



## BOOK REVIEWS

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### ***REINVENTING ARISTOCRACY: THE CONSTITUTIONAL REFORMATION OF CORPORATE GOVERNANCE***

By Andrew Fraser

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**D**ESPITE its blurb, but as its name suggests, *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance* is about corporate governance. It is not about corporate governance in the narrow sense of responsibility to shareholders, nor quite in a broader, but negative, sense of responsibility to society. Rather Fraser is interested in 'civilising' corporate power; that is, bringing the exercise of corporate power within a republican vision of the constitution (both 'republican' and 'constitution' have lower case initial letters here). To this end he advocates reinventing an aristocracy to express civic virtues in corporate decision making.

Fraser's phrase 'reinventing aristocracy' is both ironic and provocative. Ironic because 'reinventing' refers to a political movement concerned with liberal notions totally at odds with the implicit elitism of 'aristocracy'. Provocative because to advocate aristocracy is to run counter to the truism that democracy, if not meritocracy, is best. And both because aristocracy and Fraser's own republicanism appear at odds.<sup>1</sup> In this way, Fraser cleverly

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1 Set out at length in Andrew Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990).

points us in the direction of the essential conundrum revealed by the words ‘corporate governance’ in the second half of the title. This is how one is to reconcile the power of corporate decision makers to affect all of us with the indifference of those to whom they are responsible, the shareholders. His novel solution is that there should be an aristocracy of shareholders who would express the virtues ‘that a free people might expect of their leaders in politics, business and intellectual life’.<sup>2</sup> And it could be achieved, he avers, by replacing the one share–one vote rule with a rule guaranteeing an effective political voice to all shareholders possessing a minimum property qualification or threshold stake in the corporation.<sup>3</sup> This proposition is, as Fraser admits — rather, trumpets — a ‘tough sell’.<sup>4</sup> I, for one, would not buy it for a minute: his suggestion would not solve the problem, even if it could be implemented. Yet constructive reappraisals of the problem of corporate governance are so rare in Australia that one should not let them go past without at least examining them.<sup>5</sup>

Polemic, description and analysis are densely intermingled in *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance*, often with liberal doses of repetition and with few signposts or flags to indicate where we are or what is intended to be said. The thread of argument is very difficult to follow. This can be said of both individual paragraphs and chapters. It is often easier to read passages backwards, idea by idea. Fortunately, complete incomprehensibility is avoided by the five (nominally four plus an epilogue) chapter headings approximating their contents. In view of all this, I will summarise the argument as best I can, but without confidence that what I say accurately reflects authorial intention.

Fraser’s first chapter, ‘Aristocracy and Democracy in the Era of Reflexive Modernisation’, is concerned to legitimise an aristocratic model of governance in both the political and corporate spheres. He goes about this by establishing that in the modern state vast and increasing power is exercised in the corporate sector by just a few people possessed of phenomenal wealth — since Berle and Mean’s 1930 study<sup>6</sup> a cliché, to be sure, but no less true for that. There is little public deliberation on the exercise of these powers although

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2 Andrew Fraser, *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance* (1998) 1.

3 Ibid 17, 46–7.

4 Ibid 1.

5 Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993) is another, but narrower project. Graeme Lowe, ‘Corporations as Objects of Regulation’ (1987) 5 *Law in Context* 35 deals with much the same subject matter but takes a different approach. Most of the standard textbooks have a section or chapter on the problem of corporate responsibility, but only rarely venture a proposal. Sandra Berns and Paula Baron, *Company Law and Governance: An Australian Perspective* (1998) is the best of these, covering much of Fraser’s material but, again, without the attempt to be constructive.

