Corporate Law in the Age of Statutes

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I. Introduction

Professor Finn writes that Australians "were born to statutes".[1] From the time of white settlement, our laws were derived largely from statutes.[2] Even if this was not the history of Australian law, it is now very clear that the way in which significant social problems are resolved is through legislation rather than the courts. In the words of one commentator "if law constitutes governmental social control, today legislation embodies its usual form".[3]

Nowhere is this more evident than in corporate law. This area of Australian law has been dominated by statutes since its earliest days.[4] The tradition of rule by statutes has continued and expanded in recent times given that corporate law reform is now a major priority for the federal government.[5] During 1991, the first year of operation of the national companies scheme, there occurred significant law reform dealing with insider trading, consolidated accounts, corporate fund raising and unlisted property trusts. Further reforms (contained in the Corporate Law Reform Bill 1992) are expected in the areas of loans to directors and other related party transactions, insolvency and directors' duties.[6]

Accompanying this significant amount of law reform has been a debate concerning the drafting of corporate law statutes. This debate has revolved

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1 Finn, P, "Statutes and the Common Law" (1992) 22 *WALR* 7 at 8.

2 Ibid.

3 Seidman, R B, "Justifying Legislation: A Pragmatic, Institutionalist Approach to the Memorandum of Law, Legislative Theory, and Practical Reason" (1992) 29 *Harv J Leg* 1 at 2.

4 McQueen, R, "Limited Liability Company Legislation — The Australian Experience" (1991) 1 *Aust J Corp L* 22.

5 The Attorney-General has stated: "... this Government is committed to an ongoing program of key law reform. This will involve a major review of the substantive companies and securities laws over the next few years ... It is an ambitious program. It must be: for too long important law reform was not undertaken under the former co-operative scheme.

The development of laws which establish proper standards of corporate and market behaviour, that are capable of being enforced effectively, and that will restore the confidence in Australian markets for both Australian and foreign investors, is essential to our future economic prosperity."

Second Reading Speech by the Attorney-General, Michael Duffy, Corporations Legislation Amendment Bill 1991, 29 May 1991.

6 Based upon the reports of the Companies and Securities Advisory Committee, *Reform of the Law Governing Corporate Financial Transactions* (1991), the Law Reform Commission (Australia), *General Insolvency Inquiry* (Report No 45, 1988) and the Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties — Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989), respectively.

around the question of whether the tradition of detailed and complex corporate law statutes is desirable. Some argue that what is required is a move to general principles rather than detailed statutory provisions. In this article, I argue that the debate has been characterised by many untested assumptions on both sides. For example, those advocating detailed statutory rules assume that Parliament can effectively enact comprehensive legislation regulating companies and complex commercial transactions. This is not possible. Moreover, these commentators also argue that detailed law adds precision and certainty to commercial transactions. This overlooks the obvious fact that when legislation becomes too detailed and complex, uncertainty is created.

There are also many assumptions made by those who advocate general principles in corporate legislation. First, to the extent to which general statutory provisions require interpretation, these commentators state that the courts have the ability to fulfil this role. This assumption has not been analysed by participants in the debate. Second, these commentators fail to acknowledge the existence of mechanisms which operate to transform general principles or rules into more specific and detailed rules. For example, a regulator administering general rules is inevitably under pressure to produce guidelines on the application of the rules. These guidelines operate to make the rules more specific. Guidance on the application of general rules may also be sought by means of legal opinions. These can also operate to transform general rules into more specific rules. Not only do these mechanisms transform general rules into more specific ones, there are also costs involved such as the cost of obtaining legal opinions. These matters have not been addressed.

More fundamentally, I suggest that an important issue has not been considered in the debate. Much of our corporate legislation allocates power with respect to the interpretation and implementation of the legislation. This is because Parliament cannot comprehensively legislate for corporate regulation. Therefore, we need to assess the respective merits of those agencies or bodies which are involved in interpreting and implementing legislation. This means assessing the merits of courts and the Australian Securities Commission (ASC). Legislation that incorporates general principles necessarily involves a degree of delegation with respect to the interpretation and implementation of these principles. Consequently, the critical issue is that of ensuring that these tasks are delegated to the appropriate body.

This article is divided into three parts. In Part II, I outline the current debate in Australia concerning the drafting of corporate legislation and identify reasons why we have complex corporate legislation. I also identify some problems with this type of legislation. In Part III, I elaborate principles which should govern the drafting of corporate legislation. Finally, in Part IV, I evaluate the respective merits of the two main implementing agencies: courts and the ASC.

II. The Current Debate On Corporate Law Statutes: Identifying The Issues

A. The positions

The Australian tradition of corporate law statutes is one of Parliament legislating by means of complex and detailed provisions. Three examples drawn from recent or proposed corporate law reform can be provided: share buy-backs, insider trading and loans to directors. In November 1989, amending legislation was enacted by Parliament in order to enable companies to acquire their own shares. To accomplish this, a new Division was introduced consisting of 17 subdivisions.[7] Forty-three new pages of complex legislation were introduced. Despite the fact that there are significant economic advantages in allowing companies to acquire their own shares,[8] the provisions have been little utilised. Only 12 listed companies announced their intention to buy-back their shares in 1991.[9] It was predicted at the time the legislation commenced operation that the complex nature of the provisions combined with the high compliance costs meant that there would be few share buy-backs.[10]

In August 1991, the *Corporations Law* was amended in connection with the regulation of insider trading. Up until that date, insider trading was regulated primarily by one section consisting of 12 subsections. The new legislation consists of 20 sections totalling approximately 10 pages.[11] Although it has been asserted that insider trading is endemic to the Australian securities markets,[12] only one conviction has ever been recorded under insider trading legislation.[13]

The most recent corporate law reform proposals concern loans to directors and other related party transactions. The Companies and Securities Advisory Committee has recommended the replacement of sections 231 and 234 of the *Corporations Law* that regulate disclosure of interests by directors and loans to directors with more detailed provisions that:

- limit the types of loans that may be given to directors and more closely regulate permitted loans by generally eliminating the right of directors to vote themselves loans;
- require the disclosure of loans to other senior officers;

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7 *Corporations Law*, Part 2.4, Div 4B. See also Companies and Securities Law Review Committee, *A Company's Purchase of its Own Shares* (1987); Hewett, J, "Share Buy-Backs for Australian Companies" (1990) 8 *Co & Sec LJ* 383; Magner, E S, "'Repurchase', Redemption and the Maintenance of Capital" in Austin, R P and Vann, R, (eds) *The Law of Public Company Finance* (1986).

