

**SUPREME COURT CORPORATE AND COMMERCIAL LAW
CONFERENCE**

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**TRANSCRIPT OF PRESENTATION BY
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SUPREME COURT OF NEW SOUTH WALES

ANNUAL CORPORATE LAW CONFERENCE

What is the Future of the Australian Business Corporation?

2019 Conference

Tuesday, 29 October 2019 at 4.30pm

Banco Court, Supreme Court of New South Wales,
Level 13, Queen's Square, Sydney

JUSTICE BARRETT: It is my pleasure to introduce now

6 Daniel Crennan who will continue the conspectus of the
7 future of the corporation by looking at things from the
8 point of view of the corporate regulator.

9

10 Daniel is very well placed to speak from that
11 perspective, having held the position of Deputy Chair of
12 ASIC since the middle of last year. His appointment as
13 Deputy Chair came at an interesting time and was in its
14 context an interesting appointment.

15

16 ASIC has had in the past some very outstanding lawyers
17 at the top of its structure, including as Chair. Indeed,
18 one of them is in this room today - or was before, I'm not
19 sure whether he still is. The appointment of a Deputy
20 Chair who is not only a lawyer but also a practicing member
21 of the inner Bar with first-hand and contemporary in-court
22 experience of significant commercial cases is I think a
23 first.

24

25 In the wake of the Royal Commission it is a very
26 significant first. A lot has been said in recent times
27 about whether enforcement litigation should be a first,
28 last or other resort for ASIC in cases of non-compliance.
29 Speaking as someone who sat here in the corporations list
30 for about a decade, I must say I was never aware of ASIC
31 being a reticent participant in that arena.

32

33 It was interesting to see in the Financial Review just
34 last week an opinion piece by three corporate solicitors
35 expressing a hope that ASIC would tread carefully in taking
36 any litigation-first approach. They put forward a number
37 of reasons, including that regulators lose respect from the
38 public when they lose cases, that a litigation-first
39 approach will put corporations on the defensive and make
40 them less amenable to transparency. In other words, I
41 suppose, they will clam up and become inscrutable and that
42 litigation has a disproportionate impact on individuals
43 caught up in it.

44

45 One could debate whether these are in any abstract way
46 good reasons to spurn the male fist in favour of some form
47 of velvet or similar glove. Daniel, as I said, was

1 appointed to ASIC direct from the ranks of practicing
2 silks. He was a member of the Victorian Bar for 16 years
3 and became Queens Counsel in 2016. He has also had
4 experience significantly in the current context as a
5 director of public companies.
6

7 Unusually for a Victorian - although he did confess to
8 me over the tea break he spent some formative years in
9 Sydney - in earlier times he frequented the rugby field as
10 a second row forward, which may add some special dimension
11 to his performance in his present role.
12

13 A phrase that fell from the last speaker which
14 I thought was particularly apposite as we move into this
15 last session was "holding to account". Daniel?
16

17 MR CRENNAN: Thank you very much for those kind words.
18 I hope I'm not too restricted in what I can say or what
19 I can make an account of, but obviously as a regulator, we
20 possess a particular position in society and public policy
21 is beyond what I can in any meaningful way discuss.
22

23 The Australian Securities and Investments Commission
24 is the conduct regulator of a wide range of industries in
25 Australia, including financial services, credit, insurance,
26 markets, corporations, and soon to be conduct regulator of
27 superannuation. Its mandate is to supervise, investigate,
28 pursue court outcomes and other outcomes with respect to
29 misconduct, both by individuals and corporate entities in
30 their sectors. It may pursue criminal prosecutions with
31 the Commonwealth Department of Public Prosecutions against
32 individuals and entities. ASIC also conducts joint
33 investigations with the Australian Federal Police, most
34 recently into alleged complex cyber crime in relation to
35 superannuation funds.
36

37 ASIC does not have rule-making power or the power to
38 issue penalties itself.
39

40 The Royal Commission into Misconduct in the Banking,
41 Superannuation and Financial Services Industry which was
42 referred to in passing earlier shone a powerful light on
43 the financial services sector throughout 2018, and those
44 stewards of it. The hearings dominated the media cycle,
45 and the interim report, delivered in September 2018, and
46 the final report, delivered on 1 February 2019, contained
47 many case studies of misconduct in these sectors. The

1 final report contained 76 recommendations for legislative
2 reform and other changes to the regulation of the sectors.

