The Architecture of Corporate Governance in Australia

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Abstract

The paper was prepared as the Australian National Report on Corporate Governance for the International Academy of Comparative Law, 18th International Congress of Comparative Law, which was held in Washington from July 25 - August 1, 2010. The paper provides an overview of the structure of corporate governance in Australia, focusing on a number of recent developments in this area. Many elements of Australian corporate law differ markedly from the U.S. system. Specific corporate governance issues, which are discussed in the paper in an Australian context include: the effect of financial scandals on corporate law reform; composition and structure of the board of directors, including recent developments concerning board diversity; directors' duties and the operation of the antipodean version of the business judgment rule; trends in the structure and regulation of executive compensation; shareholder rights and minority shareholder protection; shareholder activism; takeover regulation; the continuous disclosure regime; and enforcement by regulator, the Australian Securities and Investments Commission (ASIC).

Keywords: Australia, corporate governance, comparative corporate governance, corporate law, corporate scandals, board structure, independent directors, directors' duties, business judgment rule, institutional investors, shareholder rights, continuous disclosure, enforcement

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The Architecture of Corporate Governance in Australia - Corporate Governance - National Report: Australia

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The Architecture of Corporate Governance in Australia

Corporate Governance – National Report: Australia

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Survey

I. INTRODUCTION

Although Australia technically has a state-based system of corporate law, the primary legislation, the *Corporations Act* 2001 ("*Corporations Act*"), effectively operates as a "federal" rule. This is due to a reference by each state of its powers relating to corporations to the federal government. This broad referral of powers constituted an attempt to unify and harmonise corporate law rules and improve corporate efficiency in Australia.[1]

In spite of this statutory centralisation, Australian corporate governance is highly fragmented and occurs "in many rooms".[2] During the 1990s, the emergence of "corporate governance"[3] as an

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1 The referral of power was prompted by the decisions in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 and *R v Hughes* (2000) 202 CLR 535 which identified constitutional problems in the design and structure of the previous corporations law scheme in this regard.

2 Bird and Hill, "Regulatory Rooms in Australian Corporate Law" (1999) 25 *Brook J Int L* 555, n 1.

ubiquitous commercial goal coincided with a deliberate withdrawal from direct regulation by the government.[4] Yet, since that time, Australian corporate law has been the subject of almost continual statutory reform. Not everyone views this dynamic and evolving regulatory picture in a positive light. A former Australian judge has stated, for example, that these reforms have "added substantial… complexity" and "created obfuscation" in the area of corporate law.[5] The ongoing focus on good corporate governance in the commercial realm has also contributed to this intricate regulatory picture.

The aim of this paper is to provide a roadmap of contemporary corporate governance in Australia, including the array of legal and commercial mechanisms that contribute to the regulation of Australian companies today.

II. CORPORATE GOVERNANCE IN AUSTRALIA: STRUCTURES AND ISSUES

A. Capital Market and Regulatory Structures

There is a high level of public investment in Australian listed companies. The Australian Securities Exchange ("ASX") 2008 Share Ownership Study reports that 6.7 million people, or 41% of the Australian public, own shares either directly or indirectly.[6] The proportion of shares held by institutional investors tends to be somewhat lower than in other common law

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3 A number of commentators at that time noted a connection between the "corporate excesses of the 1980s" and the rise of corporate governance in Australia. See, for example, Corbett, "A Proposal for a More Responsive Approach to the Regulation of Corporate Governance" (1995) 23 *Federal Law Review* 277; Schelluch and Gay, "Corporate Governance" (1997) 15 *Company and Securities LJ* 235.

4 This governmental retreat was reflected in Australia's Corporate Law Economic Reform Program (CLERP). See Commonwealth of Australia, *Corporate Law Economic Reform Program*, Policy Reforms (1998). The close interplay between government regulation and corporate governance has been long recognised. Sir Adrian Cadbury, for example, once warned the UK business community that inadequate enforcement of good governance practices could lead to a renewal of onerous government regulation. See Holland, "Self Regulation and the Financial Aspects of Corporate Governance" [1996] *J Bus L* 127, 131 n.12 (citing Adrian Cadbury, Reflections on Corporate Governance, in The Chartered Institute of Bankers (1993)).

5 Justice R.P. Austin, Supreme Court of New South Wales, Opening Commentary at the University of New South Wales Mergers and Acquisitions Conference (Oct. 24, 2007).

6 ASX, 2008 Australian Share Ownership Study (2008), 2.

jurisdictions, such as the US and UK.[7] Local institutional investors hold approximately 38% of shares in Australian listed companies,[8] and international shareholders hold around 37%.[9] Although Australia's system of corporate governance is traditionally treated as reflecting an "outsider" system of governance with dispersed shareholding,[10] in fact Australia's listed corporate sector contains a high level of controlling blockholder ownership structures.[11]

Australia's system of corporate governance is highly ranked internationally. As the 2009 Johnson Report on *Australia as a Financial Centre*[12] notes, it was recently been ranked fourth in the world and first in the region.[13] The regulatory framework comprises a complex ecosystem of hard and soft law.[14] The *Corporations Act* itself contains a mix of mandatory rules and replaceable (or optional rules), which companies can elect to adopt as constitutional provisions.[15] Some provisions are replaceable for proprietary companies, but mandatory for public.[16] Major reforms to the *Corporations Act* were introduced as a response to Enron, and analogous

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7 Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009), 63.

8 See Boros and Duns, *Corporate Law* (2nd ed, 2010), [5.3.2(c)], citing Australian Bureau of Statistics ("ABS"), *Australian National Accounts: Financial Accounts*, June Quarter, cat no 5232.0 (AGPS, Canberra, 2008).

9 According to Boros and Duns, a significant proportion of this holding by international shareholders would relate to institutional investors. Boros and Duns, *ibid*.

10 See Visentini, "Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?" (1998) 23 *Brooklyn J Int'l L* 833.

11 See generally Stapledon, "Share Ownership and Control in Listed Australian Companies" (1999) 2 *Corp. Gov.: Int. Rev.* 17; Lamba and Stapledon, "The Determinants of Corporate Ownership Structure: Australian Evidence", U. Melbourne Public L. Research Paper No. 20 (2001). For recent patterns of Australian share ownership, see Australian Securities Exchange (ASX), *2008 Australian Share Ownership Study* (2009).

12 Commonwealth of Australia, Australian Financial Centre Forum, *Australia as a Financial Centre: Building on Our Strengths*, November 2009.

13 *Id*, [2.3], [6.1] (citing Governance Metrics International, *Global Corporate Governance Ratings*, September 2009).

14 See generally Sheehan, "The Regulatory Framework for Executive Remuneration in Australia" (2009) 31 *Syd L Rev* 273.

15 Section 135(2) *Corporations Act*.

16 See, for example, s 249X *Corporations Act*. *Cf* ss 203C and 203D.

Australian corporate scandals, under the *CLERP (Audit Reform and Corporate Disclosure) Act* 2004 ("*CLERP 9 Act* 2004"). This Act included reforms relating to the audit function, disclosure, shareholder participation in corporate governance, executive remuneration and enforcement.[17] Listed companies are also obliged to comply with the Australian Securities Exchange ("ASX") Listing Rules ("ASX LR").[18]

Non-binding codes of practice and guidelines also form part of the regulatory matrix. The ASX Corporate Governance Principles and Recommendations ("ASX corporate governance principles") fall within this category. These guidelines adopt a flexible and non-prescriptive "comply or explain" (or "if not, why not")[19] regulatory approach, whereby listed companies must disclose deviations from the principles. The guidelines have been the subject of ongoing assessment and consultation since their introduction in 2003, and a revised second edition was released in 2007.[20] In April 2010, the ASX released an exposure draft of further proposed amendments to the guidelines relating to a range of issues, including board diversity and remuneration.[21] At the same time, the ASX also released draft amendments to its Listing Rules relating to remuneration committees and a company's trading policies.[22]

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17 See generally, Hill. "Regulatory Responses to Global Corporate Scandals" (2005) 23 *Wis Int'l LJ* 367.

18 See s 793A *Corporations Act*.

19 See Humphry, "If Not, Why Not?", address to the Australian Institute of Company Directors Forum, Sydney, 2 April 2003.

20 See ASX, *ASX Corporate Governance Council releases revised Corporate Governance Principles and Recommendations,* 2 August 2007.

21 See ASX Corporate Governance Council, Exposure Draft, *Proposed Amendments to the ASX Corporate Governance Council Corporate Governance Principles and Recommendations* (22 April 2010). See, ASX Media Release, *Changes to Corporate Governance Principles and Recommendations*, 30 June 2010. The changes will take effect from 1 January 2011. *Ibid*.

22 See ASX, *Listing Rule Amendments – New Requirements for a Remuneration Committee and a Company Trading Policy* (22 April 2010). The proposed changes to the ASX Listing Rules provided for the introduction of (i) a mandatory requirement that the top 300 ASX listed companies to have a remuneration committee comprised exclusively of non-executive directors (see *id*, [1] – [12]) and (ii) minimum requirements for the adoption, content and disclosure of the company's trading policies (see *id*, [13] – [18]). See also ASX, ASX Public Consultation, *Listing Rule Amendments – Company Policies on Trading 'Windows' and 'Blackout Periods'* (4 December 2009). These proposals responded to a range of corporate governance recommendations set out in three influential government reports over the previous twelve month period. The relevant reports that prompted the proposed amendments to the ASX Listing Rules and guidelines were:- (i) the Corporations and Markets Advisory Committee (CAMAC) Report, *Diversity on*

Shareholder practice guidelines, such as those issued by the Australian Council of Superannuation Investors ("ACSI")[23] and the Investment and Financial Services Association ("IFSA")[24] have also been influential sources of regulation.

B. The Role of Corporate Scandals and Financial Crises

In the last decade, Australia experienced a number of major corporate governance scandals and collapses, which have had a significant effect on corporate law reform and enforcement. Three prominent scandals — those at HIH Insurance Ltd ("HIH"), One.Tel Ltd ("One.Tel") and James Hardie Industries Ltd[25] — occurred around the time of Enron, however, their reverberations are still being felt in current Australian corporate law. A brief description of these important corporate scandals is set out below.

The events at HIH and One.Tel led to the introduction of major corporate governance reforms in Australia, including the *CLERP 9 Act* 2004 and the ASX corporate governance principles. At the time of its collapse in 2001, HIH was Australia's second largest general insurer. The company's collapse, which was the largest in Australian corporate history, resulted in a A$40 million Royal Commission (HIH Royal Commission).[26] The HIH Royal Commission found that the company had engaged in a variety of high-risk practices in extremely competitive markets.[27]

Boards of Directors (March 2009); (ii) CAMAC Report, *Aspects of Market Integrity* (June 2009); Productivity Commission Inquiry Report, *Executive Remuneration in Australia* (January 2010).

23 ACSI, *A guide for superannuation trustees to monitor listed Australian companies* ("ACSI Governance Guidelines") (May 2009).

24 IFSA, *Blue Book: IFSA Guidance Note No. 2.00: Corporate Governance: A Guide for Fund Managers and Corporations* (June, 2009)

25 See generally, Hill, "Regulatory Responses to Global Corporate Scandals" (2005) 23 *Wis Int'l LJ* 367.

26 Commonwealth of Australia, HIH Royal Commission, *The Failure of HIH Insurance* (2003) vol 1. The Royal Commission investigation lasted for 18 months and reported its findings in April 2003.

27 These high-risk practices included failure to carry prudential insurance margins. *Id*, xvii, xxiv and xxviii*ff*.

The collapse of HIH also involved aggressive and problematic characterization of transactions for accounting purposes.[28]

One.Tel was a relatively new telecommunications company, with aspirations to become a major player in Australia and the European market. James Packer and Lachlan Murdoch, both heirs to large Australian fortunes, sat on the board of One.Tel as non-executive directors, due to the fact that News Ltd and PBL (the publicly listed companies controlled by, respectively, the Murdoch and Packer families) held a forty percent stake in One.Tel.[29] Following the company's collapse, one of the non-executive directors swore in an affidavit that he had been "profoundly misled" about One.Tel's financial position.[30]

ASIC commenced civil penalty proceedings in relation to both collapses. Major players in the HIH scandal were subsequently held liable in civil and criminal proceedings.[31] In relation to the One.Tel collapse, no proceedings were brought against the non-executive directors. ASIC commenced civil penalty proceedings, however, against several other former One.Tel directors and officers,[32] seeking disqualification and compensation orders of up to A$92 million. Prior to the trial, two of the defendants entered into settlement agreements with the regulator.[33] ASIC

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28 Barry, *Rich Kids: How the Murdochs and Packers Lost $950 Million in One.Tel* (2002, 361; Commonwealth of Australia, HIH Royal Commission, *The Failure of HIH Insurance* (2003) vol 1, xxx-xxxii.

29 Barry, *id*, 359.

30 Affidavit lodged by Mr Lachlan Murdoch, Supreme Court of NSW (Lacey and Hepworth, "One.Tel: ASIC bombshell", *Australian Financial Review*, 15 June 2001, 1).

31 See generally Hill, Regulatory Responses to Global Corporate Scandals" (2005) 23 *Wis Int'l LJ* 367, 404-405.

32 In late 2001, ASIC commenced proceedings against joint managing directors, John David ("Jodee") Rich and Bradley Keeling, finance director, Mark Silbermann, and non-executive chairman, John Greaves.

33 Mr Keeling was banned from managing a corporation for 10 years, and found jointly and severally liable for A$92 million compensation to One.Tel. See ASIC Media Release, *Brad Keeling Settles in ASIC One.Tel Proceedings*, 21 March 2003. Mr. Greaves was banned from managing a corporation for 4 years and found liable for A$20 million compensation to One.Tel. See ASIC Media Release, *ASIC Reaches Agreement with John Greaves in One.Tel Proceedings*, 6 September 2004.

ultimately failed in proceedings against the remaining One.Tel directors[34] in the case of *ASIC v Rich*,[35] which was decided in late 2009 (see further below under "Enforcement").

The James Hardie scandal prompted reconsideration of Australia's traditional shareholder-centred approach to corporate law and the issue of corporate social responsibility generally. The saga involved James Hardie Industries Ltd ("JHIL"), a building company, which manufactured asbestos products in Australia from the early 20th century until the late 1980s, amid increasing evidence of the dangers of asbestos.[36]

In 2001, JHIL was restructured to quarantine potential asbestos-related compensation claims from the operating businesses.[37] As part of this restructure, JHIL established a foundation ("the Foundation"), to cover claims of workers and others suffering asbestos-related illnesses.[38] JHIL issued a media release stating that the Foundation was "fully funded", with sufficient funding to meet all legitimate future tort claims.[39] There was also a complex restructuring of the James Hardie group,[40] in which a new Dutch company, James Hardie Industries NV ("JHI NV") was substituted for JHIL as the ultimate holding company in the group. In 2003, it became clear that there was a massive shortfall in the Foundation's funding, and that the restructure would have

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34 See, for example, Sexton, "Judge Clobbers ASIC Case", *Sydney Morning Herald*, 19 November 2009, 1; Heath, "One.Telling Wipe-Out: Decision in *ASIC v Rich* Finally Delivered", *Mallesons Stephen Jaques Alert*, November 2009.

35 [2009] NSWSC 1229.

