THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

DIRECTORS' AND OFFICERS' DUTIES IN THE AGE OF REGULATION

SPEECH DELIVERED AT THE CONFERENCE IN HONOUR OF PROFESSOR BAXT AO

26 JUNE 2018[*]

Introduction

1 At the outset, I would like to acknowledge the Wurundjeri people who are the traditional custodians of this land and pay my respects to the Elders both past, present and emerging of the Kulin Nation. I consider it an immense privilege to have been invited to present a paper at this conference, in honour of the late Professor Bob Baxt. His contribution to the development of corporate law was outstanding. His work always provided a sure compass to navigate the shoals of corporations law. I am immensely saddened that he could not be with us here today.

2 The matters that I would like to canvass this morning draw inspiration from the most recent edition of Professor Baxt's *Duties and Responsibilities of Directors and Officers.* In that text, he lamented the reliance of governments on strict liability provisions, considering that they imposed an "intolerable burden" on company directors.[1] This was characteristic of his commitment to reasonableness in company law.

3 However, this reasonableness also extended to his concern that directors bear responsibility for conduct *they engage in* which causes a company to breach the law. He questioned whether a company director could be held liable if his or her conduct was instrumental in the company suffering a significant penalty for a breach of ancillary legislation. In his view, it was a

[*] I express thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

[1] Robert Baxt, *Directors and Responsibilities of Directors and Officers* (Australian Institute of Company Directors, 21st ed, 2016) 311.

feasible argument, because “directors must ensure that companies are law abiding”.[2] Today I will attempt, in part, to respond to that query. I will also consider, if directors are liable for a breach of such duty, to whom that liability extends and whether increasing focus on directors’ responsibility and liability has the potential to inhibit what might be described as lawful corporate activity.

4 I am not, of course, blind to the wider context in which I am delivering this address. Public concern over the behaviour of corporations and their directors has, of late, been momentous. The characterisation of some of this behaviour by directors has been to suggest that they unduly placed “shareholder” interests over the interests of customers.[3] This has included conduct directed to maintaining short-term profitability at the expense of compliance with the law. But it has also included conduct which, while not in breach of the law, placed short-term profit over the interests of other stakeholders, with now devastating impacts on reputation and future profitability. I will make the following disclaimer at the outset: this presentation was prepared well before any revelations emerging from the Hayne Royal Commission, and it is not intended to express any view about the legality or otherwise of that conduct.

5 Nevertheless, with all due caution, I want to make some comments on the current state of the law regarding directors’ liability for corporate misconduct – focusing on what has in recent times been known as “stepping stones” liability. I will also touch on the interaction of the law with things like a “culture of compliance”, the “social licence to operate” and broader public interest concerns in company law.

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[2] 308.

[3] Draft Transcript of Proceedings, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (17 April 2018) <https://financialservices.royalcommission.gov.au/public-hearings/Documents/transcripts-2018/transcript-17-april-2018.pdf> P-1113.

The standard of care

6 The written paper that accompanies this address outlines the development of the objective standard of care pursuant to s 180(1), and I won't repeat everything here for the sake of time, and your sanity. I will just note that it is, objective, "in the sense that the question is what an ordinary person, with the knowledge and experience of the defendant might be expected to have done in the circumstances".[4] It was recognised unequivocally as objective in *Daniels v Anderson,*[5] a case which effected a real shift in the understanding and scope of the duty. It should be noted that breaches of the duties of good faith and improper use of position may also be used as a basis for liability in "stepping stones" cases. However, the focus tends to be on s 180, given its wider scope, and will thus be the focus of this address.

"Stepping stones"

7 The "stepping stones" approach to directors' liability is, on its face, simple. First, the company breaches the *Corporations Act,* or perhaps some other law. In exposing the company to that breach, the director is then found to have breached their duty of care (or other statutory duty). The obvious example is the James Hardie Group proceedings, in which directors and officers were found to have breached their duties of care and diligence[6] in circumstances involving contraventions by the corporation of its disclosure obligations.[7]

8 On closer analysis, it not that simple. The company's breach of the law is neither necessary, nor sufficient, to impose liability under directors' duties. That is, the company does not need to have been found to have breached a

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[4] *Vrisakis v ASC* (1993) 9 WAR 395; 11 ACSR 162, 185 (Ipp J).

[5] (1995) 37 NSWLR 438; 16 ACSR 607.

[6] Under the law in force at the time, being s 180(1) of the *Corporations Law* (Cth).

