CRITIQUE AND COMMENT

THE CHANGING POSITION AND DUTIES OF COMPANY DIRECTORS

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In 1974, in the first edition of his Principles of Company Law, Professor Ford was able to say that directors' duties were 'not very demanding'. This lecture traces how the duties and standards of care demanded of company directors have increased since then. In doing so, it makes reference to the attenuated business judgment rule, comparing the positions in the United Kingdom and, briefly, South Africa. It then considers similarities and differences between the duties imposed on company directors, union officers and public officials. It suggests that, while the regulatory regimes that apply to company directors and union officers are strikingly different, there is little reason in principle why that should be so. For practical reasons, the same cannot be said of the differences between public officials and company directors or union officers. But it remains somewhat paradoxical that, although the actions of public officials may have far more broad-ranging effects on the nation's well-being than the actions of any company director or union officer, public officials' duties are much less onerous.

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I Introduction

The development of directors' duties over the last century is a subject in which the late Professor Ford took particular interest. The first edition of his work *Principles of Company Law*, published in 1974, included a sizeable chapter on the subject and each subsequent edition has expanded and developed it.[1] Forty-three years on, it might seem remarkable that Professor Ford was able to write accurately in that first edition that the duties imposed upon company directors were 'not very demanding'.[2] But that was before the corporate excesses of the 1980s and their financial consequences, which resulted in very wide-ranging legislative intervention.[3]

In times past, the study of directors' duties principally focused on the fiduciary quality of the relationship between a director and a company by analogy to the relationship between a trustee and a beneficiary.[4] By contrast, these days, we tend to go first to the statutory duties prescribed by pt 2D.1 of the *Corporations Act 2001* (Cth). Those provisions largely cover the field, and, for a time, it might have been thought that they would also make the law simpler. But, inasmuch as the duties prescribed by pt 2D.1 are informed by general law antecedents, it remains necessary from time to time to look back to whence we have come in order to assess where we are going in future.

Directors' duties are not alone in that trajectory of development. Like the duties of company directors, those of union officers, and, to a lesser extent, public officials, were originally conceived of as fiduciary in nature by analogy to the duties of trustees, but are now in varying degrees regulated in their own right and by statute. There is, however, a notable difference. Whereas the effect of legislative intervention in directors' duties has been greatly to add to the scope of those duties and to increase the standard of care required of company directors, union officers continue to enjoy protections which directors either never had or have since been denied and, in the case of public officials, apart from an

[1] HAJ Ford, *Principles of Company Law* (Butterworths, 1974) ch 15 ('*Principles* (1st ed)').

[2] Ibid 349 [1540].

[3] Brian Cheffins, 'Comparative Corporate Governance and the Australian Experience' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 13, 27–8.

[4] See Ford, *Principles* (1st ed) (n 1) 310–11 [1501].

obligation to avoid conflicts of interest, the idea of a fiduciary duty of care and diligence is for all intents and purposes academic.

I propose, first, to recall in brief how it came about that the duties and standard of care demanded of company directors increased to their present levels. That will necessitate some reference to the so-called business judgment rule and, particularly, to the effect, or more accurately the lack of effect, the statutory embodiment of that rule has had on directors' liability. I intend then to contrast those developments with the way in which the duties of union officers have evolved in the last 40 years and, on that basis, to pose the question of why there are significant differences between the two regimes. Finally, I propose to make brief mention of the duties of public officials in order to identify the point that, although the actions of public officials may have far more broad-ranging effects on the nation's wellbeing than the actions of any company director or union officer, a public official's duties are, paradoxically, much less onerous. Ultimately, what I shall seek to convey is that there is little reason in principle why the duties of company directors and of union officers should not now be much the same, and although, for practical reasons, the same cannot be said of the duties of public officials, it is at least arguable that they should be more closely aligned.

II Directors' Duties

A *The Development of Directors' Duties in Equity*

Directors' duties first evolved in Chancery by analogy to the duties of trustees as part of the thinking that led from unincorporated joint stock companies regulated by deeds of settlement to the concept of a corporation.[5] The development of directors' duties was equally influenced by the partnership theory of corporations that, as shareholders were taken to have appointed the directors as their agents, they were responsible for the quality of the directors whom they selected.[6] Hence, if shareholders chose to appoint a director who lacked relevant skills, the shareholders could hardly be heard to complain when and if their appointee performed, or failed to perform, accordingly.

