TO:	ASX Corporate Governance Council
For attention:	Ms Mavis Tan mavis.tan@asx.com.au
FROM	Malcolm Irving FAICD (Life)
SUBJECT	**Consultation Draft of the Fourth Edition of its Corporate Governance Principles and Recommendations**

I respond to the Council's invitation to comment on the Consultation Draft of the Fourth Edition of its Corporate Governance Principles and Recommendations and apologise that, because of other commitments, this submission is later than your requirements.

In doing so I congratulate and thank the Council for its work on these very important issues and also thank the representatives of the organisations noted within the document for their input to the work. However, in acknowledging this contribution there are some issues where my view differs from that of the Council and, in the following pages, I have sought to draw attention to these variances, hoping that the Council will reconsider its recommendations.

The Council has adopted a very comprehensive and fair process for comment and, in my case, provided the opportunity to consult with colleagues in developing my response which I hope will be helpful.

1. The ASX Corporate Governance Council

Whilst I have been aware of the Council for many years and thought it was part of the ASX family, it is only now that it has been clarified for me that the Council is a body independent of the ASX and, whilst the ASX is represented on the Council, the Council operates independently of the ASX which has no power of approval or veto over its recommendations.

I feel this is an important point which should be clarified in the document even to consideration of an amendment to the Council's name.

A similar point relates to the list of organisations which are members of the Council.

I am informed that some of these organisations may not agree with the proposed recommendations and a statement to this effect should be noted in the document.

Neither of these comments should be regarded as criticisms; rather clarifications.

2. Some Guiding Principles

Where the law already covers the position, e.g. whistleblowers, continuous disclosure and others, there is no need to expand upon the Law's requirements.

Great care should be taken with undefined terms as "socially responsible manner", "accepted community standards", "excessive remuneration", "aggressive tax minimisation strategies", "social licence to operate" where clarity and legal certainty is needed.

If the Council feels these are important then they should be defined in the Glossary.

Under the heading “the purpose of the Principles and Recommendations” page 2 it is noted the Council “do not seek to prioritise the Corporate Governance position that a listed entity must adopt.”

Because the Council’s recommendations have the full force of a listing requirement, notwithstanding the “if not why not” concept, Boards will be under great pressure to adopt concepts which some people see as necessary to fulfil undefined concepts, e.g. “social licence to operate” (see later comments).

3. Inside Cover

It is presumed that of the eight Principles on the inside cover Item 2 relates to the entire Board and not individual Directors.

Item 3	Delete “socially responsible manner” which is subjective.
Item 4	Change “validate” to “verify”.
Item 8	“short, medium and longer term” difficult to achieve at the same time.

4. The basis of the Principles and Recommendations – The “if not, why not” approach

I prefer the original words “an appropriate” rather than “a reasonable”.

5. The structure of the Principles and Recommendations (Page 3)

Item 2	The addition of “and knowledge of the entity and industry in which it operates” may not be necessary in all cases.
Item 3	Delete “socially responsible manner”.
Item 4	“verify” rather than “validate”. This is not a prospectus.
Item 8	The short, medium and longer term. How does an organisation achieve each of these at the same time? Sometimes it is necessary to forego short term results to obtain longer term goals.

6. The linkage with ASX’s listing rules

As stated, Listing Rule 4.10.3 requires an Annual Corporate Governance Statement which must disclose the extent to which the entity has followed the recommendations set by Council during the reporting period.

The Council, as I understand it, is independent of the ASX which may not agree with the Council’s recommendations especially the social engineering requirements contained in the Exposure Draft.

As the Exposure Draft states, Listing Rule 4.10.3 acts “to encourage listed entities to adopt the governance practices suggested in the Council’s recommendations” <u>but does not force them to do so</u>.

If the ASX and Council are in conflict this presents Boards with an unenviable position.

As stated earlier, the name of the Council overstates the relationship with the ASX.

Principle 1 -	**Lay solid foundations for management and oversight.** If the document is to be re-issued with the commentary for consistency the reference should be to Core Values which should be stated. Also, "timely and balanced disclosure", how does this requirement relate to continuous disclosure obligations?
Recommendation 1.2	Dot point 5 "or other party" is too broad. I prefer the original words "and its security holders generally".
Recommendation 1.5	Gender Diversity Whilst I support the gender diversity target of 30% I do not agree with its inclusion in these guidelines. Promotion of this objective is much better suited to the Australian Institute of Company Directors. I also believe there should be more research to support the proposition that diversity achieves better outcomes. The recommendations in their present form are research light. Recommendation 1.5(b)(ii) is probably intended for employees generally and, if so, it should state that. If not, it is inappropriate for Management to be involved in the composition of the Board. I do not agree with the second paragraph in the commentary on page 13. What does "embrace diversity at all levels and in all its facets" mean? Is the Council suggesting some quota system for the thirteen categories nominated in the paragraph or that membership of one of these categories is a prerequisite for employment? Note: I do not agree with or support the suggestions in Box 1.5(2) on page 15.
Recommendation 1.6	I believe formal Board Reviews would become "box ticking" exercises if conducted annually or, even worse, if "each reporting period" included interim reports. Each two years, or even three years if that's the usual Board appointment cycle, is preferred using an external facilitator.
Recommendation 1.7(a)	I presume this is an annual review?
Principle 2	**Structure the Board to be effective and add value.** The addition "and knowledge of the entity and the industry in which it operates" is too restrictive, e.g. it may be more effective to add an international director whose value is knowledge of the international market or Government rather than the specific local market. (This comment is also applicable to the similar comment on page 3 of the Exposure Draft.)

	Note: In commenting on page 18, “Board renewal is critical to performance.” Where are the facts/research to support this statement? Note: Corrections needed to page 22: Paragraph 4 – “third example” should be “fourth example”. Paragraph 7 – “fourth example” should be “fifth example”.
Principle 3	**Instil the desired culture.** If “socially responsible manner” is to be added to this principle it should be defined. See also separate comment (later) on “social licence to operate”. What a “dog’s breakfast” this commentary is! The need for the Board and management to have regard “to the views and interests of a broad range of stakeholders”. The laundry list suggested in the commentary is unrealistic and an unwarranted imposition on Directors and Management. Who are the taxpayers? Who says security holders “expect Boards and Management to engage with these stakeholders”? This whole section needs re-writing with the accent on realism and the role of the Board.
Recommendation 3.3	The law is now settled on whistleblower protection and does not need this recommendation. However, I believe whistleblowers should be able to have access to someone outside of the Executive to help maintain their anonymity.
Principle 4	**Produce Corporate Reports of high quality and integrity.** A listed entity should have formal and rigorous processes to <u>validate</u> the quality and integrity of its corporate reporting. I suggest “validate” be changed to “verify”. These reports are not prospectuses and the Corporations Law is specific about their content and integrity. I suggest the appropriateness of the proposed audit fees be included in these items reviewed by the Audit Committee and recommended to the Board.

Recommendation 4.4	Change “validate” to “verify”.
Principle 5	**Make timely and balanced disclosure.**
Recommendation 5.1	The Corporations Act, ASX Rules and ASIC Regulatory Guide 62 cover this issue quite adequately; there is no necessity for this recommendation.
Recommendation 5.2	I suggest the Board receive copies of all material announcements under listing rule 3.1 <u>at the same time</u> as they are made to the ASX.
Principle 6	**Respect the rights of security holders.**
Recommendation 6.4	I agree provided there is prompt advice of the result.
Principle 7	**Recognise and manage risk.** I am troubled by the expression “stakeholders” and deal with it later.
Recommendation 7.2(b)	Should “and the outcome of such review” be added to (b)?
Recommendation 7.4	What are “accepted community standards”, “socially responsible”, “social licence”? Please provide definition.
Principle 8	**Remunerate fairly and responsibly.** Why is this principle restricted to directors and executives? Shouldn’t it be for all employees?
Recommendation 8.2	I agree but this is something for the webpage not the Annual Report. Should it include comment on its ability to claw back bonuses in certain circumstances?
Recommendation 8.4	I don’t agree that (a) is necessary, (b) should suffice.

7. The application of the recommendations to externally managed listed entities
The comments listed above carry through to these entities as appropriate.

8. Other issues
I am concerned and find unacceptable the use of concepts such as “social licence”, “accepted community standards”, “stakeholders”, “taxpayers” throughout the document where there is an inherent responsibility for directors to report “if not why not”.

Taking “social licence to operate” for example, it is my understanding that this expression/concept was first used by James Cooney at a World Bank meeting when describing an essential requirement for the mining industry in a risk management arena. The term was mainly referenced in the natural and finite resource industries in an attempt to maintain community support. The term was used again at a World Bank affiliated meeting later in 1997. It is also noted that Mr Cooney was referring to resource entities that were licensed to operate.

The contrasting approach to this concept of social licence is well argued in two papers - one supporting the concept by Sam Mostyn, one of my colleagues at O’Connell Street Associates, and the other by Professor Pamela Hanrahan, Professor in the UNSW Business School, which prefers the duties of directors to be considered within the framework of the Corporations Law (pages 12-13). Copies of the papers are attached; I prefer the Professor Hanrahan approach.

“Stakeholders” is another concept which concerns me. In the discussion paper a definition of stakeholders occurs e.g. pages 25, 39 and 41. In the latter definition “taxpayers” is included. Is this intended to include each of us? Why the different definition? Why not have a consistent definition in the Glossary?

