

CRITIQUE AND COMMENT

UNLOVELY AND UNLOVED: CORPORATE LAW REFORM'S PROGENY

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[Despite massive efforts at law reform in the last 15 years and continuous tweaking, the Corporations Act 2001 (Cth) remains, as Sir Anthony Mason found it, 'indigestible and incomprehensible'. The state of the legislation is at odds with the dynamism of the Australian economy over this same period and raises some intriguing questions. Is corporations law not just 'trivial', as Bernard Black provocatively suggested a few years ago, but completely irrelevant? In this case, does law not matter, not a whit? Is corporate law reform not worth the economic candle? Why is consistency and coherency in business law not valued in Australia? Is this an atavistic response of an old common law system, a deep-rooted aversion to 'codification'? This piece looks at some of the consequences of this state of affairs, arguing that a better corporations law would be of benefit to Australia. The piece identifies some points of departure: a separate business corporations statute, elimination of the bifurcation of directors' duties (as between the statute and the general law), substitution of a comprehensive personal property security regime for the troublesome insolvent trading provisions and reconceptualisation of the complexities of capital maintenance rules.]

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Oscar Wilde ... would have regarded our modern *Corporations Law* not only as uneatable but also as indigestible and incomprehensible.¹

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¹ Sir Anthony Mason, 'Corporate Law: The Challenge of Complexity' (1992) 2 *Australian Journal of Corporate Law* 1, 1.

[E]very significant amendment to the corporations legislation since [1998] ... has added substantially to complexity and, it has to be said, has created obfuscation.²

I INTRODUCTION

There is no dispute. The *Corporations Act 2001* (Cth) ('*Corporations Act*') is unlovely and unloved.³ Complex, ungainly, badly drafted, internally inconsistent and 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. As one of my compatriots once quipped in a different context, the *Corporations Act* resembles no less than a rider galloping 'madly off in all directions.'⁴ Despite massive efforts at law reform in the last 15 years,⁵ and continuous tweaking,⁶ the *Corporations Act* remains, as Sir Anthony Mason found it, 'indigestible and incomprehensible.'⁷

² Justice R P Austin, 'Mergers and Acquisitions 2007: Opening Commentary' (Paper presented at Mergers and Acquisitions 2007, The University of New South Wales, Sydney, 24 October 2007) 6.

³ The *Corporations Act* comprises over 2300 sections divided into 29 chapters. Tomasic, in Roman Tomasic, 'The Modernisation of Corporations Law: Corporate Law Reform in Australia and Beyond' (2006) 19 *Australian Journal of Corporate Law* 2, opines that the *Corporations Act* has a 'haphazard chapter structure' (at 22) and is 'economically burdensome' (at 33). Farrar notes in his book, John Farrar, *Corporate Governance in Australia and New Zealand* (2001) 6, that Australians 'have a tendency to over-legislate [in the area of corporations law] and the result is obese and user-unfriendly legislation'. Goddard describes the Australian approach as an example of how *not* to reform companies law: David Goddard, 'Company Law Reform — Lessons from the New Zealand Experience' (1998) 16 *Company and Securities Law Journal* 236, 254.

⁴ With apologies to Leacock: 'Gertrude the Governess: Or Simple Seventeen' in Stephen Leacock, *Nonsense Novels* (10th ed, 1917) 71, 75.

⁵ As the result of a Corporations Law 'Simplification Task Force' established by the Commonwealth Attorney-General in the 1980s, the *First Corporate Law Simplification Act 1995* (Cth) was passed to amend the corporations legislation in force at the time. When the responsibility for reform of corporations law was shifted from the Attorney-General's Department to the Commonwealth Treasury, the Corporate Law Economic Reform Program ('CLERP') was instituted with the aim of reviewing corporations legislation. In 1998, the *Company Law Review Act 1998* (Cth) was passed — some of the changes wrought by this Act survive in the modern *Corporations Act* (for example, the '[s]mall business guide' contained in pt 1.5). Further changes were effected to Australian corporations law by the first wave of CLERP reforms in the *Corporate Law Economic Reform Program Act 1999* (Cth). Finally, after significant constitutional strife, the *Corporations Act* was passed, the result of the states agreeing to refer their constitutional powers in respect of corporations to the Commonwealth. Between 2001 and 2007, significant changes were made to the *Corporations Act* as a result of the passing of the *Financial Services Reform Act 2001* (Cth) and the *Criminal Code Act 1995* (Cth) — these reforms affected the financial services and markets and the criminal offence provisions of the *Corporations Act* respectively. Further CLERP reforms (known as CLERP 7, 8 and 9) also took effect during this time. In 2005, the Corporations Amendment Bill (No 1) 2005 (Cth) was passed, which clarified the personal liability of directors of corporate trustees in addition to enacting regulations designed to support the reforms made to the *Corporations Act* by the *Financial Services Reform Act 2001* (Cth): see Elizabeth Boros and John Duns, *Corporate Law* (2007) 12–22; H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (12th ed, 2005) ch 2.

⁶ Since its inception in 2001, the *Corporations Act* has been amended by 41 different pieces of legislation.

⁷ Mason, above n 1, 1.

II TWO DECADES OF REFORMS

What is there to like about the *Corporations Act*? It seems that its main virtue, in the eyes of the business community, is the ‘one stop shopping’ it provides,⁸ obviating the necessity of multi-state filings. Constitutionally, this was a hard won advantage, and one which arguably would not necessarily have had to be such a costly, time-consuming battle had the courts demonstrated a greater inclination to reconsider questionable precedent.⁹ Administrative convenience, though, may have come at a high price.

Secondly, the hard work of the Corporations Law Simplification Task Force (‘Simplification Task Force’) over the period of 1993–96, although perhaps now taken for granted, should not be underestimated. According to one consultant working for the Simplification Task Force,

the *First Corporate Law Simplification Act* [1995 (Cth)] ... rewrote company law, drastically simplified the text and substance of the law of proprietary companies (incidentally killing off the unnecessary complication of a separate *Close Corporations Act*, by meeting all of its objectives within company law), and materially simplified the law of public companies, with surprisingly little litigation going to the superior courts to resolve the meaning of the new provisions. The Task Force’s remit was to simplify the drafting, keeping the substance intact, except where there was a consensus for incremental change,

⁸ Boros and Duns, above n 5, 16.