6 Adolf Augustus Berle and Gardiner Means, *The Modern Corporation and Private Property* (1932).

they can pose real risks to the people at large. It is a pity that Fraser does not apprehend the conventionality of his argument. It was even raised by the Democrats and the Greens in the debates in the Senate over the *Company Law Review Act 1998*.<sup>7</sup> Moreover, responsibility to society is increasingly recognised as we move corporations law more into the public realm.<sup>8</sup> For example, the *Company Law Review Act 1988* introduced s 250S, which requires the chair of the annual general meeting to allow members a reasonable opportunity to ask questions or make comments on the management of a company. The opportunity so presented is frequently taken up by the green movement. A reading of newspapers might have helped to make this book current.

But Fraser moves on. In an exercise of golden-ageism, he asserts that, whereas wealth, in the form of hereditary aristocracy, once brought with it public responsibility, democratisation, with its concomitant emphasis on rights, relegated the responsibilities of property ownership to the private sphere. Belief in the workings of the economy as the best expression of democratic ideals, even better than within the political sphere, works to deprive members of modern corporate elites of any obligation to bear responsibility for the exercise of their powers.

To recreate responsibility, Fraser asserts that, as corporate power is governmental power, it should be 'constitutionalised'. The issue, then, is how to do this. As a republican, Fraser insists that the constitutional exercise of power involves making it subject to reflection by citizens of the republic; this is the 'reflexive modernisation' of his chapter heading. Shareholders, as those to whom corporate decision makers are nominally responsible, are those citizens and thus should reflect on their dual roles as private wealth owner, or investor, and public citizen. While this is implicit in the existing structure of corporations law, collective action problems amongst widely dispersed or minority shareholder-citizens, majority rule, the proxy system, and the possibility of exit deprive reflecting shareholder-citizens of the will to voice their concerns, if not their voice entirely. This is exacerbated by the one share—one vote rule. To combat these enervating tendencies, Fraser argues that

7 Commonwealth, *Parliamentary Debates*, Senate, 23 June 1998, 3869–77; it was especially evinced in the debates over directors' remuneration, the contents of annual reports and disclosure to auditors: Commonwealth, *Parliamentary Debates*, Senate, 24 June 1998, 4050–69.

8 The movement in the world of corporations law is contrariwise to that of the rest of the world — it is from contract to status. We increasingly directly constitute and regulate the relationships previously the subject matter of the contract represented by the articles of association. The genealogy of this move is the acceptance in recent amendments to the *Corporations Law* of the schema set out in the *New Zealand Companies Act 1993*, which derived from the Canadian *Business Corporations Act* which itself was modelled on the Californian and New York corporations statutes. And this is odd because it runs counter to our perceptions of the trend against regulation. Yet neo-liberalism is not just about taking away state functions, it is about regulating from a distance: as we devolve functions onto corporations, we increasingly regulate the form of corporations. See Nikolas Rose and Peter Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 *British Journal of Sociology* 173.

shareholder senates should be mandated in which shareholders who choose to exercise their voice may do so. Their voice would be as human beings, the individuals of which society is comprised, rather than as investors, hence would be on the basis of one person—one vote, rather than one share—one vote. Fraser relies on competition for glory and recognition in the eyes of peers, and the expression of the inherent nature of man (sic) as a political animal for the incentive to participate in the governance of corporate public power. A ‘self-selecting aristocracy’ or ‘elite’ is thereby constructed to express civic virtues.

Fraser’s second chapter asks whether the economic logic of efficiency should constrain his proposal. He argues that the free exercise of corporate powers unfettered by responsibility to a wider electorate is almost universally justified by its utility to society: it provides a means to strong material growth through the accumulation of capital and the central direction of the pool. Fraser overstates his case here, as even his chief source, James Willard Hurst, sets the utility of the corporate form against its legitimacy and relates how the legitimacy of the corporate form has been an abiding concern for theorists and law makers.<sup>9</sup> The question has always been just how to make the exercise of the societal power conferred by incorporation responsible, even if there has been no solution to date. Nevertheless, Fraser, in setting out a proposal for constitutionalising the corporation, must deal with arguments arising from the alleged efficiency of the corporate form.