[7] See *ASIC v MacDonald (No 11)* (2009) 230 FLR 1; 71 ACSR 368; *Morley v ASIC* (2010) 247 FLR 140; 81 ACSR 285; *ASIC v Hellicar* (2012) 247 CLR 345; 88 ACSR 246; *Gilfillan v ASIC* (2012) 92 ACSR 460.

provision of the *Corporations Act* or any other law in order for directors to be found liable. Further, even if the company has breached the law, breach of duty is not presumed.[8] Rather, it requires a consideration of the usual test, being whether the director has exercised reasonable care, to "prevent a foreseeable risk of harm to the interests of the company".[9]

9 In practice, many of the cases have been based on breaches of the continuous disclosure regime. The regulator has often used it to found liability where company conduct has fallen below acceptable community standards, but has not caused loss to investors or otherwise breached the law; the Hardie litigation being the prime example.

10 The 2006 decision of *ASIC v Maxwell*[10] is a leading authority on the issue. The allegation in that case was that a director, Mr Nahed, breached his duties by "permitting, allowing and participating in"[11] various contraventions of the *Corporations Act* committed by companies of which he was a director. The reasons do suggest judicial circumspection about this form of liability. Brereton J stated that while "there are cases in which it will be a contravention of their duties, owed to the company, for directors to authorise or permit the company to commit contraventions of … the *Corporations Act* … it is a mistake to think that ss 180, 181 and 182 are concerned with any general obligation owed by directors at large to conduct the affairs of the company in accordance with law generally or the Corporations Act in particular, *they are not*."[12] However, he acknowledged that it may be a breach to expose the company to a risk of exposure to civil penalty liability, "at least if the risk is

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[8] See *ASIC v Cassimatis* [2016] FCA 1023 (26 August 2016) [7].

[9] *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449-450 (Ipp JA) adopted in *ASIC v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373, 398 [102] ("*Maxwell*").

[10] [2006] NSWSC 1052; (2006) 59 ACSR 373.

[11] Ibid 402 [111] (Brereton J).

[12] Ibid 399 [104] (emphasis added), cited with approval in *ASIC v Sino Australia Oil and Gas Limited (in liq)* [2016] FCA 934 (11 August 2016), [85] (Davies J), *ASIC v Warrenmang* [2007] FCA 973; (2007) 63 ACSR 623, [27] (Gordon J); *ASIC v Citrofresh International Ltd (No 2)* [2010] FCA 27; (2010) 77 ACSR 69, [50] (Goldberg J).

clear and the countervailing potential benefits insignificant".[13] He also recognised that the statutory duty could be contravened "even if there was no actual damage".[14]

11 The *Fortescue* proceedings, which provided the context to Professor Baxt's query I mentioned earlier, was the first of three recent cases. A Full Court of the Federal Court held that the CEO of Fortescue had breached s 180[15] in allowing the company to engage in misleading and deceptive conduct through the inaccurate release of information,[16] and breach its obligations of continuous disclosure.[17] The information related to the potential viability of certain major investments in the company by Chinese organisations and in particular whether Fortescue had a binding contract with those organisations. This decision was overturned, but on the basis that the relevant information was not misleading or deceptive, and as a result the s 180 issue fell away and was not considered by the High Court.[18]

12 The Full Federal Court decision has nevertheless been relied on to suggest the business judgment rule does not apply to "stepping stones" cases, as the Court held that "a decision not to make accurate disclosure of the terms of a major contract is not a decision related to the 'business operations' of a corporation" but rather "a decision related to compliance".[19] Putting aside its precedential value, it is probably not the case that s 180(2) can never apply to a "stepping stones" or compliance-based case. This was evidenced by the

[13] Ibid [104].

[14] Ibid [102] citing *Vrisakis v ASC* (1993) 9 WAR 395, 449–50; 11 ACSR 162, 211–13 (Ipp J, Malcolm CJ agreeing).

[15] *ASIC v Fortescue Metals Group* (2011) 190 FCR 364; [2011] FCAFC 19, [200] (Keane CJ, Emmett and Finkelstein JJ agreeing) ("*Fortescue*").

[16] *Corporations Act* s 1041H.

[17] Ibid s 674(2).

[18] *Forrest v ASIC* (2012) 247 CLR 486.

[19] *Fortescue* (2011) 190 FCR 364; [2011] FCAFC 19, [197] (Keane CJ, Emmett and Finkelstein JJ agreeing).

decision of *ASIC v Mariner Corporation Ltd,*[20] and is something I will touch on in a moment.

