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# THEORY, GENDER AND CORPORATE LAW

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KATHERINE HALL\*

## INTRODUCTION

Explicitly teaching theory is vital to all areas of law. Theory, whether in the general sense of jurisprudential, philosophical or political theories or in the more specific sense of theoretical analysis of particular areas of law, is an integral part of law and learning. It is as vital to learning as air is to breathing. And we usually take them for granted in much the same way.

The purpose of this paper is to emphasise the importance of explicitly teaching theory in corporate law. Traditionally, corporate law has been taught without much reflection upon theory.<sup>1</sup> Perhaps this has been because of the growing scope and complexity of corporate law statutes, because of the technical nature of many corporate law concepts, or because the doctrinal, procedural and practical dimensions of the topic have been considered more important than the theoretical ones. Perhaps it has just been an issue of time and space within corporate law courses and of the significant demands already placed upon corporate law lecturers in teaching such a vast area of law. But whatever the reason, the fact remains that theorising about corporate law, either generally or specifically, has not only been a neglected area of legal scholarship<sup>2</sup> but also a neglected area of teaching.

Gender analysis of corporate law is one area of theoretical reflection that has been particularly slow to develop. Whilst a growing body of research is now emerging in Australia on feminist analysis of corporate law,<sup>3</sup> the challenge is to ensure that this

research is incorporated into corporate law teaching. Including an explicit reflection upon gender, just as including a reflection upon political and economic theory, can enhance the way students learn about and understand corporate law.

To illustrate the importance of explicitly discussing theory in corporate law teaching I am going to look briefly at the concept of the separate legal personality of the corporation as discussed in Ford's Principles of Corporations Law.<sup>4</sup> I have chosen this text because it is the "traditional" text on corporate law in Australia.<sup>5</sup> I have chosen the separate legal entity doctrine because it is an ideal example of the values and priorities reflected in corporate law, and of how we often teach principles as though they were inevitable consequences of commercial activity. It is also a doctrine taught at the beginning of our topics and it is therefore a good example of the confusion our students often experience when first encountering corporate law.

To demonstrate the potential for including gender analysis in corporate law teaching I am going to discuss selected aspects of the decisions in *Metal Manufacturers v Lewis*<sup>6</sup> and *Statewide Tobacco Services Ltd v Morley*.<sup>7</sup> Whilst these cases have been the subject of feminist analysis in other contexts,<sup>8</sup> they are useful to demonstrate how case law can contextualise and "personalise" the seemingly abstract rules of corporate law. In particular, they show how cases can reveal the circumstances in which women are coming into contact with corporate law and the ways in which women are being characterised by the law and the judiciary.

Overall, I hope to demonstrate that all teaching of corporate law involves teaching theory.<sup>9</sup> I also hope to demonstrate that corporate law can, and must, be taught in a way that incorporates a reflection upon gender issues.

### THE IMPORTANCE (AND INEVITABILITY) OF THEORY

As already stated, my impression is that corporate law theory is not central to corporate law teaching, research or reform in Australia.<sup>10</sup> David Wishart argues that this is because of the power of the ideology of positive law.<sup>11</sup> He suggests that even when we critique corporate law or put forward alternate theories these ideas can be refuted and deemed trivial by the power of the claim "well what the law is (or what the courts" say) is what matters."<sup>12</sup> Whilst

this might be the case, my point here is that incorporating theory in our teaching (or research or reform for that matter) is not optional, for theory influences and defines what corporate law is and what we think it should be. Our only choices are whether to talk about theory explicitly, which in the context of teaching means informing our students about the theoretical underpinnings and assumptions of the law we are teaching, and whether to go beyond the dominant ideas of liberalism and positivism that so strongly influence corporate law.

My own experience with corporate law theory has been very much one of discovery. I started to consider the questions of theory, gender and corporate law when I was teaching in the School of Commerce at Flinders University and I felt a strange creature for being interested in what seemed to be a very “esoteric” area of corporate law. In particular, I wondered if I should have been researching more practical issues on corporate law. As theory had never played a major role in what I had studied and read about corporations I wondered if it was really that relevant.

Since that time, I am glad to say, I have come to more fully understand what corporate law theory really is or isn't if you agree that little is happening in this area in Australia. In my opinion, it is considering the fundamental ideology of corporate law, the bigger picture of how we view corporations and why, or whether, we consider they are important. It is also about the different strands of theory that have developed in the last three to four hundred years on the nature of corporate personality and the extent of corporate power. For example, concession theories, corporate realism and aggregate/contractarian theories have all tried to characterise the nature of the modern corporation and provide a framework from which to analyse central concepts such as the separate legal entity doctrine, limited liability and management control.<sup>13</sup>

I have also come to realise that my concern in undertaking research on corporate law theory was being reinforced by the dominant attitude of many corporate law academics to theorising about corporate law. As researchers it seems most of our time is taken up considering issues other than corporate law theory. In particular, there is still a preference in Australia for corporate law research that is doctrinal, practical or focused on specific reform. Whilst this is not always the case,<sup>14</sup> it seems that there is no ongoing “mainstream” discussion on the issues of theory that

underlie our approaches to corporations or corporate regulation, or upon the fundamental assumptions and values upon which corporate law rests.<sup>15</sup>

In the same way, discussions of theory have not developed a central place in our teaching.<sup>16</sup> We seem to spend much of our time covering large areas of doctrine, case law and procedure and trying to ensure our topics are sufficiently practical and skills oriented. We often believe that what our students need most are a solid understanding of corporate law principles and concepts and the ability to reason and argue well from the applicable cases and rules.<sup>17</sup> If we can also add practical insight to this learning process, we think that we have done well. The absence of a substantial reflection upon theoretical issues is not a crucial omission, we might reason, as there are usually other subjects in the law school curriculum that focus upon theory and, we might add, corporate law theory itself is still not a strongly developed area of legal analysis.

Yet when we make decisions such as these to limit the discussion of theory in our teaching we limit other possibilities. For example, we limit our students' intellectual skills and deny them an essential opportunity to understand and contextualise corporate law. We also limit the innovative developments which might result of our own and our students' reflections upon corporate law. Unless we consider the theoretical underpinnings of what we research, teach and learn we unconsciously commit ourselves to promoting the same corporate structure and system of corporate regulation we currently experience.

It is essential for students to learn that all legal analysis involves a process of adopting positions on important political, social and philosophical questions.<sup>18</sup> In the context of corporate law, these issues include the importance and growth in economic activity, capitalism and commercial power. Once our students understand that there is no way to extricate law from broader issues and values they will better understand how corporate law has developed and how legal arguments are constructed.<sup>19</sup>

We will also help our students to understand that the cloak of formalism put over law often hides its values from view. Traditionally, we have been educated to believe that it is possible to learn and apply law as if it were a self contained system removed from our own values and concepts of justice.<sup>20</sup> We have been

encouraged to see corporate law rules and decisions as somewhat inevitable; as valid and justifiable choices between a limited number of available options. We have not readily seen corporations as intertwined with liberalism, economic values and male power. We have not seen our own practice, and discussions of law as intertwined with ourselves and that we are responsible for the versions of corporate law that we adopt.