⁹ Historically, Australian corporations law existed in the form of state legislation, a state of affairs that was eventually concluded to be undesirable and an impediment to national consistency. In 1989, the Hawke government passed the *Corporations Act 1989* (Cth), a national piece of corporate law legislation. The power relied upon to pass this legislation was the corporations power contained in s 51(xx) of the *Australian Constitution*. The power conferred upon the Commonwealth by this section allows legislation to be passed ‘with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. However, at the time of the passing of the *Corporations Act 1989* (Cth), there existed conflicting interpretations of what the word ‘formed’ within s 51(xx) meant. The narrow interpretation of the word was that the power bestowed on the Commonwealth was confined to companies *already* formed, thereby rendering the Commonwealth incapable of legislating with regard to the registration of new companies. The broader view was that the power extended to *all* companies formed within the Commonwealth (as well as to foreign corporations). The *Corporations Act 1989* (Cth) was based on the broader interpretation of s 51(xx); however, challenges by the states prevented proclamation of the *Corporations Act 1989* (Cth), and ultimately the High Court of Australia in *New South Wales v Commonwealth* (1990) 169 CLR 482, 502–3 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) (‘*Incorporation Case*’), held that ‘formed’ meant ‘already formed’, and so the *Corporations Act 1989* (Cth) was constitutionally invalid. The Commonwealth and the states then attempted to collaborate on corporations law issues — a ‘cross-vesting scheme’ was instituted, such that for the purposes of administration and enforcement, state law was treated as if it were federal law. Jurisdiction was ‘vested’ in both the Federal Court and the state courts to hear matters under the legislation. However, a series of High Court decisions including *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 held that this scheme was constitutionally invalid, a conclusion that also rendered invalid all previous decisions of the Federal Court on point (therefore requiring legislation to be passed to retrospectively validate them). Ultimately, the states and territories agreed to refer their constitutional powers over corporations to the Commonwealth Parliament for the purpose of a national legislative scheme — the *Corporations Act*. See generally Suzanne Corcoran, ‘Corporate Law and the *Australian Constitution*: A History of Section 51(xx) of the *Australian Constitution*’ (1994) 15 *Journal of Legal History* 131.

but they marshalled support so effectively that they carried through a wholesale reform within that remit.¹⁰

Thirdly, there has been innovation — some uniquely Australian responses to local circumstances.¹¹ In some instances though (the approach to statutory directors' duties, for example), the case for Australian exceptionalism is not persuasive.

The problems with the reforms to date are not the result of a lack of either good ideas or an understanding of the issues at the forefront of modern corporate practice. There are lots of good models and studies around: the *Canada Business Corporations Act*,¹² the *New Zealand Companies Act 1993*, the *US Revised Model Business Corporation Act*,¹³ the efforts of the American Law Institute in its *Principles of Corporate Governance*,¹⁴ the review of the Hong Kong *Companies Ordinance*¹⁵ and, beginning in 1998, the extensive studies of UK companies law undertaken by the Department of Trade and Industry in London¹⁶ that culminated in the *Companies Act 2006*.¹⁷ Traces from these various sources can be detected throughout the *Corporations Act*, albeit occasionally to untoward or surprising effect.

Undoubtedly, the process of the law reform efforts during this 15-year period provides some explanation for the condition of the current *Corporations Act*. The initial efforts, perhaps in response to Sir Anthony Mason's stinging comments,¹⁸ were focused on form not substance: simplification and the use of plain English drafting.¹⁹ Not surprisingly, it proved devilishly difficult to disentangle form from substance. In the process, major changes were made in approach, in effect constituting a major shift in the conceptual underpinnings of parts, but not all, of the legislation.

Then ideology intervened, with the renaming of the reform efforts as the Corporate Law Economic Reform Program ('CLERP') and their repackaging as

¹⁰ Email from George Durbridge to Cally Jordan, 20 April 2008.

¹¹ For example, the inclusion of a new non-statutory '[s]mall business guide' in pt 1.5 of the *Corporations Act*. In the spirit of the plain English drafting of the Simplification Task Force, the '[s]mall business guide' sets out the basic features of a proprietary company and its operation. However, as noted below in Part IV, the inclusion of this non-statutory material in the statute itself may cause some confusion as to its import and normative force.

¹² *Canada Business Corporations Act*, RSC 1985, c C-44.

¹³ American Bar Association, *Revised Model Business Corporation Act Annotated: Official Text with Official Comments and Statutory Cross-References* (3rd ed, 2005).

¹⁴ American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (1994).

¹⁵ *Companies Ordinance 1950* (HK) cap 32. See also Cally Jordan, *Review of the Hong Kong Companies Ordinance: Consultancy Report* (1997).

¹⁶ See, eg, Department of Enterprise, Trade and Investment (UK), *Company Law: Flexibility and Accountability — A Consultative Document* (2004); Department of Trade and Industry (UK), *Company Law Reform: Small Business Summary* (2005); Department of Trade and Industry (UK), *Company Law Reform Bill: Regulatory Impact Assessment* (2005). The Department is now known as the Department for Business, Innovation and Skills.

¹⁷ *Companies Act 2006* (UK) c 46.

¹⁸ See Mason, above n 1, 1.

¹⁹ See Durbridge, above n 10. See also Tomasic, above n 3, 24–7; Ford, Austin and Ramsay, above n 5, 45.

part of an economic agenda of a newly ensconced government. The reform efforts themselves were shifted from the Attorney-General's Department to the Treasury, although the enactments that immediately followed were largely unchanged from those proposed (but not enacted) by the Simplification Task Force.²⁰ Corporate law reform ever since has remained in the Treasury.²¹ Unfortunately, the work of the Simplification Task Force was arrested in mid-flight; the planned restructuring of the legislation was left undone.²²

Adding to the confusion in the legislative landscape is the existence of two separate, dedicated corporate law reform bodies: the Corporations and Markets Advisory Committee and the Parliamentary Joint Committee on Corporations and Financial Services, which may be simultaneously carrying out inquiries into the same issues.²³ Specific parliamentary committees or other bodies such as the Productivity Commission may also weigh in on corporations law matters.²⁴

III ARE CONTINUED REFORMS WORTH THE ECONOMIC CANDLE?

On the other hand, corporate activity is the motor of a free market economy, and, until the very recent financial shocks reverberating around the world, the Australian economy has experienced impressive, unprecedented and uninterrupted growth over the entire period of the legislative imbroglio. Does this mean that corporations law doesn't matter?²⁵ Is corporate legislation as 'trivial' as

²⁰ The *Corporations Act 1989* (Cth) came into force on 1 January 1991, following an agreement between the Commonwealth and the states. The previous legislation had established the Companies and Securities Advisory Committee (post-2001, this body is known as the Corporations and Markets Advisory Committee ('CAMAC')), a body charged with advising the relevant Commonwealth Minister on proposed law reform and other matters pertaining to corporations law. During the 1990s, some corporations law reform projects were pursued independently of CAMAC through the Commonwealth Attorney-General's Department's Simplification Task Force. Under the Treasury's CLERP initiative from 1996, many of the reform proposals developed by the Simplification Task Force were enacted. For further details, see Ford, Austin and Ramsay, above n 5, 84–5; Tomasic, above n 3, 28–32.

