TO WHOM DOES AUSTRALIAN CORPORATE AND CONSUMER LEGISLATION SPEAK?

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I INTRODUCTION

The doctoral project upon which Laura Guttuso embarked was undoubtedly ambitious. She sought to understand the wide range of enforcement mechanisms employed by modern competition law, which span the traditional gulf between public and private law, and to develop a coherent, integrated, and effective regime. Despite being ambitious, Laura's ability as a scholar, her experience in the competition law field, and her insight left no-one in doubt that she would have more than met this challenge but for being cruelly snatched from this world.

One small aspect of Laura's project was an investigation into the insights that modern regulatory theory might hold for her research.[1] It was in relation to this that I had the honour and pleasure of meeting and working with Laura. In this short article, my aim is to consider an aspect of regulatory theory that Laura may have found useful in her overall project. The issue relates to a central tenet of regulatory theory that the goals of regulation are more effectively achieved through a range of indirect strategies that seek to create structures and processes that will lead those being regulated to the desired policy goals of their own accord. One such strategy is to engage the self-interest of the participants in the particular matter being regulated and to enlist them as active regulators and enforcers in place of state agencies. In this way the regulatory system becomes a self-executing one as the participants themselves bring about the goals of the regulation. This strategy in turn gives rise to the issue, which is the particular focus of this paper, of whether it is feasible for regulation (and particularly legislation) effectively to communicate to the participants the rights, duties, processes, and procedures that embody the regulatory goals upon which they are meant to act. Looking at attempts in Australia to implement this regulatory strategy in the fields of corporate law and consumer law, this article suggests that a more profound change would need to occur in the form and style of Australian legislation before such an approach is viable.

II LEGISLATION IS FOR LAWYERS

Historically, legislation in most common law jurisdictions was drafted by and for lawyers and judges.[2] The principal goal of the drafter was precision, not readability or

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1 The subject of regulatory theory is a vast one, but by way of general themes and overview, see Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies* (OUP, 2003) 119; Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597 and 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 33.

2 E Driedger, 'Legislative Drafting' (1949) 27 *Canadian Bar Review* 296; F Bennion, 'Don't put the Law into Public Hands' *The Times*, 24 December 1995; Law Reform Commission of Victoria, *Plain English and the Law* (Report No 9, 1987) [67].

intelligibility by ordinary citizens.[3] Accordingly, statutes were expressed in highly formal, technical, and often archaic language. They were also largely inaccessible to anyone outside the priesthood of the legal profession, being found only in the libraries of parliament, the courts, and legal professionals. Although the internet and various open access projects by government and scholarly bodies have facilitated better physical access, most of the law on the statute books remains technically and formally expressed. It also continues to be drafted against the background of the common law and thus a presumption that the reader has a body of technical legal knowledge and experience with which to read, understand, and contextualise the words of the statute.

It is in this context that the Plain English Movement ('PEM') has argued for a greater emphasis on intelligibility when it comes to drafting statutes.[4] It is an article of faith of the PEM that legislation can and should be drafted so as to be understandable by laypersons such that it might directly guide and inform their behaviour without the need for costly mediation by professional advisers or the courts. The Law Reform Commission of Victoria perhaps most eloquently stated this position:[5]

> When Parliament passes a law applying to citizens or to a selected group of citizens, its prime concern is ... with the conduct of the citizens whom it regulates or on whom it imposes burdens or confers benefits. … [T]he prime aim should be to ensure that those to whom the law is addressed act in accordance with it. The law should be drafted in such a way to be intelligible, above all, to those directly affected by it. If it is intelligible to them, lawyers and judges should have no difficulty in understanding it and applying it.

However laudable the aim of the PEM might be, one only has to the look at the size, complexity, and technicality of the Australian statute book to understand that it has had only limited success. Australian drafters seem wedded to a drafting style that expresses the law in highly technical language, convoluted grammatical structures, and elaborate organisation and numbering. Australia also seems committed to omnibus statutes that, while comprehensive of the subject area, become extremely large and daunting documents. This in turn seems driven not only by the traditional concern with precision, but by a concern to 'judge-proof' Parliament's will by addressing every possible circumstance at great length.[6] Indeed, the problem of intelligibility may have even gotten worse in that there is now so much more legislation to contend with: in 1901 all of the legislation enacted by the Commonwealth Parliament amounted to just 488

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[3] S Krongold, 'Writing Laws: Making them easier to understand' (1992) 24 *Ottawa Law Review* 495, 499. Commonwealth Office of Parliamentary Counsel, *Reducing Complexity in Legislation* (vol 2.1, 2016) [7].

