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A Brief Thematic History of Corporate Governance

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Abstract
In this article we will examine some dominant themes in the history of corporate governance. This will necessarily be of an international nature since Australian and New Zealand owe much to their colonial inheritance and are currently influenced by North American ideas and yet do business with South East Asia where many of the legal systems are of a different background and history. Having identified major themes we shall see how they are relevant to Australia and New Zealand. In doing so we shall consider path dependence amongst other things.

Keywords
corporate governance, history, path dependence, Australia, New Zealand

A BRIEF THEMATIC HISTORY OF CORPORATE GOVERNANCE

By John H Farrar[*]

It is currently fashionable to talk about the history of corporate governance in terms of path dependence[1] and to assume that, as in the natural sciences, complex systems can be reduced to a few simple rules. Corporate structures, it is said, depend in part on the structures a country had in earlier times, in particular the structures with which the economy started.[2] These structures also bias the legal rules in terms of what is efficient in any given country and the interest group politics which determine which rules are chosen.[3] To some extent this is an elaborate statement of the obvious, to some extent it is the application to law and economic phenomena of a metaphor taken from science and offered as an alternative analytical perspective for economics.[4] Justice Cardozo many years ago warned us of the dangers of seduction by metaphors.[5] One of the dangers is a tendency to reductionism. The interplay of historical forces which lead to any given state of affairs are

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1 See for example Roe M 'Chaos and Evolution in Law and Economics' (1996) 109 *Harvard L Rev* 641; Bebchuk LA and Roe MJ 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford L Rev* 127; Walker G, 'Reinterpreting New Zealand Securities Regulation' in Walker G, Fisse B and Ramsay I, (ed) *Securities Regulation in Australia and New Zealand* (2nd ed) LBC Information Services, North Ryde 1998, 88. The chapter by Gordon Walker gives a useful overview at 89. See further for the scientific background, Lewin R *Complexity – Life on the Edge of Chaos*, Phoenix, London (1997).

2 Bebchuk and Roe op cit 127.

3 Ibid.

4 See Roe op cit 641; Liebowitz SJ and Margolis SE 'Path Dependence, Lock-In and History' (1995) 11 *Journal of Law, Economics and Organization* 205.

5 *Berkey v Third Avenue Pty* 244 NY 84 (1926) at 94-5 'Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it'.

often many and complex. This is particularly true of economic history and the relationship of law and economics.[6]

It has sometimes been said that economic history is the major part of Australian history. This is no doubt true since European settlement.[7] The same is probably true of New Zealand except for the Maori wars and Maori dimension.

In this article we will examine some dominant themes in the history of corporate governance. This will necessarily be of an international nature since Australian and New Zealand owe much to their colonial inheritance and are currently influenced by North American ideas and yet do business with South East Asia where many of the legal systems are of a different background and history. Having identified major themes we shall see how they are relevant to Australia and New Zealand. In doing so we shall consider path dependence amongst other things.

The Public Law Privilege Model[8]

The earliest form of incorporation in the Common Law was by papal bull or royal charter. Rights of association and corporate status sprang from the Church or the Crown. Later the same result could be achieved by specific legislation. Implicit in this approach is that incorporation is a privilege which exists for a public purpose. Early grants were for charitable purposes or for the extension of the power and interests of the Crown.

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6 See Samuels W, 'The Idea of the Corporation as a Person: On the Normative Significance of Juridical Language' in Samuels WJ and Miller AS *Corporations and Society: Power and Responsibility,* Greenwood Press, New York (1987), 124; Liebowitz and Margolis op cit 223-4.

7 Butlin SJ, *Foundations of the Australian Monetary System 1788-1851,* Melbourne University Press (1953) 1. See too Groenewegan P and McFarlane B, *A History of Australian Economic Thought* Routledge, London (1990) 12.

8 See Hurst JW, *The Legitimacy of the Business Corporation,* University Press of Virginia, Charlottesville (1970) I; Davies P, *Gower's Principles of Company Law*, (6th ed) Sweet and Maxwell, London (1997) Chapter 2; Farrar JH and Hannigan B, *Farrar's Company Law* (4th ed), Butterworths, London (1998) Chapter 2.