13 *Mariner* involved a number of alleged breaches by the company which had announced making an off-market takeover bid. ASIC claimed the announcement involved a number of breaches of the Act, specifically that the takeover bid was a bluffing order[21] and that the information released in relation to the offer was misleading and deceptive.[22] The "stepping stone" aspect involved an allegation of related breaches of s 180 by the managing director and two other directors.[23] Beach J first dismissed the claims of breaches by the company. There was no bluffing offer: a proper valuation had been undertaken, the directors had considered how it might be funded,[24] and the announcement to the ASX was not misleading.[25]

14 Secondly, Beach J found that even if Mariner were found to have breached the relevant *Corporations Act* provisions, ASIC had not established that the main director involved, a Mr Olney-Fraser (as well as the other two directors) failed to exercise their duties with the degree of care and diligence required.[26] Beach J found that Mr Olney-Fraser reasonably believed that Mariner would have no difficulty arranging funding of its bid,[27] and that Mariner stood to make a substantial gain from the proposed takeover bid.[28] To that end, Beach J found that the "countervailing benefits to Mariner well exceeded the theoretical risks [and that the] modest financial consequences of these

[20] (2015) 241 FCR 502; [2015] FCA 589 ("*Mariner*").

[21] *Corporations Act* s 631(2)(b).

[22] *Corporations Act* s 1041H.

[23] *Mariner* (2015) 241 FCR 502; [2015] FCA 589, [2].

[24] Ibid [314]-[418].

[25] Ibid [419]-[438].

[26] Ibid [453]-[561].

[27] Ibid [480].

[28] Ibid [481].

theoretical risks were well outweighed by the benefits that could be achieved by Mariner”.[29]

15 Beach J made comments which reflected the circumspection of Brereton J in *Maxwell,* stating s 180 does not impose a “wide-ranging obligation on directors to ensure that the affairs of a company are conducted in accordance with law” and that “it is not to be used as a back-door means for visiting accessorial liability on directors” or in a “contrived” attempt “to empower the Court to make a disqualification order under s 206C by the artificial invocation of s 180 (a civil penalty provision), when such a route is not otherwise available directly.”[30] ‘

16 However, I think the most recent decision of *ASIC v Cassimatis*[31] to some extent suggests a shift in judicial attitudes to this form of liability. It involved the now defunct “Storm Financial Ltd” financial advice company. ASIC made claims against Mr and Mrs Cassimatis, the sole directors and shareholders, for breaches of their duties of care and diligence. The first stone in the steps related to breaches by the company of former ss 945A and 945B of the *Corporations Act,*[32] which required that the provider of financial services have a reasonable basis for providing advice. The Storm “model” involved a strategy described as “double gearing”, namely (i) borrowing against the security of the clients’ home (ii) obtaining a margin loan; and (iii) using the funds from these loans to invest in index funds, establishing a cash reserve, and paying Storm’s fees.

17 Importantly there was no dispute that the Storm model was, in general, viable and indeed that it had been reviewed by compliance professionals and

[29] Ibid [482].

[30] Ibid [444].

[31] [2016] FCA 1023 (26 August 2016).

[32] Repealed following the passage of the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) which replaced the sections with new Part 7.7A

ASIC.[33] Rather, it was the application of the Storm model to particular clients in the class which was likely to result in inappropriate advice being given.[34]

18 ASIC set itself the bar of proving that Storm had actually breached the *Corporations Act* as a necessary precondition to Mr and Mrs Cassimatis' breach of s 180.[35] Edelman J proceeded on that assumption, but expressed "serious doubts" as to whether an actual breach is necessary.[36] The explanation was that if a director unreasonably and intentionally commits acts which are extremely likely to involve a serious breach of the Corporations Act, it might "be seriously doubted whether the director could escape liability simply because, by some good fortune, no actual breach eventuates."[37] This accords with the orthodox understanding of s 180 that actual loss to the corporation is not necessary to found a breach.[38]

19 Edelman J also emphasised that a breach of the law by the company is insufficient to found directors' liability. On one reading this reflects exactly what Beach J said in *Mariner,* that "it is wrong to assert that if a director causes a company to breach a provision of the Act, then necessarily the director has contravened s 180'.[39] However, Edelman J made this point in response to the objection that directors' duties were being used to create "back-door" accessorial liability.[40] In rejecting that submission, he emphasised that no question of accessorial liability arises, adopting ASIC's submission

[33] *Cassimatis* [2016] FCA 1023 (26 August 2016), [701]-[758].