However, as many critical legal scholars have shown there is no way to step outside ourselves to see the world or law.<sup>21</sup> All of our perceptions and ways of seeing are inevitably affected by our life experiences, characteristics and ideas on the world. The liberal claim to judicial and legal neutrality is therefore impossible. As traditionally understood, neutrality has meant that law is applied in a dispassionate or impartial way to all those who come before it. Instead, it has been shown that law often applies particular standards, reflected in legal principles and case law, based on the experiences of white, middle class, liberal men.<sup>22</sup>

The absence of an express reflection upon theory in corporate law perpetuates these illusions of law. When we teach law as rules and cases, as abstract doctrine and precedent we cut off discussions about the values and assumptions which underlie law. Through our silence, we endorse the dominant values and limit the potential for intellectual discussion. Theory opens up these discussions because it reveals the partiality of law — the idea that law is a reflection of the values of those who have had the power to shape reality. As Margaret Davies writes:

[K]nowledge is not itself neutral, since it always exists within a particular social and philosophical setting. “Neutrality” is only the position which is culturally enabled to deny its positionality — it is the position which is empowered to know.<sup>23</sup>

Theory can also help students to come to terms with the abstract nature of corporate law. The language of corporate law is unique and specific — students need to learn a whole new way of talking and thinking to discuss the corporation. In this context, it is often assumed that students will come around to seeing the world the way corporate law sees it just by having this view reinforced. For example, in the context of the separate legal entity doctrine, students are asked to believe that what is, perhaps in their reality, just pieces of paper and a name, is in law a distinct and important legal person.

And the effect of this process of abstraction is powerful. It can circumscribe students' ability to bring their own reality into the learning process and to comprehend the social, economic and political relations upon which corporate law is based beyond the legal categorisations. Students may feel they have neither the language nor the concepts to challenge the dominant discourse of corporate law and they may see its legal abstractions as more real than their own experiences and perceptions. As Karl Llewellyn wrote in 1938:

[I]f the world of law is thus at its very creation in a student's mind created in divisions and in concepts which falsify the facts of law, the student is helpless. The false concepts give him [sic] the only eyes to see that legal world, his only words to describe it. All later efforts of qualification leaves it permanently distorted to him.<sup>24</sup>

### EXPOSING THEORY IN A CORPORATE LAW TEXT

To explain the importance of explicitly teaching theory in corporate law I am going to refer to the discussion of the separate legal entity doctrine in *Ford's Principles of Corporations Law* by H A Ford, RP Austin and IM Ramsay. Corporate law text books are important tools for teaching and even more important parts of student learning.<sup>25</sup> Whether we chose to focus upon a text in our teaching or not, it seems that students will often seek out general discussions of corporate law to reinforce or expand what they are learning in class. If we do prescribe a text book, the influence and importance of the ideas conveyed in that book are greatly increased. Text books are also useful indicators of current attitudes to law as they often attempt to present material in a way that will appeal to a significant portion of law teachers, practitioners, and students.

Overall, Ford, Austin and Ramsay's text fits well within the conventional style of corporate law research. The authors adopt traditional ideas about divisions in corporate law on which to base the chapters. They offer a detailed discussion of legal principles and doctrines which reinforces the idea that this is a "black letter" area of law. Case analysis and discussion of legislation are generally integrated into the narrative of the text and particular importance is placed on trying to highlight the practical

implications of the law where possible.

The discussion of corporate law theory is not well developed in the text.<sup>26</sup> For example, in the context of the specific strands of theories on the nature of the corporation and the extent of corporate power, there is only a brief discussion of managerialist and contractarian theories. There is no discussion of concession or aggregate theories, corporate social responsibility, or economic and feminist analysis of corporate law, and no references are given for further readings on these topics.

Inevitably, however, theoretical issues underlie many of the statements made in the text. For example, implicit in many of the authors' comments on the details and problems of corporate law regulation are opinions on the nature of corporate personality, the role of corporations in society and the value of corporate activity. Making these opinions explicit would enhance students' understanding of the issues and provide the framework for a more dynamic, rigorous and informed discussion on corporate law.

### *The Separate Legal Personality of the Corporation*

Consistent with the general approach of the book, Ford, Austin and Ramsay's discussion of the separate legal entity doctrine is theoretically narrow. For example, the idea that a company is a separate legal entity is raised early in Chapter 1 when the authors write:

A corporation (or body corporate) in the common law sense is a legal device by which legal rights, powers, privileges, immunities, duties, liabilities and disabilities may be attributed to a fictional entity equated for many purposes to a natural person...

The separate legal personality of a company is usually the explanation as to why a company has been chosen for the conduct of some business enterprise...

[T]he persons associated in the company and interested in the enterprise have only limited exposure to the liabilities of the company.<sup>27</sup>

This discussion starts to raise some of the important values of corporate law. For example, the quote refers to legal formalism and the artificial nature of the company when it calls a corporation a "legal device", a "fictional entity". It alludes to concepts of individualism when it states that the company is "equated for many purposes to a natural person". And it opens up discussion of the



importance of economic liberty and commercial activity when it indicates that the pursuit of limited exposure to financial risk is the central and most commonly sought after feature of incorporation. Yet, whilst these points are already starting to provide a foundation for students' assumptions and understanding of the separate legal entity concept, a discussion of these values or the broader context in which corporations have developed is not offered at this point.

Later on in the text the separate legal entity doctrine is discussed in more detail. Again, however, explicit discussion of the relevance of theory to the doctrine is not well developed.<sup>28</sup> For example, in Chapter 4 the issue of equating a corporation with a natural person is raised without any discussion of liberal theories of the state or the importance of individualism in our social, political and legal systems.<sup>29</sup> No link is drawn between the influence of liberalism and the development of specific corporate law theories on the nature of the corporation. There is only limited reference to the history leading up to the application of the doctrine to registered companies and no reference is made to the influence of liberal values to the widespread adoption of the corporate form.<sup>30</sup>

Yet one simple way to explicitly incorporate discussion of some of the liberal values underlying the separate legal entity doctrine is to focus upon extracts from the case of *Salomon v Salomon & Co.*<sup>31</sup> For example, as Lord Herschell wrote:

It is said that the respondent company is a "one man" company and that in this respect it differs from such companies as those to which I have alluded. . . . I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading with the benefit of limited liability and not for one person to do so provided in each case the requirements of the statute have been complied with and the company has been validly constituted. . . . The Court of Appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant were a scheme "contrary to the true intent and meaning of the *Companies Act*". I know of no means of ascertaining what is the intent and meaning of the *Companies Act* except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability.<sup>32</sup>

As this extract shows the Court in *Salomon's* case supported a version of judicial method that was considered removed from political or social issues. Its view of legal positivism and judicial formalism maintained that statutory interpretation only involved looking at the words of the statute and giving them their literal and

obvious meaning, and it was not for the Court to inquire what the purpose of the legislation was in determining its meaning. Indeed, Lord Chancellor Halsbury considered that “[w]hether ... the result be right or wrong, politic or impolitic, I say ... that we have nothing to do with that question if a company has been duly incorporated by law”.<sup>33</sup>

Whilst this form of literal interpretation is no longer very common, it is a clear example of the effect of liberal notions of formalism and the rule of law upon the development of corporate law.<sup>34</sup> It was considered justifiable and achievable for members of the Court to maintain a separation between the justice and the outcome of the case and to discuss the process of judicial method as if it were a certain, “scientific” process.