3
4 The Royal Commission made some criticisms of ASIC and
5 its regulatory responses to misconduct in the past. On
6 13 March 2019, the Act containing provisions effecting
7 penalties reform received Royal assent. This Act was
8 responsive to recommendations contained in the ASIC
9 Enforcement Review Task Force dated December 2017,
10 predating the commencement of the Royal Commission.
11 Thereafter, contraventions of provisions that contain the
12 cornerstone obligations owed by financial services
13 licensees and credit licensees to those to whom they
14 provide services have attracted significant potential civil
15 penalties. The Penalties Act also increased maximum civil
16 penalties very significantly and increased maximum terms of
17 imprisonment significantly for criminal conduct.

18
19 Much of the misconduct examined by the Royal
20 Commission in its case studies arguably amounted to
21 contraventions of these key provisions, which I will come
22 to now - that is, the mandatory obligation contained in the
23 relevant legislation on licensees to do all things
24 necessary to ensure that the financial services covered by
25 the licensee are provided efficiently, honestly and fairly,
26 and that is in section 912 of the Corporations Act, and to
27 do all things necessary to ensure that the credit
28 activities authorised by the licence are engaged in
29 efficiently, honestly and fairly, and that is section 47 of
30 the National Consumer Credit Protection Act.

31
32 Unsurprisingly, perhaps, the regulator historically,
33 at least prior to 13 March 2019, typically entered into
34 enforceable undertakings with firms it suspected of
35 contravening these key provisions, rather than pursue bare
36 declarations of contravention from this and other courts.
37 Typically, these undertakings contained no admission of
38 contravention but merely an acknowledgement of the
39 regulator's concerns. The Royal Commission itself
40 expressed some scepticism as to the efficacy of enforceable
41 undertakings in effecting enduring deterrence.

42
43 Where the regulator's role in administering the key
44 provisions of section 912A and section 47 may once more
45 comfortably have resided in the protective aspects of its
46 regulatory responses to misconduct, with the introduction
47 of significant civil penalties the regulator's role is

1 clearly more punitive - that is, the regulator is more
2 likely to respond by utilising enforcement and litigation
3 where it takes the view that significant misconduct has
4 been engaged in by a licensee.

5
6 These important reforms introducing penalties for
7 contraventions of these cornerstone obligations may go some
8 way to the exploration of the scope and dimension of these
9 duties, such that the purpose of a corporate licensee may,
10 in some way, inform an examination of whether or not such
11 a licensee has breached its duty to act efficiently, fairly
12 and honestly. I will elaborate on that in a moment.

13
14 So too, a stated purpose of a company that, for
15 example, increases its opportunities or chances of
16 accessing certain species of capital - and I think
17 enlightened shareholders were referred to - may inform an
18 examination of whether or not a director, as a steward of
19 a company possessing that particular design, may not have
20 acted within the company's best interests within the
21 meaning of section 181 of the Corporations Act.

22
23 So too, disclosure requirements may include or extend
24 to non-financial risks, such as regulatory risks that are
25 peculiar to a particular industry or endeavour. A publicly
26 listed mining company, for example, may be subject to the
27 strictures of particular State-based environmental or
28 remediation lease or licence requirements or conditions.
29 ASIC released a report in September 2018 on climate risk
30 disclosure by Australia's listed companies, which does
31 discuss possible disclosure issues in this regard, and
32 I have referred to that in the footnote.

33
34 Beyond those types of possible outcomes, or at least
35 the application of legal theory and argument within ASIC's
36 remit, under the current legislative framework in Australia
37 the regulator's interest in a company's purpose, beyond
38 compliance with the law it administers generally and good
39 governance, could best be described as presently somewhat
40 agnostic. However, in this paper I will discuss recent
41 developments in Australia that may shed light on the role
42 of corporate purpose in the current and emerging
43 legislative framework in which ASIC operates.

