

# *The Complexity of Corporate Law*

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## *Abstract*

Many claims have been made about the complexity of Australian corporate law, prompting a succession of inquiries and legislative reforms. Despite this attention, there has been little examination of the idea of complexity itself. It is assumed that we know what it is and what causes it. Looking behind those assumptions, this article draws on the work of complexity theorists to analyse why our system of corporate law is complex and to argue for realistic expectations in efforts to address the ‘complexity problem’.

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Ideas thus made up of several simple ones put together, I call complex; such as are beauty, gratitude, a man, an army, the universe ...<sup>1</sup>

I hold it equally impossible to know the parts without knowing the whole, and to know the whole without knowing the parts in detail.<sup>2</sup>

## I Introduction<sup>3</sup>

The Australian system of corporate and financial services law is complex. To most observers this is an unremarkable observation, in two senses. First, no one disagrees with it; academics, judges, corporate regulators, law reformers and legal practitioners have made the same point, in different ways, for many years.<sup>4</sup> Second, having made the point, few people then remark on it; the observation is repeated rather than analysed. It serves as a brief introduction to more detailed arguments about the need for law reform, legislative simplification, increased regulatory enforcement or resourcing, and more (or less) freedom from regulatory control for specified categories of actors in the corporate world. Our attention is thus drawn to the proposals and inquiries that are said to follow from the apparently self-evident claim about corporate law's complexity.

There is no shortage of reform activity here. The 'complexity problem' (my term) has prompted or featured in several inquiries into the operation of corporate and financial services law in Australia since the early-1990s. The most recent of these (at the time of writing this article) is the Australian Law Reform Commission ('ALRC') review of the legislative framework for corporate and financial services

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<sup>1</sup> John Locke, *An Essay Concerning Human Understanding* (Kay & Troutman, 1847) bk 2, 110. Noting the gendered language of Locke's time, I have borrowed the use of this quote from Melanie Mitchell, *Complexity: A Guided Tour* (Oxford University Press, 2009) 3.

<sup>2</sup> Blaise Pascal, *Thoughts*, tr WF Trotter [trans of: *Pensées* (1670)] in CW Eliot (ed) *The Harvard Classics* (PF Collier and Son Company, 1910) vol 48, 31. I have borrowed the use of this quote from Sean Snyder, 'The Simple, the Complicated, and the Complex: Educational Reform through the Lens of Complexity Theory' (Education Working Papers No 96, Organisation for Economic Co-operation and Development, 2013) 11.

<sup>3</sup> The underlying argument in this Introduction is adapted from JB Ruhl, 'Law's Complexity: A Primer' (2008) 24(4) *Georgia State University Law Review* 885.

<sup>4</sup> See, eg, Sir Anthony Mason, 'Corporate Law: The Challenge of Complexity' (1992) 2(1) *Australian Journal of Corporate Law* 1, 1 (referring to the 'Byzantine complexity' of the corporations legislation); Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14(4) *Sydney Law Review* 474, 476 (describing '[t]he Australian tradition' of 'complex and detailed' corporate law statutes); Cally Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33(2) *Melbourne University Law Review* 626, 627 (describing the *Corporations Act 2002* (Cth) ('*Corporations Act*') as '[c]omplex, ungainly, badly drafted, internally inconsistent and conceptually troubled'); Justice Steven Rares, 'Competition, Fairness and the Courts' (FCA) [2014] *Federal Judicial Scholarship* 10, [61] (referring to the 'discordant patchwork' in the *Corporations Act*); *Oreb v Australian Securities and Investments Commission* [No 2] (2017) 247 FCR 323, 337 [54] (Rares, Davies and Gleeson JJ noting the 'over complex verbiage' of the *Corporations Act*); Australian Law Reform Commission ('ALRC'), *Legislative Framework for Corporations and Financial Services Regulation: Initial Stakeholder Views* (Background Paper FSL1, June 2021) 1 [5] (noting that '[t]here has been a level of consensus amongst stakeholders that the law is "too complex" and in need of simplification').

regulation that commenced in September 2020.<sup>5</sup> The terms of reference for that review emphasise the need to ‘simplify financial services laws’,<sup>6</sup> and direct the Commission’s attention to several earlier reports and inquiries in which the complexity of different aspects of the corporate and financial services system has been a concern. These include the Final Report of the Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry in 2019;<sup>7</sup> the 2017 Treasury review of the enforcement regime of the Australian Securities and Investments Commission (‘ASIC’);<sup>8</sup> and the 2014 inquiry into the financial system in Australia.<sup>9</sup> Predating these inquiries, though not referred to in the ALRC’s terms of reference, was the work of the 1993 Corporations Law Simplification Taskforce.<sup>10</sup>

When significant and official consequences follow on from the claim about complexity, such as calls for greater resourcing of enforcement or formal inquiries into legislative reform, then it is appropriate to reconsider the claim so that we can be sure that there is a clear understanding about its meaning and implications. Sometimes, apparently non-controversial propositions require closer scrutiny. In the United States, Ruhl makes the same point, referring to the legal system at large:

[W]hen one claims that Proposition X [such as the need for legislative reform] follows from the fact that the legal system is complex ... one necessarily must develop or adopt a theory of what complexity is, otherwise how can we conclude that it is *complexity* that leads to the truth of the proposition?<sup>11</sup>

In law, as in other disciplines, the way in which a problem is defined will determine or, at least, shape the solutions that are applied to it. Assuming for the moment that complexity is always a problem (more on this later), a definition that focuses on legal

<sup>5</sup> ALRC, *Review of the Legislative Framework for Corporations and Financial Services Regulation* (Web Page) <<https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>>. See also ALRC, *Interim Report A: Financial Services Legislation* (Report No 137, November 2021) (‘*Interim Report A*’).

<sup>6</sup> ALRC, *Review of the Legislative Framework for Corporations and Financial Services Regulation: Terms of Reference* (Web Page) <<https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/>>.

<sup>7</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 494–6 (‘*Banking Royal Commission Final Report*’) (noting the need to simplify financial services laws).

<sup>8</sup> The Treasury (Cth), *ASIC Enforcement Review* (Taskforce Report, December 2017) 95 (noting the complexity of the penalties framework in the *Corporations Act* (n 4)).

<sup>9</sup> The Treasury (Cth), *Financial System Inquiry* (Final Report, November 2014) noting the complexity of the financial system.

<sup>10</sup> In 1993, the Commonwealth Attorney-General established the Corporations Law Simplification Program, one aim of which was to rewrite the corporations legislation to make it ‘easier to understand’ Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Draft Second Corporate Law Simplification Bill 1996* (Report, November 1996) 1.1 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/1996-99/2nd\\_simp/report/c01#introduction](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/1996-99/2nd_simp/report/c01#introduction)>. This resulted in the *First Corporate Law Simplification Act 1995* (Cth). The Program ceased operation before the Second Corporate Law Simplification Bill 1996 could be passed, when responsibility for corporate law reform was moved from the Attorney-General’s Department (under a different Attorney-General) to the Commonwealth Treasury, which then initiated the Corporate Law Economic Reform Program in 1997, adopting some of the reform proposals that had been developed, but not initiated, by the Simplification Program.

<sup>11</sup> Ruhl (n 3) 886 (emphasis in original).

technicalities or procedural inefficiencies will likely lead to equally technical or procedural solutions that may not work as hoped or intended. Legal problems are not, however, always solely the product of technical or procedural issues. Factors outside the parameters of standard legal analysis can also be influential. By adding a non-legal perspective to the analysis of corporate law's complexity we may produce better solutions or, as this article will argue, better expectations of the legal solutions that are applied.

Pause a moment to reconsider the opening statement to this article: our system of corporate and financial services law is complex. Notice that it contains two claims and sets of assumptions. There is the claim that corporate and financial services law constitutes a 'system', and it is assumed that we know and agree on what that system is — what holds it together, what its component parts and boundaries are, how it operates and so forth. Next, there is the claim about the system's complexity, with the assumption that those involved in the system (or those who simply observe it) also generally understand what this means. We know what complexity is, what causes it and what problems it causes, and we agree that it should be addressed (although there may be debate on how that should be done). The purpose of this article is to explore the idea of systemic complexity that underlies these claims and assumptions.<sup>12</sup> The article has three aims: first, to demonstrate why corporate law is complex; second, to explain that this complexity is an integral feature of the corporate law system; and third, to argue that, consequently, efforts to remove complexity are misconceived and that simplification programs should necessarily have restricted expectations.

Three points of clarification are necessary before proceeding. First, for brevity's sake, and because claims about complexity predate concerns about financial services regulation, I will refer generally to 'corporate law', by which I mean the law covered by the *Corporations Act 2001* (Cth) ('*Corporations Act*').<sup>13</sup> This includes financial services law as well as the law relating to takeovers, managed investments, corporate insolvency, and the general law governing the incorporation, capacity and governance of corporations. Second, nothing in this article denies that our corporate law system *is* complex; to the contrary, the article argues that complexity is an integral feature of this system. Nor does the article deny that this complexity creates costs and problems that need attention. The argument, instead, is that it is important — and useful — to be clear about what complexity means in this context and what might and can be done about it. Third, this is a conceptual, not a technical inquiry. The article does not, for example, delve into the definition of 'financial product' in ch 7 div 3 of the *Corporations Act*. That definition, currently spanning 10 sections with specific inclusions and exclusions, is undoubtedly complicated; the question here is whether something further is involved by describing it as complex and, if so, what that 'something' is.