The result was acceptance of the idea — which in effect continued to hold sway for much of the 20th century — that a director's fiduciary duty to act with

[5] LCB Gower, *The Principles of Modern Company Law* (Stevens & Sons, 3rd ed, 1969) 515.

[6] Jennifer Hill, 'The Liability of Passive Directors: *Morley Statewide Tobacco Services Ltd*' (1992) 14 *Sydney Law Review* 504, 507. See also *Daniels v Anderson* (1995) 37 NSWLR 438, 493 (Clarke and Sheller JJA).

care and diligence was one to act according only to such level of skill as the director possessed. He — for they were then invariably male — was to be judged on the basis of what he knew, rather than what he ought to have known, and on the basis of what he did, rather than what he ought to have done.[7]

As Professor Ford observed, it eventually came to be recognised that, because the functions of a company director were in some respects different from those of a trustee, a director's duties in respect of business judgments were less than a trustee's responsibilities in respect of decisions relating to a trust.[8] A trustee was duty-bound to preserve the trust fund and so to exercise constraint and conservatism in decision-making, whereas a director's function was to conduct a business — not infrequently a speculative business — and a director's duties had to be conceived of accordingly. Acceptance of that resulted in the precept — which, like the concept of a subjective standard of skill, held sway until the latter part of the 20th century — that, if a director acted within power for a proper purpose and with such care as was reasonably to be expected of him having regard to his skill and experience, he would not be held liable for errors of judgment.[9] Nor was he otherwise liable for 'negligence' — meaning at that time imprudence of such a nature as to constitute a breach of trust — unless his breach of duty were so gross as to amount to *crassa negligentia* or 'culpable' negligence.[10]

Hence, Lord Hatherley LC's aculeated apophthegm of 1872 in *The Overend & Gurney Co v Gibb* that, if directors acted in the execution of what they believed to be their duty, however mistaken they might appear in hindsight to have been, the only question was whether they exceeded the powers entrusted to them and, if they did not, whether

> they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into? Was there *crassa negligentia* on their part … so that they should be fixed with the loss … ?[11]

[7] *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407, 428–9.

[8] Ford, *Principles* (1st ed) (n 1) 310–11 [1501].

[9] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832.

[10] *The Overend & Gurney Co v Gibb* (1872) LR 5 HL 480, 493 (Lord Hatherley LC), 496 (Lord Chelmsford).

[11] Ibid 486–7. See also *Sheffield and South Yorkshire Permanent Building Society v Aizlewood* (1889) 44 Ch D 412.

Evidently, that formulation was unremarkable according to the laissez-faire standards of Victorian England in which it developed. By contrast, however, it surely is remarkable that, even 40 years later, the same approach continued to apply. In 1925, Romer J rearticulated that approach in *Re City Equitable Fire Insurance Co Ltd* in the form of the three well-known propositions that would prove to be of such enduring influence in the law relating to directors' duties.[12] A director was bound to act honestly but he was not required to exercise any greater degree of skill than that which might reasonably be expected from a man of the director's knowledge and skill. A director was not bound to give continuous attention to the affairs of the company. And, in the absence of grounds for suspicion, a director might entrust some other company official to perform some duties.

Some scholars have argued that the languidness of the development of directors' duties up to that point was a reflection of the fact that the law was then still some seven years away from the recognition in *Donoghue v Stevenson* of the common law duty to take care[13] and still the better part of 40 years short of the recognition in *Hedley Byrne v Heller* of the recoverability of damages for pure economic loss.[14] It is also perhaps a reflection of the fact that, prior to World War II and the great social changes which resulted from that conflict, society was less litigious and more disposed to put up with the commercial consequences of human frailty.[15]

It is apparent, however, that neither the pace of common law development, nor the postwar change in society's attitude to litigation and regulation, is the whole of the answer. For, even as late as 1974 — a year after the 1973 oil crisis sent many economies, including Australia's, into recession; a decade after the recognition of damages for pure economic loss; and four decades after the recognition of the common law duty to take care — Professor Ford was still able to write, accurately, in the first edition of *Principles of Company Law* that a director's duties were equitable and that the common law, in the sense that includes equity, had not recognised a standard of the reasonably competent company director, analogous to the reasonably competent member of other professions.[16]

[12] *Re City Equitable Fire Insurance* (n 7) 428–9.