Australia has very comprehensive laws covering taxation and an aggressive enforcement regime. Should this not be sufficient for directors rather than the view of “social progressives” where concerns appear to be less with operational efficiency and more with their view of fairness.

Why should “their view” prevail over the Corporations Law?

Regards
Malcolm Irving FAICD (Life)

AICD Governance Summit, Melbourne
1 March 2018

THE EVOLVING ROLE OF DIRECTORS — SAM MOSTYN

Thank you for that generous and personal welcome to country Ian Warrend-Badj – I would also like to acknowledge that we meet on the traditional lands of the Kulin Nation, and pay my respect to elders past and present, and acknowledge any indigenous people in the audience this morning.

Thank you Elizabeth and the AICD team for inviting me to share some thoughts with you about the evolving role of directors.

As Elizabeth has just highlighted, the focus areas of this Summit come at a critical time for everyone involved in governance.

Groucho Marx once observed:

'The secret of life is honesty and fair dealing. If you can fake that, you've got it made!'

Well, what might once have been a funny line, today feels more like a reflection on our changing times.

Not just in relation to the new notion of 'fake news', but with the collapse in trust revealed in the various surveys referenced by Elizabeth Proust this morning.

Clearly, many now feel that we are faking honesty and fair dealing.

Whether it be the insights from the Edelman Global Trust Barometer, or the reflections of directors themselves in the AICD/KPMG survey released yesterday, we are living in changing times.

The KPMG survey was a fascinating insight into the contemporary director's world:

While the majority of directors believe trust is important, less than half believe that their Board currently has a pro-active approach to building trust with stakeholders, and only 23% believe that they have 'meaningful' metrics of trust.

And in thinking about the hierarchy of stakeholders, directors ranked 'the local community in which we operate' third highest, above government and investors (but closely behind customers and employees).

I'm old enough now to know, and remember, that we have been here before – examining trust and accountability.

Perhaps not with the same complexity, interconnectedness and consequence of our world today – but certainly, we've seen failures of governance that have captured the public's imagination, and led to both increased public and regulatory scrutiny, and nervousness about the role of boards and directors.

I'm thinking in particular of the collapse of the insurer, HIH, and the ensuing Royal Commission into that event which reported its findings in 2003.

It was of great interest to me at the time, as I was working at Insurance Australia Group, where our CEO Michael Hawker, together with our board chaired by the late James Strong, was deeply invested in the question of corporate culture, governance, trust and sustainability.

Almost 15 years ago, the HIH Royal Commissioner, Justice Neville Owen, took the opportunity in the opening of his report to canvass the landscape of governance. He commented that:
'it would be a mistake to dismiss the case of HIH as simply a corporate aberration which could be avoided in future by tougher legislation and corporate governance rules'.

He noted that a collapse of this kind could recur:

‘if directors, executives and professional advisers ask themselves – how far can the prescriptive dictates be stretched... rather than ‘Is this right?’

Good governance, he warned back in 2003, is not simply a set of boxes to be ticked. It requires the courage to question, and act – so that the safeguards to protect the public, actually do so.

Justice Owen noted that, while regulation is necessary, he thought that:

'all those who participate in the direction and management of public companies, as well as their professional advisers, need to identify and examine what they regard as the basic moral underpinning of their system of values'.

It is an insight which can be applied to any organisation.

What I heard in Justice Owen’s words, and no doubt what we will ultimately hear from the current Banking Royal Commission, is that some quite old-fashioned principles guide good governance – for any organisation – however structured; whatever industry; whatever size. And to my mind, they are the principles of stewardship.

As you all know, it is a privilege to serve as a director – to be invited to play a key role in the success of an organisation. I’m sure we all aim to leave any organisation we’re involved with in better shape than when we joined – to take a longer term view and create sustainable long term value; to help shape an ethical and principled tone from the top; to create legacies and inter-generational success. To have those that depend on us, and observe us – to trust us.

Our newspapers, broadcast and social media, our workplace conversations, our regulator briefings are all now grounded in the questions of stewardship – of trust, values and character – whether in politics, business, sport, the arts, media, civil society and NGOs, the bureaucracy, our police forces or defence force – in institutions like churches and universities. And in the shadow of #MeToo and other social movements, our communities have heightened, and more knowledgeable expectations, of those who sit around the top tables.

On an almost daily basis in the last month alone, we have learned of allegations of misbehaviour by someone in a senior, influential, leadership or governance role.
Simon Longstaff, founder of The St James Ethics Centre recently published a very thoughtful piece on Trust, Legitimacy and the Ethical Foundation of the Market Economy. He has written an opinion piece based on this in the most recent edition of Company Director.

I commend it to you.

Responding to the trust and stewardship question, Simon reminds us that we also need to consider 'legitimacy' and takes us to a time in the 18th and 19th centuries when markets were believed, and relied upon, to increase the stock of public good, with corporations playing fundamental roles within those markets.

He says the following:

'So, from the beginning, the purpose of the corporation per se was to advance the "prosperity and happiness of man". As a creation of society, the corporation was never intended to provide an exclusive (or dominant) benefit to shareholders. That is, a limited focus on increasing shareholder wealth is not a purpose of the corporation.'

It's an important piece of historical context.

He goes on to propose this:

'Although I have never seen it expressed in these terms, it seems that it is at least arguable that company directors have an implied fiduciary duty to shareholders, to govern the corporation in a manner that does not give rise to the risk that society might remove or mediate the privilege of limited liability on which their shareholders so heavily rely.'

In other words, there is much more to the notion of 'the social licence to operate' than we might think when we use that term now.

Simon suggests that Company directors (and I would extend this to any directors) need to start repositioning the organisations they govern as integrated parts of civil society, and to find new ways to sit “on the same side of the table” as the people.

He concludes that ‘This is not about transactions – but relationships. Privileges like limited liability are best protected by popular consent – not by the assumption that they’re mandated by history and protected by an (increasingly impotent) political class’.

Now, it has certainly been my recent experience that boards of all kinds are talking about the ‘social licence’ – and trying to work out not only what this is, but how it is earned and maintained. I think the KPMG director’s survey results give us an insight into the fact that the topic, and its inextricable link to trust, are top of mind for directors, but that we are in the early stages of understanding how to define this ‘social licence’ in today’s world, and build appropriate metrics to test whether we are doing it well.

As I’ll explain later, it is clear to me that this task is carried out more competently by diverse groups of people in inclusive organisations.

This concept of an organisation’s place within our community and society has come to dominate the discussion of whether we are in fact playing our stewardship roles well enough, and as Simon points out, goes to our capacity to build long term relationships beyond the transactional kind.

In this area, I’m a great fan of the work of Rachel Botsman, whose 2017 book ‘Who Can You Trust?’ is a must-read for directors. Her insights on the erosion of trust in systems and institutions, and the rise of the new dynamic of ‘distributed trust’, which underpins the sharing economy, are vital signposts for directors and boards grappling in this area. Her work also helps to explain the growing interest in new governance models such as B-Corps, and the rise of Shared Value and Integrated Reporting.

One of the elements of stewardship in the midst of these challenges which I think helps us navigate better, is the role of ‘purpose’. Alongside ‘values’, ‘purpose’ now gets a lot of airplay.

But, it has been my long experience with the companies and organisations whose boards I've served on, that where time is spent truly understanding the purpose of the organisation's place in the community, the building of sustainable and meaningful relationships can then flourish. Whether with customers, with employees, with suppliers, with investors, and so on.

This is not a prescription for the Enron-type of stewardship - where the posters on the walls said one thing, whilst behaviour said another. Quite the opposite.

This is the work that engages entire organisations, from where the long term strategy emerges, and guides and focuses what the organisation cares about, and how it goes about it.

It's been a delight as a director to see purposes developed by many organisations such as Transurban's 'to strengthen communities through transport' and Mirvac's 'Reimagine Urban Life', which have taken those companies to new understandings of the role they play in our society.

The purpose work is important in all types of organisations, not only companies. I have seen it's impact at sporting clubs, member associations, not-for-profit organisations and across civil society.

So, amongst all these challenges for us as stewards of our organisations, there are positives.

It was heartening to find deep in the Edelman Barometer for 2018 that there are some important green shoots where trust is growing and community expectation may be being met. Whilst we no longer trust governments, the media, and even 'people like ourselves', Edelman has seen broad gains in trust for expert voices across business, with the effect that technical experts, financial industry analysts, and successful entrepreneurs all enjoying credibility levels of 50 percent or higher today.

As Richard Edelman himself points out –

'There are new expectations of corporate leaders. Nearly 7 in 10 respondents say that building trust is the No. 1 job for CEOs, ahead of high-quality products and services. Nearly two-thirds say they want CEOs to take the lead on policy change instead of waiting for government, which now ranks significantly below business in trust in most markets.'

The growing regard for voices of authority is in accordance with the mounting expectations for today's businesses, and CEOs especially, to lead.

As Elizabeth highlighted this morning, 65% of Australian respondents in this year's Edelman Trust survey said that business leaders should take the lead on change, rather than waiting for government, and we saw an increase in trust towards company directors and CEOs as key spokespeople on societal issues.

This is important.

First, it underscores the critically vital role of boards in appointing the right CEOs for their organisations.

And second, it means that boards and their directors are now having to consider just how this step into the public sphere on social issues is navigated, and by whom.

