Bond Law Review

Volume 37 Issue 1

2025

The Evolution of Australian Corporate Law – Looking Back to Look Ahead

Akshaya Kamalnath
Australian National University

THE EVOLUTION OF AUSTRALIAN CORPORATE LAW – LOOKING BACK TO LOOK AHEAD

AKSHAYA KAMALNATH*

Abstract

This article aims to tell the story of the journey of Australian corporate law – its evolution, and the infrastructure supporting it (i.e., courts, regulator, and other bodies providing soft law/ guidance). It argues that the history of a jurisdiction's corporate law journey is an important consideration while attempting to tackle corporate law challenges of the present and future. The challenges of the present and future are identified as sustainable business practices, changing shareholder profile, and the impact of technology on corporate activity. While these challenges are global, ie all countries are grappling with them, Australia's response has to be suited to its own local realities and these realities are reflected in the story of how we got here. In telling this story, the article discusses hard law, soft law, efforts to simplify the corporations statute by the Australian Law Reform Commission, and the role of the courts and the market regulator in Australia. Finally, the article also contributes to the debate about corporate law convergence from an Australian perspective.

* Associate Professor, The Australian National University, College of Law, and Academic Fellow of the Center for Retail Investors and Corporate Inclusion (RICI). I would like to thank Ross Grantham, Stephen Bottomley, Pauline Ridge, Will Bateman and Leonid Sirota for helpful discussions and/ or feedback on previous drafts. I am also grateful to the two anonymous reviewers.

I Introduction

This article aims to tell the story of the journey of Australian corporate law – its evolution, and the infrastructure supporting it (ie, courts, regulator, and other bodies providing soft law/ guidance). Both internal and external forces influencing the development of Australian corporate law will be studied. This story is told with a view to pointing out future directions for Australian corporate law which could address the corporate law challenges of the present and future – sustainable business practices, changing shareholder profile, and the impact of technology on corporate activity.

To be clear, the focus of this article is not on the challenges of our times for corporate law, but rather on the story of the development of corporate law in Australia. However, this article will provide concluding thoughts on how Australian corporate law may address some of these challenges although I must acknowledge that predicting the future based on historical examples is always a challenging exercise.

The article argues that the history of a jurisdiction's corporate law journey is an important consideration while attempting to tackle corporate law challenges of the present and future. To make this argument, the article embarks on a review of the important developments which have shaped the development of corporate law in Australia and then explains how an understanding of Australia's corporate law journey might help address current and future challenges. In making this argument, the article also contributes to the literature on corporate law convergence.

Before we go any further, it is necessary to ask and answer an important question. Why does the journey of Australian corporate law matter? Especially, why does it matter for thinking about future directions? Here, I offer two reasons. The first is path dependence, which is the idea that history and context of a jurisdiction matter because of change being costly and because of the existence of a general resistance to change.[1] The second is that Australian corporate law, the way this article defines it (referring not only to the black letter law but also to other infrastructure giving effect to it, particularly the courts and regulator) has unique features which might help or impede dealing with the present and future challenges for corporate law. It is important to understand this while forging ahead. For instance, the outsized role of the regulator has meant that it is also involved in addressing some of the newer challenges of corporate law by issuing relevant guidelines. From an international perspective, debates about comparative corporate law and comparative corporate governance have not paid much

---

1 Lucian Arye Bebchuk and Mark J Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52(1) *Stanford Law Review* 127.

attention to the Australian experience.[2] So this article will add an Australian perspective to that debate.

Now, some clarifications about the scope of this article. First, this article uses 'Australian corporate law' in a broad sense ie, the phrase is intended to include not just the substance of the law but also the infrastructure within the corporate law system. I am not the first scholar to emphasise the systemic nature of corporate law.[3] My definition of 'Australian corporate law' as a system includes the rules, sources of these rules, courts, judges, regulators, industry bodies, etc. However, as Stephen Bottomley has noted, some elements of the system may be more important than others.[4] The second clarification is that this article does not aim to detail the substance of the corporate law in Australia. Rather, as mentioned above, the story is about the journey. The key aspects of this story are the role that legislation, soft law, courts, and the regulator have come to play in corporate law in the country. A brief discussion of how Australia's corporate law journey compares with other countries is also pertinent.

The remainder of this article is organised as follows. Part 2 provides a brief background about the development of corporate law in Australia. Part 3 discusses the legislative history of the main legislation governing corporations in Australia, and then discusses its features. Rather than a substantive analysis, this is a study of legislative structure. Part 4 considers the role of the courts and regulator in the evolution of Australian corporate law. Part 5 discusses the literature on corporate law convergence and provides an analysis of how the story of Australian corporate law might contribute to it. Part 6, which is also the conclusion, looks briefly at how Australian corporate law might tackle present day challenges.

II Background

Despite being a country with a strong common law tradition, Australia slowly developed its own distinct law. This is true for different areas of law including corporate law. A similar phenomenon can be seen in other

2 One of the few articles that considers the Australian experience through the comparative corporate governance lens is by Brian Cheffins: Brian Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002) 16 *Transnational Law* 13.

3 Stephen Bottomley, 'The Complexity of Corporate Law' (2022) 44(3) *Sydney Law Review* 415, 419-34.

4 Ibid 422.

former British colonies like New Zealand[5], Canada[6], Singapore[7], and India[8]. Yet, the story for each country has been different and the story for corporate law in particular is not only different in Australia compared to other countries, but also distinct from other areas of Australian law.

To a large extent, Sir Anthony Mason, during his time on the High Court of Australia ('HCA'), ie the late 1980s to early 1990s, has been credited with the development of 'a body of common law and equitable principle that was distinctly Australian'.[9] There are important public and private law judgements which can be said to have 'altered the common law in Australia' during this period.[10] Yet, for corporate law, the narrative has been different. This is not to say that Justice Mason did not decide important corporate law cases. *Walker v Wimborne*[11] is an example of a significant corporate law case where Justice Mason's judgement is often quoted with approval.[12] However, since the latter half of the twentieth century, major developments in Australian corporate law have come from the legislature.[13] Where some developments have come from the courts, it has been from the Federal Court of Australia ('FCA') or the state supreme courts.

This trend has continued been accompanied by another trend – the increasing complexity of corporate law in the country. As of 2024, we are still grappling with the problem of complexity. Not only have

---

[5] Peter Fitzsimons, 'Australia and New Zealand on Different Corporate Paths' (1994) 8(2) *Otago Law Review* 267.

[6] Camden Hutchison, 'The Patriation of Canadian Corporate Law' (2020) 70 *University of Toronto Law Journal* 107; Ronald J Daniels and Jeffrey G MacIntosh, 'Toward a Distinctive Canadian Corporate Law Regime' (1991) 29(4) *Osgoode Hall Law Journal* 863.

[7] Jiang Yu Wang, 'Making Singapore Company Law More Singaporean? -A Critical Examination of the Recent Revision of the Companies Act in the Light of Comparative Law' (2014) 14 (Fall) *The Asian Business Lawyer* 15.

[8] Umakanth Varottil, 'The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' (2016) 31(2) *American University International Law Review* 253.

[9] Stephen Gageler, 'The Coming of Age of Australian Law' in Barbara McDonald, Ben Chen, and Jeffrey Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (The Federation Press, 2022) 9.

[10] Ibid. While this is not indicative in and of itself, in an edited collection focused on Sir Anthony Mason's development of the law during his time as a judge and then as the Chief Justice of the High Court of Australia, there are chapters dealing with a number of areas of law; but a chapter on corporate law is glaringly absent. The section on private law has chapters on torts, trusts, contracts, estoppel, equity, restitution, conflict of laws, property, and first nations heritage, but not corporate law.

[11] *Walker v Wimborne* (1976) 137 CLR 1.

[12] The passage in question is:
it should be emphasized that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them.

[13] As Stephen Bottomley noted in 2003, 'Australian corporate law has moved from a system of primarily court-centred rules in the nineteenth and early twentieth centuries' to one where statutes, and delegated and non-statutory forms of rule-making supplanted the court Stephen Bottomley, 'Where did the law go? The delegation of Australian corporate regulation' (2003) 15 *Australian Journal of Corporate Law* 105.

various scholars expressed concerns about this issue,[14] but the Australian Law Reform Commission ('ALRC') has attempted to remedy this through a review of the provisions relating to financial services within the *Corporations Act 2001* (Cth) ('the Act').[15] However, since the scope of that review remains limited, the legislation in question, the Act, remains one of the most complex.

