# *Bringing Back the Bubble? Regulation of Corporate Abuse by an Action in Public Nuisance.*

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## *Introduction*

Although companies are the central unit of economic life, they have been used in some cases as a vehicle by the unscrupulous to avoid legal obligations and violate the trust of shareholders. The Australian legislature has sought to regulate such corporate abuse by its Corporations Law. Some three hundred years ago, the State was also perplexed by the problems posed by companies, then in their infancy. Initially, commercial corporations received privileges, such as monopoly powers and limitations on the liability of their members for corporate wrongdoing, because the State perceived the corporation to be engaged in some activity which was particularly valuable. As special acts of the legislature were necessary to create each corporation, corporate privilege was restricted. Despite this apparently stringent control, however, the dangers of the corporate form to the stability of the State were only too evident. In 1720, the notorious Bubble Act[1] was passed in an attempt to curb certain abuses of the corporate form. The method used by the legislature in this case was to deem certain practices public nuisances and accordingly punish these practices with severe penalties. The purpose of this article is twofold. The first aim is to trace the history of the Bubble Act and judicial decisions under that Act. The second is to consider the survival and possible re-introduction of an action in public nuisance in circumstances where the Corporations Law has been contravened.

## *History of the South Sea Bubble Incident*

The first two decades of the eighteenth century were marked by a dramatic increase in share speculation and company flotations. Company promoters did not always obtain charters, however, and those who did often acquired charters from moribund companies because it was simpler and cheaper to do so. Radin[2] records that, towards the end of the seventeenth century, the needs of the English government became too large to be satisfied by ordinary revenues or

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1 6 Geo 1, c. 18

2 Max Radin, Handbook of Anglo-American Legal History (St. Paul, Minn: West Publishing Company, 1936), 480-482

private loans. As a result, the Bank of England was chartered to provide funds for the government and to enable the government to pay its debts. Although this was a public enterprise, it was primarily the idea of the Whig party which was then in power. In 1711 the Tories were elected to government. They created the South Sea Company (The Company of Merchants of Great Britain Trading to the South Seas) which was granted a monopoly of British trade in South America and the Pacific Islands. Later. a monopoly was granted over the slave trade of Spanish America. The Tories' scheme was that government annuitants were to be induced to exchange their annuities for South Sea Stock which was to be offered at a premium. To make the South Sea stock more attractive to the investing public, the company took over 10,000 pounds of the government debt for which it received interest secured by taxes. Subsequently,[3] it volunteered to take over still more of the debt. Between February and August 1720 the market price of the Company's 100 pound shares rose from 129 pounds to over 1000 pounds. The higher the value of South Sea stock, the more attractive an exchange for shares would appear to a debt holder and the lower the cost to the Company. An annuity worth 10,000 pounds could be exchanged for 10 shares with a par value of 100 pounds when those shares were trading for 1000 pounds.[4] The theory was that the possession of an interest-bearing loan owed by the state was a basis upon which the Company might raise vast sums to extend its trade. The Company had little trade to extend, however, and its privileges had been bought at a high price, the Company outbidding the Bank of England. At the same time, many other companies, also offering stock to the investing public, were created. This development was not confined to England. In France, the so-called ' Mississippi Bubble' also took place. The rash of speculation caused considerable concern in England, not least because the public interest was inextricably tied to the fortunes of the South Sea Company. On February 22, 1719, the House of Commons appointed a Committee of Investigation upon:

> A complaint being made to the House of several publick and private subscriptions in and about the Cities of London and Westminster, for several unjustifiable Projects and Undertakings whereby great Mischiefs may accrue to the publick. [5]

Accordingly, it was

> Ordered that a Committee be appointed to inquire into and examine, the several Subscriptions for Fisheries, Insurances, Annuities for Lives, and all other Projects carried on by subscription in and about the cities of London and

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3 By 7 Geo I c. 5

4 An example given by Paul Redmond, Companies and Securities Law (Sydney: LBC, 1988), 13

5 JHC XIX 274-5

> Westminster, and to inquire into all Undertakings for purchasing Joint Stocks or obsolete Charters.

The Committee reported on April 27, 1720, recommending that a Bill be introduced to counter certain practices which 'manifestly tend to the Prejudice of the Publick Trade and commerce of the Kingdom.' Royal Assent was given to the Bill of June 11 and the Act came into force on June 24.[6] On the very day on which the Act came into force, Treasury summoned the Attorney and Solicitor-General to a meeting to consider the increase in the number of unlawful subscriptions. The Lord Justices who were acting as Regents in the absence of the King in Hanover, were concerned with the growth of Bubbles. This concern led ultimately to a writ of *scire facias*[7] being brought against four Bubble companies: the York Building Company, the Lustring Company, the English Copper Company and the Welsh Copper and Lead Company. There was a general expectation[8] that the writs would cause a recovery in South Sea quotations (despite the ironic fact that the Company was employing the Sword Blade Company, which was operating under an obsolete charter, as its banker). It is believed by many historians that it was the directors of the South Sea Company, desiring to limit the benefits of the speculative boom to their own Company, who procured the enactment of the *Bubble Act*. When the Act did not achieve the directors' aims, they took legal proceedings to forfeit the charters of other companies.[9] Although these proceedings were ultimately dropped, it was largely their institution which prompted the crash of Autumn 1720.[10] By September of that year, shares in the South Sea Company had fallen to 124 pounds.[11] After an unsuccessful attempt

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6 The bill was introduced to the House of Commons on May 20 and given a second reading on May 21. On the 24th of that month, the Committee of Correspondence of the Company laid drafts of its suggested clauses before the Court and remaining amendments were made on the third reading. On June 2, the Court of Chancery was informed that all clauses had been inserted.