Abuse of defunct charters and other excesses led to the UK Bubble Act 1720 which set back the development of the modern corporation for some time. The legislation, as Maitland said,[9] screams at us from the statute book. Much business continued to be run as sole traders or partnerships until the late Nineteenth century. Canals and railways were the subject of specific legislation because of the large sums of capital involved.[10] International trade developed originally through the grant of royal charters to companies such as the East India Company, the Africa Company, the Virginia Company and the Hudsons Bay Company.[11]

The term 'director' was first used generally at the end of the seventeenth century. It was used by the Bank of England and Bank of Scotland.[12]

Despite these restrictive trends entrepreneurs and their lawyers managed to evade the Bubble Act by Deed of Settlement Companies and many of our modern principles and problems in the law spring from that source.[13] The Deed of Settlement was built on the foundation of trust and partnership and was at best an inchoate corporation.

From the Seventeenth Century using all three methods people began to employ the concept of joint stock, the pooling of investment capital.[14]

When the first general UK Companies Act was passed in 1844 it provided for incorporation by registration of Deeds of Settlement. It did not confer limited liability which came in 1855. Incorporation began to change from an ad hoc privilege to be granted on certain terms for the public benefit to a right to be granted with relatively few conditions.[15] Freedom of contract began to take over. The legislation became increasingly facilitative.[16] As such it soon became adopted by

9 Maitland FW, *Collected Papers,* Vol 3, 'Trust and Corporation', 390.
10 Farrar op cit 19.
11 Gower op cit 22.
12 Formoy RR, *The Historical Foundations of Company Law*, Sweet and Maxwell, London (1923) 21.
13 Gower op cit 29.
14 Farrar op cit 17.
15 Ibid 21.
16 Ibid 21 and Chapter 9.

entrepreneurial capitalism. Australia and New Zealand followed the UK model.

Banking Capitalism[17]

Colonial and post colonial systems suffer from a lack of capital.[18] Few immigrants bring much capital. There is a need for investment capital.[19] The state needs capital to provide for infrastructure. Some it raises from taxation but from a small base. The rest is raised through debt capital.

This results in the next phase of Banking Capitalism[20] which characterised the history of the USA, Australia and New Zealand in the Nineteenth Century and into the Twentieth Century, at least until the 1930s.

Unlike British banks of the time, most Australian and New Zealand banks were incorporated with limited liability on formation either by charter or private act or later under the Companies Act of the respective colonies.[21] The first Australasian bank was the Bank of New South Wales[22] formed in 1817. It had an inauspicious start. Opposed by Whitehall it ran into difficulties in 1826 and had to be rescued by the Governor. Technically its charter was null and void. Fortunately the Governors proceeded on the assumption of its validity, renewed it and weathered the storm. There were 51 trading and savings banks formed in Australia between

17 See Van den Berghe L and De Ridder L, *International Standardisation of Good Corporate Governance*, Kluwer Academic Publishers, Boston (1999), Chapter 4.

18 See for instance Blainey G, *A Shorter History of Australia*, Mandarin, Melbourne (1994) 119 et seq. On the history of banking and banking issues in Australia see Goodwin CDW, *Economic Equiry in Australia*, Duke University Press, Durham, NC (1966). See too Ma R and Morris RD, *Disclosure and Bonding Practices of British and Australian Banks in the Nineteenth Century*, Monograph No 4, University of Sydney Accounting Research Centre, March 1982.

19 For a fascinating account see Sykes T, *Two Centuries of Panic – A History of Corporate Collapses in Australia*, Allen and Unwin, Sydney (1988), Chapters 1, 3, 5, 7 and 9.