8 Partlett, D F and Burton, G, "The Share Repurchase Albatross and Corporation Law Theory" (1988) 62 *ALJ* 139.

9 Redmond, P, *Companies and Securities Law: Commentary and Materials* (2nd edn, 1992) at 662.

10 *Australian Financial Review* 1 November 1989 at 67.

11 *Corporations Law*, Part 7.11, Div 2A.

12 Tomasic, R and Pentony, B, "The Extent of Insider Trading in Australia: A Socio-Legal Account" (1990) 23 *ANZ J Crim* 125.

13 *The Australian* 31 August 1991 at 41.

- introduce specific legislative controls on inter-corporate loans between related or linked companies or asset transfers with associated persons;
- extend the obligations on directors to disclose their interests in transactions with the company and prohibit them from voting on those transactions at meetings of directors, where they have a material interest; and
- revise the obligations of directors to disclose the benefits they receive from their companies, including those obtained indirectly through "service companies" or "consultancies".

The recommendations are embodied in the Corporate Law Reform Bill 1992.[14] When the Bill was released for public comment in February 1992 it contained 69 pages of detailed provisions concerning the above matters.

There has recently occurred a reaction to the detailed and complex provisions contained in the *Corporations Law*. It is argued that a move away from detailed legislation to statements of general principle is required. One commentator expresses the argument in the following terms:

> For many people extra words are indeed the gateway to fraud. The more words and the more complexity, the more opportunity to loophole. So if there is to be law reform, my heretical suggestion is that we move away from black-letter, detailed, heavily proscriptive, law.
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> How? Do you give sweeping power to bureaucrats? No. You give it to the courts and hope they do not need to use it too often. I have coined the term "Fuzzy Law" just for this . . . Our laws would be more conceptual, not too detailed but binding . . . What it would do is give our courts room to move and attack artifice, something black-letter law makes very difficult, but something courts used to be familiar with, especially in developing the principles of equity. It would encourage our courts to keep moving away from technicalities and towards substance. It would discourage loopholing, because without precise black-letter law, it would be harder.[15]

This argument contains three assumptions. The first is that general principles are superior to detailed statutory provisions. However, in order to resolve this issue it is necessary to understand and evaluate the reasons why we have a tradition of detailed legislation. This is undertaken in Part IIB. The second assumption is that it is possible to maintain general statutory provisions in the area of corporate regulation. In fact, there are a number of

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14 The background to the recommendations is explained by the Companies and Securities Advisory Committee in the following terms: "Following the corporate collapses of the 1980s, it has become evident that some corporate controllers abused their positions of trust by arranging for the shifting of assets around and away from companies and corporate groups, and into their own hands. They achieved this by various means, including remuneration payments, asset transfers or loan arrangements, on terms highly advantageous to themselves but to the detriment of these companies. In other instances, substantial inter-corporate loans were entered into with the apparent purpose or effect of disguising the true financial position of individual companies within a group. This was made easier by the lack of any general statutory requirement that shareholders either consent to, or be informed of, these transactions. These abuses generally involved significant losses of corporate funds, with adverse effects on investor and creditor returns and confidence. They also brought into question the integrity of Australian financial markets, with detrimental consequences for the national economy." Above n 6 at 1.

15 Green, J M, "Fuzzy Law" (1991) 9 *Co & Sec LJ* 144.

mechanisms in the enforcement and operation of general rules that lead to more detailed rules. These mechanisms are identified in Part IIC. The third assumption is that courts are the appropriate body to be interpreting and implementing general statutory provisions. An evaluation of this assumption is undertaken in Part IV of the article.

B. Reasons for complex legislation

There are many reasons that explain why we have complex and detailed corporate legislation. Some of these reasons are now elaborated. First, it is said that Parliament is rarely amenable to simplifying legislation if this results in potential injustice. Parliament will generally insist that the rights and obligations of those subject to the legislation be spelt out precisely.[16] As an example, much of the complexity of the takeover provisions of the Corporations Law is explained by Parliament's concern with the welfare of target company shareholders.[17] Second, regulatory statutes generally exist in a state of "dynamic complexity".[18] In other words, organisations or individuals subject to these statutes may exploit ambiguities or inconsistencies in the legislation. The response of Parliament is to include greater detail in the statute in order to prevent avoidance of the legislation or to obtain consistency.[19] For example, until 1991, Australian companies had to ensure that their annual financial statements provided a "true and fair view" of the affairs of the company. This was a legislative statement of general principle, rather than one of detail. However, the concept of "true and fair view" was subject to such misuse that it was necessary to amend the *Corporations Law* to enforce compliance with detailed accounting standards.[20]

A third reason for complex legislation is that complexity may be required in order to remove or mitigate a market failure or imperfection.[21] It is possible to interpret much of the mandatory disclosure provisions of the *Corporations Law* as an attempt to remove a market failure caused by a lack of information.[22] Undoubtedly, the mandatory disclosure requirements of the *Corporations Law* have grown more complex in recent years.[23] This can actually lead to inefficiency with respect to the costs of obtaining advice in order to comply with the complex requirements and also the opportunity costs involved in the time and energy devoted to compliance with the

16 Mayhew, P, "Can Legislation Ever Be Simple, Clear, and Certain?" (1990) 11 *Statute LR* 1 at 7.

17 Ramsay, I, "Balancing Law and Economics: The Case of Partial Takeovers" [1992] *JBL* 369.

18 McCaffery, E J, "The Holy Grail of Tax Simplification" [1990] *Wisconsin LR* 1267 at 1275.

19 Ibid.

20 McGregor, W, "True and Fair View — An Accounting Anachronism" (1991) 9 *Co & Sec LJ* 414. For further discussion of the concept of true and fair view, see Chambers, R J and Wolnizer, P W, "A True and Fair View of Financial Position" (1990) 8 *Co & Sec LJ* 353; McGee, A, "The 'True and Fair View' Debate: A Study in the Legal Regulation of Accounting" (1991) 54 *Mod LR* 874; National Companies and Securities Commission, *A True and Fair View and the Reporting Obligations of Directors and Auditors* (1984).