7 Scire facias (that you cause to know) was a writ founded upon a record, such as a judgment or letters patent, which directed the sheriff to make known or warn the person against whom the writ is brought, to show cause why the person bringing it should not have the advantage of the record, or, in the case of a scire facias to repeal charters, why the record sould not be annulled and vacated. John Burke, Jowitt's Dictionary of English Law (2nd. ed.)(London: Sweet & Maxwell Ltd., 1977), 1402

8 This may be seen in contemporary a report in the Edinburgh Evening Courant. See Gower, 'A South Sea Heresy?' (1952) 68 LQR fn. 64.

9 Gower rejects the contention that these proceedings were brought formally by the directors of the South Sea Company, although he does consider it plausible that such proceedings were brought informally by the directors because of the link between the company and treasury. Id. 221

10 Id. 225

11 Redmond, op. cit. 14.

by Parliament to transfer the stock from the South Sea Company to the Bank of England and the East India Company, the directors of the South Sea Company were punished for fraud and their estates were confiscated and used to relieve stock holders. Subsequent investigations disclosed fraud and corruption in which members of the Government and the royal family were implicated.[12] Along with the South Sea Company, many other companies also fell. As a consequence of the South Sea Bubble incident, the creation of new corporations was held in check for some time. This was because public confidence in joint stock companies was effectively destroyed, individual responsibility of members was insisted upon for many years and the *Bubble Act* provided that certain practices constituted a public nuisance and sanctioned these practices by *praemunire.* [13]

## *An Analysis of the Bubble Act*

The Bubble Act is formally titled *'An Act for Better securing certain powers and privileges intended to be granted by His Majesty by two charters for assurance of ships and merchandize at Sea and for lending money upon bottomry; and for restraining several extravagent and unwarrantable practices therein mentioned.'* The Act is composed of two parts. The first, ss. 1-17, authorised the Crown to create two corporations by charter for marine insurance: The London Assurance and Royal Exchange Assurance Companies. These companies were given the monopoly of business in marine insurance with the proviso that on 3 years' notice, at any time within thirty-one years in repayment of the 300,000 pounds advanced by the corporations, the corporations might be determined by parliament.[14] The second part of the Act (ss. 18-21) declared certain practices illegal or void and provided sanctions. Section XIX, the most important section, provided as follows:

> XIX ...all such unlawful undertakings and attempts so tending to the common grievance, prejudice and inconvenience of his Majesty's subject, or a great number of them, in their trade, commerce, or other lawful affairs, and the making or taking of any subscriptions for that purpose, the receiving or paying of any money upon such subscriptions, the making or accepting of any assignment or transfer, or pretended alignment or transfer, or any share or shares upon any such subscription, and all and every other matter and thing whatsoever, for furthering, countenancing, or proceeding in any such unlawful undertaking or attempts, and more particularly the presuming

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12 L.C.B. Gower, J.B. Cronin, A.J. Easson and Lord Wedderburn of Charlton, Gower's Principles of Modern Company Law, (4th. ed.) (London: Stevens and Sons, 1979), 30

13 Radin, op. cit. 482

14 This monopoly continued until the legislature permitted any corporation or partnership to effect politics of assurance and to lend money upon bottomry in 5 Geo IV c. 114. The rights already granted to the two corporations in the Bubble Act , however, were saved.

> or pretending to act as a corporate body or to raise a transferable stock or stocks, or to make transfers or assignments of any share or shares therein, without such legal authority, as aforesaid, and all acting or pretending to act under any charter formerly granted for the Crown for any particular or special purposes therein expressed, by persons making or endeavouring to make use of such charter for any such other purpose not thereby intended, and all acting or pretending to act under any such obsolete charter as is before described and every of them (as to all or any such acts, matters of things as shall be so acted, done attempted, endeavoured or proceeded upon, ...shall be deemed to be a publick nusance and nusances, ...and all offenders ...shall be liable to such fines, penalties, and punishments, whereunto persons convicted for common and publick nusances are, by any of the laws and statutes of this realm, subject and liable; and moreover shall incur and sustain any further pains penalties and forfeitures as were ordained and provided by the statute of provision and praemunire made in the sixteenth year of the reign of King *Richard* the Second.

The Act thus recites various practices to be illegal: These are: opening books for public subscription; presuming to act as if a corporate body; pretending to make stocks transferable; and pretending to act under an obsolete charter. The list was not exhaustive, however, the Act stating that all other 'public undertakings and attempts tending the common grievance, prejudice and inconvenience' of subjects in their lawful affairs was deemed to be a public nuisance.[15] The Act provided that these offences incurred the penalties provided under the *Statute of Praemunire* of 1392. These penalties were forfeiture of all lands, goods, and chattels and imprisonment for life.[16] Section 20 provided that any merchant or trader suffering particular damage in his trade by practices which the Act declared unlawful was entitled to a remedy. Section 21 of the Act made brokers dealing in securities of illegal companies liable to penalties. The remaining sections exempted companies established before June 24, 1718; the East India and South Sea Companies; and the two assurance companies created by the first part of the Act.

