

Professor Harold Ford and the Development of Australian Corporate Law

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Introduction

On 14 October 2010, Professor Harold Ford celebrated his 90th birthday. This is an appropriate time to record his many and varied contributions to corporate law teaching and research as well as his contributions to corporate law reform, such as his time as Chair of the Companies and Securities Law Review Committee. His contributions have been enormous and this brief paper cannot begin to do justice to them. However, we can tell some of the story. This paper is in two parts. The first part records, in summary form, Harold Ford's contributions to teaching, research and public policy. This is followed by an interview in which Harold Ford responded to questions posed by Ian Ramsay. We therefore have the benefit of Harold Ford's views on a range of topics such as his experience of teaching company law at the University of Melbourne, the influences for his important books in the areas of corporate law, securities regulation and unincorporated non-profit associations, and his thoughts on his work for several law reform bodies. We are also fortunate to read the views of Harold Ford on the development of corporate law since he began teaching.

Professor Ford and his contributions to teaching, research and public policy

Almost all of Harold Ford's academic career was spent at The University of Melbourne. The University of Melbourne Law School was established in 1857. The degree of Bachelor of Laws was instituted in 1860 and 1865 saw the first graduates of the Law School. The first Dean of Law was William Hearn, who was appointed Dean while Professor of History and Political Economy. Early Professors of Law were Edward Jenks (appointed 1889), William Harrison Moore (appointed 1892), Kenneth H Bailey (appointed 1928) and George W Paton (appointed 1931).¹

Harold Ford's connection with The University of Melbourne Law School began in 1937 when, as a sixteen year old fresh from University High School, he enrolled as a part-time student in the course for Articled Law Clerks, a course then taken by approximately one third of the Law School's students.

The Law School of the 1930s was unusual by modern standards. It differed from other Faculties at The University of Melbourne in not having any sub-professorial teachers. Many subjects were taught by members of the legal profession by lectures delivered before or after business hours and on Saturday morning. The two professors, Professor Kenneth H Bailey (who held the Chair of Public Law) and Professor George W Paton (who held the Chair of Jurisprudence), took responsibility for subjects considered to be more academic in that they were not applied often in day-to-day practice. University law schools in the other State

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¹ For additional detail concerning the history of The University of Melbourne Law School, see John Waugh, *First Principles: The Melbourne Law School 1857-2007*, 2007; Ernest Scott, *A History of The University of Melbourne*, 1936; Ruth Campbell, *A History of the Melbourne Law School 1857 to 1973*, 1977; John Poynter and Carolyn Rasmussen, *A Place Apart: The University of Melbourne*, 1996, Harold A J Ford, 'Re-Creating Australian Legal Education' in Charles Sampford and Carol-Anne Bois (eds), *A Life in the Law: Sir Zelman Cowen*, 1997.

capitals of Australia shared this characteristic. In another contrast with the present day, the Australian law schools of that era had no post-graduate studies.

While attending the Articled Law Clerks course, Harold Ford worked with the law firm Pearson, Eggington and Leggatt from January 1937 until August 1939. His course was interrupted by war service in the Royal Australian Navy from August 1939 to January 1946 and during this time he attained the rank of Lieutenant-Commander. He returned to Pearson, Eggington and Leggatt in January 1946 and was with them until December 1946. He then spent 1947 as a full time student at the Law School completing the subjects needed for the Articled Law Clerks course. He did something unusual for articled clerks by entering the Final Honour Examination of early 1948 at which he won the Supreme Court Prize for Articled Clerks and was runner-up to David P Derham who was later to become successively Professor of Jurisprudence at The University of Melbourne, foundation Dean of the Monash University Faculty of Law and then Vice-Chancellor at The University of Melbourne. Harold Ford completed the subjects for the degree of Bachelor of Laws as a part time student during 1948.

In 1948 Harold Ford joined the law firm Rodda, Ballard and Vronland and was with them until early 1949 when he joined Melbourne Law School as a member of its academic staff.

Part of the background to the appointment of Harold Ford to Melbourne Law School was that Professors Bailey and Paton had made representations to the University for the establishment of lectureships. Their efforts bore fruit with the appointment in 1940 of Geoffrey Sawer and in 1946 of Arthur L Turner as Senior Lecturers. Harold Ford was appointed to a further senior lectureship. He took up duties in February 1949 joining Paton, Sawer and Turner as well as Professor Wolfgang Friedmann who had succeeded Bailey in the Chair of Public Law after Bailey resigned in 1946 to become the Commonwealth Solicitor-General. Dr Norval Morris joined the Law School in 1950. He later became Professor of Law and Criminology at the University of Chicago Law School.