21 Above n 18 at 1293.

22 Blair, M, "The Debate Over Mandatory Corporate Disclosure Rules" (1992) 15 *UNSWLJ* 177.

23 An example is the liability provisions applicable to those involved in the preparation of a prospectus: *Corporations Law*, Part 7.11, Div 4.

requirements.[24] However, the issue of compliance costs is more complicated than first appears. This is because imposing compliance costs can be a means of deterring undesirable activities. An example is the proposed legislation regulating loans to directors and other related party transactions.[25] A major criticism of these proposals is that compliance with the rules for approval would be unreasonably costly. Yet there is an opposing argument:

> Objections of this kind, however, appear to miss the point that the object of the exercise is to discourage all forms of self-interested conduct by directors and controllers in public companies by making it difficult and costly to provide what amounts to additional remuneration in such indirect and often concealed ways rather than by open and properly approved payment and incentive schemes.[26]

A fourth reason for complex legislation is that it "reflects an appropriate balancing of competing interests in a complex society".[27] This may appear to be particularly applicable to corporate law where there needs to be a delicate balancing of the interests of all stake-holders in the company — be they shareholders, creditors, managers or employees. For example, in recent times, Parliament, the courts and regulators have had to focus upon the need to protect the interests of creditors against actions by shareholders.[28] One need only refer to the well known case of *Kinsela v Russell Kinsela Pty Ltd (in Liq)*[29] for a very clear example of a situation where shareholder approval of a transaction severely jeopardised the interests of creditors. In the words of Street CJ:

> . . . this insolvent company, in a state of imminent and foreseen collapse, entered into a transaction which plainly had the effect, and was intended to have the effect, of placing its assets beyond the immediate reach of its creditors; it did this by means of a lease of its business premises entered into with the intention that two of its directors, as lessees, would use those premises for the purpose of continuing to conduct a business of the nature that which the family of the directors and all of the shareholders had carried on for many years; the lease was executed on behalf of the company by the two directors who were to be lessees with the unanimous approval of all the shareholders of the company; it may be added, for what it is worth, that the terms of the lease were, to say the least, commercially questionable.[30]

There are numerous instances of courts being required to consider the impact of shareholder action upon creditors.[31] This has also been the subject

24 Above n 18 at 1297.

25 Above n 14 and accompanying text.

26 Hadden, T, "The Regulation of Corporate Groups in Australia" (1992) 15 *UNSWLJ* 61 at 75.

27 Above n18 at 1300.

28 Creditors face four main problems resulting from shareholder action: the payment of excessive dividends, the incurring of debt with higher or similar priority, the substitution of non-saleable assets for saleable assets, and excessive risk taking: Smith, C W and Warner, J B, "On Financial Contracting: An Analysis of Bond Covenants" (1979) 7 *J Fin Econ* 117.

29 (1986) 10 ACLR 395.

30 Id at 399. The argument advanced by the defendants was that the granting of the lease was entered into with the unanimous approval of all the shareholders and therefore there could be no question of the lease not being in the best interests of the company or of there being a breach of fiduciary duty by the directors. This was rejected by the court.

31 See, generally, Grantham, R, "The Judicial Extension of Directors' Duties to Creditors" [1991] *JBL* 1.

of discussion by the ASC[32] and the Senate Standing Committee on Legal and Constitutional Affairs in its report on the duties of directors.[33] Recent statutory amendments have given specific attention to the way in which certain corporate actions can adversely affect creditors. An example is the protections given to creditors in the context of share buy-backs.[34]

A fifth reason for complex legislation is that Parliament is responding to restrictive interpretations of legislation by courts.[35] In other words, the courts have not followed (or have been unable to discern) the policy of Parliament. This results in Parliament enacting more detailed provisions. In Part IV, I provide two examples of this: the shareholder oppression remedy and tax avoidance legislation.[36]

These then are some of the reasons that explain the tradition of complex corporate statutes. What remains to be considered are the costs associated with such legislation. I have already referred to the costs of complying with complex legislation. It has also been argued that such legislation fosters a distrust of government and can result in erratic implementation of the legislation.[37] However, these costs do not necessarily result from complex or detailed legislation. They result when legislation lacks clarity. A lack of clarity can occur in either detailed legislation or legislation that contains general principles. The need for clarity is one of two essential rules that should govern the drafting of corporate legislation that are addressed in Part III.

C. *The tendency to detailed rules*

It is of course possible to draft statutes that contain general principles rather than detailed and complex provisions. However, it is important to ask the question whether general principles can be maintained. It needs to be recognised that there are mechanisms in the enforcement and operation of general rules or principles that lead to more precise and detailed rules. McBarnet and Whelan refer to four such mechanisms.[38]

- *Guidelines.* Where general rules are administered by a regulatory agency, there is pressure on the regulator to produce guidelines on the application of the rules. These will operate to make the rules more specific. For example, the ASC issues a significant number of practice notes and policy statements for the guidance of lawyers, accountants and their clients.

- *Courts.* Clarification and narrowing of general rules may emerge or be sought through the courts.

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32 Australian Securities Commission, *Submission to the Inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into Corporate Practices and the Rights of Shareholders* (1990) at 50-54.

33 Above n 6 at Ch 5.

34 Above n 7. Another example of creditor protection is the statutory requirement of a trustee to protect the interests of debenture holders: *Corporations Law* s1052.

35 Twining, W and Miers, D, *How To Do Things With Rules* (2nd edn, 1982) at 313.

36 Below nn 92-102 and accompanying text.

37 Above n 18 at 1291 and 1311.

38 McBarnet, D and Whelan, C, "The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control" (1991) 54 *Mod LR* 848.

- *Legal Opinions.* Guidance on the application of general rules may be sought by means of legal opinions from barristers and solicitors. An opinion may itself assume the quality of a rule. According to McBarnet and Whelan, "the vaguer the regulation, the more uncertain its application, the more likely interested parties are to go for legal clarification as protection if things go wrong. Likewise, the more important the claim to legal certainty is ... the more likely it is that opinions will be sought and acted upon as though they were rulings".[39]

- *Clearances.* Clearances for a transaction may be sought from the regulator administering general rules even where there is no statutory right to them. For example, the ASC provides advice to practitioners on the application of provisions of the *Corporations Law* to particular transactions. This can, albeit informally, operate to narrow general rules. "However abstract regulations may be . . . and however hard regulators try to keep the rules in the books general, enforcing regulations inevitably involves application to concrete situations, and decisions about whether a practice . . . is to be treated as caught by the regulation or not. These then spread remarkably quickly through the network of practice and become informal precedents."[40]

All the above mechanisms operate to create a powerful tendency to transform general rules into more specific rules. Recognition of their existence is not in itself a criticism of those who advocate general principles in legislation. However, to the extent to which the operation of the mechanisms may be seen as inevitable,[41] certain costs result. There are costs associated with the ASC formulating guidelines for the application of general rules, individuals seeking legal opinions[42] and, if necessary, having litigation about the meaning of general rules. The important question which has not been addressed by participants in the debate on the drafting of corporate legislation is whether having more specific rules in the first place substantially reduces these costs. An answer to this question depends upon the formulation of principles that should govern the drafting of corporate legislation. This is now undertaken.

