

# REVIEW OF COMPANY AND SECURITIES LAW IN NEW ZEALAND

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John Farrar (ed) *Company and Securities Law in New Zealand* (Brookers, Wellington, 2008).

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This is a new work in the Brookers Treatise Series: these books aim to be "authoritative and definitive works of reference on New Zealand law". Yet at the same time, as is inevitable in our small jurisdiction, they do, as Professor Farrar points out in his Preface, aim to "be of use to judges, practitioners and students". The size of the work is testimony to the growing volume of case law stemming from the core company and securities statutes in New Zealand, and the work clearly succeeds as a reference tool. It is difficult for a comprehensive work to straddle both the student and practitioner market, given that most Company Law courses are one semester in duration, or even less if they are part of a Business Organisations course. Nevertheless, it will undoubtedly prove to be a comprehensive text as a basis for a dedicated undergraduate or postgraduate company law course, assuming dedicated students.

This book, as its apparent conceivers Grantham and Rickett identified, fills a gap in the market. There are of course looseleaf works on company and securities law, and there are introductory student texts. But it is just about small enough to take to court without having to see a chiropractor afterwards, and does, at least in most of the chapters, contain conceptual and detailed analysis informed by theory and policy discussion that is not normally found in a looseleaf edition, where new cases tend to encroach upon a holistic view.

The work is edited under the eminent imprimatur of Professor Farrar, who writes and contributes to some of the chapters. Professor Farrar has of course straddled jurisdictions over the years, and his Australian and New Zealand experience comes to the fore, particularly in the Introductory comments (more of which below). Yet as Professor Farrar acknowledges, this is the work of eight authors. Unusually these days, but understandably in this case, the order in which their names appear on the title page seems to reflect the size of their contributions, rather than being alphabetical. In this respect it is gratifying to see that the first three names on the list, and thus the major contributors, are female academics from three different universities in New Zealand,

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corporate law not having to date been known for its gender balance either in practice or academia. Lynne Taylor and Susan Watson are rightly acknowledged by Professor Farrar in his Preface as having written a substantial amount of the text, but it is not just the size, but also the quality of their chapters, along with that of Shelley Griffiths on Securities Law, which stands out in terms of its readability, interweaving of theoretical and policy perspectives and depth of research and coverage.

New Zealand company and securities law is focused inevitably on the core statutes, the Companies Act 1993, the Securities Act 1978 and other securities legislation. Yet just as in Phillip Larkin's world, sexual intercourse began in 1963, so in this case, one could be forgiven for thinking that New Zealand company law began in 1993. There is half a page in the Introduction which acknowledges the historical connection with United Kingdom company law, but for a student coming fresh to the subject, they would be none the wiser as to what the "United Kingdom model" was. This rich history, which includes statutes back to the nineteenth century, cannot be dismissed as of interest only to legal historians, given that later chapters illustrate the pervasiveness of the common law both through case law and statutory enshrinement, particularly in relation to directors' duties. It would therefore have been useful to have a more extended history of corporate law before 1993, as the Introduction goes on to make it clear that the 1993 Act is very much the focus of the work. For example, it makes a passing reference to "Table A", without explaining to the uninitiated student, most likely born in the 1980s, what Table A was.

The last two sections of the Introduction clearly carry the mark of the Editor, who echoes views he has expressed elsewhere in relation to what he sees as relatively light-handed corporate and securities regulation in New Zealand. Professor Farrar is in an almost unique position to evaluate such matters, particularly by comparison with Australia. However, one wonders whether some of these statements are appropriate in an Introduction, particularly one partly aimed at students, which could have more usefully taken the form of an overview of the subject. In portraying New Zealand as the Wild West of corporate regulation, it is Professor Farrar who perhaps shoots from the hip. For example, he states that "the Securities Act 1978 is a weak system of securities regulation by international standards", then later refers to the "idiosyncratic local securities regulation regime". Corporate governance has apparently "been left to be dealt with first by the Institute of Directors", and only more recently by the Securities Commission's principles, which "arguably do not go far enough", and we are told that "company law and securities regulation is more pro-business than that of Australia, and there are vested interests in keeping it so".

