
INTERNATIONAL CONFERENCE ON CORPORATE GOVERNANCE + SUSTAINABILITY

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The Role of Regulatory Intervention in the Affairs and Governance of Corporations

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“The limited liability corporation is the greatest single discovery of modern times even steam and electricity are far less important than the limited liability corporations.”

Nicholas Murray Butler
President Columbia University
16 November 1911

1. Types of corporate exposure risk:

- **Agency Risk** for investors
 - impropriety (malfeasance)
 - negligence (misfeasance)
 - mere underperformance
- **Solvency Risk** for stakeholders
 - culpable behaviour causes
 - inherent business risks
- **Community Risk** for “neighbours”
 - environment, OH&S, human rights etc
 - driven by contemporary social mores
- **Dependency Risk** for society generally
 - banking system, utilities, communication, etc failures
 - prudential governance policy controls

EACH RISK NEEDS CAREFUL ANALYSIS TO DETERMINE ITS
APPROPRIATE TREATMENT MEANS

2. “Principled” Regulatory Philosophy

There is:

- behaviour that must be prescribed, or proscribed, essential for the orderly conduct of society.
- not an effective system already operating [OR] there is market failure.
- fairness and equity in the regulation in the context of:
 - mischief to be addressed;
 - benefit to be derived.
- reasonable prospect of regulation being enforced.
- regulatory efficiency:
 - compliance burden costs;
 - value of the social benefit.

REGULATIONS WHICH DO NOT SATISFY ALL OF THESE TESTS WARRANT REVIEW AND REDRESS

3. Tools available to the Regulator

- policy influence
- information dissemination
- education and training
- licensing
- mandatory codes and standards
- offences/enforcement
 - jail
 - fines/penalties
 - banning orders
 - compensation/remediation
 - community service
 - public apology / “name and shame”

REGULATORS NEED TO USE THE MOST APPROPRIATE TOOL IN THEIR TOOLBOX FOR THE JOB AT HAND RATHER THAN TO OVERLY RELY ON OFFENCES/ENFORCEMENT

4. Evolving “Unprincipled” Regulatory Practices

- “derivative” or “of fact” deemed offences
- pernicious “civil” offences (with lower prosecutorial burdens)
- reversal of presumption of innocence/burden of proof
- prosecutorial powers in hands of vested interest groups
- non judicial executive “infringement notices”
- coercive information gathering powers by regulators

THESE PRACTICES WARRANT CRITICAL REVIEW AS BEING UNPRINCIPLED AND OFFENSIVE IN THE CONTEXT OF THE RULE OF LAW

5. Getting Regulation Right

- case for regulatory reform must be established
- all alternatives must be properly considered
- cost to business must be calculated
- effective stakeholder consultation must first be held
- adequate Regulatory Impact Statement must first be prepared
- post implementation reviews must be committed to

THESE PRACTICES SHOULD BE MANDATORY BEFORE ANY NEW
REGULATION/LEGISLATION IS AUTHORISED

6. Special plight of corporate directors & officers

- directors as the “hearts and minds” of corporations
- executives as the “arms and legs” of corporations
- society seeks retribution for corporate failure in the form of “a soul to damn and a body to kick.”
- “limited liability” is a shareholder, not a director, protection

“DID YOU EVER EXPECT A CORPORATION TO HAVE A CONSCIENCE WHEN IT HAS NO SOUL TO BE DAMNED, AND NO BODY TO BE KICKED.”

Edward, First Baron Thurlow
1731 - 1806

7. Case for regulatory reform

- regulation of corporate endeavour should be:
 - principled and considered
 - effective and efficient
 - reasonable and fair
- need for a universal and uniform protective business judgement rule (BJR) where the director:
 - acted reasonably in all the circumstances
 - acted honestly in good faith
 - held a rational belief the decision was in best interests of the corporation

WITHOUT PRINCIPLED AND APPROPRIATE REGULATION, AND WITHOUT EFFECTIVE BJR PROTECTION, IT IS SOCIETY WHICH BEARS THE RISK OF UNINTENDED CONSEQUENCES

8. Risk of Unintended Consequences

- avoidance of corporate office by capable people to avoid liability and reputational risk
- unwarranted distraction from constructive enterprise value creation
- vacation of public corporate endeavour in favour of private equity
- cost and efficiency burdens
- insidious effect of regulatory compliance being a sufficient condition without regard as to what may be done, should be done, and is right to be done.

IMPORTANTLY THIS INCLUDES THE RISK OF LOSS OF INTERNATIONAL AND STRATEGIC COMPETITIVENESS

9. Conclusion

- there is a proper role, in appropriate cases, for regulatory intervention to reasonably hold corporate directors and officers to account
- where regulation is appropriate it needs to be principled, considered, fair, effective and efficient
- there is compelling argument to review some existing regulatory practices that have evolved and which are offensive to the Rule of Law
- unless balance is found, society will bear the risk of unintended consequences including the loss of international and strategic competitiveness