Employees, too, give their employers credit for, and have an expectation of them leading on change. The 2018 Trust Barometer shows strong levels of employees' trust in their employers to do what is right, with a global average of 72 percent trust. In only two countries – Japan and South Korea – are trust levels below 60 percent.

It's fair to say that we saw this convergence of expectation play out through the Marriage Equality debate across Australia in the last year. And I suspect we may see a similar stepping up of these players when it comes to the resolution of a lasting and respectful acknowledgment and inclusion of Indigenous Australians, as sought in the Uluru Statement.

We see this also where organisations take strong action on issues such as mental health, domestic violence, and racism.

I believe one of the reasons we are seeing a transfer of expectation on leadership and change to business, and to organisations outside the political and policy environment, is that we are all living through some of the most complex, global, and interconnected challenges imaginable. This necessarily impacts the role of directors.

The 2018 Global Risks Report from the World Economic Forum identifies the 4 macro risks as

- environmental degradation;
- cybersecurity breaches;
- economic strains; and
- geopolitical tensions.

And their "Future Shocks" section the report cautions against complacency and highlights the need to prepare for sudden and dramatic disruptions.

The confluence of the impacts of climate change, social and economic inequality in its many forms, tens of millions of migrants and refugees on the move across the world, stress on our natural environment and food sources, the rise of small and large Artificial Intelligence, the future of work, rapid demographic shifts and new geo-political tensions as the world rebalances... all these sustainability problems, and more, have exposed governments, and our traditional ways of governing and organising, as inadequate to solve these wicked problems and navigate successful futures for our communities.

This is why in 2015, we saw for the first time, the collaborative efforts of the UN, national governments, civil society and business lead to the establishment of the Sustainable Development Goals - a development supported by many of Australia's leading businesses and investors, alongside civil society.

Amidst this changing landscape, the role of Investors has become key, and it is clear that many of them have a rising and active interest in the qualitative aspects of our stewardship of companies, and now expect directors to be engaging with sustainability issues.

In January, Larry Fink, the Chairman of BlackRock, one of the world's biggest investors, focused his Annual Letter specifically on the role of stewardship, trust and the role of business in society.

Celebrating BlackRock's 30th anniversary, Fink underscored the importance of this in appointing his Vice-Chairman, Barbara Novick to lead a dramatically increased focus on what he calls 'investment stewardship'.

It is a three page letter I recommend you read, no matter what organisation you help steward. It is a harbinger of significant change.

Amongst its many valuable insights about the need for long term strategy, reliable policies and processes, strong culture and strong governance, Larry Fink says the following:

'Your company's strategy must articulate a path to achieve financial performance. To sustain that performance, however, you must also understand the societal impact of your business as well as the ways that broad, structural trends – from slow wage growth to rising automation to climate change – affect your potential for growth... the board's engagement in developing your long-term strategy is essential because an engaged board and a long-term approach are valuable indicators of a company's ability to create long-term value for shareholders...

Directors whose knowledge is derived only from sporadic meetings are not fulfilling their duty to shareholders. Likewise, executives who view boards as a nuisance only undermine themselves and the company's prospects for long-term growth."

He also pointed out that the board is essential to helping a company articulate its purpose and engage with stakeholders on a broad range of issues.

As with many investors today integrating broader issues into the investment process, the sentiment behind the Fink letter tells us that being able to manage environmental, social, and governance matters demonstrates leadership and good governance that is so essential to sustainable growth.

It is telling that the questions that Larry Fink suggests companies ask themselves go to the heart of the Sustainability and innovation issues of our time.

These are not the sorts of questions that have traditionally been asked of directors and boardrooms.

Questions such as:
'What role do we play in the community? How are we managing our impact on the environment? Are we working to create a diverse workforce? Are we adapting to technological change? Are we providing the retraining and opportunities that our employees and our business will need to adjust to an increasingly automated world? Are we using behavioural finance and other tools to prepare workers for retirement, so that they invest in a way that that will help them achieve their goals?'

At the same time, as James Moody predicted in his book "The Sixth Wave", we are also living in a time of unprecedented opportunity characterised by innovation:

'a wave of innovation driven by resource efficiency, enabled by the pricing of waste and natural resources, and turbo charged by clean technology.'

It is this balance of accounting for our responsibilities and managing risks, and participating in the opportunities presented by our changing world, that makes our stewardship role complex, but rewarding.

So, we've had plenty of road signs for what good stewardship looks like. We see investors, amongst others, raising the bar with their expectations about how companies and organisations play their role in society, and take advantage of innovation. And regulators are now holding boards directly accountable for the culture of their organisations. It is now the norm for regulators such APRA and ASIC to sit across the table from Chairs and directors to probe us on our understanding of our organisation's culture – to ask us to demonstrate a reliable capacity to diagnose, test, and account for the behaviour and values of the organisation. You only need to read recent speeches of the Chairmen of those regulators to see the extent of the change underway, and the new expectations of boards.

So, what does all this mean for a director?

What could it mean for you, wherever your company, organisation, department, club, charity sits in our community?

The role of a director has always been evolving, and responding to our changing times – and given the world we now live in I believe that there are new skills, attributes and intentions required of the contemporary director, and an enhanced stewardship role for boards.

This is as true for a small charity, or a sporting club, or a member association, as it is for a large listed company.

Over many years, I have had the great privilege of serving on the boards of many different organisations – large and small, corporate and not-for-profit, government and non-government across diverse sectors and industries, including sport and the arts.

My observation about what is changing is twofold:

First – who sits around the board table?

Second – The character and quality of the work around that table, and the new conversations required to discharge the expectations of society.

Turning to the composition of our boards, I believe we are simply not moving fast enough in building effective diversity and inclusion in governance, and embracing qualities like humility, curiosity, the capacity to deal with complexity, a comfort with uncertainty, and a genuine interest in the culture of organisations.

Despite good intentions, and some undoubted leadership from many of our leading companies, our overall progress is frustratingly slow.

This poses both a great risk, and more importantly, leads to missed opportunities.

As Larry Fink pointed out in his shareholder letter, BlackRock will ‘continue to emphasize the importance of a diverse board. Boards with a diverse mix of genders, ethnicities, career experiences, and ways of thinking have, as a result, a more diverse and aware mindset. They are less likely to succumb to groupthink or miss new threats to a company’s business model. And they are better able to identify opportunities that promote long-term growth.’

He is not alone in articulating this challenge.

In a recent speech at Regent’s University in London reflecting on the qualities of leadership in the finance sector and more broadly, Bank of England Governor Mark Carney reflected on the duty of leaders to promote a culture of inclusion to realise the benefits of a diverse workplace. Mr Carney advised leaders: 'in a world of division, fusion will bring breakthroughs. Select your teams wisely and recognise that while diversity is a reality, inclusion is a choice. Take it'.

Mr Carney also identified humility as a key characteristic of successful leaders – commenting that leaders should be ready and open to listen to different points of view, and ready to 'engage people’s intuitions and win their trust in order to convince them'.

I could swamp you with data about the benefits of diversity on boards and in teams – most particularly around gender diversity – but also cultural diversity, thinking styles, age, lived experience, and so on.

But rather than do that, I hope you can see from the significant shift in the attitudes of Investors and regulators, that good stewardship is enabled and enlivened by a genuine mix of diverse people who can engage in meaningful discussions, test and probe assumptions, and avoid much of the bias and risk of group-think.

My experience of diverse groups engaged in governance, compared to homogenous groups, tells me that the theory certainly plays out in practice. And it’s why I’m frustrated, along with so many others, at our slow place in this regard.

And particularly in the easiest of all – gender – where we remain stuck in the mire.

The evidence on the benefits of gender diversity is well and truly in.

But we continue to debate the ambition, slugging it out on the question of merit v quota, and stalling in our commitments, even when they are achievable. It's very likely that we'll miss our current goal of women holding 30% ASX 200 director seats by the end of 2018 – with the number currently stubbornly stuck at 26%.

I'm always surprised when faced with the response that either there aren't enough qualified women, or that it's just too hard. We didn't have that response when Safety became a key priority for boards and organisations – zero tolerance for harm in the workplace has become the norm, despite its ambition, and difficulty of implementation. So too it should be for gender.

My own experience is instructive, and I'd like to share some stories with you.

In 2010 when I was first appointed to the board of Virgin Australia, I joined the 9% group of women in such roles at the time. I assumed at the time that I was part of a positive and well supported move to redress the historical imbalances around board tables.

I also joined the Transurban board that year, and again felt from the conversations I had with Chairmen taking action that the change was underway across the ASX 200.

Unfortunately, my optimism was tempered by the reality. Today, there are still eight ASX 200 companies with no women on their boards, and just as worryingly, 67 of those companies with only one woman.

I am very proud to be able to say that the companies where I serve have done strong work – at Virgin Australia, Elizabeth Bryan is our Chair, at Transurban we are almost close to parity and Chair Lindsay Maxsted has taken a strong role in this regard. And the boards I chair, whether companies or otherwise, are gender balanced.

I want to particularly call out the progress at Mirvac.

I was appointed to that board by Chair John Mulcahy in 2016, as part of a targeted appointment process to achieve gender balance. I joined Elana Rubin and Christine Bartlett, and together with our CEO and Managing Director, Susan Lloyd-Hurwitz, alongside our male colleagues, we are a gender balanced board.