²¹ Some concerns that have been raised anecdotally with the author as to corporate legislation being drafted in Treasury include inadequate legislative drafting skills, insufficient institutional memory, seeming adhocery and ideologically driven reforms. On the other hand, another commentator vigorously dismissed the first two of these concerns as 'mischievous nonsense': see Durbridge, above n 10.

²² The 'patchwork appearance' of the *Corporations Act*, as described by Durbridge, above n 10, is a result of the simplification programme having been interrupted half-way. The CLERP programme did enact the Bills left to it by the simplification programme, but the remaining simplification work was never taken in hand, relevantly including the tidy-up act which would have completed the restructuring and re-numbering of the Act.

²³ As was the case in 2006 with respect to corporate social responsibility: see CAMAC, *The Social Responsibilities of Corporations* (2006); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006).

²⁴ The Australian Securities and Investments Commission ('ASIC') also has the authority to vary the *Corporations Act* by means of class order: *Corporations Act* s 1020F. This authority was invoked recently in the case of short selling restrictions: see, eg, ASIC, *Covered Short Sales*, Class Order No 08/751, 22 September 2008.

²⁵ One of the arguments posited in the influential 'law and finance' literature has been that 'law matters' and may even be a determinative of economic development. For the latest in a series of such articles, see Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The

Bernard Black argued so disingenuously in 1990?²⁶ Are efforts expended on improving the state of corporate legislation in Australia simply not worth the economic candle? An affirmative response would be disheartening. There are compelling arguments to be made in support of addressing the statutory morass of the *Corporations Act*.

Economic efficiency is one such argument. A better statute would reduce compliance costs (primarily in the form of legal fees) associated with the statute. Indeed, the cynical might cite the immediate impact on legal fees as a motivating factor in the toleration of the status quo evidenced by the legal profession. More likely, though, it is simply a manifestation of the well-documented phenomena of path dependency and interest group politics in corporate law.²⁷

A better statute might also promote a culture of compliance. 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. Are there areas of the *Corporations Act* which might fall into this category — the capital maintenance requirements, for example?²⁸

Arguably, a better statute could also reduce the volume of litigation generated by a difficult statute. Given the size of the economy, is there a disproportionately large number of corporate law issues which find their way to the courts and, in some cases, all the way to the High Court of Australia for judicial consideration?²⁹ In this area of the law, although the judiciary will ably resolve the dispute, judicial principles so laid down in response to highly specific factual situations may not be optimal as a general matter.³⁰ And, to judge by the comments of Sir Anthony Mason and Justice R P Austin,³¹ the judiciary may be justifiably exasperated with the demands that such a difficult statute places upon them.

Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285, 291–302.

²⁶ Bernard Black, 'Is Corporate Law Trivial? A Political and Economic Analysis' (1990) 84 *Northwestern University Law Review* 542. Black asserts what he himself acknowledges to be an 'extreme hypothesis', namely, that state corporate law is trivial: at 544. Black's approach is to examine mandatory corporate law and assess its triviality with reference to four considerations. These considerations are: whether the rules are 'market mimicking', that is, mandatory but with no 'bite'; whether the rules can be avoided by 'advance planning'; whether a rule that has started out as irrelevant has now become relevant and thus subject to change by the 'political forces that [lead] to the trivialization of corporate law'; and finally, whether the rule covers such rarely occurring situations that it remains unchanged by the relevant political forces in corporate law.

²⁷ See generally Lucian Arye Bebchuk and Mark J Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127.

²⁸ *Corporations Act* pt 2J.1. This proposition has not been tested empirically and is merely anecdotal. It may be a fruitful avenue for further investigation.

²⁹ At the time of preparing this piece, statistics on the number of corporations law decisions in the High Court were not readily available; however, reference may now be made to Ian Ramsay and Are Watne, 'Which Courts Deliver Most Corporate Law Judgments? A Research Note' (2008) 26 *Company and Securities Law Journal* 392.

³⁰ See, eg, *Gambotto v WCP Ltd* (1995) 182 CLR 432 and the commentaries contained in Ian M Ramsay (ed), *Gambotto v WCP Ltd: Its Implications for Corporate Regulation* (1996).

³¹ See Mason, above n 1, 1; Austin, above n 2, 6.

Then there is the desire to facilitate international transactions. The state of Australia's corporations law statute is no longer a purely domestic matter. Australian exceptionalism, intended or not, also has a cost internationally. To the extent that the *Corporations Act* does not meet the usual expectations of international business partners, it adds an additional layer of cost and complexity to international transactions. 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.³² Somewhat incredulous encounters with the *Corporations Act* by international business people also detract from the enviable reputation of Australia as a place of innovative, effective regulation (which it is in some areas)³³ and a dynamic, modern business community.

A second, and somewhat tangential, consideration in the international realm is the significance of Australian legislation and regulation as a model for emerging and transitional economies in the Asia-Pacific region. A controversial but widely accepted view in the world of international development has been that the origins and nature of a legal system may determine the level of development of a country's financial system.³⁴ Argued the other way around, the existence of a vibrant financial system would indicate, as a precondition, a well-functioning system of commercial and financial legislation, worthy of emulation in the search for similarly stellar economic results.

With its large number of foreign students and visiting scholars,³⁵ Australia is exporting its legal system; the visitors take home with them both the good and the not so good, often in an uncritical fashion. Thus the outdated and less than optimal aspects of the *Corporations Act* receive an undeserved validation (by

³² For example, outdated companies legislation in Hong Kong led to a mass exodus of listed companies in search of friendlier, modern companies legislation and avoidance of Hong Kong registration by non-publicly traded companies. Bermuda and other Caribbean jurisdictions were prime beneficiaries: see Jordan, *Review of the Hong Kong Companies Ordinance*, above n 15, 23–4, 165, 203.

³³ The 'Aussie model' of dual financial regulators, also known as the 'twin peaks' approach, is of interest to US regulators: see, eg, Howard Davies, 'Sharks Circle Paulson's Aussie Plan', *Financial Times: Asia Edition* (London), 2 April 2008, 11. The idea of the 'twin peaks' model of financial regulation is that there are two financial regulators, and so, in line with recommendations made by consultative committees, the Australian government created ASIC and the Australian Prudential Regulation Authority ('APRA'). APRA was intended to be responsible for prudential regulation, whereas ASIC's responsibilities were specified to be market and disclosure regulation. As this illustrates, the 'twin peaks' model depends upon creating two highly specialised agencies, each with clearly demarcated and comprehensive roles in the regulation of financial services. This model is thought to be better than a model which depends upon one single 'mega-regulator' because a single regulator with all functions may become too powerful and may not realise maximum efficiency in carrying out all of these functions. For more information, see Jeremy Cooper, 'The Integration of Financial Regulatory Authorities — The Australian Experience' (Paper presented at the Securities and Exchange Commission of Brazil 30th Anniversary Conference: Assessing the Present, Conceiving the Future, Rio de Janeiro, 4–5 September 2006).