The additions to the teaching strength enabled some subjects previously taught by part-time lecturers to become the responsibility of full-time lecturers. The transformation of the Law School staffing accelerated when Zelman Cowen came in 1951 from Oriel College, Oxford, to the Chair of Public Law in succession to Friedmann (who departed to the University of Toronto Law School and who was subsequently Professor of Law at Columbia University). Professor Cowen shortly afterwards became Dean after Paton was appointed Vice-Chancellor at The University of Melbourne. One of Professor Cowen's early achievements was to obtain funding for the Chair of Commercial Law. The first occupant was Professor Patrick Donovan.

Professor Cowen's plans for the development of Melbourne Law School were much influenced by what he had seen on visits to some of the better law schools in America. He arranged for his colleagues to spend time in American law schools. Harold Ford spent a stimulating year (1954-1955) at Harvard Law School, observing the variety of methods of teaching and examining, participating in graduate seminars and working on a doctoral dissertation on *Unincorporated Non-Profit Associations* under the supervision of Austin W Scott who wrote *Scott on Trusts*. The dissertation was published in 1959 by Clarendon Press,

Oxford.² The book was reviewed in the *Modern Law Review* by Professor LCB Gower who wrote:

This is a very useful and timely work...the student and practitioner have lacked guidance through one of the most confusing of legal labyrinths. To them, this monograph... will be invaluable. [The book concentrates] on two major problems – the vesting of property in unincorporated associations and their liability in contract and tort. These, however, are the two problems of the greatest practical importance in this field. Mr Ford subjects them to scholarly and critical analysis and adds greatly to the value of his discussion by his use of comparative method.³

Among the fruits of Harold Ford's experience at Harvard were his introduction at Melbourne Law School of open-book examinations which permitted the setting of examination papers that were more testing and adoption of some of the features of the casebook teaching method for which he prepared *Cases on Trusts* which was published in 1959.⁴

The organisational changes of the 1950s called for adaptability in teaching and in that decade Harold Ford lectured at various times in Legal History, Principles of Equity, Constitutional Law (Articled Clerks), Private International Law, Industrial Law and Property (Future Interests).

In 1960 Harold Ford was appointed Robert Garran Professor of Law at the Australian National University (following the departure of Professor John Fleming to the University of California) and foundation Dean of the Faculty of Law. He returned to The University of Melbourne in 1962 on appointment as Professor of Commercial Law.

Apart from being a visiting teacher at the University of Michigan in 1964 and Queen Mary College, University of London in 1972, he taught Trusts and Legal Persons/Company Law until his retirement. From 1974 to 1984 and for some years after retirement he taught in the LLM course-work program. Harold Ford had a significant influence on those who taught with him. One of these colleagues was Professor Cheryl Saunders, a long standing member of Melbourne Law School, who writes:

I taught company law with Harold Ford for several years in (I think) the 1980s. Since joining Melbourne Law School I had taught primarily in constitutional and administrative law and other related subjects. Company law was a second and, in some respects, quite different area of teaching interest. Harold and I were the only teachers in the subject at the time. Harold Ford was a remarkable person to work with in these circumstances. Despite the extreme imbalance in our expertise and knowledge, he treated me as an equal in that understated way that is familiar to all those who know him. I was fully involved in making decisions about the scope of the course and the distribution of marks during the examination process. I remember in particular a discussion that he initiated about the approach that we should adopt in awarding first class honours. Harold asked me whether I favoured awarding an H1 to

² Harold Ford, *Unincorporated Non-Profit Associations: Their Property and Their Liability* (Oxford, Clarendon Press, 1959) pp i-xxii, 1-151 reprinted 1977 by Scientia Verlag Aalen.

³ Professor LCB Gower, Review of *Unincorporated Non-Profit Associations: Their Property and Their Liability* (1960) 23 *Modern Law Review* 121.

⁴ Harold Ford, *Cases on Trusts* (Sydney, Law Book Co, 1959) pp iii-xvi, 1-794.

the best papers, or whether we should also require genuine excellence. We agreed on the latter. For teaching purposes, we used Harold's text on company law. I came to greatly admire Harold's approach in writing the book. As each knotty legal problem arose, it was analysed in depth, examining the competing possibilities, including their practical ramifications, before a conclusion was reached. Thereafter, however, the conclusion was taken as a given, as the author moved on to the next problem. Harold's distinctive style made his treatment of the subject-matter clear and coherent without minimising the complexity of it. In due course, I moved out of company law, because I was not also conducting research in the area and I was uncomfortable teaching on that basis. I have found my knowledge of company law continually useful in public law, however. And I learnt a great deal about academic teaching and scholarship from the memorable experience of working with Harold Ford.⁵

Harold Ford also had a significant influence on those he taught. One of his former students, the Honourable Justice Julie Dodds-Streton of the Federal Court of Australia, writes:

I welcome the opportunity to pay tribute to Professor Harold Ford on his 90th birthday. Professor Ford's unparalleled contribution to the study and development of commercial law in Australia as a profound scholar, prolific writer and gifted teacher is universally acknowledged. His great erudition is marked by common sense and acute understanding of the needs of the practising profession, which has depended on his publications for decades. The generations of law students taught by Professor Ford not only admire his scholarship but reserve a special and lasting affection for him as a man. His modesty, kindness and absolute integrity are legendary. Like many others, I am a beneficiary of Professor Ford's inspiring teaching, his generous support of junior colleagues and his valuable advice and enjoyable company over many years.⁶