Economics in the broader sense has taken a number of approaches to understanding the corporation. Fraser analyses them into two schools, called the ‘erosion’ thesis from the political left and the ‘inherence’ thesis from the right. The latter develops into the law and economics approach. Both, he argues, ultimately bow to the utility of the corporate form. He is keen, therefore, to distance his proposal from both, and to question the degree to which the economic logic of efficiency does impinge on his proposal.

The erosion thesis starts from the proposition that corporations were originally conceived of as ‘little republics’. One of the larger irritations of this book becomes apparent at this stage (if not earlier when political history is discussed). This is the US-centric approach. When talking of globalisation this may be forgivable, but not when it is at the expense of the legal genealogy of the book’s target audience. For the idea of ‘little republic’ suffused Robert Lowe’s speeches when introducing incorporation by registration and limited liability to the British Empire. The original, pre 1 July 1998, version of the crucial section of all Australian (and, for that matter, UK) companies Acts declaring the existence of companies used to say that on and from the date on the certificate of incorporation the subscribers to the memorandum *were* a body corporate, so constituting a private political sphere — a republic, as it were.

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<sup>9</sup> James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780–1970* (1970).

In any event, the erosion thesis simply describes the erosion of control over management, either by the state abdicating its responsibilities or through shareholders losing their original rights and control position through their dispersal and the proxy system. The inherence thesis is that shareholders were always supine and that that is good, for the best way of using the corporate form is to allow the product, capital and corporate control markets to operate to constrain abuses and allow efficiency to happen. Both these theses imply that the corporate system has shortcomings. Theorists have made attempts to remedy them without diminishing the economic utility of the corporation: the social democratic suggestion of legislation to impose corporate social responsibility, the complacency of equating responsibility with efficiency, and various ways of implementing stakeholder approaches to responsibility to society. Fraser's analysis of these attempts is strong, with perceptive critiques of some of the more fondly-held approaches to corporate social responsibility.

Would the self-selecting aristocracy of shareholder-citizens, who would allegedly make more considered and reflexive decisions, impair the utility of the corporate form? Fraser, of course, thinks not, and his discussion is oddly attractive at first blush. While he argues against the utility of the market for corporate control, at least at this point<sup>10</sup> appearing to misunderstand it and to argue in favour of uncontrolled oligarchies of the sort Berle and Means railed against, his perception that economic efficiency is about what people express themselves as wanting and that these preferences are malleable is crucial to any reform agenda. Policies based on economic welfare assume stable preferences, yet the very existence of advertising argues for their instability. To counter the culture of discontent created by commercial advertising with techniques for the moulding of preferences on ethical bases is beyond economic reasoning and correspondingly to be welcomed. Yet Fraser's polemic remains futile. Neo-liberalism is working in the opposite direction, reconstructing institutions where there are already decision-making methods approximating those he recommends into corporations amenable to market-based governance. Hospitals, universities, prisons, banks, insurance companies and even social welfare agencies are all now being subjected to a process whereby decision making is to be refocused on profit for owners rather than the lowering of societal risks and the consideration of both positive and negative externalities as aspects of the preference set of the citizens involved.

The third chapter is entitled 'Corporations and the Political Realities of Power'. It moves the discussion away from the economic perspective towards political analysis. The point at which it starts is that, because the economic order is imperfect, the corporate form is the product of political forces. The history Fraser draws upon is again that of the US: the reaction there to widespread monopolisation at the turn of the century led to the control of financial capital through anti-trust law with a particular small-business policy impetus. This is contrasted with the Japanese and German financial structures. Fraser omits any

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10 Fraser, above n 2, 47–8.

analysis of Australian economic structure. Whatever the holes in his story, Fraser asks the question whether financial capital can exercise responsible political power in the way financial capital is pictured to wield power in Japan and Germany and, if it cannot, why his ‘aristocracy’ would. He draws upon his critique of the erosion theory and the social democratic response to mandate stakeholder responsibility, asserting that there is nothing in those theories to prevent corruption. There is no incentive to act responsibly towards society. And if that responsibility is found in management acting as an agent for multiple stakeholders and mediating between them, he points out that interest groups do not have equal bargaining power and some will capture management. Management may even free itself from responsibility to anyone. For those reasons, Fraser asserts the need for a political theory of corporate governance — the one he supplies — based on property ownership in the form of shareholding as the criterion of citizenship in the corporate republic.