44
45 I will commence by discussing fairness. I will
46 consider that in some detail and, to refer to something
47 that Justice Edelman observed, it might in fact be a

1 statutory manifestation of the communitarian theory.

2

3 As a starting premise, existing law in Australia
4 already requires good corporate conduct. Good corporate
5 citizens are unlikely to attract the regulator's attention.

6

7 As set out above, financial services licensees and
8 credit licensees are, and have been for some time, legally
9 obliged to act efficiently, honestly and fairly. Whether
10 societal norms and concepts of value-driven corporate
11 purposes will be capable of residing within the regulator's
12 remit will necessarily await the development of
13 jurisprudence arising from this and other obligations.

14

15 To fairness. Treating customers fairly is the third
16 of six key norms of conduct outlined in the Royal
17 Commission final report. The Royal Commission acknowledged
18 that fairness "may lie at, or at least close to, the heart
19 of community standards and expectations about dealing with
20 consumers".

21

22 There is an emerging body of law with respect to the
23 content of the "efficiently, honestly and fairly"
24 obligation. In ASIC v Westpac Banking Corporation,
25 Justice Beach observed that the meaning of this obligation
26 is not in doubt and referred to Justice Foster's
27 construction of the statutory obligation, which was:

28

29 The words "efficiently, honestly and
30 fairly" must be read as a compendious
31 obligation meaning a person who goes about
32 their duties efficiently having regard to
33 the dictates of honesty and fairness,
34 honestly having regard to the dictates of
35 efficiency and fairness, and fairly having
36 regard to the dictates of efficiency and
37 honesty ...

38

39 et cetera. I got that right for once.

40

41 Justice Foster further noted that the words connote
42 a requirement of competence in providing advice and
43 complying with the law, of evenhandedness in dealing with
44 clients, and sound ethical values and judgment in matters
45 relevant to a client's affairs.

46

47 Justice Foster also noted that "honestly" can include

1 conduct that is not criminal but is somehow morally wrong.
2 When combined with the word "fairly", it connotes a person,
3 "who not only is not dishonest but is also ethically
4 sound".

5
6 Most recently, indeed yesterday, the full Federal
7 Court handed down a decision in which it had cause to
8 examine the scope of the section 912A obligation, in
9 Australian Securities and Investments Commission v Westpac
10 Securities Administration Limited. I won't comment on the
11 judgment, but I will refer to some of Chief Justice Allsop
12 and Justice O'Bryan's observations as to the operation of
13 the section the 912D obligation.

14
15 Chief Justice Allsop observed that:

16
17 The phrase has been held to be compendious
18 as a single, composite concept, rather than
19 containing three discrete behavioural
20 norms. That said, if a body of deliberate
21 and carefully planned conduct can be
22 characterised as unfair, even if it cannot
23 be described as dishonest, such may suffice
24 for the proper characterisation to be made.

25
26 He goes on to say:

27
28 The provision is part of the statute's
29 legislative policy to require social and
30 commercial norms or standards of behaviour
31 to be adhered to. The rule in the section
32 is directed to a social and commercial
33 norm, expressed as an abstraction, but
34 nevertheless an abstraction to be directed
35 to ...

36
37 and this is a quote from Justice Gummow:

38
39 ... the "infinite variety of human conduct
40 revealed by the evidence in one case after
41 another".

42
43 I won't take you to the full quotation. That will be in
44 the paper that will be available.

45
46 His Honour goes on to say:

47

1 The word "fair" in its adjectival form,
2 directed to conduct, includes a meaning of
3 "free from bias, dishonesty, or injustice;
4 that which is legitimately sought, pursued,
5 done, given, etc ..."

6
7 Just to note a couple of observations from Justice O'Bryan,
8 he made these observations:

9
10 Although not the subject of argument on
11 this appeal, I have considerable
12 reservations about the view that the words
13 "efficiently, honestly and fairly", as used
14 in s 912A(1)(a) of the Act should be read
15 compendiously in the manner suggested by
16 Young J in Story. His Honour gave two
17 reasons for interpreting the phrase in that
18 manner. The first is that it is impossible
19 to carry out all three tasks concurrently.