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15 The word 'nuisance' came originally from the Norman-French and meant 'harm'. Only four years before the statute, William Hawkins in Pleas of the Crown had sought to organise crimes into a coherent scheme of classification. Residual offences were headed 'common nuisance' and included such disparate crimes as keeping treasure trove, digging up the wall of a church, keeping a bawdy-house and running noisome trade in towns. See J.R. Spencer, 'Public Nuisance - A Critical Examination' (1989) 48 (1) CLJ, 55-84.

16 Until the Act of Supremacy, 1562, it was, perhaps, lawful to kill the defendant. The statutes relating to praemunire were aimed at countering papal usurpation by presentation of aliens to English benefices. The Statute of Provisors was the foundation of the subsequent statutes of praemunire, but the Statute of Praemunire, 1392, was incorporated by reference in many subsequent statutes. Burke, op. cit. 1402

Section 25 exempted (somewhat vaguely) trading by partnership: 'The Act shall not be construed to prohibit or restrain the carrying on of partnerships in trade in such manner as had been usually and may legally be done.'

## *Judicial Decisions under the* Bubble Act

The first decided case under the *Bubble Act* was *The King v. Cawood* [17] In this case of 1723, it was decided that part of the penalties provided by *praemunire* might, at the Court's discretion, be awarded against the defendant.

> The defendant was found guilty upon an information for setting up a bubble called the North Sea, founded upon the Act of 6 G 1, c 18 s. 19 and was brought up several terms ago to receive judgment. And it was insisted on, that judgment ought to be given against him by that Act, as if he had been found guilty of a premunire. And the Court took time to consider of it, and in the mean time he was committed to the King's Bench prison, and afterwards escaped; but being re-taken, he was brought May 18 this term to receive judgment. And the Court were all of opinion, that they were not obliged by that Act, to give the whole judgment as in case of a premunire against him, but only such part of it as in their discretions they should think fit. And therefore a fine of £5 was set on the defendant, and judgment that he should remain in prison during the King's pleasure.[18]

The next reported case[19] under the Act was not considered until 1808. [20] In *R. v. Dodd,* [21]the defendant published and circulated two different schemes. The first was entitled 'Prospectus for the London Paper Manufacturing Company' and the other 'A Prospectus of the intended London Distillery Company for Making and Rectifying genuine British Spirits, Cordials and Compounds'. Both schemes sought to raise monies by subscription of transferable shares. By deed of trust or enrolment in Chancery "no party could be accountable for more than the sum subscribed under the regulations therein stipulated". The action was brought by the Attorney-General on behalf of a private relator. It was alleged by the defendant that there was 'no apparent mischievous tendency or public grievance' in such schemes (one being to supply better and cheaper paper and the other to supply better and cheaper British spirits to the public than

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17 2 Ld. Raymond, 1361; 92 ER 386.

18 Ibid

19 Gower notes that contemporary news sheets reveal that other actions were instituted but were not reported, Principles, op. cit. 31, fn 40.

20 The Attorney-General suggested in this case that the only reason that the Bubble Act had not been acted upon for so long was because it had corrected the evil that it had intended to suppress. Ronald Ralph Formoy, The Historical Foundations of Modern Company Law (London: Sweet and Maxwell, 1923), 49.

21 9 East 516; 103 ER 670

they had at present) without which they were not within the letter, and still less within the spirit of the law. Lord Ellenborough stated:

> But independent of the general tendency of schemes of the nature of the project now before us to occasion prejudice to the public, there is besides in this prospectus a prominent feature of mischief; for it therein appears to be held out that no person is to be accountable beyond the amount of shares for which he shall subscribe, the conditions of which are to be included in a deed of trust to be enrolled. But this is a mischievous delusion, calculated to ensnare the unwary public. ...But considering that this is brought forward after a lapse of so many years since any similar prosecution was instituted, and brought forward by a party who does not profess to have been himself deluded by the project; and the statute having been passed principally for the protection of unwary persons from delusions of this kind; the court think, in the exercise of their discretion, that they should not now enforce the statute against this defendant at the relation of a person so circumstanced. [The Court] recommend it as a matter of prudence to the parties concerned, that they should forbear to carry into execution this mischievous project, or any other speculative project of the like nature, founded on joint stock and transferable shares: and we hope that his intimation will prevent others from engaging in the like mischievous and illegal projects.

In 1808, in both *Buck v Buck* and *Rex* v *Stratton*,[22] companies having transferable shares (the British Ale Brewery and the Philanthropic Annuity Society respectively) were held to be illegal within the statute. In *Buck v Buck*, the defendant was employed by the plaintiff to purchase, on his behalf, shares in the British Ale Brewery. The highest premiums on shares in the company were then five pounds each, but the defendant charged and received 50 pounds each as the premium upon the shares so purchased. It was alleged that the excess on the original premium was money had and received to the plaintiff's use. It was held that no action was available, however, as the company was a public company, neither incorporated by charter nor Act of Parliament and its stock was raised by public subscription and its shares transferable. The plaintiff argued that the company was outside the Act because the 'object of the British Ale Brewery was to carry on a lawful trade in a lawful manner, and to furnish to the public at a cheap rate, and of a good quality, an article of the first necessity'. It was a public benefit, therefore, instead of a nuisance. The Act did not apply because it was only intended to prohibit companies which tended to the common grievance, prejudice or inconvenience of the public. The court rejected this argument and held, relying upon *R. v Dodd*, that the company was within the prohibitions of the *Bubble Act* and the parties *in pari delicto*. In *Rex v. Stratton*, it was alleged that there was a conspiracy to deprive one Thompson, secretary to the Philanthropic

22 (1808) 1 Campb. 547; 170 ER 1052 and (1808) 1 Campb. 549; 170 ER 1053 respectively.