[4] The literature on the subject is huge. See generally, R Assy, 'Can the Law Speak Directly to its Subjects? The Limitation of Plain Language' (2011) 38 *Journal of Law and Society* 376; J Barnes, 'The Continuing Debate about "Plain Language" Legislation: A Law Reform Conundrum' (2006) 27 *Statute Law Review* 83; D Berry, 'Audience Analysis in the Legislative Drafting Process' (2000) *The Loophole* 61; R Penman, 'Unspeakable Acts and other Deeds: a critique of plain legal language' (1993) 7 *Information Design Journal* 121.

[5] Law Reform Commission of Victoria, above n 2, [69].

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

pages, but for 1997, that figure had increased to 7,521 pages,[7] and in 2016 the 10 largest Commonwealth statutes totalled almost 20,000 pages.[8]

III Australian Corporate and Consumer Legislation as User Manuals

When seen against the background of the volume and complexity of the statute book as a whole, Australian corporate and consumer legislation stands out as reflecting a rather different approach. In these two areas, the legislation seems directed not to the normal professional audience of lawyers and judges, but to lay end-users. Rather, Parliament seems to have intended that the text of the legislation be used by end-users as a manual[9] to guide and inform their actions without the need for mediation by professional advisers or the courts.

In relation to the *Corporations Act 2001* (Cth) ('*CA*'), the re-writing of the legislation so that it communicated directly to those involved in the corporate enterprise was the central policy goal of the major corporate law reform programs of the 1990s and early 2000s. The central objective of these programs was to reduce the complexity and verbiage in corporate law and to encourage business to create wealth, prosperity, and jobs. This was to be achieved by making corporate law more user-friendly in terms of the clarity of the instructions it gave to those involved in the affairs of companies and was especially true of the *Corporations Law Simplification Program*.[10]

In the Simplification Task Force's view, the 'central objective of the program is to simplify the Corporations Law and make it capable of being understood so that users can act on their rights and carry out their responsibilities'.[11] The idea that the law ought to be directly usable by those involved in the enterprise was reiterated in the Explanatory Memorandum to the *First Corporate Law Simplification Bill 1994*:[12]

> The Law needs to be more accessible, particularly to those who are not professionally qualified in law or accountancy. They should be able to have a grasp of the general principles of the Law and an appreciation of their rights and responsibilities.

The Memorandum also noted that a 'constant complaint about the current Law is that companies cannot use the Law efficiently because of its unnecessarily complicated rules. Sometimes, parts of the Law which were intended to offer a facility to companies are seldom used'.[13] Giving as an example of this facility the rules on share buy-backs, the Memorandum states:[14]

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7 K Hayne, 'Australian Law in the Twentieth Century' (Paper presented at the Judicial Conference of Australia, Melbourne, 13 November 1999) 6. Chris Berg's analysis (*Policy without Parliament: The growth of regulation in Australia* (Institute of Public Affairs, IPA Backgrounder, November 2007, vol 19/3) 3) shows a sudden leap in legislative production in the late 1980s. Berg also shows that the output of state legislatures has increased at similar rates.

8 Commonwealth Office of Parliamentary Counsel, above n 3, 24.

9 Explanatory Memorandum, *First Corporate Law Simplification Bill 1994* (Cth), [3.7].

10 Generally, see R Grantham, 'The Proceduralisation of Australian Corporate Law' (2015) 43 *Federal Law Review* 233.

11 Corporations Law Simplification Program, *Task Force — Plan of Action* (Attorney-General's Department, 1993) 1; Explanatory Memorandum, *Simplification*, above n 8, [3.3].

12 Ibid [3.9].

13 Ibid [3.5].

14 Ibid [3.6]–[3.8].

> They run to over 40 pages and are so elaborate and demanding that many companies refrain from carrying out buy-backs because of the cost and time involved in understanding and complying with the rules. …
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> A much higher degree of uniformity will be achieved in the new buy-back rules. They are set out in the chronological order that a company must follow, so that the Law can be used almost as a procedural manual. The relevant provisions are identified in easy-to-follow tables, which can be used as indexes to the rules. … The 59 sections in the current law will come down to 11 in the simplified version.