³⁴ See, eg, La Porta, Lopez-de-Silanes and Shleifer, above n 25.

³⁵ See, eg, Australian Bureau of Statistics, *A Picture of the Nation: The Statistician's Report on the 2006 Census*, ABS Catalogue No 2070.0 (2006) 119, which states that '[a]ccording to the 2006 Australian Census there were 137 100 tertiary students who were born overseas and had recently arrived in Australia.'

virtue of unrelated desirable economic activity) and are propagated throughout the region.³⁶

While such an outcome may not directly impact the Australian business community, Australia is an active participant in international development in the Asia-Pacific and has an interest at various levels in the economic development of its neighbours. Australian legal practitioners and business people are present throughout the region. Legislation can be viewed as another potential high value export, intangible though it may be.

At a more fundamental level, though, the state of the *Corporations Act* raises the question of the place of legislation generally in the Australian legal system. What is the point of legislation? What should a statute do? How does a statute interact with case law, past and future? Why would consistency and coherency in statutory drafting not be valued? To the contrary, why would such characteristics be sniffily dismissed as efforts at 'codification' on the basis that we do not do that here?

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 or an ancient preference for authority residing in the judiciary as opposed to the legislature. Of course, these predilections in the modern UK itself have been turned on their head since the entry of the UK into the European Union ('EU'). The significant structural changes to UK companies law that took place in the 30 or so years following the UK's accession to the EU were driven, both for better and for worse, by continental codified law as manifested in European Commission Directives. This was mostly for the better, according to Gower, who welcomed as a positive influence the structural analysis and intellectual rigour of these systems.³⁷

L C B Gower's view might explain an otherwise inexplicable phenomenon. How is it that Canadian and US corporate legislation is so much better drafted and is accorded greater stature and deference than the *Corporations Act* — even where provisions of the latter are directly derived from the former? The legislatures, the business communities and the legal communities make it so. Legislation is perceived to be preferable to, and to automatically oust, case law for business law solutions.³⁸ For example, the creation of a statutory derivative

³⁶ For example, the *Corporations Act*, together with Singaporean legislation (itself influenced by Australian legislation), is being referred to extensively in the ongoing Hong Kong *Companies Ordinance* rewrite: see, eg, Financial Services and Treasury Bureau (HK), *Share Capital: The Capital Maintenance Regime Statutory Amalgamation Procedure* (Consultation Paper, CO Rewrite: Rewrite of the *Companies Ordinance*, 2008). The author has also supervised several doctoral theses making proposals for reforms to recent business legislation in Vietnam where the source of the proposals is explicitly the *Corporations Act*.

³⁷ L C B Gower, *Gower's Principles of Modern Company Law* (1992, 5th ed) 50–2. See also Cally Jordan, 'Towards a Commonwealth Model of Companies Law' in Fiona Macmillan Patfield (ed), *Perspectives on Company Law: 2* (1997) 289.

³⁸ For a more detailed analysis of this phenomenon, see Cally Jordan, 'The Conundrum of Corporate Governance' (2005) 30 *Brooklyn Journal of International Law* 983. Delaware may be an important exception to this proposition, where both the judiciary and the legislature appear to be equally significant in the development and interpretation of business law precepts. But few jurisdictions can boast of the experienced and specialised judiciary which Delaware has created.

action is assumed to override the application of the exceptions to the rule in *Foss v Harbottle*.³⁹ There is no need for a statutory signpost to that effect.⁴⁰

An explanatory factor here may be the comfort level of both US and Canadian legislators with the concept of ‘codification’, in the sense of systematic, structured and principles-based legislation. There are, of course, glaring exceptions to this proposition,⁴¹ but, again on the other hand, some fine examples too: the *Canada Business Corporations Act*⁴² and the US *Revised Model Business Corporation Act*⁴³ among them. Canada is a true civil code jurisdiction (thanks to Quebec), and the beneficent civil code influences of clarity, consistency and organisation have permeated the traditional English common law approach to statutory drafting and have created a more European acceptance of the primacy of legislation. In fact, the drafting and organisational style of the old Quebec civil code,⁴⁴ of Napoleonic origins, was a direct influence on the *Canada Business Corporations Act* of 1975.⁴⁵

Codification is also an accepted part of the US legislative landscape. There are many US codes, although they may bear only a remote resemblance to their European cousins. But related they are. An often ignored aspect of the US legal system is the strong French influences during the 19th century — influences which continue to be perceptible to this day.⁴⁶

In terms of reconceptualising Australian corporations law, the fundamental question is where to start. The lessons of the Simplification Task Force of the 1990s must be taken to heart; both form and substance must be addressed.

³⁹ (1843) 2 Hare 461; 67 ER 189. Robert W V Dickerson, John L Howard and Leon Getz (‘Dickerson Committee’), *Proposals for a New Business Corporations Law for Canada* (1971) vol 1, 161 (‘Dickerson Report’), which referred to the Canadian statutory derivative action contained in the *Canada Business Corporations Act*, RSC 1985, c C-44, said that:

In effect, [the] provision abrogates the notorious rule in *Foss v Harbottle* and substitutes for that rule a new regime to govern the conduct of derivative actions. ... [W]e have relegated the rule to legal limbo without compunction, convinced that the alternative system recommended is preferable to the uncertainties — and obvious injustices — engendered by that infamous doctrine.

⁴⁰ Cf *Corporations Act* s 236(3).

⁴¹ See, eg, *Sarbanes–Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745; *Securities Act of 1933*, Pub L No 73-38, 48 Stat 74; *Securities Exchange Act of 1934*, Pub L No 111-72, 48 Stat 881.

⁴² *Canada Business Corporations Act*, RSC 1985, c C-44.

⁴³ American Bar Association, above n 13.

⁴⁴ The *Civil Code of Lower Canada* of 1866, largely inspired by the Napoleonic Code of 1804, was replaced in its entirety by the *Civil Code of Quebec*, SQ 1991, c 64.

⁴⁵ *Canada Business Corporations Act*, SC 1975, c 33.

⁴⁶ See H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (3rd ed, 2007) 249 (citations omitted), who stated that:

Law in the United States is generally seen as adhering to a common law ‘family’, but today this is far from obvious. In many respects US law represents a deliberate rejection of common law principle, with preference being given to more affirmative ideas clearly derived from civil law. These were not somehow reinvented in the United States but taken over directly from civilian sources in a massive process of change in adherence to legal information in the nineteenth century.