20 See Van den Berghe op cit.

21 Ma and Morris op cit 20.

22 Ibid.

1817 and 1851 and 53 operating between 1851 and 1900.[23] There were also a number of land banks in the 1880's and 1890's. These were a species of land mortgage company which competed for deposits.[24] The imperial government and the colonies attempted, unsuccessfully, to regulate the activities of the banks.[25] The colonies were subject to cycles of boom and bust.[26] The worst crisis was the banking collapse 1891-93 when 54 out of 64 banks closed their doors, 34 never to open them again.[27] The response to the crash was the Bank Issue Act 1893 and the Current Account Depositors Act 1893. The first limited legal tender.[28] The first Commonwealth note was issued in 1910. Another crisis came in the Depression with the collapse of the Government Savings Bank of New South Wales and the bitter medicine prescribed by Bank of England to deal with the Depression.[29]

Bank finance of business was usually debt finance although some investment or merchant banks took equity interests as well. Intensive investment in equity has been restricted by banking rules such as capital adequacy and other prudential regulation.

This mode of Banking Capitalism has survived the universal banks in countries like Germany.[30]

Banks have traditionally been conservative lenders but abandoned their natural caution in the 1980s with disastrous results in Australia and New Zealand.[31]

Imperialism and the imperial model

Many of the early businesses in Australia and New Zealand were branches of UK companies. Later they were subsidiaries. Imperial

23 Ma and Morris op cit 21.
24 Ibid.
25 Ma and Morris op cit 21.
26 See eg Sykes op cit passim.
27 Tyree A, *Banking Law in Australia*, Butterworths, Sydney (1998) 2.
28 Ibid.
29 See Clark M, *History of Australia* Abridged by Cathcart M, University of Melbourne Press (1993), 535 et seq.
30 Van den Berghe op cit.
31 See Sykes T, *Bold Riders*, Allen & Unwin, St Leonards, 1994, Chapter 17.

commerce dominated the economies and the local statutes were based on the UK Companies legislation.[32] The larger local banks were often owned or affiliated with UK banks by the turn of the century.

As a system this worked tolerably well while the interests of the UK coincided with Australia and New Zealand but increasingly they did not and there were crises and friction, particularly in the Depression.[33] When the UK joined the European Union in 1973 there was a final parting of the ways and the two countries looked more and more to North America for reform ideas.

A legacy of this dependency survives in the fact that a significant number of Australian and New Zealand listed companies are owned by other companies and the ultimate ownership is often in foreign hands.[34]

Managerial capitalism

As companies adapted to the corporate form some needed further equity capital and went public. Disclosure regimes developed backed by a degree of self regulation by the securities industry. Many English companies in the late Nineteenth Century issued preference shares in order for the owners to retain control.[35] Later ordinary shares were floated and there began the development of the separation of ownership and control which had been foreshadowed by Marx[36] and Lenin[37] and was

32 For an interesting account see McQueen R, 'Limited Liability Corporate Legislation – The Australian Experience' (1991) 1 *Australian J of Corp L* 22. See too Waugh J, 'Company Law and the Crash of the 1890s in Victoria' (1992) 15 *UNSWLJ* 356; McQueen R, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15 *UNSWLJ* 1.

33 Clark M, op city (footnote 29).

34 See Stapledon G, 'Share Ownership and Control in Listed Australian Companies' (1999) 2 *Corporate Governance International* 17 and the earlier work in respect of New Zealand by Farrar JH in 'Ownership and Control of Listed Public Companies – Revising or Rejecting the Concept of Control' in Pettit B, *Company Law in Change*, Stevens & Sons, London (1987) 39.

35 See Farrar JH and Hannigan B, *Farrar's Company Law* (4th ed), Butterworths, London (1998) 226.

36 *Das Kapital*.

37 *Essay on Imperialism*.

documented by Adolf Berle Jr of Colombia Law School and Gardiner Means[38] of Harvard in respect of the USA. This era marks the ascendancy of professional management in the absence of ownership blocs large enough to represent a counterveiling power. It created the agency problem as Adam Smith had anticipated.[39] Management, in the absence of a counterveiling power, have a tendency to pursue their own self interest at the expense of the corporation.[40]

There is a need then to monitor management to prevent shirking and other opportunistic behaviour.[41] One way to achieve this is by the law. The law developed fiduciary restraints[42] which were supplemented by legislation so that modern directors' duties are an amalgam of common law, equity and statute. Another way is by economic forces or markets.[43] The company is in the market for products. There is no future in producing bad widgets. The company needs investment capital. Investors will not support badly managed companies but to some extent companies protect themselves by ploughing back profits. The management themselves are a marketable commodity. They need to have a good profile. Ultimately there is the market for corporate control. Under performance may lead to a takeover bid by more aggressive managers.