The emphasis on communicating directly to those involved in the enterprise also underpinned the creation of the 'small business guide' within the *CA*:[15]

> One notable step towards making the Law more accessible is the small business guide that forms part of the proprietary companies amendments. It offers directors and shareholders an overview of the central rules that affect them in a way that is readily understandable. It is an introduction rather than a statement of the Law and it points readers to the operative sections.

Underpinning the Simplification Task Force's recommendation were considerations of both the Rule of Law and efficiency. It was important that those involved in the enterprise be able to understand what was required of them and that 'its content was as easy as possible to comply with'.[16] It was also important to lighten the regulatory burden on companies and make facilities in the *CA* actually useable.

The *Simplification Program* was replaced in March 1997 by the *Corporate Law Economic Reform Program* ('*CLERP*'). However, much of its work to that date was subsequently enacted under the auspices of *CLERP* by the *Company Law Review Act 1998* (Cth).[17] This reflected not only the 'dedication and accuracy of the task force',[18] but also in the importance of communicating directly to those involved in the enterprise to achieving the efficiency objectives of *CLERP*.[19] Thus, the Explanatory Memorandum to what became the *Company Law Review Act*, states:[20]

> [U]sers of the Law must find out and understand their rights and obligations under the Law — this is made difficult because the Law is expressed in unnecessarily complex language, so business users may need professional advice (e.g. from accountants or lawyers) before undertaking routine company activities.

Another important driver of the attempt to write corporate legislation in terms that spoke directly to those involved in the company was a change in the underlying strategy of regulation. Traditionally, regulation took the form of a command to the subject of the

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15 Ibid [3.10].
16 Ibid [3.12].
17 C Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33 *Melbourne University Law Review* 626, 630.
18 I Callinan, 'The Corporate Law Economic Reform Programme: An Overview' (Paper presented at the Corporations Law Update Conference, Sydney, 26 October 1998) 1–2.
19 Treasury, *CLERP — Policy Framework* (Treasurer's Office, 1997).
20 Explanatory Memorandum, *Company Law Review Bill 1997* (Cth) [2.6].

law backed by a sanction for non-compliance, so-called 'command and control'. In recognition of the failure of this direction, regulatory theory has moved to a more procedurally-oriented approach.[21] Broadly, this means that instead of directly prescribing the policy goals or desired outcomes, the legislature seeks to achieve the substantive policy goals by creating a self-balancing system that relies upon incentives designed to induce those being regulated to bring about the desired conduct or outcomes themselves. The policy goals remain public-regarding, but the mechanisms no longer rely on a direct prescription backed by sanctions imposed by external regulators such as the courts. Instead, corporate regulation focuses on the process of decision-making and the creation of largely internal governance procedures as the means of regulating the behaviour of the participants in the corporate enterprise.[22]

By prescribing the way in which a company might achieve its goals, through re-structuring its decision-making processes such that the 'right' people are involved and that the decision-making process itself is conducted in a way that is aligned with the State's social-economic policies, the overall regulatory goals for the company are achieved. Thus, corporate regulation increasingly reflects an ideal model of decision-making that embodies the essential features of procedural correctness. These features are broadly that the decision-makers are impartial, that they are informed, and that the decision is rational or reasonable.

A proceduralised approach is evident throughout the *CA*, but two brief examples will suffice for present purposes.[23] The perennial problem of directors' conflicts of interest was traditionally addressed by proscribing such conflicts and sanctioning directors who continued to act while conflicted. Those aggrieved enforced this proscription through the courts. However, sections 191 to 196 of the *CA* now manage rather than prohibit the conflict by way of a process of disclosure, in a prescribed form, to designated groups. The procedure vests in those designated groups the power to approve the conflicted director's continuing involvement, to validate tainted transactions, and then provides an escape valve should the process fail in the form of empowering the regulator (Australian Securities and Investment Commission) to make exemptions.

The regulation of changes to the company's capital structure — reductions in capital, companies buying their own shares, and providing financial assistance — now also reflects a proceduralised approach.[24] Historically, changes in capital structure were simply prohibited due to the risks that management would use changes in capital to injure shareholders or creditors. The current regime, which is typical of a proceduralised approach, seeks to manage rather than prohibit capital changes. The risks associated with changes are addressed by creating an approval process within the company. This process

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21 See Grantham, above n 10.