III. Principles Governing The Drafting Of Corporate Legislation

In this part I explore two principles which should govern the drafting of corporate legislation. The first is the need for clarity. I identify the costs associated with legislation that lacks clarity. The second principle involves a recognition that Parliament is incapable of comprehensively legislating for

39 Id at 862-863.

40 Id at 863.

41 It is reasonable to presume that the operation of at least some of these mechanisms is inevitable because legal advice and the opinion of the regulator will certainly be sought in relation to the ambit of general rules.

42 For an economic analysis of whether the demand for the provision of legal advice is optimal, see Kaplow, L and Shavell, S, "Private Versus Socially Optimal Provision of Ex Ante Legal Advice" (1992) 8 *JL Econ & Org* 306.

the regulation of companies and commercial transactions. Reasons for this are outlined. The consequence is that legislation necessarily involves the allocation of power with respect to the tasks of interpreting and implementing legislation. Our focus therefore shifts from Parliament to an evaluation of the merits of bodies that might undertake these tasks.

A. The need for clarity

We sometimes hear that legislation should be simple.[43] However, if business and commercial dealings are complex, it is unreasonable or even naive to expect that legislation regulating commercial dealings will be simple. Simplicity should not be confused with clarity. What is important is that legislation contains policies, purposes and concepts that are clear.[44] This objective is reflected in the work of the New Zealand Law Commission in its reform of company law. The Commission states that company law in that country needs to be "more accessible and intelligible".[45] A lack of clarity in legislation results from a failure to appreciate the need for legal rules to be communicated effectively.[46]

When legislating for complex phenomena such as companies and commercial transactions an inevitable problem is the tension between clarity and complex legislative drafting.

> The curse of legal drafting in common law jurisdictions is that the draftsman uses far too many words. He does not trust the judge to use his commonsense, feels it necessary to stop up every loophole, real or imaginary, and concentrates on producing the desired legal effect to the exclusion of communicating what he is about to his readers. In so doing he fails to realise that for each problem he solves two take its place. The minute particularisation positively encourages a judge to rule that with so many words what is not specified is not covered. The more words, the more scope for dispute about meaning, the more chance of inconsistency and obscurity, the less likelihood of accommodation to change and the greater the risk of uncertainty and error.[47]

Where legislation lacks clarity, significant costs result. Maggs identifies the following costs:[48]

- *Increased legal research costs.* Much legislation, particularly in the area of corporate law, requires expenditure on legal research costs, such as legal opinions from lawyers, in order to obtain clarification.
- *Litigation costs.* Legislative ambiguity promotes litigation in order to obtain clarification.

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43 Nazareth J "Legislative Drafting: Could Our Statutes Be Simpler?" (1987) 8 *Statute LR* 81.

44 Goode, R, "The Codification of Commercial Law" (1988) 14 *Mon ULR* 135 at 157.

45 New Zealand Law Commission, *Company Law: Reform and Restatement* (Report No 9, 1984) at para 26.

46 Blume, P, "The Communication of Legal Rules" (1990) 11 *Statute LR* 189. See also Cranston, R F, "Reform Through Legislation: The Dimension of Legislative Technique" (1979) 73 *Northwestern ULR* 873 at 878.

47 Above n44 at 156.

48 Maggs, G E, "Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee" (1992) 29 *Harv J Leg* 123 at 126-30.

- *Judicial system costs.* By promoting litigation, legislative ambiguity requires expenditure on judicial resources.
- *Increased unlawful activity.* Legislative ambiguity may result in persons or companies unwittingly breaching the law because the ambit of the law is not clearly marked.
- *Decreased lawful activity.* Legislative ambiguity may chill lawful and productive activity by reason of the fact that persons or companies may not enter into transactions because the precise ambit of the law cannot be determined.
- *Discrimination.* A lack of clarity in legislation may mean that its implementation by a regulator is undertaken on an arbitrary or discrimatory basis.

It may be argued that ambiguous legislation can be used to secure greater compliance with the law by means of its deterrent effect.[49] However, the costs of ambiguous legislation referred to above would appear to outweigh any possible benefit gained by means of deterrence. Few would doubt that portions of the *Corporations Law*, because of their complexity, lack clarity and therefore these costs are incurred. In the following section I argue that this results from a failure to acknowledge a fundamental principle that should govern the drafting of corporate legislation — that Parliament cannot comprehensively legislate for the regulation of companies and commercial transactions.

B. *The limits of parliament and the allocation of power by legislation*

Much of the *Corporations Law* reflects an unquestioning faith in the ability of Parliament to accurately comprehend problems and legislate for their solution. These are heroic assumptions. Parliament cannot comprehensively legislate for all situations.[50] In the words of one commentator, "the very idea of codification rests on the sanguine eighteenth century belief in the ability of the human mind by its reason to project the solution of future controversies, and to do so in a systematic and comprehensive manner."[51] Where Parliament does endeavour to comprehensively legislate in a detailed and prescriptive manner, the result can be legislation that lacks clarity and that is both under inclusive with respect to some matters and over inclusive with respect to others.[52]

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49 Cranston, above n46 at 884; Maggs, above n48 at 133.

50 Anton, A E, "Legislation and Its Limits" (1979) 5 *Dalhousie LJ* 233.

51 Schlesinger, R B, *Comparative Law: Cases, Text, Materials* (4th edn, 1980) at 293 quoted in Vranken, M, "Statutory Interpretation and Judicial Policy Making: Some Comparative Reflections" (1991) 12 *Statute LR* 31 at 45.

52 An example is the prescribed interest provisions of the *Corporations Law*: see Ramsay, I, "Flaws in the Prescribed Interest Provisions of the *Corporations Law*" (1991) *Corporations Law Bulletin* (No 22) at 296. Many other examples could be provided. Some argue that the *Corporations Law* inadequately regulates corporate groups ie, that the *Law* is under inclusive: above n26. Others argue that the insider trading provisions of the *Corporations Law* are over inclusive: Bostock, T E, "Australia's New Insider Trading Laws" (1992) 10 *Co & Sec LJ* 165.

