asian focus, is of great, indeed, vital, importance for our national future. Regrettably I have to say that there are still areas of the law which remain inward looking and parochial. From time to time there emerge particular reforms that indicate a global outlook, but they occur on

an ad hoc basis in particular categories of reference. There is no systematic and co-ordinated approach to these matters which was suggested, perhaps most clearly, in the Australian Law Reform Commission's Report No 80 entitled *Legal Risk in International Transactions*, much of which has never been acted upon.

I regret to say that my attempts to encourage Attorneys General to pursue a more ambitious project of this character have been successful in some specific respects, but not yet in the broad based manner that I believe is required if Australia is to develop an image abroad of approaching global issues with a global perspective.

Regrettably we have not developed such an image and in a number of particular respects we appear parochial. I refer, for example, to our adoption of the "clearly inappropriate forum" test, rather than the English "more appropriate forum" test, for determining whether or not to decline jurisdiction on forum non conveniens grounds.<sup>11</sup> However, the practical significance of this approach is significantly attenuated by the adoption of an internationally sensitive "no advantage principle" for choice of law.<sup>12</sup>

Similarly, much of our legislation such as the *Trade Practices Act*, the *Insurance Contracts Act* and the proposed national Consumer Law<sup>13</sup> are enacted or proposed without consideration of their effects on international commerce. I refer specifically to whether they contain “mandatory rules” for the purposes of private international law. The result is that we have judgments which determine that a foreign jurisdiction clause offends our public policy in circumstances where no order of an Australian court could be of any practical efficacy.<sup>14</sup>

To some degree the level of parochialism amongst Australian lawyers reflects the instincts of a generation that came to maturity in reaction to the traditional deference that Australian lawyers used to give to English lawyers. We really have to get over this reverse colonial cringe. The English no longer regard us as an inferior species. Rather, they regard us in much the same way as we regard New Zealanders: as altogether too successful for our proper station in life, of which, from time to time, we need to be reminded.

Our own attitude to England should move from adolescence to adulthood in the context of the recognition of the change in our respective global significance. I refer particularly to our close involvement with the most dynamic commercial region of the world.

In the development of such a global perspective amongst lawyers, particularly focused on the Asian region, the two books which I launch today represents a development from which we can all take comfort.

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<sup>1</sup> Robin Burnett, Vivienne Bath *Law of International Business in Australasia* Federation Press, Sydney, 2009; Luke Nottage, Leon Wolff and Kent Anderson (eds) *Corporate Governance in the 21<sup>st</sup> Century: Japan's Gradual Transformation* Edward Elgar, Cheltenham, UK, 2008.

<sup>2</sup> See Ruth Knight *Illiberal Liberal: Robert Lowe in New South Wales 1842-1850* Melbourne University Press, Melbourne, 1966. For a more recent analysis of the significance of his contribution see Peter Cochrane *Colonial Ambition: Foundations of Australian Democracy*, Melbourne University Press, Melbourne, 2006.

<sup>3</sup> See *Australian Dictionary of National Biography*, vol 1, 1788-1850, Melbourne University Press, Melbourne, 1966, pp 112-113.

<sup>4</sup> See J J Spigelman "Tolerance Inclusion and Cohesion", 2006, 27 *Australian Bar Review*, 133 at 136-137.

<sup>5</sup> See eg J D Hirst *The Strange Birth of Colonial Democracy: New South Wales 1848-1884*, Allen & Unwins, Sydney, 1988, pp 24-26.

<sup>6</sup> John Micklethwait and Adrian Wooldridge *The Company, a Short History of a Revolutionary Idea*, Modern Library, New York, 2003, p 51.

<sup>7</sup> Micklethwait and Wooldridge *supra* at xiv.

<sup>8</sup> See J J Spigelman "Judicial Exchange between Australia and Japan" 2006, 11 *Journal of Japanese Law* 225.

<sup>9</sup> *Ibid.*

<sup>10</sup> See J J Spigelman "Transaction Costs and International Litigation" 2006 80 *Australian Law Journal* 438; 2006 3 *Chuo Law Journal* 118; J J Spigelman "International Commercial Litigation: An Asian Perspective" 2007 35 *Australian Business Law Review* 318; 2007 37

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*Hong Kong Law Journal* 860; J J Spigelman “*Cross Border Insolvency: Co-operation or Conflict?*” 2009 83 *ALJ* 44; J J Spigelman “The Hague Choice of Court Convention and International Commercial Litigation” 2009 83 *ALJ* forthcoming.

<sup>11</sup> *Oceanic Sun Line Special Shipping Co Ltd v Fay* (1988) 165 CLR 197.

<sup>12</sup> See *Neilson v Overseas Projects Corporation* (2005) 223 CLR 331.

<sup>13</sup> This speech was delivered at a time when the proposal for the Australian Consumer Law was directed to any standard form contract and not limited to consumer contracts. (See *The Australian Consumer Law: A Consultation on Draft Provisions of Unfair Contract Terms* Commonwealth of Australia, 11 May 2009.) The Bill subsequently introduced is limited to consumer contracts.

<sup>14</sup> See, eg *Akai Pty Ltd v The People Insurance Co Limited* (1996) 108 CLR 418 as discussed in my paper “Transaction Costs in International Litigation” *supra* at pp 442-443.