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<sup>12</sup> The complexity of corporate law rules is discussed in Stephen Bottomley, 'Corporate Law, Complexity and Cartography' (2020) 35(2) *Australian Journal of Corporate Law* 142. This present article takes a broader perspective, looking at the complexity of the context within which those rules operate.

<sup>13</sup> While this article takes as its point of reference the law governing corporations and financial services in Australia, the arguments are likely applicable in comparable common law jurisdictions.

The remainder of this article proceeds as follows. In Part II, I examine the idea of complexity, looking at a body of scholarship that falls under the broad label ‘complexity theory’. This also involves exploring what it is for something to be a ‘system’; as will be seen, complexity theory and systems theory are closely connected. In Part III, I bring these broader ideas to bear on the complexity of the corporate law system. I argue that corporate law’s complexity is comprised of three dimensions: (1) corporate and financial practices; (2) the rules and standards that apply to those practices; (3) the regulatory processes by which those rules and standards are implemented and enforced. Corporate law’s complexity lies in the way in which these three dimensions interact. In Part IV, I describe some of the implications that follow from the application of this analysis for corporate law reform. In the Part V conclusion, I argue that we should be realistic in our expectations for ‘reducing’ complexity, noting that a similar message has been often repeated by scholars in the socio-legal and critical legal studies traditions.

## II The Idea of Complexity

The claim that our corporate law system is complex usually has a normative purpose, pointing to concerns about systemic inefficiency, regulatory ineffectiveness, legal incomprehensibility, and/or procedural inconsistency. Several implications or consequences are said to follow. First, the legislative system should, and can, be simplified and clarified. Framed against a dichotomy between complexity/obfuscation and simplicity/clarity, the argument is that we should aim for the latter because this accords with the rule of law principle that those who are subject to laws should be able to understand those laws.<sup>14</sup> This, in turn, will increase the prospect for regulatory compliance. Conversely, ‘the greater the complexity of legislation and the rules that it embodies, the less clear it is likely to become and the greater the challenges for achieving compliance’.<sup>15</sup> Complexity also creates and reinforces a reliance on professional expertise to navigate the system, thereby adding to the cost of regulatory compliance.<sup>16</sup> This ties in with Coffee’s critique of the role that lawyers, auditors and other securities-related experts play as ‘gatekeepers’ to the daily operation of the corporate law system.<sup>17</sup>

None of these arguments can be dismissed. They raise important points, but they often rely on unexplored and possibly reductive assumptions about what complexity is, what causes it (for example, overly detailed rules)<sup>18</sup> and its adverse consequences. On the latter point, it is not axiomatic that complexity always has

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<sup>14</sup> See, eg, Justice Nye Perram, ‘The Perils of Complexity: Why More Law is Bad Law’ (2010) 39(4) *Australian Tax Review* 179, 186.

<sup>15</sup> Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, ‘Legislative Design: Clarifying the Legislative Porridge’ (2021) 38(5) *Company and Securities Law Journal* 280, 281.

<sup>16</sup> See generally Hadfield noting that ‘[a]s the complexity of law and procedure increases, the total cost of resolving a matter goes up’: Gillian K Hadfield, ‘The Price of Law: How the Market for Lawyers Distorts the Justice System’ (2000) 98(4) *Michigan Law Review* 953, 965. See also Hui Xian Chia and Ian Ramsay, ‘Section 1322 as a Response to the Complexity of the *Corporations Act 2001* (Cth)’ (2015) 33(6) *Company and Securities Law Journal* 389, 393.

<sup>17</sup> John C Coffee Jr, *Gatekeepers: The Professions and Corporate Governance* (Oxford University Press, 2006).

<sup>18</sup> Godwin, Brand and Teele Langford (n 15) 282.

adverse outcomes. In some situations, complexity can be beneficial. For example, complex systems may be the product of policies intended to encourage broad inclusivity of interests and diversity of viewpoints.<sup>19</sup> Equally, simplicity may reduce the capacity of a system to respond to legitimate and unique questions raised by individual cases; as Harris notes, '[t]here may be a trade-off between fairness and simplicity'.<sup>20</sup> Implicit in all this is the point that complexity and simplicity are not intrinsically good or bad. Neither are they mutually exclusive; a system can be complex in part and simple in other aspects. As one analysis puts it, 'there is an inseparable relationship between simplicity and complexity' such that both can be found in different parts and in different stages of a system's operations.<sup>21</sup> Nevertheless, the usual response is that complexity should be removed or, at least, reduced. The implication is that complexity is an ancillary and remediable feature of the corporate law system. The history of repeated efforts to reduce that complexity suggests that this may not be a useful perspective.<sup>22</sup> There is a persistence to complexity in the corporate law system that needs explanation.

This article treats the claim about corporate law's complexity as descriptive rather than normative. The starting proposition is that complexity, to one degree or another,<sup>23</sup> is an integral property of the corporate law system. I begin by describing the idea of complexity in general terms, relying on a diverse body of writing that falls under the general label of 'complexity theory'. At the outset, it should be emphasised that complexity theory is not a single body of ideas; nor is it a theory in the sense of providing a predictive model against which hypotheses can be tested. It does not lead to definitive or predictable solutions such that we can say 'to achieve outcome X, do Y'. Instead, the work of complexity theorists aims to provide 'a framework for understanding' the social world.<sup>24</sup> The first step in explaining that framework is to consider the other claim that was identified in the introduction to the article: that corporate law constitutes a 'system'.

## A *What is a System?*

In complexity theory, discussion about complexity is intertwined with understandings of what constitutes a system. As Byrne and Callaghan summarise it,

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<sup>19</sup> Mark Chinen, 'Governing Complexity' in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 151, 156. See also Chia and Ramsay noting that '[c]omplex legislation may be necessary in order to achieve fair outcomes in a highly complex modern economy': Chia and Ramsay (n 16) 393.

<sup>20</sup> Neville Harris, 'Complexity: Knowing it, Measuring it, Assessing it' in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 47, 58. See also Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42(1) *Duke Law Journal* 1, 8.

<sup>21</sup> M Pina e Cunha and A Rego, 'Complexity, Simplicity, Simplexity' (2010) 28(2) *European Management Journal* 85, 93.

<sup>22</sup> See above n 10 for a summary of that history.

<sup>23</sup> As noted by Smith, 'complexity falls along a spectrum': Henry Smith, 'Property Beyond Flatland' (Harvard Public Law Working Paper No 21–36, December 2021) 3.

<sup>24</sup> David Byrne and Gill Callaghan, *Complexity Theory and the Social Sciences: The State of the Art* (Routledge, 2014) 8.

‘when we talk about complexity we are talking about systems’.<sup>25</sup> Like other complex systems, the corporate law system is both typical and unique. It is typical because it is one of many systems that comprise the modern social world.<sup>26</sup> Think, for example, of systems in other branches of law such as family law or international law or, moving outside the law, the education system, the health system, the financial system and so on. At the same time, the corporate law system is unique because, like other systems, it has its own structures, elements and dynamics, and therefore its own type of complexity. I come back to the particular qualities of the corporate law system in Part III. Before that, I consider more generally what are the ‘typical’ features of a system.

There are many ways of approaching this inquiry. Indeed, one writer warns that ‘[t]here is a risk when discussing complexity theory to tie oneself in knots over definitions of what is meant by “the system” and thus never get to the substance of applying the theory’.<sup>27</sup> This risk is exacerbated by the wide range of available theories about social systems, some with lengthy pedigrees.<sup>28</sup> In the interests of getting to the substance of corporate law’s complexity, I rely on the useful distillation of systems thinking presented by Anabtawi and Schwarcz.<sup>29</sup> While their focus is on the financial system, they explain that any system, whether it is biological, physical or social, has three essential attributes.<sup>30</sup> First, it must be composed of elements. For example, the elements of the financial system include the various firms (investment banks, insurance companies, index funds, and so on) that trade in financial products, as well as the legal rules that regulate that activity, among other things. Second, these elements must be interconnected and, as another complexity theorist notes, ‘[m]any of the interconnections in systems operate through the flow of information’.<sup>31</sup> Third, a system must have a function (or purpose) that is distinct from its elements. Although Anabtawi and Schwarcz (in common with other writers) refer to function or purpose in the singular, one of the points I will make later about the corporate law system is that it has multiple functions (or, more precisely, there are several functions that are attributed to it).

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<sup>25</sup> Ibid 3. The reverse proposition is not necessarily true, however. Not all systems are complex; some are ‘simple’, others are random or chaotic: see R Keith Sawyer, *Social Emergence: Societies as Complex Systems* (Cambridge University Press, 2005) 3.

<sup>26</sup> Byrne and Callaghan (n 24) 8.

<sup>27</sup> Thomas E Webb, ‘Asylum and Complexity: The Vulnerable Identity of Law as Complex System’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 66, 68.

<sup>28</sup> Three well-known examples are: Emile Durkheim, *The Rules of Sociological Method* (Free Press, 8<sup>th</sup> ed, 1966); Talcott Parsons, *The Social System* (Free Press, 1951); Niklas Luhmann, *Social Systems* (Stanford University Press, 1995).

<sup>29</sup> Iman Anabtawi and Steven L Schwarcz, ‘Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure’ (2013) 92(1) *Texas Law Review* 75. As an aside, there are alignments between the complexity theorist’s understanding of a system and the regulatory theorist’s understanding of ‘regulatory space’: Michael Leach, ‘Complex Regulatory Space and Banking’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 170, 172–3.

<sup>30</sup> Anabtawi and Schwarcz (n 29) 78.

<sup>31</sup> Donella H Meadows, *Thinking in Systems: A Primer* (Earthscan, 2009) 188.