I can't begin to tell you how different it feels to be part of a governing group where that balance is achieved. It is different to walk into a room where I am not in the minority, where I don't need to take into account how I can fit in, or how best to make myself heard. I believe that, collectively, our capacity to utilise our full discretionary energy and capacity underpins the great strength of diversity and inclusion.

Most recently, I was struck by the comments on this topic by tennis legend Billie Jean King while she was in Australia. She observed that it had been her experience that whilst those in the extreme minority in groups worked hard to understand the culture and preferences of the majority, the reverse was often not the case – leading to sub optimal outcomes in the quality of decision-making, and the inclusion of different voices.

This has often been my experience, with conscious and unconscious bias potentially affecting decisions in the absence of the strengthening role of debate and challenge.

And in the world of #MeToo and #NeverAgain where we should expect heightened focus on organisational and governance culture, the active promotion of diversity-gender and beyond-should be seen both as reducing risk, and opening up new, unexplored opportunities.

The story which for me best demonstrates the benefit of gender diversity comes not from the corporate world, but from sport, and the AFL. And it's an emerging story underpinning the rise of women's elite sport more generally.

In 2005, I was appointed to the AFL Commission – effectively a quota appointment, at the behest of the late Ron Evans. Responding to the profound impact of women on the game, yet with no presence in governance, the Commission and most of the AFL Club Presidents supported an appointment process only open to women.

I was the fortunate successful candidate, and within two years another woman, the now Governor of Victoria, Linda Dessau was appointed in the normal course of board renewal.

Since then, other women have been appointed, and there is a stated aim to appoint an indigenous person the Commission by 2019.

Until women started populating the seats around the AFL governance tables, who knew that women not only played Australian Rules Football, but wanted to compete in an elite competition just like the men??

Once women could take that insight into the boardroom, briefed and engaged by the women athletes themselves, the possibility of engagement with decision makers became possible.

Many club Presidents who now have women's teams have told me that the presence of the women athletes around the club is having a hugely beneficial impact on club culture. It may prove that this is one of the most effective means of building strong, respectful, and inclusive cultures in domains where risk has abounded.

And this is the great story of opportunity. I hope most of you would be aware of the spectacular debut of the AFL Women's Competition in 2017.

What you may not be aware of is the extraordinary ripple effect that competition is having on participation rates at community levels around the country.

It has opened up one of the most powerful drivers of connection to the game, and growth in support for the game, and will, in my view, underpin the future sustainability of the industry.

It is a great recent example of what the late Geraldine Ferraro said when she ran as the first woman major party Vice Presidential candidate in the US:

'When women stop making history, they can start making policy'.

It is of course as true for other forms of diversity.

I would encourage directors to engage with the groundbreaking work of the Diversity Council of Australia on the breadth of other diversity opportunities.

Whether it's the Cracking The Bamboo Ceiling, or Cracking The Glass Cultural Ceiling Report, the research of DCA is a powerful source of support for the strategic importance of cultural diversity as a key strategic component of governance. The DCA work also shows just how disconnected we are from our national aspiration to grow future prosperity through our place in the region through our failure to promote capable culturally diverse people to senior governance and management roles.

On a separate note, the National Mental Health Commission is a stellar example of the differentiating impact diverse directors can have on outcomes – a board established with a number of commissioners with a lived experience of mental health challenges ensuring the success of the Commission's work.

To my second observation, are we having the right conversations around the board table?

Increasingly, our board rooms are needing to create safe spaces for complex and difficult conversations, and a comfort with challenge and engaging with the broader world – getting insights which reduce risk of future problems.

In addition to our commitment to the success of the organisation, and demonstrated competence and expertise, directors need to be able to be independent, authentic, prepared to speak up, and prepared to learn. We must have integrity and bring hearts and minds to the role - and feel comfortable to bring our whole selves into the boardroom. As stewards, we must stand for something, and understand our legacy role. And we need to be able to engage frankly and respectfully around the board table in difficult conversations when they are required.

I'm going to turn to a regional political leader to make this point.

Last year, in his Menadue Oration for the Centre for Policy Development's 10th anniversary, former Indonesian Foreign Minister, Marty Natalegawa, lamented the retreat of democracy and diplomacy in the region. He thought this retreat was dangerous for Australia and Indonesia as our regional and domestic challenges converge.

He had a wonderful line about how leaders must be able to 'disagree, without being disagreeable.' To disagree, without being disagreeable.

Marty Natalegawa was speaking about the conduct of international relations and foreign policy, but I think the line works just as well as a motto for difficult discussions in the boardroom.

When it matters, it is important to be able to disagree with your fellow directors. In today's world, we must be much more comfortable having complex conversations and constructive disagreements around boardroom tables.

Directors have a pivotal role in raising and resolving disagreements, finding a way forward, and being frank about the conversations the board may not be having.

I'm certainly not suggesting a 'free for all' nor a retreat from all the other business of the board. But there is a great benefit to opening the space to broaden the conversation. I've seen this done very well by the Chairs of the boards I serve on, who I often observe have the skill of 'conducting' the participation of the directors, and never assume that they are the smartest people in the room, nor that their minds are closed to alternate perspectives.

When it comes to the changing world we live in, there is one conversation I believe boards weren't having enough of in recent years - the topic of climate-related risks.

Few boards have laid strong foundations for measuring and disclosing these risks.

It has generally taken intervention by regulators – Bank of England Governor Mark Carney in the UK, and more recently APRA's Deputy Chair Geoff Summerhayes, joined now by RBA Deputy Governor Guy Debelle – who have asked uncomfortable questions and opened up a new conversation about the risks and opportunities presented by climate-related financial risks.

Boards didn't need to wait for the lawyers and the regulators to open up this conversation, but many did.

I observed at close range the role of the Centre for Policy Development in the past year in bringing together a diverse group of business leaders, legal experts and regulators, to start a conversation about climate risk and director’s duties in order to be better prepared as the issues come into sharper focus.

This reinforced to me that boards should be more discerning and strategic in how they engage in the policymaking process. Boards shouldn't hesitate to take the road less travelled and break away from the 'safe' political options, where there is a clear imperative for engagement by the company, and a belief that good policy can be assisted by broader perspectives.

Marty Natalegawa’s speech last year made it clear that our region is entering unchartered waters. No country or company can shy away from these challenges. The 'safe' options won't cut it. It is a time when the best directors will have a curiosity and a capacity for complexity. They will be equally candid in admitting when they lack knowledge – or when the board has a knowledge deficit – and how they can reach out and fill that gap.

And if we have the right people around the table, having the right conversations, we can then properly acquit our roles as stewards of the ‘Tone from the Top’, as required not only by regulators, but by the community at large.

As boards we need to be vigilant against complacency, and ready to accept the responsibility of taking big strategic decisions in the long term interests of our organisations. This is hard work, and requires commitment and genuine engagement. As Larry Fink said, it is not simply about turning up for board meetings.

We must always act according to our values, and speaking up where we know things to be wrong. Our judgment will sometimes tell us that a course of action is not in the long term interest, despite significant potential short term gain. These are the moments when directors need to pause, review decisions, and resist the temptation to think that an issues management strategy later will suffice. It does sometimes take courage to do this, but it's easier around a table of colleagues who respect the hard conversations, led by Chairs who encourage the challenge.

I want to return to where I started, and where the AICD conference is focused – trust, innovation and sustainability.

In the program over the coming days, there are exceptional speakers and panels engaging with the challenges of our time. But for all the complexity of these challenges, the answers lie within us, as directors and stewards.

My vantage point from within boardrooms gives me confidence that there is much to be optimistic about - but that as directors we'll need to remain humble, curious and accountable. We must be prepared to listen, collaborate, and embrace diversity and inclusion as the norm.

At the end of the day though, directorship should not be a lifestyle choice. It involves a fundamental commitment to the contemporary stewardship expectations I've described, and undertaking that role must involve clear sightedness about those responsibilities and accountabilities. And an understanding of what it is not.

Directorship is not for everyone, and understanding that it important. If the complexity and expectations of stewardship don't play to your strengths, or you feel better placed in different parts of the business and organisational structure, that's a decision to be respected and admired.

But for those who embrace the governance role, we live in a time where our full commitment to stewardship for the long term, and the embracing of the opportunities to build a sustainable and prosperous future, are the best ways for us to earn and retain the trust of the communities we serve.

DIRECTORS' DUTIES AND PUBLIC INTERESTS

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1. INTRODUCTION

The invitation for this seminar contains a bold assertion. It is that 'the law now recognises that public interests may be (and sometimes must be) protected and advanced by boards, instead of directors' decisions turning exclusively on private corporate or shareholder interests'. I am not sure I agree. My intention today is to test that assertion having regard to some recent developments in the law of directors' duties and in the stance publicly adopted by the Australian Securities and Investments Commission (ASIC) to enforcing that law.

This paper explores ways in which considerations of public interest might impact on director decision-making, in two contexts. The first is in connection with the company's obligation to comply with the law. The second is in situations where a company is urged by politicians, regulators or others to go beyond the law to do what is 'right'. This second context is often now connected (at least rhetorically) with the notion of a company requiring a 'social licence to operate'.

I begin with two preliminary observations.

The first is about 'public interests'. This is an elastic concept, but I want to use it in a way that goes beyond traditional stakeholder interests (particularly those of a company's contractual counterparties and neighbours)[1] to encompass the idea of the interest of the whole community in the proper conduct of the affairs of companies. Depending on the nature and scope of the company's activities, that community may be local or, in the case of a multi-national enterprise (MNE), global. The public's interest in the proper conduct of a company's affairs may be more acute in some industries and sectors than in others.