20
21 That might be of some interest, given the topic of this
22 conference. He goes on to give some examples and he talks
23 about the disjunctive nature of the obligation. As I said,
24 those quotations will be available in the paper.

25
26 It is clear from this judgment and others that precede
27 it that the obligation of fairness in dealing with the
28 customers will no doubt be of acute importance going
29 forward in the emerging jurisprudence which has effectively
30 been initiated by an alteration in the regulatory response
31 to contraventions of these very important cornerstone
32 obligations, given the penalties that the regulator is now
33 able to pursue through the courts.

34
35 I will just give some examples from overseas
36 jurisdictions, firstly starting with the United States.
37 Under the Dodd-Frank Act, it is unlawful for providers of
38 financial products and services to engage in unfair,
39 deceptive or abusive acts or practices. The Act
40 establishes a three-limbed test for unfairness, which
41 captures an act or practice which (a) causes or is likely
42 to cause substantial injury to consumers; (b) the injury is
43 not reasonably avoidable by consumers; and (c) the injury
44 is not outweighed by countervailing benefits to consumers
45 or to competition. Subparagraph (b) highlights the
46 question of asymmetry, which I will come back to.

47

1 Guidance issued by the Consumer Financial Protection
2 Bureau, "CFPB", provides additional information on the
3 interpretation of these three elements of unfair practice
4 and examples of enforcement action to demonstrate how the
5 standard of unfairness might be applied - that substantial
6 injury generally involves monetary harm; can include
7 a small amount of harm to a large number of consumers; and
8 that actual injury is not required in each case. It
9 provides an example of economic injury suffered when
10 a mortgage servicer did not release a security interest in
11 a property after the borrower had repaid the total amount
12 due on the mortgage. Then (b) that the avoidance of injury
13 does not mean that the consumer could have made a better
14 choice but, rather, whether the act or practice hinders
15 a consumer's decision-making capacity, including changes to
16 the nature of a product without the consumer's knowledge.

17
18 A further example is contained in the paper.

19
20 This three-pronged test reflects the Federal Trade
21 Commission's definition of "unfairness" contained in the
22 Policy Statement of Unfairness published in 1980 and later
23 codified into the Federal Trade Commission Act. Prior to
24 that publication, United States courts had typically
25 identified that a practice was unfair where it offends
26 established public policy and is immoral, unethical,
27 oppressive, unscrupulous or substantially injurious to
28 consumers.

29
30 I will just refer to one case, which is
31 LabMD v Federal Trade Commission. The court considered an
32 appeal against a cease and desist order against the
33 plaintiff made on the basis that its failure to design and
34 maintain a reasonable data security program invaded
35 consumers' right to privacy, constituting an unfair act or
36 practice. Whilst ultimately finding that the FTC cease and
37 desist order was unenforceable, the court made a number of
38 useful observations about determining unfairness by linking
39 the test with established legal standards of fairness.

40
41 Put another way, an act or practice's
42 "unfairness" must be grounded in statute,
43 judicial decisions - ie the common law - or
44 the Constitution. An act or practice that
45 causes substantial injury but lacks such
46 grounding is not unfair within
47 Section 5(a)'s meaning.

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There are further aspects of that quotation which I won't take you to now.

To go to the United Kingdom, the UK financial services legislation, as has been referred to in part earlier, contains a number of provisions that impose a standard of fairness on firms when dealing with consumers in relation to contracts, including the Unfair Contracts Term Act, the Unfair Terms in Consumer Contracts Regulations and the Consumer Credit Act. The Consumer Protection from Unfair Trading Regulations also places on traders, including financial services firms, a general prohibition on unfair commercial practices.

A practice is deemed to be unfair if it is found to be misleading or aggressive or otherwise where it contravenes the requirements of professional diligence and it materially distorts, or is likely to distort, the economic behaviour of the average consumer with regard to the product. That's also of some interest, one would think.