Importantly, the implication from the second and third of these attributes is that a system cannot properly be understood by focusing exclusively on one or other of its elements. This is because:

[i]n a system, the state of each element is conditional on the states of the others. Restricting our level of analysis to the elements would ignore each element's effects on the other elements. More broadly, we would miss the connections between each element and the system of which they were a part.<sup>32</sup>

We cannot, for example, hope to understand the operation of the corporate law system simply by reading the text of the *Corporations Act*. At the same time, while the individual elements cannot tell us about the system as a whole, it is the case that some elements in a system can be more important or integral than others. An element is integral to a system 'if removal of that element would alter the system's behavior in some salient way'.<sup>33</sup> Typically, in a system that involves the use and application of laws, the law will be an integral element in the sense just described.

The final observation here is that a system can itself be an element in another larger system. Thus we can think of the corporate law system as an element within a larger financial, economic or social system.

This brief description of systems thinking has already encroached onto the terrain of complexity; as noted, the two ideas are closely related. Nevertheless, it is useful to examine the idea of complexity separately.

## **B** *What is Complexity?*

As noted in the Introduction to this article, although corporate lawyers have commented on corporate law's complexity for some time, there has been little analysis of what that idea means. This may be because the origins of that analysis lie outside the law in the natural sciences, especially biology and physics. Nevertheless, other non-science disciplines have caught on. In his overview, Erdi notes that nearly every discipline of inquiry has turned its attention to complexity such that we find references to 'computational complexity, ecological complexity, economic complexity, organizational complexity, political complexity, social complexity' and so on.<sup>34</sup> This is a reminder that complexity is found everywhere and it suggests that there may be insights from other inquiries into the phenomenon that can usefully be applied in a legal context.

Within the parameters of this article, it is neither possible nor useful to delve into the many dimensions of complexity theory, nor the diverse ways in which complexity has been defined. As is often the case with emerging areas of knowledge, there are disagreements about key concepts; as one commentator has observed, '[t]here is then, unsurprisingly, no agreement on how to conceptualize, define or

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<sup>32</sup> Anabtawi and Schwarcz (n 29) 79 (citations omitted).

<sup>33</sup> *Ibid* 81.

<sup>34</sup> Peter Erdi, *Complexity Explained* (Springer, 2008) 4.



measure complexity.<sup>35</sup> In what follows, I describe just some aspects of complexity theory. This selective approach is justified on the grounds that my aim is to identify those aspects of the complexity literature that can assist in understanding the challenges of complexity in the corporate law system.

Complex systems exhibit five interrelated and overlapping features (among others):<sup>36</sup>

**(1) *Non-linearity*:** Complex systems are comprised of non-linear relationships. It is easier to understand non-linearity by looking at the opposite idea. In linear relationships, the elements connect with each other in a direct and causal link, so that a change in one element will produce predictable changes in other elements located further along the causal chain. This is reflected in the formal hierarchical understanding of law, which assumes that changes to legal rules will have intended and observable effects on the behaviour of those affected by those rules (I return to this idea in the corporate law context later in this article). By contrast, in non-linear relationships a change in one part of the system may have unpredictable or disproportionate effects on other elements.<sup>37</sup>

**(2) *Emergence*:** The nature and properties of a complex system are generated, or ‘emerge’, as a result of the non-linear interactions between the elements of the system.<sup>38</sup> The idea of emergence has two important features, the first of which takes us back to the previous description of what constitutes a system. At the macro level, a system has properties or capacities that differ from those of its constituent elements (that is, the whole is not simply the sum of its parts). There are various ways of describing this difference.<sup>39</sup> In some accounts, a system’s emergent properties are said to be irreducible to the properties of its elements. Alternatively, the system’s properties are described as novel, in that they are not held by any of the elements. The second feature is that ‘complex structures are not designed as such’.<sup>40</sup> That is, systems are not built from the outside in or from the top down. A system emerges, continuously, from the many changing interactions between its different elements.

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<sup>35</sup> Steve Maguire, ‘Constructing and Appreciating Complexity’ in Peter Allen, Steve Maguire and Bill McKelvey (eds), *The Sage Handbook of Complexity and Management* (Sage, 2011) 79, 83. See also Jamie Murray, Thomas Webb and Steven Wheatley, ‘Encountering Law’s Complexity’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 3, 4 (arguing there is ‘no agreed-on final definition’ of complexity).

<sup>36</sup> This is not an exhaustive list. Most analyses have a longer list of complexity attributes, but all include the features listed here.

<sup>37</sup> Chaos theory, with its well-known reference to the relationship between the flap of a butterfly’s wings and subsequent weather events on the other side of the globe, is an extreme illustration of a non-linear relationship.

<sup>38</sup> Murray, Webb and Wheatley, ‘Encountering Law’s Complexity’ (n 35) 3; Byrne and Callaghan (n 24) 22. Again, this is a bare description. Emergence has generated a field of study replete with its own categories, distinctions (eg between strong and weak emergence) and debates: see, eg, Peter Allen, Steve Maguire and Bill McKelvey (eds), *The Sage Handbook of Complexity and Management* (Sage, 2011).

<sup>39</sup> Sawyer (n 25) 4.

<sup>40</sup> Julian Webb, ‘Law, Ethics and Complexity: Complexity Theory and the Normative Reconstruction of Law’ (2004) 52(1) *Cleveland State Law Review* 227, 232.

**(3) Unpredictability:** According to Harris, ‘what characterises a system as complex is the propensity for unpredictable outcomes to arise from the operation of its internal dynamics’.<sup>41</sup> This is not to say that complex systems are inherently unpredictable so that one can never foresee outcomes. Instead, ‘[c]omplex orders are frequently held to have a degree of stability, but to be periodically subject to unpredictable developments in which self-organizing processes will reformulate the system and its structure’.<sup>42</sup> Put another way, there can be degrees of unpredictability in a system.<sup>43</sup> One constraint on the range of outcomes produced by a system is found in the concept of ‘path dependence’, describing the way in which past actions and practices in a system can shape future decisions and outcomes.<sup>44</sup> This still leaves open the possibility of there being more than one possible future development: ‘the precise behaviour of a complex system may be very difficult to predict, even while keeping the system within certain bounds’.<sup>45</sup> At the same time, path dependence can also explain why, in the absence of some reason to change, a system will sometimes persist with less-than-desirable options.<sup>46</sup>

**(4) Boundaries:** A complex system has boundaries that distinguish it from the rest of the world and from other systems with which it interacts. Two points need emphasis. First, a system’s boundaries are not fixed and objectively determined; they are defined, instead, by the continuous interactions between the elements of the system.<sup>47</sup> Second, in complexity theory a boundary does not work simply to separate a system from its surrounds. Instead, the boundary connects the system with its environment. As Zeleny puts it, boundaries ‘are not “perimeters” but functional constitutive components of a given system’.<sup>48</sup> A complex system is therefore said to be ‘organisationally open’ in the sense that it interacts with and responds to its environment, and ‘operationally closed’ in the sense that it maintains its own internal processes and organisation.<sup>49</sup> As a consequence, the impetus for change in a complex system can be internal or external.

**(5) Self-organisation:** There is no ‘controlling power or central control’ that determines the operation of a complex system; rather, the system is organised through ‘the actions and interactions of micro-level component elements’.<sup>50</sup> This does not mean that the system is able to operate without constraint. There are, for

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<sup>41</sup> Harris (n 20) 51.

<sup>42</sup> Stephen Kemp, ‘Unpredictability and Nonlinearity in Complexity Theory: A Critical Appraisal’ (2009) 11(1) *Emergence: Complexity and Organisation* 84, 89.

<sup>43</sup> *Ibid* 90.

<sup>44</sup> See, eg, Oona A Hathaway, ‘Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System’ (2001) 86(2) *Iowa Law Review* 601.

<sup>45</sup> Eve Mitleton-Kelly, ‘Ten Principles of Complexity and Enabling Infrastructures’ in Eve Mitleton-Kelly (ed), *Complex Systems and Evolutionary Perspectives on Organisations: The Application of Complexity Theory to Organizations* (Pergamon Press, 2003) 23, 39.

<sup>46</sup> John Bell, ‘Path Dependence and Legal Development’ (2013) 87(4) *Tulane Law Review* 787, 790–1.

<sup>47</sup> See, eg, Webb (n 27) 69–70.

<sup>48</sup> M Zeleny, ‘On the Social Nature of Autopoietic Systems’ in Kenneth Boulding and Elias Khalil (eds), *Evolution, Order and Complexity* (Routledge, 1996) 122, 133, quoted in Byrne and Callaghan (n 24) 32.

<sup>49</sup> Minka Woermann, ‘Complexity and the Normativity of Law’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 234, 236.

<sup>50</sup> Murray, Webb and Wheatley, ‘Encountering Law’s Complexity’ (n 35) 8.

example, boundary and path dependence limitations (as noted above). The idea of ‘self-organisation’ has implications for legal systems, which often emphasise the central authority of a public regulatory agency, such as ASIC. The insight here is that while such agencies can exert control, this is simply one input into the overall functioning and definition of the system. A controlling agent, like ASIC, does not sit above or outside the system, and ‘cannot be separated from the system’.<sup>51</sup>

To repeat, these five features are characteristics of all complex systems. The next task is to take these features, together with the attributes of a system described earlier, and explain how corporate law can accurately be described as a complex system.