The periods from 1960 until the 1980s represented the supremacy of management. The management of the larger corporations to some extent were the masters and not the servants of finance.[44] However, the Stock

38 *The Modern Corporation and Private Property* (revised ed), Harcourt Brace, New York (1968).

39 *An Inquiry into the Nature of Causes of the Wealth of Nations*, 3 Vols, 2 Strahan, London (3rd ed) (1784) (vie). The highly critical account of joint stock companies was added to this edition. See Ross, IS. *The Life of Adam Smith*, Clarendon Press, Oxford (1995) 283.

40 See the law and economics literature cited in Farrar op cit (footnote 34 above), 44-47.

41 Ibid. See also Easterbrook FH, and Fischel DR, *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge, Mass (1991) Chapter 4.

42 Easterbrook and Fischel op cit.

43 Ibid.

44 See Sykes op cit footnote 31 above.

Market crash of 1987 precipitated the collapse of confidence and heralded a number of changes.[45]

To ward off the increasing politicization of reform of corporate law, to combat increased shareholder activism and simply out of self protection management of leading companies through their interest groups and in cooperation with institutional investors began to give serious attention to the development of self regulation of corporate governance in the 1990s. This led to a number of reports and codes or guidelines on corporate governance.

Institutional Investor Capitalism[46]

Since the Second World War a number of factors have led to increased investment by institutional investors in public corporations. There has been the use of superannuation and pension schemes. There has been an increase in insurance linked investment products and other forms of indirect investment. Trustee investment rules have been relaxed, enabling trustees to invest in equities.[47]

The result is that in Australia, New Zealand, the USA and the UK more than 50% of all equities are held by institutional investors and the tendency is to increase. Add to this the traditional domination by institutions of the bond market and we have the beginning of the growth of a significant counterveiling power if the economic strength is harnessed to a common cause. Listed corporations are becoming the servants of global financial activity rather than its masters.[48]

Peter Drucker argued that this led to a quiet revolution – 'The Unseen Revolution…The US is the first truly Socialist country.'[49] This was

45 Ibid.

46 Van den Berghe op cit. See generally Stapledon G, *Institutional Shareholders and Corporate Governance*, Clarendon Press, Oxford (1996); Brancato CK, *Institutional Investors and Corporate Governance*, Irwin, Chicago (1997).

47 See Farrar JH and Hannigan B, *Farrar's Company Law* (4th ed), Butterworths, London (1998) 579.

48 See Warburton P, *Debt and Delusion*, Penguin Books, London, 1999.

49 Drucker P, *The Unseen Revolution: How Pension Fund Socialism Came to America*, Harper Row, New York (1976) 1.

simply reflecting what Berle in his later workings had identified and his research student Paul Harbrecht had called 'The Paraproprietal Society' – the evolution of a new form of property.[50]

Until the late 1980s the tendency of the institutions was to be a sleeping giant. There were instances of discrete intervention but by and large the institutions voted with their feet and followed the Wall Street Walk – if in doubt, sell.[51]

Institutions themselves came under attack and we see two developments. First, the involvement by them in promotion of improved corporate governance and secondly the use of specialist funds managers. The latter makes it more unlikely for institutions to become activists in particular companies although there have been exceptional cases where a group of funds managers have taken action.[52]

Institutions are primarily focussed on profit and liquidity and have been attacked for short termism in their approach to companies.[53] There is also a problem of lack of coincidence between the interests of institutions and other smaller shareholders in takeover situations. Often institutions collectively have strategically significant holdings.[54]

Institutions sometimes encounter legal problems in increased shareholder activism.[55]

It is sometimes argued that public sector pension funds are more likely to take a long term strategic view and certainly the US and the UK public

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50 See Farrar JH and Russell M, 'The Impact of Institutional Investment on Company Law' (1984) 5 *Co Law* 107. See now Gates J, *The Ownership Solution – Towards a Shared Capitalism for the Twenty First Century*, Penguin Books (1998).