Annuity Society, of his office. 'It appeared that this society is an unincorporated company, with transferable shares; that there was a violent dispute amongst the subscribers as to the choice of secretary; that one party headed by the defendants, cashiered the prosecutor; that he still went on collecting subscriptions; and that they indicted him for obtaining money upon false pretences, of which he was acquitted'. Lord Ellenborough said:

> This society was certainly illegal. Therefore, to deprive an individual of an office in it, cannot be treated as an injury. When the prosecutor was secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime. In *Dodd's* case, all the Judges of this court were agreed upon the illegality of these associations;...he did obtain the money upon a false pretence. He pretended that there was then a real legal society, to which he was secretary; whereas no such society existed. The defendants must all be acquitted.[23]

In 1811 in the case of *The King v. Webb*, the defendants were prosecuted for having covenanted by a deed of co-partnership to raise 20,000 pounds by subscriptions of 1 pound per share for the purpose of making and selling bread under the name of the Birmingham Flour and Bread Company. Under this arrangement, each member was obliged to buy a weekly quantity of bread not exceeding a shilling in value per share. Several partners in the venture were charged under the *Bubble Act* s. 18 and 19 as a public nuisance,

> with intending to prejudice and aggrieve divers of the King's subjects in their trade and commerce, under false pretences of the public good, by subscribing, collecting, and raising, and also by making subscriptions towards raising a large sum for establishing a new and unlawful undertaking, tending to the common grievance, &c. of great numbers of the King's subjects in their trade and commerce, ie making subscriptions towards raising 20,000l. in 20,000 shares for the purpose of buying corn, and grinding and making it into flour and bread, and dealing in and distributing the same; and also with presuming to act as a corporate body, and pretending to raise a transferable and assignable stock, for the same purposes...[24]

Although the jury considered that the Company was originally created for altruistic motives which were beneficial to the townsfolk, it found that, at the time of finding the special verdict, which did not include the time of the offence charged in the indictment, the scheme was 'prejudicial to the bakers and millers of the town and neighbourhood in their trades'.[25] Lord Ellenborough held that the purpose for which the capital was raised was not 'manifestly tending to the common grievance, and being in this case expressly found to have been beneficial', it did not fall within the *Bubble Act*: 'It is only,

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23 1 Camp. 549; 170 ER 1053
24 14 East 406; 104 ER 658
25 This gave rise to an action under s. 20 of the Bubble Act.

therefore, where the subscription is with reference to undertakings &c. which the Act prohibits, that it is illegal: the Act does not apply indiscriminately to all subscriptions'.[26] He found that the shares in the stock were not generally transferable, but were effectively restricted to persons in the neighbourhood only; no one could purchase more than twenty shares; they could only be transferred to those willing to undertake the obligations imposed; and that the consent of the other members or of the committee had to be obtained before a transfer could be effected. As to the charge of presuming to act as a body corporate, Lord Ellenborough said:

> ...how is this made out? It was urged that they assumed a common name..., that they have a committee, general meetings, and power to make bye-laws; but are these unequivocal indicia and characteristics of a corporation? How many unincorporated insurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings, and power to make bye-laws? Are these all illegal? or which of these particulars can be stated as being, of itself, the distinctive and peculiar criterion of a corporation?[27]

Therefore, Lord Ellenborough found that the facts did not bring the defendants within the prohibitions contained within the *Bubble Act* so as to make them liable under its provisions.

In *Pratt v, Hutchinson,* [28]the next decision under the Act, the headnote states:

> There is no objection upon the statute of 6 Geo I c. 18 section 18 as for a publick nuisance and grievance to articles of agreement whereby fifty persons agree to raise 200 shares of 210 pounds each by small monthly subscriptions for building houses for each other every holder paying interest on his shares until paid up; with a stipulation for the members to employ certain tradesmen only in the building; with power to each member to sell his shares and transfer them in the books of the Society, provided that the purchaser should be approved at a meeting of the Society and should on his admission become a party to the original articles; for there is nothing illegal *per se* in the general object or in the mode of executing it; nor is such a limited power of transferring the shares a raising of transferable stock within the mischief of the Act.

Lord Ellenborough asked the defendant's counsel to state upon what grounds it was contended that the shares were transferable stock within the meaning of the *Bubble Act* 'when the holder had not the power of transferring his share except upon certain conditions, namely, upon the purchaser being approved by the society, and becoming a party to the original articles?' Comyn, for the defendant, replied that the plea had been put in before the decision in *R v Webb*

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26 14 East 406 at 421; 104 ER 664
27 14 East 406 at 415-416; ER 662
28 (1812) 15 East, 511; 104 ER 936

was made known. He then claimed that the decision in *Webb* did not impugn the decisions of *Dodd, Buck* and *Stratton*, on the grounds that the nuisance in *Webb* was specifically negatived by the special finding of the jury that the association in that case was originally constituted for laudable motives and was beneficial to the people of Birmingham. Bayley J., however, retorted that this was no reply, as 'the plea does not allege generally as a question for the jury that this society was prejudicial to the public at large; and, therefore, unless it be brought within the statute, it is no answer'. Comyn then attempted to argue that the arrangement was in restraint of trade, alleging that this was 'one of the very mischiefs intended to be prevented by the Act: it is calculated to put down individual industry and competition, which is most advantageous for the public'. This argument, too, was rejected by the Court.[29]