These provisions are supplemented by a principles-based regulatory model which sets out 11 principles, which I won't go to now, and in a sense that is not dissimilar to the Royal Commission's observations, referred to by Justice Edelman earlier, in that a principle is that a firm must pay due regard to the interests of its consumers and treat them fairly.

In Director-General of Fair Trading v First National Bank, the House of Lords considered the meaning of "fairness" in this context, which deemed the term to be unfair where it causes significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, presumably for the pursuit of profit, in a manner and to an extent which is contrary to the requirements of good faith.

As you can see, courts throughout the world are looking at the concept of fairness to endeavour to prevent the asymmetry between the provider of the services, whether they be credit/financial services or otherwise, and the consumer, who is, more often than not, in a position which is naturally out of balance with the position of the provider.

1 In his judgment, Lord Bingham considered relevant
2 considerations in determining whether a contract term
3 should be found to be unfair by reference to standards of
4 fair dealing. Lord Bingham said:

5
6 Appropriate prominence should be given to
7 terms which might operate disadvantageously
8 to the customer. Fair dealing requires
9 that a supplier should not, whether
10 deliberately or unconsciously, take
11 advantage of the consumer's necessity,
12 indigence, lack of experience,
13 unfamiliarity with the subject matter of
14 the contract, weak bargaining position or
15 any other factor ...
16

17 To turn briefly to Canada, the Financial Services
18 Commission of Ontario released guidance on the fair
19 treatment of customers to ensure that there is common
20 understanding between the FSCO, which is now the FSRA, and
21 its licensees as to what it means to treat consumers
22 fairly. The guideline sets out standards of conduct and
23 product design that are required to meet licensee
24 obligations to treat customers fairly, including those
25 covered by existing statutory requirements. Licensees are
26 expected to ingrain fairness in their company culture, act
27 with due diligence, promote services clearly and honestly,
28 recommend products that are suitable for a consumer based
29 on their specific needs, disclose and manage potential
30 conflicts of interest and keep consumers appropriately
31 informed, and some other matters. There are other aspects
32 of that and the Ontario Insurance Act contained in the
33 paper, but I won't go to them now.
34

35 The concept of the obligation of fairness in
36 commercial dealings is certainly not confined to Australian
37 legislation, as you can see. This concentration on the
38 concept of fairness in the legislative framework in which
39 ASIC regulates the commercial activities of the providers
40 of financial services and credit will no doubt throw up
41 a significant body of jurisprudence, including the decision
42 that was delivered yesterday.
43

44 This should go a long way, one would hope, to
45 addressing the British Academy's position, at least as to
46 the importance of a purpose consistent with the proper and
47 fair treatment of customers - that is, the adherence to

1 a purpose that is consistent with acting in such a way to
2 customers - that is, fairly - that does not prefer
3 shareholder primacy or profit to the detriment of the
4 interests of the customer.

5
6 I apologise for speaking about fairness for such
7 a long period of time, but from a regulatory perspective,
8 it is one of the cornerstones of our regulatory activity
9 when dealing with the relationship between the provider and
10 the consumer.

11
12 I will say a little bit about corporate social
13 responsibility, a concept which has been around for some
14 time, and social licence to operate, which has been widely
15 debated in the regulatory contexts and elsewhere.

16
17 In 2014, the Governance Institute of Australia
18 published a discussion paper entitled "Shareholder primacy:
19 Is there a need for change?" The paper examines case
20 studies and societal expectations with respect to a number
21 of identified issues, such as hydraulic fracking, poker
22 machines, obesity and plastic beverage containers, not
23 confined to Australia, of course, but significant societal
24 issues from time to time in Australia.

25
26 In the paper, the authors refer to two inquiries,
27 which I think were referred to earlier, one by the
28 Corporations and Markets Advisory Committee, CAMAC, and
29 a second undertaking by the Parliamentary Committee on
30 Corporations, PJC. They were some time ago, in 2006.
31 However, in summary, those inquiries found that there was
32 no need for change in the Corporations Law in Australia in
33 circumstances where the current law - and I think this is
34 concordant with some of the comments earlier - was
35 sufficiently flexible to ensure that corporations and their
36 stewards, the directors and officers, are able to be held
37 to account for its and their actions that affect
38 stakeholders beyond shareholders.