So do these statements find any support in the later pages of the book? Securities regulation is thoroughly covered by Shelley Griffiths in two excellent chapters where she traverses the history and policy of securities regulation in New Zealand, and then the role of the Securities Commission (including the raft of recent reforms to securities and insider dealing legislation, the role of New Zealand in IOSCO, and the moves towards Trans-Tasman co-operation and harmonisation). Far from supporting the comments in the Introduction, the Securities regulation chapters arguably refute them, and at the very least are testimony to the strides that have been made by Government and its

agencies in recent years, and the degree of co-operation with overseas regulators, including Australia.

The other area where the suggestion of relatively weak regulation was made, was in relation to Corporate Governance. Professor Farrar himself has written a book for Oxford University Press on Corporate Governance in Australia and New Zealand,<sup>1</sup> and in Chapter 10 of the Brookers book, as part of a larger Part 3 with the same title, he states that New Zealand has been "slower off the mark" than Australia, the United States and the United Kingdom. Chapter 10 sets out verbatim the Securities Commission's Principles, and then refers for detailed discussion to Professor Farrar's OUP book. The Chapter does refer to the NZX Practice Code, but it does not mention how this Code and these Principles inter-relate, and the important relationship between the Commission and NZX. Other than to state that the Principles are not as detailed as those in Australia and the US, the chapter gives no analysis of the Principles, nor does it set them in the wider theoretical debate about corporate governance models. (An overview of the theoretical stances is left to Susan Watson, at 14.2.4 in the context of Directors Duties and the interests of the company). The whole of Part 3 of this book is intituled "Corporate Governance", but one finds no support or explanation anywhere within the Part, for the view expressed in the Introduction that the Securities Commission Principles (or their enforcement perhaps?) "do not go far enough".

Turning to the detailed content of the book, it commences with useful chapters on company formation, constitutions, and an excellent chapter by Susan Watson on capacity. But why would one want to form a company in the first place, as opposed to another type of business entity? A chapter setting out the various choices of trading structure, and some of the advantages and disadvantages of incorporation would have been apposite prior to a description of company formation. At 5.6, at the end of Professor Farrar's chapter on Corporate Personality, there is a page which does set out the advantages of incorporation, which could usefully have been incorporated at the start of Part 1. Part 2 of the book, Corporate Transactions and Liability, mostly written by Susan Watson, is thorough, meaty and excellently written.

Part 3 covers Corporate Governance, which is stated by Professor Farrar to be a "fashionable term", though he then points out that it has been in use now for 20 years. The chapters which follow deal with the control and management of the company, and its internal relationships. They do so very well, although as the Table at 13.5 shows, directors' duties arise at various points throughout the Companies Act 1993, including on insolvency and takeovers, and this book could have benefited from a more co-ordinated approach to the treatment of directors' duties, particularly between different authors.

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1 John Farrar *Corporate Governance: Theories, Principles and Practice* (3 ed, Oxford University Press, Melbourne, 2008).

For the most part, Part 3 of the work, Corporate Governance, covers the heart of company law, and includes shareholder rights and remedies including derivative actions and unfair prejudice. These chapters make full and careful use of North American and United Kingdom case law respectively. Though I am not prepared to say that it was interesting reading, the chapter on Accounts and Disclosure was thorough, and thankfully free from controversy.

Part 4 of the work, a very short Part, is called "Corporate Finance", a term as "fashionable" as "corporate governance". It commences with a short but interesting contextual chapter from John Farrar about the types of capital, and its economic and legal meanings. It would have been, for the sake of comprehensiveness, interesting to hear a little more about derivatives and other products by which, we are told, "smart people seek to escape by contract" from "the Procrustean bed" of company law structures! The bulk of Part 4 consists of the chapter on equity finance, which deals with share issue and purchase, financial assistance, and in the solvency test. Perhaps it would have been useful at this point to have a cross-reference to the Securities Law and Regulation section, to make clear the link between equity finance and the securities market.