[13] [1932] AC 562.

[14] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[15] See generally Rob McQueen, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15 *University of New South Wales Law Journal* 1.

[16] Ford, *Principles* (1st ed) (n 1) 310 [1501], 350–1 [1540]–[1541].

Granted, it was also said by Professor Ford in that first edition that things were changing.[17] Reference was made to Sir Douglas Menzies's observation of some 15 years before that, although the law had not previously demanded much more of directors than that they act honestly, it was to be understood that the law's approach to directors' duties was formulated at a time when the tasks of many directors were limited to attending board meetings when convenient, adopting policies recommended by the company's officers, and signing documents.[18] Sir Douglas had observed that the tasks of directors had since expanded considerably and would continue to do so as a result of the developing trend of appointing full-time executive directors. So, he had predicted, just as more was expected of directors, more would be required of them. But, in the event, the courts of that time did little to heed such prognostications. The three propositions from *Re City Equitable Fire Insurance* continued to hold sway. And when a change finally did come about, it was essentially the result of legislative intervention, rather than any endogenous development of equitable or common law principle.

B *Legislative Intervention*

That is not to say that the idea of statutory regulation of directors' duties was necessarily novel, even in the 1950s. As has been observed, it first sprung to life in Victoria in the last decade of the 19th century in the fallout from the corporate misfeasance of the 1880s land boom.[19] Based on a recommendation of the Davey Committee in the United Kingdom in 1895 — although, ironically, the recommendation was not adopted in England — s 116(2) of the *Companies Act 1896* (Vic) provided:

> Every director shall be under an obligation to the company to use reasonable care and prudence in the exercise of his powers and duties, and shall be liable to compensate the company for any damage incurred by reason of culpable neglect to use such care and prudence.[20]

By expressly limiting the recovery by companies to damage caused by 'culpable neglect', that provision did little more in terms than reiterate the duties and

17 Ibid 350 [1540].

18 Sir Douglas Menzies, 'Company Directors' (1959) 33 *Australian Law Journal* 156, 156.

19 See generally John Waugh, 'Company Law and the Crash of the 1890s in Victoria' (1992) 15 *University of New South Wales Law Journal* 356.

20 See Rosemary Teele Langford, Ian Ramsay and Michelle Welsh, 'The Origins of Company Directors' Statutory Duty of Care' (2015) 37 *Sydney Law Review* 489, 492.

standards of the general law. Its enactment was nonetheless significant as an early manifestation of the idea that the regulation of companies should be viewed as a matter of public concern.[21] Yet, as events transpired, even that development was short-lived. The provision was repealed in 1910,[22] as a result of neo-colonial enthusiasm for the idea that Victoria's company law should remain as one with the company law of England;[23] and it was not replaced for another 40 years until the enactment of s 107 of the *Companies Act 1958* (Vic).

Furthermore, even when s 107 re-enacted statutory duties in 1958, it too did little more than reiterate the propositions from *Re City Equitable Fire Insurance*: that a director should at all times act honestly and use reasonable diligence in the discharge of the duties of his office and that an officer of a company should not make use of any information acquired by virtue of his position to gain an improper advantage for himself or to cause detriment to the company.[24] Indeed, the Explanatory Memorandum that accompanied the 1958 Bill purposefully declared that s 107 was declaratory of the existing law; and the courts proceeded accordingly.[25] In 1964, in *Byrne v Baker*, the Full Court of the Supreme Court of Victoria concluded that, because it had been held in *Re City Equitable Fire Insurance* that a director was not ordinarily bound to give continuous attention to the affairs of the company, s 107 was to be construed as concerned with negligence referable 'to identifiable acts or omissions, not to any general characterisation of the conduct of a director over a selected period'.[26] And that was said to be so notwithstanding that the words 'at all times' were included in s 107 in relation to the duty to 'use reasonable diligence'.