22 This approach is seen, for example, in the regulation of directors' conflicts of interest. Traditionally, the issue of a conflict of interest was dealt with by a rule (at common law) which prohibited a director from acting while conflicted and was enforced by claims brought in the courts by those who suspected that the rule had been infringed. The solution to this issue now found in the *Corporations Act*, is the creation of a procedure by which the potential procedural impropriety is recognised and addressed. Sections 191 to 196 require that a conflicted director disclose the conflict and prescribe how the disclosure is to be made and to whom (*Corporations Act 2001* (Cth), s 191(1). The procedure then addresses the principal consequences of a conflict (whether the director may vote and the validity of the tainted transaction), and then finally provides an escape valve in the form of a delegation to the Australian Securities and Investment Commission to make exemptions.

23 The case for a proceduralised approach now being a defining characteristic of Australian company law is made fully in Grantham, above n 10.

24 *Corporations Act 2001* (Cth), ch 2J.

allows directors to achieve their commercial aims (and, by not frustrating their goals, the regulation encourages compliance) and provides oversight in the form of approval by shareholders. The quality of that approval is then assured by prescription of the details of the information that must be provided to shareholders. There is then a final 'back stop' assurance that the underlying risks have been addressed in the form of intervention by ASIC.[25]

A proceduralised approach to regulation may not necessarily entail that the legislation embodying the rules is written to speak directly to end-users (the participants in the corporate enterprise). However, such an approach does have a strong tendency in that direction. In seeking to create a self-executing system within the company, where external intervention by courts or regulators is only ever a last resort, it is clear that a proceduralised approach will work much more effectively and efficiently if the rules themselves communicate the processes directly to those who are meant to implement and follow them. If the participants in the enterprise can understand and implement the rules without the need for professional advice, let alone judicial guidance, they are much more likely to 'buy into' the process rather than seek to comply only minimally or evade the process altogether.

The reforms in the late 2000s to Australia's consumer guarantee law ('CGL') also reflect the goal that the text of the legislation should be intelligible to, and directly useable by, the ultimate end-user, this time consumers. The language, style, and substance of the CGL that was included in the *Competition and Consumer Act 2010* (Cth) ('*CCA*') was a response to empirical evidence that the substantively similar, but traditionally expressed, provisions of the *Trade Practices Act 1974* (Cth) ('*TPA*')[26] were inaccessible to consumers. Consumers were thus unable to rely effectively on the rights afforded by the *TPA*. This undermined consumer confidence, which in turn harmed the functioning of the economy.

In its report, *Consumer Rights: Reforming statutory implied conditions and warranties*, which formed the basis of the consumer guarantees provisions in the new *CCA*, the Commonwealth Consumer Affairs Advisory Council ('CCAAC') noted that:[27]

> Consumer law, perhaps more than any other law, needs to be comprehensible to individual consumers and businesses alike. In such an extensive and important area of the law, consumers need to understand their rights and businesses need to understand their obligations without the need for recourse to expensive legal advice.

The CCAAC concluded that:[28]

> … making it simpler for individual consumers to enforce their rights will increase the incentive for manufacturers and retailers to comply with their obligations. Wherever possible, there is a need to make the law self-executing and eliminate recourse to expensive litigation.

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[25] Generally, see J Hill, 'Visions and Revisions of the Shareholder' (2000) 48 *American Journal of Comparative Law* 39.

[26] The *CCA* renamed the *TPA* as well as making changes to the substance of consumer protection regime.

[27] Commonwealth Consumer Affairs Advisory Council, *Consumer Rights: Reforming statutory implied conditions and warranties* (Final Report, 2009) 4.

[28] Ibid 7.

The new CGL thus rejected technical legal terms to express the standards required and replaced the remedial regime of the *TPA*, which relied on the largely inaccessible common law of contract, with a new self-contained statutory regime.

The attempt in these two areas to address the text of the legislation to the ultimate end-user, without the need for mediation, also perhaps reflects the nature and function of the law in these areas. Unlike many parts of the law, corporate and commercial law exist to facilitate the activities of those engaged in business. It is thus less about the traditional proscription and sanctioning of certain acts or behaviours than it is about giving those engaged in commerce the means and facilities to carry out their own wishes, plans, and projects. Accordingly, the need to communicate directly to those whom the legislation is seeking to assist is much greater and more obvious.

The strategy pursued in the *CA* and the CGL of attempting to create self-executing manuals that the ultimate end users might directly rely upon poses two related questions. First, as a matter of principle, is it possible to construct legislation so that it speaks directly to its ultimate users? Secondly, is the way in which this has been done in the *CA* and CGL fit for that purpose?