36 Dunn, "James Hardie: No Soul to Be Damned and No Body to Be Kicked" (2005) 27 *Syd L Rev* 339.

37 *Id*, 339 - 342; David Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004), [2.43] - [2.45].

38 See James Hardie Industries Limited, *James Hardie Resolves its Asbestos Liability Favourably for Claimants and Shareholders* (ASX Announcement, 16 February 2001) (available at http://www.asx.com.au/asx/statistics/displayAnnouncement.do?display=text&issuerId=602&announcementId=645410).

39 *Ibid*.

40 Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004), [2.43] – [2.45]; Dunn, "James Hardie: No Soul to Be Damned and No Body to Be Kicked" (2005) 27 *Syd L Rev* 339, 340-342.

disastrous consequences for tort claimants.[41] JHIL's directors claimed that under Australian corporate law their primary duty was to the shareholders, and that it would have been impermissible for them to provide additional funds to the Foundation to support liabilities to tort claimants.[42]

The James Hardie events caused on-going public outrage, which ultimately forced JHI NV to enter into the largest personal injury settlement in Australian history.[43] The saga also resulted in a special inquiry,[44] two government reports on the general issue of corporate responsibility,[45] and proceedings brought by ASIC against the executive and non-executive directors of JHIL[46] (see further below under "Enforcement" and "Other Matters").

III THE ACTORS IN CORPORATE GOVERNANCE

A. The Board

1. Powers and Role of the Board

41 Dunn, "James Hardie: No Soul to Be Damned and No Body to Be Kicked" (2005) 27 *Syd L Rev* 339. The shortfall in the Foundation's funding would ultimately be assessed at A$1.5 billion. See Elisabeth Sexton, "Hardie Asbestos Lawyer to be ASIC's First Witness in Case Against Board", *Sydney Morning Herald* (Sydney), 23 September 2008, 19.

42 See Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006), 47, 181.

43 Under the settlement, JHI NV agreed to cover an estimated A$1.5 billion in future asbestos disease claims, however, it has been suggested that JHI NV's compensation obligation could be as high as A$4.5 billion. See generally, Higgins and Saunders, "Deal Breathes Humanity Back into Hardie", *The Australian* (Sydney), 22 December 2004, 1.

44 Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004).

45 See Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006); Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations*, Report (2006).

46 *ASIC v Macdonald (No 11)* [2009] NSWC 287; (2009) 256 ALR 199.

Allocation of power between the board of directors and the shareholders in general meeting is a matter for the corporate constitution.[47] In listed companies, management power is invariably vested in the board of directors, which is not subject to shareholder direction in the exercise of this power.[48] Nonetheless, the *Corporations Act* and the ASX Listing Rules require shareholder resolutions on a range of matters.[49]

According to the Corporations and Markets Advisory Committee ("CAMAC")[50] the role of boards in Australia is "to direct a company on behalf of the shareholders...setting the strategic direction and aims of the company, providing resources for their implementation, and directing or overseeing the management of the company's business and compliance with its obligations".[51] It has at times been suggested that modern commercial reality necessarily limits the functions of the board of directors to matters of broad policy only.[52] However, the ASX corporate governance principles set out a detailed and wide-ranging list of board responsibilities, which include input into strategy, as well as monitoring a listed corporation's control, accountability and risk systems.[53]

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47 The replaceable rule in s 198A(1) of the *Corporations Act* adopts this position as the default rule, stating that "[t]he business of a company is to be managed by or under the direction of the directors". Subsection (2) states that "[t]he directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting".

48 *NRMA v Parker* (1986) 4 ACLC 609, 614.

49 See CAMAC, *Diversity on Boards of Directors*, Report (March 2009), 13.

50 CAMAC's predecessor, the Companies and Securities Advisory Committee (CASAC), was established in 1989 to provide independent advice to the Australian Government on issues relating to corporations and financial markets law and practice.

51 CAMAC, *Diversity on Boards of Directors*, Report (March 2009), 11–12. See also CAMAC, *Guidance for Directors*, Report (April 2010), on the question of whether there is a need for greater guidance for Australian executive and non-executive directors regarding their respective roles and responsibilities.

52 This view was taken by Rogers CJ in a prominent 1992 directors' duties case, *AWA Ltd v Daniels* (1992) 7 ACSR 759. According to Rogers CJ, the board's function would normally be limited to setting corporate goals, appointment of the chief executive and monitoring progress towards goals, with no responsibility for day to day business: *Id*, 865, 867. The case subsequently went on appeal to the New South Wales Court of Appeal in *Daniels v Anderson* (1995) 16 ACSR 607.

53 *ASX Corporate Governance Principles and Recommendations* (2nd ed, 2007), Principle 1. See "Responsibilities of the Board".

2. Board Size, Composition and Structure

Apart from some minimum requirements, such as the condition that public companies must have at least three directors,[54] there are few restrictions on the structure and composition of Australian boards.[55] Australian boards typically adopt a one-tier model, a legacy of their historical links with UK law and practice. The ASX corporate governance principles address a number of aspects of board structure and responsibility.

Two recent reports — one by Korn/Ferry International ("Korn/Ferry Report")[56] and the other by the Australian Council of Super Investors ("ACSI Report")[57] — provide a snapshot of board composition and governance structures today in Australasia. The total sample in the Korn/Ferry Report is the ASX Top 300 Australian companies, ranked by revenue and market capitalisation. The report also focuses on the ASX Top 50 companies, with revenue and market capitalisation greater than A$10 billion.[58] The data provided in the ACSI Report relates to ASX Top 100 companies.

Some significant aspects of the composition and profile of Australian listed company boards emerging from these two reports are as follows:

- The boards of Top 300 companies typically comprise seven directors, and the average number of directors for Top 50 companies is nine. 86% of Top 50 companies have

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54 In addition, at least two of the directors must ordinarily reside in Australia. See s 201A(2) *Corporations Act*.

55 See CAMAC, *Diversity on Boards of Directors*, Report (March 2009), 14.

56 Korn/Ferry International (with Egan Associates), *Board of Directors Study: Australia and New Zealand* (2008).

57 ACSI (with RiskMetrics), *Board Composition and Nonexecutive Director Pay in the Top 100 Companies: 2008* (October, 2009).

58 Korn/Ferry International (with Egan Associates), *Board of Directors Study: Australia and New Zealand* (2008), 10–11.

boards of between six and eleven directors. Board size tends to increase in proportion to revenue.[59]

- There is a high level of non-executive directors on the boards of Australian public companies. Non-executive directors comprise 74.1% of directors on Top 300 boards, and 80.4% of directors on the boards of Top 50 companies.[60] The vast majority of retired executives, who serve as non-executive directors of Top 100 boards, were executives at a different company.[61] Only a small percentage (10.2%) of existing executive directors hold a non-executive board position at another of Top 100 company.[62]

- The ACSI Report further categorises non-executive directors of listed companies as either independent or affiliated. The total percentage of non-executive directors of Top 100 companies is 80.4%, and, within this group, 80.5% are classified as independent. Independent directors therefore occupy 64.5% of all directorships in Top 100 companies.[63]

- The ASX corporate governance principles recommend that listed companies should establish a range of committees, including a nomination committee,[64] remuneration committee,[65] and audit committee.[66] The ASX corporate governance principles also

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59 *Id*, 19.

60 *Id*, 16.

61 ACSI (with RiskMetrics), *Board Composition and Nonexecutive Director Pay in the Top 100 Companies: 2008* (October, 2009), 15.

62 *Id*, 20.

63 *Id*, 7. The ACSI Report uses the definition of independence found in the ACSI Governance Guidelines. See, ACSI, *A Guide for Superannuation Trustees to Monitor Listed Australian Companies* (May, 2009), 5.1 ("ACSI Guidelines").

64 *ASX Corporate Governance Principles and Recommendations* (2nd ed, 2007) Principle 2, Recommendation 2.4.

65 *Id*, Recommendation 8.1. Recent amendments to the ASX corporate governance principles will strengthen the provisions relating to remuneration committees and their composition, and the obligations to report departures from the standards. See ASX Media Release, *Changes to Corporate Governance Principles and Recommendations*, 30 June 2010. See also ASX, *Marked up Amendments dated 30 June 2010 to the*

recommend that the audit committee should consist only of non-executive directors, a majority of whom are independent.[67] Entities listed on the S&P All Ordinaries Index are required by the ASX Listing Rules to have an audit committee.[68] Also, recent changes to the ASX Listing Rules, will introduce a mandatory requirement for top 300 ASX listed companies to have a remuneration committee, comprised exclusively of non-executive directors.[69] A recent study shows that 95% of Top 300 companies and 100% of the Top 50 companies have an audit committee. 88% of Top 300 companies have a remuneration committee and 98% of top 50 companies have a remuneration committee. Nomination committees are, however, less common, with only 31% of Top 300 companies and 52% of Top 50 companies having such a committee.[70]

- The average age of all directors of Australian Top 50 companies is 59 years.[71] The average age of non-executive directors in Top 100 companies has increased slightly in recent times to 60.4 years,[72] and in 2008 there was a corresponding decline in the number

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Second Edition August 2007 of the Corporate Governance Principles and Recommendations, amendments to Recommendation 8.2.

66 *Id*, Recommendation 4.1.

67 *Id*, Recommendation 4.2. Recommendation 4.2 also stipulates that the audit committee should have an independent chair, who does not also occupy the role of chair of the board. In addition the audit committee should have a formal charter. *Id*, Recommendation 4.3.

68 ASX Listing Rule 12.7 ("ASX LR").

69 ASX, *Listing Rule Amendments – New Requirements for a Remuneration Committee and a Company Trading Policy* (22 April 2010), [1]-[12]). The ASX released details of this and other amendments to the Listing Rules on 4 August 2010. The amendment will commence operation on 1 July 2011.

70 Korn/Ferry International (with Egan Associates), *Board of Directors Study: Australia and New Zealand* (2008) 22.

71 *Id*, 20.

72 The average age of non-executive directors was 60 in 2007 and 58.6 in 2001: ACSI (with RiskMetrics), *Board Composition and Nonexecutive Director Pay in the Top 100 Companies: 2008* (October, 2009), 4, 15.

of non-executive appointments.[73] Male non-executive directors are on average 5.8 years older than their female counterparts.[74]

- The average tenure in 2008 at Top 100 companies is 6.4 years for executive directors,[75] and 5.6 years for non-executive directors.[76] The longest tenure for an executive director is 49 years,[77] and for a non-executive director, 28 years.[78] Most directors of a Top 100 company hold office for between one and five years, with only 13.5% holding office for less than one year.[79]

- Board membership of Australian listed companies still tends to be predominantly male. Women held only 11.1% of directorships,[80] and 3% of chairs[81] of Top 100 companies in 2008. 28% of Top 100 companies had no female directors.[82]

3. Board Diversity in Listed Companies

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73 The number of non-executive appointments in 2008 was 79, compared to 106 in 2007 and 134 in 2006: *Id*, 16.

74 The average age of male non-executive directors in 2008 was 61.2 years compared to 55.4 for their female counterparts: *Id*, 15.

75 The average tenure for executive directors for 2007 was higher at 6.9 years: *Id*, 16.

76 The average tenure for non-executive directors for 2007 was lower at 5.1 years: *Ibid*.

77 This record is held by Frank Lowy, who is an executive director and co-founder of the Westfield Group: *Id*, 16.

78 *Ibid*.

79 *Ibid*.

80 *Id*, 17–18. The Korn/Ferry Report provides a slightly different figure of 11.4% of female directorships in Top 100 companies. The level of female directorships in Top 300 companies was 8.3%. See Korn/Ferry International (with Egan Associates), *Board of Directors Study: Australia and New Zealand* (2008), 18.

81 Korn Ferry, *ibid*.

82 ACSI (with RiskMetrics), *Board Composition and Nonexecutive Director Pay in the Top 100 Companies: 2008* (October, 2009), 17–18.

Board diversity in listed corporations has come under increasing scrutiny in Australia. A recent Australian government study confirmed that the number of women on boards and in executive positions had declined since 2006.[83] In September 2008, the Australian federal government sought the advice of the CAMAC on this subject, amid growing concern that listed company boards "tend to be homogenous groups" in terms of gender, age, ethnicity and educational and professional background.[84] CAMAC's report on board diversity[85] noted that there are higher levels of gender diversity on public sector boards than private sector boards,[86] and supported increased diversity as a way to ensure that listed company boards have an effective mix of qualified and skilled candidates.[87] CAMAC rejected, however any attempt to increase diversity through mandatory quotas or indicative targets for the board composition of listed corporations.[88] Changes to the ASX corporate governance principles announced on 30 June 2010 respond to the issue of board diversity by requiring that listed entities disclose in their annual reports a range of matters concerning diversity, including their achievement against gender objectives adopted by the board.[89]

4. Determination of the Composition of the Board

a) Appointment of directors. The CAMAC report on board diversity notes that the issue of board diversity is closely related to board appointment processes.[90] The appointment and

[83] See Equal Opportunity for Women in the Workplace Agency (EOWA), *EOWA 2008 Australian Census of Women in Leadership: Women's Glacial Progress Melts Away* (Press Release, 28 October 2008).

[84] See CAMAC, *Diversity on Boards of Directors*, Report (March 2009), 1.

[85] CAMAC, *Diversity on Boards of Directors,* Report (March 2009).

[86] *Id*, 8, 53.

[87] *Id*, 6, 52.

[88] *Id*, 9, 48.

[89] See, ASX Media Release, *Changes to Corporate Governance Principles and Recommendations*, 30 June 2010. See also See ASX Corporate Governance Council, Exposure Draft, *Proposed Amendments to the ASX Corporate Governance Council Corporate Governance Principles and Recommendations* (22 April 2010), 6-7.

[90] CAMAC, *Diversity on Boards of Directors,* Report (March 2009), 5.

removal of directors has traditionally been viewed as a core right of shareholders, and an important countervailing force to centralised managerial control. The general meeting possesses a *prima facie* power to appoint the company's directors.[91] Nonetheless, it has been said that in practice the board may have "subtle powers of influence over its own composition".[92] This is also acknowledged by the CAMAC report on board diversity,[93] which notes that it is common practice for the directors to appoint a person to fill a casual vacancy on the board, although for public companies, such appointments must be confirmed by the shareholders at the next annual general meeting.[94] Also, the board has a high level of control over the re-nomination process for directors.[95]

Special rules to enhance accountability apply to the election of directors of Australian public, and listed, companies. Under s 201E of the *Corporations Act*, individual resolutions are required for the election of each public company director, unless the meeting has resolved, with no dissenting votes, to appoint multiple directors by single resolution.[96] Under the ASX Listing Rules, listed companies must hold an election of directors each year;[97] and a director must not hold office, without re-election by shareholders, beyond a period of three years.[98] Although the ASX Listing Rules require companies to accept director nominations for a specified period prior

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91 Austin and Ramsay, *Ford's Principles of Corporations Law* (14th ed, LexisNexis Butterworths, 2010), [7.170].

92 Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009), [5.220].