Section 107 of the 1958 Act is nevertheless generally conceived of as the *fons et origo* of statutory directors' duties in Australia;[27] and, although it was not the first statutory enactment of its kind, it was, as Langford, Ramsay and Welsh have written, groundbreaking in other respects.[28] Notably, a breach of a directorial duty had never before been conceived of as a criminal offence: s 107 made

21 Ibid 490–2.

22 *Companies Act 1910* (Vic) s 2.

23 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 1910, 479–80 (John Mackey).

24 See *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507, 529–30 [60]–[62].

25 Langford, Ramsay and Welsh (n 20) 504.

26 [1964] VR 443, 453; see also at 450–2.

27 *Angas Law Services* (n 24) 528 [55], [57]; Justice KM Hayne, 'Directors' Duties and a Company's Creditors' (2014) 38 *Melbourne University Law Review* 795, 804; RP Austin and Ian M Ramsay, LexisNexis, *Ford, Austin and Ramsay's Principles of Corporations Law* (at 19 January 2018) [8.305.3] ('*Ford, Austin and Ramsay*').

28 Langford, Ramsay and Welsh (n 20) 499, 505–18.

it punishable by a penalty of up to £500. Additionally, a contravention of s 107 rendered a director liable to the company for any profits made as a result of the contravention. To that point it had been arguable that a director was only liable for damages suffered by the company.[29] Further, and perhaps most significantly, the Attorney-General was empowered to bring proceedings for breach of duty under s 107, thereby recognising that directors' duties were to be thought of and enforced as part of the public law, and not just as part of the law of private obligations. That notion of the public enforcement of directors' duties by state authorities was, and to an extent remains, unique to Australia and arguably has been the most substantial factor in shaping the subsequent development of company law in this country.[30]

As at 1958, however, we still remained a fair way off the idea that a director should be held to an objective standard of care; and, as it turned out, we were to remain a fair way off that idea for a considerable time to come. Section 107 was re-enacted in the same form as s 124 of the *Uniform Companies Acts* of 1961–62 and thus the influence of *Re City Equitable Fire Insurance* continued up to and beyond the publication of the first edition of *Principles of Company Law* in 1974.[31] Yet though the change to an objective standard of care was slow in coming, it was of course inevitable. Throughout the 1970s there were a number of proposals for reform and finally there emerged s 229 of the *Companies Act 1981* (Cth).[32]

Section 229(2) subjected a director to a statutory duty to 'exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties'. It also imposed a criminal penalty of up to $5,000. Where a director acted with intent to deceive or defraud, a penalty of $20,000 or five years' imprisonment or both applied.[33] And significantly, it provided that if the court were satisfied that the corporation had suffered loss or damage as a result of the act or omission that constituted the offence, the court could, in addition to imposing a penalty, order the director to pay compensation to the corporation,

29 Ford, *Principles* (1st ed) (n 1) 321–3 [1512].

30 Michael J Whincop and Mary E Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law' (1997) 25 *Federal Law Review* 51, 88; Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217.

31 See *Australian Securities and Investments Commission v Vines* (2003) 182 FLR 405, 408 [12]; *Angas Law Services* (n 24) 530 [63].

32 See *Vines* (n 31) 409–10 [15]–[18].

33 *Companies Act 1981* (Cth) s 229(1)(b).

and such order was enforceable as if it were a judgment of the court.[34] Section 229(2) was later re-enacted as s 232(4) of the *Corporations Act 1989* (Cth), without substantial amendment, and continued to operate until the enactment of the *Corporate Law Reform Act 1992* (Cth).

At the time of the enactment of s 229(2) in 1981, few in practice had much doubt that s 229(2) was intended to impose an objective standard of skill and care. That also appeared to be the view of the courts. Consistently with the idea that the age of the objective standard of care had arrived, courts in New South Wales and Victoria held, in relation to insolvent trading provisions requiring an assessment of whether a director had reasonable grounds to expect that if a company incurred a debt it would not be able to pay all its debts when they fell due, that regard was to be had, not only to what was known to the director, but also to what ought to have been known to the director.[35] Tadgell J effectively decided that point in *Commonwealth Bank of Australia v Friederich*, remarking, by reference to the comments of Sir Douglas Menzies earlier mentioned, that surely the law had progressed to the point that a director was bound to exercise an objectively reasonable standard of skill in discharging the duty to understand the financial statements and affairs of the company and to take reasonable steps to place himself in a position to guide and monitor the management of the company by reference to information appropriate for that purpose.[36]