Harold Ford was Dean of Melbourne Law School in 1964 and from 1967 to 1973. He was President of the Australasian Universities Law School's Association in 1966-1967. During his Deanship in 1967-1973 he convened a meeting of representatives of Monash University and the legal profession to consider establishment of an institute to co-ordinate continuing education for the profession, an activity which was growing rapidly. He had seen such a body operating successfully in Michigan. The idea was endorsed and extended to training in legal practice. The outcome was the Leo Cussen Institute. Other initiatives during his time as Dean were the creation of the Professional Admission Summer School, and preparation of the program for LLM by course-work. When he stepped down as Dean the Minute of Appreciation read at the meeting of the Faculty of Law held on 15 May 1974 records that the Faculty expressed its "warm appreciation" for his work as Dean and for the "considerable skill and wisdom he brought to his term as Dean". It is also recorded in the Minute:

His quiet energy enabled him to combine the onerous obligations of the Deanship with heavy commitments as a member of Council and its various Committees, while still contributing much to the activities of professional organizations. Above all he remained universally admired by those students who benefitted from his teaching and maintained his scholarly research activities. His modesty and discretion won him the

⁵ Email from Professor Cheryl Saunders to Professor Ian Ramsay dated 25 September 2010.

⁶ Email from Justice Julie Dodds-Streton to Professor Ian Ramsay dated 10 September 2010.

ready affection and respect of his colleagues and, at their request, he became the first Dean to be appointed for a term of years.⁷

Harold Ford chaired the Graduate Studies Committee of the Law School from 1974 to 1981. He retired from the University of Melbourne at the end of 1984. The *Law Institute Journal* marked his retirement with a feature article in which it was stated:

He is universally admired and respected both for his scholastic and professional expertise as well as for his basic humanity and kindness.⁸

Following Harold Ford's retirement, he was a consultant to the law firm Clayton Utz from 1985 until 1995. Brad Vann, the Managing Partner of the Melbourne Office of Clayton Utz, recalls Harold Ford's time with the firm:

Harold Ford joined us a consultant in the mid-1980s when we were very much in start up mode in Melbourne, in the days when firms practising in more than one state were very much a rarity. It is a measure of Harold's integrity and acuity that he would accept such a challenge when undoubtedly he could have taken a role with any of the established firms. His counsel and wisdom contributed significantly to the growth of our corporate business as we had on hand the leading academic in that area of law, and yet Harold was always exceedingly approachable and modest about his own achievements - something that resonated with the culture of a very young firm.⁹

Harold Ford has played a prominent role in the development of corporate law in Australia. He was a member of important law reform committees. The first was the Manning Bills of Exchange Act Committee whose report led to amendments of the Bills of Exchange Act. The second was the Task Force on a National Companies Bill. This small committee produced the National Companies Bill 1975.

Between 1976 and 1978 he chaired a Corporate Affairs – Stock Exchange Joint Working Party which recommended establishment of a central clearing house system for settling transactions on the stock exchange. From 1984 to 1990 he chaired the Companies and Securities Law Review Committee – the Federal Government's corporate law reform body. The quality of the reports produced by that body is well-known internationally. The reports dealt with matters such as a statutory derivative action for shareholders (which was finally introduced in 2000 as part of the Corporate Law Economic Reform Program Act), the introduction of a statutory business judgment rule (which was also enacted as part of the Corporate Law Economic Reform Program Act), the abolition of par value for shares (enacted in 1998) and the introduction of share buy-backs (enacted in 1989). In the final report of the Companies and Securities Law Review Committee, the Committee stated:

The members of the Committee wish to acknowledge publicly the outstanding and major contribution made to the work of the Committee by its Chairman, Professor Harold Ford. Professor Ford has throughout the seven years of the life of the Committee by his industry and intellectual leadership been the driving force in the

⁷ Previously, Deans were appointed for a term of 12 months.

⁸ Chris Maclean, "...And all the Time he was Learning From Us" (1985) 59 (Nos 1 and 2) *Law Institute Journal* 76 at 77.

⁹ Email from Brad Vann to Professor Ian Ramsay dated 7 September 2010.

achievements of the Committee. It is a fitting testament to the Chairman that the Committee has rightly become known as ‘the Ford Committee’.¹⁰

It can therefore be seen that Harold Ford has had a profound influence upon the direction of Australian corporate law through his contributions to law reform.