39
40 There are well-known criticisms of the shareholder
41 primacy concept as not being consistent with the law. For
42 example, in her 2002 paper, Professor Stout observed that
43 shareholders do not own the corporation:

44
45 Rather, they own a type of corporate
46 security commonly called "stock". As
47 owners of stock, shareholders' rights are

1 quite limited. For example, stockholders
2 do not have the right to exercise control
3 over the corporation's assets.

4
5 That is not controversial, I wouldn't have thought.

6
7 Shareholders' rights are set out in Australian
8 legislation in Chapter 2F of the Corporations Act and are
9 limited to actions arising from the oppressive conduct of
10 affairs and derivatives actions, sections 232 to 241 of the
11 Corporations Act. Shareholders can, of course, act in
12 concert - and this was referred to earlier - to alter the
13 composition of the board contrary to the recommendations of
14 the board in particular circumstances.

15
16 The GIA paper poses the question: Should stakeholder
17 interests be dealt with in Corporations Law or by social
18 policy intervention? The authors note that some precedent
19 exists for impacts of corporations on stakeholders through
20 laws other than Corporations Law, for example, workplace
21 health and safety laws which protect another set of
22 important stakeholders, the employees, another set of
23 stakeholders referred to in the work of the
24 British Academy.

25
26 One case study as to how corporations may be subject
27 to a panoply of legal obligations that stand outside of the
28 Corporations Law proper is the mining industry. As with
29 the Toronto Stock Exchange and the Johannesburg Stock
30 Exchange, the Australian Stock Exchange has a significant
31 number of junior explorer companies listed. The purpose,
32 put one way, of a junior explorer is to identify mineral
33 assets and attain access to them. In Australia and
34 elsewhere, in order to attain access to the assets for the
35 purposes of exploiting them and thereby producing profit
36 and return for shareholders' investment, the junior
37 explorer must satisfy a number of legal conditions to be
38 entitled to that access. For example, the company must
39 comply with laws, often State laws, that relate to
40 environmental impact, remediation, indigenous land use and
41 native title issues. In one sense, the junior explorers in
42 Australia are well versed in having a social licence to
43 operate, or something along those lines.

44
45 Some of the British Academy's concerns, therefore,
46 relating to the environment, social expectations and
47 employees are probably, to an extent at least, addressed in

1 existing current Australian legislation, in which this
2 regulator may or may not be directly or indirectly
3 interested. It is not for this regulator to opine as to
4 whether the current legislative framework in which it
5 operates is sufficient for regulating any particular
6 corporate purpose. Rather, this paper hopefully
7 illustrates some ways in which the existing legal framework
8 might relate to a corporations purpose that transcends,
9 deliberately so, the pursuit of profit.

10
11 I will just turn to directors' duties, to the stewards
12 of the corporation. In Australia, company directors are
13 required to act with due care and diligence and in the best
14 interests of the company, in summary, sections 180 and 181
15 of the Corporations Act. When taking a long-term view,
16 factoring in the interests of the multitude of stakeholders
17 beyond shareholders alone as well as the company's
18 reputation is arguably consistent in considering the best
19 interests of the company.

20
21 If a director fails to act in the best interests of
22 the company with respect to non-financial risks,
23 environmental, social and governance, or "ESG", issues
24 might impact future cashflows, asset values, intangible
25 assets such as reputation and ultimately the longevity of
26 the company. Mismanagement of these non-financial risks
27 may readily become a financial risk over time.

28
29 As observed before, our society and others have also
30 come to expect much more from companies than short-term
31 shareholder returns, and much has been said of that thus
32 far. Internationally, there is also recognition that a
33 range of factors can affect the long-term interests of
34 a company. The UK Financial Reporting Council's July 2016
35 report, "Corporate culture and the role of boards", noted
36 that intangible assets such as reputation, IP and customer
37 base - I'm not sure how they valued reputation, but IP
38 certainly has been capable of value for some years - today
39 account for 80 per cent of total corporate value. Forty
40 years ago that figure, they say, was under 20 per cent.
41 With figures such as those, behaviour that compromises
42 customers, behaviour that is unfair, certainly has the
43 potential to impact on a company's long-term interests.