It was, therefore, a little against the tide that Professor Ford wrote in the fifth edition of *Principles of Company Law*, published in 1990, that, apart from adding the word 'care' to the pre-existing requirement to exercise 'reasonable diligence', and extending the duty to corporate officers other than directors, the statutory provisions of the 1980s neither required a particular level of skill, nor envisaged a model reasonably competent non-executive director.[37] He concluded that, as to the demands of skill, previous case law would continue to apply.[38] In effect, it was a case of back to *Re City Equitable Fire Insurance*. But, despite such comfort as Professor Ford's view of the matter might have brought to company directors of the day, Parliament was not to be denied its goal of establishing an objective duty of skill and care.

[34] Ibid s 229(6).

[35] *Metal Manufacturers Ltd v Lewis* (1986) 11 ACLR 122, 129, affd (1988) 13 NSWLR 315; *Statewide Tobacco Services Ltd v Morley* [1993] 1 VR 423, 429–30, affd [1993] 1 VR 423, 451.

[36] (1991) 5 ACSR 115, 125–6.

[37] HAJ Ford, *Principles of Company Law* (Butterworths, 5th ed, 1990) 484 [1527] ('*Principles* (5th ed)').

[38] Ibid 479–80 [1527].

In a Discussion Paper published in April 1989, the Companies and Securities Law Review Committee stated:

> There has been no clear indication that [s 229 of the 1981 Act] changes the standard of care to be achieved by officers. Just as the common law standard has had to operate without there being a recognised calling of company directors so this provision is subject to the same impediment. Hence it seems that in assessing a director's performance attention would have to be given to his own training and experience rather than some objective standard.[39]

In November 1989, the Senate Standing Committee on Legal and Constitutional Affairs recommended, in the *Cooney Report*, that legislation be enacted to make plain that company directors were subject to an objective standard of care.[40] Those developments led to the insertion by the *Corporate Law Reform Act 1992* (Cth) of a new s 232(4), which provided:

> In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.

As was stated in the Explanatory Memorandum to the 1992 Bill, that amendment was intended 'to reinforce that the duty of care is an objective one'.[41] And, as was to be expected, subsequent case law construed it accordingly. Fortified by the new form of the statutory duty, in *Daniels v Anderson* in 1995 the New South Wales Court of Appeal held that a director owes not only a statutory duty of care but also a common law duty of care which is not limited by the director's subjective knowledge and experience or ignorance and inaction, but rather requires directors to discharge their duties in good faith and with the degree of diligence, care and skill which an ordinary prudent person would exercise under similar circumstances in a like position.[42] Hence, it was said that, as a general rule, a director should acquire at least a rudimentary understanding of the business of the corporation. He or she could no longer set up a defence of lack of knowledge. A director was not permitted to shut his or her eyes to corporate

[39] Companies and Securities Law Review Committee, *Company Directors and Officers: Indemnification, Relief and Insurance* (Discussion Paper No 9, April 1989) 17–18 [28].

[40] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Report, November 1989) 29 [3.28] ('*Cooney Report*'). See Michael Legg and Dean Jordan, 'The Australian Business Judgment Rule after *ASIC v Rich*: Balancing Director Authority and Accountability' (2014) 34 *Adelaide Law Review* 403, 404–5.

[41] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) 25 [82].

[42] *Daniels* (n 6) 503 (Clarke and Sheller JJA).

misconduct and then claim that, because he or she did not see it, there was no duty to look. And if a director felt that he or she did not have sufficient business experience to be qualified to perform the duties of a director, he or she was to either acquire the knowledge or refuse to act.

III The Business Judgment Rule

Subject to one qualification, that remains, in effect, the position today. What was said in *Daniels v Anderson* forms the basis of the duty to exercise 'the degree of care and diligence' of a reasonable person in similar circumstances that is now to be found in s 180(1) of the *Corporations Act*. The one qualification is the statutory business judgment rule that now finds expression in s 180(2).