Much of the chapter is dedicated to reworking his earlier analyses of the exercise by corporate management of public policy-making powers. The analysis is excellent and it is a pity that it is so repetitive of earlier and lesser accounts in the book. Moreover, the emphasis is on ‘constitutionalising’ power. To constitutionalise is an unnecessary step in the process he advocates. It is to lay too much at the feet of law, with its limited reach into lives and the way they are lived.<sup>11</sup> It is no surprise, then, that the greatest difficulty with Fraser’s proposal is revealed in chapter 4: ‘Corporations and the Constitutional Genesis of Civic Authority’. The title to the chapter reveals an assumption as large as those made in economics, for it is not established that civic authority comes out of the constitution of a state (even when there is a lower case ‘c’ in ‘constitution’). Fraser’s ideology is revealed when he says: ‘Only the authority of the law can hope to subordinate the economic power of capital to the power of reasoned speech.’<sup>12</sup> Yet, as Foucault rather belatedly recognised, we should decapitate the body politic by excising sovereignty from our understanding of society.<sup>13</sup> Even Hart rooted his positive perspective in habits of obedience rather than any inherent efficacy of law.<sup>14</sup> Power mediated by culture, race, gender or even age provides a persuasive substitute for Fraser’s constitutionalism. Thus Confucianism is often said to constrain capital in Japan and amongst the overseas Chinese in ways which makes law quite irrelevant.<sup>15</sup> Fraser’s constitutional ideology requires the state’s authority to be deployed to impose republican government in the corporate sphere. Thus in turn the legal profession has to be reinvented on aristocratic lines: if the legal profession exercises civic

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11 See in particular Stewart Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28 *American Sociological Review* 55; and in general Michel de Certeau, *The Practice of Everyday Life* (1984).

12 Fraser, above n 2, 102.

13 Michel Foucault, ‘Two Lectures’ in Colin Gordon (ed), *Power/Knowledge: Michel Foucault* (1980) 78, 97–100.

14 H L A Hart, *The Concept of Law* (1961) 54–9.

15 See Philip Lawton, ‘Berle and Means, Corporate Governance and the Chinese Family Firm’ (1996) 6 *Australian Journal of Corporate Law* 348.

virtues, the legal interpretive community will legitimate and apply a constitutional guarantee of republican government to the corporate sphere. Fraser's program of reform then has the reforms to corporate governance starting with media groups in Canada and Australia, resulting in a shaming of the US body politic.

Chapter 5, nominated 'Epilogue: the Rebel in *Paradise Ltd*', was clearly intended to set out the program of change, but loses itself in summary.

The great strength of all this is that it sets out the way in which many diverse thinkers approach or would approach the problem of the lack of responsibility of corporate power to the community. In particular, both the law and economics movement and the stakeholder approach are analysed with great acumen. The book is worth reading for this alone. It is just a pity that reading it is such hard work. The analytical discussion is submerged in polemic: economics and politics have served us ill; we need a self-selecting aristocracy of shareholder-citizens to exercise republican virtues through a renewed connection of the civic virtues and property ownership. In order for this polemic to succeed, Fraser has to persuade us of three things: that the system does indeed serve us ill; that what he recommends would make it serve us better; and how it could be implemented.