The same year, the court refused to find that a brewery Company was a nuisance within the statute upon a motion to set aside a judgment confessed to them in *Brown v. Holt*.[30] In 1825 in the case of *Joseph* v *Pebrer* [31] a broker sued for work and labour and money expended in the purchase of shares for the defendant in a concern called the Equitable Loan Bank which purported to make its shares transferable without restriction. The court held that the plaintiff could not maintain the action. The same year, in *Kinder v. Taylor,* [32] there was a dispute between partners in the Real del Monte Mining Company as to the purchase of the Bolanos mine, but it was to the interest of both sides to argue the legality of the Company so the case was not decided upon this point. The Lord Chancellor expressed his doubts, however, as to the legality of such an association as the Real del Monte Co. but criticised the statute of 6 Geo I c. 18 as very ill-drawn, the recital clause mixing and jumbling together a variety of things in such a manner that it was very difficult to say what was or was not included in it. Interestingly, he claimed to be of the opinion that acting as a corporate body not being such is an offence at common law independent of the statute.

This was the last case to be prosecuted under the Statute. The second half of the *Bubble Act* was repealed in 1825 by 6 Geo IV e. 91. This Act was formally entitled *'An Act to repeal so much of an Act passed in the sixth year of Geo I as relates to the restraining several extravagant and unwarrantable practices in the said Act mentioned: and for conferring additional powers upon His Majesty with respect to the granting of charters of incorporation to trading and other companies.'* The effect of repealing the section of the Bubble Act recited was that large unincorporated partnerships were again regulated by the common

29 15 East, 515 at 515-516; 104 ER 938
30 (1812) 4 Taunt, 587; 128 ER 460
31 (1825) 3 B & C, 639; 107 ER at 870
32 (1825) 3 LJOS Ch. 68

law, and remained so until 1834.[33] The second half of this Act, granting certain powers upon the Crown, stated that it should be lawful for the Crown to grant a charter of incorporation with a proviso that the members of the corporation should be individually liable in their persons and property for the debts of the corporation to such extent as the charter should provide.[34]

### *Assessment*

Why were there so few prosecutions under the *Bubble Act*? One reason may be that few cases were brought because, as the Attorney-General suggested, the Act successfully suppressed the mischief it sought to remedy. It is plausible that the combination of the Act and the *scire facias* proceedings brought against the four Bubble companies had a significant deterrent effect. Undoubtedly, the Act was poorly drafted and its import unclear. It was doubtful, for instance, whether companies having beneficial objects were illegal if they had all or any of the features outlined by the Act, and whether shares were transferable within the meaning of the Act if there was a limited right of transfer only.[35] The Act made it difficult for joint stock societies to assume a corporate form and did not contain any rules for the conduct of such societies if they did assume that form.[36] A further reason for the lack of successful prosecutions could be that society was undergoing a fundamental change during this period. The economy was changing from a medieval to a market model: the ideas of Hobbes and Locke were circulating, and these ideas suggested that the government should not play a wide role in the economic sphere but rather, should protect the rights of property and the rules of the private market economy. This was a period of transition and of a growing individualism in which the ideas the morality of commercial conduct were altered. Against this background, it can be argued that judicial opinion of what constituted 'mischief' underwent considerable change.[37]

## *Public Nuisance and the Corporation after the Repeal of the Bubble Act*

Despite the demise of the *Bubble Act*, an action at common law in public nuisance still, of course, existed. Spencer[38] recounts that, at the beginning of the nineteenth century, a corporation was regarded

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33 With the exception of banking companies.

34 This was presumably for the benefit of creditors who would have no claim against individual members of the corporation, but gave the impression of limited liability. Formoy, op.cit. 54-55, note (r).

35 Id. 52

36 Gower, Principles , op.cit. 29, quoting Holdsworth, HEL vol 8, 219-220.

37 PS Atiyah, Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979) 70-76.

38 Spencer, op. cit. 70-72

as incapable of committing a criminal offence and was thus beyond the reach of criminal proceedings for public nuisance. Directors could be found liable, but usually claimed to have no knowledge of the offensive act. In 1834, the courts ruled that in the crime of public nuisance, the directors of the enterprise were vicariously liable for the acts of their employees.[39] In two cases of the 1840's the courts extended this rule to find that where the employer was a body corporate, the corporation itself could be convicted of a public nuisance.[40] A corporation, however, was physically unable to plead to an indictable offence. Although the problem could be circumvented by removing the trial by *certiorari* into the Queen's Bench, where by way of an exception defendants could plead through counsel, this was an expensive and lengthy process. Chancery had encountered this procedural problem before,[41] and an injunction became the appropriate remedy.[42] A further development in the application of an action in public nuisance to corporations came in the mid-nineteenth century when municipal corporations started to construct sewers. Most sewers discharged directly into rivers, posing a considerable threat to public health. Although an action in public nuisance was appropriate to these circumstances, a plaintiff faced certain difficulties. The first was that the defendants were corporations; the second that their liability hinged on enabling legislation which was a matter not suited to determination at quarter sessions or on the criminal side of the Assizes. In consequence, a relator action in Chancery was adopted.[43] The advantage of this was that Chancery granted permanent injunctions and not temporary ones pending a criminal trial. In time, the relator action came to be the usual way in which common types of public nuisance were dealt with.[44]

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39 R v Medley (1834) 6 C & P 292, 172 ER 1246.