93 CAMAC, *Diversity on Boards of Directors*, Report (March 2009), 15–16, 33, 52.

94 See s 201H(1) and (3) *Corporations Act*.

95 See CAMAC, *Diversity on Boards of Directors,* Report (March 2009), 15–16.

96 Section 201E *Corporations Act*. There are further limitations, in s 201E(2) and (3), on the operation of the rule.

97 ASX LR 14.5.

98 ASX LR 14.4. A managing director is exempt from this requirement: *Ibid.*

to board elections,[99] contested elections are rare in Australian listed corporations,[100] and most new appointments are initiated by the chairman or existing board members.[101] The CAMAC report raises the question of whether changes to the processes for nomination and election of directors could contribute to greater diversity on boards.

b) Removal of directors. The power of shareholders to remove directors from office is an important governance device under Australian corporate law.[102] Although it is common for Australian public companies to have staggered election terms for directors, staggered boards cannot operate as an entrenchment or anti-takeover device as they can, for example, under Delaware law.[103] This is because s 203D(1) of the *Corporations Act* grants shareholders of a public company an absolute right to remove directors from office at any time, with or without cause.[104] Furthermore, in the case of public companies (though not proprietary companies),[105] s

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99 Under ASX LR 14.3, a listed company must accept director nominations up to 35 days (or for a shareholder initiated meeting, 30 days) before the date of the general meeting at which the election will take place, unless the company's constitution provides otherwise.

100 One high profile exception to this was in the case of *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464, where directors were held to have acted outside their power in using company resources to oppose certain board nominations.

101 Austin and Ramsay, *Ford's Principles of Corporations Law* (14th ed, LexisNexis Butterworths, 2010), [7.170].

102 *See Allied Mining & Processing v Boldbow Pty Ltd* [2002] WASC 195, [47], [52].

103 See generally Bebchuk, Coates and Subramanian, "The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy" (2002) *Stan L Rev* 887; Hill, "Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware" (2010) 63 *Vand L Rev* 1, 39-40.

104 Section 203D of the *Corporations Act* provides - "A public company may by resolution remove a director from office despite anything in:
(a) the company's constitution (if any); or
(b) an agreement between the company and the director; or
(c) an agreement between any or all members of the company and the director."

105 It would be possible for the constitution of a proprietary company to provide for removal of a director by the board, since the relevant removal power for directors of proprietary companies is found in s 203C of the *Corporations Act*, which is a replaceable rule only, and s 203E applies exclusively to public companies. See Stephen Knight, "The Removal of Public Company Directors in Australia: Time for Change?" (2007) 25 *Comp & Sec LJ* 351, 353.

203E prohibits removal of a director by the board,[106] since this could potentially compromise director independence and corporate governance principles.[107] This provision ensures that shareholders remain responsible for removal of directors from office in the public company context.[108]

5. Independent Directors and the Role of the Chair

Independent directors have become an increasingly important component of Australian boards. Recommendation 2.1 of the ASX corporate governance principles[109] states that "[a] majority of the board should be independent directors". Principle 2 states that all directors, irrespective of whether they are classified as independent directors" should "bring an independent judgement to bear on board decisions".[110] An independent director is defined under Principle 2 as being "a non-executive director, who is not a member of management and, who is free of any business or other relationship that could materially interfere with – or could reasonably be perceived to materially interfere with – the independent exercise of their judgement".[111] A list of specific relationships, which may undermine independence, is also set out in Principle 2.[112]

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[106] Section 203E *Corporations Act* provides - "A resolution, request or notice of any or all of the directors of a public company is void to the extent that it purports to:
(a) remove a director from their office; or
(b) require a director to vacate their office."
For debate concerning whether the use of directors' prenuptial agreements in public companies would breach ss 203D or 203E of the *Corporations Act*, see Hill, "The Rising Tension Between Shareholder and Director Power in the Common Law World" (2010) 18 *Corporate Governance: An International Review* 344.

[107] See Australian Institute of Company Directors ("AICD"), *Resignations or Removal of Directors* (Position Paper No 6, May 2007), 2.

[108] See, for example, ASIC, "Removal of Directors of Public Companies" (Information Release IR 04-4, 17 August 2004).

[109] *ASX Corporate Governance Principles and Recommendations* (2nd ed, 2007), Principle 2, Recommendation 2.1.

[110] ASX Corporate Governance Principles and Recommendations (2nd ed, 2007), Principle 2.

[111] *Ibid*.

[112] *Id*, Box 2.1, "Relationships affecting independent status". Box 2.1 states that the board, when determining independent director status, should consider factors such as whether the director: (1) is, or is associated with, a substantial shareholder of the company; (2) has been employed in an executive capacity by the

The role and status of the chair has also increased in recent times.[113] This trend is reflected in the remuneration of listed company chairs, who earn considerably more than other non-executive directors. In Top 50 companies, for example, the average fee for a non-executive chair is A$420, 795, compared to the average directors' fee of A$187, 092.[114] Recommendation 2.2 of the ASX corporate governance principles states that the chair should be an independent director, and that the chair is responsible "for leadership of the board and for the efficient organisation and conduct of the board's functioning".[115] Recommendation 2.3 advocates separation between the roles of chair and CEO.

6. Risk Management

The global financial crisis has focused greater attention on risk management as a critical aspect of corporate governance, particularly in the area of executive remuneration. Principle 7 of the ASX corporate governance principles is titled "Recognise and Manage Risk", and Recommendation 7.1 states that "[c]ompanies should establish policies for the oversight and management of material business risks and disclose a summary of those policies".[116] The

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company or another member of the group within the last three years; (3) has been a principal of a material professional advisor or consultant within the last three years; (4) is, or is associated with, a material supplier or customer of the company; (5) has a material contractual relationship with the company or group member, otherwise than as a director. Principle 2 also states that family ties and cross-directorships can be relevant to the issue of independent status, and should be disclosed to the board. See also IFSA, *Blue Book: IFSA Guidance Note No. 2.00: Corporate Governance: A Guide for Fund Managers and Corporations* (June, 2009) pt 3, Guideline 3, from which the ASX definition was adapted, and ACSI, *ACSI Governance Guidelines* (May 2009) 5.1, which contains a more detailed definition of independence.

113 For a detailed analysis of the evolving role, and increasing responsibilities, of the chair in listed companies, see the comments of Austin J in *ASIC v Rich* [2003] NSWSC 85, [51]–[72].

114 Korn/Ferry International (with Egan Associates), *Board of Directors Study: Australia and New Zealand* (2008), 14.

115 *ASX Corporate Governance Principles and Recommendations* (2nd ed, 2007), Principle 2.

116 *ASX Corporate Governance Principles and Recommendations* (2nd ed, 2007), Principle 7, Recommendation 7.1. See also ASX Corporate Governance Council, Australian Securities Exchange, *Review of the Principles of Good Corporate Governance and Best Practice*, Explanatory Paper and Consultation Paper (2006) [66] *ff*, discussing amendments that were introduced to clarify certain aspects of Principle 7.

Korn/Ferry Report notes that there has been a significant growth in the role of the Audit/Audit-Risk Committee in most publicly listed companies in recent years.[117]

7. Rights, Duties and Liabilities

a) Overview of directors' duties. Directors of Australian companies are subject to an array of duties, which are the flipside to centralised managerial power.[118] The duties at general law include the duty of care and diligence; the duty to act in good faith, in the best interests of the company and for proper purposes; and the duty to avoid conflicts of interest. These duties are replicated, and extended, in ss 180–184 of the *Corporations Act*.[119] In contrast to the recent codification of directors' duties in the UK under the *Companies Act* 2006, which seeks to displace the general law,[120] the Australian statute specifically preserves the operation of general law duties.[121] Since the 1980s, there has also been a significant trend in Australia towards imposing personal liability on directors for corporate breaches under environmental, occupational health and safety, and industrial legislation.[122]

Conflicts of interest receive additional statutory attention. Directors with a "material personal interest" in a matter that relates to the affairs of the company are required to disclose the interest to the other directors,[123] unless within a statutory exception.[124] Additional provisions apply in

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117 Korn/Ferry International (with Egan Associates), *Board of Directors Study: Australia and New Zealand* (2008), 6.

118 See, for example, comments of Weinberg J in *Downey v Crawford* (2004) 51 ACSR 182, [172].

119 See ss 180–184 *Corporations Act*,.

120 The common law rules may, nonetheless, be used to interpret the UK statutory provisions. See ss 170(3) and 170(4) *Companies Act* 2006. See generally Austin, "Australian Company Law Reform and the UK Companies Bill" in Austin (ed), *Company Directors and Corporate Social Responsibility: UK and Australian Perspectives* (2007), 3, 5–6.

121 See *Corporations Act,* ss 179(1), 185.

122 See Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009) [7.15]. See also CAMAC, *Diversity on Boards of Directors,* Report (March 2009), [8.3]; CAMAC, *Personal Liability for Corporate Fault*, Report (September 2006). There is growing concern in the Australian business community about the risk of director liability under this array of legislation. See, for example, Australian Institute of Company Directors ("AICD"), *Impact of Legislation on Directors* (November 2010).

123 Section 191(1) *Corporations Act*.

the case of public companies. Public company directors are *prima facie* prohibited from voting or being present at a directors' meeting considering a matter in which they have a material personal interest.[125] Public companies are also subject to the related party transaction provisions in the *Corporations Act*,[126] and are not permitted to give a financial benefit to a related party, unless it has been approved by disinterested shareholders or falls within a range of stated exceptions.[127]

b) Duty to prevent insolvent trading. In addition, Australian directors (and shadow directors[128]) are subject to a statutory duty to prevent insolvent trading under s 588G of the *Corporations Act*.[129] The insolvent trading provisions constitute a form of statutory veil-piercing,[130] under which it is possible for directors to be personally liable in certain circumstances for debts incurred by a company when it is insolvent or near-insolvent.[131] Although s 588H provides for some defences against liability,[132] current Australian law provides no protection for a director who believes that it is in the best interests of the company and creditors to continue to trade

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[124] Section 191(2) *Corporations Act*.

[125] Section 195(1) *Corporations Act*. Note, however, that certain exceptions apply, such as participation with the approval of the other directors under s 195(2).

[126] Ch 2E *Corporations Act*. The primary restriction is in s 208 *Corporations Act*.

[127] The exceptions are set out in ss 210–216 *Corporations Act.*

[128] A person (including a corporation) who is not validly appointed as a director, may nonetheless be subject to director liability if classified as a "shadow director". According to s 9 (b) (ii) of the *Corporations Act*, this will occur when "the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes". See *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2010] NSWSC 233.

[129] For discussion of the practical requirements of this duty in terms of directors' conduct, see ASIC, Consultation Paper 124, *Duty to Prevent Insolvent Trading: Guide for Directors* (November 2009); ASIC, Draft Regulatory Guide, *Duty to prevent insolvent trading: Guide for directors* (November 2009).

[130] See Boros and Duns, *Corporate Law* (2nd ed, 2010), [3.4.1].

[131] For a clear outline of the preconditions to liability under s 588G *Corporations Act*, see generally *McLellan, in the matter of the Stake Man Pty Ltd v Carroll* (2009) 76 ACSR 67. An analogous provision applies to a holding company, which allows its subsidiary to trade while insolvent. See s 588V *Corporations Act*.

[132] See generally Commonwealth of Australia, *Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, [2.2.5] (January 2010).

while insolvent.[133] The Chief Justice of Western Australia has stated that "[t]he laws of Australia which expose directors to personal liability in the event that a company trades while insolvent are arguably the strictest in the world".[134] Breach of the prohibition on insolvent trading may also expose directors to severe penalties under the civil penalty provisions of the *Corporations Act*.[135]

Liability for insolvent trading has become controversial in Australia in the light of the global financial crisis, which has simultaneously increased the risk of business failure and made the task of assessing a company's solvency more difficult. The insolvent trading regime arguably provides incentives for directors of a company in financial difficulties to stop trading immediately and place the company into external administration.[136] However, it has been argued that this may not be the best solution from a policy perspective.[137] Some business organisations and commentators have therefore lobbied for specific reforms to provide protection to directors, who try to restructure the company's affairs in a "work-out" context,[138] in order to create an "effective culture of corporate rescue" in Australia.[139] In January 2010, the Australian Government released a discussion paper, which canvassed the advantages and disadvantages of

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133 *Id*, [2.2.6].

134 W. Martin CJ, "Official Opening Address" (Speech delivered at Insolvency Practitioners' Association of Australia 16th National Conference, Perth, 28 May 2009).

135 The court may, for example, order payment of a pecuniary penalty of up to $200,000, disqualify a director from managing a company and/or impose compensation orders. Where failure to prevent incurring of the debt was dishonest, criminal liability may also arise. See generally Commonwealth of Australia, *Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, [2.2.7] – [2.2.8] (January 2010).

136 External administration under Australian law may take the form of either a voluntary winding up under or a voluntary administration. *Id*, [4.1.8].

137 See, for example, Australian Institute of Company Directors ("AICD"), *Response to Treasury Discussion Paper – Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, 2 March 2010, 2-3.

138 See generally Harris, "Director Liability for Insolvent Trading: Is the Cure Worse than the Disease?" (2009) 23 *Aust J Corp L* 266. See also *Hall v Poolman* (2007) 65 ACSR 123 (on *Hall v Poolman* [2009] NSWCA 64.

139 See AICD), *Response to Treasury Discussion Paper – Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, 3 (2 March 2010) (quoting Harris, *id*, 268).

corporate work-outs in this context, and considered three regulatory options to deal with the issue. These were (i) maintaining the status quo;[140] (ii) introducing a modified business judgment rule;[141] (iii) providing a moratorium for insolvent trading during a work-out.[142]

c) Duty of care. Another duty receiving much current attention is the duty of care and diligence under s 180(1) of the *Corporations Act*, and the related business judgment rule. Business organisations, such as the Australian Institute of Company Directors ("AICD"), have expressed concern that directors are too vulnerable to liability, and that this is inhibiting risk-taking in Australian corporations.[143] The AICD has suggested that would-be directors have a preference for boards controlled by private equity investors over listed companies, due to their apprehension of liability.[144] Others, including, somewhat unusually, the chairman of ASIC appear to endorse this view.[145] These concerns have been fuelled by a range of factors, including the high level of Australian share ownership, a surge in class actions[146] and a spate of legal actions brought against directors under s 180(1) alleging breach of disclosure obligations or making false and

140 Commonwealth of Australia, *Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, [5.1] (January 2010).

141 *Id*, [5.2], [5.3].

142 *Id*, [5.2], [5.4]. Sections of the business community, such as the AICD, have, however, argued strongly in favour of the introduction of a general business judgment rule, which would also apply beyond the current arena of directors' duty of care, and extend to insolvent trading and work-outs. See AICD), *Response to Treasury Discussion Paper – Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, 3 (2 March 2010).

143 See Young QC, "Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required for Directors under Sections 180–184 of the Corporations Act" (2008) 26 *Company and Securities LJ* 216, 216–218; Byrne, "Directors to Hide from a Sea of Liabilities in a New Safe Harbour" (2008) 22 *Aust J Corp L* 255, [1.1]. See generally Australian Institute of Company Directors ("AICD"), *Impact of Legislation on Directors* (November 2010).

144 Young, *id*, 228.

145 *Id*, 216–218.