The modern common law trend of likening the corporation to an individual was also evident in various parts of the Court’s decision. For example, Lord MacNaghten wrote:

The company attains maturity on its birth. There is no period of minority — no interval of incapacity. I cannot understand how a body corporate thus made “capable” by statute can lose its individuality by issuing the bulk of its capital to one person whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum ...<sup>35</sup>

This analogy of the corporation with the individual has had a powerful influence on modern corporate law. In particular, it has been used to place the corporation in the liberal world view of the individual and the state.<sup>36</sup> One result of likening the corporation to the individual has been to hide in legal discourse the power, impact and size of many corporations. In particular, by talking about the corporation within the parameters of ideas about the human form we have restricted the law from fully developing notions of collective responsibility unique to corporations.

Finally, the Court gave clear preference to the rights of individuals to carry on business activities with limited exposure to risk over the social consequences of reallocating this risk. For example, it considered creditors were the appropriate group to bear the risk of commercial insolvency. As Lord Watson wrote:

The unpaid creditors of the company whose unfortunate position has been attributed to the fraud of the appellant if they had thought fit to avail themselves of the means of protecting interests which the Act provides could have informed themselves of the terms of purchase by the company of the issue of debentures to the appellant and of the

amount of shares held by each member. In my opinion the statute casts upon them the duty of making inquiry in regard to these matters. Whatever be the moral duty of a limited company and its shareholders when the trade of the company is not thriving the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. ... [T]he apathy of a creditor cannot justify an imputation of fraud against a limited company of its members ... and in my opinion a creditor who will not take the trouble to use the means which statute provides for enabling him [sic] to protect himself must bear the consequence of his own negligence.<sup>37</sup>

Ideas such as these, that corporations do not have general obligations of good faith or fair dealing, continue to affect notions about appropriate corporate behaviour. It was considered legitimate for a corporation to act in a way that might appear improper or deceitful to “ordinary” persons provided it was within the letter of the law. This attitude had strong links to the liberal ideal of economic liberty emerging at the time of *Salomon’s* case that each individual (and each corporation) had the right to act in their own self interest and to pursue private wealth and ownership free as far as possible from state or other intervention.<sup>38</sup> In this context, corporations were seen to be vitally important to economic activity and growth and their interests were preferred over those of creditors, employees and the public.

It is clear that there were important political choices involved in deciding whether the corporation was to be treated as separate and distinct from its incorporators. The dominant political attitudes of the time supported the importance of economic liberty, private enterprise and commercial interests in the development of our liberal capitalist society. And these values continue to have an impact today.

There is little doubt that the separation of the corporation from the entrepreneurs behind it provided the “essential impulse” to the most remarkable economic development of the last 200 years. Although those dealing with a corporation would sometimes suffer upon its insolvency and liquidation, a social judgement was made that their losses were the price occasionally to be borne, where the protective mechanisms of company law had failed, upon the basis that the general immunity of directors and of investors from liability for the debts of the corporation promoted innovation, investment and risk taking by the corporation essential to economic progress.<sup>39</sup>

If we appreciate that priority is often placed on economic freedom over individual and social responsibility we are more likely to see and appreciate that the separate legal entity doctrine’s

consequences are legal issues as well as moral and political issues. We are also able to consider issues of development and reform of the doctrine in the context of its constructed nature and its impact on ideas of corporate liability. Finally, we can acknowledge the consequences of enshrining such a principle in law. The separate legal entity doctrine not only has the effect of reallocating director's responsibilities but it encourages individuals and society as a whole to think that this sort of shifting of risk is desirable. It legitimates individuals distancing themselves from the real life effects of their involvement in activities and in the process it decreases society's perception of personal responsibility.

### THE IMPORTANCE (AND INEVITABILITY) OF GENDER

So far we have focused upon the importance of exposing the dominant values embedded in corporate law and our own position in relation to them. There is also the possibility of enhancing and expanding our teaching by drawing upon other theoretical insights than those of liberalism. In this context, there is great potential for feminist contributions to teaching. Just as corporate law has not been constructed in a politically neutral way nor has it been constructed in a gender neutral way. Including a discussion of gender in our teaching is taking a stance on the importance of gender to the social and legal order. In the same way excluding a discussion of these issues reflects a position on the perceived unimportance of gender issues to corporate law.

In every sense, gender issues are relevant to corporate law. Although we do not often see the women in corporate law, as directors, shareholders, creditors, consumers, employees or members of the public, corporate law reflects important ideas on how power is held and used in society.<sup>40</sup> It operates against a backdrop of values and assumptions about women's economic, political and commercial power, women's profession opportunities and constraints, women's position in the home and in the workplace, and the relevance of women's experiences and voices.

Corporate law hides these issues of power and privilege behind the language of objectivity and neutrality and the abstract formalism of many legal concepts. People are classified according to the roles of director, shareholder, creditor or employee. Relations between corporate players seem detached and unreal and create the

image of a commercial world inhabited by abstract “faceless” non gendered individuals.

In contrast, however, the corporate world is very much about “real” people and in particular about men. In courts, universities, law firms, business and government it has generally been men who have created, defined and used corporate law.<sup>41</sup> This has resulted in certain questions being asked, certain issues being valued and certain goals being pursued. Most particularly, the corporation has been about values and activities culturally associated with men.

These ideas are supported by research of both a theoretical and a practical nature. For example, in her book *Law and the Sexes* Ngaire Naffine argues that law does not, and can not, deal in abstract individuals.<sup>42</sup> Instead she argues that law has been based on a particular vision of the “average person” and this vision has been of the white middle class man of the market.