51 See Farrar and Russell op cit and Brancato cit 23, 108.

52 See Stapledon op cit 189 et seq.

53 See EPAC, *Short Termism in Australian Investment,* Proceedings of an EPAC Workshop held in Canberra, 10 Nov 1994, AGPS (1995); Stapledon op cit 212–237.

54 See Farrar and Russell op cit 110.

55 Ibid 110 et seq See also Stapledon GP, '*Disincentives to Activism by Institutional Investors in Listed Australian Companies'* (1996) 18 Sydney LR 152.

sector funds have had a tendency at least to mouth the appropriate rhetoric.[56]

56 See Brancato op cit 11, 26-31, 122.

Reference Shareholdings

In their book *International Standardisation of Good Corporate Governance*[57] Professor Lutgart van den Berghe and Liesbeth De Ridder refer to reference shareholdings as the presence of a significant shareholder with a long term relationship with the corporation and their closer involvement in and contribution to the strategic development of the company. This is common in the so called Latin countries such as France, Belgium and Italy.[58] Surprisingly, it is common in Australia and New Zealand. In Australia, New Zealand and Canada a significant number of companies are under majority or minority control. [59]

The governance problems with such shareholdings are excessive power positions and potential conflict of interest in group transactions.[60]

The impact of globalised standards of corporate governance is to promote equal treatment of shareholders, and to dismantle elaborate crossholdings and interlocking directorships.[61] With overseas countries like Japan this is virtually impossible due to the Keiretsu system. A Keiretsu is a spider's web of cross shareholdings and interlocking directorships clustered around one or more banks.[62]

The Evolution of Multinational and Transnational Corporations[63]

The evolution of the multinational and transnational corporation represents the latest stage of development of the traditional corporate

57 See footnote 17 above.
58 Ibid.
59 See footnote 34 above and Daniels RJ and Morck R (eds) *Corporate Decision-Making in Canada* University of Calgary Press, 1995.
60 See Farrar JH and Hannigan B, *Farrar's Company Law* (4th ed), Butterworths, London (1998) 569 et seq.
61 See Farrar JH, 'The New Financial Architecture and Effective Corporate Governance' (1999) *The International Lawyer* 927.
62 See Miyashita K and Russell D, *Keiretsu – Inside the Hidden Japanese Conglomerates*, McGraw-Hill, New York (1996).
63 See *Farrar's Company Law* (4th ed) Chapter 44 for a more detailed discussion on which this is based.

group. However, the more recent evolution begins to transcend the corporate and group form.

The complexity of structure and the economic strength of such entities presents a challenge to nation states and international institutions. One of the most common problems involves income shifting through transfer pricing which raises problems of conflict of interest for directors of subsidiaries. These are most acute where there are minority shareholders or creditors in the host state. Even without them there are the economic interests of the host state itself which may be affected.

Attempts have been made to regulate such entities at national, bilateral, regional and international levels. All have failed. Some argue that the answer lies in international institutional investment but this in its way simply adds to the complexity and the question arises as to whom the institutions themselves are accountable.

Recent research emphasises the myth of the genuinely multinational and transnational corporation, stressing the significance of the home state.[64]

The relationship of corporate governance to such entities and the development of a new financial architecture are only now beginning to receive attention.

Modernisation and Reform

Both Australian and New Zealand have faced the breakdown of the imperial model, the International Financial Revolution and the forces of globalisation but have handled change in different ways.

In 1961-2 Australia adopted Uniform Companies legislation which was substantially based on the Victorian Companies Act 1958.[65] This followed the UK Companies Act 1948 but contained some differences including the statutory statement of the basic directors' duties, breach of which was foolishly made the subject of criminal penalties. This

64 Doremus PN et al, *The Myth of the Global Corporation,* Princeton University Press, Princeton (1998).

65 For the history see the material by McQueen cited in footnote 32 above and *Ford's Principles of Corporations Law* (9th ed) by Ford HAJ, Austin R and Ramsay I, Butterworths, Sydney (1999) para 2.170 et seq.

provided the model for Singapore and Malaysia which still have the legislation in force as amended. In the late 1970's the New Zealand National government favoured this model but by 1981 Australia had opted for the more complex Companies Code. Corporate governance had become a political football.