146 *Id*, 217, n 6.

misleading statements, such as the ASIC proceedings against the directors of James Hardie[147] and One.Tel.[148]

Under s 180(1) of the *Corporations Act*, which was redrafted in its current form in 2000,[149] a director or other officer is required to act with the degree of care and diligence that a reasonable person would exercise if s/he were a director or officer of a corporation in the corporation's circumstances, and occupied the office and had analogous responsibilities within the corporation.[150] It has been said that the provision creates a "sliding standard".[151] Although the test requires the director to meet an objective test of care and diligence, it seems that the particular circumstances of the corporation and the skill and experience of the director may be taken into account in assessing breach. According to *Daniels v Anderson*[152] and *Commonwealth Bank of Australia v Friedrich*,[153] leading cases in the areas of duty of care and insolvent trading respectively, all directors have a minimum duty requiring them to understand the business of the company and to place themselves in a position where they can guide and monitor the company. There are, it seems, enhanced duties for directors holding specialised positions, such as the company chair,[154] or the chief financial officer.[155] It has also been argued that a director's

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147 *Id*, 217–218.

148 *ASIC v Rich* [2009] NSWSC 1229.

149 Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009), [7.80].

150 The duty in s 180(1) *Corporations Act* is supported by another provision, s 300(10) which requires public companies, which are not wholly-owned subsidiaries, to include a provision in their annual reports specifying the number of board meetings convened that year and the number of meetings attended by each director.

151 Young QC, "Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required for Directors under Sections 180–184 of the Corporations Act" (2008) 26 *Company and Securities LJ* 216, 220.

152 (1995) 37 NSWLR 438.

153 (1991) 5 ACSR 115; 9 ACLC 946.

154 See *ASIC v Rich* (2003) 44 ACSR 682; *ASIC v Rich* (2003) 44 ACSR 341; *ASIC v Rich* (2004) 50 ACSR 500.

155 See *ASIC v Vines* (2004) 48 ACSR 322. See also Harris, "An Analysis of the Vines Appeal" (2007) 25 *Company and Securities LJ* 554.

position on the audit committee, particularly in the role of chair, may increase the expected duty of care and diligence.[156]

d) Statutory business judgment rule. A business judgment rule was imported into Australian corporate law in 2000.[157] Based on the US business judgment rule,[158] the Australian version is found in s 180(2) of the *Corporations Act*. Under the provision, a director is deemed to have complied with the requirements of the duty of care and diligence if the director has made a business judgment in good faith for a proper purpose, does not have a conflicting interest, has adequately informed himself or herself, and rationally believes that the decision is in the best interests of the corporation.[159]

In 2008, one commentator described the protection offered by the statutory business judgment rule as "nothing but window dressing".[160] Certainly the operation of the provision is circumscribed by a range of conditions. Section 180(2) offers protection, for example, only in relation to the duty of care under subsection (1), and is irrelevant to the broad range of other potential sources of liability for directors. The provision also applies only in relation to a positive decision, or "business judgment", of the board.[161] Other board conduct, involving negligent omissions, monitoring and oversight failures, and the duty to prevent insolvent trading

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156 Young QC, "Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required for Directors under Sections 180–184 of the Corporations Act" (2008) 26 *Company and Securities LJ* 216, 221.

157 For background to the introduction of the business judgment rule in Australia, see Byrne, "Directors to Hide from a Sea of Liabilities in a New Safe Harbour" (2008) 22 *Aust J Corp L* 255, [1.2].

158 There are, nonetheless, significant differences between the US business judgment rule and its Australian statutory counterpart. See generally Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009), [7.105].

159 Section 180(2) *Corporations Act*.

160 Young QC, "Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required for Directors under Sections 180–184 of the Corporations Act" (2008) 26 *Company and Securities LJ* 216, 222.

161 "Business judgment" is defined in s 180(3) *Corporations Act* to mean "any decision to take or not take action in respect of a matter relevant to the business operations of the corporation".

fall outside its protective rubric.[162] Also, there has been uncertainty as to which party bears the evidentiary onus of proof under s 180(2).[163]

Increasing recognition of these restrictions on the operation of the Australian business judgment rule, coupled with its rare use, led some members of the business community, such as the AICD to lobby for a "generic" business judgment rule, which would radically expand the scope of the current safe harbor to provide protection from breach of the duties in ss 181-183 of the *Corporations Act*, as well as insolvent trading,[164] disclosure and a variety of other duties.[165] Several commentators have, however, strongly criticised proposals to introduce a generic safe harbor, on the basis that it would potentially weaken directors' duties and undermine accountability.[166]

The statutory business judgment rule became the focus of attention in late 2009 in the prominent decision *ASIC v Rich*,[167] which related to the collapse of One.Tel. ASIC alleged that the defendant directors had committed numerous breaches of the duty of care and diligence under s 180(1) of the *Corporations Act*.[168] The defendants, in turn, sought to rely on the statutory business judgment rule in s 180(2) with respect to all claims made against them.[169]

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162 See Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009), [7.110].

163 Byrne, "Directors to Hide from a Sea of Liabilities in a New Safe Harbour" (2008) 22 *Aust J Corp L* 255, [1.2].

164 See Harris, "Director Liability for Insolvent Trading: Is the Cure Worse than the Disease?" (2009) 23 *Aust J Corp L* 266; AICD, *Response to Treasury Discussion Paper – Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration*, 3 (2 March 2010).

165 See AICD, *Submission to Treasury Review of Sanctions in Corporate Law* (8 June 2007), 3–4.

166 See generally Byrne, "Directors to Hide from a Sea of Liabilities in a New Safe Harbour" (2008) 22 *Aust J Corp L* 255; Young QC, "Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required for Directors under Sections 180–184 of the Corporations Act" (2008) 26 *Company and Securities LJ* 216.

167 [2009] NSWSC 1229, [7248] – [7295].

168 For a detailed discussion of the history and scope of the statutory duty of care and diligence, see *id*, [7180] – [7247].

169 *Id*, [7179].

The issue of onus of proof under the Australian statutory business judgment rule was a key issue in this case, with ASIC and the defendants each arguing that the other bore the onus of proof.[170] Austin J recognised the great practical significance of placement of the onus of proof,[171] yet described s 180(2) as "opaque"[172] and "profoundly ambiguous"[173] on this issue. He concluded, however, that under the Australian business judgment rule, unlike its US counterpart,[174] the onus of proof rests on the defendant directors. [175]

ASIC v Rich[176] also raised acutely the issue of how far the protection of the business judgment rule extends into business management and planning,[177] since the defendants sought to invoke the rule to cover a wide range of their decisions and activities in relation to the business operations of One.Tel.[178] Austin J interpreted "business judgment" broadly to encompass many operational activities, such as planning, budgeting and forecasting.[179] The judge explicitly disputed the view that Australian business judgment amounted to little more than "window

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170 *Id*, [7260].

171 *Id*, [7261], citing DeMott, "Legislating Business Judgment - A Comment from the United States" (1998) 16 *Co & Sec LJ* 575, 576.

172 *Id*, [7263].

173 *Id*, [7264].

174 The US business judgment rule creates a rebuttable presumption in favor of the defendant directors. See *Gries Sports Emters., Inc. v Cleveland Browns Football Co, Inc*, 496 N.E.2d 959, 963-964.

175 *Id*, [7269]. Austin J nonetheless stated that he had adopted this statutory interpretation concerning the onus of proof with "some hesitation", noting the importance of resolving this issue at appellate level. *Ibid*.

176 [2009] NSWSC 1229.

177 *Id*, [7272].

178 See *id*, [7248]. One limitation on the availability of the statutory business judgment rule in Australia, identified by Austin J, however, was the need for a "decision to take or not take action" for the purposes of s 180(3) of the *Corporations Act*, defining "business judgment". As a result of this restriction, simple neglect cannot qualify for the protection of the business judgment rule. *Id*, [7277]. Austin J disagreed with ASIC's submission that the defendant directors' actions in *ASIC v Rich* could properly be construed as unconsidered inaction or omissions. *Id*, [7279].

179 *Id*, [7274], [7280].

dressing”,[180] and considered that it had the potential to provide a high level of protection for directors with respect to such operational decisions of the kind at issue in this case.[181]

e) Remuneration, stock options and other incentives. The 1990s saw a strong shift in Australia towards performance-based pay and an escalation of executive pay. By 2001, a global survey by Towers Perrin found that Australian CEOs had become the third highest paid executives in the world, after the US and UK executives, with the average Australian CEOs pay increasing by 73% in the previous year. Indeed, since that time there has been, until recently, continuous upward growth in executive pay. In 2008, the Australian Council of Superannuation Investors (ACSI) released a report on executive remuneration practices in the top 100 listed Australian companies.[182] According to this report, the average pay of CEOS in the top 100 listed Australian companies in 2007 was A$5.53 million – up from A$4.56 million in 2006 and A$3.77 million in 2005.[183]

Stock options do not appear to have been used as extensively in Australia as in other jurisdictions, such the US.[184] Performance hurdles in long-term incentives schemes (LTIs), to link pay and performance are almost universal in Australia,[185] due to institutional investor pressure, in contrast to the US where they were until recently, less common.[186]

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180 *Id*, [7293] – [7295].

181 See *id*, [7248], [7295].

182 See ACSI, *Pay in the Top 100 Companies: 2007* (2008, Research Paper prepared by RiskMetrics - ISS Governance Services, Melbourne). See generally ACSI, Media Release, *Top 100 CEO Pay Research Released*, 27 October 2008.

183 *Ibid*.

184 See Hill, Masulis and Thomas, “Comparing CEO Employment Contract Provisions: Differences Between Australia and the U.S.” (forthcoming, 2011, *Vand L Rev*); Mercer, *Executive Remuneration Perspective: Perfecting Long-Term Incentive Remuneration* (14 September 2008). There has, however, been a general decline in use of stock options around the world in recent years. *Ibid*.

185 Hill, Masulis and Thomas, *ibid*; Mercer, *ibid.*

186 However, according to the Mercer report, about 59% of companies in the US currently use performance-based LTIs in their remuneration packages. *Ibid*.

Director and executive remuneration is regulated under the *Corporations Act*, the ASX Listing Rules and the ASX corporate governance principles.[187] Responding to the corporate scandals at the beginning of this decade, the *CLERP 9 Act* 2004 and the ASX corporate governance principles addressed the problem of remuneration through enhanced disclosure and increased shareholder participation in pay decisions. The ASX corporate governance principles include, for example, Principle 8 entitled "Remunerate Fairly and Responsibly".[188] According to this principle, a listed company's remuneration policy should be structured in a way that "motivates senior executives to pursue the long-term growth and success of the company", demonstrating a clear link between pay and performance.[189] The *CLERP 9 Act* 2004 introduced reforms to enhance of remuneration disclosure,[190] and, more controversially, a provision requiring shareholders of an Australian listed company to pass a non-binding vote at the annual general meeting, indicating whether they adopt the directors' remuneration report.[191]

f) Regulatory responses to executive pay after the global financial crisis. The global financial crisis again brought the issue of executive remuneration to the forefront in Australia. In late 2008, the then-Australian Prime Minister, Kevin Rudd, described the financial crisis as a

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187 For an overview of the Australia's regulation of executive pay, see Sheehan, "The Regulatory Framework for Executive Remuneration in Australia" (2009) 31 *Syd L Rev* 273; Hill, Masulis and Thomas, "Comparing CEO Employment Contract Provisions: Differences Between Australia and the U.S." (forthcoming, 2011, *Vand L Rev*).

188 Changes to the ASX corporate governance principles were announced on 30 June 2010, which included amendments to Principle 8. See ASX Media Release, *Changes to Corporate Governance Principles and Recommendations*, 30 June 2010. The changes included an amendment stating that the responsibilities of the remuneration committee should include a review of and recommendation to the board on the issue of "remuneration by gender", and a revision strengthening, by the introduction of a specific recommendation in revised Recommendation 8.2, provisions dealing with the structure of the remuneration committee. *Id*, 15-18.

189 See generally Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, Law Book Co, 2009), para [7.410]; Ablen, "Remunerate 'Fairly and Responsibly': The 'Principles of Good Corporate Governance and Best Practice Recommendations of the ASX Corporate Governance Council" (2003) 25 *Syd L Rev* 555.

190 See s 300A *Corporations Act*.

191 See s 250R *Corporations Act*. See generally Chapple and Christensen, "The Non-Binding Vote on Executive Pay: A Review of the CLERP 9 Reforms" (2005) 18 *Aust J Corp L* 263; Hill, "Regulating Executive Remuneration: International Developments in the Post-Scandal Era" (2006) 3 *European Company Law* 64.

consequence of "extreme capitalism",[192] which rewarded greed at the expense of capital market integrity.[193] The Australian reaction to this alleged problem was multi-faceted.[194] It included a number of government discussion papers,[195] to consider whether stricter regulation of executive pay is justified, in addition to responses from the corporate sector,[196] and shareholder groups.[197] Also, the Corporations Amendment (Improving Accountability on Termination Payments) Act 2009 was passed to provide greater constraints on "golden handshakes".[198]

In January 2010, the Australian Productivity Commission released its final report, *Executive Remuneration in Australia*.[199] The Productivity Commission made seventeen recommendations in relation to executive remuneration, the majority of which related to ensuring procedural integrity of the pay-setting process and to shareholder approval, increased disclosure and reporting requirements. The most controversial proposal related to Australia's non-binding shareholder vote on executive pay.[200] The Productivity Commission sought to strengthen

192 See Bartlett, "Global crisis 'failure of extreme capitalism': Australian PM", *Agence France Presse*, 15 October 2008, 16:43.

193 Bartlett, *ibid*.

194 See generally Hill, "New Trends in the Regulation of Executive Compensation", in Austin and Bilski (eds), *Directors in Troubled Times*, 100 (Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney Law School, 2009); Hill, "Regulating Executive Pay in the Post-Financial Crisis Era", in Hill and Thomas (eds), *The Research Handbook on Executive Pay* (Edward Elgar Publishing, forthcoming, 2011).

195 See, for example, APRA, *Discussion Paper: Remuneration: Proposed Extensions to Governance Requirements for APRA-regulated Institutions* (May 2009); Productivity Commission, Discussion Draft, *Executive Remuneration in Australia*, September 2009.

196 See AICD, *Executive Remuneration: Guidelines for Listed Company Boards* (2009). The AICD Guidelines, which focus on the procedure for determining executive pay, reflect a strong preference for self-regulation.

197 See Australian Shareholders Association (ASA), *ASA Policy Statement Executive Remuneration*, 23 March 2009.

198 The Act, which received Royal Assent on 23 November 2009, radically lowers the benefit threshold beyond which shareholder consent is required.

199 Australian Government Productivity Commission, Productivity Commission Inquiry Report No. 49, *Executive Remuneration in Australia*, 19 December 2009.

200 Section 250R(2) *Corporations Act*.

consequences of a significant "no" vote, via a "two strikes and re-election resolution" recommendation.[201] Under this proposed reform, a 25% "no" vote on the remuneration report would trigger a formal obligation on the board to explain how shareholder concerns are being addressed.[202] Two consecutive "no" votes of 25% or more would activate a separate "re-election" resolution, which, if successful, would require all elected directors who signed the remuneration report to submit to re-election at an extraordinary general meeting to be held within 90 days.[203]

In April 2010, the Australian Government responded to the Productivity Commission, supporting virtually all its recommendations, including the controversial "two strikes and re-election resolution" proposal.[204] The government recommended further strengthening of the proposals relating to the legitimacy of the non-binding remuneration vote,[205] and announced that it would consider the introduction of an additional clawback provision.[206] Recent changes to the ASX Listing Rules and corporate governance principles in relation to executive remuneration are in response to the Productivity Commission Recommendations.[207] In December 2010, the Federal Government released an exposure draft of the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill* 2011, which will implement a number of recommendations of the Productivity Commission, including the two strikes proposal

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201 See Australian Government Productivity Commission, Productivity Commission Inquiry Report No. 49, *Executive Remuneration in Australia*, 19 December 2009, Recommendation 15, *id*, XL, 294*ff*.