[Law] has a preferred person: the man of law, the individual who flourishes in and dominates the type of society conceived by law. This person is preferred in the sense that law reflects his priorities and concerns and conducts itself in a manner which is considered by him to be both desirable and natural. ... [H]e is assertive, articulate, independent, calculating, competitive and competent. And these are precisely the qualities valued in the sort of society which law has in mind: a society which is fiercely competitive and composed of similarly self interested and able individuals; a society very much like the modern market place.<sup>43</sup>

This man of the market, “the archetypal tough minded businessman”, is clearly visible in corporate law.<sup>44</sup> Underlying the language of corporate law cases and texts are images of self interested, composed, reliant, assertive *men* engaged in business.<sup>45</sup>

Corporate law also reinforces western values traditionally associated with men. It operates on assumptions that competition, conflict and conquest are good, that self interest and profit are legitimate and worthwhile, that hierarchical and detached structures are effective and reasonable. It emphasises notions of individualism, economic liberty and market control — values that have traditionally been associated with men. It operates through abstract concepts and rules which promote legal formalism and (false) ideas of objectivity and impartiality in corporate law.

In a more practical context, research has indicated that the masculinist values of corporate law are also reflected in the culture of many large corporations.<sup>46</sup> Studies have found that corporate

workplace practices for executives and managers are still responsive to traditionally masculine approaches to work such as long and inflexible working hours, limited provision of childcare facilities and partners in fulltime domestic support.<sup>47</sup> Masculine characteristics such as assertion, independence, risk taking, and competitiveness are often rewarded with promotion and define the environment in which many women managers are measured.<sup>48</sup> As a result it is perhaps not surprising that recent research of nearly 600 leading companies in Australia has shown that only 2.7% of the directors are women. Indeed, of the total number of companies studies only 16% had at least one woman on the board.<sup>49</sup>

Other research has also confirmed that most women's involvement in corporations is not in an independent capacity but is through family businesses or family relationships.<sup>50</sup> For example, in one preliminary study it was found that in the 123 cases involving at least one female participant reported in the Australian Corporations and Securities Reports (volumes 1–17) only 13 cases (9.8%) involved women in an independent capacity.<sup>51</sup> In contrast 91 cases involved women in their capacities as wives and de factos of other parties to the litigation and other cases involved women as mothers, daughters and granddaughters of parties.

And other studies have indicated that gendered family values, particularly notions that the proper role for women is caring for the home and children and that responsibility for business rests with men, provide the backdrop against which many family companies are run.<sup>52</sup> For example, in her research on ethnic family businesses in Sydney, Caroline Alcorso found that, despite the blurring of boundaries between domestic duties and business roles, women were usually still confined to domestic work while their husbands undertook the role of entrepreneur.<sup>53</sup> In a similar way, research on the social structure of farming units in New Zealand lead Joan Carr to suggest that “in the small business which is wholly or predominantly reliant on family labour, the dominant relations of production are patriarchal”.<sup>54</sup>

Most of our teaching reinforces the masculinist values and images that underlie corporate law. For example, to talk about directors without talking about the reality of who those directors most likely are, or are not, and why is to implicitly reinforce students' notions that directors are men. In the same way, to talk about the power of corporations or the importance of the corporate

form to economic development, without talking about the general lack of power for women or the social cost of corporate activity, is to give priority to the dominant values in a way that has traditionally been done by men.

To raise gender issues in corporate law teaching we need to adopt a number of strategies. Firstly, we need to place corporate law in its wider social, political and economic context. This is vital if we are to see both the values embedded in corporate law and the relationship between these values and women's position in society generally.<sup>55</sup>

The prevailing positivist conception of our discipline . . . suggests that the law exists only in judicial decision or statute and that there is no need to look elsewhere. This "law/not law" divide imprisons us, keeping us internal to and therefore uncritical of this narrow conception of the law: we can never see it from outside, let alone question the existence of the supposed boundary between that which law is and that which it is not.<sup>56</sup>

We also need to develop and draw upon empirical research to indicate how and why women are (and are not) coming into contact with corporate law. This is vital if we are to understand what women's needs are in the context of corporations, whether corporate law is responding to these needs, how corporate law is interacting with other areas of law such as management practice or family law, and the consequences of corporate law principles (such as rules on liability) for women.

Finally, it is necessary to reconsider the teaching materials, such as text books, cases and other materials, we use in our courses.<sup>57</sup> In a conventional analysis of corporate law it can be hard to locate, let alone analyse, the position of women in corporate law.<sup>58</sup> This silence can in turn significantly affect student's ideas about the relevance of gender in corporate law. For example, it can reinforce the general invisibility of women in commercial law and can build on the idea that corporate law is concerned with regulating male activities in the public (male) domain. As a result, we need to draw upon a variety of materials such as non appellate case law,<sup>59</sup> empirical research from areas such as management, ethics, and psychology, and fictional and non fictional stories of women as directors, managers and workers to see and discuss women in corporate law.

## THE IMPORTANCE OF CASE LAW

Case law is a vital tool in teaching law. As the discussion of the separate legal entity doctrine has shown, by incorporating a detailed discussion of case law we can expand students' understandings of the theoretical underpinnings and values of corporate law.<sup>60</sup> In particular we can use cases to :

- reveal gendered stereotypes in law and the ways that these can affect the outcomes cases for women;
- bring in more instances of women's involvement in law whether in the capacity of judges or parties to the dispute;
- acknowledge that there are still areas of law that are more about men's activities and needs than they are about women's;
- show the actual effects of the law upon women and consider whether there are ways in which this results in unfairness or inequality;
- critique the dominant values of law and show that there are alternate values to those expressed;<sup>61</sup>
- raise feminist analysis as an important and valid form of legal analysis;
- compliment a focus that incorporates other theories or influences on law including cultural, historical and political analysis.

These goals are important when we consider the treatment of gender issues in corporate law texts.<sup>62</sup> For example, text books tend to set up doctrinal boundaries for their discussion based on traditional ways of thinking about corporate law. These boundaries exist in the way doctrinal categories are reinforced between areas such as "corporate law", "contract law", and "family law", and in the way principles are collected together in areas such as "directors duties" and "internal/external relations of a company". In particular, these forms of classification (and exclusion) are based on the assumption that boundaries can be drawn between what is relevant and what is not in both a practical and a doctrinal sense.<sup>63</sup>

However feminists have argued that these standard classifications can render women and women's issues invisible.<sup>64</sup> Whilst some of the reasons for this are obvious,<sup>65</sup> it makes locating women in corporate law difficult. In particular, despite the vast ambit of corporate activities, the doctrinal boundaries of what comes within corporate law textbooks is narrow. As a result, broader issues about corporations, including issues of safe and fair



employment practices (labour law/equal opportunity law), corporate liability for negligence and defective products (tort law/consumer law), liability for pollution of residential areas (environmental law), distribution of commercial property on divorce (family law), financial arrangements using family structures (taxation law), are placed outside the corporate law curriculum and the consideration of corporate academics and students.

Case law is therefore vital to locating women in corporate law. Where women have been rendered invisible by the discussion and materials included in a text book or by the boundaries defining the relevance of issues to corporate law, case law can show some of the ways women are involved in and characterise by corporate law.