40 R v. Birmingham and Gloucestor Ry. (1842) 3 QB 224; R v. Great North of England Railway (1846) 9 QB 315

41 Salmon v Hamborough Co (1671) 1 Ch 204; 22 ER 763

42 This problem has been removed by the Corporations Legislation s. 161 which provides that a corporation has all the powers of a natural person. Previously s. 67(i) inserted by No. 108 of 1983 s34.

43 Spencer, op. cit. 71. The relator action first succeeded in Attorney-General v. Luton Board of Health (1856) 2 Jur. NS 180 and Attorney-General v. Birmingham Corporation (1858) 4 K and J 528.

44 Spencer notes that the some of the more colourful types of public nuisance which posed a threat to public health, such as disposing of a corpse by burning it in the kitchen grate as in Byers (1907) 71 JP 205 still attracted prosecution where the aim of the action was to punish the defendant, rather than attempting to prevent a repetition of the offending behaviour. (Id. 71-72)

## *The Modern Action in Public Nuisance*

It is interesting to note that the legislature, in an early attempt to curb corporate wrongdoing, chose to do so by an action in public nuisance. Although there were few actions under the *Bubble Act*, and fewer prosecutions, the reasons outlined for this above have little to do with the public nuisance action per se. Today the action is most notable for its use in curbing environmental offences by corporations.[45] Corporate practices which dupe the investing public invoke liability primarily under the *Corporations Law*. Would it be possible to revive an action in public nuisance either in addition, or as an alternative to, existing statutory and common law actions? If it were possible, what would the advantages and disadvantages of doing so be?

The action in public nuisance is seen by some to be an anachronism: a wide 'catch all' provision which is a hangover from an era when legislative control over certain practices was far less common than today.[46] On this view, it is argued that the public nuisance action should be eliminated, not revived. Such an action is a remnant from the days when there was insufficient legislation to govern society. This argument presupposes, however, that the legislative provisions are efficient. In contemporary Australia, there is concern as to the effectiveness of the *Corporations Law* . The criticisms of the legislation centre upon the law's complexity and its lack of enforcement.[47] There can be no doubt that companies, by

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45 For instance, in Tasmania, s. 140 of the Criminal Code provides:
(1) A common nuisance is an unlawful act or an omission to discharge a legal duty, such act or omission being one which endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects.
(2)For the purposes of this section the comfort of the public shall be deemed to be affected by any pollution of the environment within the meaning of the Environment Protection Act, 1973.

46 Spencer, op. cit. 76.

47 In '"Fuzzy Law"-A Better Way to Stop "Snouts in the Trough"?', (1991) Companies and Securities Law Journal, 146, John Green writes that since the introduction of the State Companies Acts in the early 1960s, the legislation governing corporations has increased some 450%, the bulk of this increase occurring in the last twenty years. Yet, Justice Rogers of the NSW Supreme court has stated that, despite this virtual torrent of legislation, '...the improvements in the justice system, both legislative and curital, ... are so marginal as to be unnoticeable and ineffective';47 Green notes that the costs of justice have increased without a corresponding increase in the chances of justice and JF Corkery, Directors Powers and Duties (Melbourne: Longman, 1987), p.xxv has written that '[A] major regret of corporate law writers, jurists, lawyers and business people is that company law is unnecessarily complex and voluminous. Rules are not always clearly thought out or concisely and clearly expressed.'47 Even the Australian Securities Commission has recognised that:

their very nature, give rise to legal complexity. The act of incorporation creates a rich and complex web of relationships and a multiplicity of legal, moral and social interests. Incorporation creates a distinct legal entity, the rights and obligations of which may be distinguished from those who compose it. In turn, the interests of both the company and its shareholders may be distinguished from those who create and/or manage that company. Further, because the company is a functioning commercial entity, creditors, employees and other third parties such as consumers have an interest in the operation of the company. Where the company forms part of a group, other companies have an interest in its operation. Finally, because the company operates in the wider social and economic environment, the State, and increasingly, the international community, have interests in the operation of the company.

Complexity, however, can operate against justice and efficiency. The technique of drafting legislative provisions which seek to cover every possible abuse of the corporate form allows for 'loopholes', capable of exploitation.[48] Such complexity can obscure the underlying morality of corporate dealings, leading to cynicism on the part of the general public.[49] Complexity can also lead to duplication of actions, leading to delay and expense in the courts.

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Company law is becoming excessively complicated and there is a risk that people will turn away from companies altogether. We have seen a spectacular loss of confidence in the capital generation context. There is a real risk of a similar loss of confidence in the utility of company law in the operating business context.
P. Cranswick, 'Background to the Corporations Law and Australian Securities Commission- the ASC's Philosophy', paper presented at A.S.C. Seminar, Hobart, March 1991.