IV A VIABLE APPROACH?

Many remain sceptical that it is possible or desirable for the text of legislation to be drafted to speak directly to the lay reader without the need for its meaning to be mediated through professional advisers. Some, like Justice Nazareth, reject the idea outright: 'The sooner such fanciful notions are abandoned the quicker we should be able to get on with the business of achieving … a measure of simplicity and intelligibility'.[29] Others see a division of function. The text of the statute and the communication of its meaning are distinct issues and should be addressed separately. If, and to the extent that, the meaning must be communicated beyond the priesthood, that is the role of administrative measures such as guidelines or government awareness campaigns.

Any attempt to resolve the issues at the heart of the PEM, which would necessarily draw on insights from disciplines such as philosophy, semiotics and psychology, are of course well beyond the scope of this brief article. Nevertheless, the experience in New Zealand in respect of both corporate and consumer law suggests that it is at least possible to make legislation more accessible than has historically been the case.

The New Zealand *Companies Act 1993* ('*NZ Act*') proceeded on the basis that the *NZ Act* was to contain only the core principles of company law[30] and that it was to be expressed in a way that was accessible to those involved in the management and operation of companies:[31]

> [T]hose needing to know what their rights and obligations are should not be driven immediately to seek legal advice. The Companies Act should be the statement of first recourse. Directors and shareholders and not simply their professional expert advisers should be able to use it.

The result was a statute of a mere 397 sections expressed in a concise 132,000 words.

One measure of the success of the *NZ Act* as a largely self-executing document is the huge decline in the volume of corporate litigation since the *NZ Act* was passed. The

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29 C Nazareth, 'Legislative Drafting: Could our Statutes be Simpler?' (1987) 8 *Statute Law Review* 81, 90.

30 Law Commission, *Company Law: Reform and Restatement* (NZLC R9, 1989) [16].

31 Ibid [123].

average number of reported cases in the years following the introduction of the *NZ Act* dropped by half, and over the last few years there has been an average of only 15 reported cases per year.[32] Although a simple count of the number of cases reported is a fairly crude proxy, the magnitude of the decline does suggest that the New Zealand legislature's aim of a largely self-executing *NZ Act* has been achieved to a considerable extent.

Similarly, the New Zealand *Consumer Guarantees Act 199*3 seems to have been very successful in communicating to consumers the substance of their rights. Empirical data referred to by both the CCAAC and in the Explanatory Memorandum to the *CCA*, suggested that whereas less than 20% of Australian consumers knew the rights conferred by the *TPA*, in New Zealand over 80% 'correctly indicated that they would be eligible for a replacement, refund or repair of a faulty product and only 16 per cent of consumers indicated that they are not confident that the New Zealand legislation would protect them if they have a problem'.[33] The decision in Australia to replace the consumer protection provision of the *TPA* with the CGL, even though the new regime was substantially very similar, was driven by the evidence that consumer rights could be expressed in a way that communicated directly with consumers. As Paterson noted:[34]

> The CGL model, however, was not adopted on the basis of harmonisation with overseas models. The key consideration appears to have been the view that the *Consumer Guarantees Act 1993* (NZ) is more accessible to consumers than were the relevant provisions in the *TPA* …

V Are the Corporations Act and Consumer Guarantees Legislation Fit for Purpose?

Assuming that it is possible in principle for a statute to be drafted in such a way as to be a direct source of information and guidance for users, the next question is whether the manner and form of the *CA* and CGL are fit for that purpose.

Looking first at the *CA*, the most notable feature is its length: at over 2,600 sections and 750,000 words, it is a very large document. This length is attributable in part to its attempt to be comprehensive of all matters to do with companies. Thus, while most common law jurisdictions deal with matters of insolvency and financial markets regulation in separate legislation, in Australia all of these matters are bundled into the *CA*. From the perspective of being comprehensive this makes some sense, but any advantages come at a high price in terms of user-friendliness.[35] The sheer volume of the *CA* also reflects the 'one-size fits all nature' of Australian corporate legislation:[36] the *CA* seeks to regulate both the smallest one-person company and the largest publicly listed

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32 See R Grantham, 'Company Law' in M Russell and M Barber (eds.), *The Supreme Court of New Zealand 2004-2013* (Thomson Reuters, 2015) ch 4. The figures suggest a steady decline in the number of cases from 1997, followed by a period of levelling out from around 2007.