*Exposing Gender in Metal Manufacturers v Lewis*<sup>66</sup>  
*and Statewide Tobacco Services Ltd v Morley*<sup>67</sup>

To demonstrate how case law can raise important gender issues in our teaching I am going to consider aspects of the decisions of Hodgson J in *Metal Manufacturers v Lewis* and Ormiston J in *Statewide Tobacco Services Ltd v Morley*. Whilst these cases are not new, they are useful examples of language used to characterised women in the context of commercial law.

The central issue in these two cases was Section 556 of the Companies Code, redrafted as Section 592 and now Sections 588G and 588H of the Corporations Legislation, and the defences available against a director's liability for debts incurred whilst a corporation was insolvent. In particular, due to the previous requirement that all companies were to have at least two directors (a requirement that was amended in 1995 allowing for sole director proprietary companies) it was common for family companies to be set up with women (whether wives, partners, mothers or daughters) as directors. Once appointed, these women would often have little actual involvement or input into the business affairs which were generally conducted by the male partner. On insolvency, however, women directors often faced liability for debts incurred when the company was insolvent.

In *Lewis*' case Mrs Lewis was a director of a company which was run entirely by her husband. Metal Manufactures sued Mrs Lewis under the Old Companies Code for goods which were

delivered to the company but never paid for. The company was wound up a year after delivery of the goods. Mrs Lewis had been appointed as a director at the request of her husband in order to fulfil the requirement for two directors. She was not involved in the running of the business and had been occupied in the home continuously since her marriage looking after her husband and children.

Metal Manufacturers argued that the debts were incurred when there were reasonable grounds for Mrs Lewis to expect that the company was insolvent. Mrs Lewis gave evidence to the effect that she did not realise that she was a director of the company and she did not know when the company had commenced trading. She had signed corporate documents at her husband's request without reading them. Her sole involvement in the business was answering telephone calls.

Hodgson J at first instance found Mrs Lewis liable under s 556 on the basis that when the debts were incurred she had reasonable grounds to expect that the company was insolvent. However, he went on to find that Mrs Lewis had made out the defence in s 556(2)(a) that the debt was incurred without her express or implied consent. On appeal a majority of the New South Wales Court of Appeal upheld Hodgson J's decision.<sup>68</sup>

Hodgson J's judgement contains useful evidence on Mrs Lewis' position within the business and family structure. In particular, he noted:

In cross-examination the second defendant [Mrs Lewis] agreed that she was content for her husband to do everything as far as the operations of the company were concerned. She said that her husband never told her how the business was going. She said that on a few occasions she said to her husband that she felt absolutely stupid because she knew nothing about the business and her husband's response was to the effect that she was a director only for signatory purposes. When asked if she ever pursued this she said she did ask him on a few occasions to teach her but he did not do this and she carried on with her housework. ...

My impression was that the first defendant [Mr Lewis] was a somewhat overbearing and somewhat arrogant man, while my impression of the second defendant was that she was of a more passive nature. This confirmed my view that in fact the first defendant did take it upon himself to conduct the whole of the business of the company, that he did tell the second defendant that she was a director for signatory purposes only and that apart from occasional expressions of concern and enquiries she in substance accepted that role.<sup>69</sup>

This discussion gives us a real opportunity to raise the importance of gender in our teaching. Unlike many other judges Hodgson J was willing to include in his judgement evidence about Mrs Lewis' subordinate and dependent position in the family and business and to recognise, to some degree, the domination and control her husband exerted over her.<sup>70</sup>

However, the case raises difficult issues about imposing general standards of involvement upon directors. Mrs Lewis had effectively been excluded from being involved in the affairs of the corporation by the rebukes and silence of her husband. She had been denied access to the most basic information about her role and responsibilities and had been limited in every way in having input into the business. Yet the circumstances of her exclusion are similar to those faced by many women in family owned businesses.<sup>71</sup> Gendered ideas about women's roles as passive carers in the home can collide with gendered notions about assertive behaviour in the market place. In this case for example "it was practically impossible for [Mrs Lewis], within her family structure, even to ascertain much less fulfil her duties as a company director".<sup>72</sup>

Indeed Julie Dodds Streeton argues that Hodgson J did not go far enough in taking account of Mrs Lewis' position when he found that she had reasonable grounds to expect insolvency and was therefore unable to rely on the defence in s 566(2)(b).<sup>73</sup> She argues that:

[T]he judge accepted that a defendant must have behaved *reasonably* in order to rely on ignorance of the company's affairs pursuant to s 566(2)(b). ... It can be argued that the concept of reasonableness employed in the judgement is gender biased. It is not "unreasonable" for a woman in a patriarchal family structure or relationship to be ignorant of duties entailed by her formal status as a director ... Far from being unreasonable such ignorance is a natural consequence of conformity to a socially and legally endorsed stereotype of passivity, dependence and derivative participation in commercial activity.<sup>74</sup>

We can therefore see that women's positions in families can be relevant to corporate law through the intersection of the requirement of two directors and the reality of how many businesses are run. We can see that the common image of directors as men, as knowingly involved in commerce, is not necessarily borne out in the small family owned company. Mr Lewis and his accountant presumably thought it was legitimate to make Mrs Lewis a director and require her to sign documents without

providing the necessary information or explanation to her. Mrs Lewis presumably accepted her general exclusion from the business and her confinement to the home.

Overall this case is very useful in raising important social and political issues. It challenges us to think about women's roles in the home and the workplace, the influence of the traditional patriarchal family structures on the operation of family businesses, the operation of corporate law defences in the context of limited involvement and the information provided to women directors, and the different expectations and behaviours adopted by men and women in commercial affairs.

In contrast to the approach adopted by Hodgson J, the decision of Ormiston J in *Statewide Tobacco Ltd v Morley* showed a general unwillingness to recognise the subordinate position of women in family businesses. In this case Mrs Morley was a shareholder and director of a family company and took no active part in the management from the company's incorporation in 1959 until its compulsory winding up in 1988. The business was run by her husband until his death and thereafter by their son. From the time her son became involved Mrs Morley was not provided with regular accounts, information or reports. Director's meetings were not held and the son did not indicate to her that the company was in any difficulty.

Ormiston J ruled that Mrs Morley was liable under S 556 and that she did not make out either of the defences under S 556(2). In justifying his decision Ormiston J wrote:

A director should not ... be entitled to hide behind ignorance of the company's affairs which is of his [sic] own making, or if not entirely of his own making, has been contributed to by his own failure to make further necessary enquires . . . What each director is expected to do is to take a diligent and intelligent interest in the information either available to him or which he might with fairness demand from the executives or other employees and agents of the company ... I accept that [Mrs Morley] knew nothing of her responsibilities as a director and that nobody informed her that they involved doing more than signing a few documents from time to time upon the say so of her son, or possibly of the company's accountants. Those matters unfortunately for her do not excuse her failure to perform these duties ... [I]f people choose to use a corporate vehicle to carry on their business activities, then they must accept consequential responsibilities imposed by law.