Beyond developments in case law and statute, the trajectory of the evolution of Australian corporate law has also been affected by other factors; namely, the specialisation of federal courts in corporate law, the way in which the Act has been drafted, and the outsized role of the regulator. It is therefore important to understand Australian corporate law in a broader sense, as explained at the beginning of this article.

III Legislation

In any jurisdiction, the fundamental problem in the regulation of corporations is that of striking a balance between having appropriate checks in place and over-regulation which can stifle growth and innovation. As Katharina Pistor and co-authors say, 'striking the right balance between flexibility and control is the key ingredient for ensuring the adaptability of the corporate form to a constantly changing environment'.[16] It is of course important to ensure that the corporate form can adapt and survive in order to secure a thriving economy.

Another way to frame this problem is to think of two regulatory approaches to corporate law – principles-based regulation and rules-based regulation. Principles-based regulation would involve a focus on setting standards by which those regulated must conduct themselves.[17] This is in contrast to the other regulatory approach of prescribing detailed rules. For better or for worse, Australian corporate law has tended to lean more towards the latter approach. To an extent, this focus on heavy legislation was defined by conditions in Australia during the first century of British settlement in Australia. It has been noted that 'the great distances between population groups and the absence of pre-existing institutional structures, laid the foundations for a system of government that was more interventionist than that in Britain'.[18] This

---

14 See, eg, William Isdale and Christopher Ash, 'Legislative morass and the rule of law: a warning, and some possible solutions', *AusPubLaw* (Blog Post, 12 May 2021) <https://www.auspublaw.org/blog/2021/05/legislative-morass-and-the-rule-of-law-a-warning-and-some-possible-solutions>.

15 Australian Law Reform Commission, *Review of the Legislative Framework for Corporations and Financial Services Regulation* (Report No 141, November 2023) ('*Review of the Legislative Framework*').

16 Katharina Pistor et al, 'Evolution of Corporate Law: A Cross-Country Comparison' (2002) 23(4) *University of Pennsylvania Journal of International Economic Law* 791, 796.

17 Julia Black, Martyn Hoper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191.

18 Stephen Bottomley et al, *Contemporary Australian Corporate Law* (Cambridge University Press, 2nd ed. 2020) 15-16.

tendency seems to have continued even after Australia became an independent country, especially in corporate law.

A *Drivers of Legislative Reform*

Corporate law reform in Australia has been driven to a large extent by local incidents – whether corporate collapses or political events. Thus, while Australia's corporate law, like those in other post-colonial nations like New Zealand and Canada, was based on the *Companies Act 1862* (UK), it was also heavily influenced by local issues like boom-and-bust cycles and political ideas of the day.[19]

Fast-forwarding now to the late 1900s, corporate collapses in the 1960s[20] had led Australia to introduce some reforms via the *Companies (Amendment) Act 1971* (NSW).[21] Thereon, political considerations influenced the consolidation of corporate law at the federal level.[22] In 1978, a cooperative scheme in which each state and territory passed the same corporate legislation was introduced by the Liberal-National coalition. This was followed by the introduction of the *National Companies and Securities Commission Act 1979* (Cth) which set up the National Companies and Securities Commission ('NCSC') which was to work with the state commissions to ensure uniformity.[23] Eventually, the *Corporations Act 1989* (Cth) was passed and after some legal hurdles, it came into force in 1990. The stock market crash of 1987 also helped facilitate this consolidation of corporate law at the federal level. The *Australian Securities Commission Act 1989* (Cth) was also passed and by this, the Australian Securities Commission ('ASC') replaced the NCSC.[24] The federal nature of the corporate law statute in the country sets Australia apart from other federations like the US (and Canada to some extent) where different states have their own corporate law statute,[25] promoting competition between the states.[26] On the contrary,

---

[19] For a discussion of the boom-and-bust stories in the 1980s and early 1990s see ibid, 16-20; Michael J Whincop, 'The Political Economy of Corporate Law Reform in Australia' (1999) 27(1) *Federal Law Review* 77, 83.

[20] This was specifically caused by the boom and crash in the mining industry. See Bottomley (n 18) 21.

[21] Peter Fitzsimons, 'Australia and New Zealand on Different Corporate Paths' (1994) 8 *Otago Law Review* 267.

[22] Ibid 271. See also Jason Harris, 'The Failure of Corporate Law Reform in Australia' in Rosemary Teele Langford (ed), *Corporate Law and Governance In The 21st Century* (Federation Press, 2023) 133–5.

[23] Niall Coburn and Kristine Goodin, 'Understanding and Researching Company Law' (1998) 6(1) *Australian Law Librarian 14,* 15.

[24] Ibid 15, 16; Fitzsimons (n 21) 271–2.

[25] For a comparative discussion of corporate law federalism in the US and Canada, see Camden Hutchison, 'Corporate Law Federalism in Historical Context: Comparing Canada and the United States' (2018) 64(1) *McGill Law Journal* 109. While thinking about different jurisdictional choices, the difference in population and size of Australia on the one hand and countries like U.S. and Canada on the other hand must be acknowledged.

[26] Emma Armson et al, *Redmond's Corporations And Financial Markets Law*, 72 (Thompson Reuters, 8th ed, 2022).

the Australian system promotes uniformity.[27] It has been said that this uniformity in Australia's corporate law 'is perhaps its most distinctive characteristic'.[28]

The *Corporations Act 1989* (Cth), rather than being discrete legislation, like the current Act was something that each state had to formally adopt into law.[29] The situation was resolved in 2001 when all the Australian states referred their constitutional powers with respect to corporate law to the Commonwealth government.[30] In the same year, the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') was introduced by which ASC was renamed as ASIC.

In addition to local events, developments in other countries have also provided inspiration for domestic reform. For instance, the statutory derivative action in the Act was based on relevant Canadian law.[31] Another example is the business judgement rule which was based on the law in the US, specifically from the American Law Institute's statement of the business judgement rule.[32] In a third, perhaps more interesting example, Australia initially introduced the say-on-pay (shareholders being able to vote on executive remuneration) based on developments in the UK,[33] but then went further and gave the measure more teeth than in the UK (known as the 'two-strikes' rule in Australia).[34] So while there might have been an initial pull away from what was received from England in the form of a legal transplant in order to suit local needs, there has also been importation of ideas from different parts of the world in later years.

In recent times, reforms in the provisions relating to insolvency of companies, specifically the introduction of the small business insolvency regime and the introduction of equity crowdfunding have

---

27 Ibid.

28 Ibid 73.

29 Coburn and Goodin (n 23).

30 *NSW v Commonwealth* (1990) 169 CLR 482 clarified that the Australian Constitution does not give the Commonwealth complete power to make laws about companies. Stephen Bottomley has observed that the High Court's biggest impact on corporate law may be from its constitutional law cases amongst which this case (also known as the incorporation case) is one: Stephen Bottomley, 'Corporations Law' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to The High Court of Australia* (Oxford University Press, 2007).

31 Lang Thai, 'How Popular are Statutory Derivative Actions in Australia? Comparisons with United States, Canada and New Zealand' (2002) 30 *Australian Business Law Review* 124.

32 Michael Legg and Dean Jordan, 'The Australian Business Judgment Rule after ASIC V Rich: Balancing Director Authority and Accountability' (2014) 34 *Adelaide Law Review* 403, 410.

33 Betty Wu, Iain MacNeil, and Katarzyna Chalaczkiewicz-Ladna 'Say on pay' regulations and director remuneration: evidence from the UK in the past two decades' (2020) 20(2) *Journal of Corporate Law Studies* 541, 542 stating that the UK was the first country to adopt 'say on pay' legislation and that similar initiatives have been introduces in other countries since then including in Australia.