33 Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, [25.98].

34 J Paterson, 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35 *Melbourne University Law Review* 252, 259-260.

35 Jordan, above n 17, 628.

36 R Grantham, 'The Privatisation of Australian Corporate Law' in R Levy et al (eds.), *New Directions For Law In Australia: Essays In Contemporary Law Reform* (ANU Press, 2017) 32.

companies. The result is that, for the 99% of Australia's 2.5m companies which are micro- or small-businesses, there are large parts of the *CA* that are completely irrelevant.

As many have noted, the drafting of the *CA* is also problematic from a user-friendliness perspective.[37] Quite apart from the relentless attempt to detail every eventuality that is a feature of all recent Australian legislation, the *CA* has been the subject of a seemingly endless number of amendments, deletions, and insertions. This is reflected in the convoluted numbering and explains how the *CA* can have sections with four capital letters.[38] The process of tinkering also leaves behind confusing remnants of approaches and provisions long since changed or abandoned. Thus, for example, s 115 imposes a limit on the size of partnerships. This provision is now a pointless vestige of a distinction drawn in the original companies legislation between partnerships and companies based on the size of the business: partnerships were for small businesses, the new corporate form was for large businesses. This approach had, however, been abandoned before the end of the nineteenth century.

More fundamentally, however, this tinkering reflects a deeper conceptual incoherence in the *CA*. At the heart of the *CA* is an entity that was created by the first modern companies legislation in 1844. However, over the years vast slabs of modern financial regulation have been bolted on to it and more crucially, our deeper conception of what the company is and how and why we allocate control rights has changed fundamentally. In 1844, all parliament had done was to clothe existing deed of settlement companies, which were legally partnerships, with some of the attributes of juristic personality.[39] The company (referred to as 'they' at this time) was thus an association of investors — properly referred to as 'members' — who hired specialist management and whose doctrinal basis in the law of contract was expressed in what is now s 140 of the *CA*. Since then, however, our conception of the company has changed fundamentally and in often inconsistent ways. On the one hand, we now allow companies to be created with a sole investor-director. This, of course, makes the idea in s 140 of a contract as the basis of the company meaningless and confusing. We have also rejected the contractual association conception as both unworkable and inappropriate. It was unworkable because we could not allow the full implications of contract law to apply: we could not have individual members being able to enforce their contract and the s 140 'contract' thus became completely denatured. It became inappropriate once we recognised the full implications of legal personality. Members could no longer be said to own the assets (or the company itself), but only the shares they held and, while as 'members' they might have been the ultimate authority, as mere holders of shares they had only those rights which the company chose to vest in them.

Under the influence of economic theories and the emergence of large companies our underlying conception of the company has been turned on its head: we have gone from a nineteenth century capital-hires-management conception to one where capital is just one of many inputs into the operation of the enterprise which is directed by management who are effectively free from shareholder control. The result is that trying to understand the *CA* is more of an exercise in sifting through legal archaeological remains than reading a coherent statement of the nature, purpose, and governance of the modern company. The drafting difficulties, convoluted organisation, conceptual

[37] See Jordan, above n 17, and the references cited therein.
[38] For example, s 601SCAA.
[39] R Grantham, 'The Limited Liability of Company Directors' [2007] *Lloyd's Maritime and Commercial Law Quarterly* 362.

ambiguity, and sheer prolixity combine to make the *CA* 'obese and user-unfriendly'[40] and an example of 'how not to legislate on commercial matters'.[41]

Turing to the CGL, it is of course of more recent origin and does not have the baggage of the hundreds of years of history that the *CA* does. The CGL provisions were, therefore, always likely to be much cleaner and simpler in their expression in the legislation. The CGL has also benefited from being effectively restatements of legislation that has a proven track record of user-friendliness in New Zealand and Canada, both of which have a history of simpler drafting styles.

Consistently with the various reports on which the CGL was based,[42] the language and concepts that have been used to express the rights of consumers undoubtedly make it more user-friendly. It replaced older technical concepts such as of 'merchantable quality' and abandoned technical distinctions between conditions and warranties. Instead, the CGL uses the more plain English concepts of 'acceptable quality' and major and non-major failures. At least until they become smothered in judicial gloss, these concepts are much more likely to convey to consumers the content of their rights. The CGL also moved from the essentially contract law remedial scheme employed by the *TPA* to a self-contained statutory remedial regime. This means that the remedies can be understood by consumers without needing to understand the wider common law of contract.