As this extract shows, Ormiston J's belief that directors should be subjected to higher standards of duty was reinforced by

gendered assumptions and ideas about appropriate conduct. In particular, he adopted traditionally masculine notions of “diligent and intelligent” behaviour, involving assertiveness with executives and employees and a degree of knowledge of commercial and financial affairs. He implied that Mrs Morley could have reduced her liability if she had *asserted* her right to know what the company was doing. Her failure to do so, and to measure up to a standard based on traditionally masculine characteristics, seemed to justify the imposition of liability.

The judge’s language implied that when Mrs Morley *chose* not to ascertain information on the company’s financial position she relinquished her right to protection from liability under s 556. He did not recognise that often women do not *choose* to use a corporate vehicle, rather there is a common practice of asking women to assist their partners to incorporate businesses. He also did not acknowledge that women’s access to information on a company’s financial position might be affected by their perception of their right to this information. For example, Mrs Morley and Mrs Lewis might not have considered asking an accountant or employee for the financial information refused to them by their male partners when both their families and society endorsed their reliance upon these men for such information.

Ormiston J’s decision also makes it clear that he believed all directors could be treated equally regardless of their circumstances and that in reaching his decision he was not trying to single out Mrs Morley or other female directors for strict treatment. To him gender was irrelevant and by interpreting s 556 objectively he made it seem that this was the only fair and neutral position for the Court to adopt.

Yet silence on the gender issues involved in this case is itself a policy decision on what is relevant to corporate law. It is clear that the practice of involving women as “token” directors of family companies continues to exist and that many of these women are effectively prevented from fulfilling the legal and practical responsibilities this role entails. However, case law now suggests that such women may be held to standards that are near impossible for them to uphold or contrary to everything they have been told about their involvement in the family company.

A critical reading of these cases, by ourselves and our students, suggests that gender is a very relevant issue. It might support the

idea that “gender neutral” approaches can reinforce gender inequality. It might raise questions about the practice of involving women in companies where they have little opportunity for input or control. It might lead us to consider how conduct can be penalised in law yet acceptable in a social context.

Furthermore, in not discussing the gendered aspects of these cases in our teaching we reinforce the position that questions of gender and power are irrelevant in the context of corporate law. For example, we ignore the power differentials that exist in many personal and business relationships; the power which results from access to knowledge, commercial experience and control of business affairs; the power of legal norms to define reality by male standards; and the power of law’s silence to hide the relevance of women’s experiences.

As lecturers we also exercise power when we present law to our students. We influence their ability to see the many social, political and philosophical issues involved in corporate law. Whether we also empower our students depends on what and how we choose to teach on corporate law.

## CONCLUSION

From whatever perspective we explicitly discuss theory and gender, we challenge ideas about the underlying (masculinist) nature of law and the traditional role of lawyering. We also reveal our own understanding that all knowledge, just as all law, is contingent. By consciously incorporating feminist analysis into our teaching we can step outside of the traditional approaches to law. For example, we can ask questions which challenge why corporate law is the way it is, who it works for and who it works against. What our students expect of feminist analysis depends on the value we give to it. If we see it as irrelevant, they are likely to see it that way too.

Inevitably, in teaching law we are involved in taking stands on fundamental issues of economic, political and moral theory. Whether we choose to do so explicitly will significantly influence our student’s learning. As Gerald Frug writes:

[W]e disable our students ... if we suggest to them that we are offering them no theory at all — that we are simply presenting the world as it is. If lawyers play an important role in the making of the modern world, as seems increasingly to be true, we should teach our students to be

conscious of and responsible for the kind of world they use their talents to create and defend.<sup>75</sup> In the same way — we as lecturers must be conscious of and responsible for the world view we promote in our teaching.

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- <sup>1</sup> See M Stokes, *Company Law as Legal Theory*, in W Twining ed, *Legal Theory and Common Law* (Oxford: Blackwell, 1986) at 155 who wrote:

Students of company law very often complain that the subject is technical, difficult and dull. This is not without some justification. The reason can perhaps be found in the fact that company law as an academic discipline boasts no long and distinguished pedigree. The result is that company lawyers lack an intellectual tradition which places the particular rules and doctrines of their discipline within a broader theoretical framework which gives meaning and coherence to them.

See also B Dyer, *Making Company Law More Practical and More Theoretical — Curriculum Design* (1995) 5 *Aust Jnl of Corp Law* 281.

- <sup>2</sup> See K Hall, *The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia* (1996) *Aust J Corp Law* 1; D Wishart, *Does the High Court Understand Corporations Law?* (1996) 6 *Aust J Corp Law* 424; R Simmonds, *Corporate Law Research: Pluralistic Visions* (1992) 2 *Aust Corp Law* 115.

- <sup>3</sup> See J Dodds Streeeton, *Feminist Perspectives on the Law of Insolvency* (1994) 6 *Adel L Rev Research Paper* 1; K Hall, *Starting From Silence: The Future of Feminist Analysis of Corporate Law* (1995) *Corp & Bus Law J* 149; P Spender, *Women and the Epistemology of Corporations Law* (1995) 6 *Legal Educ Rev* 195; P Spender, *Exploring the Corporations Law Using a Gender Analysis* (1996) 3 *Canberra Law Rev* 82; S Berns, P Barron and M Neave eds, *Gender and Citizenship: Materials for Australian Law Schools*, Part 2 — *Company Law* (Canberra: DEET, 1996); P Spender, *Corporations Law: Women as Directors*, in R Graycar and J Morgan eds, *Work and Violence Themes: including Gender in the Core Law Curriculum* (Canberra: DEET, 1996); S Corcoran, *Does a Corporation Have a Sex?: Corporations as Legal Persons*, in N Naffine & R Owens eds, *Sexing the Subject of Law* (Sydney: Law Book Co, 1997) and S Chesterman, *Gender Ltd: Why Aren't More Women on the Boards of Australia's Top 100 Listed Companies?* (1996) 14 *Company and Securities Law Journal* 352.

- <sup>4</sup> HAJ Ford, RP Austin and IM Ramsay, *Principles of Corporations Law* 8th ed (Sydney: Butterworths, 1997).

- <sup>5</sup> For example, it was first published in 1974 and it has been through seven revisions since then. P Redmond's text *Companies and Securities Law: Commentary and Materials* (Sydney: Law Book CO) was first published in 1988 and is now in its 3rd edition. Other important texts are P Lipton & A Herzberg, *Understanding Company Law* (Sydney: Law Book Co) first published in 1984 and now in its 6th edition; R Tomasic, J Jackson, & R Woellner, *Corporations Law: Principles, Policy and Process* (Sydney: Butterworths) first published in 1990 and now in its 3rd edition; and R Tomasic & S Bottomley, *Corporations Law in Australia* (Sydney: Federation Press, 1995).