34 Randall S Thomas and Christoph Van Der Elst, 'Say on Pay Around the World' (2015) 92 *Washington University Law Review* 653, 659-75; Stephen Bottomley, 'Rethinking the Law on Shareholder Initiated Resolutions at Company General Meetings' (2019) 43(1) *Melbourne University Law Review* 93, 117-18 explaining the two strikes rule and how it has played out.

been prompted by a combination of international developments and local needs.[35]

B *Structure and Complexity*

The structure of corporate law in Australia is worth noting. Underneath the level of the *Corporations Act 1989* (Cth) were the *Corporations Regulations 2001* (Cth) and policy statements from ASC.[36] After the Act was introduced the same broad structure continued. The detailed regulatory requirements are contained in the *Corporate Regulations, 2001* (Cth) which are made pursuant to provisions found in Part 9.12 of the Act. While the general assumption is that the *Corporate Regulations 2001* (Cth) are meant to contain the nuts and bolts pertaining to the legislative provisions, in Australian corporate law, they have begun to be used for more substantive purposes as well.[37] In some instances, the legislation even allows the regulations to amend or modify the provisions of the legislation.[38] Additionally, ASIC can make 'class orders' (orders that modify the applicability of certain legislative provisions for a specific class of companies) to address legislative gaps.[39] Over and above this, ASIC also issues policy statements, practice notes, and regulatory guides which are useful indicators of how ASIC will exercise its powers.[40] Unsurprisingly, and as foreshadowed in the introduction, the legislation has been criticised widely both from inside and outside Australia, for its complexity.[41] Of course, listed companies must also follow the Listing Rules and ASX Corporate Governance Principles, but this is fairly standard across jurisdictions.

The New Zealand journey provides an interesting perspective about Australia's journey. That country's Law Commission, while putting

---

35 On the introduction of the equity crowdfunding regime, see Akshaya Kamalnath and Nuannuan Lin, 'Crowd-Sourced Equity Funding in Australia — A Critical Appraisal' (2019) 47(2) *Federal Law Review* 288.

36 Bottomley et al (n 18).

37 Ibid 31.

38 Bottomley (n 13), 8-9. Bottomley argues in this article that delegated legislation is not problematic per se, and instead, might offer many benefits including flexibility and the ability to draw on the expertise of specialist bodies. I agree with this general argument. However, the accumulation of multiple rules across legislation and other levels of rules has added to the complexity of corporate law.

39 Bottomley et al (n 18) 31. See also ibid 3. ['…exemptions from (and in most cases, modifications to) the enhanced disclosure provisions (s 111AT), the restriction on directors' voting (s 196), the financial reporting and audit provisions (ss 340–342), the takeovers provisions (s 655A), and the fundraising provisions (s 741)' are examples of such class orders.]

40 Bottomley (n 13).

41 But see Stephen Bottomley, 'The Complexity of Corporate Law' (2022) 44(3) *Sydney Law Review* 415. Bottomley notes that while our system of corporate law is complex, there will always be some level of complexity in any corporate law system. Further, and more on point here, he notes that legislative structure and drafting is only one aspect of complexity. Bottomley also notes, as this article will discuss later, other elements including the regulator and its role in the system may also be adding to complexity.

forward a draft company legislation in response to a request by the government to review the legislation, considered Australia's corporate law statute.[42] It was motivated by the desirability of aligning business laws across the two countries.[43] However, it rejected drawing from the Australian legislation because it was considered 'outdated and dense in form', and 'complex and difficult legislation' and that its adoption 'would run counter to a major aim of the reform - to make company law intelligible to non-lawyers'.[44] This sentiment has been consistently echoed in Australia from various quarters. For instance, writing extra-judicially, Justice R P Austin said: '[E]very significant amendment to the corporations legislation since [1998] …has added substantially to complexity and, it has to be said, has created obfuscation.'[45]

The corporation is one of humanity's greatest innovations and its regulation holds the key to a thriving economy. But complexity has meant that the legislation speaks to lawyers rather than the subjects of the regulation (mostly business persons). This clearly drives up costs for individuals, companies, and consequently, the economy. Even beyond accessibility to non-lawyers, it has been noted that the complexity (length, lack of clarity, and lack of legislative hierarchy) has amounted to a situation where there is a 'real possibility of misunderstanding or misapplication of its provisions' even by trained lawyers.[46]

Another factor adding to complexity in Australian corporate law, is its proceduralisation, as Ross Grantham has termed it. He explains that the legislation sets out the procedure to be followed in different situations, and the players involved (board of directors in most cases) will have to comply with them.[47] For instance, in order to change the company's capital structure, the statute prescribes a certain procedure that has to be followed.[48] Chief Justice Allsop made a similar point when he said in a speech that 'there is an apparent drafting

---

42 Fitzsimons (n 5).

43 John Farrar, 'Harmonisation of Business Law Between Australia and New Zealand' (1989) 19 *Victoria University of Wellington Law Review* 436.

44 Fitzsimons (n 5) 280.

45 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 https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Assorted%20-%20A%20to%20K/austin_speeches.pdf>. See also William Isdale and Nicholas Simoes da Silva, You're almost 20, Corporations Act, https://www.alrc.gov.au/news/youre-almost-20-corporations-act/.

46 Isdale and Ash (n 14) 14citing *Casaclang v WealthSure Pty Ltd* [2015] FCA 761 (Buchanan J).

47 Ross Grantham, 'The Privatisation of Corporate Law' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 29.

48 Id. For more examples see Ross Grantham, 'The Proceduralisation of Corporate Law' (2015) *Federal Law Review* 239-43.

determination to express ideas both exhaustively and by reference to particularised lists in a deconstructed fashion.'[49] The result of this proceduralisation is that more and more detail has to be stipulated in the legislation, thus adding to the complexity.

Intentionally or not, complex legislation shows a lack of confidence in the role of the courts because the thinking seems to be that every rule must be precisely stated in detail, rather than leaving it to the courts to apply the general rules to specific facts. This seems to be a broader concern in Australia even beyond corporate law, thus resulting in a tendency towards voluminous statutes,[50] which has apparently partly been driven by the need to 'judge-proof' the will of Parliament.[51] The corollary to this is that simple legislative drafting shows faith in the judiciary. As David Wishart rightly notes in the context of New Zealand company law, simple legislative drafting is 'an implicit declaration of faith in the judiciary to make sense of the legislation and to limit and provide, exempt and except as circumstances arise'.[52] The impact of this legislative reality on the role of courts in the development of corporate law in Australia will be discussed in greater detail in Part 3 below.

C *Soft Law*

Globally, soft law refers to rules that do not have state-based enforcement mechanisms tied to them.[53] These sorts of rules have been used extensively across jurisdictions in the area of corporate law. Before discussing this type of soft law in more detail, it is useful to think about another type of soft law which has become significant in Australia – guides produced by various bodies to help understand the complex Corporations legislation. For instance, guides by the Australian Institute of Company Directors ('AICD'), ASIC,[54] and even by the legislature[55]

---

49 Chief Justice Allsop, 'Statutes and Equity' (Kenneth Sutton lecture, Minter Ellison, 12 November 2019).

50 Ross Grantham, 'To Whom Does Australian Corporate and Consumer Legislation Speak?' (2018) 37(1) *University of Queensland Law Journal* 57, 58.

51 M McHugh, 'The Growth of Legislation and Litigation' (1995) 69 *Australian Law Journal* 37, 38.

52 David Wishart, 'Reform of New Zealand Companies and Securities Law' (1992) 2 *Australian Journal of Corporate Law* 30, 33.

53 Barnali Choudhury, 'Balancing Soft and Hard Law For Business and Human Rights' (2018) *International and Comparative Law Quarterly* 961, 963. [Noting that although soft law does not have a universally binding definition, it 'may refer to "principles, norms, standards or other statements of expected behaviour" that do not create enforceable rights and duties'.]

54 As the official ASIC website explains, regulatory guides are meant to give guidance to regulated entities by explaining, amongst other things, 'when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)' <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/>.

55 See, eg, The Small Business Guide in the Corporations Act 2001.

which explain new provisions in the Act have become common. Grantham rightly notes that the increase in these soft law rules is a consequence of the complexity of the legislation.[56] Further, the whole idea of drafting legislation that does not speak to non-lawyers and then issuing soft law rules in the form of guides to ensure that the key requirements are understood by those regulated is highly inefficient.[57]

Another problem that Grantham identifies is that the body drafting the soft law guide becomes the body which in fact shapes the conduct of those who are being regulated, thus giving rise to Rule of Law concerns.[58] Not only are business persons and those who are the subjects of the law relying on soft law, but according to a recent ALRC report even lawyers 'rely heavily on ASIC guidance, and can even treat guidance as law'.[59] A further illustration of the importance accorded to soft law guides even by the courts is available in *ASIC v Healey* where Middleton J referred to an AICD soft law guide titled 'How to Review a Company's Financial Reports – A Guide for Boards' and noted that the guide reflected his 'own view of what is required of the directors in this proceeding, and what is required by the Act and the case law'.[60] This kind of positive reference from the court is certainly not problematic, yet it is significant in the context where such guides from various quarters have proliferated. Further, as discussed in Part 4 of this article, ASIC is also increasingly using guidance notes and media releases (which can be seen as soft law) to address some of the current challenges in corporate law.