[34] Ibid [23].

[35] Ibid [4].

[36] Ibid [834].

[37] Ibid [5].

[38] *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449-50 (Ipp J), quoted with approval in *ASIC v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373, 398 [102].

[39] *Mariner* (2015) 241 FCR 502; [2015] FCA 589, [447].

[40] *Cassimatis* [2016] FCA 1023 (26 August 2016), [526].

that "directors are primarily liable for a breach of s 180, which imposes duties upon them."[41]

20 What these comments make clear is that there is nothing improper about imposing this form of liability just because personal liability could not have been imposed on the director in relation to the primary contravention. It suggests a shift from the caution expressed in *Mariner* and *Maxwell* that it is not to be used as a "contrived" way to impose civil penalties. The focus is not on what penalties or remedies are or are not available in relation to the corporation's convention, but rather whether the steps taken in relation to compliance are reasonable, having regard to the degree of care and diligence of the reasonable director in the relevant circumstances.

21 Edelman J also rejected the argument put by Mr and Mrs Cassimatis that directors who were sole shareholders could not breach s 180(1). Their argument was two-pronged: (1) that the purpose of the limited liability corporation was to pursue ventures involving risk and (2) that the degree of risk that a solvent company should adopt in pursuit of profit is a matter for the directors and shareholders. The response of Edelman J was that while the pursuit of risky ventures is one purpose of the corporation, this does not give a director *carte blanche* to engage in a venture highly likely to contravene the law.[42]

22 After a review of the authorities,[43] Edelman J emphasised that the interests of the shareholders and company are not always entirely coincident. The

[41] Ibid [528] (emphasis in original).

[42] Ibid [496].

[43] See *Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239; (2008) 39 WAR 1, 534 [4393] (Owen J) (not considered on appeal in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157; (2012) 44 WAR 1; *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2013] VSC 543, [26]-[27] (Almond J) (not considered on appeal in *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2015] VSCA 9; (2015) 318 ALR 302); Heydon JD, "Directors' Duties and the Company's Interests" in Finn PD (ed), *Equity and Commercial Relationships* (Law Book Company, Sydney, 1987) 134-135; *Singer v Beckett sub nom Re Continental Assurance Co of London Plc (No 4)* [2007] 2 BCLC 287, 294 (Park J); *Pilmer v The Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165, 178-179.

interests of the corporation *include* the interests of shareholders – and there is nothing novel about this proposition. For example, it is well established that in a case of insolvency or near insolvency taking into account the interests of the company, includes the interest of creditors. Edelman J also found that a corporation has a "real and substantial interest in the lawful or legitimate conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss", and that "one reason for that interest is the corporation's reputation."[44]

23 The point is this: corporations *always* have an interest in compliance with the law, which is partly because of a corporations' interest in its reputation, but also inherent in the very nature of a corporation as a vehicle for lawful activity.[45] These remarks do potentially extend the liability of directors and for that matter officers, of a company. Exposure may not only extend to actual unlawful activity but activity which, even if not unlawful or resulting in loss, has the effect of damaging the corporation's reputation. Further, accepting the difficulty of proof where pecuniary loss may only have been suffered by shareholders as distinct from the corporation,[46] there remains a potential liability for compensation if the company could in fact prove it had suffered loss.

24 The final point of interest in the judgment was the treatment of the "balancing" required when considering a "stepping stones" case. As I mentioned earlier, there is an obvious public policy concern in Courts condoning the behaviour of a director who weighs the benefits of breaching a legislative provision against the possible penalties.[47] In cognisance of this issue, Edelman J stated that the reference to "balancing" in the assessment in *Vrisakis* should "not be taken

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[44] *Cassimatis* [2016] FCA 1023 (26 August 2016), [482]-[483].

[45] Ibid [483]-[484].