### III How Corporate Law is Complex

What do we mean when we say that the corporate law system is complex? Sometimes we may be referring to the law itself: the wide scope of the *Corporations Act*, the dense and technical drafting of particular sections in that Act, or the arcane reasoning of a particular judicial decision. At other times we may be describing the way in which the law is, or is not, implemented and enforced. Complexity, then, can apply to the substance and form of the law as much as to processes by which it is developed and put into practice. Looking at this ‘substance and process’ perspective more closely, we can see that the complexity of the corporate law system has three interconnected dimensions. Each dimension simultaneously contributes to corporate law’s overall complexity while also demonstrating features of complexity in its own right. In this Part of the article, I describe these three dimensions separately and then draw them together to explain how corporate law operates as a system.

#### A *Dimension 1: Complexity in Corporate Structures, Markets and Practices*

The first dimension is the institutions, investment products, transactions, markets and practices to which corporate law applies. The complexity here is easily observed in the financial services industry. Schwarcz, writing in the immediate aftermath of the 2008–09 global financial crisis (‘GFC’), usefully analyses this under three headings.<sup>52</sup> There is the complexity of the assets underlying modern investment products. For example, mortgage loans are packaged in a variety of ways, each presenting its own types and level of risk, and requiring different modelling and analysis. Next, there is the complexity of the financial products that are built on those assets, exemplified by the esoteric range of mortgage-backed securities that gained notoriety in the GFC. In some cases, the complexity of these products has tested the capacity of professional advisors tasked with providing clients clear advice about

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<sup>51</sup> Geert R Teisman, Lasse Gerrits and Arwin van Buuren, ‘An Introduction to Understanding and Managing Complex Process Systems’ in Geert Teisman, Arwin van Buuren, and Lasse Gerrits (eds), *Managing Complex Governance Systems: Dynamics, Self-Organization and Coevolution in Public Investments* (Routledge, 2009) 1, 9.

<sup>52</sup> Steven Schwarcz, ‘Regulating Complexity in Financial Markets’ (2009) 87(2) *Washington University Law Review* 211.

their investment ramifications.<sup>53</sup> While the investment products that were so deeply implicated in the GFC may no longer be in favour, other investment complexities have emerged, including the use of blockchain and smart contracts to create and trade ‘smart securities and derivatives’.<sup>54</sup> Last, there is the complexity of the financial markets in which these products are traded. Schwarcz notes that these markets are typically characterised by the use of intermediaries and indirect forms of investment.<sup>55</sup> This gives rise to myriad interactions between analysts, advisers, brokers, dealers, lawyers, insurers, underwriters, clients, investors of different types, proxy advisory services, regulators, corporations, securities exchanges, and (increasingly) self-learning automated trading systems.<sup>56</sup> And, again, blockchain offers the possibility of augmenting (and perhaps even displacing) the role of traditional exchange-based clearance and settlement processes.<sup>57</sup> Financial market complexity also includes the diversity of ways in which information is formulated, transmitted and received by these participants.<sup>58</sup> The Australian financial system has therefore been described as ‘a complex adaptive network’.<sup>59</sup>

While complexity is readily apparent in the financial sector, the same is also true of ‘everyday’ corporate structures and practices. Consider the diversity of corporate types and structures to which the *Corporations Act* applies: public and proprietary; holding and subsidiary; listed and unlisted; profit and not for profit; trading, nominee and shell companies; business operations that are local, national, or international. Large corporate structures demonstrate complexity internally and through the creation of corporate groups and conglomerates. Indeed, the archetypal hierarchical corporate structure with designated lines of control and clear divisions of operational responsibility has given way to corporate models based on networks, both within and between individual corporations.<sup>60</sup> As Anidjar argues, this structural complexity requires the law to follow ‘a firm-specific perspective’.<sup>61</sup> The practices and actions of corporate actors within these structures adds to this picture. One illustration of this is found in the extent to which courts must go to unravel complex business transactions when deciding cases about breach of directors’ duties. A stark example is found in Austin J’s judgment of nearly 200 pages in *ASIC v Rich*.<sup>62</sup>

<sup>53</sup> See, eg, the description of ‘synthetic collateralised debt obligations’ in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1.

<sup>54</sup> Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code* (Harvard University Press, 2018) ch 5.

<sup>55</sup> Schwarcz (n 52) 231.

<sup>56</sup> On the latter point, see Dirk A Zetzsche, Ross P Buckley, Janos N Barberis and Douglas W Arner, ‘Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation’ (2017) 23(1) *Fordham Journal of Corporate and Financial Law* 31, 95.

<sup>57</sup> De Filippi and Wright (n 54).

<sup>58</sup> See, eg, *Banking Royal Commission Final Report* (n 7) vol 1, 473.

<sup>59</sup> The Treasury (Cth), *Financial System Inquiry* (n 9) 8.

<sup>60</sup> John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008) 1–3.

<sup>61</sup> Leon Anidjar, ‘Corporate Law and Governance Pluralism’ (2022) 35(2) *Canadian Journal of Law and Jurisprudence* 283, 283.

<sup>62</sup> *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1. In *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*, Owen J begins his judgment by acknowledging that ‘[t]hese reasons can only be described as a megillah. I am uneasy about that (at least in relation to length)’: (2008) 70 ACSR 1, 12 [4]. See also Rares J’s observation in *Wingecarribee Shire Council*

Further complexity results from competing understandings of these corporate and market practices. What, from one perspective, might be applauded as an example of entrepreneurial spirit or necessary risk-taking can simultaneously be decried from another perspective as short-termism or strategic regulatory avoidance. Often these judgments will correlate with positions or roles in the corporate sector. Thus, we might expect to see different assessments expressed by regulators, directors (and peak bodies, such as the Australian Institute of Company Directors), shareholders (and peak bodies such as the Australian Shareholders' Association), professional advisors, and so on. This is evident, for example, in the continuing debate about the role of proxy advisory firms. Proxy advisors provide advice to clients (usually large investors such as superannuation funds) on how to vote at the general meetings of listed companies on critical issues such as directors' remuneration and board appointments. These large investors will hold shares in multiple companies, making it difficult to become familiar with the details of each company's meeting agenda during the few months of the annual general meeting season. On one view, typically expressed by superannuation peak bodies, proxy advisors add to the efficient operation of the investment market by reducing the costs of researching individual company agendas and by acting as 'information agents'.<sup>63</sup> The opposing view, typically expressed by peak bodies representing directors and executives, is that proxy advisors have an impact on company operations that lacks accountability and transparency.<sup>64</sup> But the diversity of views often goes further than simple distinctions between shareholders and directors. For example, not all shareholders necessarily hold the same views about appropriate shareholder behaviour (compare, for example, the investment practices of private equity funds and day traders). Attitudes towards shareholder activism are another example. In some assessments, shareholder activists are a resource-consuming, self-interested diversion from the proper purpose of corporate decision-making; for others, they are a necessary element in the pursuit of better corporate accountability.

## **B Dimension 2: Complexity in Rules and Standards**

The second dimension is the usual point of reference when the corporate law system is described as complex. This dimension is comprised of the rules, doctrines, standards and norms that are applied to the structures and practices discussed above. Beginning with those created by legislation or judicial decision, there are bespoke corporate law rules and doctrines (most fundamentally, the ideas of separate corporate legal status and shareholder limited liability). Added to this, corporate law borrows and adapts principles from other areas of law, particularly contract, equity, and criminal law. Additionally, some knowledge of constitutional law,

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*v Lehman Brothers Australia Ltd (in liq)* that '[t]he preparation of these reasons has taken longer than I had intended because of the detail and complexity of the parties' cases and the issues that required resolution.': (n 53) 325 [1245].

<sup>63</sup> See Stephen Choi, Jill Fisch and Marcel Kahan, 'The Power of Proxy Advisors: Myth or Reality?' (2010) 59(4) *Emory Law Journal* 869.

<sup>64</sup> In response to these latter concerns, the Federal Treasurer tabled regulations in 2021 that would impose obligations on proxy advisors; see *Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021* (Cth). The Regulations were disallowed in the Senate in February 2022: Commonwealth, *Parliamentary Debates*, Senate, 10 February 2022, 230, 232.

administrative law and (in a global context) private international law is also necessary. The perception of complexity is reinforced by the different ways in which the legislative and judicially created rules interact. Many areas of corporate practice are governed predominantly by legislative rules, which may either be statutory creations (for example, laws defining and prohibiting insider trading)<sup>65</sup> or be a modification of pre-existing general law doctrine (for example, the corporate contracting assumptions in the *Corporations Act*)<sup>66</sup>. Other areas are governed by a combination of the two sources, in either of two ways: in some places the legislation supplements the general law, filling in gaps or adding new rules (for example, the law on corporate contracting), while in other areas both sources of law can operate simultaneously (for example, the fiduciary and statutory law on directors' duties). The result is that corporate law, considered simply as a body of State-made rules, satisfies each of the four criteria of legal complexity identified by Schuck: density, technicality, differentiation, and indeterminacy or uncertainty.<sup>67</sup> Corporate law is 'dense' in that its rules are 'numerous and encompassing', and they 'seek to control a broad range of conduct' that can lead to conflicts between rules and 'their animating policies'.<sup>68</sup> The rules require '[technical] expertise on the part of those who seek to understand and apply them'.<sup>69</sup> Corporate law rules are 'institutionally differentiated',<sup>70</sup> being located in primary and delegated legislation, securities exchange listing rules, accounting and audit standards, and regulatory guides. Finally, the rules demonstrate a degree of 'indeterminacy';<sup>71</sup> many areas of the *Corporations Act* rely on broad or open-textured standards, rather than prescriptive detail.<sup>72</sup>

In addition to the complexity criteria identified by Schuck, corporate law rules (particularly those in legislative form) also exhibit normative complexity.<sup>73</sup> Considered as a whole, the *Corporations Act* seeks to promote a variety of norms and ideals: economic efficiency and market competition, wealth and profit maximisation (either long- or short-term), investor protection, equality of opportunity, fairness, accountability, good faith conduct, and absence of self-interest. Sometimes these norms are set out expressly, either in 'objects' or 'purpose' sections (for example, *Corporations Act* s 602, describing the purposes of the takeovers provisions as including a 'reasonable and equal opportunity' for participation as well as the maintenance of 'an efficient, competitive and informed market') or in substantive sections (for example, s 181, the directors' duty to act in good faith, and s 232, the members' right of action for conduct that is oppressive, unfairly prejudicial or unfairly discriminatory). At other times they are implicit (for

<sup>65</sup> See, eg, *Corporations Act* (n 4) ss 1042A–1043O.