48 Green, op. cit. 145, considers a number of different practices, including 'skimming' or 'value shifting' which includes such acts as selling assets to the company at an overvalue or buying assets from the company at undervalue; 'toys for the boys' which includes such acts as improper loans and remuneration for directors; 'window dressing', which includes off balance sheet accounting and non-disclosure of important information to the market; and 'market rigging' or 'insider trading' which includes the stealing of corporate information by a director for his or her own benefit and not for shareholders. Green asks:
Do we have laws for that already? In the main, yes. Are those laws clear? In the main, yes. Where the enforcers and the legislators seem to fall over is by totally ignoring these simple prohibitions and focusing only on the specific, and technically drafted, prohibitions'.

49 Sir Gerard Brennan acknowledged this problem in 'Commercial Law and Morality', (1989), 17 Melbourne University Law Review at p. 104 where he wrote that:
...the interests of company, company officers and employees, directors, shareholders, creditors, suppliers and customers are often interdependent and there may be little or no connection between the person whose conduct is regulated or prohibited and the class of persons whose interests are to be protected. It is difficult in such a

This is not to suggest that an action in public nuisance could cure the complexity of corporate governance. It is, however, to suggest that an action in public nuisance may still have a role to play in certain circumstances, despite the existing statutory provisions. Public nuisance in tort may be utilised in addition to existing statutory or common law remedies. In the alternative, it may be possible to draft a statutory nuisance action in order to curb certain corporate abuses.

### *The Elements of an Action in Public Nuisance*

At common law and under the state Criminal Codes, public nuisance is a crime. *Archbold's Criminal Pleading and Practice* defines the offence of public nuisance as follows:

> Every person is guilty of an offence at common law, known as public nuisance, who does an act not warranted by law, or omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.[50]

The number of people that must be affected before it can be said that a nuisance is one interfering with the comfort or convenience of a class of the public and so actionable as a public nuisance has not been conclusively determined.[51] Further, it has been suggested that the effect on the public need not be actual but may be potential.[52] The unlawfulness of the act or the nature of the legal duty may be imposed by statute or at common law. Where a nuisance is 'so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it but it should be taken on the responsibility of the community at large,[53] the Attorney General may seek an injunction to restrain a public nuisance in a relator action.

In order to establish the tort of public nuisance,[54] the plaintiff must show that he or she has suffered 'particular' damage as a result

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situation for those who are not familiar with the consequences of the conduct to perceive the moral value which underlies the statute.

50 42nd ed., (1985), para 27-44, quoted in Spencer, op. cit. 55. See, for example, R. v Clifford [1980] 1 NSWLR 314.

51 A/G v. Abraham & Williams Ltd. [1949] NZLR 461, 498-9 per Hutchinson J.

52 See A/G v PYA Quarries [1957] 2 QB 169, 191 where Lord Denning suggested that the obstruction of a public footpath could amount to a public nuisance, even if it was used by only one or two people, because the obstruction affected everyone who wished to use it.

53 A/G v PYA Quarries [1957] 2 QB 169, 191, per Denning LJ.

54 Originally, the relationship of private to public nuisance was that no private action in tort could be brought to recover damages for a nuisance common to the whole locality. If this were not the case, a wrongdoer would be subject to a multiplicity of actions. The correct

of the commission by the defendant of the crime of public nuisance.[55] In general, damage is said to be special if it is worse than that suffered by the general public. This is made out where the plaintiff has suffered injury to person[56] or property[57] where the rest of the public has suffered mere inconvenience.

The plaintiff in a public nuisance action in tort has two remedies. These are an injunction to restrain the defendant from commencing or continuing an activity causing or threatening an interference; and an action for damages. Provided that the loss which the plaintiff suffers is 'particular' and direct,[58] damages may be awarded in respect of invasions of interests in private land; in personal security or chattels; and purely economic interests.[59]

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course was for an indictment to be preferred against the offender; or in later times, a 'relator' action by the Attorney-General to secure an injunction. In the sixteenth century, however, it was determined that an action could be brought for extraordinary damage which an individual suffered over and above that which he or she suffered in common with the rest of the public. This view was put forward by Fitzherbert J in Sowthall v Dagger (1535) Kiralfy AC p. 211 but the reasoning continued to deny a private action to the individual who suffered no damage greater than that suffered by the rest of the community. JH Baker, An Introduction to English Legal History (2nd. ed.) (London: Butterworths, 1979), 362

55 The concept of particular damage in a public nuisance action is explored in Gilbert Kodilinye, 'Public nuisance and particular damage in the modern law', (1986) 6 Legal Studies, pp. 182-194

56 Palmer v. Nova Scotia Forest Industries (1984) 2 DLR (4th.) 397; Wall v Morrissey [1969] IR 10; Castle v St Augustine Links (1922) 38 TLR 615.

57 Overseas Tankship (UK) Ltd. v The Miller Steamship Pty. Ltd. (The Wagon Mound) (No. 2) [1967] 1 AC 617; Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145

58 The meaning of direct is somewhat obscure. In Hickey v Electric Reduction Co Canada Ltd (197) 21 DLR (3d) 368, directness was treated as an issue of remoteness, so that loss of livelihood caused by pollution of fishing waters was 'purely economic loss without direct damage' (at 372) and so not recoverable. This view conflicts, however, with that of Lord Reid in Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty. Ltd [1967] AC 617, who claimed directness had nothing to do with remoteness.