[46] *Pilmer v The Duke Group Ltd* (2001) 207 CLR 165, [18], [50]-[65]

[47] See *ASIC v Cassimatis* (2013) 220 FCR 256; [2013] FCA 641, [172] (Reeves J), stating "[w]hether financial benefits of this kind can be offset against a possible breach of the law seems to me to offend public policy".

literally" and "balanced or weighed as though by a common metric".[48] The reasoning for this was as follows:

> "… suppose a director makes a decision to commit a serious breach of the law, by intentionally discharging large volumes of toxic waste. Suppose the decision is made on the basis that the financial cost of avoiding the breach would be far greater than the cost of a pecuniary penalty under the relevant environmental regulation. *This conduct might nevertheless involve a breach of the director's duty of care and diligence, irrespective of any other breaches*."[49]

25 While expressed tentatively, this view is probably correct — the alternative would offend public policy and disregards the interest the corporation has in the lawful conduct of its activities. But it has difficulties. Does a director breach his or her duty by condoning a breach of contract by the corporation where the economic consequences of the breach are less onerous to the corporation than complying with the contractual obligations? These days each of the *Australian Consumer Law* and the *ASIC Act* prohibit a corporation from engaging in unconscionable conduct in certain circumstances and provide that a contravention is a civil penalty provision.[50] Can a director be liable for authorising the company to engage in conduct which he or she believes to be in the best interests of the corporation but which is subsequently found by a court – applying what might be described as a somewhat rubbery test – to be unconscionable? That raises the question, to which I will now turn, of whether "stepping stones" liability could extend to company breaches of non-*Corporations Act* laws.

[48] *Cassimatis* [2016] FCA 1023 (26 August 2016), [485].

[49] Ibid (emphasis added).

[50] See *Australian Consumer Law* (*Competition and Consumer Act 2010* (Cth) sch 2) ss 20-22, 224; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA-CC, 12GBA.

Breaches of Non-Corporations Act Laws

26 This possibility was flagged by Herzberg and Anderson in 2012, who asserted there was "no reason in principle why a company's breach of non-Corporations Act laws could not also lead to the imposition of directors' liability for breach of their statutory duties."[51] Typical examples include directors' failure to take reasonable care in relation to company breaches of environmental protection, workplace relations or work health and safety legislation. Given that those legislative frameworks already tend to provide for directors' personal liability,[52] this may point against any imposition of liability pursuant to *Corporations Act* duties. Another area that may emerge is the possibility of directors' liability for sexual harassment in the workplace in the wake of the "#metoo" movement – the AICD has recently suggested that boards should put a risk and audit lens on the issue.[53]

27 There would naturally be arguments made as to whether the burden on directors has become "intolerable", and the extent to which the purpose of the limited liability corporation as a vehicle for pursing risky ventures is undermined. As a preliminary point it is important to state that the nature and scope of the duty remains fixed. However, neither the law, nor the complexity of commerce has stood still in the 30 years since *Daniels v Anderson.* Again, the burden on directors should not be so intolerable so as to become impossible. Likewise, it is not sufficient for a board to presume that practices considered adequate 30 years ago will stand up to judicial scrutiny in the modern world of regulation and commerce. The scope of the duty has not changed, but the world around it has, and that has real consequences for the types of behaviour expected.

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[51] Abe Herzberg and Helen Anderson, 'Stepping stones — from corporate fault to directors' personal civil liability' (2012) 40 Federal Law Review 181, 198.

[52] See, eg, *Protection of the Environment Operations Act 1987* (NSW) ss 169-169A.

[53] AICD, "#BoardsToo", 1 May 2018, *Company Director* (online) <https://aicd.companydirectors.com.au/membership/company-director-magazine/2018-back-editions/may/boardstoo>.

28 There are two further points to be made in relation to concern over directors' liability, all of which apply equally to "stepping stones" liability in the *Corporations Act* context and in terms of other laws. First, the *raison d'être* for the limited liability company might be to enable the pursuit of risky ventures, but it is the pursuit of risky *lawful* ventures.[54] The purpose of the corporate form is not to facilitate law-breaking activities with no personal consequences. Second, the imposition on directors of liability pursuant to directors' duties enables the focus to be put squarely on what the director has or has not done. In a climate where there are increasing calls for the imposition of greater and stricter liability on directors for corporate fault, this form of liability offers a principled alternative to "lazy" strict liability regimes about which Professor Baxt expressed concern.[55]

Application of the Business Judgment Rule

29 Secondly, I want to discuss the application of the business judgment rule to stepping stones cases, because the Australian Institute of Company Directors has expressed concern[56] that the statutory business judgment rule[57] does not apply in "stepping stones" cases, based on what was said in *Fortescue.*[58]

30 In that case, Keane CJ considered that a decision not to comply with the Act was not a "business judgment". However, in *Mariner,*[59] despite finding there was no breach of s 180, Beach J went on to say that s 180(2) would also be satisfied. He considered that ASIC's characterisation of the directors' decision

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[54] See *Cassimatis* [2016] FCA 1023 (26 August 2016), [482] (Edelman J).