IV FORM AND STRUCTURE

The *Corporations Act* continues to be built on the chassis of old UK companies law, with now disparate elements 'bolted together' (as one of the author's colleagues put it)⁴⁷ into a fantastical, multipurpose vehicle — the *Mad Max*⁴⁸ approach to corporate law.⁴⁹

Of course, the *Corporations Act* is no longer 19th century companies law at all. It is a compendium of modern capital markets regulation, insolvency law, secured transactions regulation — the list goes on.⁵⁰ As difficult as it may be to untwist all these strands, it would be a gargantuan task to recreate a coherent whole, in effect an Australian corporate commercial code.⁵¹ The most persuasive argument for one comprehensive piece of legislation dealing with virtually all of the aspects of corporate activity is that it would be comprehensive. But to be useful, it must also be coherent. However, neither comprehensiveness nor coherency was the motivating factor in the drafting of the *Corporations Act*; rather, the amalgamation of the disparate rules served to prop up the Commonwealth's constitutional claim to regulatory authority.

Sadly, coherency was the victim of this approach. The *Corporations Act* is clutter and complexity, rife with inconsistencies and anachronisms. New provisions, often thumb-in-the-dyke 'fixes', are wedged in alphanumerically

⁴⁷ Associate Professor Paul Ali, Melbourne Law School, The University of Melbourne.

⁴⁸ The *Mad Max* films are an iconic series of Australian films starring the young Mel Gibson and set in an alien landscape of the future, featuring fantastical motor vehicles composed of cannibalised old car parts: see especially *Mad Max 2* (Directed by George Miller, Kennedy-Miller Productions, 1981).

⁴⁹ The story behind the comprehensive approach to the *Corporations Act* is a fascinating mixture of constitutional drama and publisher-driven expediency as described by Durbridge, above n 10:

Until 1991, we had four principal codes, and the original *Corporations Law* represented little more than a bundling of those into one Act. ... Those of us who lived by the Codes used to carry about with us both Vol 1 (the Companies Code) and Vol 2 (the Takeovers, Securities, Futures and Interpretation Codes). The two volumes were easier to pack into a briefcase than one big volume, but that was about all: the provisions so often interlock that you needed to have both. The bolting together brought about some economy in definitions, and some gain in uniformity, both because one definition of 'association' etc replaced four, but no great change. The Simplification Task Force looked at whether the *Corporations Law* could be split into a companies volume and a markets volume, by re-enacting it as two statutes, or just structuring one statute in such a way as to facilitate printing it in two volumes. The idea did not fit the political rhetoric of the day: the Commonwealth had just brought us out of [an] archaic welter of separate statutes into a modern and convenient unitary statute. ... In the end, the publishers killed off the idea, by indicating that they would put it all in one volume, however it was structured.

⁵⁰ The impact of the *Financial Services Reform Act 2001* (Cth) on the *Corporations Act* has been castigated in particular by Durbridge, above n 10, as

the outstanding ... failure of the last few years. Logical and rigorous it may have seemed, but in the end it has been a policy and political failure which has been partly fixed by a patchwork of hasty regulations and exemptions, and which has burnt all of the capital which reformers had accumulated through cautious and well-prepared reforms in the 1990s.

⁵¹ Mind you, Napoleon achieved his code in a matter of years, but the result was primarily a compilation of commercial practices developed over several centuries, whereas the Germans took their time (some 75 years) to produce a rigorously consistent, theoretically 'perfect' commercial code.

(s 50AAA, for example).⁵² At least the complexity of the alphanumeric provisions may provide a clue to their vintage and how they may need to be interpreted in light of older provisions.

The definitional s 9 is a minefield. There are the usual, inoffensive if inelegant, shortcuts: ‘unfair loan has the meaning given by section 588FD’.⁵³ Later definitions sometimes cause confusion with earlier statutory provisions. An ‘officer’ is defined to include a ‘director’,⁵⁴ which is also defined.⁵⁵ The key statutory provisions on directors’ and officers’ duties refer to ‘directors and other officers’.⁵⁶ Is this a deliberate distinction, or redundant drafting? Other definitions are, in fact, substantive provisions.⁵⁷

Then there are the anachronisms: provisions derived from the very earliest of companies statutes in the UK that no longer serve their original or any other useful purpose. For example, s 115 of the *Corporations Act* states:

A person must not participate in the formation of a partnership or association that:

- (a) has as an object gain for itself or for any of its members; and
- (b) has more than 20 members;

unless the partnership or association is incorporated or formed under an Australian law.

Compare this provision to s 4 of the *Companies Act 1862*, 26 & 27 Vict, c 89 (the consolidation of the original *Joint Stock Companies Registration and Regulation Act 1844*, 7 & 8 Vict, c 110):

no Company, Association, or Partnership consisting of more than Twenty Persons shall be formed ... for the Purpose of carrying on any other Business that has for its Object the Acquisition of Gain by the Company, Association, or Partnership or by the individual Members thereof, unless it is registered as a Company under this Act, or is formed in pursuance of some other Act of Parliament, or of Letters Patent ...⁵⁸

The derivation of *Corporations Act* s 115 is pretty clear; apart from modernising the capitalisation of nouns (a hangover from the 18th century) and a bit of rephrasing, the provisions are more or less identical.

But what is the point of s 115? The original provision marked the beginning of modern UK companies legislation and was an early form of investor protection,

⁵² Of course, the *Corporations Act* is not the only Australian statute to demonstrate the extensive use of alphanumeric provisions in amendments: see, eg, *Income Tax Assessment Act 1936* (Cth) s 124ZAFAA; *Social Security Act 1991* (Cth) s 660XBJ. Renumbering of the *Corporations Act* was on the agenda of the Simplification Task Force, but was never carried through by its successor, CLERP: see Durbridge, above n 10.

⁵³ *Corporations Act* s 9 (definition of ‘unfair loan’).

⁵⁴ *Corporations Act* s 9 (definition of ‘officer’ para (a)).

⁵⁵ *Corporations Act* s 9 (definition of ‘director’).

⁵⁶ See *Corporations Act* ss 180–1; see also ss 182–4.

⁵⁷ See, eg, *Corporations Act* s 9A(3) for the meaning of ‘rights issue’ with its detailed conditionalities.

⁵⁸ See also *Joint Stock Companies Registration and Regulation Act 1844*, 7 & 8 Vict, c 110, s 2.

requiring the public registration of entities offering subscriptions to the public.⁵⁹ The *Corporations Act* has an entire regulatory framework comprised of hundreds of statutory provisions, which are based on modern securities regulatory regimes elsewhere, designed to promote investor protection. Therefore, s 115 serves no modern purpose.