202 *Id*, 295.

203 *Id*, XXXII.

204 See Minister for Financial Services, Superannuation & Corporate Law & Minister for Human Services, Joint Media Release, *Government Responds to the Productivity Commission Report on Executive Remuneration*, 16 April 2010.

205 The Australian Government recommended further strengthening of the following Productivity Commission proposals: Recommendation 4, 5 and 7. *Ibid*.

206 *Ibid*.

207 See above n 69 and n 188.

and a ban on hedging of executive remuneration packages.[208] At the same time, the government released a discussion paper on a clawback proposal for executive remuneration.[209]

B. The Shareholders

1. Shareholder Rights, Minority Protection and Shareholder Litigation

Shareholders possess a range of important rights under Australian corporate law,[210] including the ability to initiate, and effect, alterations to the corporate constitution,[211] to appoint[212] and remove directors.[213] Under the so-called "100 member rule", 5% of shareholders, or 100 shareholders by number, may requisition a meeting to alter the company's constitution,[214] or propose such a resolution at a general meeting.[215] Shareholders have certain rights to ask questions at general

[208] According to the Australian Government, the goal of the proposed legislation is to provide more power to shareholders and to enhance "transparency, disclosure and accountability" in the area of executive pay. See Parliamentary Secretary to the Treasurer, Media Release, *More Power to Shareholders on Executive Remuneration*, 20 December 2010.

[209] Australian Government, *The Clawback of Executive Remuneration Where Financial Statements are Materially Misstated*, Discussion Paper, December 2010.

[210] For a comparative analysis of the rights of shareholders under Australian and US corporations law, see Hill, "The Rising Tension Between Shareholder and Director Power in the Common Law World" (2010) 18 *Corporate Governance: An International Review* 344; Hill, "Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware" (2010) 63 *Vand L Rev* 1.

[211] Section 136(2) *Corporations Act*. Amendment under s 135(2) is by special resolution.

[212] Section 201G (replaceable rule).

[213] Section 203D *Corporations Act*.

[214] Section 249D *Corporations Act*.

[215] Section 249N(1) Corporations Act.

meetings.[216] They also have access to the register of members,[217] and may apply to the court for an order to inspect the books of the company.[218]

It is possible for minority shareholders to challenge a resolution of the majority in general meeting on the basis that it is in "fraud on the minority". The traditional interpretation of this doctrine[219] was very generous to the majority shareholders.[220] In the mid-1990s, however, the watershed High Court of Australia decision in *Gambotto v WCP Ltd*[221] introduced a new test to assess fraud on the minority in the context of alterations to the corporate constitution involving expropriation of shares or valuable proprietary rights attached to shares. This new test, which placed an onus of proving proper purpose and fairness on the majority, is far more favorable to the minority.[222]

Minority shareholders are also able to seek compulsory liquidation of the company and other remedies on a "just and equitable" ground,[223] or on the ground that the directors are acting in their own interests.[224] The previously restrictive statutory oppression remedy[225] has been

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216 Sections 250S, 250SA, 250T *Corporations Act*.

217 See ss 168, 169 and 173 *Corporations Act*. See also *AXA Asia Pacific Holdings Ltd v Direct Share Purchasing Corporation Pty Ltd* (2009) 69 ACSR 491.

218 Section 247A(1) *Corporations Act*. The court may only make an inspection order where it is satisfied that the applicant is acting in good faith and for a proper purpose. *Ibid*.

219 Under *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656 at 671, the test for fraud on the minority required the majority to act "bona fide for the benefit of the company as a whole".

220 See, for example, *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457.

221 (1995) 182 CLR 432.

222 Note, however, that following *Gambotto's* case, the *Corporations Act* was amended to introduce a compulsory acquisition power in Pt 6A.2 Div 2. See Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, Law Book Co, 2009), 522-523.

223 Section 461(1)(k). See, for example, *Re Tivoli Freeholds Ltd* [1972] VR 445.

224 Section 461(e) *Corporations Act*. See, for example, *Re Cumberland Holdings Ltd* (1976) 1ACLR 361; *Re Weedman's Ltd* [1974] Qd 377.

225 See ss 232-234 *Corporations Act*.

liberalised and now provides much wider scope for relief on grounds of oppression, unfair prejudice or unfair discrimination.[226] In 2000, a new statutory derivative suit was introduced to overcome historical obstacles to shareholder actions,[227] however, this does not appear to have resulted in an increase in the number of actions brought, possibly due to reluctance by courts to grant applicants an indemnity against costs from the company.[228]

There has, however, been a dramatic surge in the number of class actions in Australia.[229] The development of class actions as a private enforcement mechanism has been facilitated by the rise of litigation funding, which performs a similar function to contingency fee arrangements. Whereas contingency fee arrangements are common in the United States, they are prohibited in Australia, and litigation funding arose to fill that vacuum. There was some uncertainty as to the legality of litigation funding until 2006, when the High Court considered and affirmed the practice in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd*.[230]

A high profile example of surge in class actions is the recent Multiplex class action, an action brought by approximately one hundred shareholders of Brookfield Multiplex ("Multiplex") for the company's failure to disclose huge losses relating to construction of the Wembley Stadium in

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226 See generally Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, Law Book Co, 2009), [8.195]. The modern grounds for relief were discussed in the High Court of Australia decision, *Wayde v New South Wales Rugby League Ltd* (1985) 59 ALJR 978, although no oppression was found to exist on the facts of that case. Also, class rights receive special protection: Pt 2F.2 *Corporations Act*.

227 Pt 2F.1A *Corporations Act*. See generally Redmond, *id*, [8.75], [8.100]. There was also some doubt as to whether shareholders had standing to apply for injunctive relief under s 1324 *Corporations Act*, following the restrictive decision in *Mesenberg v Cord Industrial Recruiters (Nos 1 & 2)* (1996) 12 ACSR 483.

228 See generally Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, Law Book Co, 2009), 531-532.

229 Class actions have only been brought on a regular basis in Australia since around 2004. Examples include proceedings brought against GIO, Telstra, Harris Scarfe, HIH, the Australian Wheat Board, Multiplex, Aristocrat Leisure, Centro Property Group and Sons of Gwalia. Legg, "Shareholder Class Actions in Australia – the Perfect Storm?" (2008) 31 *UNSW LJ* 669, 669. See generally Lindgren (ed), *Investor Class Actions* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney Law School, 2009).

230 (2006) 229 CLR 386.

the United Kingdom.[231] The class action emerged despite a compromise reached in December 2006 between ASIC and Multiplex, under which the company agreed to pay A$32 million to a group of aggrieved shareholders, in relation to its failure to comply with its continuous disclosure obligations.[232] The Multiplex litigation, like many other Australian class actions in Australia, ultimately settled.[233] The figure for settlement of the class action, A$110 million, was considerably higher than the 2006 compromise with ASIC.[234] Another interesting class action was brought by Australian investors, not in Australia, but in the United States. In this decision, *Morrison v National Australia Bank*,[235] the US Supreme Court held that the anti-fraud provisions of the Securities Exchange Act of 1934 do not apply to securities transactions entered into outside the United States.[236] The *Morrison* decision therefore constitutes a major roadblock to class actions brought in the United States against Australian companies, and it will inevitably redirect such litigation to the Australian courts.

Shareholders may in some circumstances be able to bring an action against directors for misleading and deceptive conduct.[237] The *Corporations Act* contains several prohibitions against such conduct.[238] There is a general prohibition on false or misleading conduct in relation to a

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231 For background to the Multiplex class action, see Wood, "Wembley Final Score is a Win for Litigants", *Sydney Morning Herald*, 11 June 2010, 6. Also, in mid-2010, the first class action against a major Australian bank arose when proceedings were filed against the Commonwealth Bank of Australia(CBA) in the Federal Court. See Bell, "CBA says Storm Class Action Premature", *Australian Associated Press Financial News Wire*, 2 July 2010.

232 See ASIC Media Release, *ASIC Accepts an Enforceable Undertaking from the Multiplex Group*, 20 December 2006; Enforceable Undertaking, Australian Securities and Investments Commission Act 2001, Section 93AA- Multiplex Limited (20 December 2006).

233 The Multiplex settlement occurred in July 2010. See Dunlevy, "Multiplex Settles for $110m – Wembley Disclosure Saga Comes to an End", *The Australian*, 22 July 2010, 33.

234 The disparity between the class action settlement figure and the earlier compromise with ASIC provoked shareholder ire. See Butler, "Multiplex Shareholders Slam ASIC", 22 July 2010, 3.

235 130 S. Ct. 2869 (2010).

236 *Id*, 2888.

237 See, for example, *Fraser v NRMA Holdings Ltd* (1995) 127 ALR 543.

238 See generally Boros and Duns, *Corporate Law* (2nd ed, OUP, 2010), [15.5.1(b)].

financial product or financial services under s 1041H of the *Corporations Act*,[239] and specific provisions proscribing misleading and deceptive conduct in relation to takeover documents[240] and disclosure documents for securities offerings.[241]

One potential barrier to a shareholder obtaining damages for misrepresentation was the 19th century UK decision in *Houldsworth v City of Glasgow Bank*,[242] which held that existing shareholders, who had purchased shares in the company on the basis of a fraudulent misrepresentation, could not recover damages against their own company.[243] On the basis of this authority, it had been assumed that shareholder claims of this kind ranked behind the claims of other unsecured creditors in the administration of an insolvent company.[244] The 2007 High Court of Australia decision in *Sons of Gwalia Ltd v Margaretic*,[245] held, however, that such claims by aggrieved shareholders were not brought in the capacity of member, and therefore could rank equally with other unsecured creditors.[246] The decision has been the subject of much

[239] See, for example, *ASIC v Narain* [2008] FCAFC 120 (special leave to appeal to the High Court refused), which was an appeal against a decision finding that a CEO had contravened s 1041H of the *Corporations Act*. See also *ASIC v Fortescue Metals Group Ltd* (2009) 264 ALR 201, in which ASIC unsuccessfully argued that notifications, given by the company to the ASX pursuant to the continuous disclosure regime regarding certain foreign agreements, constituted misleading and deceptive conduct under s 1041H. ASIC subsequently lodged an appeal in this matter, which commenced in November 2010. See ASIC Media Release, *ASIC Appeals Federal Court Decision in Fortescue Metals Group Civil Penalty Proceedings*, 4 February 2010; Sexton, "Corporate Watchdog's Iron Resolve Remains", *Sydney Morning Herald*, 19 November 2010, 5.

[240] Section 670A *Corporations Act*.

[241] Sections 728, 670A *Corporations Act*.

[242] (1880) 5 App Cas 317.

[243] See generally Boros and Duns, *Corporate Law* (2nd ed, OUP, 2010), [15.5.1(c)].

[244] See Pompilio, "Should Claims Held by Misled and Deceived Shareholders Rank with Rather than Behind Claims Held by Other Unsecured Creditors of Insolvent Companies?" (2009) 27 *Company and Securities LJ* 426.

[245] [2007] 231 CLR 160. For background information on the *Sons of Gwalia* litigation, see CAMAC, Report, *Claims Against Insolvent Companies*: *Implications of the Sons of Gwalia* (December 2008), [1.2]. As the CAMAC Report makes clear, the High Court decision in *Sons of Gwalia* litigation related only to the ranking of shareholder claims in external administration and had no relevance to shareholder claims against a solvent company. *Id*, [1.4.2].

[246] See Pompilio, "Should Claims Held by Misled and Deceived Shareholders Rank with Rather than Behind Claims Held by Other Unsecured Creditors of Insolvent Companies?" (2009) 27 *Company and Securities*

controversy,[247] and prompted a report by CAMAC on the issue of claims against insolvent companies.[248] According to CAMAC, the issues in the *Sons of Gwalia* case arose in the context of a range of developments which had provided shareholders with expanded remedies for financial loss suffered as a result of corporate misconduct,[249] and increased direct rights of action via class actions.[250] For CAMAC the critical issue was that there should be certainty about the ranking of such claims;[251] since the High Court decision had provided a "useful measure"[252] of certainty, the committee was unconvinced of the need to amend the current law.[253] The Australian Government took a different view, however, and introduced draft legislation,[254] to reverse the effect of the *Sons of Gwalia* decision, by postponing shareholder claims until all other claims against a company have been satisfied.[255]

2. Shareholder Activism

LJ 42; Boros, "Shareholder Litigation after *Sons of Gwalia v Margaretic*" (2008) 26 *Company and Securities LJ* 235.

[247] According to CAMAC, the views of interested parties were polarised on the policy issue of how claims for damages by aggrieved shareholders should rank in a voluntary administration or liquidation should rank. See CAMAC, Report, *Claims Against Insolvent Companies*: *Implications of the Sons of Gwalia* (December 2008), [3.4].

[248] CAMAC, Report, *Claims Against Insolvent Companies*: *Implications of the Sons of Gwalia* (December 2008).

[249] *Id*, [1.5].

[250] *Id*, [3.4].

[251] *Ibid.*

[252] *Ibid*.

[253] *Id*, [1.7].

[254] The draft *Corporations Amendment (Sons of Gwalia) Bill* 2010 was introduced into Parliament in June 2010, and reintroduced in September 2010. See Parliamentary Secretary to the Treasurer, Media Release, *Legislation Reversing Sons of Gwalia Reintroduced into Parliament*, 29 September 2010. The *Corporations Amendment (Sons of Gwalia) Act* 2010 was passed in Federal Parliament in November 2010. See Parliamentary Secretary to the Treasurer, Media Release, *Sons of Gwalia Passes Federal Parliament*, 26 November 2010.

[255] *Corporations Amendment (Sons of Gwalia) Bill* 2010, *Explanatory Memorandum*, [1.3].

Shareholder activism increased in Australia during the 1990s, when there were a number of high profile corporate governance campaigns by institutional investors.[256] More recent examples of shareholder activism include a revolt by institutional investors against News Corp between 2004 and 2006 concerning the company's reincorporation from Australia to Delaware, and its implementation of a poison pill.[257]

There have also been examples of shareholder activism under the "100 member rule". This rule has been controversial. CAMAC, for example, advocated its abolition on the ground that the "100 member" threshold of support for convening a shareholder meeting was too low, inconsistent with much higher thresholds in other jurisdictions, and could be abused by activist shareholders with a social agenda.[258] There have been a number of instances in recent times where environmental activists[259] and unions[260] have indeed used the 100 member rule to pursue an activist agenda.

The introduction in 2004 of s 250R(2) of the *Corporations Act*, requiring a non-binding annual shareholder vote on the directors' remuneration report,[261] has provided a new and prominent avenue for shareholder activism. The explicit goals of this provision were to give shareholders a

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256 See Stapledon, *Institutional Shareholders and Corporate Governance* (Clarendon Press, Oxford, 1986); Hill, "Institutional Investors and Corporate Governance in Australia" in Baums, Buxbaum and Hopt (eds), *Institutional Investors and Corporate Governance* (Walter de Gruyter & Co, Berlin/New York, 1994), 583.