In relation to soft law more commonly seen in corporate law across jurisdictions, ie, corporate governance codes which use 'comply or explain' rules (requiring companies to either comply with the rules or explain the reasons for non-compliance), they play an important role in Australia as well.[61] These codes have been the regulatory tool of choice to address some of the newer issues in corporate law, like board diversity and cybersecurity, thus making soft law an important part of the corporate law ecosystem, especially to address the present day challenges. The Australian Stock Exchange ('ASX') corporate governance principles are where these rules are located in Australia. The equivalent in the UK is the UK Corporate Governance Code. Since these rules rely on disclosures and shareholder engagement with

---

56 Grantham, 'To Whom Does Australian Corporate and Consumer Legislation Speak?' (n 50) 66.

57 Ibid 67.

58 Ibid.

59 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, November 2021) 144 ('*Interim Report A*').

60 (2011) 196 FCR 291, 337–9 [194]–[207].

61 Iain MacNeil and Irene-marié Esser, 'The emergence of "comply or explain" as a global model for corporate governance codes' (2022) 33(1) *European Business Law Review* 1.

companies to ensure compliance, the enforcement can be said to be private rather than public in nature.

D *ALRC Simplification Project*

In 2020, the ALRC was asked to inquire into the simplification of provisions of the Act relating to financial services regulation, and associated delegated legislation.[62] To be clear, this is not the first time that simplification efforts have been made. A corporate law simplification program with the objective of making the law understandable by users, was announced in 1993.[63] This program was cut short when the government changed and caused the reform efforts to take on the avatar of the Corporate Law Economic Reform Program ('CLERP') and then moved from the Attorney General's office to Treasury.[64]

There were also efficiency concerns that the simplification program sought to address. The government noted that the program 'will involve improvements designed to reduce operating costs for business, both large and small, and to enhance Australia's competitiveness in the international marketplace'.[65]

Tomasic astutely inferred from government statements from that time that the efficiency objective could be tied to the drive to modernise corporate law in the country.[66] Justice Kirby, in a 1997 publication, went one step further and observed that having an effective corporate law is crucial to Australia's ability to be internationally competitive.[67] Both issues of modernising and international competitiveness are just as important, if not more, all these years later. Today, countries are competing to provide the most attractive corporate law, in order to attract top companies, and tech start-ups in the hopes of bolstering their

---

62 *Review of the Legislative Framework* (n 15).

63 Roman Tomasic, 'The modernisation of corporations law: Corporate law reform in Australia and beyond' (2006) 19 *Australian Journal of Corporate Law* 2, 24: he cites the following statement by the then Attorney General, the Hon Michael Lavarch MP:
The simplification program is not about making great changes to the substance and fabric of our Corporations Law. Nor is it about altering the general policy settings currently reflected in the law. The central objective of the simplification program is a law capable of being understood by its users.

64 Cally Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33(2) *Melbourne University Law Review* 626.

65 Tomasic (n 63).

66 Ibid 25: Tomasic cites the following statement by the then Justice Minister and Acting Attorney-General, Duncan Kerr MP:
Now is the time to take the whole body of law inherited from the old cooperative scheme, and strip away all the unnecessary verbiage and complexity that has grown up during the century of company law development in this country.

67 Michael Kirby, 'Corporate Governance, Corporate Law and Global Forces' in Ian Ramsay (ed), *Corporate Governance and The Duties Of Company Directors* (University of Melbourne, Centre for Corporate Law & Securities Regulation, 1997).

economy.[68] This is true for Australia as well.[69] Additionally, in a situation where the global economy is grappling with supply chain issues (caused by the Covid-19 pandemic and the Ukraine crisis) and an impending recession, it is vital for the nation's corporate law to be enabling rather than impeding business activity. Further, as this article will explain in Part 4 below, more and more Australians, particularly younger Australians, are becoming investors, and this should form part of the impetus (although this is not one of the reasons articulated by the ALRC or in the submissions) for simplifying corporate law so that it is understandable by retail shareholders.[70]

The ALRC review of a section of the Act is therefore timely and important. However, a similar review of the entire Act will be needed if the complexity in the legislation is to be done away with. In the Interim Report B, the ALRC identifies four broad principles which 'should guide decisions about 'what goes where' in the legislative hierarchy and how delegated powers should be designed'.[71] These principles, if internalised throughout the Act, would address much of the issues discussed in Part 2.

The first principle is about democratic accountability and legitimacy. The prevalence of delegated legislation in Australian corporate law has already been highlighted at Part 3.2. above and the first principle seeks to address this issue. The report addresses legitimacy concerns regarding delegated legislation. In this regard, it is stated that 'maintaining the legitimacy of delegated legislation requires, at a minimum, that the democratically accountable Parliament exercise some form of control over delegated legislation and hold delegated law-makers to account'.[72]

The second principle is durability and flexibility. The idea is to have a legislation that is both durable (ie it does not need to be amended repeatedly) and flexible enough to adapt to unforeseen changes.[73] The recent Covid-19 crisis has underscored the importance of the latter point,

---

68 For example, the introduction of dual class shares in some jurisdictions has been motivated by its supposed attractiveness to technology company founders.

69 Adrian Johnstone, 'Australia's reputation for fostering startups has slipped recently. Here's what we can do to fix that' (*SmartCompany*, May 9, 2022) <https://www.smartcompany.com.au/startupsmart/op-ed/australias-startups-innovation/>; Paul Wallbank, 'Atlassian's move to the UK exposes Australia's tech investment black hole' (*SmartCompany*, January 8, 2014) <https://www.smartcompany.com.au/technology/atlassian-move-to-london-exposes-australia-s-tech-investment-black-hole/>.

70 Sergio Alberto Gramitto Ricci and Christina Sautter, 'The Educated Retail Investor: A Response to 'Regulating Democratized Investing'' (2022) *Ohio State Law Journal Online* (forthcoming).

71 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation*, (Report No 139, November 2022) 103 ('*Interim Report B*').

72 Ibid 103-4.

73 Ibid 105.

(although perhaps the Covid-19 situation was a particularly extreme type of crisis for which we need to be better prepared than to rely on flexibility in the law making process).[74]

The third principle, clarity and predictability, emphasises clarity of the primary legislation and the terms of delegation to ensure predictability. Thus, this point is also addressing the increasing reliance on delegated legislation in corporate law. On clarity at the primary legislation level, the Interim Report states that the underlying policy behind the provision should be clear.[75] Applying these broad principles, the Interim Report B rightly notes, on the issue of soft law being perceived as binding, clarity in the legislative hierarchy will reduce the need for soft law.[76]

The fourth principle, coherence and navigability, strikes at the heart of the issue of complexity in the Act.[77] The multiple levels of rules (legislation and delegated legislation) and the sheer volume of the Act have made both coherence and navigability key issues to be addressed.

While the articulation of these principles is encouraging in general, the fact that the ALRC is focused on the financial services aspects of the legislation than on core corporate law matters means that we will not see a complete overhaul of the Act. Indeed, the final report has introduced changes to the financial services aspects of the legislation.[78] A useful summary of the final report is below:[79]

> In summary, the reformed legislative framework would consist of three elements: the Financial Services Law, a Scoping Order, and rulebooks. The Financial Services Law would be primary legislation containing the key regulatory provisions. The Scoping Order would be a single, consolidated legislative instrument that adjusts the regulatory scope or boundaries. Thematic rulebooks would contain detail that gives effect to different aspects of the regulatory regime in different circumstances. Each element of the framework would be designed to make it as easy as possible to navigate and understand.

Interestingly, the report also noted that 'although it may be outside the scope of this Inquiry to recommend its creation, there would be significant benefit in a consolidated guide to legislative design applicable to all Commonwealth legislation'.[80] Thus, there is a

---

74 Luca Enriques, 'Pandemic Resistant Corporate Law' (2020) 17 *European Company and Financial Law Review* 257 arguing that 'normal-times corporate law' should be ready for emergencies similar to Covid-19 that may arise in the future.