The incoming Labour government in New Zealand rejected this as an appropriate model in spite of the Closer Economic Relations Agreement between the two countries and instead favoured the Canadian models of the Canada Business Corporations Act and Ontario Business Corporations Act which represent a half way house between the UK and US models.[66] This was finally adopted in 1993, after a thorough, if at times seemingly endless debate. The result was that business and its advisers knew what they were getting and supported the reforms. The preamble to the Companies Act 1993 provides that the objects of the legislation are to reform the law and in particular:

> (a) To reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks; and
>
> (b) To provide basic and adaptable requirements for the incorporation, organisation, and operation of companies; and
>
> (c) To define the relationships between companies and their directors, shareholders, and creditors; and
>
> (d) To encourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business judgment while at the same time providing protection for shareholders and creditors against the abuse of management power; and
>
> (e) To provide straightforward and fair procedures for realising and distributing the assets of insolvent companies.

66 See Farrar JH, 'Closer Economic Relations and Harmonisation of Law Between Australia and New Zealand' in Joseph PA, (ed) *Essays on the Constitution*, Brookers, Wellington (1995) 158.

The New Zealand model which was substantially based on the Canadian models abolished the distinction between public and private companies and yet took as its underlying prototype the private company, leaving more substantial regulation to the Securities Act 1978 with its underfinanced Securities Commission and a weak Stock Exchange. Otherwise faith was put in private enforcement which was somewhat naïve given the absence in New Zealand of institutional support for such litigation.

Australia meanwhile in endless pursuit of national legislation in spite of the narrow interpretation of the Constitution by the High Court adopted the Corporations Act 1989 which became known as the Corporations Law. This has been subsequently amended. The legislation stands as an obese monument to complexity and confused thinking.

The complexity was the subject of the Simplification Task Force who succeeded in further complicating the law, particularly the law of corporate governance.[67] This was followed by CLERP, the Corporate Law Economic Reform Program.[68] The reform was well intentioned and pursued the following fundamental economic principles. These are:

- *market freedom:* 'Competition plays a key role in driving efficiency and enhancing community welfare. However, free markets do not always operate in a sufficiently competitive, equitable or efficient manner. Business regulation can and should help markets work by enhancing market integrity and capital market efficiency. At the same time, the regulatory framework needs to be sufficiently flexible so that it does not impede market evolution (for example, new products and technologies) and competition.'

- *investor protection:* 'With an increasing number of retail investors participating in the markets for the first time, business regulation should ensure that all investors have reasonable access to information regarding the risks of particular investment opportunities. Regulations should be cognisant of the

67 See Whincop M, '*Trivial Pursuit: A Theoretical Perspective on Simplification Initiatives*' (1997) 7 *Australian J of Corporate Law* 250.

68 See Baxt R, Fletcher K and Fridman S, *Afterman & Baxt's Cases and Materials on Corporations and Associations* (8th ed) Butterworths, Sydney (1999) 173 et seq.

differences between sophisticated and retail investors in access to information and the ability to analyse it.'

- *information transparency:* 'Disclosure is a key to promoting a more efficient and competitive marketplace. Disclosure of relevant information enables rational investment decision making and facilitates the efficient use of resources by companies. Disclosure requirements increase the confidence of individual investors in the fairness and integrity of financial markets and, by fostering confidence, encourage investment. Different levels of disclosure may be required for sophisticated and retail investors.'

- *cost effectiveness:* 'The benefits of business regulation must outweigh its associated costs. The regulatory framework should take into account the direct and indirect costs imposed by regulation on business and the community as a whole. What Australia must avoid is outmoded business laws which impose unnecessary costs through reducing the range of products or services, impeding the development of new products or imposing system-wide costs.

  The regulatory framework for business needs to be well targeted to ensure that the benefits clearly exceed the costs. A flexible and transparent framework will be more conducive to innovation and risk taking, which are fundamental elements of a thriving market economy, while providing necessary investors and consumer protection.'