44
45 Taking by way of an example a hypothetical example,
46 a board may spectacularly fail to meet a purpose that
47 relates to a societal expectation or an ESG issue, such

1 that the corporation is disentitled to have access to
2 necessary capital, such that the dependance of the
3 company's maintenance of and meeting that purpose affects
4 that access. That might - and I'm only saying might - give
5 rise to a derivative action under Chapter 2F.2 of the
6 Corporations Act for breaches of section 180 and/or 181 of
7 the Act. That is, the shareholders might be given leave to
8 sue the directors in the name of the company for failing to
9 act in the best interests of the company.

10
11 As far as I know, that is a purely hypothetical
12 example. The flexibility of the directors' duties
13 provisions will no doubt continue to be tested by the
14 regulator and private parties before the court if
15 a company's purpose - that is, non-financial purpose or
16 societal purpose, whatever it might be - is perceived to be
17 relevant to a particular case.

18
19 Speaking of capital, one might imagine that the
20 British Academy's work might, in part, relate to access to
21 capital rather than pure law enforcement per se. That
22 flexibility - that is, the flexibility of the common law
23 and statutory law in this country - may, in time, address
24 some of the British Academy's concerns, particularly when
25 a company self-identifies a non-financial purpose and
26 adherence to that purpose provides a benefit to that
27 company such as access to capital, but other benefits
28 themselves.

29
30 I will just turn to, briefly, the Corporate Governance
31 Task Force which ASIC established this year, which is one
32 of its new enhanced supervisory initiatives - that is
33 non-enforcement initiatives - to gain better insights into
34 the governance practice of our largest listed companies.

35
36 The task force has recently completed a comprehensive
37 review of how the boards of seven of the country's largest
38 financial services companies oversee the management of
39 non-financial risk. It is currently completing its next
40 review regarding the oversight of decisions regarding
41 variable remuneration for executives.

42
43 I will just speak about this in summary form, but
44 ASIC's review found that, firstly, whilst boards were
45 setting risk appetites for non-financial risks, often
46 management was operating outside of those approved
47 appetites. Boards need to actively position themselves to

1 hold management accountable, in ASIC's report, to operate
2 within their stated appetites.

3
4 A second key finding was that monitoring of risk
5 against appetite, put broadly, often did not enable
6 effective communication of the company's risk position.

7
8 ASIC's third key finding was that material information
9 about non-financial risk was often buried in dense board
10 packs hundreds of pages long. Boards should, in ASIC's
11 report and recommendations, require management to make
12 reports using a clear hierarchy and prioritisation of
13 non-financial risks.

14
15 A fourth finding was that board risk committees are
16 not operating as effectively as they should be. I have
17 gone into more detail in the paper, but I will just leave
18 that there.

19
20 The Royal Commission has demonstrated what impact
21 poorly managed non-financial risk can have on a company,
22 and certainly Australians have lost hundreds of millions of
23 dollars arguably, in large part, because of mismanagement
24 of that risk.

25
26 Non-financial risk does result in financial costs, if
27 they are not managed properly, and ASIC's message to firms
28 is to take these risks seriously and ensure they are
29 managed effectively and transparently and, in fact, in the
30 context of today's conference perhaps that is part or
31 embedded within a purpose that is not driven by the pursuit
32 of profit.

33
34 I will speak briefly about deterrence. It relates to
35 the fairness imperative which I was referring to earlier
36 and the legislative framework in which we are able to
37 regulate the law and enforce the law. The regulator was
38 identified by Commissioner Hayne as the fourth line of
39 defence. The first was public policy, second the consumer
40 and, third, the firms themselves. ASIC now has a greater
41 range of power and penalties, as I have referred to, as a
42 result of legislative reform.