75 *Interim Report B* (n 71) 105-6.

76 Ibid 111.

77 Ibid 106.

78 Australian Law Reform Commission, *Final Report Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Report No 141, November 2023).

79 Ibid 75.

80 Ibid 107.

recognition that the problem goes beyond financial services provisions of the Act, and perhaps applicable to drafting legislation in the country more generally.

With respect to corporate law, a point to be considered here is whether, by deciding to have a uniform Corporations law, Australia lost something important in the bargain. Would the existence of regulatory competition between the states have resulted in a state, say New South Wales, coming up with a simple principles-based statute for company law (and putting other matters like financial services law into a different statute) on the lines of what New Zealand has? Indeed, Cally Jordan wondered in her 2009 article whether '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)'.[81] Whincop had also argued that corporate law competition between states would incentivise 'states to take incorporators' preferences seriously'.[82] But perhaps the fact that Australia is much smaller with fewer states would mean that there would be less room for experimentation. In any case, that ship has now sailed.

Legislation (including delegated legislation and soft law) is one part, albeit the largest part in Australia, of the corporate law story. Courts and ASIC also play an important role which will be the focus of Part 4 below.

IV Role of the Courts and Regulator

For the most part, the courts have not been a big part of the story in the evolution of corporate law in Australia, with the exception of decisions based on common law and equity.[83] However, this is a broad generalisation and there are a few exceptions to this which will be discussed below. The purpose of making such a generalisation is not to cast the courts in bad light. On the contrary, as this Part 4 will make clear, the courts, particularly the New South Wales Supreme Court and the Federal Court have developed expertise in corporate law matters.

One reason for the courts not being responsible for major developments in corporate law is that these developments came through statute instead, especially in the second half of the twentieth century.[84] This is borne out by the fact that the courts have advanced the law as

81 Jordan (n 64).

82 Whincop (n 19) 83.

83 The operation of common law and equity in addition to statute is provided for in the Act especially in the context of duties of directors. For example, s 185 says that 'sections 180 to 184 have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation'.

84 Bottomley, 'Corporations Law' (n 30).

applicable to corporations when parties have made claims in equity rather than under the statute.[85]

Another explanation for major corporate law developments not coming from the courts is that corporate law has become more and more procedure-based in Australia. Grantham argues that this proceduralist approach (referred to in Part 3.2 above) has also contributed[86] to a reduction in the number of corporate law cases, especially on core company law issues, being heard by the courts.[87] Grantham notes:[88]

> Whereas in 1991 the majority of cases saw the courts fulfilling the traditional judicial role of interpreting statutory provisions and corporate constitutions, and applying common law doctrines, to determine the rights and duties of the litigants, by 2013 the courts were hearing only a handful of core corporate law issues and in the vast majority of those the court's role was merely a regulatory one of supervising a decision-making process prescribed by the Corporations Act or the company's constitution.

This is consistent with what other scholars have observed. It has been noted that very few decisions of the High Court of Australia have contributed to the development of corporate law principles.[89] One of the few post-1990 decisions is that of *Gambotto v WCP Ltd* which was decided in 1995.[90] Funnily enough, this decision also takes a proceduralist approach, if I may use Grantham's term to describe the phenomenon.[91] In any case, *Gambotto* received much criticism and the legislature eventually responded by limiting the impact of this decision.[92] A more recent example is the 2023 decision of *Walton v ACN 004 410 833 Ltd (in liq)* which clarified the purposes for which a liquidator could hold public examinations under s 596A of the Act.[93]

More generally, John Farrar, comparing the High Court with that of the New Zealand Court of Appeal (New Zealand's highest court at the

85 An example is the case of *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* [2017] FCAFC 74 where the full Federal Court ruled on the relationship between liability under equity and statute for the issue of accessory liability. See Pauline Ridge, 'Breaches of Duty by Corporate Officers and Directors: Accessory Liability, Account of Profits and Causation' (2017) *Companies and Securities Law Journal* 35 (8) 578 for a detailed comment on this case.

86 Grantham, 'The Proceduralisation of Corporate Law' (n 48): Grantham notes that another possible reason could be the growth of private dispute resolution mechanisms.

87 Ibid 29-30.

88 Ibid.

89 Bottomley, Corporations Law (n 30).

90 (1995) 182 CLR 432 ('*Gambotto*').

91 Grantham, 'The Proceduralisation of Corporate Law' (n 48) 236.

92 Ian Ramsay and Benjamin Saunders, 'What do you do with a high court decision you don't like? Legislative, judicial and academic responses to Gambotto v WCP Ltd' (2011) 25 *Australian Journal of Corporate Law* 112.

93 *Walton v ACN 004 410 833 Ltd (in liq)* [2022] HCA 3.

time),[94] noted that the former was more focused on black letter law while in New Zealand, there was more willingness to consider policy.[95] However, whether or not courts should be considering policy issues in private law matters is controversial.[96] In any case, Farrar's observation is consistent with what has been noted about the role of the High Court in corporate law cases.

But we also need to look beyond that court's decisions to understand the role of the courts in the development of corporate law in Australia. Since corporate law cases can be heard by state courts or federal courts in Australia, particular state courts and the federal court have developed expertise in corporate law matters over time. A study found that between 2007 to 2008, nearly 74% of all corporate law judgements were delivered in the New South Wales Supreme Court and the Federal Court.[97]

While the New South Wales Supreme Court would naturally attract corporate law cases because of majority of the businesses being located there, the Federal Court has an interesting journey through which it gained jurisdiction of corporate law matters. Initially, it was given jurisdiction over applications for judicial review of decisions and conduct of the Australian Securities Commission via the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[98] The Federal Court or FCA also had jurisdiction to decide cases under the *Trade Practices Act 1974* (Cth) (now called the *Competition and Consumer Act 2010* (Cth)) which through accrued jurisdiction, resulted in some company law issues being decided by the FCA.[99] Eventually, the FCA was given cross-vesting jurisdiction in corporate law matters in 1991 by the Corporations Law which superseded the cooperative scheme that was in existence until then.[100] Within a year of this, the FCA had decided a range of corporate law issues.[101] Once the Act was enacted, both the Federal Court and Supreme Courts of each state had jurisdiction over corporate law matters, thus creating jurisdictional competition for corporate law adjudication, similar to what is seen in Delaware in the

---

94 When Farrar published the article, Australia had abolished appeals to the judicial committee of the Privy Council but New Zealand had not yet done so.

95 Farrar (n 43).

96 See, eg, Ross Grantham and Darryn Jensen, The Proper role of policy in private law adjudication (2018) 68(2) *University of Toronto Law Journal* 187.

97 Ian Ramsay and Are Watne, 'Which courts deliver most corporate law judgments? A research note' (2008) <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1709835/64-Which_courts_deliver_most_corporate_law_judgments__22_07_08_1.pdf>.

98 Michelle Gordon, 'Corporations and Corporate Insolvency Jurisdiction of the Federal Court' in James Stellios and Pauline Ridge (eds), *The Federal Court's Contribution to Australian Law* (The Federation Press, 2018) 246.

99 Ibid.

100 Ibid 247.

101 Ibid 248.

US.[102] Since then, the FCA has decided a number of complex corporate law matters thus developing expertise in corporate and commercial law matters, just like the courts in Delaware have famously developed expertise in corporate law matters .[103] The cases decided by the FCA included cases arising in the aftermath of the global financial crisis of 2007-8, and then later cases which continue to be significant.[104]

One FCA judgement that has comments of significance to the big present-day problems of corporate law and is therefore worth mentioning here is that of *ASIC v Cassimatis*.[105] In that case, while examining the duty of care that directors owe to the corporation, Edelman J noted that directors might need to consider non-financial factors including the reputation of the company.[106] The long-lasting corporate law debate about whether corporate boards should prioritise shareholder interests above all else has become even more pertinent today in light of the urgency of sustainability issues, and the importance of ensuring that new technologies are not deployed without factoring in societal risks. A judicial decision that notes corporate reputation as an important part of the calculus of board decision making withing the framework of directors' duties outlined in the Act is significant in this context because reputational incentives have come to play an important role in corporate regulation. Corporations, too, have been alert to reputational risks, more so now in a social media age when negative publicity can spread very quickly.