The second is about directors' duties. There is no need to rehearse the Australian law of directors' duties here, but there are some distinctive features that are pertinent to the discussion that follows and are worth pointing out. First, some of the core duties arise from the *Corporations Act (2001)* (Cth) (Corporations Act), some from the general law (that is, common law and equity), and some from both. There are areas of overlap, but they are not completely co-extensive. Directors also have duties related to their management of the affairs of the company that arise under other laws.[2] Secondly, the core statutory duties in Chapter 2D of the Corporations Act cannot be excluded by the company's constituent documents (although the constituent documents might

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[1] A company's contractual stakeholders include shareholders, creditors, suppliers, customers, employees, joint venture partners and others who voluntarily enter into relationships with the company based in contract. 'Neighbours' are others who are foreseeably and directly impacted by the company's actions, to whom the company may owe obligations (for example in equity or tort).

[2] This is recognised in *Corporations Act 2001* (Cth) s 179.

be relevant in discerning where the company's interests lie). Thirdly, the company cannot ratify a breach of the core statutory duties. Fourthly, the company cannot exempt a director from a liability incurred to it as an officer and cannot indemnify a director against a liability to the company or for a pecuniary penalty order. Fifthly, ASIC has standing to bring proceedings against a director for breach of the core statutory duties even if the company itself would have no cause of action arising out the breach. These features of the Australian law mean that, among other things, a company's shareholders are not the ultimate arbiters of whether the directors have discharged their duties. If there was any doubt previously about the public character of the Australian directors' duties,[3] that was put to rest in 2016 by Edelman J in *Australian Securities and Investments Commission v Cassimatis (No 8)* (*Cassimatis*).[4]

2. COMPLYING WITH THE LAW

This Part explores the relevance of public interests to the directors' responsibilities concerning their company's compliance with the law.

Companies, like all other legal persons, must comply with the law and there is a public interest in them doing so. The public interest lies not only in achieving the policy outcome intended by the particular law, but also in upholding the rule of law. Deliberately disregarding or disobeying the law is ordinarily not a legitimate choice.[5] This is so even where it might benefit the company to do so, and where the chances of detection are low or the potential sanctions are insignificant. The point is well made by Edelman J in *Cassimatis* and is worth repeating here.[6]

The role and responsibilities of the board in relation to a company's compliance with the law have received considerable attention in Australia and elsewhere, particularly since the Global Financial Crisis.[7] In Australia, the guiding legal principles are as follows:

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[3] See M Welsh, "Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia" (2014) 42 *Federal Law Review* 217; J Farrar and P Hanrahan, *Corporate Governance* (LexisNexis, 2017) [18.1].

[4] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023.

[5] Whether an intentional refusal to comply with law (including unjust law) might be in the public interest is a longstanding concern of jurisprudence. A recent and much more controversial variation of this is the view that it is acceptable for a company not to comply with a law in the interests of 'disruption' – think UBER and the taxi laws.

[6] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [485]; see also *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502; (2015) 327 ALR 95; (2015) 106 ACSR 343; [2015] FCA 589 at [482].

[7] See R Teele Langford, "Corporate Culpability, Stepping Stones and Mariner: Contention Surrounding Directors' Duties Where the Company Breaches the Law" (2016) 34 *Company and Securities Law Journal* 75; T Bednall and P Hanrahan, "Officers' Liability for Mandatory Corporate Disclosure: Two Paths, Two Destinations?" (2013) 31 *Company and Securities Law Journal* 474; A Black, "Directors' Statutory and General Law Accessory Liability for Corporate Wrongdoing" (2013) 31 *Company and Securities Law Journal* 511; A Herzberg and H Anderson, "Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability" (2012) 40 *Federal Law Review* 181. The term "stepping stone" comes from Keane CJ's description of ASIC's proceedings in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364; 81 ACSR 563 at [10]. Herzberg and Anderson describe the stepping stones approach (at 182) as an enforcement strategy by ASIC that "applies directors' duties in a novel context. The first stepping stone involves an action against the company for contravention of the [Corporations Act]. The establishment of corporate fault then leads to the second stepping stone; a finding that by exposing their company to the risk of criminal prosecution, civil liability or significant reputational damage, directors contravened their statutory duty of care with the attendant civil penalty consequences."

- Directors do not have any generalised duty to ensure that the company always complies with the law.
- However, directors must not deliberately cause or allow the company to contravene the law. This would be a breach of their duty to act in good faith in the interests of the company and for a proper purpose. It would also make the director an accessory to the company's wrongdoing.
- Directors also have a duty to take reasonable care to ensure compliance if:
    - specific legislation imposes that obligation on them (for example, s 344 or s 601FD(1)(f) of the Corporations Act), or
    - the potential for non-compliance creates a foreseeable risk of harm to the company, for example exposure to regulatory action or reputational damage.

No general duty to ensure compliance

It seems well established that Australian directors do not have a generalised legal duty to ensure compliance. (Whether they ought to is a separate question.) As Gordon J pointed out in *Australian Securities and Investments Commission v Warrenmang Ltd*:

> … directors' duties provisions are not concerned with any general obligation owed by directors to conduct the affairs of the company in accordance with the law generally or the Corporations Act. Moreover, the directors' duties provisions do not necessarily make a director liable for a breach by the company of another provision in the Corporations Act. The corollary is that it cannot be said that every breach by a company of the Corporations Act necessarily gives rise to a breach of the directors' duties provisions.[8]

Therefore, it does not flow automatically from a finding that an entity has contravened the Corporations Act, that the officers must have contravened their duty of care to the company. As Beach J said in ***Australian Securities and Investments Commission v Mariner Corporation Ltd*** (*Mariner*), it 'is wrong to assert that if a director causes a company to contravene a provision of the Act, then necessarily the director has contravened s 180'. [9]

In *Cassimatis*, ASIC argued that directors have a duty to 'ensure that the corporation meets its statutory obligations', relying in part on a 2008 decision of the Canadian Supreme Court concerning the statutory duty of care contained in s 122(1)(b) of the Canada Business Corporations Act (1977).[10] Justice Edelman declined to accept this as a general proposition. His Honour described the use of the phrase as:

> ⋯ both misleading and inaccurate in Australia. A duty to "ensure" compliance is a duty of strict liability. Any failure of compliance by the corporation will lead to liability for the director. The duty in s 180(1) of the Corporations Act is not a duty of strict liability. Nor is it a duty which requires the director to take every possible step to avoid a foreseeable risk of contravention of legislation.[11]

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[8] (2007) 63 ACSR 623; [2007] FCA 973 at [22]. See also *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502; (2015) 327 ALR 95; (2015) 106 ACSR 343; [2015] FCA 589 at [444] – [447].

[9] *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502; (2015) 327 ALR 95; (2015) 106 ACSR 343; [2015] FCA 589 at [447].

[10] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560.

[11] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [529]. In declining to give even persuasive force to the view expressed by the Canadian court, Edelman J gave three reasons. 'First, even in Canada it might be doubted whether the Supreme Court's reference to a

That his Honour declined to find that directors have a duty to ensure that the company meets its statutory obligations when expressly invited by ASIC to do so is significant.[12]

A duty not to deliberately cause or allow a contravention

A director would likely breach their duty to exercise their powers and discharge their duties in good faith in the interests of the company and for a proper purpose if they deliberately caused or allowed the company to contravene the law. In *Australian Securities and Investments Commission v Flugge & Geary* (*Flugge*), Robson J said:

> In my opinion, s 181(1) addresses how a director or an officer of a corporation should exercise his powers and discharges his duties in particular circumstances where he seeks to do so…. If [the director] had made a decision to not make inquiries or inform himself, or had made a decision not to prevent the wrong doing, the provision would have come into play. It would be possible to apply an objective test of whether an honest and reasonable director could have made such a decision in the circumstances. Similarly, if [the directors] decided or elected not to do anything, the section could be tested against that decision or election.[13]

Being knowingly concerned in, or party to, the company's contravention would also make the director an accessory to that contravention.[14]

A business judgement that carries with it the risk that it might lead to a contravention of the company's legal or regulatory obligations is not the same as a decision to contravene the law.[15]

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director being obliged to "ensure" that the corporation meets its statutory obligation would be interpreted literally so that liability is imposed on directors whenever the corporation did not meet its statutory obligations. Secondly, the statement was made in relation to the "fiduciary duty" in s 122(1)(a) not the "care, diligence and skill" duty in s 122(1)(b). The section with which the Supreme Court was concerned was s 122(1)(a), a statutory duty to "act honestly and in good faith with a view to the best interests of the corporation" (see [36]–[37]). Thirdly, the Canadian legislation was being interpreted in light of s 122(2) which provides that "Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement." There is no Australian counterpart to that subsection.' *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [532]. The position may be different in New Zealand; s 134 of the *Companies Act 1993* (NZ) provides that 'a director of a company must not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company'.

[12] In *Cassimatis*, Edelman J drew a distinction between different types of public wrongs; including 'a public wrong which is parasitic or dependent on a private wrong but where the legislation merely imposes additional public sanctions and additional enforcement mechanisms' and one 'which is based upon a private wrong but which is independent of the private wrong, including having different elements based upon different interests which are protected'. He did not decide which type a contravention of *Corporations Act 2001* (Cth) s 180 fell into. See *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [453] and [473].

