

Time to start again on complex Corporations Act

Oscar Wilde would have regarded our modern Corporations Law not only as uneatable, but also indigestible and incomprehensible.

— Anthony Mason,
former chief justice of Australia

There is no dispute. The Corporations Act 2001 (CA 2001) is unlovely and unloved. Complex, ungainly, badly drafted, internally inconsistent, conceptually troubled — it is a mishmash of old law, ad hoc amendments, provisions pulled willy-nilly from different legal systems, statements which are not law at all, ideological posturing, and drafting styles that swing wildly from the colloquial to the technical.

Despite massive efforts at law reform in the past 15 years, and continuous tweaking, the CA 2001 remains as Anthony Mason found it in 1992: uneatable, indigestible and incomprehensible.

What is there to like about the CA 2001? Its main virtue, in the eyes of the business community, appears to be the one-stop shopping it provides. Constitutionally, this was a hard-won advantage. Secondly, there has been innovation, some uniquely Australian responses to local circumstances.

Good models and studies abound; traces from these various sources can be detected throughout the CA 2001. Undoubtedly, the process of the law

reform efforts during the past 15 years provides some explanation of the results. The initial efforts were focused on form not substance: simplification and the use of plain English drafting. Not surprisingly, it proved devilishly difficult to disentangle form from substance.

On the other hand, does the unruly state of the CA 2001 matter?

Our economy has experienced impressive, unprecedented and uninterrupted growth over the entire period of the legislative imbroglio.

Are efforts expended on improving the state of corporate legislation in Australia simply not worth the economic candle?

There are, however, compelling arguments to be made in support of addressing the statutory morass of the CA 2001. Economic efficiency, for example. A better statute would cut compliance costs (primarily in the form of legal fees) associated with the statute. Could this be a motivating factor in the toleration of the status quo evidenced by the legal profession? Or, as is more likely, is it simply a manifestation of the well-documented phenomenon of path dependency and interest group politics that explains the resistance to fundamental change?

A better statute might also promote a culture of compliance.

There needs to be a serious review of the legislation, which has been amended beyond comprehension, writes **Cally Jordan**.

Where the statute makes no sense, either because it is confusing or commercially unrealistic, it risks losing its normative force. There may be token compliance at the margins or in highly visible situations, but otherwise the law becomes a dead letter. Anecdotal evidence suggests there may be several areas of the CA 2001, the capital requirements for example, which may fall into this category.

Arguably, a better statute could also reduce the volume of litigation generated by such a difficult one.

Why would consistency and coherence in statutory drafting not be valued?

Do a disproportionately large number of corporate law issues find their way to the courts, and ultimately the High Court?

Although the judiciary will resolve the dispute, judicial principles so laid down in response to highly specific factual situations, may not be optimal as a general matter.

Then there is the facilitation of international transactions. Australian exceptionalism, intended

or not, has a cost internationally. When international transactions are derailed or delayed by arcane processes, ghosts from another century, the first reaction of international participants is to look for an alternative route around an annoying local impediment.

The CA 2001 may also detract from the enviable reputation of Australia as a place of innovative, effective regulation and a dynamic, modern business community.

At a more fundamental level though, the state of the CA 2001 raises the question of the place of legislation generally in the Australian legal system. Why would consistency and coherence in statutory drafting not be valued?

A suspicion of “codification”, and statutory law generally, runs deep in old English law traditions, an atavistic response perhaps associated with political trauma such as the French Revolution.

Starting with form first. The CA 2001 continues to be built on the chassis of old British companies law, with now disparate elements bolted together into a fantastic multipurpose vehicle. The *Mad Max* approach to corporate law.

But, of course, this is no longer companies law at all. It is a

compendium of modern capital markets regulation, insolvency law and secured transactions.

Does it matter? It is possible to tear the statute apart and clip together the useful companies law bits into a fairly readable package.

Why not do it then, legislatively?

It is not quite so simple, and a lot of the “useful bits” are open to question. But the exercise would offer more than just satisfaction to those with tidy minds. It could reinvigorate and reconceptualise business corporations law in Australia. If it is also possible to eliminate the bifurcation of directors duties (now split between statute and general law), the complex and mostly irrelevant insolvent-trading provisions and obsolete capital maintenance rules, all the better.

It is hard to escape the conclusion that the legislative reforms of the 1990s represent a missed opportunity, one seized by the New Zealanders. Perhaps it is time to take a page from the book of regulatory competition. Should Victoria or NSW provide a sleek, modern business corporations vehicle to give the bloated old CA 2001 a run for its money? After all, there are no constitutional difficulties in doing so.

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