This issue can be viewed as part of a larger debate concerning whether law which purports to impose substantive standards is capable of coping effectively with the many complexities of a modern economy.[53] Teubner argues for "reflexive law". This requires a move away from legally imposed substantive standards to laws that regulate processes and establish structures for future decisions in terms of organisation, procedure and competencies.[54] Reflexive law arises because comprehensive and substantive legal rules cannot be implemented effectively. Thus, the role of reflexive law is that of "providing institutions and procedures within which conflicts between [institutions and groups within society] can be resolved, rather than attempting to provide comprehensive social control".[55]

This necessarily involves allocations of power[56] and different levels of regulation. This is clearly occurring in corporate law where different aspects of regulation are undertaken by a range of bodies including the ASC, the Australian Stock Exchange, the Corporations and Securities Panel, courts and the Administrative Appeals Tribunal. What is also clear is that a significant issue that has been insufficiently addressed in the debate concerning the drafting of corporate legislation is the way in which legislation allocates this power. One advocate of the use of general principles in corporate legislation states that he favours allocating "sweeping power" to the courts.[57] However, the following question needs to be answered. Because Parliament is, of necessity, required to delegate the interpretation and implementation of corporate laws, which body is best suited for this task? Is it the courts, a specialist agency such as the ASC or some other body?

A related matter also requires discussion. It is the connection between the type of legislation enacted by Parliament and the amount of discretion or power vested in the body which is required to implement the legislation, be it the courts or the ASC. What I am specifically concerned with is the extent to which Parliament specifies the precise rule that it expects the implementing body to apply. This has been referred to as the "transitivity" of a statute.[58] If a statute does specify a precise rule, it is highly transitive. A statute that instructs the implementing body to develop its own rules is intransitive. This is because the person or company to which the statute is directed does not know what is required by the statute until the rules are developed by the implementing body.[59] The important point which follows is that the degree of transitivity displayed by a statute necessarily determines the amount of

53 See generally, Teubner, G, "Substantive and Reflexive Elements in Modern Law" (1983) 17 *Law Soc R* 239.

54 Id at 275.

55 Galligan, D J, *Discretionary Powers* (1986) at 83.

56 Galligan (id at 74-79) identifies a number of factors that have contributed to the vesting of broad discretionary powers in a range of agencies. First, the significant increase in regulatory activites necessitates delegating discretionary powers with respect to some of these activities. Second, many regulatory undertakings require technical or scientific knowledge that lends itself to regulation by a specialist agency with broad powers. Third, the growing complexity and variability of the matters sought to be regulated results in the grant of broad powers.

57 Above n15 at 147.

58 Rubin, E L, "Law and Legislation in the Administrative State" (1989) 89 *Col LR* 369.

59 Id at 381.

discretion and power wielded by the implementing body.[60] A highly transitive statute grants the implementing body little discretion whereas an intransitive statute requires this body to engage in rule making of some sort.[61]

The *Corporations Law* is a statute which is highly intransitive. In particular, the operation of this statute relies to a large degree upon the rule making powers and discretions vested in the ASC. Some parts of the *Corporations Law* appear highly transitive but in fact are less so upon closer inspection. Subsection 219(3) concerning company numbers is a good example. It provides that a company must (unless its registration number is part of its name) set out after the company's name where it first appears, the company's registration number on every public document of the company that is signed, issued or published and every "eligible" negotiable instrument of the company that is signed or issued. An initial reading of this section indicates that it is a transitive provision. Parliament has enacted a precise rule which applies unambiguously to companies. The rule provides that on the specified documents, the company number must be set out. However, the intransitive nature of the provision is revealed by the fact that the ASC has published a 16 page Practice Note on the section.[62] The Practice Note deals with matters such as whether the expression "public document" is confined to documents in writing, when documents are "signed, issued or published" by a company, when the company number is to be used in an advertisement and what entities are required to use company numbers.

It is evident therefore that even apparently straightforward provisions in the *Corporations Law* require the exercise of discretions and rule making power by the ASC. Many would agree with the ASC being the appropriate body to undertake this task because it is, after all, the specialist agency charged by Parliament with overseeing the regulation of companies and the securities markets in Australia.[63] Corporate statutes that contain general principles are intransitive in nature. They rely to a large degree upon an implementing body. We have seen that one advocate of general corporate statutory provisions believes that such provisions should allocate power to the courts.[64] Yet what is missing from the debate is an evaluation of the respective merits of courts and the ASC as implementing bodies. This is undertaken in the following Part.

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60 Id at 383.

61 Ibid.

62 Practice Note 3.1.1 — Australian Company Numbers and Australian Registered Body Numbers (20 May 1991).

63 The other specialist agency is the Australian Stock Exchange but the Exchange has more limited jurisdiction, its regulatory powers applying only to listed companies.

64 Above n15 at 147.

IV. Courts And The ASC: Evaluating Their Respective Merits

A. Introduction

A fundamental question that has not been addressed in the debate concerning the drafting of corporate law statutes concerns the respective merits of courts and the ASC in interpreting and implementing legislation. This evaluation is required because, as demonstrated in the preceding Part, Parliament must necessarily delegate aspects of corporate regulation. One point needs to be emphasised. This is not a debate about the merits of judicial review of administrative action by agencies such as the ASC. Judicial review has, among its goals, "structuring governmental action and decision-making in the hope of improving its quality and rationality and limiting the scope for arbitrariness, and ensuring that those who exercise public powers respect the limits of those powers".[65] It is to be noted that the broad powers given to the ASC by Parliament are complemented by administrative law remedies, including judicial review.[66] The assumption underlying judicial review is that courts must be available to ensure agency fidelity to statutory directives.[67]

However, judicial review of administrative action is not what is at stake in our discussion. We are concerned with who best interprets certain regulatory statutes. Under one model, the power of interpretation lies principally with the courts. In the second model, this responsibility lies with a specialist agency and in any subsequent review by a court, the court must accept any reasonable interpretation advanced by the agency.[68] Some proponents of general principles in corporate statutes are adherents to the first model. Yet this model has its critics. If we take the example of loans to directors and inter-corporate loans, it is clear that this is a complex regulatory problem. For some commentators, this complexity should be resolved by the courts.[69] However, it has been argued that courts lack the flexibility, expertise, initiative and powers of coordination which are necessary to deal with complex regulatory problems when compared with specialist agencies.[70] The fact-finding capacity and accountability of agencies are also greater than those of courts.[71] Moreover, when courts are given the task of interpreting general legislative principles there is always the possibility that this task will not be fulfilled because of disincentives confronting potential litigants or that, if there is litigation, courts will adopt unnecessarily restrictive interpretations of general provisions. These issues require elaboration.