Even worse, it is not as though s 115 has been inadvertently overlooked, tucked away for a century or so, or gone unnoticed in the metaphoric statutory attic. It has been amended in modern times to permit exceptions to the statutory limit of 20 members (for law firms, no less)⁶⁰ and it is commented upon in leading textbooks.⁶¹ Yet no-one has asked the fundamental questions: why do we have it and why do we not get rid of it?⁶²

Then there is the non-law. 'Part 1.5 — Small business guide' is not legislation at all. It is a useful summary of legislative provisions, but certainly one that could be provided outside the statute (and avoid the confusion its inclusion creates). It is unlikely, especially given its current state, that small business people will be found trolling the statute for this information.

It would be of much greater utility to have a modern, well-drafted *business corporations Act*, of the Canadian or New Zealand variety, that would be accessible to business people (if they were inclined, as few are, to consult statutory sources). We should leave behind the old statute to deal with all of the marginal varieties of company that may continue to exist. Furthermore, we should also encourage the preparation of comprehensive annotations and official commentaries for the use of practitioners and the judiciary.

Twenty years ago, looking to Canada and the US, the New Zealanders coined the term 'core companies law' and began the process of unpacking old UK-style companies law into discrete statutes. This process had itself been prompted, although imperfectly executed, in the UK under pressure from European Commission companies law directives. Here in Australia, Ralph Simmonds (then Dean of Law at Murdoch University) urged the reformers of the 1990s to do the same.⁶³ His advice went unheeded, which now makes the task even more difficult.

⁵⁹ The US securities regulation regime, beginning with the *Securities Act of 1933*, Pub L No 73-38, 48 Stat 74, looked back to the 19th century UK statutes as its inspiration. Offers to the public required the filing of 'registration statements': § 6(a).

⁶⁰ The *Corporations Regulations 2001* (Cth) contains reg 2A.1.01, which specifies the exact number of partners in a partnership as permitted by exceptions to the principle contained in *Corporations Act* s 115(2). The maximum number of members permitted under these exceptions was increased by virtue of *Corporations Amendment Regulations 2006 (No 1)* (Cth) sch 1 item 1. These regulations took effect as of 17 February 2006: reg 2.

⁶¹ See Ford, Austin and Ramsay, above n 5, 13–14.

⁶² To be fair, the comparable provision in the UK was only repealed in 2002 by the *Regulatory Reform (Removal of 20 Member Limit in Partnerships etc) Order 2002* (UK).

⁶³ Simmonds, in his article Ralph Simmonds, 'Dismembering the *Corporations Law* and Other Law Reform: Should Something More Be Added to the Law Reform Agenda?' (1995) 13 *Company and Securities Law Journal* 57, 57 (emphasis in original), argued that '[s]eparation into distinct statutes in this country should be on the local reform agenda for the law of the new millennium.' He felt that the success of the New Zealand approach came from 'the attention the New Zealand reformers paid to the question of what belong[s] in a corporations law, and what [does] not':

Does it matter? Is it worth the effort? As one practitioner commented to the author (and the author, to test the theory, did it), it is possible to (literally) tear the statute apart and clip together the useful bits on ‘core companies law’ into a fairly readable package. If it is possible to do this so readily, why not do it legislatively? Of course, it is not quite so simple and a lot of the ‘useful bits’ are themselves open to question. But the exercise would offer more than just satisfaction to those with tidy minds; it would aid in the reinvigoration and reconceptualisation of business corporations law in Australia. The *Corporations Act* is becoming an oddity in the modern common law world. More and more recourse is had to Canadian and US approaches to business law. In future, no doubt, the new *Companies Act 2006* (UK) c 46 will also serve as a touchstone. The debates invoked by *Sons of Gwalia Ltd v Margaretic*⁶⁴ — that perfect storm of old companies law principles, modern securities regulation and insolvency — could perhaps be resolved without recourse to the highest court of the land. Unpacking the *Corporations Act* into separate statutes would promote a more obvious, and conceptually sound, characterisation of principles and issues.⁶⁵

V SUBSTANCE

The reforms of the 1990s were marked, and marred, by too little real change and too much compromise in the face of clear choices. As noted above, it is a futile exercise to attempt to change form without consideration of substance. This may be one of the factors militating against rationalisation of the *Corporations Act*. It is not a simple exercise and reform fatigue has set in.

But assuming that such an obstacle could be overcome, what areas of companies law are worth reconsideration, particularly in light of recent developments in the UK and the now habitual recourse by counsel and the courts to Canadian and US approaches for guidance? Here are some first impressions.

A Officers’ and Directors’ Duties

The statutory treatment of directors’ duties⁶⁶ is perhaps the most surprising aspect of the *Corporations Act*. Somewhat similar statutory statements of directors’ duties are found in other Commonwealth statutes (in Canada and New

at 59 (emphasis in original). Ultimately, Simmonds advised the would-be reformers of Australian corporations law (at 63) that:

Modernisation and simplification ... are not enough. Modernisation — addressing the out-of-date, the technically inapt or the policy-poor in the *Corporations Law* — is rightly considered to be important. So too is simplification — getting the statute into a more intelligible form of communication, shorter if possible, clearer at least. However, these are not enough because we are doing too much in one statute. ... [W]e need to [divide the *Corporations Act* up into] different statutes ...

⁶⁴ (2007) 231 CLR 160. See (2008) 22(2) *Australian Journal of Corporate Law* for the debates raised by this case.

⁶⁵ Large swathes of detail are also now consigned to regulation.

⁶⁶ Chapter 2D extends beyond directors’ duties, strictly speaking, to include officers and in some cases employees.

Zealand, for example)⁶⁷ and in most US state legislation (following the *Revised Model Business Corporation Act*⁶⁸ or its predecessors).

There are some differences in wording and import in the statutory statements of directors' duties in the *Corporations Act*. 'Skill', for example, has been dropped from the duty of care in s 180(1) and the 'proper purpose' doctrine (scathingly rejected in Canada,⁶⁹ although not in New Zealand or the UK) is perpetuated in the duty of good faith provisions of s 181. In addition, there is a statutory statement of the 'business judgment rule'.⁷⁰ There is no statutory formulation of the business judgment rule in the US, where the rule originated; there it remains a judicial doctrine.⁷¹

The creation of statutory directors' duties was controversial in the UK, as it was in Hong Kong and Australia. The reticence appeared to stem from concerns that a statutory statement could narrow or dilute the duties developed over decades by the courts. The courts would be deprived of their ability to inject nuance and discernment into their decisions, particularly in hard cases. Some support for this view could be found in the fact that one of the most important commercial jurisdictions in the US, Delaware,⁷² does not have a statutory statement of directors' duties (whereas nearly every other state does). However, the Delaware story is a unique one.⁷³ To this author, the hesitations over a statutory statement of directors' duties smack more of the generalised suspicion of statutes that permeates older common law jurisdictions.