His influence has also been felt through his many widely respected publications. In his history of Melbourne Law School, John Waugh refers to Harold Ford’s “prodigious flow of authoritative publications”.¹¹ His many books include *Principles of Company Law* (first published in 1974¹² and now in its 14th edition with Dr Robert Austin and Professor Ian Ramsay as co-authors and known as *Ford’s Principles of Corporations Law*), *Principles of the Law of Trusts* (co-authored with Mr W A Lee),¹³ *Principles of the Law of Death Duty*,¹⁴ *An Introduction to the Securities Industry Acts* (co-authored with Professor Robert Baxt and Graeme Samuel),¹⁵ and *The Law of Wills* (co-authored with Dr Ian Hardingham and Marcia Neave).¹⁶ Dr Robert Austin, formerly a Judge of the Supreme Court of New South Wales, writes in relation to the influence of Harold Ford’s publications on Australian corporate law:

Every serious student of Australian company law would acknowledge Harold Ford as our leading scholar. His work has made a fundamental conceptual contribution to company law.

When he first published *Principles of Company Law* (as it then was) in 1974, Professor Ford gave us the shape of our modern subject. Before then, most of us in the Australian universities were using LCB Gower’s *Principles of Modern Company Law*, eventually with an Australian supplement. Professor Gower’s exposition was elegant, but the organisation of the material in *Gower* was untidy. After introductory chapters, Part Two (headed “Consequences of Incorporation”) moved from incorporation and lifting the veil, to company organs, ultra vires, agency principles, the raising and maintenance of capital, and the taxation of companies. Then Part Three addressed the Formation and Flotation of Companies, well after we had learned about the maintenance of capital. Prospectuses were in Part Three, but then Part Four explained “A Company’s Securities”, and Part Five was about investor and creditor protection (in which, perhaps oddly, directors’ duties appeared).

Harold Ford’s framework was more rigorous. Company law had five substantive components: the company as a corporate entity; company finance; management and control; reorganisation, takeovers and liquidation; and securities regulation. As it was for Harold Ford, so it has been for the rest of us. We have changed “management and control” to “corporate governance”, but the content of the concept is the same.

¹⁰ Companies and Securities Law Review Committee, *Report No 12 - Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action*, November 1990, at 2.

¹¹ Waugh, above n 1, at 201.

¹² Harold Ford, *Principles of Company Law* (Sydney, Butterworths, 1974) pp v-1, 1-503.

¹³ Harold Ford and William A Lee, *Principles of the Law of Trusts* (Sydney, The Law Book Co, 1983) pp v-cxvii, 1-1055.

¹⁴ Harold Ford, *Principles of the Law of Death Duty* (Sydney, The Law Book Co, 1971) pp v-xxviii, 1-450.

¹⁵ Robert Baxt, Harold Ford and Graeme J Samuel, *An Introduction to the Securities Industry Acts* (Sydney, Butterworths 1977) pp v-xv, 1-232.

¹⁶ Harold Ford, Ian J Hardingham and Marcia A Neave, *The Law of Wills* (Sydney, The Law Book Co, 1977) pp v-xxxiii, 1-295.

Securities regulation has been broadened by legislation to become financial services and financial markets regulation. Otherwise his conceptual analysis has been preserved, and with it the coherency of the subject as an academic legal discipline.

Professor Ford recognised in the preface to his first edition that the enacted law is not self-sufficient, and that the courts have developed far-reaching principles to give effect to the statute. His textbook is about the interplay of ideas between Parliament and the bench since the mid-19th century. His deep scholarship in equity has given him an inside advantage in expounding judge-made principles, especially in the fields of fiduciary duties and remedies. Under his influence, company law is an extension of equity scholarship.

About six generations of students across Australia, and beyond, are in his debt for his many insights. Since his ideas are embodied in the subject, his influence will continue wherever Australian company law is taught.¹⁷

Ford's Principles of Company Law is the most extensively cited corporate law publication by courts and scholars in Australia and has also been relied upon by courts and scholars outside Australia. In a review of the first edition it was said:

In this country there has long been a ...pressing need for a good, comprehensive, general text book on Australian Company Law. At last, that need has been satisfied. This book, written by a most distinguished senior Australian academic, fully deserves to be warmly welcomed by students, teachers, legal practitioners and businessmen...In writing this book, Professor Ford has brought to bear his long experience in the field of commercial law and a masterly knowledge of the equitable principles upon which so many of the fundamentals of company law are based. The result is a scholarly work that is a model of lucidity and conciseness...In summary, it can be said that Professor Ford has discharged a very difficult task with great distinction.¹⁸

As noted above, Harold Ford also wrote (with Professor Robert Baxt and Graeme Samuel) a pioneering book titled *An Introduction to the Securities Industry Acts*. The book was published in 1977 at a time when securities regulation was rapidly developing as an important area and there was a need for a text to illuminate the many complex legal issues in this area. The value of the book is illustrated by this comment:

Few dispute that the securities industry requires regulation. A careful and well reasoned plea for that to be done is contained in the book 'An Introduction to the Securities Industry Acts' ...[it is] a carefully planned and thoughtful text.¹⁹

Professor Baxt, Harold Ford's co-author of the Securities Industry book, former Dean of Monash Law School and former Chair of the Trade Practices Commission (now the Australian Competition and Consumer Commission) writes:

¹⁷ Email from Dr Robert Austin to Professor Ian Ramsay dated 10 September 2010.