Luca Enriques has rightly noted that judges matter for corporate law in order to ensure that the 'corporate law on the books (good or bad) is good off the books'.[107] He argues that for corporate law to be good off the books, the country should have honest and sophisticated judges who:

> (1) show no deferential attitude towards insiders when conflict-of-interest situations are involved; (2) are endowed with the 'nose' to sense what really is at stake among the litigants and the real causes of the dispute that have led the plaintiff to bring suit; (3) do not partake of a formalistic legal culture; (4) are concerned with the impact of their decisions on the future behaviour of corporate actors in general.[108]

---

102 Armson et al (n 26) 74.

103 Gordon (n 98) 250-1.

104 Ibid 251. *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 is an example of a case that continues to be cited to this day.

105 *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 301.

106 Vivienne Brand and Rosemary Teele Langford, '"Doing the Job That's Required"?: Social Licence to Operate and Directors' Duties' 22(44) *Sydney Law Review* 112, 119.

107 Luca Enriques, 'Do corporate law judges matter? Some evidence from Milan' 2002 3(4) *European Business Organization Law Review* 765.

108 Ibid 768, 769.

There are no issues regarding deference to corporate insiders in conflict-of-interest cases by courts in Australia. The preceding analysis in Part 3 also shows that courts, particularly in New South Wales and in the Federal jurisdiction have developed enough corporate law expertise to be credited with having the 'nose' to assess what is at stake. There is also some historical evidence of the HCA being concerned about inconsistent corporate law judgments by lower courts.[109] However, this is not a concern anymore. The questionable point may be formalism in corporate law but this might be a function of how prescriptive the Corporations legislation is rather than the judicial philosophy.[110] The *Cassimatis* decision discussed above would also signal against formalism. On balance, one can conclude that Australia has good corporate law off the books even if there are problems with corporate law on the books (as discussed in Part 2 above).

Presumably then, the corporate and commercial expertise developed in the FCA and in the New South Wales Supreme Court would mean that parties would hesitate to appeal corporate law matters to the High Court, thus allowing less scope for it to contribute to corporate law developments.

Apart from the interplay of statute and judge-made law, another important factor in the development of Australian corporate law is the oversized role[111] of ASIC, the regulator that, amongst other things, enforces the Act.[112] In a 1995 study conducted by Ian Ramsay, it was found that most enforcement actions in Australia were undertaken by the ASC (as ASIC was then called) against shareholder actions.[113] Although this study was conducted prior to the introduction of the statutory derivative action in Australia, Ramsay argued that this finding should not be troubling since the ASC was better resourced than shareholders.[114] Six years after the statutory derivative action was introduced in Australia, Ramsay along with co-author Benjamin

---

109 Kirby (n 67) 55: amongst other things, Kirby notes in this regard that in a 1993 judgement, the HCA urged appellate courts throughout the nation, and single judges, not to depart from an interpretation placed upon national or uniform legislation – such as the Corporations Law – given by another court 'unless convinced that the interpretation is plainly wrong'. *Australian Securities Commission v Marlborough Goldmines Ltd* (1993) 177 CLR 485 at 492.

110 Grantham, 'The Proceduralisation of Corporate Law' (n 48).

111 For an account of how ASIC's role and powers increased over time, see Zehra G Kavame Eroglu and Karen E Powell, 'Role and Effectiveness of ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the United States and Australia' (2020) 31 *Journal of Banking and Finance Law and Practice* 71, 73-8.

112 ASIC is 'Australia's combined companies registrar, securities and markets regulator, and financial services regulator': Pamela Hanrahan, 'ASIC and Managed Investments' (2011) 29(5-6) *Company & Securities Law Journal* 287, 287.

113 Ian Ramsay, 'Enforcement of Corporate Rights and Duties by Shareholders and the ASC: Evidence and Analysis' (1995) 23 *Australia Business Law Review* 174.

114 Ibid.

Saunders, examined its effectiveness in a study.[115] Interestingly, 27 of the 31 statutory derivative actions during this time period involved proprietary companies.[116] This suggests that there was no incentive to bring derivative actions against public companies because of ASIC's active enforcement in those set of companies.

Another significant point to note is that ASIC's wide-ranging regulatory tools include options like enforceable undertakings,[117] and remedial warnings which do not require court involvement. This is not necessarily problematic.[118] On the contrary, it indicates efficient use of resources. The point is simply that there is less scope for the court to play a role in the development of corporate law, with ASIC playing such a big role, both in a regulatory capacity and in the capacity of a body acting (on behalf of shareholders or the company) to enforce rights between parties. Teasing out the distinction between ASIC standing in the shoes of individual 'right-bearers' for the purposes of enforcing their rights and ASIC performing some more general regulatory role also helps us see how corporate law in Australia might be distinguishable from private law more generally.

The Hayne Royal Commission 2018, in the wake of misconduct in the banking and financial sectors, was critical of ASIC's 'soft enforcement' approach and instead noted with approval, the 'why not litigate' approach adopted by ASIC from October 2018.[119] However, from a core corporate law perspective, ASIC prioritising litigation over other tools alone will not change the story of the court's role on the development of corporate law in the country. As indicated in Part 3 and in Part 2 above, the substance and style of legislation forms a bigger part of the story.

Further, the soft law guidance provided by ASIC not only includes information sheets about new issues and law, regulation, and enforcement around it, but also statements about its priority areas. The latter allows ASIC to address some of the present-day challenges that corporate law is grappling with. For instance, because of the influx of

---

115 Ian Ramsay and Benjamin Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of The Statutory Derivative Action' (Centre for Corporate Law and Securities Regulation, 2006).

116 Ibid.

117 Marina Nehme, 'Enforceable Undertakings: A New Form of Settlement To Resolve Alleged Breaches of the Law' (2007) 11(1) *University of Western Sydney Law Review* 104.

118 Cf Ian Ramsay and Mihika Upadhyaya, 'Compliance Programs Introduced in Response to Enforcement by the Australian Securities and Investments Commission' (2021) 32(3) *Journal of Banking and Finance Law and Practice* 194 which finds that the lack of information about the implementation of compliance programs instituted as a result of enforcement undertakings, in the reports published by ASIC problematic because it has 'has implications for accountability, deterrence and public confidence.'

119 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 427.

'green products' in the market, one of ASIC's priority areas in enforcement in 2023 was greenwashing. To educate market participants, ASIC published articles on its website, detailing how greenwashing would amount to misleading and deceptive conduct and the applicable provisions of the Act.[120] Another such example is that of a media release on cybersecurity issued in 2023. In it, ASIC called on companies to be vigilant in the face of cyberthreats.[121] It also summarised a survey that ASIC had conducted to get a sense of the cybersecurity readiness in companies in Australia.[122] Thus, the soft law generated by ASIC might have a role to play in putting companies on notice that new issues involving sustainability, technology, etc, might implicate existing provisions of the Act and that ASIC is paying attention to this.

In Part 5 below, the article will consider how corporate law in different nations may be influencing the development of Australian corporate law.

V Convergence and Path Dependence

A study of the evolution of Australian corporate law would be incomplete without a focus on developments in other jurisdictions and more global developments. The latter is an important driver of legal reform in most countries, and the same is true for Australia.

Business persons within corporations know better than anyone that no country is entirely insulated from global forces. Justice Kirby's point about the corporate law of Australia needing to be internationally competitive also underscores this fact about living in a global economy.[123] A long-lasting line of scholarship in corporate law addresses this from the perspective of what has come to be known as the 'convergence thesis'. The most influential, albeit controversial article in this strand of literature was an article written in 2000, by Henry Hansman and Reinier Kraakman.[124] The controversy could mostly be attributed to the indignant reactions to the audacious title of the article.[125] Yet, there is some merit in the 'more modulated' text of

---

120 'Red Light for Greenwashing', *Australian Securities and Investment Commission* (Article, 7 November 2023) <https://asic.gov.au/about-asic/news-centre/articles/red-light-for-greenwashing/>.

121 'ASIC calls for greater organisational vigilance to combat cyber threats', *Australian Securities and Investment Commission* (Media Release, 13 November 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-300mr-asic-calls-for-greater-organisational-vigilance-to-combat-cyber-threats/>.

122 Ibid.

123 Kirby (n 67).

124 Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89(2) *Georgetown Law Journal* 439.

125 Hansman and Kraakman themselves admitted that the title of the article was hyperbolic. Henry Hansman and Reinier Kraakman, 'Reflections on the End of History for Corporate Law' in

their article,[126] although it too has attracted its share of criticism including in Australia.