[13] *Australian Securities and Investments Commission v Flugge & Geary* (2016) 342 ALR 1; (2016) 119 ACSR 1; [2016] VSC 779 at [2002]. In this same passage, Robson J expressed the view that 'it is not apposite to apply [*Corporations Act 2001* (Cth) s 181] to a situation where the director or officer has not sought to exercise his powers or discharge his duties'. ASIC appealed aspects of the decision relating to s 181 and the decision of the Court of Appeal is reserved.

[14] 'Accessory' is used in the general sense, to include being involved in the company's contravention within the meaning of *Corporations Act 2001* (Cth) s 79 and its analogues. See in particular A Black, above n 7. See also *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1; (2017) 120 ACSR 421; [2017] FCAFC 74.

[15] In *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502; (2015) 327 ALR 95; (2015) 106 ACSR 343; [2015] FCA 589 Beach J said at [486]: 'In the present context, the relevant

Duty to take reasonable care

The third principle is that the directors' statutory and general law duty of care requires them to exercise reasonable care or take reasonable steps to guard against corporate compliance failures in certain circumstances. In *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (*Avestra*) Beach J concluded that:

> … the necessary requirement for liability in such a case is that the director failed to exercise reasonable care and diligence in circumstances that caused or failed to prevent the company from contravening [the relevant law] and where it was reasonably foreseeable that such contravention might harm the interests of the company.[16]

Directors have a duty to take reasonable care to avoid or prevent compliance failures by the company where and to the extent that the (potential) failure creates a foreseeable risk of harm to the company itself. In *Mariner*, Beach J says that, 'In order for an act or omission of the director to be capable of constituting a contravention of s 180 there must be reasonably foreseeable harm to the interests of the company caused thereby'.[17] The fact that the directors' negligence might cause damage to other stakeholders is not directly relevant except to the extent it impacts on the company's interests. In *Cassimatis*, Edelman J proceeded on the basis that the 'public duties as directors in managing Storm could only be contravened if they acted contrary to *Storm's* interests rather than contrary to any general norm of conduct'.[18] However the company's interests are not limited to its financial interests and should not be narrowly construed; the 'interests of the corporation, including its reputation, include its interests which relate to compliance with the law'.[19]

Directors can also have express statutory obligations to take reasonable steps or exercise due diligence to secure compliance in a range of circumstances.[20] Where an express statutory duty

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'business judgment' was the decision to initiate a takeover bid for Austock, the necessary starting point for which was the making of the 25 June announcement. Having regard to the nature of Mariner's business and the evidence concerning the potential benefits to Mariner of attaining control of Austock, the decision to commence the takeover and make the 25 June announcement was a business judgment. ASIC's characterisation of the directors' decision as a judgment not to comply with the Act … is a misconceived analysis of the judgment made by Mr Olney-Fraser. No decision was made not to comply with the Act, indeed the converse.'

[16] *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (2017) 348 ALR 525; (2017) 120 ACSR 247; [2017] FCA 497 at [216].

[17] *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502; (2015) 327 ALR 95; (2015) 106 ACSR 343; [2015] FCA 589 at [449].

[18] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [478].

[19] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [483].

[20] Section 344(1) of the *Corporations Act* provides that a director of a company, registered scheme or disclosing entity contravenes this section if they fail to take all reasonable steps to comply with, or to secure compliance with, Part 2M.2 or 2M.3', which deal with corporate reporting. Section 601FD(1)(f) applies to officers of a responsible entity of a registered managed investment scheme; it requires that they take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with' the *Corporations Act*, any conditions imposed on the responsible entity's Australian financial services licence, the scheme's constitution, and the scheme's compliance plan. The directors of a corporate trustee of a registrable superannuation entity are required by the statutory covenant in s 52A(2)(f) of the *Superannuation Industry (Supervision) Act 1993* (Cth) to 'exercise a reasonable degree of care and diligence for the purposes of ensuring that the corporate trustee carries out' the trustee's covenants referred to in s 52 of that Act. An officer of a person conducting a business or undertaking that has a duty or obligation under the model work health and safety legislation is required by s 27(1) of the model Act to 'exercise due diligence to

applies, there is no need to consider whether it is reasonably foreseeable that a contravention might harm the interests of the company. Instead the obligation is imposed by the statute. Generally, the specific duty sits alongside or is coextensive with a general duty of care and in those circumstances the requirements are treated as equivalent.

It is also relevant that s 206E of the Corporations Act allows for a court, on the application of ASIC, to disqualify a person from managing corporations for an appropriate period if the person 'has at least twice been an officer of a body corporate that has contravened this Act … while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention'.[21] Where the order is sought on the basis that there was a failure to take reasonable steps to prevent the contravention, there is no need for ASIC to establish first that the director contravened s 180(1) although this may follow.[22]

The required standard of care, and the business judgement rule

What amounts to reasonable care or reasonable steps in any situation depends on various factors, including the nature of the corporation and its circumstances and the role and responsibility of the individual director within it. Directors may delegate responsibility for compliance functions, if it is reasonable to do so in the circumstances. The extent to which they can rely on others to perform those functions depends on, among other considerations, ss 189 and 190 of the Corporations Act. [23]

That said, all directors are subject to an ongoing obligation to take 'reasonable steps to place themselves in a position to guide and monitor the management of the company'.[24]

Determining what the standard requires of a director in a particular situation 'involves consideration of all circumstances including the foreseeable risk of harm to any of the interests of [the company] and the magnitude of that harm, together with the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question, and any burdens of further alleviating action'.[25] The officers' action or inaction is evaluated objectively,

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ensure that the person conducting the business or undertaking complies with that duty or obligation'. These are just examples. See generally, Commonwealth of Australia, Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault* (2005); Farrar and Hanrahan, above n 3 [5.30] – [5.38].

[21] *Corporations Act 2001* (Cth) s 206E(1)(a)(i). See *Australian Securities and Investments Commission v Astra Resources Ltd (No 2)* (2016) 113 ACSR 162; [2016] FCA 560 at [72], referring to *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561 ; [2002] NSWSC 310 at [102]; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373 ; [2006] NSWSC 1052 at [124] ; *Australian Securities and Investments Commission v Axis International Management Pty Ltd (No 6)* (2001) 84 ACSR 703 ; [2011] FCA 811at [6]–[7] and [18]–[19]; and *Re Vault Market Pty Ltd (ACN 075 799 772)* [2014] NSWSC 1641 at [67] and [88].

[22] See *Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (In Liq)* (2016) 115 ACSR 437; [2016] FCA 934 and *Australian Securities and Investments Commission v Astra Resources Ltd (No 2)* (2016) 113 ACSR 162; [2016] FCA 560.

[23] See also *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 41 ACSR 72 at [374] (Santow J). For a useful discussion of delegation and reliance in the context of an express reasonable steps duty, see *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185; (2015) 111 ACSR 1; [2015] FCA 1452 at [222] – [223].

[24] Per Rogers J in *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 864, adopted by Clarke JA and Sheller JA on appeal in *Daniels v Anderson* (1995) 37 NSWLR 438 ; 16 ACSR 607 at 664.

[25] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [479], adopting with approval the approach taken by Ipp J in *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395.

having regard to what a 'reasonable person' would have done in the relevant circumstances.[26] Thus, the standard is not one-size-fits-all; it recognises that the level of care required is always situational, to be assessed having regard to the conditions that existed at the time of the alleged breach.

Unlike the general law duties of care owed the company,[27] an officer can contravene the statutory duty of care even if their act or omission did not cause the company to suffer actual loss or damage.[28] Further, it is not necessary to show that the company in fact contravened its legal or regulatory obligations; it is enough that it was placed at real risk of doing so.[29]

In *Avestra*, Beach J talked about directors' failure to exercise reasonable care and diligence 'in circumstances that caused or failed to prevent' the company contravening the law.[30] The failure to exercise care could lie in a business decision by a director or the board that was negligent, or in 'an unconsidered failure to act in circumstances in which due attention would arguably have prevented'[31] the contravention.

A decision or action can be negligent whether it is inadvertent or intentional.[32] The fact that an intentional decision or action is wrong or turns out badly for company is not enough to establish negligence. Instead it must be a decision or action that a reasonable person in the defendant's position, exercising the requisite degree of care, skill and diligence, would not have arrived at. It is

[26] See *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465; 286 ALR 612; 88 ACSR 126; [2012] HCA 18. The evaluation must take into account the element identified in paragraph (a), being the corporation's circumstances, and the elements identified in (b), namely the office and responsibilities within the corporation that the officer occupied. Those responsibilities are not confined to the statutory responsibilities and that they include whatever responsibilities the officer had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.

[27] In *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75; (2016) 118 ACSR 189; [2016] FCA 1552 Edelman J says at [303] that 'It is well established that an action for negligence at common law is not complete unless loss is suffered'.

[28] As Santow JA observes in *Vines v Australian Securities and Investments Commission* (2007) 63 ACSR 505; [2007] NSWCA 126 at [158], 'detriment is not an essential ingredient for breach of [the equivalent of s 180(1)], although it is commonly found'.

[29] In *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75; (2016) 118 ACSR 189; [2016] FCA 1552 at [318], Edelman J says that 'for the reasons I explained in *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 ; [2016] FCA 1023 at [4]–[5], [834], it might be seriously doubted whether that consideration requires the Court to be satisfied that the corporation actually breached the duty about which it was foreseeable that it might breach. As I explain later in these reasons, and as all counsel accepted, an assessment of whether a director has breached a duty under s 180(1) of the Corporations Act involves consideration of the foreseeability of harm, the likelihood and magnitude of the harm, and the burden of alleviating precautions. It is hard to see why that assessment requires proof of a breach of another duty'.