¹⁸ G Kenneally, Review of *Principles of Company Law* (1973-1976) 7 *Sydney Law Review* 491.

¹⁹ "Law Reform" (1980) 6 *Commonwealth Law Bulletin* 1 at 1285.

Harold Ford has been the outstanding corporate law academic in my lifetime. He befriended me when I arrived at Monash Law School early in 1968 as a young Senior Lecturer and allowed me an opportunity to teach with him in a joint Melbourne University/ Monash University course in Securities Regulation. In turn we wrote a new text (with Graeme Samuel) on the new Securities Laws of Australia. Whilst Harry Ford and Graeme Samuel are no longer involved, this text has become a standard text and my current co-authors Pamela Hanrahan and Ashley Black and I in later editions have often been reminded of Professor Ford's wisdom and acute awareness of the critical issues in this relatively new area of regulation.

His reputation was (and still remains) a truly international one; a great teacher, a kind and constructive critic of others writing in his fields (and of course his reputation in Trusts Law is equally outstanding); and of course a very thoughtful and constructive Dean of a great law school for many years.²⁰

In 1977 Harold Ford became a Fellow of the Australian Academy of the Social Sciences in Australia. The University of Melbourne conferred on him the honorary degree of LL.D. in 1987. In 1994, in recognition of his many services to law, Harold Ford was made a Member of the Order of Australia. In 2000, the Corporate Law Teachers Association made Harold Ford its first honorary life member.

In the wider community he has been an active member of Rotary International, serving as President of the Melbourne club in 1982-83 and on District Rotary Foundation committees concerned with, among other things, Rotary graduate scholarships.

For Professor Ford's 80th birthday, Melbourne Law School organised a conference with many distinguished speakers from academia and the judiciary. The proceedings were published as a book.²¹ The Foreword to the book was written by The Honourable Justice Kenneth Hayne of the High Court of Australia who was a student of Harold Ford and who said in relation to his research:

All of his work has been marked by the restless questioning and intellectual rigour of the scholar...it has been the measured, incisive, and above all deeply considered, contribution to the fundamental consideration of principle which has marked his work. Few in Australia have made the contribution to legal scholarship that he has made over the years.

²⁰ Email from Professor Robert Baxt dated 23 September 2010.

²¹ Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford*, 2002. The chapters and the contributors are: Part A - International Perspectives on Corporate Law and Corporate Governance - 'Comparative Corporate Governance and the Australian Experience' by Professor Brian Cheffins; 'Globalisation, the New Financial Architecture and Effective Corporate Governance' by Professor John Farrar; 'Institutional Investors, Corporate Governance and the New International Financial Architecture' by Professor Ian Ramsay and Associate Professor Geof Stapledon; 'Shareholders as Principals' by Professor Deborah DeMott; Part B - Key Issues in Corporate Law - 'The Role of Corporate Governance Practices in the Development of Legal Principles Relating to Directors' by Justice Alex Chernov; 'Directors' Duty of Care and the New Business Judgment Rule in the Twenty - First Century Environment' by Professor Robert Baxt; 'Voluntary Administrators as Fiduciaries' by Justice Robert Austin and Robert Brown; Part C - Key Issues in Trusts Law and Equity - 'Reflections on Some Commercial Applications of the Trust' by Professor Michael Bryan; 'The Responsible Entity as Trustee' by Pamela Hanrahan; 'Equitable Compensation as a Remedy for Diversion of Opportunity' by Professor Elizabeth Boros.

The University of Melbourne Law School has a distinguished history. Australia's second Prime Minister, Alfred Deakin, was a graduate of the Law School, as were three other Prime Ministers, Robert Menzies and Harold Holt and, more recently, Julia Gillard. There was a period of 34 years during which Law School graduates were Chief Justices of the High Court of Australia - Sir Isaac Isaacs, Sir Frank Gavan Duffy, Sir John Latham and Sir Owen Dixon. Three Australian Governor Generals have been graduates of the Law School - Sir Isaac Isaacs, Sir Zelman Cowen and Sir Ninian Stephen.

Other graduates of the Law School have had distinguished careers outside the law, including Sir John Monash, an important military leader in the First World War who was later Vice-Chancellor of The University of Melbourne.

Of Harold Ford, it is said in one of the histories of The University of Melbourne Law School:

Professor Ford is a quiet, unassuming, hard-working man, whose career has its foundation in sheer ability. Born without the advantage of an academic background, he has become a well-known and respected author, one of the elite of the teaching staff at Melbourne University. Popular among staff and students alike, he was elected Dean without opposition, and years after his retirement from that post, he remains an ornament to the Faculty and to the University as a whole.²²

Interview with Professor Ford

When did you first start teaching company law?