Hansman and Kraakman wrote that the 'core functional features' of the most popular business form in the world, the corporation, had mostly converged around the world. These features were as follows:[127]

> (1) full legal personality, including well-defined authority to bind the firm to contracts and to bond those contracts with assets that are the property of the firm as distinct from the firm's owners, (2) limited liability for owners and managers, (3) shared ownership by investors of capital, (4) delegated management under a board structure, and (5) transferable shares.

This much is not controversial. The part that has come under criticism is their view that recent years (at the time of their writing) had begun to show a 'growing consensus' towards the shareholder primacy model of the corporation.[128] They maintain that three factors have driven this consensus - – the force of logic (ie this model is more efficient than its alternatives),[129] the force of example (countries with this model have shown better economic outcomes),[130] and the force of competition.[131] The last of these factors, the force of competition, is focused on the global nature of economic activity. When companies compete internationally, according to Hansman and Kraakman, those companies that operate under the shareholder primacy model have competitive advantages.[132] In addition to these three main forces, they add that the rise of the shareholder class ie, shareholding becoming dispersed rather than concentrated, further supports the shareholder primacy model. They also discuss institutional shareholders' activism supporting shareholder primacy.[133] As these shareholder groups begin to have an effect internationally, they impact corporate governance practices, which according Hansman and Kraakman, eventually impact corporate law as well.[134]

As has been mentioned earlier, this article has been much criticised from various quarters. Michelle Welsh and her co-authors wrote in a 2014 paper that shareholder welfare should not be equated with general

---

Abdul A Rasheed, Toru Yoshikawa (eds), *The Convergence of Corporate Governance: Promise and Prospects* (Palgrave McMillan, 2012) 32.

126 Ibid.

127 Hansman and Kraakman, 'The End of History for Corporate Law' (n 124) 1-2.

128 Ibid 3.

129 Ibid 12.

130 Ibid 13.

131 Ibid,12.

132 Ibid 14.

133 Ibid, 16-17.

134 Ibid 18.

welfare.[135] They noted that although share ownership had indeed expanded in Australia (like in the United States), they claimed it was in decline during the period 2010-2012.[136] However, we should note a new reality here. As per a 2020 study, public shareholding has been rising again.[137] Specifically, the study notes that there was an increase in the number of new investors even before Covid-19 caused an upswing in investment activity.[138] It also notes that the number of investors who were women and young Australians was set to increase in the next few years.[139] Recent digitisation of investment and trading, along with the lockdowns caused by Covid-19, has increased the number of retail investors (unsophisticated investors who invest smaller amounts) in the market.[140] This is a global phenomenon which has also been observed in Australia.[141] Thus, Welsh and co-authors' criticisms on this count does not hold today. On the contrary, it seems that the shareholder base has increased and democratised since the time of Hansman and Kraakman's original publication.

Let us assume that Welsh et al's more fundamental criticism that shareholder welfare cannot be equated to the total social value created by the firm, is unaffected by how much the shareholder base has expanded. Newer literature has emerged which argues that in the wake of increased investing by younger shareholders, the 'investor activism' has begun to focus on societal issues rather than short-term financial gains.[142] Another counter-point to Welsh and co-authors is that Australian law has in fact followed some global trends like the introduction of shareholder vote on executive compensation, and on this issue, has even gone further than the countries it drew from.[143]

Welsh et al mount some other meritorious criticisms to the Hansman and Kraakman article that are not immediately relevant to the discussion in this article, so I will only briefly mention them here. For

---

135 Michelle Welsh et al, 'The end of the "End of History for Corporate Law"?' (2014) 29 *Australian Journal of Corporate Law* 147, 150.

136 Ibid. ["The ASX Share Ownership survey shows that direct and indirect shareholding ('total shareownership') in Australia fell from 43% in 2010 to 38% in 2012. Direct share ownership fell from 39% in 2010 to 34% in 2012"] ASX, 'Australian Share Ownership Study' (Media Release, 21 May 2012) 3.

137 As of January 2020, 46% of Australian adults held investments outside their homes (including SMSFs, but excluding other super) see ASX, Australian Investors Study (2020) 14.

138 Ibid 15.

139 Ibid.

140 Sergio Alberto Ricci and Christina M Sautter, 'Corporate Governance Gaming: The Collective Power of Retail Investors' (2021) 22(1) *Nevada Law Journal* 51.

141 ASIC, '22-215MR ASIC releases research about investment behaviour' (Media Release, 11 August 2022).

142 Sergio Alberto Gramitto Ricci and Christina M Sautter, 'The Vitruvian Shareholder' (2024) *Florida Law Review* 113.

143 Wu, MacNeil, and Chalaczkiewicz-Ladna (n 33).

one thing, they rightly note that there are also transnational regulations at play which Hansman and Kraakman do not focus on, and for another, they argue that Australia had not strictly been on the shareholder primacy path.[144]

I will add two more challenges to the Hansman and Kraakman article here. First, shareholder activism is not the only driver of legal change. Legislative reform projects across jurisdictions have involved a survey of well-performing economies' laws. That survey then results in the adoption of ideas from different jurisdictions, with some modifications to suit local needs. For instance, New Zealand's law company law reform project initially looked to Australia's corporate law, and then dismissed it. Instead, they drew from Canadian corporate law.[145]

The second challenge is that path-dependence may be the cause of resistance to change despite the forces identified but Hansman and Kraakman and other forces (efforts of international bodies and domestic law reform efforts). Path dependence is the idea that 'a jurisdiction will be locked into a certain set of rules because it embarked on a path in the past from which it is difficult to deviate'.[146] While Hansman and Kraakman were largely focused on the substance of corporate law, there may be similar resistance to changes in the structure of corporate law as well. As described in Part 2 of this article, the current ALRC project to simplify corporate law is not the first attempt in Australia. The previous simplification project did not result in a brand-new legislation with a drastically different style. The current ALRC project to address the complexity in the corporate legislation has a focus on the legislative style, rather than substance. Even so, there are references to practices in other countries like New Zealand and UK and what can be learnt from those practices, in the ALRC interim reports.[147] Still, one cannot be confident that these ideas will be imported into Australia.

On the other side, Australia may also have lessons to offer other jurisdictions. For instance, the courts present an optimistic story from which other jurisdictions might want to borrow ideas. Similarly, ASIC, an equally important player in the functioning of Australian corporate law, might have interesting pointers for other jurisdictions.

144 Welsh et al (n 135).

145 Fitzsimons (n 21). See also Tomasic (n 63) where corporate law reform in a range of countries is discussed).

146 Martin Gelter, 'Accounting and Convergence in Corporate Governance: Doctrinal or Economic Path Dependence?' in Afra Afsharipour and Martin Gelter (eds), *Comparative Corporate Governance* (Edward Elgar, 2021) 282, 286.

147 See, eg, *Interim Report A* (n 59) 96-7.

VI Looking Ahead and Concluding Thoughts

In Parts 2 – 5 above, this article has set out the evolution of Australian corporate law and argued that the path taken so far is relevant for a consideration of future directions. It has also set out some ways in which the present-day challenges of corporate law are being addressed in Australia. This Part 6 will briefly discuss how the preceding analysis might help us think about the future of corporate law in the country.

