

Australia

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Statute Law and Australia's Relative Economic Decline

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When nickel was discovered at Kambalda in Western Australia in 1966, only three government departments were involved and within 18 months the first shipments were on their way to Japan selling into a rising market. By contrast, this year will see the first cash flow from the discovery of gold, copper, and uranium at Roxby Downs in South Australia in 1975 — 13 years after the discovery and the involvement of 54 state and federal government departments and instrumentalities.

According to Colin Wise, solicitor and general counsel to Western Mining Corporation Ltd, the Roxby Downs project was overtaken by an explosion of Australian statute law and a "high level of indifference within our society to its stifling and destructive effects". He told the Corporate Lawyers Association of Victoria: "... the great outpouring of statute law, particularly in the economically vital area of company law, that has occurred here in the last twenty-five years or so, must have been a factor in Australia's relative economic decline".

He said common law tended to be economically efficient and increased the wealth of a nation, whereas statute law tended to impoverish a nation. But there was no sign of any diminution of Australia's enthusiasm for legislation. He had yet to meet a politician who argued that the best policy was to do nothing and let common law provide a solution. Yet the doctrines of common law form a system for inducing people to behave in an economically efficient and rational way, not only in explicit markets, but across the whole range of social interactions. It was legislative enthusiasms, he feared. And since the consequences of such legislative enthusiasms can take a generation or more to manifest themselves fully, there was further impoverishment in the pipeline for Australia.

Colin Wise stressed that his criticisms were levelled not as much at the bureaucrats of the 54 government departments and instrumentalities involved at Roxby Downs, as at the assumption which underlies the statutes within which the bureaucracy must work. This assumption, now widely held throughout the community and even within the legal profession, is that if something is wrong then the government ought to pass a law to fix it". It will bring our community before very long, to final economic ruin", he said.

"For example, it is common knowledge amongst lawyers who have worked in the mining industry for any period, that the time, complexity and cost of getting a project into production has increased exponentially in the last twenty years. So much so that mineral discoveries have to be much higher grade than previously, to be regarded as worth pursuing. The costs and frustrations of what was once routine and predictable legal work, and the uncertainty of the security of property rights, now often loom larger than the prospective profits from a mineral discovery".

He added that the geologist today who found another Roxby Downs, one of the world's largest ore bodies, might not be greeted with the same excitement and acclamation as would previously been the case. To walk away from such a discovery because of the weight of legislation and bureaucracy could, economically, be a sensible decision. But it would be hard for a mining company to explain that to its exploration team, not to mention its real owners, its shareholders.

Mr Wise challenged the notion that the implementation of black letter law would be the economic saviour of Australia. He said the proliferation of black letter law created no economic unit of value, added no value to the real production of the Australian economy, and served only to fund the services sectors which now bear down so heavily on industry and commerce. For example, company law and tax law are growth industries. "The Income Tax Assessment Act has grown in thickness from about ¾ of an inch to approximately five inches over the last twenty years. Since 1985, there has been more than 1,000 pages of new tax legislation, accompanied by in excess of 1,000 pages of explanatory memoranda. The fringe benefit tax legislation introduced a few years ago covered more than 130 pages. Within one year it was

amended by an Act with more than 150 pages of extra black letter law. The explanatory memoranda for the fringe benefit tax legislation exceeded in aggregate, 300 pages.

"The Companies Act and its related legislation has also grown enormously in the past 25 years. In 1981, a completely new Companies Code was introduced and came into force in mid-1982. After only six months of operation, it was amended by an Act covering in excess of 70 pages with amendments to some 103 sections.

Since 1981 there have been 336 amendments to the Companies Code and 93 amendments to the Companies (Acquisition of Shares) Code. And now, less than six years after the complete revamp of 1982, we are to be faced with a fresh onslaught of new legislation".

He concluded that while the proliferation of black letter law had brought about many employment opportunities for lawyers — something which lawyers within the government sector see as entirely satisfactory — there was, nonetheless, throughout Australia's legal profession a concern and even dismay at the increase in the number of words that have the force and standing of law and an even greater concern at their incomprehensibility.

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