I should first explain how Company Law came into the LLB course at the University of Melbourne. Company Law became a subject in its own right in 1948. The first lecturer was a barrister, Douglas Menzies (later Sir Douglas, and a judge of the High Court). He had been co-author of *Victorian Company Law and Practice*, an annotation for practitioners. The other author was Bernard O'Dowd, Victorian Parliamentary Draftsman and a radical poet.

Before 1948 there were a few lectures as part of Equity, a large three-lectures-per-week subject dealing with the miscellany of matters which had been within the jurisdiction of courts of Equity. Introduction to the LLB curriculum in 1948 of Company Law together with Taxation, Domestic Relations and Industrial Law as separate subjects resulted from a successful campaign by some members of the Law Institute to persuade the Faculty of Law to make the LLB course more relevant to the needs of practising solicitors. Earlier, members of the Faculty, including some senior barristers, resisted that because they considered that the LLB course should concentrate on legal principle as developed in case law. Quite apart from the Faculty's lack of resources to do more, it was thought that only study of legal principles would supply the intellectual challenge required at University level. The view was taken that Law graduates with a firm grasp of fundamental principles could master companies legislation by themselves. The controversy is well described in John Waugh's history of the Law School.²³ By the late 1940s growing complexity in commercial dealings and developments in other law schools made it imperative that the law course should include company law.

²² Campbell, above n 1 at 159.

²³ Waugh, above n 1.

I first lectured in Company Law in 1961 at the Australian National University. Upon my return from the Australian National University to the University of Melbourne in 1962 to take up appointment as Professor of Commercial Law in succession to Professor F P Donovan it so happened that the part-time lecturer in Company Law, John Young, wished to retire and the Dean, Professor Zelman Cowen, asked me to lecture in the subject. The Melbourne school, under the guidance of Professor Cowen, was then changing its character. Many subjects that had been lectured in by part-time lecturers were gradually becoming the responsibility of a growing number of full-time teachers.

Did other staff members assist with the teaching of Company Law?

Company Law was an optional subject. Because of its importance in practice it attracted large enrolments. Initially, I was on my own in lecturing in the 1960s except for six lectures on company accounting given each year by Professor Louis Goldberg, the professor of Accounting in the Commerce Faculty. Later I was joined by Malcolm Smith and, later still, by Cheryl Saunders and we were able to split the classes.

What was your approach to the teaching of Company Law?

My approach to Company Law was influenced by my having lectured in Principles of Equity since 1950. When teaching the law of trusts I had become interested in the many purposes to which the trust concept had been applied over the centuries.

One of those purposes was in the deed-of-settlement joint stock company which developed in the United Kingdom in the first half of the nineteenth century and which became our modern registered company. In passing it is of interest that the modern American corporation is descended from the chartered corporation, they having had their War of Independence before the deed-of-settlement company became established.

Another use of the trust which intrigued me was in organizing some collective investment schemes of the kind we now know as managed investment schemes. The Americans developed the so-called Massachusetts trust and real estate investment trusts. In the United Kingdom a similar vehicle for offering investment to the public came to be called a unit trust. Public unit trusts holding investments were formed in Australia in the 1950s. The advantage for promoters was that there were no restrictions on return of capital of the kind that then affected limited companies. There were also taxation advantages. An article I wrote in the *Modern Law Review* was, I think, the first article that attempted to spell out the legal implications of unit trusts.²⁴

All of this led indirectly to my interest in companies and I was glad to be given responsibility for Company Law.

What led you to write “Unincorporated Non-Profit Associations”?

My thinking about Company Law was slanted towards the character of companies as associations and the implications of their corporate personality. Before coming to Company Law I had acquired an interest in the related field of unincorporated associations while lecturing in Principles of Equity since 1950 on trusts for unincorporated associations. I was

²⁴ Harold Ford, “Unit Trusts” (1960) 23 *Modern Law Review* 129.

intrigued by the relationship of trusts to companies and corporate personality as discussed by F W Maitland (see his collected essays). The trust concept (or its European equivalent) allowed groups to have the enjoyment of property without having to approach the state for incorporation, a matter of political importance in some countries. Someone said that non-profit associations were the “spoilt darlings of the law”: the legal system enabled them to exist by giving them facilities by way of the trust and contract but did not make the funds of associations readily available to meet liabilities arising from their activities. When at Harvard Law School in 1954 I found that the position under American law was much the same and I wrote a thesis on the law about the property and liability of non-profit associations to satisfy the research requirements for the degree of SJD. My supervisor was Professor AW Scott (the author of *Scott on Trusts*).

After the thesis was passed Professor Cowen suggested that I should submit it to the Clarendon Press, Oxford, for publication. To my pleasant surprise it was accepted.²⁵ It was an academic monograph with limited relevance to legal practice. It enjoyed critical success without being commercially significant.

What were the circumstances of the publication of the text-book on company law?