The chapter on Debt Capital is a mere four pages. It could have perhaps benefited from a more comprehensive study of the nature and types of unsecured and secured debt, including leasing and factoring as well as bank debt. The role of trade credit, and retention of title, could perhaps also have been emphasised, given its importance to many small companies, albeit that it is short-term credit. The chapter contains a reference to the previous importance of the floating charge, then a very brief overview of the Personal Property Securities Act 1999. The final paragraph states that it is unfortunate that the implementation of the PPSA departed from the Law Commission's original proposals, and that there has not been enough education of the legal profession and the banking community with regard to the PPSA reform. These comments are not supported in the text, and given that the opening paragraph in the book acknowledges that the PPSA is a significant topic "requiring adequate consideration" one wonders whether it was necessary to attach this opinion to what is, of necessity, a bare summary of the Act. However, offering an equally anecdotal though less eminent view, this reviewer's feeling is that, as with most other corporate legal developments, there was a plethora of training opportunities at the time of the commencement of the Act in 2002. Having recently spent time reviewing all the litigation which has gone to court under the PPSA, this reviewer's feeling is that the Act seems to have bedded down into corporate law quite well. It is fair comment that it is conceptually complex to the uninitiated, and particularly to lay people. The latter are the ones who lack education about the Act. There is also no mention in this chapter of security over land, which is not covered by the PPSA. A useful cross-reference could have been made to the following chapters on corporate insolvency, making the connection between debt and the possible consequences of its non-payment.

Part 5 deals with Corporate Collapse. Insolvency Law, like Securities Law, is sufficiently voluminous and important these days to be able to justify a separate text, and this is amply shown by Lynne Taylor's comprehensive and insightful treatment.

There had been an extensive discussion in an earlier chapter, on financial assistance, about the solvency test in section 4 of the Companies Act. Chapter 26 starts with the proposition that a company is insolvent if it fails to meet either limb of the solvency test. This stems from two judgments of Baragwanath J where he reached that conclusion,<sup>2</sup> but this reviewer does not think the position is so clear in relation to the balance sheet test of solvency/insolvency. For example, the test of inability to pay debts, the so-called "cash-flow" or "commercial" test, is the only one mentioned in the context of the threshold for putting a company into insolvent liquidation. Baragwanath J's complex argument is a more philosophical one about the privilege of limited liability, and it should not have been used to gloss the clear words of the insolvency provisions of the Act. Neither should His Honour's view be accepted so readily here as the law. The chapter contains an overview of the main theoretical perspectives on insolvency law, though could have been brought up to date by reference to the influential work of Mokal.<sup>3</sup> There is a mistaken reference on page 690 to the 1967 Insolvency Act, as oppose to the 2006 Act, in the context of the meaning of "creditor". In the section on Part 15 compromises, there is no mention of the *Elders v PGG Wrightson* case<sup>4</sup> and the relationship between Parts 13, 14 and 15, and which could have been achieved by a cross-reference to the chapters on Takeovers and Amalgamations at the end of the book, where the latest cases are referred to.

The chapter on the new Voluntary Administration procedure puts the development in its international and historical context, and then achieves the careful balance of detail and overview necessitated by the space devoted to insolvency law. This legislation is adopted (or adapted) from the Australian procedure, but nobody so far has been able to explain why section 239ABI, "lis pendens", should be in a New Zealand version of the statute, and this chapter merely replicates the section without explanation of what it means. When discussing the discretion of the court in relation to enforcement by secured creditors, owners or lessors during a moratorium, the reference to the approach taken in *Hamilton v NAB*,<sup>5</sup> where English case law was followed, should now be followed up by the different approach taken in *Canberra International v Ansett*<sup>6</sup> where the Court took more of a balanced approach between proprietary rights and those of creditors collectively. In this respect a cross-reference and consolidation with the earlier passage at 29.6.12, where some aspects of the *Canberra* case were mentioned, would have been beneficial. When discussing what has been called the "magical power" in section 239ADO, as central to the High Court of Australia's decision in

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2 *Mountfort v Tasman Pacific Airlines* [2006] 1 NZLR 104 (HC); *CIR v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA).

3 Riz Mokal *Principles of Corporate Insolvency Law: Theory and Application*, (Oxford University Press, Oxford, 2005).

4 *Elders New Zealand Ltd v PGG Wrightson Ltd* [2007] 1 NZLR 710 (HC).