The Australian approach in the *Corporations Act* evidences this tension between legislative and judicial solutions. It appears to be a fudge, a nod of the head to both sides of the debate, resulting in an unusual and surprising outcome. There is a statutory statement of directors' duties.⁷⁴ However, it has been interpreted as solely creating a civil penalty regime enforceable only by the

⁶⁷ *Canada Business Corporations Act*, RSC 1985, c C-44, s 122; *Companies Act 1993* (NZ) ss 131–8.

⁶⁸ American Bar Association, above n 13, §§ 8.01, 8.30; see also §§ 8.41–8.42.

⁶⁹ *Dickerson Report*, above n 39, vol 1, 81–2.

⁷⁰ *Corporations Act* s 180(2).

⁷¹ See, eg, *Aronson v Lewis*, 473 A 2d 805, 812 (Moore J for McNeilly, Moore and Christie JJ) (Del, 1984); *Kaplan v Centex Corporation*, 284 A 2d 119, 124 (Duffy C) (Del Ch, 1971).

⁷² The Southern District of New York (which encompasses Manhattan and the Wall Street area) is the other.

⁷³ Delaware ferociously protects the discretion of its judiciary. Three points must be noted though. The Delaware statute is famous for its management-friendly bias. The Delaware courts are highly specialised and sophisticated commercial courts; complex commercial litigation is one of the major industries in Delaware. And thirdly, as Roe has so intriguingly suggested in Mark J Roe, 'Delaware's Competition' (2003) 117 *Harvard Law Review* 588, 636–7, the Delaware legislature and its judiciary deliberately provide scope for great flexibility of interpretation of Delaware corporate law so as to pre-empt, if necessary, recourse to federal legislation in this area.

⁷⁴ *Corporations Act* ss 180–4.

regulator.⁷⁵ The general law, the common law and equity, continues to provide the source of traditional directors' duties in Australia.⁷⁶

This bifurcation of directors' duties is perplexing and adds unwarranted complexity to an already complex area. The courts themselves have pragmatically tried to resolve the issue by stating that the content of the statutory and the general law duties is one and the same.⁷⁷ If so, what purpose is served by the bifurcation? Why have the statutory statement at all? Certainly, civil penalties or standing for the regulator could be provided for in a more usual way.

Then there is the anomaly of the statutory business judgment rule. There is no generalised statutory directors' duty of care, but a statutory exculpation, applicable to both the statutory duty of care and 'their equivalent duties at common law and in equity'.⁷⁸ The language is somewhat difficult. Does s 180(1) create multiple duties? Does the duty of care sound in equity? It would appear that the exculpatory statutory business judgment rule (as proposed at a time when a comprehensive form of statutory directors' duties was contemplated) survived whereas the proposal for the underlying statutory duties did not.⁷⁹ Was there an ideological spin to this? Was it seen as a 'pro-management' gesture — clumsy, but in the great Delaware tradition?

Be that as it may, the situation is now even more anomalous. After long debate, the UK has adopted statutory statements of directors' duties⁸⁰ and made it very clear that these statutory duties, although informed by the general law, displace and take precedence over it.

B Insolvent Trading

Given the hesitations concerning the creation of a statutory statement of directors' duties, it is somewhat ironic that s 588G (and its predecessor provisions) creates a statutory directors' duty, in this case, to prevent insolvent trading.

It is important though to situate this duty in its context. The provisions relating to a director's duty to prevent insolvent trading appear in chapter 5 of the *Corporations Act* ('External administration') and, more precisely, part 5.7B ('Recovering property or compensation for the benefit of creditors of insolvent company'). Division 3 of part 5.7B is entitled: 'Director's duty to prevent insolvent trading'.

Conceptually, s 588G and following are primarily insolvency provisions, which elsewhere would be found in separate insolvency legislation. That s 588G

⁷⁵ See generally Ford, Austin and Ramsay, above n 5, 87–8. There is a separate criminal offence created in *Corporations Act* s 184 for breach of the statutory duties of good faith, use of position and use of information.

⁷⁶ *ASIC v Adler* (2002) 168 FLR 253, 346–7 (Santow J).

⁷⁷ See *ibid*; *Sheahan v Verco* (2001) 79 SASR 109, 126 (Mullighan J); *Daniels v Anderson* (1995) 37 NSWLR 438, 603–6 (Powell JA).

⁷⁸ *Corporations Act* s 180(2).

⁷⁹ CLERP, *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors* (1997) 21–2 ('CLERP 3').

⁸⁰ *Companies Act 2006* (UK) c 46, ss 170–81.

is characterised as a director's duty at all is a misconception. Parallel provisions, in s 588V and following, impose liability on holding companies in certain circumstances for insolvent trading of subsidiaries — statutory veil-piercing.

The statutory scheme provided for in division 3 of part 5.7B is complex, unwieldy and arguably of little real benefit to unsecured creditors. There is a chart included in s 588G(1A) as an aid to sorting through the provisions. The division is also relatively old law of UK derivation and has been the object of a fair amount of judicial and academic scrutiny. Opinion is divided on the utility of the provisions.⁸¹ Certainly there is some sympathy for the plight of unsecured creditors (possibly, although not conclusively, the ultimate beneficiaries of the regime). On the other hand, the direct and indirect costs associated with the regime appear unjustifiable.

First of all, the regime runs counter to one of the sacred tenets of corporations law: limited liability. In effect, together with s 588V (liability of holding company for insolvent trading by a subsidiary), the provisions create a statutory form of piercing the corporate veil to reach both corporate controllers (the holding company) and, exceptionally even for veil-piercing dogma, directors.

Supporters of the provisions maintain that, despite relatively little litigation involving the provisions, they serve to promote consensual settlements among creditors, companies and corporate directors. However, as a commercial matter in the context of conducting business as a going concern, the provisions are a director's nightmare. Corporations, like the rest of us, may be going into and out of insolvency on a daily basis. As Elizabeth Boros and John Duns put it, '[t]he Australian approach, which is to take a relatively hard line against directors, is in a number of respects a crude one both in terms of policy and practice.'⁸²

Detractors of the regime point out that no comparable provisions exist in US or Canadian corporate law.⁸³ Mind you, provisions comparable to ss 588G and 588V, were they to exist in either the US or Canada, would not be found in corporations law at all, but rather in separate bankruptcy and insolvency statutes.

Nevertheless, the absence of comparable 'director's duties for insolvent trading' in Canada and the US may be a clue to the underlying problem in the Australian and UK⁸⁴ statutes. The insolvent trading regime is designed to protect unsecured creditors by promoting their chances of recovery in the face of the insolvency of the corporate debtor. One of the main commercial law differences between Canada and the US on the one hand, and Australia and the UK on the other, is the absence in the latter of a satisfactory and comprehensive personal

⁸¹ There is a wealth of literature (both critical and supportive) on insolvent trading referenced in Ian M Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000).