After about ten years of lecturing in Company Law I set about preparing a text-book for publication.²⁶ Previous Australian student texts had been written for students of accountancy. Those books discussed the legislation but contained very little on the principles of common law and equity that underpinned the legislation, such as the common law about corporate personality, the law of agency, equity’s enforcement of dealings with property (as in the floating charge) and equity’s standards of fiduciary administration.

The book received mainly good reviews. It was thought to meet a need in Australia for a general text. Contemplation of that need moved the reviewer in the *Sydney Law Review* to quote the dictum of U S Vice President Thomas R Marshall that “What this country really needs is a good five cents cigar”. Favourable reception of the book compensated for the untimely demise of an earlier book on which I had lavished much effort. That was a book on death duty law.²⁷ It became redundant when Australian jurisdictions, following the lead given by Premier Joh Bjelke-Petersen in Queensland, abolished their death duty regimes. Fortunately, no one has suggested that company law be abolished. In recent years the title of the company law book has referred to “corporations law” rather than “company law” in recognition that the legislation no longer requires that a company should be an association having at least two members.

I had the good fortune to be joined in the authorship of the book by Robert Austin of the Sydney Law School and, lately, of the New South Wales Supreme Court. Authorship was further strengthened when Professor Ian Ramsay joined us. I have retired from the work which is now carried on by Robert Austin and Ian Ramsay. Nowadays there is both a bound version of the book and a larger loose-leaf edition which is used in the legal profession. Both retain the architecture of the first edition in which the earlier chapters were devoted to the

²⁵ Harold Ford, *Unincorporated Non-Profit Associations: Their Property and Their Liability* (Oxford, Clarendon Press, 1959) pp i-xxii, 1-151 reprinted 1977 by Scientia Verlag Aalen.

²⁶ Harold Ford, *Principles of Company Law* (Sydney, Butterworths, 1974) pp v-1, 1-503.

²⁷ Harold Ford, *Principles of the Law of Death Duty* (Sydney, The Law Book Co, 1971) pp v-xxviii, 1-450.

associative aspects of a company and the fiduciary duties of directors, leaving company finance to the later chapters.

You were involved in the preparation of the National Companies Bill 1975. What did that entail?

The Whitlam Labor Government which took office in 1972 intended to replace State companies and securities legislation by Commonwealth legislation in two measures; one, a Corporations and Securities Act regulating the securities industry and establishing a securities commission and, another, a National Companies Act. It was a bold ambition because it was by no means certain that the Commonwealth had the necessary constitutional power.

By late 1974 much work had been done on a Corporations and Securities Bill but a start had not been made on a National Companies Bill. The Attorney-General, Senator Lionel Murphy, called for a National Companies Bill to be prepared in a matter of months and a four person task force was formed to prepare a Bill. The group consisted of two officers of the Commonwealth Attorney-General's department as well as John Ewens who had recently retired from being chief Commonwealth parliamentary draftsman and myself. The time allowed us did not admit of much outside consultation and all we could do was to reframe the existing uniform State legislation as a Commonwealth measure in the light of proposals for reform such as those made in the report of the Eggleston Committee set up in 1967 and the 1962 report of the Jenkins Committee in the United Kingdom. We also looked at recent Canadian legislation. The task force spent several months drawing up drafting instructions and John Ewens drafted a Bill. Its introduction into Parliament planned for 11 November 1975 was forestalled by the dismissal of the Whitlam government on that day.

The Bill contained some innovations, including the priority system for company charges recommended by the Eggleston Committee. Framers of later Commonwealth corporations legislation adopted some of the innovations.

During 1976-1978 you chaired a working party on stockbrokers' accounts for scrip and money. What did that involve?

It was a joint working party representative of the Inter-State Corporate Affairs Commission and of the Stock Exchanges of Sydney and Melbourne which were then separate entities. The working party was concerned with the law and practice surrounding the way in which brokers acting for sellers and buyers of securities settled their transactions. The working party developed a system by which brokers could pool securities in particular companies that had been sold, pool money paid in by buyers and could strike balances as against other brokers that could be claimed at a central clearing house. The system required brokers to provide various indemnities supported by a central guarantee fund. It also required that settlement take place very soon after a sale had been entered into on the exchange. The development opened the way for securities in companies listed on the stock exchange to be sold without the need for security certificates. Attainment of uncertificated holdings in listed companies was ultimately achieved by the work of later working groups, mainly under the guidance of Charles Williams, one of the commissioners in the National Companies and Securities Commission. The changes improved the efficiency of the market in company securities.

What led you to write in 1977 (with Robert Baxt and Graeme Samuel) An Introduction to the Securities Industry Acts?

In the early 1970s considerable new legislation was enacted by the States to regulate takeovers and the securities industry. The Law School's response was to make those matters subjects of study in the program for LL.M. by coursework which was introduced in 1974. Seminars in each subject were conducted jointly with Monash University Law School. They were led by Professor Robert Baxt of Monash, Graeme Samuel and myself. At the instigation of Professor Baxt we prepared a text on securities industry legislation which ran through several editions.²⁸

In the period 1984-1990 you chaired the Companies and Securities Law Review Committee. What did that involve?