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65 Feldman, D, "Democracy, the Rule of Law and Judicial Review" (1990) 19 *Fed LR* 1 at 13.

66 Section 35 of the State Corporations Acts provides for the application of Commonwealth administrative laws including the *Administrative Appeals Tribunal Act* 1975 and the *Administrative Decisions (Judicial Review) Act* 1977.

67 Sunstein, C R, "Interpreting Statutes in the Regulatory State" (1989) 103 *Harv LR* 405 at 446.

68 Farina, C R, "Statutory Interpretation and the Balance of Power in the Administrative State" (1989) 89 *Col LR* 452 at 453-54.

69 Above n15.

70 Sunstein, C R, "Law and Administration After *Chevron*" (1990) 90 *Col LR* 2071.

71 Id at 2087.

B. Abilities and expertise

(i) Courts

Some limitations concerning the abilities and expertise of courts have recently been noted by the Chief Justice:

> . . . courts have been ill-equipped or reluctant to grapple with policy issues which often must be examined before one can decide that an existing rule is no longer serving a useful purpose and that it should be replaced by another and better rule. The inductive and analogical reasoning by which the courts have traditionally proceeded is not appropriate to the resolution of such questions. In a society in which community values change with great rapidity, the inability or the reluctance of the courts to bring about change in the substantive principles of judge-made law has been a catalyst to legislative action in some fields.[72]

The problem of statutory obsolescence led Calabresi to suggest that courts should be permitted to give statutes the same status as judicial precedents.[73] This would allow courts to update or even eliminate anachronistic legislation. Yet whether courts are able to do this as efficiently as a specialist agency is open to question. As Mason J has observed:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes in the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.[74]

(ii) The ASC

Some of the advantages that specialist agencies such as the ASC possess in comparison to courts have already been referred to. In particular, they have

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72 Sir Anthony Mason, "Australian Law for Australia". Address to the 27th Australian Legal Convention, September 1991, reprinted in (1991) 26 *Aust L News* 14.

73 Calabresi, G, *A Common Law for the Age of Statutes* (1982).

74 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633.

greater fact-finding capabilities and powers of coordination.[75] Agencies can also commence hearings and investigations on their own initiative. They are not dependent upon other people commencing proceedings as is the case with courts. Agencies have the capacity to go into great detail in their work and can adapt rapidly to changing circumstances and requirements.[76] Moreover, elaboration of rules by regulatory agencies is often done by utilising the cooperation of experts and the submissions of those who are regulated.[77] This is the procedure adopted by the ASC with respect to the formulation of significant polices.[78]

When evaluating the respective merits of courts and specialist agencies, an important issue is that of independence. Independence from outside dictates is a valued part of the structure of implementing bodies and directly influences the effectiveness of these bodies.[79] An extreme lack of independence finds recognition in the capture theory of regulation whereby agencies serve the interests of those who are regulated rather than the public interest.[80]

The *ASC Law* provides a degree of independence to Commissioners by specifying that appointments are for a fixed term and limiting termination to express causes.[81] However, political control of the ASC (which necessarily limits independence) is enforced in both direct and indirect ways. Direct control is reflected in s12 of the ASC Law which provides that the Attorney-General may give the ASC a written direction about policies it should pursue or priorities it should follow. The power of appointment is also a form of control.[82] The Attorney General is able to influence the policies of the ASC by nominating Commissioners of a certain philosophy.[83] Indirect control can also be exercised through the funding of the ASC. The independence of an agency can be significantly constrained by inadequate resources. This is a particular problem for regulatory agencies.

> The fewer the resources available to a regulatory agency, the more its decisions must be reached with inadequate information, unless the agency relies on those it regulates for information, whereupon it is more susceptible to unacceptable influence. Law enforcement capacity is dependent on adequate resources, especially to investigate complex wrong doing and then to pursue it through the courts. Limited resources lead many regulatory

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75 Above nn70 and 71 and accompanying text.

76 Kubler, F, "Juridification of Corporate Structures" in Teubner, G, (ed) *Juridification of Social Spheres* (1987) at 229.

77 Id at 234.

78 Many examples can be provided including public hearings by the ASC into accounting relief for wholly-owned subsidiaries (MR 91/64), offers of common funds by statutory trustee companies (MR 91/75, 91/107 and 92/60), sharehawking of foreign securities (MR 91/189), solicitors mortgage investment schemes (MR 92/38) and screen based trading for the trading of property unit trusts (MR 92/47).

79 Verkuil, P R, "The Purposes and Limits of Independent Agencies" [1988] *Duke LJ* 257.

80 Rowe, G C, "Economic Theories of the Nature of Regulatory Activity" in Tomasic, R, (ed) *Business Regulation in Australia* (1984) at 156-61.

81 *ASC Law* ss108 and 111.

82 Subsection 9(2) of the *ASC Law* provides that the Governor-General appoints the members of the ASC on the nomination of the Attorney-General.

83 For a comparison with the US Securities and Exchange Commission, see Peters, A L, "Independent Agencies: Government's Scourge or Salvation?" [1988] *Duke LJ* 286.