[30] See n 16 above.

[31] *In re Caremark International Inc. Derivative Litigation*, 698 A 2d, 959, 967 (Del Ch, 1996). For a comparison of the liability of Delaware directors under the *Caremark* doctrine with the liability of Australian directors for catastrophic compliance failures, see R Yates and P Hanrahan, "Directors' Duties of Oversight: Insights for Australia from Recent Developments in Delaware's *Caremark* Jurisprudence", Paper presented at the Corporate Law Teachers' Association Conference, La Trobe University Melbourne, February 2018.

[32] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [505].

for the person alleging that the director's conduct was negligent to prove the action that would have been taken by a reasonable person in the director's place.[33]

A claim arising from a decision or action is one to which the business judgement rule potentially applies. This means that the director will be taken to have discharged their duty to act with care and diligence if they can establish[34] that they made the judgment in good faith for a proper purpose; did not have a material personal interest in the subject matter of the judgment; informed themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and rationally believe that the judgment is in the best interests of the corporation. The director's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Conduct that is an 'unconsidered failure to act' on the part of directors is not covered by the business judgement rule.[35] In *Australian Securities and Investments Commission v Rich*, Austin J said that:

> … the discharge by directors of their "oversight" duties, including their duties to monitor the company's affairs and policies and to maintain familiarity of the company's financial position, is not protected by the business judgment rule, because the discharge or failure to discharge those duties does not involve any business judgment as defined. That is important in the present case because one aspect of ASIC's claim is that the defendants failed to discharge their monitoring duty. Monitoring the company's affairs and maintaining familiarity with its financial position are not in themselves matters that involve a "decision to take or not to take action" in respect of a matter relevant to the company's business operations.[36]

Cases involving an unconsidered failure to act on the part of directors are rare in Australia, at least outside the corporate disclosure context. Most larger Australian companies have adopted formal compliance systems and processes that are at least in theory intended to bring issues with compliance to the attention of the board. This might be because a licensing or regulatory regime under which the company operates positively requires those arrangements;[37] because the absence of such arrangements exposes the company to more severe sanctions, or to potential criminal liability, in respect of compliance failures that could be avoided if such arrangements were in place;

[33] *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75; (2016) 118 ACSR 189; [2016] FCA 1552 at [400].
[34] *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at [197].
[35] *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; (2009) 75 ACSR 1; [2009] NSWSC 1229 at [7278].
[36] *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; (2009) 75 ACSR 1; [2009] NSWSC 1229 at [7278].
[37] For example, an Australian financial services licensee is required by s 912A(1)(h) of the Corporations Act to have adequate risk management systems; these must cover legal and compliance risk. See Australian Securities and Investments Commission *Regulatory Guide 104 - Licensing: Meeting the general obligations* (July 2015) and Australian Securities and Investments Commission *Regulatory Guide 259 – Risk management systems of responsible entities* (March 2017). APRA regulated entities must comply with *Prudential Standard CPS 220 - Risk Management* (July 2017). This includes a requirement to maintain board-approved risk management strategy that includes policies and procedures that include 'the mechanisms in place for monitoring and ensuring ongoing compliance with all prudential requirements'. Prudential requirements include 'requirements under the respective *Banking Act*, the *Insurance Act*, the *Life Insurance Act*, the *Banking Regulations 1966*, the *Life Insurance Regulations 1995*, the *Insurance Regulations 2002*, prudential standards, reporting standards, the *Financial Sector (Collection of Data) Act 2001*, licence conditions, authorisations, directions and any other requirements imposed by APRA under legislation'. See CPS 220 para 35(f).

[38] because self-regulatory principles and guidelines recommend it;[39] or because it is sound business practice to do so. The challenging question is what the directors' (particularly non-executive directors') liability ought to be in the face of a catastrophic compliance failure that can be attributed to defective systems or processes, to a failure by directors to follow up on issues or problems revealed by those systems or processes, [40] or to a failure by the board to take adequate corrective measures when those systems and processes revealed ongoing problems.

3. GOING BEYOND THE LAW

This Part explores the relevance of public interests to directors' decisions in situations where a company is urged by politicians, regulators or others to go beyond the law to do what is 'right'.

In the decade since the Financial Crisis, there has been a perceptible shift in community attitudes to corporate behaviour, particularly behaviour that is lawful but is said to fall short of 'community expectations'. This is evident in a range of domains, from the BEPS tax debate to the terms of reference of the current Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Sector. Regulators and others increasingly talk about 'corporate culture' as if it were an end in itself. This shift may be a contributor to, or consequence of, a broader change in social attitudes; either way, it still has some distance to play out.[41] Elsewhere I have suggested that it might point to a more 'post-law' future, in which the capacity of law and legal institutions to control corporate behaviour is increasingly under challenge.[42]

That shift lies, I suspect, at the base of the proposition we are testing today. Directors are increasingly being told that their company must go beyond the law to do what is 'right', even where that involves sacrificing private corporate interest or shareholders' interests to public interests. This is particularly the case in three areas I want to consider briefly today:

- pronouncements by regulators
- codes of conduct and voluntary ESG commitments, and
- the idea of a 'social licence to operate'.

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[38] *Australian Securities and Investments Commission, in the matter of Chemeq Limited v Chemeq Limited* [2006] FCA 936 (French J).

[39] For example, the ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd ed, 2014) (CGPR).

[40] In *Australian Securities and Investments Commission v Flugge & Geary* (2016) 342 ALR 1; (2016) 119 ACSR 1; [2016] VSC 779, Robson J found at [1287] that 'a reasonable director in the position of Flugge would have made reasonable inquiries into the propriety of the inland transport fees being paid by AWB to Iraq'. His Honour went on to conclude at [1943] that the director could not 'avoid his duties to prevent the improper conduct AWB was engaged in by contending he was ignorant of the matters when, by reason of his position as a director and chairman and in the circumstances alleged, he was duty bound to inquire and the inquiry would have revealed the improper conduct'. For a discussion of *Flugge*, see T Bednall, "ASIC v Flugge: Section 180 Strikes Again" (2018) 36 *Company and Securities Law Journal*, forthcoming.

[41] P Hanrahan, "Corporate Governance in These 'Exciting Times'" (2017) 32 *Australian Journal of Corporate Law* 142.

[42] Ibid, 160 – 161.

Regulatory pronouncements

Homilies have always been part of the regulatory toolkit. Education and guidance, including aspirational guidance, has a recognised place in ASIC's approach to regulation, although ultimately the 'regulatory pyramid' relies on enforcement as a credible threat at its apex for its efficacy.[43]

Since the GFC, ASIC seems to have place increased reliance on 'jawboning' as a regulatory strategy, arguably in the absence of a coherent enforcement program. There are many possible explanations for why this is the case. ASIC's performance as a regulator has been examined before[44] and is within the terms of reference of the Royal Commission,[45] so I will not comment here. However, it is interesting to note that in his two public speeches since arriving at ASIC, Chair James Shipton has had little to say about ASIC's approach to enforcement.[46] This is in stark contrast to inaugural Chair Tony Hartnell's 16 priority matters for the new Australian Securities Commission, announced in September 1990.[47]

The issue for directors is when regulators suggest they require of companies something at goes beyond the law. How should directors respond to that? Recently, ASIC Chair James Shipton said in relation to the financial sector:

> Now, I know there may be some in the audience who may be interpreting my comments about the need for more professionalism as just another lecture from a regulator. That could not be further from the truth; I want, today, to give you some of ASIC's views on the behaviours we want to see …
>
> Second, that the providers of financial services prioritise the consumer's interests and put the consumer's interest before their own…. Third, financial providers look to do the right thing and act with integrity and fairness, not just comply with the law….[48]

As a community, we need to consider carefully the implications of such an approach to regulation, including where it is carried forward to legislative measures such as the Banking Executive Accountability Regime.[49] This is particularly so if it is used as an alternative to the proper enforcement of the law as made, with the protections it carries for defendants.

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[43] For a discussion of ASIC and its use of responsive and risk-based regulation, see P Hanrahan, "Fairness and Financial Services: Revisiting the Enforcement Framework" (2017) 35 *Company and Securities Law Journal* 420, 428 - 430.

[44] Commonwealth of Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into financial products and services in Australia* (November 2009); Commonwealth of Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Collapse of Trio Capital* (May 2012); Commonwealth of Australia, Senate Economics Reference Committee, *Final Report: Performance of the Australian Securities and Investments Commission* (June 2014); Commonwealth of Australia, Financial System Inquiry, *Final Report* (December 2014); Commonwealth of Australia, Senate Economics Reference Committee, *Agribusiness managed investment schemes – bitter harvest* (March 2016); Commonwealth of Australia, The Treasury, *Fit for the future: A capability review of the Australian Securities and Investments Commission* (April 2016); Commonwealth of Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Life Insurance Industry* (March 2018).

[45] Available at https://financialservices.royalcommission.gov.au/Pages/Terms-of-reference.aspx.

[46] Chair James Shipton, Australian Securities and Investments Commission, "Opening Address to the ASIC Annual Forum" (19 March 2018) and "Rebuilding Trust – A Conduct Regulator's Perspective" (5 April 2018), available at http://asic.gov.au/about-asic/media-centre/speeches/.