- <sup>6</sup> *Metal Manufacturers v Lewis* (1986) 4 ACLC 736.

- <sup>7</sup> *Statewide Tobacco Services Ltd v Morley* (1990) 2 ACSC 405.

- <sup>8</sup> See Dodds Streeeton, *supra* note 3 and Spender in Graycar and Morgan, *supra* note 3.

- <sup>9</sup> See generally bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (New York: Routledge, 1994); G Frug, *A Critical Theory of Law* (1989) 1 *Legal Educ Rev* 43; C Sampford & D Wood, *Legal Theory and Legal Education* (1989) 1 *Legal Educ Rev* 107; C MacKinnon, *Feminism in Legal*

- Education (1989) 1 *Legal Educ Rev* 85.
- <sup>10</sup> See references *supra* note 2 and I Ramsay, Corporate Law Research: To Whom Should it be Addressed? (1992) *Aust Corp Law* 123.
- <sup>11</sup> Wishart, *supra* note 2.
- <sup>12</sup> *Id* at 437. As a result, Wishart suggests we should develop critiques and “metatheories” which challenge the superiority of judicial law, which find law in other sources, for example in what officials do, and which consider issues such as the “technologies of regulation” by developing a greater appreciation of the roles of the legislature, the judiciary and the operation of law.
- <sup>13</sup> See generally Hall, *supra* note 2; S Bottomley, Taking Corporations Seriously: Some Considerations for Corporate Regulation (1990) *Federal Law Review* 203; SJ Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Canberra: Australian University Press, 1973); D Wishart, *Company Law in Context* (Melbourne: Oxford University Press, 1994).
- <sup>14</sup> For example there was a national Workshop on Corporate Law Research Methods and Theory held at the University of Canberra in November 1995, and the papers are published in (1996) 3 *Canberra Law Review* 7–115.
- <sup>15</sup> See Wishart, *supra* note 2, at 436–437 where he argues that this lack of debate is not because of an absence of corporate law theorists but because the theorists are not actually listening to or debating with each other. He suggests we dismiss each other in the same way that “traditionalists” dismiss us by asking what use our critiques are in the context of the superiority of what *the law is*.
- <sup>16</sup> This conclusion is based upon observations of colleagues from a variety of Universities and upon a perusal of the conference papers from the Corporate Law Teachers Conferences 1991–1997.
- <sup>17</sup> See Frug, *supra* note 9, at 43.
- <sup>18</sup> *Id.*
- <sup>19</sup> Frug, *supra* note 9.
- <sup>20</sup> See MJ Mossman, Feminism and Legal Method: The Difference it Makes (1986) 3 *Australian Journal of Law and Society* 30 at 48 and M Stubbs, Feminism and Legal Positivism (1986) 3 *Australian Journal of Law and Society* 63.
- <sup>21</sup> See generally S Bottomley, N Gunningham & S Parker, *Law in Context* 2nd ed (Sydney: The Federation Press, 1997); M Davies, *Asking the Law Question* (Sydney: Law Book CO, 1994) and R Hunter, R Ingleby & R Johnstone eds, *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law* (Sydney: Allen & Unwin, 1995).
- <sup>22</sup> *Id.*
- <sup>23</sup> Davies, *supra* note 21, at 177.
- <sup>24</sup> K Llewellyn, On Our Case Law of Offer and Acceptance (1938) 48 *Yale LJ* 1 at 83.
- <sup>25</sup> Text books can have great influence over students ideas about law. Often they carry significant authoritative power by virtue of their claim to “state the law”, the seniority of their authors, even their size. See MJ Frug, Re-reading Contracts: A Feminist Analysis of a Contracts Casebook (1985) *American University Law Review* 1065 at 1069.
- <sup>26</sup> This means that generally corporate law theory, both in the narrower and the broader sense, is not explicitly referred to. See R Hunter, Representing Gender in Legal Analysis: A Case/book study in Labour Law (1991) 18 *Melbourne University Law Review* 305 where she explains how the decision not to incorporate theory in a text is a usually a “product of choice, not a lack of choice”.
- <sup>27</sup> Ford, Austin & Ramsay, *supra* note 4, at 5.
- <sup>28</sup> Ford, Austin & Ramsay, *supra* note 4, at Chapter 4 on *Incorporation and its Consequences* where there is a discussion of the effects of registration and the separate legal entity doctrine. In particular, the authors focus upon the exceptions to the doctrine, and discuss the reform to the requirement for a plurality of members and the problems raised by corporate groups. See however Dyer, *supra* note 1, at 291 who writes: [Whilst the significance and justification of the legal personality of corporations] ... is already a major focus of all company law courses ... it is all too easy to let the treatment of this topic degenerate into a



rather sterile and aimless discussion of “lifting the corporate veil”. ... This, I think is an ideal time for “stepping back to consider broader perspectives. (footnotes omitted) The area of director’s liability for insolvent trading is dealt with briefly in Chapter 4 and is returned to in considerable detail in Chapter 20 on the *Protection of creditors*.

<sup>29</sup> See Hall, *supra* note 2, at 6–12.

<sup>30</sup> On the relevance of these issues see Hall, *supra* note 2 and P Ireland, The Triumph of the Company Legal Form, 1856–1914 in J Adams ed, *Essays for Clive Schmitthoff* (Oxfordshire: Professional Books, 1983) at 29.

<sup>31</sup> [1897] AC 22.

<sup>32</sup> *Id* at 37.

<sup>33</sup> *Supra* note 31 at 33.

<sup>34</sup> Stubbs, *supra* note 19.

<sup>35</sup> *Supra* note 31, at 50.

<sup>36</sup> See Hall, *supra* note 2.

<sup>37</sup> *Supra* note 31, at 42.

<sup>38</sup> See Hall, *supra* note 2.

<sup>39</sup> JA Kirby in *Metal Manufacturers v Lewis* (1988) 6 ACLC 725 at 727–8.

<sup>40</sup> See Hall, Starting From Silence, *supra* note 3 and Spender, Women and the Epistemology of Corporations Law, *supra* note 3.

<sup>41</sup> See Hall, *supra* note 2

<sup>42</sup> N Naffine, *Law and The Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990.)

<sup>43</sup> *Id* at 22. As MacKinnon, *supra* note 9, at 89 wrote: [I]t is clear that the gender neutral person is a man, that few women have access to the prerequisites even to imitate his qualities because of sex inequality, and that gender neutrality is a deeply biased standard blind to power. In societies in which gender has hierarchical consequences, there are not truly gender neutral persons. In such societies, neutrality is a strategy to cover up the realities of male power.

<sup>44</sup> Naffine, *supra* note 42, at 116.