257 See generally Hill, "Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware" (2010) 63 *Vand L Rev* 1.

258 See CASAC, *Shareholder Participation in the Modern Listed Public Company*, Final Report (July 2000), Recommendation 2, 15. *Cf* Rawling, "Australian Trade Unions as Shareholder Activists: The Rocky Path Towards Corporate Democracy" (2006) 28 *Syd L Rev* 227, 241-243, disputing this argument.

259 See Bielefeld, Higginson, Jackson and Ricketts, "Directors' Duties to the Company and Minority Shareholder Environmental Activism" (2004) 23 *Company and Securities LJ* 28, 43-47.

260 See generally Rawling, "Australian Trade Unions as Shareholder Activists: The Rocky Path Towards Corporate Democracy" (2006) 28 *Syd L Rev* 227; Anderson and Ramsay, "From the Picket Line to the Board Room: Union Shareholder Activism in Australia" (2006) 24 *Company and Securities LJ*. 279.

261 Section 250R(2) *Corporations Act*.

greater voice on remuneration issues,[262] and to encourage improved consultation and information flow concerning compensation policies between directors and shareholders.[263] There have been a large number of protest votes at Australian listed companies since the provision commenced operation,[264] and early empirical research suggests that it has been effective as an outrage constraint on pay packages diverging from best practice principles.[265] In its recent inquiry into executive remuneration in Australia, the Productivity Commission considered that the non-binding shareholder vote on executive pay had been remarkably successful in the goal of fostering "more productive engagement between shareholders and boards".[266] It nonetheless sought to strengthen the vote even further, via the proposed "two strikes and re-election resolution" recommendation.[267]

Increased shareholder engagement continues to be an important theme in Australian corporate law reform. The assumption that shareholder engagement enhances corporate performance and accountability is reflected in the 2008 report of the Parliamentary Joint Committee on Corporations and Financial Services Report, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia*.[268] The Report made a range of recommendations for improving the flow of information between companies and shareholders, including in areas such as environmental, social and governance issues. The 2009 Johnson

262 See Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill, 2003, Austl. H.R. Bill, Explanatory Memorandum [5.434] - [5.435] (2003).

263 *Id*. at [4.353], [5.413].

264 See generally Hill, "Regulatory Show and Tell: Lessons from International Statutory Regimes" (2008) 33 *Delaware Journal of Corporate Law* 819.

265 See Sheehan, "Is the Outrage Constraint an Effective Constraint on Executive Remuneration? Evidence from the UK and Preliminary Results from Australia" (March 2007) (available at http://ssrn.com/abstract=974965), 3.

266 See Australian Government Productivity Commission, Productivity Commission Inquiry Report No. 49, *Executive Remuneration in Australia*, 19 December 2009, 277. See also *id*, 282.

267 Id, Recommendation 15, *id*, XL, 294*ff*.

268 Parliamentary Joint Committee on Corporations and Financial Services, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia* (June 2008).

Report on *Australia as a Financial Centre*[269] took the view that strengthening shareholder influence is the best accountability mechanism in the area of executive remuneration.[270] Effective communication with shareholders is also viewed as important under Principle 6 ("Respect the rights of shareholders") of the ASX corporate governance principles.

C. Labor

Historically, labor law and corporate law developed as separate areas under Australian law. Australian companies typically adopted a shareholder-centred model of corporate governance, within which little attempt was made to accommodate employee interests. One notable exception to this pattern, however, was Lend Lease Corporation Ltd ("Lend Lease"). Lend Lease is a leading Australian public company, specialising in property development and financial services, which was founded by the admired Dutch entrepreneur, Gerard J Dusseldorp in the 1950s. Under Dusseldorp's leadership, Lend Lease established a distinctive corporate culture, which stressed long-term shareholder value, and adopted a range of innovative techniques, such as productivity bonuses, to integrate employee interests and promote "employee wellbeing".[271]

There has been an international trend over the last two decades, towards decentralization of collective bargaining. The trend was reflected in Australia in the early 1990s with the introduction of an enterprise bargaining regime.[272] This regime constituted a significant shift away from Australia's dominant award-based system of industrial relations and collective bargaining.[273] The effect of the enterprise bargaining regime was to focus attention on individual

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269 Commonwealth of Australia, Australian Financial Centre Forum, *Australia as a Financial Centre: Building on Our Strengths*, November 2009.

270 *Id*, 80.

271 See http://www.lendlease.com.au/llweb/llc/main.nsf/all/all_found. For the history of Lend Lease, see Clark, *Finding a Common Interest: The Story of Dick Dusseldorp and Lend Lease* (2002).

272 *Industrial Relations Reform Act 1993* (Cth).

273 See generally, McCallum, "The Internationalisation of Australian Industrial Law: *The Industrial Relations Reform Act 1993*" (1994) 16 *Syd L Rev* 122.

workplace agreements, under which employees themselves, rather than unions, would primarily be responsible for protection of their interests.[274]

The balance of power between corporate employers and workers, and the fate of collective bargaining, has fluctuated since this time under successive Australian governments. In 1996, the Howard Coalition Government further reduced the status of collective bargaining, with the introduction of statutory individual agreements, and the removal of "good faith bargaining obligations".[275] It was, however, the Howard Government's controversial 2005 "Work Choices" legislation,[276] which led some commentators to admit that collective bargaining was now "under siege" and had a doubtful future in Australia.[277] After the election of the Rudd Labor Government in November 2007, the pendulum swung back towards re-establishing the primacy of collective bargaining, under the current Government's "Forward with Fairness" policy.[278] This new policy has resulted in the abolition of individualised bargaining, and restored the role and rights of unions in collective negotiations and in public sector workplaces.[279]

D. Auditors as Gatekeepers

Corporate collapses, such as Enron in the US and HIH and One.Tel in Australia, raised concerns about the role of auditors. In response to these concerns, the *CLERP 9 Act* 2004 introduced a

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274 See generally, Hill, "At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees" (1995) 23 *Fed L Rev* 204, 206.

275 See Forsyth, "'Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work", in Forsyth and Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 120.

276 For an analysis of the 1996 and 2005 reforms, see *id*, 121-125.

277 See Forsyth and Sutherland, "Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining" (2006) 19 *AJLL* 183.

278 See generally Forsyth, "'Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work", in Forsyth and Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 120, 125*ff*.

279 *Id*, 121.

range of reforms relating to the audit process in Australia.[280] Principle 4 ("Safeguard Integrity in Financial Reporting") of the ASX corporate governance principles also requires listed companies to have in place a structure of review and authorization to ensure truthful and factual presentation of the company's financial position. According to Principle 4, the structure would include review of the accounts by an audit committee, and a process to ensure that the company's external auditors are independent and competent.[281]

Auditor independence was a central plank in the *CLERP 9 Act* 2004 reforms. The reforms introduced both a general "conflict of interest" requirement and specific relationship categories (based, for example, on family or employment relationships) between the corporation and auditor, which will disqualify a person from acting as auditor.[282] Also, the reforms altered the framework for setting, and monitoring, accounting standards in Australia,[283] and provided accounting standards with the status of law.[284]

IV EXTERNAL CORPORATE GOVERNANCE

A. Takeover Regulation

Australia's statutory takeover regime under the *Corporations Act* is explicitly based on a policy of equality of opportunity and protection of minority shareholders (embodied in the so-called

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280 For an overview of the auditing process under Ch 2M of the *Corporations Act*, see Boros and Duns, *Corporate Law* (2nd ed, OUP, 2010), [20.2] *ff*.

281 See Chapple and Koh, "Regulatory Responses to Auditor Independence Dilemmas – Who Takes the Stronger Line?" (2007) 21 *Aust J Corp L* 1.

282 See generally, *ibid;* Boros and Duns, *Corporate Law* (2nd ed, OUP, 2010), [20.2.2].

283 Gay, "Recent Developments in Australian Auditing Standards" (2007) 25 *Company and Securities LJ* 122. Within this new structure, the Auditing and Assurance Standards Board ("AUASB") and the Australian Accounting Standards Board are subject to the oversight of the Financial Reporting Council ("FRC". See Boros and Duns, *ibid*; Chapple and Koh, "Regulatory Responses to Auditor Independence Dilemmas – Who Takes the Stronger Line?" (2007) 21 *Aust J Corp L* 1.

284 See s 307A *Corporations Act*. For a general discussion of the changes to the setting and enforcement of auditing standards, see Gay, *ibid.*

"Eggleston principles").[285] This historical focus on "fairness" rather than economic efficiency[286] accords the takeover regime a distinctive character by international standards. According to one commentator, Australia's takeover laws are "widely regarded as some of the most restrictive among capitalist economies".[287]

Australian law designates a control threshold, of 20% of voting shares in the target company, to serve as a line of regulatory demarcation. Acquisitions beyond this threshold are prohibited unless certain permitted statutory pathways are followed. The basic rule is that the offeror for an Australian listed company cannot acquire control of a parcel of more than 20% of voting shares, except pursuant to a general offer to all shareholders.[288] Private control transactions are thus precluded, and any control premium is shared equally between majority and minority shareholders. This rule is particularly strict by international standards.

A major change to the regulation of Australian takeover law occurred in 2000, when responsibility for the resolution of takeover disputes shifted from the courts to the Australian Takeovers Panel.[289] This change was designed to redress the problem of delays associated with the widespread use of tactical litigation in Australian courts.[290] The Takeovers Panel has been the subject of a constitutional challenge, however the High Court upheld the constitutional

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285 The Eggleston Principles are embedded in s 602 of the Corporations Act. *See also* Mannolini, *Convergence or Divergence: Is There a Role for the Eggleston Principles in a Global M&A Environment?* (2002) 24 *Syd L Rev* 336, 337-338. For background on the history and development of takeover regulation in Australia, see Elaine Hutson, "Regulation of Corporate Control in Australia: A Historical Perspective" (1998) 7 *Cant L Rev* 102.

286 Mannolini, *id*.

287 *Ibid.*

288 See ss 606(1) and 611 *Corporations Act*. See generally Levy and Pathak, Takeovers Law & Strategy (3rd ed, Lawbook Co, 2009), [2.1] *ff.*

289 Corporations Act 2001 (Cth), Part 6.10, Division 2 – "The Takeovers Panel". For a detailed analysis of the performance of the Takeovers Panel since it commenced operation in 2000, see Austin and Hill (eds), *The Takeovers Panel* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney Law School, forthcoming 2011).

290 *See* Ogowewo, *Tactical Litigation in Takeover Contests* (2007) *J Bus L* 589, 602-603; McKeon and Farrer, "Expanding the Jurisdiction of the Takeovers Panel in the Aftermath of Glencore: A New Chapter Begins?" (2008) 26 *Company and Securities LJ* 517.

validity of its powers.[291] In the period since it became the primary forum for resolving takeover disputes, the Takeovers Panel has generally been considered a success[292] in spite of some jurisdictional problems.[293]

The move to the Takeovers Panel in 2000 brought with it some substantive changes to the law in relation to defensive takeover conduct. Whereas Australian courts had previously applied a fiduciary duty analysis to assess directors' defensive conduct, the Takeovers Panel adopted a different "frustrating action" policy.[294] This policy focused on the effect, rather than the purpose, of directors' conduct in response to a takeover, and seriously limited the permissible action by the board in the absence of shareholder consent.[295] It constituted a major shift in the balance of power between the board and shareholders during a bid under Australian law.[296] Additional constraints on directors' defensive conduct apply under the ASX Listing Rules, which have resulted in the absence of some well-known defensive techniques, such as US-style poison pills, from the Australian takeover arena.[297]

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291 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542. See generally Armson, "Attorney-General (Commonwealth) v Alinta Limited: Will the Takeovers Panel Survive Constitutional Challenge?" (2007) 29 *Syd L Rev* 495.

292 See McKeon and Farrer, "Expanding the Jurisdiction of the Takeovers Panel in the Aftermath of Glencore: A New Chapter Begins?" (2008) 26 *Company and Securities LJ* 517; Armson, "Models for Takeover Dispute Resolution: Australia and the UK" (2005) *JCLS* 401.

293 See generally McKeon and Farrer, *id*, 17-18.

294 Takeovers Panel, *Guidance Note 12: Frustrating Action* (16 June 2003); Armson, *The Frustrating Action Policy: Shifting Power in the Takeover Context*, 21 COMP. & SEC. L.J. 487 (2003). In early 2010, the Takeovers Panel issued a substantially revised version of Guidance Note 12, which included a new broadened definition of "frustrating action". See Takeovers Panel, *Guidance Note 12: Frustrating Action* (revised), 11 February 2010.

295 See Thompson, *Takeover Regulation after the 'Convergence' of Corporate Law* (2002) 24 *Syd L Rev* 323, 324; Hill, *Back to the Future? Bigshop 2 and Defensive Tactics in Takeovers* (2002) 20 *Company and Securities LJ* 126.

296 According to the Australian Takeovers Panel, "[a]lthough it is generally the responsibility of a company's directors to make company decisions, decisions about control and ownership of the company are properly made by its shareholders." Takeovers Panel, *Guidance Note 12: Frustrating Action* (June 2003).

297 ASX LR 7.1, for example, requires shareholder approval for any issue of more than 15% of the company's share capital, otherwise than on a pro-rata basis. For more detail on the effect of ASX LR 7.1 on takeover defences, such as poison pills, see Hill, "Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware" (2010) 63 *Vand L Rev* 1, 36-38.

Two other current areas of controversy relating to corporate control transactions are worth noting. First, a large number of control transactions in Australia in recent years have been effected, not under the takeover provisions of the *Corporations* Act,[298] but rather by members' scheme of arrangement.[299] In 2007, for example, almost half of the control transactions considered by shareholders were in the form of a scheme of arrangement, including the ten largest takeovers of that year.[300] The functional equivalence, but regulatory differences between takeovers and schemes,[301] have engendered controversy concerning the use of schemes to effect changes of control. In December 2009, CAMAC released a report dealing with a range of issues relating to members' schemes of arrangement.[302]

Secondly, foreign investments and acquisitions have been have become topical, due to an increased number of Chinese companies seeking to buy stakes in the Australian resource sector, culminating in the unsuccessful $19.5 billion investment by Chinalco in Rio Tinto.[303] The *Foreign Acquisitions and Takeovers Act* 1975 (Cth) requires a foreign person seeking to acquire certain interests in Australia, including via a takeover bid, to obtain prior approval from the Foreign Investment Review Board ("FIRB"). The Federal Treasurer is the ultimate arbiter of foreign investment decisions, and is advised by FIRB.[304] In February 2009, the Australia

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298 Chapter 6 *Corporations Act*.

299 See generally Damian and Rich, *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement to Effect Change of Control Transactions* (2nd ed, Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney Law School, 2009).

300 CONNECT 4, 2007 Mergers and Acquisitions Legal Advisory Survey.

301 For an analysis of the similarities and differences between takeovers and schemes of arrangement, see CAMAC, Discussion Paper, *Members' Schemes of Arrangement* (June 2008), 17-20. See also Lindgren J, "Private Equity and Section 411 of the Corporations Act 2001 (Cth)" (2008) 26 *C & SLJ* 287 at 295, stating that "[l]ogic seems to suggest that equivalent outcomes … would demand the same approval thresholds".