[47] Australian Securities Commission, *Annual Report 1991-1992*, 5.

[48] Shipton, 5 April 2018, above n 46. Note that not all financial services providers are legally required to prioritise their clients' interests over their own; see *Corporations Act 2001* (Cth) s 601FD(2), *Superannuation Industry (Supervision) Act 1993* (Cth) s 52A(2)(d) and *Life Insurance Act 1995* (Cth) s 48(2).

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

Codes of conduct, ESG commitments and institutional investor expectations

For most companies, the obligation to go beyond the law to take into account public interests arises through their adoption of codes of conduct or other voluntary environmental, social and governance (ESG) commitments.

For Australian listed companies, Principle 3 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (CGPR) is that a 'listed entity should act ethically and responsibly'.[50] The ASX Corporate Governance Council makes the case for ethical and responsible behaviour on the basis that it contributes to long-value for investors,[51] although the evidence is mixed and this crowds out other, potentially more compelling theoretical justifications.[52] The Council says that:

> Acting ethically and responsibly goes well beyond mere compliance with legal obligations and involves acting with honesty, integrity and in a manner that is consistent with the reasonable expectations of investors and the broader community. It includes being, and being seen to be, a "good corporate citizen", for example by:
>
> - respecting the human rights of its employees (for instance, by not employing forced or compulsory labour or young children even where that may be legally permitted);
> - creating a safe and non-discriminatory workplace;
> - dealing honestly and fairly with suppliers and customers;
> - acting responsibly towards the environment; and
> - only dealing with business partners who demonstrate similar ethical and responsible business practices.

The accompanying recommendation in the CGPR is that the listed entity should adopt and disclose a code of conduct, and this is widely done. A listed entity's code 'must be, and be seen to be, a meaningful statement of its core values. It needs to be promoted as such across the organisation and reinforced by proper training and proportionate disciplinary action if it is breached'.[53]

Many large companies will also be have adopted other codes of conduct, including industry specific codes, and other voluntary ESG commitments. These range from global commitments such as the *UN Global Compact* (2000), the *OECD Guidelines for Multinational Enterprises* (revised, 2011) and the *UN Framework on Business and Human Rights* (2008, 2011) to local or company-specific commitments. These are generally supported by disclosure mechanisms, such as the Global

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[50] ASX CGPR, above n 39.
[51] Ibid, 19. The commentary to Principle 4 argues that 'anything less' than acting ethically and responsibly is 'likely to destroy value over the longer term' and that 'acting ethically and responsibly will enhance a listed entity's brand and reputation and assist in building long-term value for its investors'. This approach is sometimes referred to as 'strategic CSR': see D P Baron 'Private politics, corporate social responsibility and integrated strategy' (2001) 10 *Journal of Economics and Management Strategy* 7.
[52] As Baden and Harwood observe, 'The attempts to emphasise the business case for CSR are understandable in the context of motivating businesses to engage in CSR, for whom ethical concerns may not make a strong enough motivator on their own. However, this risks drowning out other approaches.' Denise Baden and Ian A Harwood, "Terminology Matters: A Critical Exploration of Corporate Social Responsibility Terms" (2013) 116 *Journal of Business Ethics* 615.
[53] CGPR, above n 39, 19.

Reporting Initiatives Sustainability Reporting Guidelines or the International Integrated Reporting Council's Integrated Reporting Framework.

Where the company has made these commitments, it should honour them. Failure to do so may expose the company to reputation damage and community backlash, particularly if the commitments are seen as hollow or merely as exercises in greenwashing or bluewashing. The approach taken by the Courts to directors' duties in relation to the company's legal obligations seem apposite to these self-regulatory obligations too. To paraphrase Beach J in *Avestra*,[54] the directors must exercise reasonable care and diligence to ensure the company honours its obligations, where it is reasonably foreseeable that a contravention 'might harm the interests of the company'.

The expectations of institutional investors are also relevant. After the Financial Crisis, institutional investors examined their role in the governance of the entities in which they invest. Initiatives have included the United Nations Principles of Responsible Investing ('PRI'), the Santiago Principles for Sovereign Wealth Funds and the International Corporate Governance Network guidelines for institutional investors.[55] The most influential development, however, has been the *UK Stewardship Code*, first published in June 2010 and strengthened, after the release of the Kay Review into UK equity markets.[56] This has been copied around the world. In In July 2017, the Financial Services Council in Australia followed suit, with its *Standard 23: Principles of Internal Governance and Asset Stewardship*, which will take effect from July 2018. The new standard is that:

> Asset Managers should exercise effective asset stewardship on behalf of their clients. They should encourage the companies in which they are invested to meet the highest standards of governance, as well as ethical and professional practices. Asset Managers should use the tools available to them to encourage improving practices and endeavour to hold boards and management accountable where they fail to maintain acceptable standards. Asset Managers should provide a description of their approach to asset stewardship which includes monitoring and engaging with investee companies and the connection between monitoring, engagement, proxy voting and investment decision-making.[57]

These initiatives clearly have the potential to affect the balance in corporate governance between the board, management and shareholders. With institutional investors now dominating the registers of large Australian listed companies, their views on what amounts to 'the highest standards of governance, as well as ethical and professional practices' will be important, as will those of the proxy advisory firms who service them. Directors will need to take these considerations into account.

Social licence to operate

My final comment relates to the idea of a 'social licence to operate'.[58] This is not a 'real' licence – it is about a community's ongoing tolerance of a particular business or way of doing business.

The idea of social licence has been present in extractive industries for some time.[59] A decade ago the Minerals Council of Australia described the social licence as an 'unwritten social

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[54] See n 16 above.
[55] See Hanrahan, above n 41, 157-8.
[56] John Kay, *The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report* (July 2012).
[57] Financial Services Council, *Standard No 23: Principles of Internal Governance and Asset Stewardship* (July 2017) [2.3.3].
[58] See generally, P Hanrahan, "Corporate governance, financial institutions and the 'social licence'" (2016) 10 *Law and Financial Markets Review* 123-126.
[59] See John R Owen and Deanna Kemp, 'Social licence and mining: A critical perspective' (2013) 38 *Resources Policy* 29.

contract', that is about 'operating in a manner that is attuned to community expectations and which acknowledges that businesses have a shared responsibility with government, and more broadly society, to help facilitate the development of strong and sustainable communities'.[60] It is now used in a range of contexts, including by politicians and regulators, particularly in politically sensitive sectors like banks and energy providers.[61] Given that, like miners, these businesses require governmental permission to operate and that their activities have significant impact on non-contractual stakeholders and the public good, the extension of the idea of social licence into this domain is perhaps unsurprising. The real question is what the impact, if any, of this will be on thinking about corporate governance over the longer term.

In a competitive market, a corporation's contractual stakeholders always have the option (at least in theory) of voting with their feet, by withdrawing their capital, labour or business if they are unhappy with a corporation's activities and other viable options are available to them; non-contractual stakeholders do not. Therefore, the social licence concept is often concerned with that second group — it is really about the extent to which a corporation's non-contractual stakeholders are willing to countenance its activities on an ongoing basis. When the corporation or industry is sufficiently important, and non-contractual stakeholders are sufficiently vocal, discontent may eventually percolate through the media, attracting the notice of politicians. Loss of the 'social licence' may ultimately mean a loss of political support for corporate activities that are otherwise lawful, with all that follows. In discharging their duties, directors must take into account the potential impact of that occurring on the company.

4. CONCLUSION

In 2006, the now lost[62] and much lamented Corporations and Markets Advisory Committee concluded that 'directors have considerable discretion concerning the interests they may take into account in corporate decision-making, provided their purpose is to act in the interests of the company as a whole, interpreted as the financial well-being of the shareholders as a general body'.[63] To my mind, this remains an accurate statement of the Australian position. This paper has explored what that means in two contexts – where directors' acts or omissions are relevant to their company's compliance with the law, and where they are urged to go beyond the law to ensure that their company does what is 'right'.

The challenge for directors is obvious. But their legal duty remains to act in the interest of the company. As Jagot J commented in 2017, in a decision dealing with the oppression provisions of the Corporations Act:

> The courts recognise that it is the responsibility of the directors to weigh the competing considerations with which they will be routinely confronted and determine what is in the best

[60] Minerals Council of Australia, *Enduring Value: The Australian Minerals Industry Framework for Sustainable Development* (June 2005).
[61] The expression 'social licence' is used in a speech to the Harvard Club UK Southwark Cathedral dinner, London given on 21 September 2015 by Mark Carney, Governor of the Bank of England, entitled "Three Truths for Finance". See also comments made by the Hon Malcolm Turnbull MP, Prime Minister of Australia, referred to the 'social licence' of banks, quoted in James Massola, Sarah Danckert and Clancy Yeates, 'Malcolm Turnbull lashes banks over trust and standards following ASIC allegations', *The Sydney Morning Herald*, 6 April 2016.
[62] *Statute Update (Smaller Government) Act 2018* (Cth), Sch 7.
[63] Commonwealth of Australia, Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (2006) [3.7].

interests of the company as whole. They recognise also that as the task of the directors is evaluative it is necessarily one about which reasonable minds may differ.[64]

[64] *RBC Investor Services Australia Nominees Pty Ltd v Brickworks Ltd* [2017] FCA 756 at [42].