59 Lyons Sons and Co v Gulliver[1914] 1 Ch 631. See Kent v Minister of State for Works (1973) 2 ACTR 1 for discussion of other interests protected by public nuisance. It is unclear as to what amounts to special damage where the plaintiff suffers inconvenience which does not cost him or her any money. See Walsh v Irvin [1952] VLR 361; Smith v Wilson [1903] 2 IR 45 and Winterbottom v Lord Derby (1867) LR 2 Ex 316. Spencer, op. cit. 74. Where the plaintiff alleges loss of custom or business, such loss will only be particular if it (i). is not suffered by members of the public generally; (ii). the loss is direct and not consequential; and (iii). the loss is not 'fleeting and evervescent'. See Wiles v Hungerford Market Co. (1835) 132 ER 110 per Tindal CJ; Benjamin v Storr (1874) LR 9 CP 400 and Fritz v Hobson (1880) 14 Ch D 542

The plaintiff in an action for public nuisance has two remedies. These are: (i) an injunction to restrain the defendant from commencing or continuing an activity causing or threatening an interference; (ii) an action for damages in tort to compensate the plaintiff for the injury he or she has suffered.

I suggest that the action for damages in public nuisance, then, may be available to a plaintiff in addition to any statutory or common law remedy he or she may have, in circumstances where a defendant has breached the *Corporations Law* or other legislation, this breach has endangered the property of the investing public, and has caused the plaintiff (as shareholder or creditor) particular loss. It may also provide a remedy in certain limited circumstances where an action in negligence is not available to the plaintiff. In some instances, for example, a plaintiff can establish a breach of the law, but cannot establish a duty of care necessary to bring an action in negligent misstatement. An instance of this is, for example, where a creditor has suffered loss by the relying on company documents which have been prepared by 'creative accounting'.[60] The courts have been reluctant to hold that an auditor owes a duty of care to the individual shareholder or creditor.[61] If the plaintiff can show that the auditor has failed to discharge his or her legal duty, that this failure has endangered the property of the investing public and the plaintiff has suffered particular loss, it would be conceivable to claim damages in a public nuisance action.

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60 It is doubtful that the action in public nuisance has been fully overtaken by the action in negligence. Lord Reid in the Wagon MoundOverseas Tankship (UK) Ltd. v T. Miller Steamship Co Pty Ltd [1967] AC 617 at 639 claimed:
It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts of omissions and in many negligence in the narrow sense is not essential. An occupier may incur liability for the emission of noxious fumes or noise although he has used the utmost care in building and using his premises. The amount of fumes or noise which he can lawfully emit is a question of degree and he or his advisers may have miscalculated what can be justified. Or he may deliberately obstruct the highway adjoining his premises to a greater degree than is permissible, hoping that no one will object. On the other hand, the emission of fumes or noise or the obstruction of the adjoining highway may often be the result of pure negligence on his part: there are many cases ... where precisely the same facts will establish liability both in nuisance and in negligence. And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability.

61 The duty of care owed by the auditor to third parties is a highly contentious issue. See Arenson v Casson Beckman Rutley & Co. [1975] 3 All ER 901; Scott Group Ltd v McFarlane [1978] 1 NZLR 553; JEB Fasteners Ltd v Marks, Bloom & Co. [1981] 3 All ER 289; Ultramares Corp v Touche (1931) 174 NE 441; Al Saudi Banque v Clark Pixley (1989) 5 BCC 822; Caparo Industries Plc v Dickman (1990) 8 ACLC 3 011

Although it would seem possible that a wrongdoer could be prosecuted in a criminal action in public nuisance for a breach of the *Corporations Law* or his or her common law obligations such an action offends against the principle of *null poena sine lege* (that the limits of the criminal law should be discoverable in advance). Spencer notes criminal proceedings for public nuisance are typically brought in two circumstances: The first is where the defendant's behaviour 'amounted to a statutory offence, typically punishable with a small penalty, and the prosecutor wanted a bigger or extra stick to beat him with' and the second is, 'where a defendant's behaviour is not obviously criminal at all and the prosecutor could think of nothing else to charge him with'.[62] The principle of *nulla poena sine lege* is contravened if a defendant is prosecuted for an act which was not considered to be criminal at the time at which he or she did it, and if an act which is punishable by a small fine is allowed to proceed on the basis that it is an indictable offence, punishable with life imprisonment.[63] The alternative is to replace the existing provisions with a statutory nuisance action. A statutory provision aimed at curbing 'creative accounting' could read as follows:

> A person who directly or indirectly prepares a statement of the company's financial affairs which does not accurately disclose the economic substance of those affairs commits a public nuisance.

Such an approach would accord with recent calls to simplify corporate legislation..[64] In addition, an action in public nuisance would allow the flexibility of both criminal and civil actions.

## *Conclusion*

In an age when general statutory controls over corporations were in their infancy, the *Bubble Act*, with its action public nuisance and its severe sanction of *praemunire* was an early attempt to curb corporate abuse. This attempt, however, was largely unsuccessful. This failure can be attributed to a number of factors, not least a changing social and economic environment that upheld individualism at the expense of substantive justice, and the poor drafting of its provisions.

I have suggested in this article that it may be possible to bring a tortious action in public nuisance. It would also be possible to draft a statutory nuisance provision which would bring the benefit of simplicity and of flexibility (actions may be civil or criminal) to corporate governance. Most importantly, the morality of an action in public nuisance is clear: the action is declaratory of the fact that practices which seek to dupe the investing public or company creditors offend against the public good.

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62 Spencer, op. cit. 77.
63 Id. 78.
64 See, for example, John M. Green, op. cit. 146.