Does the present system serve us ill? Fraser's critique is not coherent, it just presents us with a picture of vast power and disaster. Much more has to be considered: the utilitarianism implicit in our social democracy is not self-evidently morally wrong, although one of the more gaping holes in current debate is the absence of incisive critique; our corporate sector is not obviously dominated by uncontrolled megalomaniacs; the vast proportion of companies are small proprietary companies and the vast proportion of businesses are small, which sits uneasily with a generalised critique of the corporate sector; to be a company limited by guarantee is an option for businesses and, as these are exactly the sort of institution Fraser recommends, we might well ask why they are not adopted more often; we are not subject to the sort of corruption which has brought Indonesia to its knees, and we might conclude it is because we have relied on competition rather than democracy to discipline the powerful.

Fraser's picture of society is out of Berle and Means' 1930s America, one far too simplistic to be persuasive in 1990s Australia. We must then allow a retreat to the position that his recommendation would make society better than it is now, that it would force reconsideration of at least some social risk taking. His argument is that discussion by those willing to express some ideal of the good society would do the job. Yet that ideal would be subject to capture. Feminists would surely find his argument repugnant: whose ideal would the citizen-shareholders evince, those of men or women? Given that the criteria for selection are property and a willingness to put oneself forward as an individual, any feminist worth her salt would immediately respond that it is men who own the property and republican government is very male. Fraser's constant reference to ancient Greece is hardly conducive to inclusive forms of government. More generally, the

postmodern idea of a discourse indicates that Fraser's citizens would inevitably privilege some subjects over others and discussion within his framework would itself be the expression of power relations. We would be merely replacing one sort of repression, that of managerialism, with another, that of civic virtue (perhaps best rendered by Nathaniel Hawthorne in *The Scarlet Letter*). To repeat my earlier comment, democracy is demonstrably limited in its ability to control corruption; it may be that markets are sometimes better, provided there are strong (and ironically legislated) controls on market behaviour and structure.

Fraser asks us to reform our way of thinking about power in our society by constitutionalising corporations. Yet we in Australia find merely agreeing on the details of how to change our Constitution to a politically republican form, let alone actually doing it, almost insuperably difficult. Expressing some sort of consensus on civic virtues in a preamble to the Australian Constitution seems beyond Australians. The types of ideas which slip so easily into Fraser's writing ('constitutionalise', 'civic virtue', 'republic') are those which may imbue American (both Canadian and US) political life, but not Australian. We are heavily influenced in our conception of the state by the form of our inception into the West: a settlement of convicts sent by a legal system implementing the interests of a property-owning ruling class and ruling itself and its surroundings by violence, without a shred of moral legitimacy upon which to found a constitution in its governance of itself and its occupation of territory. To 'constitutionalise' means nothing other than to divide powers, 'civic virtue' begs the question of 'whose?', and 'republic' is about who has power over the people. We cannot then believe aristocracy expressing civic virtues is a meaningful concept, whether or not the aristocrats are the members of the legal profession or substantial shareholders. As much as any economist assumes self-interest and that its pursuit leads to societal wealth, Fraser assumes the basis of his contention, that people are inherently political, seeking glory and recognition in the eyes of their peers. There is nothing in the book to persuade us that Rupert Murdoch's 1993 attempt to issue shares with higher than normal voting rights ('super shares') was and would have been other than institutionalisation of family control in a very feudal sense.<sup>16</sup>

While the agenda is totally unrealistic, Fraser's attempt is noble. There is a bravery in making his assumption about the nature of people: that there is a goodness in us. And we do need a theory which counters economism, the theory behind neo-liberalism. This theory may well come out of the idea of the civil society and its implied attack on individualism which pervades *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance*. This is why this book is important. It shows us that an alternative can be constructed, even if the particular project fails.

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16 See Vivien Goldwasser, 'Differential Voting Rights and the Super Share — In Search of an Accommodation on the Merits' (1994) 7 *Corporate and Business Law Journal* 205.