<sup>66</sup> *Ibid* ss 128–30.

<sup>67</sup> Schuck (n 20) 3.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid* 4.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*.

<sup>72</sup> For example, the directors' duties sections in the *Corporations Act* (n 4) that rely on standards of 'good faith', 'proper purpose' and 'best interests': see ss 180–1.

<sup>73</sup> Eric W Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50(4) *Washington and Lee Law Review* 1565, 1587ff. Normative complexity is a feature of regulatory systems in general: see, eg, Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *University of New South Wales (UNSW) Law Journal* 392.

example, *Corporations Act* pt 2G.2, dealing with meetings of members, can safely be characterised as being concerned with accountability). This normative complexity arises from the accretion of different legislative and regulatory policies over time, developed in response either to the crisis of the day or to the demands (actual or perceived) of diverse stakeholders with divergent or competing concerns.<sup>74</sup> It is exacerbated by the indeterminate nature of many of these norms and the possibility of contestation when different norms are applied to the same rules. Contestation arises because there is no general agreement on which, if any, of the various norms should have precedence. An example is found in the longstanding debate about whether mandatory disclosure rules, intended to promote informed decision-making and market integrity, impede economic efficiency.<sup>75</sup> This contest between normative frameworks was apparent in the lead up to the 2021 amendments to the continuous disclosure provisions in ch 6CA of the *Corporations Act*.<sup>76</sup> Chapter 6CA requires a disclosing entity to notify the market operator of information that is not otherwise generally available and which would have a material effect on the price or value of that entity's securities if it were available. The ostensible purpose of the requirement is to promote the accountability of managers to shareholders and to enhance market integrity by ensuring, so far as possible, that investors can make investment decisions on the basis of accurate information. Prior to the 2021 amendments, contravention could attract civil penalties as well as possible criminal sanctions. Enforcement required ASIC to determine what an objective reasonable person would be taken to expect regarding material effect. Between May and September 2020, early in the COVID-19 pandemic, these provisions were temporarily modified by legislative Determinations that replaced the objective standard with a test based on the knowledge, recklessness or negligence of a disclosing entity or an involved person as to whether information would have a material effect on the price or value of securities.<sup>77</sup> In place of the reasonable person test, the modifications thus introduced a subjective test, removing the previous no-fault element. The rationale for this modification was the need for business certainty: the fast-changing context of the pandemic created uncertainty in determining whether a piece of information would have a material effect on price or value, requiring a temporary relaxation of the rules.<sup>78</sup> Soon after, in December 2020, the Parliamentary Joint Committee on Corporations and Financial Services, in its inquiry into class actions and litigation

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<sup>74</sup> See, eg, Donald Feaver and Benedict Sheehy, 'Designing Effective Regulation: A Positive Theory' (2015) 38(3) *University of New South Wales (UNSW) Law Journal* 961 ('Designing Effective Regulation'). To be clear, the reference here to 'stakeholder' interests is not limited to the so-called stakeholder theory of corporate governance that calls on directors to recognise the impact of their decisions on interests beyond those of shareholders, such as employees (see, eg, Stephen Bottomley, Kath Hall, Peta Spender, and Beth Nosworthy, *Contemporary Australian Corporate Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2021) 64). Here I use the term to include the sometimes-competing interests of different types of shareholders.

<sup>75</sup> See, eg, Mark Blair 'The Debate Over Mandatory Corporate Disclosure Rules' (1992) 15(1) *University of New South Wales (UNSW) Law Journal* 177; Robert Bushman and Wayne R Landsman 'The Pros and Cons of Regulating Corporate Reporting: A Critical Review of the Arguments' (2010) 40(3) *Accounting and Business Research* 259.

<sup>76</sup> *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth).

<sup>77</sup> See *Corporations (Coronavirus Economic Response) Determination (No 2) 2020* (Cth); *Corporations (Coronavirus Economic Response) Determination (No 4) 2020* (Cth).

<sup>78</sup> Explanatory Statement, *Corporations (Coronavirus Economic Response) Determination (No 2) 2020* (Cth).

funding, recommended that these modifications be made permanent.<sup>79</sup> This recommendation was not prompted by the ongoing problems of the COVID-19 context, but instead by a concern that '[c]laims for a breach of continuous disclosure laws underpin many shareholder class actions. Shareholder class actions are generally economically inefficient and not in the public interest'.<sup>80</sup> The alleged inefficiency of shareholder class actions was said to be evidenced by increased D&O insurance premiums, difficulties in filling board positions, and risk-averse board decision-making.<sup>81</sup> In August 2021, the *Corporations Act* was amended along the lines set out in the earlier Determinations.<sup>82</sup>

In this example, we see how legislative change was shaped by competing normative frameworks — a debate between the ideas of market integrity, business certainty and economic efficiency. None of these narratives was intrinsically more correct or valid than the others. Instead, the point is that the emergence and development of rules is shaped by continuing contestation between different normative perspectives within shifting economic and social contexts. A critical aspect of this second dimension is that corporate and market activity is governed and regulated by more than State-generated rules. There is also a web of non-State, or industry-made, codes,<sup>83</sup> standards and norms. The significance of industry codes was noted by the Banking Royal Commission, which took the view that they 'occupy an unusual place' in prescribing norms for corporate behaviour and 'pose some challenge to the understanding that the fixing of generally applicable and enforceable norms of conduct is a public function to be exercised, directly or indirectly, by the legislature'.<sup>84</sup> In part, that challenge was said to arise from 'the broad range of provisions contained in industry codes', with different degrees of enforceability.<sup>85</sup> Contrary to this perspective, the regulatory theory literature suggests that, rather than being 'unusual', the place of industry codes in setting and enforcing norms of conduct has become the norm. Indeed, according to some analyses, this mix of State and non-State rules signals a shift from the 'regulatory State' to 'regulatory capitalism', a term that encapsulates the idea that in addition to the regulatory State much regulatory activity is conducted by and between private organisations, non-governmental organisations ('NGOs') and markets.<sup>86</sup>

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<sup>79</sup> Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) xxxi (recommendation 29).

<sup>80</sup> *Ibid* xx.

<sup>81</sup> *Ibid* 320–2.

<sup>82</sup> See Explanatory Statement (n 78).

<sup>83</sup> For example, the ePayments Code: Australian Securities and Investments Commission ('ASIC'), *ePayments Code* (Web Page, 2 June 2022) <<https://asic.gov.au/regulatory-resources/financial-services/epayments-code/>>. The ASIC has power to approve codes of conduct relating to financial services licensees and issuers of financial products: *Corporations Act* (n 4) s 1101A. Approval is not mandatory. See generally Gail Pearson, 'The Place of Codes of Conduct in Regulating Financial Services' (2006) 15(2) *Griffith Law Review* 333.

<sup>84</sup> *Banking Royal Commission Final Report* (n 7) vol 1, 105.

<sup>85</sup> *Ibid*. The Commission went on to recommend that the law should provide for the establishment and imposition of mandatory codes in the financial services industry (recommendation 1.15), and that breach of enforceable provisions within those codes should constitute a breach of the law (108–12).

<sup>86</sup> See, generally, Braithwaite (n 60); David Levi-Faur, 'Regulatory Capitalism' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 289.



Adding even further to this complexity is the emergence of regulation *without* rules. In describing the first dimension above, I noted the growing impact of automated trading systems and blockchain in the operation of financial markets. This digital technology can also play a role in regulating conduct within those markets — doing what rules do. Along with the transposition of legal rules into digital code, we see the emergence of regulation *by* digital code, or as De Filippi and Wright put it, a shift ‘to “code as law”, relying on technology, in and of itself, to both define and implement state-mandated laws’.<sup>87</sup> Brownsword summarises the situation this way:

With rapid developments in AI, machine learning, and blockchain, a question that will become increasingly important is whether (and if so, the extent to which) a community sees itself as distinguished by its commitment to governance by rule rather than by technological management.<sup>88</sup>

Furthermore, these technologies interact with each other, creating ‘amplification effects’ that increase their social impact and prompt the growth of further technologies.<sup>89</sup>

The final point to emphasise about this second dimension is that being complex is not the same thing as being complicated.<sup>90</sup> Corporate law rules are often complicated, conceptually or structurally, or both. A complicated rule or set of rules (for example, determining whether there is a voidable transaction for the purposes of the liquidation process)<sup>91</sup> can be analysed, parsed, broken down into its component parts and then reassembled, perhaps even represented in a flow chart of the type ‘if A then B, if not-A then C (and so on)’. This is a technical exercise and will likely require the application of specialised knowledge, training and experience, but it also usually only needs to be done once; after the rule is understood and applied to a problem, that rule knowledge can then be applied in solving new problems with some degree of predictability. Complexity resists this type of approach. The dynamic interconnections and the moving parts that comprise a complex system cannot be reduced to the linear logic of a summary or a flow chart. For the most part, when we seek to simplify rules, we are addressing their complicatedness, not the overall complexity of which they are a part. To repeat an earlier point, simplification can be a valuable exercise and for everyday purposes it may not matter whether the task is framed as tackling complexity or complicatedness. But, beyond the everyday, the distinction is important, lest it be assumed that addressing problems of legislative drafting necessarily leads to a less complex system. The desired outcomes — clarity of expression, certainty of application, and predictability of outcome — are not determined solely by how complicated the rules are. Those goals are also affected by the complexity of the whole system. Put another way, an uncomplicated set of rules may still be part of a complex system.