The major problem that remains with the CGL in terms of making it a self-executing regime that avoids the need for consumers to get professional advice to know their rights, is that, like its predecessor in the *TPA*, it is buried within a very large compendium statute that deals with a range of other matters, such as competition law and the regulation of market conduct. This can be compared to the consumer legislation in New Zealand and Canada on which it was based. In both New Zealand and Canada, the CGL is in standalone pieces of legislation that, in the case of New Zealand, runs to a mere 56 sections, over 27 pages, of which only about 40 sections are core. While, therefore, it seems plausible that consumers might have the enthusiasm and ability to read 40 or so sections, no-one could for a moment think that this could be true of the 283 pages of the *Australian Consumer Law*, even if extracted from the 1,494 pages of the *CCA*.

It may be objected, as some have done, that the idea that the legislation itself should be intelligible to a lay reader is to confuse the distinct roles of stating the law, which needs to be done as precisely as possible, and the communication of the substance of the law to the public. As Barnes notes, what we may perceive as unintelligible statutes may more properly be understood 'as a problem of inadequate communication of the law by the executive government'.[43] There may be some force in this argument, but acceptance that statutes can (and should) remain intelligible only to lawyers may have undesirable and serious consequences. Principal among these is the risk that separate statements of the meaning of statutes would not just communicate the law, but that they would *replace* the statutes for all practical purposes. The codes of corporate governance best practice which have emerged over the last 30 years may illustrate this. These codes (like the Small Business Guide in the *CA*) are not 'law' and are written explicitly to speak to those

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[40] J Farrar and P Hanrahan, *Corporate Governance* (LexisNexis, 2017) [1.10].

[41] D Goddard, 'Company Law Reform — Lessons from the New Zealand Experience' (1998) 16 *Company and Securities Law Journal* 236, 254.

[42] Principally, the CCAAC's report, above n 23, and the Productivity Commission, *Review of Australia's Consumer Policy Framework*, (Inquiry Report No 45, 2008) vol 2.

[43] J Barnes, 'When "Plain Language" Legislation is Ambiguous — Sources of Doubt and Lessons for the Plain Language Movement' (2010) 34 *Melbourne University Law Review* 671, 706.

involved in the corporate enterprise. Directors of companies (at least the 99% that are small companies) seeking to find guidance and instruction do not have recourse to the *CA*, but to user guides such as these codes. This has two important implications. First, much of the effort in making the statute precise is wasted if it is not going to shape the behaviours of those being regulated by it. In many areas of law any differences between the statute and the text of its communication would be held in check by resort to the courts. However, in areas such as corporate and consumer law, where the law is largely self-executing, or where litigation is not a practical option, it is the rights and duties and processes and procedures that have actually been communicated to the users that will shape and guide their behaviour, not the law in the statute books. Secondly, as a corollary, if we accept a separation of the text of the statute and its communication to users then it is the body that drafts and disseminates the communication to users that becomes the real force in shaping conduct. Thus, it would be bodies such as the ASX, ASIC and ACCC that become the real regulator of society, not parliament. This would have profound implications for both the Rule of Law and the legitimacy of corporate and commercial regulation.

VI Conclusion

The underlying premise of the PEM has obvious merit. It ought to be possible to express statutes clearly[44] and the Rule of Law is itself premised on the ideas that the subjects of the law can and do know the law and that the law is 'ours' rather than something 'they' impose upon us. The aim of the *CA* and CGL to bypass mediation of the meaning of the statute through expensive professional advisers and litigation is thus clearly a well-meaning one. However, in its execution it fails miserably. Parliament's intent to speak directly to those who use the law has not survived intervention by Parliamentary Counsel and departmental lawyers.[45] Unless and until Australia weans itself off its love affair with complex, technical, confusing, and voluminous legislation that is seen as the solution to every possible social and economic problem, the statute book of Australia will remain as inaccessible to the general public as it has always been.

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[44] 'Everything that can be said can be said clearly': L Wittgenstein, *Tractatus Logico-Philosophicus* (trans. D Pears and B McGuinness, Routledge, 2001) 4.116.

[45] Demonstrating its lack of self-awareness, the Commonwealth Office of Parliamentary Counsel says on its website: 'Over the past 2 decades, OPC has done substantial work on plain language and is now recognised as a leader amongst drafting offices in this area. However, legislation continues to be complex': <www.opc.gov.au/clearer/index.htm>.