[55] Andrew Jennings, 'Law academic warns about director liability and overregulaiton' *Lawyers Weekly* (online), 4 May 2012 <www.lawyersweekly.com.au/news/10041-law-academic-warns-about-director-liability-and-ov>.

[56] Australian Institute of Company Directors, *The Honest and Reasonable Director Defence* (2014) < http://www.companydirectors.com.au/~/media/resources/director-resource-centre/policy-on-director-issues/2014/the-honest--reasonable-director-defence-a-proposal-for-reform_august-2014_f.ashx> 9.

[57] *Corporations Act 2001* (Cth) s 180.

[58] (2011) 190 FCR 364; [2011] FCAFC 19, [197].

[59] (2015) 241 FCR 502; [2015] FCA 589.

as a compliance decision, and reliance upon *Fortescue,* was misconceived as "[n]o decision was made not to comply with the Act, "indeed the converse."[60] That is, a decision was made that the deal could be funded, in circumstances where the director had considerable takeovers experience.[61]

31 In my opinion, it is not the case that s 180(2) will never apply to compliance decisions, and characterising a decision as one related to "compliance" as opposed to one of "business" or "commercial" judgment may sometimes be inappropriate. In *Mariner* the compliance and business aspects of the decision were inextricably linked — a business judgment was made that it would be able to perform its obligations relating to the bid if accepted, and was thus not making a bid in breach of the Act. On one view the same may be said of *Fortescue*. If that company had made an investment decision on the mistaken belief it had a binding contract, the negligent disclosure of that mistaken belief could well be said to be linked to the investment decision made as a matter of business judgment. While the s 180 case was not considered in the High Court, in considering whether the relevant disclosure was misleading, Heydon J noted that "[t]he binding quality of an alleged contract is an inherently controversial matter of professional judgment".[62]

32 Now, what I have said does not mean I disagree with Justice Keane that a director of a company cannot be permitted to lawfully decide, as a matter of business judgment, that his or her corporation will not comply with the law. However it should be noted that in these circumstances it is more than likely that a director would be liable as an accessory in any event – it is deliberate law-breaking. What s 180 is concerned with in this context is a failure to take adequate care in relation to company compliance with the law.

[60] Ibid [486].

[61] Ibid [9].

[62] *Forrest v ASIC* (2012) 247 CLR 486, [94].

Directors liability for company conduct not amounting to a breach of the law

33 Thirdly, I want to turn to the liability of directors for company conduct which does not amount to a breach of the law – such as the breach of contract example I gave earlier. In my opinion, it will become an increasingly important issue, because ASIC has increasingly been suggesting it expects something of directors beyond "strict compliance" with the law.

34 For example, Commissioner John Price stated earlier this month that "we are particularly interested in whether the culture of a firm (or an industry sector) promotes fair treatment of consumers and investors", emphasising the need for "asking the question 'should we' in relation to all decisions and dealings with customers".[63] ASIC Chair James Shipton has also recently stated it "want[s] to see … that financial providers look to do the right thing and act with integrity and fairness, not just comply with the law".[64] It may be interesting to see whether the regulator attempts to enforce this kind of behaviour through the law in future, for example through the unconscionability provisions relating to the provision of financial services.

35 It could be argued that directors could be liable for conduct falling short of a strict breach of the law, which is nevertheless inappropriate or unethical, where such conduct results in significant reputational damage, with consequent financial implications. As *Cassimatis* emphasises, a breach of the law is not a necessary precondition to a breach of directors' duties, and one of the interests of a corporation protected by s 180, is its reputation. A further question is even if there is *no* question of a breach of the law, a breach of duty could be based solely on the reputation issue – such as aggressively pursuing short-term profit in disregard of the best interests of customers and

[63] ASIC Commissioner John Price, Company Culture Matters (edited extract of speech delivered at the Governance Institute of Australia – Governance and Risk Management Forum on 7 June 2018), The Australian, Monday 11 June 2018, 21.

[64] James Shipton, 'Rebuilding Trust – A Conduct Regulator's Perspective' (Speech delivered at the AFR Banking and Wealth Summit, Sydney, 5 April 2018) <www.download.asic.gov.au/media/4691647/james-shipton-afr-banking-and-wealth-summit-speech-5-april-2018.pdf>.

long-term viability. Even if putting “shareholder” interests over that of customers is in the short term financial interests of a company, whether it is in the overall best interests is questionable — given the inevitable decline in shareholder value once discovered.