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<sup>87</sup> De Filippi and Wright (n 54) 199.

<sup>88</sup> Roger Brownsword, *Law 3.0* (Routledge, 2021) 35.

<sup>89</sup> Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford, ‘Introduction to Technology and Corporate Law’ in Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford (eds), *Technology and Corporate Law* (Edward Elgar, 2021) 1, 1–2.

<sup>90</sup> Smith makes the same point, referring to property law in the United States: Smith (n 23) 2.

<sup>91</sup> *Corporations Act* (n 4) pt 5.7B div 2 (ss 588FA–FJ).

### C *Dimension 3: The Complexity of Regulatory Practices*

The third complexity dimension consists of the processes for implementing and enforcing the rules and standards that comprise the second dimension. This is corporate law's regulatory architecture. It operates along three scales: between formal and informal, public and private, general and specific. These scales interact so that, for example, we can compare processes that are formal, public and specific (such as court action initiated by ASIC to enforce civil penalty provisions against directors of a particular company) with the informal, private and general enforcement of a code of conduct across an industry. It is important to note that the distinction between what is formal and informal, public and private, or general and specific is blurred; these are sliding scales, not defined categories. Enforceable undertakings are an example. An enforceable undertaking is a written agreement given to ASIC by a person regarding compliance with any matter for which ASIC has authority.<sup>92</sup> On the one hand, this is intended as a method of negotiated compliance that avoids the expense of court action and so might be classified as an example of informal enforcement. On the other hand, an enforceable undertaking has formal status; it is legally binding and breach of any of its terms can result in an application by ASIC for a court order.<sup>93</sup> Enforceable undertakings illustrate a further point: the different types of regulatory action do not typically occur in isolation from each other. To take an obvious example, the possibility of prosecution will affect the way in which informal compliance is negotiated and settled.<sup>94</sup> Similarly, repeated instances of specific enforcement may be escalated to more generalised forms of regulatory intervention.

As with the normative complexity found in dimension 2, the implementation and enforcement of corporate law rules exhibits regulatory complexity. There are multiple regulatory objectives and modes that underline the unpredictability and non-linearity of the system, including: compliance, deterrence (both general and specific),<sup>95</sup> monitoring and surveillance, disclosure oversight, supervision, licensing and registration, investigation, negotiation, civil penalty and criminal law enforcement, compensation for loss, investor and consumer protection, education and guidance. One reason for this diverse list is the broad coverage of the *Corporations Act* which, as noted in the introduction to this article, spans the regulation of financial services, takeovers, corporate insolvency, managed investments, and the general law governing the incorporation, capacity and governance of corporations.<sup>96</sup> There is an evident challenge for ASIC in balancing

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<sup>92</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA.

<sup>93</sup> *Ibid* ss 93AA(3)–(4).

<sup>94</sup> This calls to mind the well-known metaphor of 'bargaining in the shadow of the law': see Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

<sup>95</sup> General deterrence describes the impact of possible regulatory enforcement on potential offenders; specific deterrence refers to the effect of enforcement action brought in specific instances of wrongdoing.

<sup>96</sup> This distinguishes ASIC from corporate regulators in jurisdictions such as the US: see, eg, Zehra G Kavame Eroglu and KE Powell, 'Role and Effectiveness of ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the United States and Australia' (2020) 31(1) *Journal of Banking and Finance Law and Practice* 71.

and effectively pursuing these different objectives, in light of shifting public and political expectations, budgetary constraints and external regulatory scrutiny.<sup>97</sup> The difficulties were highlighted in the findings of the Banking Royal Commission, which emphasised the need for ASIC to ‘[separate], as much as possible, enforcement staff from non-enforcement related contact with regulated entities.’<sup>98</sup>

Still focusing on ASIC’s role, a noticeable feature of this third dimension is the grant and flexible exercise of discretionary regulatory power.<sup>99</sup> As summarised extra-curially by Justice Weinberg:

Where it appears to ASIC that there has been corporate misconduct, it may adopt any one of a number of different approaches. At one extreme, it can take enforcement action, which is designed to punish wrongdoers, and thereby protect other investors through deterrence. Alternatively, it may opt for less coercive, and more prophylactic measures.<sup>100</sup>

There is nothing untoward about this; as Schmidt and Scott remind us, ‘discretion is an essential feature of delegation to government departments and agencies’.<sup>101</sup> They go on to point out that discretionary decision-making by regulators is fundamental in shaping our understanding of the law and its effects.<sup>102</sup> This discretion operates at the agency level, for example when ASIC decides how to prioritise its scarce resources across its various functions (such as surveillance, administrative enforcement, prosecution), and at the level of individual agency officers, who decide how to implement agency policy in specific cases.<sup>103</sup> At the same time, the discretionary exercise of regulatory power — whether it be aligned with ideas such as ‘responsive regulation’<sup>104</sup> or dictated by the need to deploy scarce budgetary

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<sup>97</sup> Since June 2021 external scrutiny of ASIC has been the responsibility of the Financial Regulator Assessment Authority, which in November 2021 announced that it would undertake ‘a targeted assessment of ASIC’s effectiveness and capability in strategic prioritisation, planning and decision-making, ASIC’s surveillance function, and ASIC’s licensing function’: Financial Regulator Assessment Authority, *Scope of Assessment of the Australian Securities and Investments Commission* (Web Page) <<https://fraa.gov.au/consultations/scope-assessment-australian-securities-and-investments-commission>>.

<sup>98</sup> *Banking Royal Commission Final Report* (n 7) vol 1, 446. See also ASIC Commissioner Sean Hughes, ‘ASIC’s Approach to Enforcement after the Royal Commission’ (Speech, 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, Queensland, 30 August 2019) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-s-approach-to-enforcement-after-the-royal-commission/>> (noting the establishment of the Office of Enforcement within ASIC in response to the Royal Commission Report).

<sup>99</sup> Rebecca Schmidt and Colin Scott, ‘Regulatory Discretion: Structuring Power in the Era of Regulatory Capitalism’ (2021) 41(3) *Legal Studies* 454.

<sup>100</sup> Justice Mark Weinberg, ‘Some Recent Developments in the Corporate Regulation — ASIC from a Judicial Perspective’ (Paper presented to Monash University Law School, 16 October 2013) 1 [3].

<sup>101</sup> Schmidt and Scott (n 99) 454.

<sup>102</sup> *Ibid* 459.

<sup>103</sup> See, eg, Paul Daly, ‘The Inevitability of Discretion and Judgement in Front-Line Decision-Making in the Administrative State’ (2020) 2 *Journal of Commonwealth Law* 99.

<sup>104</sup> The idea of responsive regulation is that, as is appropriate to the situation, a regulator should begin with interventions that encourage compliance, before escalating to more coercive responses; see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). There are differing assessments about ASIC’s capacity to be a ‘responsive regulator’: see, eg, George Gilligan, Helen Bird and Ian Ramsay, ‘Civil Penalties and the Enforcement of Directors’ Duties’ (1999) 22(2) *University of New South Wales (UNSW) Law Journal* 417; Michelle Welsh, ‘Civil Penalties and Responsive Regulation: The Gap between Theory and

resources in a way that meets public expectations — introduces a measure of uncertainty into the regulatory framework.<sup>105</sup> This uncertainty is exacerbated by the low visibility of many aspects of the legal processes that comprise this third dimension. While judicial decisions are made in public, the details of out-of-court settlements are often confidential. Statutory reform takes place via public Parliamentary processes but, in contrast, delegated legislation, which ranges from regulations made under the parent statute to legislative instruments made by ASIC, largely escapes broad public scrutiny.

## D Corporate Law as a Complex System

Thus far I have argued that the complexity of the corporate law system can be understood as having three dimensions: its structures, markets and practices; its rules and standards; and its regulatory practices. The complexity of the corporate law system is the product of the non-linear and changing interactions between the many elements that make up each of these three dimensions. Importantly, this means that the system's complexity is not confined to the text of the *Corporations Act*. The statute contributes to, but is not the sole cause of, complexity in the corporate law system. This is not to downplay the importance of those rules; as Anabtawi and Schwarcz emphasise, in the corporate or financial system the legal rules are an integral element and for that reason they require attention in understanding the dynamics of the system and in addressing concerns about its complexity.<sup>106</sup> This is why the ALRC inquiry is a welcome step.<sup>107</sup> However, this cannot be the limit of our attention. Anabtawi and Schwarcz explain the point as follows:

Analytical legal scholarship typically identifies a particular problem and uses a certain approach to solve it. Limiting the scope of a project in this way has the advantage of making it more tractable. The disadvantage of focusing narrowly on a specific problem, however, is that it sets aside the broader context in which that problem exists. By screening out related elements of the system, as well as the system's interconnections, traditional legal scholarship is often forced to treat law's dynamic effects, to the extent it does so at all, discretely.<sup>108</sup>

The risk is that the law (conceived as a body of rules) is then treated as the dominant or causal element, rather than being simply an integral element, in the sense described earlier.<sup>109</sup>

It is difficult to measure and control the extent or amount of complexity in the corporate law system. This is because complexity is an intrinsic quality that

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Practice' (2009) 33(3) *Melbourne University Law Review* 908; Dimity Kingsford Smith, 'A Harder Nut to Crack: Responsive Regulation in the Financial Services Sector' (2011) 44(3) *University of British Columbia Law Review* 695; Vicky Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37(1) *University of New South Wales (UNSW) Law Journal* 195; *Banking Royal Commission Final Report* (n 7) vol 1, 433.