The Companies and Securities Law Review Committee was responsible to the Federal and State Attorneys-General for review of matters of company law they referred to it. Changes in law that resulted from the Committee's work included legislation enabling companies to defend themselves from certain less desirable partial takeover bids, giving companies power to handle their capital better by being able to buy back their own shares, abolishing par value for shares, establishing a business judgment rule in the law about directors and introducing a derivative action whereby a shareholder can, under certain conditions, bring a law suit on the company's behalf as where the directors improperly abstain.²⁹

What are your views on the development of corporate law and corporate regulation over the time since you began teaching Company Law?

There have been many changes. Fifty years ago there was nothing comparable with the Australian Securities and Investments Commission in terms of regulatory power. In the law about takeovers shareholders have obtained the benefit of much more disclosure about change of control of their company and they share the premium for that change. The continuous disclosure regime is of great benefit. There is much more awareness of the need for standards of corporate governance. Securities markets are fairer with sanctions for improper market practices, such as insider trading and market manipulation.

Prospectus requirements are now much more onerous from the point of view of promoters. Whether they benefit members of the investing public still depends on levels of financial literacy in the community and the quality of financial journalism. People need to know what to look for in a prospectus. Recent cases of failed managed investment schemes suggest that more needs to be done to alert investors to the existence of any liability to pay more than the initial investment. It may be that where a registrable managed investment scheme could carry

²⁸ Robert Baxt, Harold Ford and Graeme J Samuel, *An Introduction to the Securities Industry Acts* (Sydney, Butterworths 1977) pp v-xv, 1-232.

²⁹ The reports of the Companies and Securities Advisory Committee published while Professor Ford was the Chair of the Committee were: *Report No 1 - The Takeover Threshold* (November 1984); *Report No 2 - Partial Takeover Bids* (August 1985); *Report No 3 - Forms of Legal Organisation for Small Business Enterprises* (September 1985); *Report No 4 - Civil Liability of Company Auditors* (September 1986); *Report No 5 - Issue of Shares for Non-Cash Consideration and Treatment of Share Premiums* (September 1986); *Report No 6 - A Company's Purchase of its Own Shares* (September 1987); *Report No 7 - Prescribed Interests* (August 1988); *Report No 8 - Nominee Directors and Alternate Directors* (March 1989); *Report No 9 - Director's Statutory Duty to Disclose Interest and Loans to Directors* (November 1989); *Report No 10 - Company Directors and Officers: Indemnification, Relief and Insurance* (May 1990); *Report No 11 - Shares of No Par Value and Partly-Paid Shares* (November 1990); *Report No 12 - Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action* (November 1990).

such a liability the name of the scheme and the name of the investment, whenever they appear, should always be followed by the warning “open liability” or something similar.

But there will always be investors who are unaware of the non-existence of free lunches. It is hard to see how they can be protected short of requiring the regulator to vet the merits of particular investments, something which is not politically possible.

Whether unsecured creditors, particularly small business creditors, are better off is open to question. The insolvent trading provisions are more rigorous but how effective are they in practice? On the *Sons of Gwalia* issue,³⁰ my view is that in the distribution of a company’s property in a winding up the legislation should postpone investors in shares who have been misled to other unsecured creditors because it seems to me that whereas an investor can reasonably be expected to exercise due diligence before investing, the need to maintain the flow of commerce means that there cannot be the same expectation in the case of a small business creditor.

Looking at the broad picture, when one contemplates the current impact of globalization on securities markets and the complexities of modern commerce, it may be a matter for wonder that Company Law did not become a separate subject until 1948. Part of the explanation is that the period before the Second World War was a settled period both in commerce and the law. There were no law reform bodies other than the legislatures and there was no need for what we now know as continuing legal education. Apart from some noteworthy exceptions, like the Companies Act 1896 (Victoria), changes in local companies legislation were usually adoptions of changes made in the United Kingdom. After the Second World War Australian legislatures became more venturesome. There was also a discovery of American law as a source of ideas, especially in the area of securities regulation.

Company Law has often developed as a legislative reaction to some newly perceived commercial mischief, usually after some spectacular corporate failure. Its further development is unlikely to be different. As Justice Oliver Wendell Holmes Jr said: “The life of the law has not been logic: it has been experience.”

³⁰ *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160; 232 ALR 232; 60 ACSR 292; 25 ACLC 1. In this case, the plaintiff shareholder claimed that he was misled by the company into acquiring his shares by misleading disclosure by the company. The High Court of Australia held that the plaintiff was not claiming in his capacity as a member of the company, which would have postponed the claim behind the claims of unsecured creditors in insolvency of the company. Instead, the court held that the plaintiff’s claim, which was based on statutory investor protection provisions, ranked equally with the claims of unsecured creditors in the corporate insolvency.