The relevance of soft law

36 I think these questions occupy the increasingly grey area between the legal obligations imposed on corporations and directors and the more nebulous concept of corporate social responsibility. It seems the more vogue term these days for CSR is instead the “social licence to operate”. Rather than being enforced in the courts, traditionally these sorts of ideas have been enshrined in corporate governance “soft law” – the starting point for listed corporations being the ASX *Corporate Governance Principles and Recommendations.*

37 Principle 3 states that a listed entity should act “ethically and responsibly”. It also recommends that listed entities should adopt and disclose a Code of Conduct, which is widely done. In 2014, the Council adopted recommendation 7.4, that a listed entity “should disclose whether it has any material exposure to economic, environmental or social sustainability risks, and, if it does, how it manages or intends to manage those risks”.[65]

38 One question for future consideration is the legal effect of adopting a Code of Conduct, where company behaviour falls short of those aspirations. Where a company has voluntarily adopted this sort of statement, could it be argued that there was a foreseeable risk of harm to reputation as a result of non-compliance and the directors be pursued for a breach of duty? A further question is the extent to which these guidelines should be taken into account in determining the standard of behaviour of an objectively reasonable director.

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[65] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd ed, 2014) <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>.

39 It should be noted that on the 2nd of May, the Council released the draft fourth edition of the recommendations, which it describes as “anticipating and responding to” some of the recent governance issues.[66] The key change is a substantial redraft of Principle 3 to address corporate culture and the inclusion of this concept of a “social licence to operate”. It states that preserving this social licence requires that the board “must have regard to the views and interests of a broader range of stakeholders than just the entity’s security holders”, including employees, customers, suppliers, regulators and the local community.[67] It remains to be seen whether it will be adopted, with one major law firm already decrying it as inconsistent with s 181.[68]

The importance of a culture of compliance

40 The regulator also continues to highlight its expectation of a strong culture of compliance within organisations. Former ASIC Chair, Greg Medcraft stated in an address entitled “What ASIC expects of Directors”, that directors have a role as “gatekeepers”, who should “ensure that their company has strong internal audit and compliance functions”.[69]

41 It is clear that a director who can establish that they had these systems in place is far less likely to be found to have breached his or her duty of care in circumstances where the system fails to produce compliance.[70] However, it is

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[66] ASX Corporate Governance Council, Proposed Fourth Edition of the *Corporate Governance Principles and Recommendations* (2 May 2018) <https://www.asx.com.au/documents/asx-compliance/mark-up-to-third-edition.pdf>.

[67] Ibid.

[68] King & Wood Mallesons, *Insights* (6 June 2018) <http://www.kwm.com/en/au/knowledge/insights/proposed-fourth-edition-asx-corporate-governance-principles-20180606>.

[69] Greg Medcraft, ‘What ASIC expects of directors’ (Speech delivered at the Australian Institute of Company Directors Lunch, 24 June 2014) <www.download.asic.gov.au/media/1348736/what-ASIC-expects-of-directors--speech.pdf>.

[70] See the discussion in Tim Bednall and Pamela Hanrahan, ‘Officers’ liability for mandatory corporate disclosure: Two paths, two destinations?’ (2013) 31 *Company and Securities Law Journal* 474, 499.

the step of checking that compliance systems are actually effective that will increasingly come under scrutiny.

42 This was a key takeaway from the recent APRA review into the Commonwealth Bank of Australia, which outlined a sense of complacency in relation to non-financial risks. The Bank acknowledged a “focus on process rather than mitigating risk” which “couldn’t see the forest from the trees” and a “lack of ownership of outcomes in favour of following process”.[71] As is evident from that inquiry, processes and systems must be accompanied by some measure or at least attempted measure of their effectiveness.

The broader public interest problem

43 Moving to the broader question of the relevance of the public interest in company law, what needs to be asked is whether there is simply a misalignment between what are perceived to be the responsibilities of directors and their actual legal obligations.[72] It is widely accepted that directors owe their duties to the company, and not to any other persons. As you would all be aware, in 2006 CAMAC considered that amendments in line with s 172 of the UK law to incorporate stakeholder interests were unnecessary, and could “make directors less accountable to shareholders without significantly enhancing the rights of other parties”.[73]

44 Dr Langford has argued that rather than extending the contours of directors’ duties to protect stakeholders and other interests, it is timely to undertake a “closer examination of the responsibilities of companies (as opposed to

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[71] Australian Prudential Regulation Authority, *Prudential Inquiry into the Commonwealth Bank of Australia* (April 2018) < https://www.apra.gov.au/sites/default/files/CBA-Prudential-Inquiry_Final-Report_30042018.pdf> 32.