<sup>105</sup> This is so even with the publication of regulatory guidelines.

<sup>106</sup> Anabtawi and Schwarcz (n 29) 81.

<sup>107</sup> The ALRC emphasises that '[l]egislative complexity is a concept at the heart of this inquiry': ALRC, *Interim Report A* (n 5) 52.

<sup>108</sup> Anabtawi and Schwarcz (n 29) 83 (citations omitted).

<sup>109</sup> See above text accompanying n 33.

emerges from the many interactions within that system. It is possible to identify certain factors within the system that are likely to contribute to greater (or reduced) complexity, but we cannot determine the extent to which systemic complexity will change if those factors are addressed. This observation is relevant to the current ALRC inquiry which, in its first Interim Report (*Interim Report A*), presents a detailed empirical analysis of legislative complexity in the *Corporations Act*, based on a number of metrics, defined as ‘potential quantitative measures of the complexity of a legislative feature’.<sup>110</sup> These metrics include the word length of sections; the number of sub-sections, paragraphs etc in a section; the number of conditional statements (for example, ‘if’ or ‘but’) and indeterminate terms (for example, ‘reasonable’ or ‘fair’) in a section; and the number of exemptions or exclusions that apply to a section. All these things are measurable, and have the potential to add to difficulty in using the legislation (noting that there is a range of users). But whether they can be used as levers to reduce complexity is a different question. Caution must be exercised in constructing elaborate metric analyses of complexity, as appears to be the case in the ALRC *Interim Report A*, lest this lead to overly optimistic diagnoses about the possibility of reducing systemic complexity as opposed to complicatedness.<sup>111</sup>

A further feature of corporate law’s complexity is that each of the three dimensions operates and develops (or emerges) in its own way. Corporate practice (dimension 1) changes constantly, in response to its own internal dynamics (for example, market competition), external factors (for example, changes in macro-economic or political conditions) and changes in the other two dimensions (for example, new regulatory policies). By comparison, the law, and the processes by which it is put into effect (dimensions 2 and 3) develop more slowly and in different ways. Judicial development is sporadic, depending on factors such as the capacity and willingness of parties to pursue litigation, the quality of lawyers and arguments, and the inclination of judges to change or develop the law. Legislative development is also irregular, but for different reasons, being dependent (among other factors) on the prevailing political appetite for corporate law reform, and the power of interest groups in pushing for, shaping or resisting legal change.<sup>112</sup> Implementation and enforcement policies and practice also change over time<sup>113</sup> in response to factors such as budget constraints, external reviews and recommendations (such as the Banking Royal Commission), and financial crises (such as the 2008–09 GFC). In this way, each of these three dimensions contributes

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<sup>110</sup> ALRC, *Interim Report A* (n 5) 100.

<sup>111</sup> In its second Interim Report, the ALRC notes that ‘it is difficult to estimate with any precision the true cost of the current complexity of the regulatory regime’: ALRC, *Interim Report B: Financial Services Legislation* (Report No 139, September 2022) 27.

<sup>112</sup> As a recent example, the *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) amended the operation of the continuous disclosure requirements in ch 6CA of the *Corporations Act* (n 4) in response to concerns that the previous provisions were ‘a key factor driving the increasing prevalence of shareholder class actions’: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (n 79) 322.

<sup>113</sup> Compare the findings of Bird et al in 1999 that ASIC favoured penal over civil enforcement: Helen Bird, David Chow, Jarrod Lenne and Ian Ramsay, ‘ASIC Enforcement Patterns’ (Research Paper No 71, Faculty of Law, The University of Melbourne, 2004), with the observations in the Banking Royal Commission’s 2019 report that ASIC was over-reliant on enforceable undertakings and infringement notices: *Banking Royal Commission Final Report* (n 7) vol 1, 433.

to the overall complexity of the corporate law system and, indeed, its status as a system.

While each of these dimensions is a system in its own right, they also interact as part of the larger corporate law system. Indeed, the effectiveness of corporate law as a regulatory system depends critically on how the dimensions interact and align at any given time. As Feaver and Sheehy observe, '[r]egulation fails ... when the linkages between components of a regulatory system are mismatched or incoherently aligned.'<sup>114</sup> The process of interaction is continuous, not static. This means that what may appear to be an effective alignment at one time will require reassessment as elements within the three dimensions change. A recent example illustrates this point. It concerns shifts in the methods by which ASIC seeks compliance with the requirements of the *Corporations Act* — that is, the interaction between the first and third dimensions described above. Studies show that in the late 1990s, ASIC relied predominantly on penal sanctions to enforce the law.<sup>115</sup> By the 2010s, a different approach was apparent, with limited levels of criminal enforcement. Instead, ASIC varied its enforcement strategies in different areas. In the financial services area ASIC relied on administrative outcomes such as infringement notices or bans from engaging in certain activities, as well as enforceable undertakings and negotiated settlements.<sup>116</sup> Then, in 2019, ASIC adopted a new enforcement policy under the banner 'why not litigate?'.<sup>117</sup> Under this approach, if ASIC was satisfied that a breach was more likely to have occurred than not, and the facts of the case showed that pursuing the matter would be in the public interest, then ASIC would ask: why not litigate this matter? This shift in policy was prompted by a pointed critique made during the Banking Royal Commission by Commissioner Hayne, who stated that instead of asking how instances of misconduct might be resolved by agreement, the regulator should ask 'why it would not be in the public interest to bring proceedings to penalise the breach'.<sup>118</sup> The new approach did not last long. In the midst of the economic disruption caused by the COVID-19 pandemic, it was replaced with an enforcement strategy that focused on assisting economic recovery.<sup>119</sup> In this changed context, ASIC announced that it would 'employ the full scope of [its] regulatory toolkit in a targeted and proportionate way to enforce the law',<sup>120</sup> adding that its enforcement approach would be 'responsive to changes in [its] regulatory environment'.<sup>121</sup> In these statements, ASIC encapsulated a key characteristic of the corporate law system: the emergence of varying enforcement strategies in response to unforeseen, or unpredictable, changes in other parts of the system. Finally, notice

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<sup>114</sup> Feaver and Sheehy, 'Designing Effective Regulation: A Positive Theory' (n 74) 994.

<sup>115</sup> See generally Bird et al (n 113).

<sup>116</sup> Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Company and Securities Law Journal* 289; George Gilligan and Ian Ramsay, 'Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions under the *ASIC Act* and *Corporations Act: 2009–2018*' (2021) 38(6) *Company and Securities Law Journal* 435.

<sup>117</sup> Hughes (n 98).

<sup>118</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 277.

<sup>119</sup> See Ronald Mizen, 'ASIC Dumps "Why Not Litigate" Policy as Frydenberg Resets Path', *Australian Financial Review* (online, 26 August 2021) <<https://www.afr.com/politics/federal/asic-dumps-why-not-litigate-as-frydenberg-resets-path-20210825-p581yx>>.

<sup>120</sup> ASIC, *ASIC Corporate Plan 2021–25: Focus 2021–22* (August 2021) 15.

<sup>121</sup> *Ibid.*

that this complexity analysis works quite differently compared to the standard analysis of the corporate law and financial services regulatory process, which posits the relationship between the three dimensions as hierarchical, sequential and linear (or, with slightly more nuance, circular). In that analysis, events and practices in the corporate world prompt the creation or reform of laws, whether judicial or legislative. Those laws are intended to address identifiable problems or achieve ascertainable goals. The persons (natural or legal) to whom those laws are directed respond by adjusting their behaviour accordingly. This may mean compliance or non-compliance. In the latter case, the relevant regulatory agency then takes steps to enforce the law to either encourage compliant behaviour or to impose sanctions or prosecute for non-compliance. The success and regulatory value of the laws is then judged by the extent to which they produce compliant behaviour in the target community. If deemed necessary, there is further law reform and the process is repeated.

For many decades, scholarship in the sociology of law, critical legal studies, jurisprudence, law and history, and behavioural economics has demonstrated the many ways in which this linear model does not explain why some law reform initiatives succeed while others fail, nor why some receive ready support but others are left aside. This is not the place to summarise or rehearse all of the insights in that diverse literature, but the following brief points are relevant to the present analysis. The process by which laws ‘emerge’ is political,<sup>122</sup> in the broad sense that it is defined by relations of power and influence. Public choice theory, to take just one conceptual framework as an example, explains how legislation is used by special interest groups to promote their own agendas.<sup>123</sup> The passage of a law reform measure can be the outcome of ‘rent-seeking’ by interest groups, or vote trading by legislators, or both.<sup>124</sup> Nor do laws always have solely instrumental purposes; legislation can also have a symbolic status, reinforcing certain ‘values, ideals and ways of thinking about government and society’.<sup>125</sup> Then there are difficulties in determining whether a law has been effective. The effects of a given rule may be indirect or quite unintended, even if they are nevertheless beneficial.<sup>126</sup> All this tells us that the causal links in the linear chain are not as clear and predictable as the traditional model assumes. What the formal linear model misses, and what the study

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<sup>122</sup> See above nn 38–40 and accompanying text.