First, some observations about corporate law reform in Australia. Jason Harris has noted that both the Corporations and Markets Advisory Committee ('CAMAC') which operated from 2002 to 2018, and the Corporations and Securities Advisory Committee ('CASAC') which operated from 1983 to 2002, played a significant role in ensuring that corporate law reform in Australia was based on comprehensive consultation and debate.[148] However, since the CAMAC was defunded, the responsibility for corporate law reform shifted to Treasury and the Parliamentary Joint Committee for Corporations ('PJC'). The ALRC, as discussed above, also has a role in corporate law reform. Haris argues that since the disbanding of CAMAC, reforms in corporate law have been mostly reactive, with short consultation timeframes compared to how it was previously.[149] Disapproving of reactive reforms, Harris looks outwards at corporate law reforms in UK, South Africa, Malaysia, and Singapore. He notes that in all these jurisdictions, a central authority steers the reform process, the process itself is guided by guiding principles and values which are foundational for the reform process, and the process is unhurried and therefore informed by broad and deep consultation.[150] Australia following a more reactive approach, according to Harris, has caused us to miss the forest for the trees. Harris instead advocates for corporate law reform which involves a consideration of foundational issues about the appropriate foundation, structure, or scope of corporate law.[151]

On structure, as this article has already noted, efforts to simplify corporate law have not been entirely fruitful thus far, possibly due to path dependence and also the lack of interjurisdictional competition between the states. So perhaps one option is to simply accept that Australian corporate law will be characterised by some level of complexity.[152] Introducing a separate, simplified statute for small businesses might be another possible option. However, by 'structure', Harris is referring to more conceptual and foundational issues. This is

---

148 Harris (n 22) 134, 136.

149 Ibid 136-7.

150 Ibid 139.

151 Ibid 140

152 Bottomley, 'The Complexity of Corporate Law' (n 3) 420. ["The history of repeated efforts to reduce that complexity suggests that this may not be a useful perspective."]

apparent from the possible themes of corporate law reforms he lists.[153] However, amongst the conceptual themes listed, is also 'the integration of digital assets and blockchain technology' in corporate law.[154] I would categorise this along with other technology related issues within the broader concern about the challenge of new technologies for corporate law (listed as the third key challenge for corporate law of the present and future in the introduction of this article). I would also argue that the first two challenges listed in the beginning of this article – sustainable business practices and changing shareholder profile – are foundational issues about the content and scope of corporate law. Despite the merits of Harris' disapproval of the current nature of corporate law reform in Australia, the reality is that the big challenges for corporate law are being dealt with by soft law. Thus, the development of various types of soft law (like AICD and ASIC guides) to offset the complexity of the Corporations Act seems to have become beneficial while addressing the big present-day challenges for corporate law. This point is discussed in more detail below.

Now, let us look specifically at issues relating to the three global challenges that corporate law is facing. There has been more attention paid to the issue of sustainability globally than to the other two challenges.[155] Issues relevant here include the human rights obligations of corporations, reducing the negative externalities of corporate activity (one example is environmental harms), and ensuring that companies maintain ethical internal cultures. On some of these issues again, soft law guides have attempted to address the gaps in common law and statute (Australia has codified the duties of directors but not excluded general law in this area). For example, AICD published a guide on sustainability in 2022.[156] In December 2022, ASIC published a guide identifying sustainability as a strategic priority in 2023 for 'global and domestic securities regulators, including ASIC'.[157] The guide states that

---

153 Ibid 141. His list consists of the following themes: the types of business entities available, corporate fundraising, the integration of digital assets and blockchain technology into corporate law, corporate groups, liability framework within corporate law, the constitutional underpinnings of the Corporations Act, and the contractual foundation of the corporate constitution.

154 Ibid.

155 For a recent example of an article attempting to address sustainability from an Australian perspective, see Rosemary Teele Langford, 'Use of The Corporate Form for Public Benefit – Revitalisation of Australian Corporations Law' (2020) 43(3) *UNSW Law Journal* 977.

156 'Bringing together ESG: Board structures and sustainability', *Australian Institute of Company Directors* (Web Page, 23 November 2022) <https://www.aicd.com.au/risk-management/framework/climate/bringing-together-esg-board-structures-and-sustainability.html>.

157 'ASIC's current focus: What are the regulator's expectations on sustainability-related disclosures?', *Australian Securities and Investment Commission* (Article, 7 Dec 2022) <https://asic.gov.au/about-asic/news-centre/articles/asic-s-current-focus-what-are-the-regulator-s-expectations-on-sustainability-related-disclosures/>.

'ASIC continues to encourage listed companies to use the TCFD's [Taskforce for Climate-Related Financial Disclosures] recommendations as the primary framework for voluntary climate-related disclosures'.[158] Here, we see ASIC's priorities being influenced by global trends and international bodies, thus providing us with an example of corporate law and corporate governance convergence. This is also an example of ASIC's role in supplying soft law to supplement the Act. Further, the ASX Principles and Recommendations states that listed companies should 'instil a culture of acting lawfully, ethically and responsibly'.[159] Sustainability is also something that the companies should consider within their risk management frameworks, per the ASX Principles.[160] All of this provides a range of resources for companies to use in order to comply with the law and maintain best practices.

The growth of the number of retail investors, and especially younger retail investors, in Australia should be carefully considered and factored into policy reform. One example is for online dispute resolution facilities to be available for retail investors.[161] Another example is to prioritise investor education.[162] ASIC, with its wide powers, would be well placed to address this. This is also an area where overseas developments will be useful to look at and learn from.

Next, technology is not only set to change how the law and legal profession operate, but also how corporations operate. On the former point, while the ALRC has already made mention of making legislation machine readable[163], there is scope for more innovation. Further, online dispute resolution based on artificial intelligence might require a simplified set of rules rather than the current complex corporations legislation.[164] On the latter point, the law may need to adapt to facilitate technological advances - for example, the use of AI and other relevant technology in corporate governance. At the same time, it may need to balance such facilitation by imposing sufficient checks to protect various stakeholders. For example, requirements to ensure

---

158 Ibid.

159 ASX Principles, Principle 3.

160 Ibid Principle 7.

161 Akshaya Kamalnath and Nuannuan Lin, 'Crowd-Sourced Equity Funding in Australia — A Critical Appraisal' (2019) 47(2) *Federal Law Review* 288, 299 [arguing in the context of equity crowdfunding that access to dispute resolution processes will protect retail investors. This can be extrapolated to retail investors more broadly].

162 Sergio Alberto Gramitto Ricci and Christina M Sautter, 'The Corporate Forum' (2022) 102 *Boston University Law Review* 1861; Kamalnath and Lin (n 161) 299 arguing that investor education is useful for retail investors in the equity crowdfunding sector and the point can be extrapolated to apply to retail investors more broadly.

163 *Review of the Legislative Framework for Corporations and Financial Services Regulation* (n 15).

164 Neil Rose, 'AI-powered bots could resolve simple disputes, says MR', *LegalFutures* (Article, 1 November 2021) <https://www.legalfutures.co.uk/latest-news/ai-powered-bots-could-resolve-simple-disputes-says-mr>.

cybersecurity. Homegrown cybersecurity scandals[165] can provide the necessary impetus while any global best practices on the issue may help shape Australia's response. Even before the legislation addresses it[166], soft law is filling the gap on some of these issues. The Australian Stock Exchange Corporate Governance Principles and Recommendations already noted in 2017 that cyber security and data breaches were issues that the company's risk management framework should deal with.[167] In October 2022, the AICD issued a guidance note on cybersecurity for directors.[168] For its part, ASIC has also issued both general guidance for companies[169] and specific guidance for customers of a company that reports a cybersecurity breach.[170] Thus we see parts of Australia's complex corporate law system playing a role in addressing new challenges.

Overall, Australian law reform, while addressing the global challenges to corporate law will need to pay attention to its unique history and features and make the most of what it has. For instance, as the discussion above has shown, the range of bodies providing soft law could contribute to new issues with which the law has not yet caught up.

---

165 Aaron Raj, 'Australian companies targeted by cyberattacks again', *Tech Wire Asia* (Article, 17 March 2023) <https://techwireasia.com/2023/03/australian-companies-targeted-by-cyberattacks-again/>.

166 The Federal government released a discussion paper proposing various options one of which is a new mandatory governance standard for public companies. See Department of Home Affairs, 'Strengthening Australia's cyber security regulations and incentives' (2022) <https://www.homeaffairs.gov.au/reports-and-pubs/files/strengthening-australia-cyber-security-regulations-discussion-paper.pdf>.

167 ASX, 'Corporate Governance Principles and Recommendations' (2nd ed, 2019) Recommendation 7.2.

168 'Cyber Security Governance Principles', *Australian Institute of Company Directors* (Web Page, 25 November 2024) <https://www.aicd.com.au/risk-management/framework/cyber-security/cyber-security-governance-principles.html>.

169 See 'Cyber Resilience Good Practices', *Australian Securities and Investment Commission* (Web Page)<https://asic.gov.au/regulatory-resources/corporate-governance/cyber-resilience/cyber-resilience-good-practices/>.

170 See, eg, 'Guidance for consumers impacted by the Latitude Financial Services data breach', *Australian Securities and Investment Commission* (Web Page, 29 March 2023) <https://asic.gov.au/about-asic/news-centre/news-items/guidance-for-consumers-impacted-by-the-latitude-financial-services-data-breach/>.