[72] Governance Institute of Australia, ‘Shareholder Primacy: Is there a need for change?’(2014) < https://www.governanceinstitute.com.au/media/881619/govinst_shareholder_primacy_disc_paper_feb2017_web.pdf>.

[73] Australian Government, Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (December 2006) <www.camac.gov.au/camac/camac/nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf> 112.

directors)".[74] Another consideration may also be, in circumstances where directors are given remuneration incentives to increase profits, whether any obligation to take into account other interests is capable of trumping the very real pecuniary interest in maximising shareholder wealth at all cost.

45 It may be that it is just in certain industries that these issues have significance, such as the banking and financial services industries, whose services are "anchored to the core functions they serve for society".[75] If that is the case, then perhaps targeted regimes such as that contained in the Banking Executive Accountability Regime (BEAR) are the way forward.[76] The difficulty might be if these targeted schemes fail to recognise a broader problem of trust in institutions.

46 There is also the point that it has become a commercial imperative to be a good corporate citizen, given the "social licence" issues I mentioned earlier. Further, aside from the financial incentives, it is certainly worth pondering that the inevitable consequence of corporate behaviour falling below acceptable community standards is increased pressure for greater and stricter directors' liability.

The nature of directors' duties: public or private?

47 Putting these to one side, what I think is relatively clear is that the understanding of directors' duties in Australia has shifted from obligations solely concerned with the relationship between the company and directors to obligations which incorporate questions of the public interest. In *Cassimatis,* Edelman J noted *obiter* that since at least 1958 there has been a public

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[74] Rosemary Teele Langford, 'Best Interests: Multifaceted but not unbounded' (2016) 75(3) *Cambridge Law Journal* 505, 525.

[75] James Shipton, 'Rebuilding Trust – A Conduct Regulator's Perspective' (Speech delivered at the AFR Banking and Wealth Summit, Sydney, 5 April 2018) <www.download.asic.gov.au/media/4691647/james-shipton-afr-banking-and-wealth-summit-speech-5-april-2018.pdf> 3.

[76] See *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth).

interest in the enforcement of public duties, in part because a contravention can result in the payment of a pecuniary penalty to the Commonwealth, and can lead to a disqualification order.[77] The idea is hardly novel — Professors Whincorp and Keyes made the same point two decades ago.

48 Despite the volume of ink spilled over this issue, it remains unclear what the practical consequences are, and to what extent it has any impact on liability or enforcement. Directors do not owe any strict duty to the public at large that is capable of enforcement by any member of the public. Directors are not required to act in the public interest except to the extent that not doing so impacts upon the company.

49 That being said, there is nothing unorthodox about this idea that through civil penalty proceedings, notions of the public interest are being protected by ASIC. This is not, of course, a strict duty to take into account the broad public interest but rather the idea that corporations have an impact on society and they must operate in accordance with the law, even where this does not impact upon shareholders. It should also be remembered that the *Corporations Act* does provide for various parties to bring derivative actions on behalf of the company (with leave) pursuant to section 236 – including members, former members, officers and former officers. To that extent, there is some level of enforcement from outside the company and ASIC.

50 I will conclude with the following observations: while directors should be held to account for their lack of care, it must always be remembered that directors are not insurers. Their role is to exercise reasonable care and skill in monitoring the company and the extent that they are able to do so will always depend on the size and complexity of its various activities. It must also be remembered that a director who declines to take any decision involving uncertainty or risk is not a particularly valuable addition to a board. This is not a plea for a return of the “sleepy sentinel” or a suggestion that the obligations placed on directors at the present time are unduly onerous – in my opinion

[77] *ASIC v Cassimatis* [2016] FCA 1023 (26 August 2016), [455]-[457].

they are not. However, in considering any extension of these responsibilities in response to public outcry over corporate misconduct, the foregoing matters must be borne in mind. If they are not, the prophecy of the doomsayers that competent people will be dissuaded from accepting directorial responsibility and directors will become unwilling to pursue any activity involving risk, may start to be fulfilled.

51 Professor Baxt's concept of reasonableness is of particular relevance in balancing the legitimate public interest in corporate activities being carried out in a lawful and ethical manner and the need to promote legitimate corporate activity. One thing which is certain is that a consideration of where that balance should be struck will become an increasingly important feature of debate in this area. Thank you.