<sup>123</sup> The classic exposition of public choice theory is James M Buchanan and Gordon Tulloch, *The Calculus of Consent* (University of Michigan Press, 1962). See also Geoffrey Brennan and James M Buchanan, *The Reason of Rules* (Cambridge University Press, 1985).

<sup>124</sup> The term ‘rent-seeking’ is used to describe the way in which small groups with strong interests in a particular issue will devote their scarce resources lobbying to secure positive political outcomes, relying on the ‘rational ignorance of the general population amongst whom the cost will be distributed’: see Emanuel V Towfigh and Niels Petersen, ‘Public and Social Choice Theory’ in Emanuel Towfigh and Niels Petersen (eds), *Economic Methods for Lawyers* (Edward Elgar, 2015) 121, 132–3.

<sup>125</sup> Roger Cotterrell, *The Sociology of Law* (Butterworths, 2<sup>nd</sup> ed, 1992) 102. Arguably the statutory derivative action, found in *Corporations Act* (n 4) pt 2F.1A, is an example. Though it is rarely used, it nevertheless reinforces ideas of accountability and contestability in corporate governance: see generally Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Ashgate, 2007).

<sup>126</sup> For a classic analysis, see John Griffiths, ‘Is Law Important?’ (1979) 54(2) *New York University Law Review* 339.

of complexity adds, is that legal and regulatory systems are comprised of constantly interconnecting, adapting and changing relationships and feedback loops.

These interactions occur in many ways: formally and informally, regularly (such as everyday market trading) and sporadically (in special situations, such as a company takeover, or in unexpected situations, such as the GFC). They can be bilateral or multilateral. They involve individuals and organisations, rules and norms, from the public and private spheres. They involve decision-making by human actors and, increasingly, advanced algorithms. And, in all, they continuously shape the emerging corporate law system.

This interactional complexity resists depiction in the form of a diagram or flow chart. That would unhelpfully attempt to impose a static representation on what is a dynamic system. It would require, at least, a series of constantly updated diagrams. Equally, as Meadows has noted,

there is a problem in discussing systems only with words. Words and sentences must, by necessity, come only one at a time in linear, logical order. Systems happen all at once. They are connected not just in one direction, but in many directions simultaneously.<sup>127</sup>

Instead, we understand this complexity through experience and observation, by example and, often, with the benefit of hindsight.

#### IV Implications for Corporate Law Reform

What are the implications of the preceding analysis for corporate law reform? Here I list three, and they are framed as broad lessons, rather than specific instructions. This is a necessary consequence of looking at corporate law through the lens of complexity theory, where non-linearity, unpredictability and self-organisation are key features. Complexity theory does not lead to definitive or predictable solutions, in the sense of saying ‘if you want to achieve outcome X, then do Y’. Acknowledging the interactional complexity between the three dimensions helps us to understand, but not necessarily predict, the often disjointed process and outcomes of corporate law reform.

The first implication begins by recognising that complexity in the corporate law system will not be eliminated. Complexity theory tells us that complexity, in its many forms, is not an incidental or severable feature of the corporate law system; instead, it is an integral quality of that system. This is not a startling conclusion. Despite the frequency with which the opening observation in this article has been repeated (that our system of corporate law is complex), there is also recognition that complexity is endemic to that system. This was acknowledged in the *Banking Royal Commission Final Report*, which noted that ‘financial services laws will always involve a measure of complexity’.<sup>128</sup> This does not mean, however, that we should simply accept the problems caused by complexity — the opaque financial products, overly complicated rules and diversity of regulatory techniques. The critical

<sup>127</sup> Meadows (n 31) 5.

<sup>128</sup> *Banking Royal Commission Final Report* (n 7) vol 1, 491. See also Chia and Ramsay (n 16) 391, observing that corporate law is ‘inescapably complex’.



implication is that we should be clear in our diagnoses and realistic about the possible outcomes. This may be why the Commonwealth Attorney-General's Department instructs agencies and drafters to 'reduce' complexity, rather than eliminate it.<sup>129</sup> This suggests an acknowledgment that some degree of complexity is necessary or unavoidable, and that the task is to find the optimal or necessary degree of complexity to achieve the system's aims.<sup>130</sup>

This takes us to the second implication: if the goal is to reduce the problems caused by complexity, the questions then become 'how', 'where', and 'by how much'? The difficulty in answering these questions is evident in the proposition that we can distinguish between necessary and unnecessary complexity, with the goal of acknowledging the former and removing the latter. As defined by the ALRC, '[n]ecessary complexity is that which is required to achieve the desired outcomes of the legislation. Unnecessary complexity is that which is not essential to achieve those outcomes'.<sup>131</sup> This suggested distinction implies an agreed criterion by which we can identify and explain why a given complex feature of the corporate law system is unnecessary. It is easy to think of possible criteria; for example, compliance rates might be used, so that complexity would be unnecessary if it clearly impeded the capacity of corporate actors to comply with the rules. Cost efficiency could be another criterion (be it the costs of regulation, or the costs of compliance). Other criteria can readily be added to the list, and that is the problem. Leaving aside methodological difficulties in measuring compliance or cost (or any other chosen factor), the earlier discussion about normative complexity in Dimension 2 explained there is no single yardstick and, therefore, no way to definitively determine what is necessary and what is not. Once again, however, the implication is not that nothing can be done, but, instead, that we should clearly identify which criterion is being used *and* (importantly) acknowledge that the impact of competing criteria may affect or thwart the intended outcomes.

The third implication is contained in the 'where' question noted in the previous paragraph. To repeat an earlier point, complexity does not reside in any particular element of the corporate law system. Each of the three dimensions described in Part III embodies its own complexities, and the interactions between those dimensions produce further complexity. The implication, then, is that in assessing and deciding what to do about complexity we should not assume that the answer lies solely in redrafting legislative rules and structures or reprioritising regulatory strategies. To be clear, legislation and regulatory practice do require constant attention; as emphasised previously, they are integral elements in the system. However, the argument in this article is that this alone will not reduce the overall complexity of the system, certainly not in a completely predictable way. We see an example of this in the idea that the *Corporations Act* should be redrafted to make it more 'user friendly', so that those at whom legislative obligations are aimed

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<sup>129</sup> Attorney-General's Department (Cth), *Reducing the Complexity of Legislation* (Web Page) <<https://www.ag.gov.au/legal-system/access-justice/reducing-complexity-legislation>>.

<sup>130</sup> Harris (n 20) 53.

<sup>131</sup> ALRC, *Legislative Framework for Corporations and Financial Services Regulation: Complexity and Legislative Design* (Background Paper FSL2, October 2021) 5 [22].

(the ‘rule targets’) can know what their legal position is.<sup>132</sup> Note that there is a conflation here: it is assumed that the rule targets are the users of the Act, but it is by no means clear that this is always (or mostly) the case. There are rule users (for example, regulators) who are not rule targets. Similarly, the directors at whom the directors’ duties sections are aimed may rarely consult the legislation directly in order to determine their legal position. This is not necessarily because the legislation is difficult to understand (if anything, the principles-based drafting of the directors’ duties sections in the Act is a model of simplicity)<sup>133</sup>; it is because prudent directors rely on professional advice to understand the application of the rules to their particular situation. In practice, a rule in the Act may have many ‘users’, including professional advisers, regulators and enforcers, rule targets, and judges. Further, the ways in which each of these users engages with the text of the Act will be affected or shaped by the actions and practices of the other users. Again, while clear, accessible rule-drafting is important, it should not be assumed that simplicity is the necessary antidote to complexity.

## V Conclusion

In one of the prefatory quotes to this article, the philosopher John Locke observed complexity in things as diverse as ‘beauty, gratitude, a man, an army, [and] the universe’.<sup>134</sup> Noting the gender-specific referencing of the time, it is safe to assume that Locke could not have contemplated the complexity of the corporate and financial markets system in the early 21<sup>st</sup> century. Nevertheless, even in the technologically and economically less developed time in which Locke wrote those words, the challenges of thinking about complexity were readily apparent. Complexity is not a modern invention, although it is manifested in many more ways than was the case in Locke’s time. The modern corporate law system is a cogent example of this.

To conclude where the article began: our system of corporate and financial services law is complex. It can now be seen that this claim is a tautology, because complexity is an intrinsic part of corporate law’s status as a system. It is important to re-emphasise, however, that the purpose of this article is not to dismiss efforts to simplify our system of corporate law, to make it more comprehensible, and to make its application more predictable. It *is* important and necessary to review legislative complexity, as the ALRC has been doing. This article’s purpose, instead, is to emphasise that these goals must be bounded by realistic expectations and considered in a broader system-wide context. That realism comes from an understanding of the nature of the system within which corporate law rules operate, and the causes of its complexity. But realism does not mean certainty or predictability. That is not the nature of complex systems. At best, we should aim to be realistic in the uncertainty of our reformist aims.

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<sup>132</sup> See, eg, Ross Grantham, ‘To Whom Does Australian Corporate and Consumer Legislation Speak?’ (2018) 37(1) *University of Queensland Law Journal* 57.

<sup>133</sup> For example, the requirement in *Corporations Act* (n 4) s 181(1)(a) to act ‘in good faith in the best interests of the corporation’.

<sup>134</sup> Locke (n 1).