- *regulatory neutrality and flexibility:* 'Regulation should be applied consistently and fairly across the marketplace. Regulatory distinctions or advantages should not be conferred on particular market structures or products unless there is a clear regulatory justification. The regulatory framework should also avoid creating incentives or opportunities for regulatory arbitrage. The regulatory framework should be sufficiently flexible to permit market participants to respond to future changes in an innovative, timely and efficient manner. Regulation should be designed to facilitate predictability and certainty.'

- *Business ethics and compliance:* 'Clear guidance regarding appropriate corporate behaviour and swift enforcement if breaches occur are key elements in ensuring that markets function optimally.

> Fostering an environment which encourages high standards of business practice and ethics will remain a central objective of regulation, as will effective enforcement.'

The policy is sound; the implementation unsound, still relying on piecemeal reform and an overtechnical style of drafting. The result has been further complication but some sporadic attention paid to the clearer and simpler New Zealand reforms which were more comprehensive in scope. CLERP continues now as the latest reform juggernaut, trampling other reform proposals in its path. It is only a capacity for endurance by the business and professional communities and an ability to cope with endless, often gratuitous, change which makes a poor system work with moderate efficiency but at considerable expense.

The Development of a New Model of Democratic Capitalism

So much for history. What about the future? Professor Lutgart Van den Berghe and Ms Liesbeth de Ridder[69] argue for the evolution of a democratic model of corporate governance. This will be characterised by

(a) the knowledge worker empowered as a result of the communications revolution

(b) a power shift from shareholders towards the knowledge worker

(c) a sense of shared values.[70]

Something which is immediately noticeable about this model is first how it differs from the current model in Anglo American systems including Australia and New Zealand, secondly how much it reflects European Union and Japanese ideas thirdly how much it resembles in (b) and (c) an earlier model of labour relations in the Australian and New Zealand last seen in the Accord of the Hawke Government in Australia and lastly how much it is now based on the communications revolution. The discussion of stakeholder capitalism is the beginning of a new debate in

69 See footnote 17 above.
70 Ibid 36.

Anglo American countries.[71] This type of theory breaks away from the shareholder/manager focus of earlier corporate governance debate and turns the spotlight on the neglected role of employees, particularly in the knowledge based industries. It necessarily involves study of the formal and informal ways in which employees are currently involved in governance in different systems and why this has occurred.[72] Here there is much emphasis on path dependent explanations.[73]

Any development along these lines involves revisiting our traditional conceptions of the corporation and private property and the development of some sense of the corporation as a firm in the real world.[74] This may entail some reconsideration of the role of contract in relation to corporation and some down playing of the significance of ownership or reinterpretation of the ownership concept.[75]

Nevertheless, as we move into this new era we must not forget the historical significance of property to the development of the Rule of Law and the modern system of democracy.[76] Both of these may be under threat by globalisation.

The history of corporate governance shows a history of change and adaptation to change but the contemporary triumph of democracy and capitalism. The interesting questions are whether these can survive their own success or whether both must inevitably mutate and what form the mutation will take. Can they co-exist indefinitely? Does one

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71 See Farrar JH, 'Frankenstein Incorporated or Fools' Parliament – Revisiting the Concept of the Corporation in Corporate Governance' (1998) 10 *Bond LR* 142 and material cited.

72 See Blair MM and Roe MJ (eds) *Employees and Corporate Governance*, Brookings Institution Press, Washington DC 1999.

73 Ibid Introduction.

74 Farrar op cit footnote 67 above.

75 See Child J and Faulkner D, *Strategies of Cooperation*, Oxford University Press, Oxford (1998) Chapter 14. See also Aoi J, 'To Whom Does the Company Belong?: A New Management Mission for the Information Age' in Chew DH, *Studies in International Corporate Finance and Governance Systems,* Oxford University Press, New York (1997) 244. Joichi Aoi is Chairman of the Board of Toshiba Corporation.

76 See Pipes R, *Property and Freedom*, The Harvill Press, London (1999) passim, especially at 281.

depend on the other? How can they adapt to the communications revolution which both empowers and enslaves us all?