43
44 As referred to above, one area that we have already
45 seen strength in are these penalties. For example, maximum
46 imprisonment penalties for the most serious offences
47 increased to 15 years, and civil penalties for companies

1 have significantly increased, now at 525 million, and
2 maximum civil penalties for individuals have increased to
3 just over a million.

4
5 In addition to increasing existing penalties, civil
6 penalties apply to a greater range of conduct, and I have
7 referred to the licensee's failure to act efficiently,
8 honestly and fairly, but also civil penalties attaching to
9 failure to report breaches and defective disclosure.

10
11 In ASIC's view, a primary purpose of penalties in
12 relation to this misconduct we regulate is deterrence, both
13 general and specific. Two aspects of effective deterrence
14 are the perception of being caught and the perception of
15 being meaningfully punished. Once again, the thrust of
16 these reforms addresses primarily the British Academy's
17 concerns as to the treatment of customers to their
18 detriment in the interest of shareholder primacy or profit.

19
20 For reasons discussed earlier, the scope of the
21 obligations of fairness and directors acting in the best
22 interests of companies may develop jurisprudentially to
23 address some of the British Academy's other concerns.

24
25 Thirdly, as discussed earlier with the junior miner
26 example, there exists a panoply of legal obligations that
27 address many of, for example, the ESG concerns which may or
28 may not be relied upon by private citizens or the regulator
29 in bringing actions again under the Corporations Law.

30
31 Beyond that analysis, any public policy issues are not
32 in the purview of the regulator and I won't be speaking
33 about them. I am conscious of the time. The paper does
34 also refer to our new power of intervention - that is, the
35 product intervention power - which I don't really have time
36 to go to in sufficient detail to do it justice, but it is
37 there in the paper for you to read if you wish. The regime
38 is designed in a way that places responsibility with the
39 businesses to consider their products in light of the
40 customers' objectives, financial situation and needs.

41
42 So, too, one would think that that can form part of a
43 purpose of an organisation that provides such services
44 which, in turn, protects the consumer of the services and
45 other stakeholders no doubt.

46
47 To sum up, ASIC's expectations of corporations now and

1 into the future, in summary ASIC's vision for the future of
2 Australian corporations is one that is fair, compliant and
3 not causing consumer harm. We want to see Australia's
4 corporations contributing to a fair, strong and efficient
5 financial system that works for all Australians. As a
6 conduct regulator, ASIC expects the corporation will,
7 firstly, obey the law; secondly, act fairly - this is in no
8 particular order - in accordance with the law; and,
9 thirdly, work to create corporate governance structures
10 that guard against non-financial risks and lead to positive
11 outcomes, and that may very well include the identification
12 of non-financial purposes, review products considering the
13 design distribution obligations and ensure that products
14 meet the objectives, financial situation and needs of their
15 customers, and be prepared for ASIC to use its expanded
16 remit and strengthened powers to take action when
17 corporations break the law or sell products that cause
18 significant harm to customers.

19
20 If customers fail in their task, the regulation and
21 more intervention reforms - which I think we all agree is
22 not preferable - become more likely. If companies break
23 the law, they can expect court-based outcomes. How
24 corporate purposes that transcend the pursuit of profit
25 inform the enforcement of the law by the regulator will
26 depend in large part on the legal framework in which the
27 regulator operates and how the courts respond to the
28 regulator's cases.

29
30 I endeavoured to identify at least some illustrative
31 examples where a corporation's purpose might be relevant to
32 the regulator and ultimately, therefore, to the court.
33 Whether or not any of that analysis addresses some of the
34 British Academy's concerns probably warrants further
35 discussion, which I understand will take place shortly.
36 Thank you.

37
38 JUSTICE BARRETT: Thank you, Daniel, for emphasising in
39 our discussion of purpose that financial services and
40 corporations law are built firmly on a foundation of
41 fairness, the concept one tends to just assume, but which
42 is strongly there in the regulatory scheme as a unifying
43 theme, both explicitly and implicitly.

44
45 Thank you, too, for reminding us that corporations
46 legislation is not to be viewed as the only body of law
47 that corporations need to look at to decide how they should