<sup>45</sup> See Sonya Ballinger, *Women and The Public Company Director of Corporate Law*, unpublished Honours Thesis (Adelaide, The Flinders University of South Australia Law School Library, 1997) and, the cases of *AWA Ltd v Daniel* (1992) 7 ACSR 759; *Hurley v NCSC* (1993) 11 ACLC 443; *Vrisakis v ASC* (1993) 11 ACSR 162; *McQuestin v ASC* (1996) 12 ACSR 280; *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; *ASC v Galleger* (1993) ACLC 286; *Biala Pty Ltd v Mallina* (1995) 11 ACSR 785.

<sup>46</sup> Ballinger, *supra* note 45.

<sup>47</sup> See J Wajcman, Domestic Basis for Managerial Career (1996) *The Sociological Review* 609. When women choose to leave these environments or do not succeed on these terms, they are often characterised as having *chosen* not to remain or as not having what it takes. Yet this obscures the fact that women are not the problem where the culture of an organisation is gender biased.

<sup>48</sup> Morgan & Banks, *The Morgan & Banks Job Index 11* (Sydney: Morgan and Banks Limited, 1996).

<sup>49</sup> K McDonald, Commissioned Study of Directorships (Sydney: Egan Associates, 1997). For other important studies of the composition of large public companies see Korn/Ferry International and the Australian Institute of Company Directors, *Fourteenth Study of Boards of Directors*, (1995) and G Stapledon and J Lawrence, *Corporate Governance in the Top 100: An Impirical Study of the Top 100 Companies Boards of Directors*, (Melbourne: Centre for Corporate Law and Securities Regulation, Melbourne University, 1996).

<sup>50</sup> See *Women in Small Business: A Review of Research*, Small Business Research Program (Adelaide: The Flinders University of South Australia, 1996). It would appear from this report that despite the focus of the Commonwealth Government upon reforming the corporations legislation for small businesses, little attention has been paid to gender issues such as whether the proprietary corporation is actually meeting the needs of women in small business.

<sup>51</sup> Spender, Exploring the Corporations Law Using a Gender Analysis, *supra* note 3 at 87–89.

- <sup>52</sup> See generally *Women in Small Business Report*, *supra* note 50 and Dodds Streeton, *supra* note 3.
- <sup>53</sup> C Alcorso, “‘And I’d Like to Thank My Wife...’: Gender Dynamics and the Ethnic ‘Family Business’” (1993) 17 *Australian Feminist Studies* 93 at 105.
- <sup>54</sup> J Carr, *Negotiating Patriarchy: Gender and Patterns of Small Business Ownership* (1993) 17 *Australian Feminist Studies* 109.
- <sup>55</sup> See L Bennett, *Gender in the Labour Law and Occupational Health and Safety Law Curriculum* (1995) 6 *Legal Educ Rev* 175 at 175–177.
- <sup>56</sup> R Owens, *Work and Gender in the Law Curriculum* (1995) 6 *Legal Educ Rev* 183 at 185.
- <sup>57</sup> For materials that raise gender issues for teaching see Graycar & Morgan, *supra* note 3 and Berns, Baron & Neave, *supra* note 3.
- <sup>58</sup> The only exception is R Tomasic and S Bottomley’s text, *supra* note 5 where they spend two pages discussing feminist research on corporate law. See also the cover of the sixth edition of Lipton & Herzberg *Understanding Company Law* (Sydney: Law Book Co, 1995) which includes a stereotypical image of a man (in suit with newspaper etc) and woman (in short skirt with note book and so on).
- <sup>59</sup> There is a strong tendency to mostly use higher court decisions in teaching. This means that the facts of cases might be dealt with only briefly and more focus placed on the authoritative value of the case than the circumstances surrounding it. In contrast, lower court decisions can often reveal important facts which can be used to promote contextualised, critical and reflective analysis of corporate law.
- <sup>60</sup> L Samas, *Uncovering Issues of Sexual Violence in Equity and Trusts Law* (1995) 6 *Legal Educ Rev* 207 at 209–210. In particular, she suggests analysing the words of judges as narratives (stories) rather than objective statements of law and fact and in the process questioning the claims of “truth made by judges when they decide cases. Consider also the American experience of legal education and the relevance of the idea of cases as containing the “right answer” discussed in R Gordon, *Critical Legal Studies as Teaching Method* (1989) 1 *Legal Educ Rev* 59.
- <sup>61</sup> This method would seem to be particularly useful in the context of corporate law as economic and commercial interests are routinely sanctioned by judicial and state decisions. For example, it would involve us in considering the policy aspects of judicial decisions in a similar way to how we more commonly consider the policy issues in legislative interventions.
- <sup>62</sup> For example, *supra* note 25, at 1107 has suggested that even the analytical and abstract style of corporate law text books can reinforce ideas about gender.
- The assumption underlying my claim that a casebook can be male is my belief that because ideas about gender are deeply rooted in our culture, casebook readers are accustomed, if not reconciled, to categorising characteristics according to the masculine/feminine paradigm. ... [and] that casebook readers generally share the views that analytical intellect, detachment, autonomy, and control seem masculine, whereas emotional intellect, attachment compassion and spontaneity seem feminine. I do not claim that these qualities are essential to either sex. In fact, I would argue they aren’t. I only claim to have described my impressions of the way many people understand the content of gender.
- <sup>63</sup> See Sampford and Wood, *supra* note 9, at 112.
- <sup>64</sup> See MJ Mossman, *Gender Issues in Teaching Methods: Reflections on Shifting the Paradigm* (1996) 6 *Legal Educ Rev* 129 and Owens, *supra* note 56.
- <sup>65</sup> For example Mossman *id* at 134–135 noted how “traditional approaches to law were developed at a time when there were either no women members of the legal profession and the judiciary, or very few, when most women were not legal subjects at all, when they could not vote as citizens, and when their opportunities for paid work were narrowly confined.” (footnotes omitted)
- <sup>66</sup> (1986) 4 ACLC 736
- <sup>67</sup> (1990) 2 ACSC 405
- <sup>68</sup> (1988) 6 ACLC 725.
- <sup>69</sup> (1986) 4 ACLC 736 at 743 and 746.
- <sup>70</sup> As Dodds Streeton, *supra* note 3, at 42 writes
- Hodgson J ... clearly recognised that the defendant was accustomed to

defer to and rely on the debt incurrer. Further, she might have had no influence or control over the debt incurrer and no reasonably available means to prevent the incurring of the debt. His Honour's construction of the s 556(2)(a) defence seemed to cover the position of female defendants who are excluded from the knowledge and fulfilment of their statutory duties by reason of subjection to patriarchal family structure and domination by a male associate.

<sup>71</sup> See references in *supra* notes 52, 53 and 54. See also *Andovin Pty Ltd v Figliomeni* (1994) 14 WAR 13 at 15.

<sup>72</sup> Dodds Streeton, *supra* note 3, at 42.

<sup>73</sup> *Id.*

<sup>74</sup> Dodds Streeton, *supra* note 3, at 43.

<sup>75</sup> Frug, *supra* note 9, at 52.