302 See CAMAC, *Members' Schemes of Arrangement: Report* (December 2009).

303 See Golding and Bassill, *Australian Regulation of Foreign Direct Investment by Sovereign Wealth Funds and State Owned Enterprises: Are Our Rules Right?*, paper presented at the Law Council Corporations Law Committee, 2009 Corporate Law Workshop 10-12 (Sept. 12, 2009), 8.

304 See *id*, 8*ff*.

Treasurer announced proposed amendments to the *Foreign Acquisitions and Takeovers Act* 1975 (Cth) to extend the reach of the Act.[305]

B. Disclosure and Transparency

Australian corporate law uses disclosure as a fundamental regulatory technique in a wide range of contexts, and Principle 5 of the ASX corporate governance principles encourages companies to "make timely and balanced disclosure". Listed companies have enhanced disclosure requirements; they are obliged to make "continuous disclosure" under ASX LR 3.1.[306] This obligation, which complements periodic disclosure under financial reporting requirements,[307] requires a listed company to disclose to the ASX information concerning any new developments that would be likely to have a material effect on the company's stock price, if disclosed to the market.[308] Although the continuous disclosure regime casts a broad regulatory net, important exemptions also apply.[309]

Regulatory responsibilities with respect to the continuous disclosure regime are shared by the ASX, which stipulates, and monitors, the disclosure requirements, and ASIC, which is responsible for enforcement.[310] Concerns about the effectiveness of continuous disclosure

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305 The Treasurer stated that the amendments would ensure "that any investment, including through instruments such as convertible notes, will be treated as equity for the purposes of the Act". Treasurer of the Commonwealth of Australia, Media Release, *Amendments to Foreign Acquisitions and Takeovers Act*, 12 February 2009. See Golding and Bassill, *id*, 10-11.

306 ASX LR 3.1 is reinforced by s 674 *Corporations Act*. The continuous disclosure regime was introduced in Australia in 1994.

307 See Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, Law Book Co, 2009), [11.125]; Boros and Duns, *Corporate Law* (2nd ed, OUP, 2010), [15.5.1a].

308 See Redmond, *id*, [11.125].

309 See ASX LR 3.1A. Circumstances which may justify non-disclosure under this provision include, for example, where it would be a breach of a law to disclose the information, or where the information concerns an incomplete proposal or negotiation. *Id*, [11.140].

310 See Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, Law Book Co, 2009), [11.125].

enforcement led to reforms in 2002 and 2004, designed to increase accountability under the continuous disclosure regime.[311] A variety of remedies are available for breach of continuous disclosure obligations, including civil and criminal penalties, and compensation proceedings by persons who have suffered loss as a result of the breach, including by way of class action proceedings.[312]

V. ENFORCEMENT

A. Available Sanctions

Historically, the level of legal actions against directors and officers in Australia was low. This was due to a range of factors, including the relatively low standard of care and diligence for directors and procedural barriers to minority shareholder actions for breach of directors' duties.[313]

Over the last two decades, a number of developments have potentially strengthened enforcement and accountability under Australian corporate law. During that time, for example, liability for breach of the duty of care and insolvent trading has become more stringent.[314] Corporate law reforms at the beginning of this decade introduced a more liberal form of statutory derivative suit,[315] and, as noted earlier, shareholder class actions have also now become increasingly common in Australia.[316]

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311 In 2002, the continuous disclosure provisions were included in a new group of financial services civil penalty provisions. Reforms in 2004 provided, *inter alia*, for increased penalties and granted ASIC the power to issue infringement notices for contravention. *Ibid*.

312 See Boros and Duns, *Corporate Law* (2nd ed, OUP, 2010), [15.5.1a].

313 There existed substantial procedural barriers to minority shareholder actions against directors, both under the UK Rule in *Foss v Harbottle* and the common law derivative suit.

314 See, for example, *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115.

315 Part 2F.1A *Corporations Act* 2001 (Cth).

316 See generally Lindgren (ed), *Investor Class Actions* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney Law School, 2009).

Perhaps the most important enforcement development has been increasingly strategic use of the civil penalty regime by the primary corporate regulator, ASIC.[317] The civil penalty regime under the *Corporations Act*[318] was first introduced in 1993. The regime constituted an attempt to draw a clearer line between civil and criminal liability,[319] although the boundaries have become increasingly blurred since that time.[320] Some commentators have predicted that where overlapping proceedings are available, the regulator will inevitably favor civil proceedings as an enforcement mechanism over criminal actions, and have criticised ASIC on this basis.[321] A recent study disputes this, however, arguing that between 2001 and 2006, ASIC[322] instigated significantly more criminal, than civil, actions.[323]

Initially, the civil penalty regime was used only rarely by the regulator,[324] and there was much criticism of the regime's structural weaknesses.[325] In more recent times, however, the scope of

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317 For a history of ASIC, and its regulatory predecessors, see Mees and Ramsay, "Corporate Regulators in Australia (1961-2000): From Companies' Registrars to ASIC" (2008) 22 *Aust J Corp L* 212.

318 Part 9.4B *Corporations Act* 2001 (Cth).

319 For background to the introduction of the civil penalty regime, see Welsh, "The Regulatory Dilemma: The Choice Between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions" (2009) 27 *Company and Securities LJ* 370.

320 See, for example, *Rich v Australian Securities and Investments Commission* (2004) 50 ACSR 242, where the High Court rejected an argument that the civil penalty provisions are purely "protective" in nature.

321 See, for example, Comino, "The Challenge of Corporate Law Regulation in Australia" (2009) 23 *Aust J Corp L* 233.

322 In consultation with the Commonwealth Director of Public Prosecutions (DPP).

323 Welsh, "The Regulatory Dilemma: The Choice Between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions" (2009) 27 *Company and Securities LJ* 370, 371.

324 ASIC commenced only 14 civil penalty actions in the first 6 years of the operation of the civil penalty regime. See Gilligan, Bird and Ramsay, "Civil Penalties and the Enforcement of Directors' Duties" (1999) 22 *UNSW LJ* 417.

325 See for example, Bird, "The Problematic Nature of Civil Penalties in the Corporations Law" (1996) 14 *Company and Securities LJ* 405.

the civil penalty regime has been extended[326] to cover market misconduct offences, such as insider trading and continuous disclosure,[327] and ASIC's powers under the regime were further strengthened in the *CLERP 9 Act* 2004.[328]

Contravention of a wide range of provisions under the *Corporations* Act, including the various statutory directors' duties discussed above and the insolvent trading provisions, can result in liability under the civil penalty provisions of the *Corporations Act*.[329] It is possible for ASIC to seek orders for pecuniary penalties (of up to A$200,000 for an individual and A$1 million for corporations), compensation, disqualification, and criminal penalties. A company may bring an action against its directors under the civil penalty provisions, but is restricted to a compensation order. Injunctions are also available under s 1324 *Corporations Act*.

ASIC has, in recent times, launched a string of high profile enforcement actions under the civil penalty regime, many of them relating to well-known Australian corporate scandals. These include successful actions against the directors and officers of HIH. *ASIC v. Adler*[330] involved an action against three former directors of HIH: non-executive director, Rodney Adler; the CEO, Ray Williams; and the Chief Financial Officer, Dominic Fodera. ASIC alleged that the directors had breached their directors' duties in entering a transaction, which caused considerable loss to HIH, but indirectly benefited Adler.[331]

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326 Under the *Financial Services Reform Act* 2001 (Cth).

327 See generally Moodie and Ramsay, "The Expansion of Civil Penalties Under the Corporations Act" (2002) 30 *ABLR* 61.

328 The *CLERP 9 Act* granted ASIC power to issue infringement notices and impose direct financial penalties for contravention of the continuous disclosure regime. See generally Part 9.4AA *Corporations Act*.

329 See generally Austin and Ramsay, *Ford's Principles of Corporations Law* (14th ed, LexisNexis Butterworths, 2010), [3.400] – [3.410].

330 *ASIC v Adler* (2002) 41 ACSR 72 (appeal largely dismissed in *Adler v ASIC* (2003) 46 ACSR 504).

331 For a detailed description of the facts of the case, see Austin and Ramsay, *Ford's Principles of Corporations Law* (14th ed, LexisNexis Butterworths, 2010), 433-435.

The proceedings involved a range of improprieties, and Santow J found multiple contraventions[332] of the statutory duty of care and diligence,[333] duty to act in good faith and for proper purposes,[334] and prohibition on improper use of position.[335] In view of the seriousness of the breaches, the court imposed all forms of civil penalty liability, including the making of disqualification orders.[336] This included a twenty-year disqualification against Adler.[337] The disqualification order applied to involvement in the management of both public and private corporations.[338] The court stressed that the policy rationale for disqualification orders is not punitive in nature, but rather is based upon protection of the public.[339] Successful criminal proceedings were also subsequently brought against certain parties involved in the scandal, including Adler.

ASIC has to date had mixed results in relation to the James Hardie and One.Tel litigation. In the first instance decision of the New South Wales Supreme Court in *ASIC v Macdonald (No 11)*,[340] Gzell J held that the former James Hardie directors and CEO had breached their duty of care and

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332 This is perhaps an understatement in Mr Adler's case. Santow J found that, whereas Mr Williams and Mr Fodera had contravened the Act seven and five times respectively, Mr Adler had committed 101 contraventions. There were also found to be 84 contraventions by Adler Corp. See *Re HIH Insurance Ltd: ASIC v Adler* (2002) 42 ACSR 80, 89.

333 Section 180(1) *Corporations Act*.

334 Section 181 *Corporations Act*.

335 Section 182 *Corporations Act*. See generally Young QC, "Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required for Directors under Sections 180-184 of the Corporations Act" (2008) 26 *Company and Securities LJ* 216, 224-225.

336 The court's power to make disqualification orders was further strengthened under the *CLERP 9 Act* 2004. See, for example, s 206BA *Corporations Act* 2001 (Cth), which permits the court, on the application of ASIC, to extend an automatic five year disqualification period under s 206B for up to 15 years.

337 *Re HIH Insurance Ltd: ASIC v Adler* (2002) 42 ACSR 80, 111. A 10 year disqualification order was made against Mr Williams. (*id*, 121). Santow J held that no disqualification order was justified against Mr Fodera. (*id*, 124).

338 *Id*, 106.

339 *Cf, however, Rich v ASIC* (2004) 50 ACSR 242, where the High Court of Australia considered any such distinction between "protective" and "punitive" proceedings to be "elusive". *Id*, 252 (per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

340 *ASIC v Macdonald (No 11)* [2009] NSWC 287.

diligence under s 180(1) of the *Corporations Act*, by approving the draft ASX announcement, which proclaimed that the Foundation was "fully funded" and able to meet all future legitimate asbestos-related claims. The executive directors were found to have committed further breaches of s 180(1), relating to their failure to bring adequate material to the attention of the board.[341] The judge's findings contradicted the evidence of the directors, who gave evidence that they did not recall the draft ASX announcement being tabled or approved at the relevant board meeting.[342] Potential safe harbors, such as the business judgment rule and delegation, were unavailable to the non-executive directors, in the special circumstances of the case.[343] The court imposed civil penalty fines of A$30,000 and 5 year disqualification orders on the non-executive directors, many of whom were leading members of the Australian business community.[344]

In contrast to its first instance success in the James Hardie litigation,[345] ASIC failed in its action against the One.Tel directors in *ASIC v Rich*.[346] in what has been described as "an emphatic

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[341] See generally Hill, "Recent Developments in Directors' Duties in the Common Law World" in Lubrano (ed), *Corporate Governance Models and the Liability of Directors* (forthcoming, 2011). For a summary of particular contraventions by the various directors, see ASIC, *ASIC v Peter Macdonald and Others: Contraventions* (2009) (available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/James-Hardie-table-of-findings.pdf/$file/James-Hardie-table-of-findings.pdf).

[342] See generally Sexton, "The Suits that Turned to Dust", *Sydney Morning Herald*, 25 April 2009, 1; Frith, "Hardie's Adverse Finding will be Closely Analysed by Corporate Australia", *The Australian*, 24 April 2009, 18. According to one financial commentator, the directors' failure to remember the tabling or approval of the draft ASX announcement at the board meeting constituted "collective memory loss". See Durie, "Humble Release Crashes Careers", *The Australian*, 24 April 2009, 26.

[343] Since the directors denied approving the draft ASX announcement, they did not seek to rely on the protection afforded by the business judgment rule. Blake Dawson, "Lessons for directors and officers from the James Hardie litigation", *Company Law & Governance Update*, 8 May 2009, 4 (available at http://www.blakedawson.com/Templates/Publications/x_article_content_page.aspx?id=55219). In relation to the possible defence of delegation, Gzell J stated that, since management had brought "the matter to the board, none of them was entitled to abdicate responsibility by delegating his or her duty to a fellow director". Sexton, "The Suits that Turned to Dust", *Sydney Morning Herald*, 25 April 2009, 1.

[344] Higher penalties were imposed on the executive officers. See ASIC Media Release, *James Hardie Civil Penalty Proceedings*, 20 August 2009.

[345] *ASIC v Macdonald (No 11)* [2009] NSWC 287.

[346] [2009] NSWSC 1229.

victory for the defendant directors and defeat for ASIC as corporate regulator".[347] ASIC's central allegation was that the directors had breached their statutory duty of care and diligence by failing to keep the board of directors adequately informed of the company's true financial position.[348] Austin J was highly critical of the scope and management of the One.Tel litigation by ASIC, contrasting it unfavorably with the narrower evidentiary focus in the James Hardie case.[349] He also described the fact that no civil proceedings were brought against the non-executive directors in relation to the One.Tel collapse as "noteworthy".[350]

It originally appeared that appeals would be lodged against both the James Hardie and One.Tel decisions. ASIC lodged a notice of its intention to appeal Austin J's decision in *ASIC v Rich* in December 2009,[351] but later announced that it had reversed that decision on the basis of "[p]ublic policy considerations, cost and effluxion of time".[352]

In the James Hardie matter, nine of the ten unsuccessful defendants filed appeals against Gzell J's decision, with ASIC filing a notice of cross-appeal.[353] The appeals resulted in two judgments delivered by the New South Wales Court of Appeal in December 2010. In *Morley v ASIC*,[354]

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347 Heath, "One.Telling Wipe-Out: Decision in *ASIC v Rich* Finally Delivered", *Mallesons Stephen Jaques Alert*, November 2009.

348 *ASIC v Rich* [2009] NSWSC 1229, [3], [85]-[123].

349 [2009] NSWSC 1229, [65]. Austin J stated that "there is a real question whether ASIC should ever bring civil proceedings seeking to prove so many things over such a period of time as in this case". This criticism related to the fact that ASIC's case required it to prove the financial position of the multi-national group of companies comprising the One.Tel group over a period of four months. *Id*, [4].

350 *ASIC v Rich* [2009] NSWSC 1229, [3]. See also Sexton, "Judge Clobbers ASIC Case", *Sydney Morning Herald*, 19 November 2009, 1.