5 *Hamilton v NAB* (1996) 66 137 ALR 231 (FCA).

6 *Canberra International Airport Pty Ltd v Ansett Australia Ltd* (2002) 20 ACLC 1133 (FCA).

*Australasian Memory v Brien*,<sup>7</sup> the author (at 29.13.1) does not give a sense of just how wide and magical this power really is, which could have been achieved by referencing some of the growing body of commentary on this, both in Australia and to a lesser extent in New Zealand.

In the Liquidation chapter, there are a small number of presentational errors. Lord Millett is misspelt (838), and in searching for the discussion of the Government's recent discussion documents and proposals regarding qualification of insolvency practitioners, reference (at footnote 691) took me to the wrong place in the book.

Turning to voidable transactions, the chapter describes in detail both the un-amended law prior to 2007, and the effect of the 2006 amendments, which have moved New Zealand law in this respect closer to that of Australia. One of the key changes is the removal of the "ordinary course of business" proviso from section 292, but it would have been clearer if the chapter had emphasised initially, at 30.6.1, that this has been partially replaced by adoption of the Australian lack of reasonable suspicion test, rather than burying the detail of that test under "Additional provisions" at 30.6.5. Looking forward to the amended law, it would have been useful to have a view on whether the Australian case law on "peak indebtedness" may be relevant here, as this has been a controversial tool for liquidators in Australia.

Part 6 deals with Securities Law. These chapters are a careful blend of history, policy, context and detail, and include the 2006 amendments in relation to insider dealing. What Parts 6 and 7 (on Takeovers, Mergers and Amalgamations) illustrate together, is the significant role of government and quasi-government in regulation of corporate and securities law. Together with some aspects of corporate governance, this is really a public law interface. This reviewer would have liked a bit more discussion of the wide power of the Commission to grant exemptions and how this works in practice, within, or perhaps outside, the framework of administrative law. This Part of the work seems to suffer from more typographical errors than other Parts, some of which affect footnotes as well as body text.

The book concludes with a useful short Part 7 on Takeovers, Amalgamations and Arrangements, by David Cooper, solicitor with Bell Gully. This is as good a place as any to put this Part, since it is perhaps the most discrete Part, and it would not all fit neatly into the Parts on corporate governance or corporate finance. An equally valid approach might have been to have a larger Part entitled Corporate and Securities Regulation, which could have usefully brought together Parts 6 and 7 as well as governmental powers over directors and the role of the Registrar of Companies in that respect.

The takeovers chapter commences with reference to policy, and some useful comparisons with the United Kingdom. There then follows a detailed study of the Takeovers Code and an insight into

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<sup>7</sup> *Australasian Memory v Brien* (2000) 200 CLR 270.

the language of takeovers. The following short chapters deal with amalgamations, and with court-sanctioned arrangements, including the relationship between Parts 13, and Parts 14 and 15 which are more familiar in an insolvency context. While the book ends with reference to the Takeovers Panel's proposed amendments, and a detailed explanation of the (surprisingly unreported) *Dominion Income Property Trust* case<sup>8</sup> there is no detailed reference to the more recent analysis of the Court in *Elders v PGG Wrightson*, though it is given a reference at footnote 18 of the chapter.

As stated at the outset, this book fills a large gap and achieves the publishers' aim of providing an authoritative work of reference. Some of the bold assertions, particularly in the Introduction, seem out of place in a treatise, in that they will distract practitioners looking for an answer, and put the fresh-faced student off the scent of objective enquiry. It is hard to imagine, for example, Dicey, Morris and Collins, or Anson, describing something as "nonsense". However, these should be put in context of their relative infrequency given the size of the book, and the immense body of careful scholarship which permeates it. As with most reviews, there is a tendency to focus on the negative, and lest it be thought that this reviewer has been parsimonious in praise, it should be explicitly acknowledged that that this book is a major milestone in New Zealand company law scholarship, and by some dint of (entirely lawful!) creative accounting, is far more than the sum of its parts.

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8 *Dominion Income Property Fund Inc v Takeovers Panel* (26 October 2006) CA229/06.