> agencies to pursue the less complex (and less significant) cases, while some virtually abandon law enforcement and instead concentrate on seeking a voluntary cessation of wrongdoing and perhaps also restitution for its victims.[84]

C. *The problem of non-litigation*

A limitation with reliance on courts is that judicial interpretation of general statutory provisions may not occur because of disincentives to commence litigation. An example that can be provided is s232 of the *Corporations Law* (governing directors' duties). This section has been described as a good example of a general statutory provision.[85] It provides that directors must act honestly and exercise a reasonable degree of care and diligence. A recent study of s232 found that the number of actions brought against directors by regulatory authorities for breach of s232 has been very small.[86] One response to this information is to suggest that the reason for the lack of prosecutions is that the regulatory authorities have, until recently, been severely under resourced. It has only been in the past two years, with the establishment of the ASC, that a series of prosecutions have been commenced under the section. However, it needs to be appreciated that s232 is both a criminal and a civil provision. Yet the author of the study states that civil actions brought under s232 are "not really any more common than the number of criminal actions, if the number of cases reported in the law reports is to be any guide".[87]

Why might this be? One reason is the existence of deficiencies in the litigation process. First, there are legal impediments to shareholder litigation in the area of directors' duties.[88] The Senate Standing Committee on Legal and Constitutional Affairs has stated that "despite a recent tendency towards relaxation, the narrow rules of standing make it difficult for a shareholder to take legal action".[89] Second, the cost of litigation is a significant disincentive to shareholders. The obstacles confronting shareholders who are contemplating litigation are well summarised by Professor Corkery:

> . . . under the present law there are just too many hurdles to jump before bringing derivative suits. You must identify the wrongdoers, gather sufficient information, show there is fraud, prove the alleged wrongdoers control the company, and discover whether or not the acts complained of are ratifiable by

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84 Cranston, R F, "Regulation and Deregulation: General Issues" (1982) 5 *UNSWLJ* 1 at 17.

85 Above n15 at 148.

86 Tomasic, R, "Corporate Crime: Making the Law More Credible" (1990) 8 *Co & Sec LJ* 369.

87 Id at 374.

88 Companies and Securities Law Review Committee, *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action* (1990) Report No 12. The Report recommends the introduction of a statutory derivative action in order to overcome restrictive standing requirements. Another reform is the introduction of class actions in the Federal Court: *Federal Court of Australia Amendment Act* 1991. The Minister for Justice and Consumer Affairs, Senator Tate, described the Bill in his second reading speech as providing "a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions".

89 Above n6 at para 11.29.

> a majority at a general meeting. Then you must somehow fund the action. In the face of all this and more, genuine grievances go unremedied.[90]

It is worth emphasising the economic disincentives which confront a shareholder contemplating litigation for a breach of directors' duties. Unless a shareholder owns a significant per centage of the shares of the company, litigation is a daunting prospect. This is because the individual shareholder will have to bear the expense of the litigation (while the litigation is proceeding and will not recover legal expenses if the action is unsuccessful) and yet any damages recovered in a successful action will accrue to the company (ie, to all the shareholders) and not just to the shareholder bringing the action.[91] In summary, some of the major problems in a system of regulation that relies to a large extent on judicial intervention include restrictive standing requirements, problems in obtaining information and the expense of litigation. This may mean that interpretation of general statutory provisions does not occur.

D. The possibility of restrictive interpretations

A further possibility is that, assuming litigation is commenced, courts may adopt restrictive interpretations of legislation which contains general provisions. This may necessitate Parliament enacting more detailed legislation. Two examples can be discussed. The first of these is the statutory oppression remedy.[92] It is now well known that the history of this provision is one of Parliament continually broadening the provision and making it more detailed in response to restrictive judicial interpretations. Colin Howard refers to the "statutory response to a generally conservative attitude towards this remedy on the part of the courts".[93] Another commentator refers to recent statutory reforms of the oppression remedy in the United Kingdom and states, with respect to the history of the provision, that "the concept of oppression was quickly narrowly construed by the courts and during [the period 1948 to 1980] only two applications for relief from oppressive acts were successful."[94]

Professor Gower states that this lack of success by plaintiffs under the oppression remedy was "in part . . . due to defects in drafting and in part to the restrictive attitude adopted by the courts".[95] A more vivid description is given by another commentator who states that the judiciary has treated the oppression remedy "as a legislative sword that has somehow or other become rusted in its scabbard".[96] It is said that courts have had "little

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90 Corkery, J, *Directors' Powers and Duties* (1987) at 172.

91 For further discussion, see Ramsay, I, "Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action" (1992) 15 *UNSWLJ* 149 at 162-64.

92 *Corporations Law* s260. This section allows a shareholder to apply to the court for relief where, *inter alia*, the affairs of the company are being conducted in a manner that is oppressive. See Hill, J, "Protecting Minority Shareholders and Reasonable Expectations" (1992) 10 *Co & Sec LJ* 86.

93 Howard, C, *Law of Commercial Companies* (1987) at 292-93.

94 Bouchier, D, *"The Companies Act* 1989 — Yet Another Attempt to Remedy Unfair Prejudice" [1991] *JBL* 132.

95 *Gower's Principles of Modern Company Law* (4th edn, 1979) at 665.

96 Prentice, D D, "Winding Up on the Just and Equitable Ground: The Partnership Analogy"

perception of the purpose and effect of the remedy".[97] More enlightened attitudes to the oppression remedy are now evident.[98] However, the fundamental point remains. The history of this provision is one of Parliament being required to provide more detailed law in response to restrictive judicial interpretations.

A second example of an area of law where restrictive judicial interpretations have resulted in more detailed legislative responses is tax avoidance. Section 260 of the *Income Tax Assessment Act* 1936 (which was operative until 1981) provided:

> Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly —
>
> (a) altering the incidence of any income tax;
>
> (b) relieving any person from liability to pay any income tax or make any return;
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> (c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
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> (d) preventing the operation of this Act in any respect,
>
> be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

This provision has been described as "a weapon aimed against devices used to thwart the objectives of the Act".[99] While this is the purpose of the provision, it has been said that the approach adopted by courts during the 1970s resulted in the "effective nullification" and "destruction" of s260.[100] This resulted in the enactment of more detailed provisions — Part IVA of the *Income Tax Assessment Act* 1936.

When courts are required to interpret general legislative provisions and they adopt restrictive interpretations this can have ramifications for community standards. One commentator has stated, in relation to the High Court judgments on s260, that a "tax avoidance boom and lowered standards of commercial morality resulted from these decisions".[101] Writing over 10 years ago in the wake of the High Court judgments, another commentator stated:

> Artificial avoidance devices . . . are becoming widespread in Australia and promoting a cynicism among the body of taxpayers which is in danger of

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(1973) 89 *LQR* 107 at 125.

97 Wishart, D, "A Fresh Approach to Section 320" (1987) 17 *UWALR* 94 at 101. This is to be contrasted with the approach of Canadian courts in relation to which it has been said that ". . . for the most part judges have accepted that the oppression remedy should be construed broadly": Cheffins, B R, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40 *Univ Tor LJ* 775 at 777.

98 *Re Spargos Mining NL* (1990) 3 ACSR 1; *Jenkins v Enterprise Gold Mines* (1992) 6 ACSR 539.