⁸² Boros and Duns, above n 5, 58.

⁸³ See, eg, Dale A Oesterle, 'Corporate Directors' Personal Liability for "Insolvent Trading" in Australia, "Reckless Trading" in New Zealand and "Wrongful Trading" in England: A Recipe for Timid Directors, Hamstrung Controlling Shareholders and Skittish Lenders' in Ian M Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000) 19, 19–20.

⁸⁴ See *Insolvency Act 1986* (UK) c 45, s 214.

property security regime. In North America (and New Zealand),⁸⁵ it is very easy for virtually any creditor to become a secured creditor. And because of the comprehensive nature of the registration system for security interests, it is also relatively simple to ascertain the extent to which a potential debtor's property may already be encumbered.

Thus, arguably, the implementation of a comprehensive personal property security regime (along Canadian or New Zealand lines) — in addition to the other benefits it would bring to the commercial community — would permit the elimination of a troublesome and complex area of the *Corporations Act*. Happily, the Personal Property Securities Bill 2009 (Cth), which will create an Australian personal property security regime much closer to the New Zealand and Canadian models, is currently before Parliament.⁸⁶ In implementing a separate personal property security statute, the trick would be not to forget to revisit, with a view to eliminating, the insolvent trading provisions in the *Corporations Act*.

C Share Capital Rules

The share capital rules contained in chapters 2H ('Shares') and 2J ('Transactions affecting share capital') also merit reconsideration. There have been numerous and welcome adjustments to these rules in attempts to modernise them and keep up with rapidly evolving capital raising practices.⁸⁷ However, the provisions jostle somewhat uneasily together. For example, if you eliminate the concept of par value in s 254C, then the conceptual underpinnings for bonus shares in s 254A have been knocked out.

In other respects, the amendments to the capital maintenance rules in chapter 2J may continue to generate unjustifiable impediments to legitimate capital raising and restructuring. Unlike the insolvent trading rules, which may be worrisome in theory but relatively marginal in practice, the share capital rules are at the very heart of corporate law. The complexity of chapter 2J creates ample fodder for corporate law examination questions, but headaches for the corporate world.

Shareholders certainly deserve protection from dilution and other manipulative machinations involving the capital structure of the corporations in which they are

⁸⁵ Here, again, New Zealand has followed the North American model: see *Personal Property Securities Act 1999* (NZ).

⁸⁶ The Personal Property Securities Bill 2009 (Cth) was passed in the House of Representatives on 16 September 2009: Commonwealth, *Parliamentary Debates*, House of Representatives, 16 September 2009, 9798 (Robert McMullan).

⁸⁷ Chapter 2H comprises ss 254A–254Y, and ch 2J comprises ss 256A–260E. Each chapter has been amended by four pieces of legislation and/or regulation. Chapter 2H has been amended by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 3) 2001* (Cth), the *Corporations (Change of Incorporation) Regulations 2002* (Cth), the *Corporations Legislation Amendment Act 2003* (Cth) and the *Financial Sector Legislation Amendment Act (No 1) 2003* (Cth). Chapter 2J has been amended by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 3) 2001* (Cth), the *Financial Services Reform Act 2001* (Cth), the *Corporations Legislation Amendment Act 2003* (Cth) and the *Corporations Amendment (Insolvency) Act 2007* (Cth).

invested.⁸⁸ As for creditors, their interests may be protected in other ways. The share capital transactions chapter begins with a laudable statement of principle in terms of balancing the interests of shareholders and creditors when engaging in what would be characterised as a reduction of capital (not otherwise specifically permitted by the statute).⁸⁹ Yet it is well understood that the old impairment of capital rules have never served creditors particularly well.⁹⁰

Given the breadth and complexity of the capital maintenance rules in chapter 2J, the question should be asked: are they more honoured in the breach? That is to say, are they more or less ignored except in highly visible transactions? Such a situation would do little to promote a corporate culture of compliance. In international transactions, the provisions would provoke consternation and frustration as they are at odds with the expectations of international practice.

The *Revised Model Business Corporation Act* in the US provides a very elegant alternative. Any 'distribution' (a defined term which makes no distinction between capital distributions or distributions out of profits and which encompasses dividend payments, share buybacks, reductions in capital, etc)⁹¹ is subject to a solvency test comprised of both a balance sheet and a cash flow test.⁹² Directors are subject to personal liability if they get it wrong,⁹³ and shareholders may be required to disgorge unlawful distributions.⁹⁴

VI CONCLUSIONS

Despite the massive amounts of legislative change in the 1990s and beyond, the *Corporations Act* remains a troubled and unsatisfactory piece of legislation. Unlovely and unloved. It is hard to escape the conclusion that the legislative reforms of the 1990s represent a missed opportunity, one that was seized in neighbouring New Zealand. If anything, addressing the difficulties now may be more difficult than it was 15 years ago. There are the usual constitutional difficulties that dog major change in the commercial law area (a problem which the UK and New Zealand do not share with Australia) as well as the usual issues of path dependency, interest group pressures and reform fatigue.

Reconceptualisation of the overall framework of corporations legislation involves disentangling a matted complex of legislative strands that reach far into the commercial world. Many issues remain difficult ones and do not present easy answers. At the least, though, there is a compelling argument for liberating the basic business corporation rules from the confines of the *Corporations Act*. If at the same time it were possible to rationalise and reconceptualise some of the

⁸⁸ See, eg, *Corporations Act* pt 2F.1.

⁸⁹ *Corporations Act* s 256A.

⁹⁰ See Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (8th ed, 2008) 301–2; Robert W Hamilton and Jonathan R Macey, *Cases and Materials on Corporations Including Partnerships and Limited Liability Companies* (8th ed, 2003) 489–90, 496–7.

⁹¹ American Bar Association, above n 13, § 1.40(6).

⁹² *Ibid* § 6.40.

⁹³ *Ibid* § 8.33; see also § 8.30.

⁹⁴ *Ibid* § 8.33(b)(2).

more problematic areas, such as the treatment of directors' duties or share capital transactions, all the better.

In terms of ending this discussion with some food for thought, perhaps it is time to take a page from the book of regulatory competition. Do Canada and the US have such well-regarded business corporations statutes in part because there are so many of them (over 60 in all — lots of room for experimentation, variety and choice)? Should Victoria or New South Wales provide a sleek, modern business corporations vehicle to give the bloated old *Corporations Act* a run for its money? After all, there currently exist no constitutional difficulties in doing so.⁹⁵

⁹⁵ See *Corporations Act* s 5E; Ford, Austin and Ramsay, above n 5, 65–6.