351 ASIC Media Release, *ASIC Lodges Notice of Intention to Appeal*, 17 December 2009.

352 ASIC, Media Release, *ASIC Not to Appeal One.Tel Decision*, 26 February 2010.

353 See Jacobs, "Former Hardie Directors Lodge Appeals", *Australian Financial Review*, 17 October 2009, 7; Sexton, "Accelerated Appeals for Banned Directors", *Sydney Morning Herald*, 2 October 2009, 2; Hutton, "James Hardie to Appeal", *Australian Financial Review*, 24 September 2009, 16.

354 [2010] NSWCA 331. See generally Minter Ellison, *Alert – James Hardie and the NSW Court of Appeal*, 22 December 2010.

the Court of Appeal reversed the decision of Gzell J. in relation to the non-executive directors, on the basis that the regulator had failed to establish that the non-executive directors[355] had approved the draft ASX announcement at the relevant board meeting.[356] The Court of Appeal therefore rejected a central finding of fact in the first instance judgment of Gzell J.

One aspect of the Court of Appeal's decision, which has attracted much attention, relates to the duties of the corporate regulator in bringing civil proceedings of this kind. The court considered that that a government agency, such as ASIC, owes an "obligation of fairness" in civil penalty proceedings of this kind.[357] Within this fairness rubric, the Court of Appeal held that ASIC should have called a particular witness, the company's solicitor, to help the court determine the "true facts" on which the action was based.[358] The court stated that failure to call this witness undermined the cogency of ASIC's case, and indicated a failure by the regulator to discharge its burden of proof.[359]

Although the Court of Appeal diverged from the first instance decision in terms of its findings of fact, the appellate decision does not suggest any substantive change in the law relating to directors' duties. Indeed, the Court of Appeal considered that if ASIC had proved that the non-executive directors voted in favour of the draft ASX announcement, then breach of duty of care would have followed,[360] and the non-executive directors could not have invoked the protection of

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355 The appeal by the joint company secretary/general counsel, Mr Shafron was partially successful and partially failed, and the appeal by Mr Morley, the chief financial officer failed. See *Morley v ASIC* [2010] NSWCA 331, [871] *ff*, [1075] *ff*.

356 *Id*, [789] – [792], [804]. The Court of Appeal admitted, however, that there was some basis for a finding that the directors had approved the draft ASX announcement. *Id*, [796].

357 *Id*, [710], [713]. According to the Court of Appeal, This is reflected in the special role occupied by ASIC, and its enhanced powers, in relation to corporate law enforcement. *Id*, [723] – [728].

358 *Id*, [775] – [776].

359 *Id*, [777], [796].

360 *Id*, [810]. See generally Minter Ellison, *Alert – James Hardie and the NSW Court of Appeal*, 22 December 2010.

reasonable reliance on management.[361] In January 2011, ASIC lodged an application for special leave to appeal to the High Court of Australia in this matter. According to ASIC, the application was lodged to seek clarification in the public interest concerning "the content and scope of ASIC's obligations" in bringing civil penalty proceedings.[362]

A number of other corporate scandals have also resulted in ASIC enforcement actions or investigations. ASIC brought proceedings for breach of duty against directors and officers of AWB Ltd, one of the world's largest wheat marketing and management companies, for allegedly making corrupt payments to the Iraq under the UN Oil-for-Food Program.[363] ASIC has also commenced actions, or is conducting investigations, in relation to several corporate collapses, including Westpoint Group, Opes Prime Stockbroking, Fincorp, and allegedly Storm Financial.[364] Most recently, in October 2009, ASIC commenced a civil action against the entire 2007 board of Centro Properties ("Centro"),[365] alleging that executive and non-executive directors had breached their duty of care and diligence in approving accounts for that year, which understated the company's debt level by \$2 billion.[366] Since it appears Centro's accountants PwC, had previously approved and signed off on the accounts,[367] the case will explore the scope of a delegation defence for directors.[368] It has been suggested that the case could open the way

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361 *Id*, [817], [821].

362 See ASIC Media Release, *ASIC Applies for Special Leave to Appeal James Hardie Decision*, 14 January 2011.

363 See ASIC Media Release, *ASIC Launches the Civil Penalty Action against Former Offices of AWB*, 19 December 2007.

364 See ASIC, ASIC Annual Report 07-08, *A Year of Change*, 14-15. See also Washington, "Storm Scrutiny: Rogue from Birth", *Sydney Morning Herald*, *BusinessDay*, 26 October 2009, 1

365 ASIC Media Release, *ASIC Commences Proceedings against Current and Former Officers of* Centro, 21 October 2009.

366 See Stevens, "Centro May Become Ultimate Testbed for Board Behaviour", *The Australian*, 22 October 2009; Eyers, "ASIC's Centro Case Rattles Boards", *Australian Financial Review*, 24-25 October 2009, 22.

367 McIlwraith, "Watchdog Chases Centro Board", *Sydney Morning Herald*, *BusinessDay*, 22 October 2009, 1.

368 Eyers, "ASIC's Centro Case Rattles Boards", *Australian Financial Review*, 24-25 October 2009, 22.

for ASIC to bring proceedings against a number of other companies, whose 2008 accounts did not satisfy disclosure requirements.[369]

B. Supervision

The global financial crisis has raised the issue of enforcement acutely in the areas of market manipulation and insider trading. This is an area where enforcement has arguably been relatively weak in the past,[370] but which has become an area of increasing regulatory concern in Australia.[371] Market supervision and enforcement have to date been divided between ASIC and the ASX.[372] Since 1 July 2006, the ASX has had responsibility for detection and investigation of possible market misconduct offences,[373] and is required to refer a matter involving suspicious trading to ASIC.[374] Nonetheless, the ASX has been criticised for alleged conflicts of interest in relation to its market supervisory role.[375] Apparently in response to such concerns, in 2009 the Australian federal government announced plans to transfer the ASX's detection powers in

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369 See Johnston, "Directors Now in the Spotlight", *Sydney Morning Herald*, *BusinessDay*, 22 October 2009, 7.

370 See Austin, "A Rapid Response to Questionable Trading: Moving Towards Better Enforcement of Australia's Securities Laws" (2009) 27 *Company and Securities LJ* 203.

371 See, for example, CAMAC Report, *Aspects of Market Integrity* (June 2009); ASX, *Listing Rule Amendments – New Requirements for a Remuneration Committee and a Company Trading Policy* (22 April 2010), [13] – [18]. See also ASX, ASX Public Consultation, *Listing Rule Amendments – Company Policies on Trading 'Windows' and 'Blackout Periods'* (4 December 2009), which, in foreshadowing the introduction of listing prescribing minimum requirements concerning company trading policies, stated that "[c]reating confidence that a market is free from insider trading takes more than appropriate laws and vigorous enforcement. It also involves restricting the freedom of company leaders to engage in activities which, though not involving insider trading, may create a suspicion of insider trading" (*id*, 3).

372 For a discussion of the allocation of roles and powers of ASIC and the ASX in relation to market manipulation, see Austin, "A Rapid Response to Questionable Trading: Moving Towards Better Enforcement of Australia's Securities Laws" (2009) 27 *Company and Securities LJ* 203, 204-207.

373 *Id*, 206-207.

374 *Id*, 207.

375 See, for example, Smith, "Advisory Group Questions ASX's Supervisory Role", *Financial Times*, 11 September 2008.

relation to market abuse to ASIC.[376] The announcement was also connected to a move towards permitting applications for entry of new market operators to set up in competition with the ASX.[377] The transfer of market supervision from the ASX to ASIC became effective in mid-2010.[378] The ASX will continue to have responsibility for monitoring, among other matters, its own listing rules, the continuous disclosure regime and corporate governance disclosure.[379]

V. OTHER MATTERS

III. Corporate Social Responsibility

Corporate social responsibility has become an important issue in recent times, as a result of the corporate scandals concerning James Hardie and AWB. The James Hardie scandal in particular generated two governmental reports on corporate social responsibility by the Parliamentary Joint Committee ("PJC Report")[380] and by CAMAC ("CAMAC Report").[381] A central issue in both these reports was the extent to which the current Australian legal framework permits directors to consider the interests of stakeholders and the general community.[382] This question was raised in

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376 This was in spite of the fact that the ASX had previously stated that it would "fight tooth and nail" to retain its market supervisory role. See Durkin and Jacobs, "ASX Stripped of Market Powers", *Australian Financial Review*, 25 August 2009, 1, 10. See also Washington and Williams, "Conflict Resolved: ASX Powers Shifted to ASIC", *Sydney Morning Herald*, 25 August 2009, 17.

377 Washington and Williams, *ibid*. The Minister for Financial Services stated that "[m]oving to whole-of-market supervision is…the first step in the process towards considering competition between market operators". Three operators, Chi-X, Liquidnet and AXE ECN, applied to establish new exchanges in competition with the ASX almost two years previously. See Durkin and Jacobs, *ibid*; Williams, "Crack in ASX Wall for Potential Rivals", *Sydney Morning Herald*, 25 August 2009, 18.

378 On changes to supervision of trading on Australia's financial markets, and ASIC's approach to developing an ASIC Market Integrity Rules regulatory framework, see generally, ASIC, *Proposed ASIC Market Integrity Rules*: *ASX and SFE Markets*, Consultation Paper 131 (February 2010).

379 *Id*, 6, 10.

380 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value*, Commonwealth of Australia, Canberra, 2006.

381 See Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations: Report*, CAMAC, Sydney, 2006.

382 See Marshall and Ramsay, "Stakeholders and Directors' Duties: Law, Theory and Evidence", U of Melb Legal Studies Research Paper No 411 (2009) (available at

the context of the James Hardie scandal, where directors and officers had sought to justify their conduct by arguing that Australian law required them to protect shareholder interests "at all costs".[383] They also argued that law reform was needed to provide directors with a "safe harbor" to consider stakeholder interests, without fear of litigation.[384] Responding to James Hardies' argument that the law required directors to consider only shareholder interests, the PJC Report observed that "rampant corporate irresponsibility certainly decreases shareholder value".[385]

Both reports rejected the argument put by James Hardie directors and officers that they were straight-jacketed by a narrow shareholder-centred focus under Australian law. In spite of case law holding that directors owe their duties to the shareholders as a general body, rather than to the commercial entity,[386] the reports considered that Australian law provides company directors with ample discretion to consider a range of factors, such as environmental and social interests, in exercising their duties.

An important recent 2008 Australian case, *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* ("Bell Group case"),[387] which arose out of 1989 financial crash, also diverges from the historical position of viewing the interests of the company as simply the incarnation of its shareholders. In the Bell Group case, Owen J explicitly adopted a commercial entity view of the corporation, and rejected the idea that shareholder interests would always be paramount. The judge stated:-

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402143); Hill, "Recent Developments in Directors' Duties in the Common Law World", in Lubrano (ed), *Corporate Governance Models and the Liability of Directors* (forthcoming, 2011).

383 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value*, Commonwealth of Australia, Canberra, 2006, 47, 181.

384 See Phesant, "Directors Need a Safe Harbour: Hellicar", *Australian Financial* Review, 17 March 2005, 3. See generally Lumsden and Fridman, "Corporate Social Responsibility: The Case for a Self-Regulatory Model" (2007) 25 *Company and Securities LJ* 147.

385 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value*, Commonwealth of Australia, Canberra, 2006, 19.

386 *Ngurli Ltd v McCann*(1953) 90 CLR 425, 438.

387 [2008] WASC 239.

> "This does not mean that the general body of shareholders is always and for all purposes the embodiment of 'the company as a whole'. It will depend on the context, including the type of company and the nature of the impugned activity or decision. And it may also depend on whether the company is a thriving ongoing entity or whether its continued existence is problematic. In my view the interests of shareholders and the interests of the company may be seen as correlative not because the shareholders *are* the company but, rather, because the interests of the company and the interests of the shareholders intersect".[388]

In the insolvency context of this case, Owen J considered that the directors, in fulfilling their duty to the company, had an obligation (not merely a discretion), to consider the interests of creditors, an obligation they had breached. [389]

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388 *Id*, [4393].

389 See Marshall and Ramsay, "Stakeholders and Directors' Duties: Law, Theory and Evidence", U of Melb Legal Studies Research Paper No 411 (2009) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402143), 10-11; Loxton, "The Bell Group Litigation – The Lessons Learned", *Allens Arthur Robinson Insolvency & Restructuring*, November 2008 (available at http://www.aar.com.au/pubs/insol/foinsolnov08.htm).

Annex 1 Key Cases

- *ASIC v Adler* (2002) 42 ACSR 80 (civil penalty regime, directors' duties)
- *ASIC v Macdonald (No 11)* [2009] NSWC 287; (2009) 256 ALR 199 (director and officer duties).
- *ASIC v Rich* [2003] NSWSC 85 (role of chair of the board of directors in modern corporations).
- *ASIC v Rich* [2009] NSWSC 1229 (directors' duty of care and the statutory business judgment rule).
- *AWA Ltd v Daniels* (1992) 7 ACSR 759 (directors' duty of care).
- *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 77 ACSR 410 (concept of shadow directorship and insolvent trading provision).
- *Daniels v Anderson* (1995) 16 ACSR 607 (directors' duty of care).
- *Gambotto v WCP Ltd* (1995) 182 CLR 432 (minority shareholder protection).
- *McLellan, in the matter of the Stake Man Pty Ltd v Carroll* (2009) 76 ACSR 67 (director liability for insolvent trading).
- *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 (director and officer duties).
- *Wayde v New South Wales Rugby League Ltd* (1985) 59 ALJR 978 (modern grounds for minority shareholder relief for oppression).

Annex 2 Main Corporate Governance Literature

Key Publications on Australian Corporate Law

- Austin and Ramsay, *Ford's Principles of Corporations Law*, 14th ed, LexisNexis Butterworths, Sydney, Australia, 2010.
- Boros and Duns, *Corporate Law*, 2nd ed, Oxford University Press, Australia and New Zealand, 2010.

- Redmond, *Companies and Securities Law: Commentary and Materials*, 5th ed, Law Book Co, Sydney, Australia, 2009.
- Austin (ed), *Directors and Corporate Social Responsibility: UK and Australian Perspectives*, Ross Parsons Centre of Commercial, Corporate and Taxation *Law* Monograph Series, Sydney Australia, 2006.
- Austin and Hill (eds), *The Takeovers Panel*, Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney, Australia, forthcoming 2011.
- Damian and Rich, *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement to Effect Change of Control Transactions*, 2nd ed, Ross Parsons Centre of Commercial, Corporate and Taxation *Law* Monograph Series, Sydney, Australia, 2009.
- Lindgren (ed), *Investor Class Actions*, Ross Parsons Centre of Commercial, Corporate and Taxation *Law* Monograph Series, Sydney Australia, 2009.
- Corporations and Markets Advisory Committee (CAMAC) Report, *Diversity on Boards of Directors*, Sydney, Australia (March 2009).
- Corporations and Markets Advisory Committee (CAMAC), *Aspects of Market Integrity*, Report, Sydney, Australia (June 2009).
- Productivity Commission Inquiry Report, *Executive Remuneration in Australia*, Melbourne, Australia (January 2010).
- *ASX Corporate Governance Principles and Recommendations* with 2010 Amendments (2nd ed, 2007).

Australian Securities and Investments Commission (ASIC) - http://www.asic.gov.au/asic/asic.nsf

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