99 Grbich, Y, "Section 260 Re-Examined: Posing Critical Questions About Tax Avoidance" (1976) 1 *UNSWLJ* 211 at 223.

100 Lehmann, G, "The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism" (1983) 9 *Mon ULR* 115 at 117 and 132.

101 Id at 116.

> reaching an unacceptable level. Quite apart from ethical objections, in a system of tax relying on self-assessment and substantial voluntary compliance for its day to day operation, such threats to legitimacy must be taken seriously.[102]

A proponent of general principles in the drafting of corporate statutes acknowledges that the forthrightness that such legislation demands of the judiciary may not be forthcoming.[103] Yet if we accept that there is a link between the judgments of courts and community standards (as some certainly believe in the taxation area) then it is not simply a matter of believing that we will end up with legislation that requires amendment if the courts fail in their task. A combination of statutory provisions containing general principles and lack of effective judicial interpretation may result in a corporate culture where avoidance of the law is the norm.

E. The possibility of a lack of uniformity in judgments

A further issue concerns the possibility of a lack of uniformity in judgments. Uniformity in the administration and interpretation of law is important for those involved in commercial dealings. It is widely acknowledged that there was a lack of uniformity in the administration of corporate law under the cooperative scheme that existed until 1991.[104] Subsection 1(2) of the *ASC Law* now provides that the Commission must strive to achieve uniformity throughout Australia in how the Commission and its delegates perform their functions and powers.

While uniformity in the administration of corporate law has increased significantly in the period since the creation of the ASC, it is clear that uncertainty can be created where there is a divergence among courts of different jurisdictions in relation to important corporate law issues. The most recent example is the judicial interpretations of s592 of the *Corporations Law*. This section imposes personal liability upon a director or manager of a company when the company incurs a debt and the director or manager would or should have known that the company was insolvent.[105] Without

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102 Grbich, Y, "The Duke of Westminster's Graven Idol on Extending Property Authorities Into Tax and Back Again" (1978) 9 *Fed LR* 185 at 210-211.

103 Above n15 at 148. Parliament has endeavoured to promote a purposive approach to statutory interpretation by courts. Section 109H of the *Corporations Law* provides that in interpreting a provision of the *Law*, a construction that would promote the purpose or object of the *Law* is to be preferred to a construction that would not. The effectiveness of this provision is limited by the fact that the policy or purpose of Parliament in enacting legislation cannot always be discerned.

104 In the words of a past Chairman of the National Companies and Securities Commission: "Under its Act the NCSC was required to delegate its powers to the State Corporate Affairs officers to the maximum extent practicable. Partly because of that requirement and partly because it had insufficient resources, the Commission had delegated a number of tasks that would have been better handled nationally . . . Uniformity of administration of course depends largely on the establishment of clear policies and procedures and continual, detailed monitoring to ensure compliance. Under its Act the NCSC had power to give directions to its delegates and many were in fact given over the years. Unfortunately it had neither the resources to monitor compliance nor the authority to enforce it." Bosch, H, *The Workings of a Watchdog* (1990) at 238.

105 For further discussion of s592, see Herzberg, A, "Insolvent Trading" (1991) 9 *Co & Sec LJ* 285.

discussing the section in detail, it is evident that courts have recently expounded fundamentally different interpretations concerning:

- when there are "reasonable grounds" to expect that the company is insolvent;[106] and
- s592(2)(b) which allows a director or manager a defence where he or she did not have reasonable cause to expect that, when the debt was incurred, the company was insolvent.[107]

Because of the uncertainty created by these decisions, it has recently been recommended that s592 be amended to overcome this uncertainty.[108]

Section 592 is important in terms of its application to directors' duties. Because it imposes personal liability upon directors and managers it has a direct impact upon management decisions when a company is in financial difficulties. The role of corporate law is to facilitate business activity while protecting those who deal with companies. It is highly undesirable to have different judicial interpretations of an important section like s592.[109] The point is not to deny a legitimate role for the courts. Rather, it is the need to acknowledge the existence of advantages that a specialist agency has over courts in the area of corporate regulation.

V. Conclusion

The debate on the form of corporate law statutes, while superficially about styles of drafting, reflects deeper concerns. First, we need to understand why we have a tradition of complex and detailed corporate statutes. We also need to comprehend the pressures and mechanisms that transform general statutory principles into more detailed rules. There are costs associated with detailed legislation — particularly where such legislation lacks clarity. In this article, I have suggested that a reason for this lack of clarity is the failure to appreciate that Parliament is incapable of enacting legislation which comprehensively regulates corporate activity.

It is impossible for legislators to foresee all of the problems to be dealt with under a statute and pressures upon legislators means that they cannot amend every statute to accommodate these changes.[110] Parliament has already given to the ASC the power to modify certain provisions of the *Corporations Law* and exempt companies and individuals from provisions which would otherwise apply to them. These powers have been given to the ASC in the important areas of takeovers and fund-raising.[111] This means that the current

106 Compare *Heide Pty Ltd* v *Lester* (1990) 3 ACSR 159 with *Commonwealth Bank of Australia* v *Friedrich* (1991) 5 ACSR 115.

107 Compare *Statewide Tobacco Services Ltd* v *Morley* (1990) 2 ACSR 405 with *Group Four Industries Pty Ltd* v *Brosnan* (1991) 5 ACSR 649.

108 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders* (1991) at para 5.4.37.

109 One commentator offers the following opinion on the s592 cases: "If the judges cannot agree on what the law is, how can a practitioner possibly hope to advise his client, and how can lawyers possibly expect the commercial community to respect the law?": Sutherland, G, "The Need For Certainty in Commercial Law" (1991) *Com LQ* (No 4) at 4.

110 Above n70 at 2088-90.

111 *Corporations Law*, ss728, 730 and 1084.

regulatory scheme already contains two different means for determining the application of particular provisions of the *Corporations Law*. Courts undertake this as part of their dispute resolution role. The ASC also has the power to be determining the application of certain provisions of the statute. These examples demonstrate how much of our corporate law involves the allocation of power and different levels of regulation. The critical task then becomes one of evaluating the merits of implementing bodies which have been allocated this power. In this article, I have considered the respective merits of two such bodies: courts and the ASC. I have suggested that the ASC has a number of advantages over courts in the area of corporate regulation. This analysis should be continued with an assessment of other implementing bodies involved in corporate regulation such as the Australian Stock Exchange and the Corporation and Securities Panel.