For reasons which, in retrospect, do not appear very convincing, in the early 1990s, Parliament made a conscious decision not to legislate for the introduction of a statutory business judgment rule.[43] As was explained in the Explanatory Memorandum accompanying the Corporate Law Reform Bill of 1992, the view taken was that, just as the development of a business judgment rule in the United States had not been the subject of legislation, it was better to leave it to the courts in this country to develop similar principles.[44]

But exactly how that was supposed to happen in the face of a newly introduced statutory provision strengthening the scrutiny of directorial decision-making in accordance with an objective standard of care and skill is, to say the least, not at all clear. After all, s 232(4), introduced in 1992, was enacted for the very purpose of overcoming the courts' thitherto reticence about second-guessing business judgments. In those circumstances, one might have thought it obvious that the courts would not be disposed to develop any sort of business judgment rule. Then, as now, courts took the law to be as expressed in the terms of the statute, rather than as reflected in the high hopes of explanatory memoranda. Consequently, during the 1990s courts became not at all hesitant in second-guessing business judgments and in holding directors liable for decisions with which those courts disagreed. The litigation associated with the Duke Group is one example which comes to mind.[45]

As a result, as was recorded in the proposals for reform associated with the Corporate Law Economic Reform Program ('CLERP'),[46] by 1997 there had developed a good deal of concern and uncertainty among directors as to the scope

[43] Cf Cooney *Report* (n 40) 31 [3.35].

[44] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) 26 [89].

[45] See *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

[46] CLERP, *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors* (Proposals for Reform: Paper No 3, 1997) 22–3 [5.2.1].

of their liability and not a little lobbying was undertaken to resolve that question. CLERP proposed that a statutory business judgment rule be enacted in order to overcome the problem. And significantly in view of subsequent developments, the Reform Paper stated that

> [a] statutory formulation of the business judgement rule would clarify and confirm the position reached at common law that Courts will rarely review bona fide business decisions. However, unlike the common law, *it would provide a clear presumption in favour of a director's judgement* thereby creating much more certainty for directors. Accordingly, while the substantive duties of directors would remain unchanged, directors would benefit from knowing that if they took decisions in good faith and in the company's interest, they would not be subject to challenge.[47]

CLERP added that

> the parameters of a statutory business judgement rule, or director *safe harbour* law, need to be very clearly expressed in legislation. A business judgement rule should not insulate directors from liability for negligent, ill-informed or fraudulent decisions.[48]

The problem with all that, however, was that CLERP's assumption that the position that had been reached at common law was that courts would rarely review directors' bona fide business decisions was misplaced. In terms, that assumption accorded with views which Professor Ford had expressed in the fifth edition of *Principles of Company Law*. There he had set out what he described as the American 'so-called business judgment rule', as being that

> a director or officer shall not be subject to liability under the duty of care standards with respect to the consequences of a business judgment if he (1) informed himself and made reasonable inquiry with respect to the business judgment; (2) acted in good faith and without a disabling conflict of interest; and (3) had a rational basis for the business judgment.[49]

Professor Ford had also observed that, although the business judgment rule had *not* been adopted in Australia at that time, Australian courts had in effect applied some aspect of the rule by acknowledging that the business decisions of directors would not be reviewed on their merits and that courts would not, in

47 Ibid 25 [5.2.2] (citations omitted) (emphasis added).

48 Ibid (emphasis in original).

49 Ford, *Principles* (5th ed) (n 37) 482–3 [1527].

general, impugn a board decision that could have been made by reasonable directors.[50] He cited the 1968 High Court decision in *Harlowe's Nominees*[51] and the 1974 decision of the Privy Council in *Howard Smith v Ampol Petroleum*[52] in support of his conclusion.

But the difficulty with CLERP proceeding on that basis was that what Professor Ford had written in the fifth edition concerned the position in 1990; that is, as it was before the changes made to s 232(4) in 1992 imposed an express statutory objective standard of skill and care, and before *Daniels v Anderson* recognised the same standard applied in relation to a director's common law duty of care. *Harlowe's Nominees* and *Howard Smith v Ampol Petroleum* were decided before those later developments and therefore had nothing to say about them. Each had involved an essentially different issue of whether a decision to raise capital by an issue of shares which diluted the percentage holding of existing members was a decision made bona fide in the best interests of the company as a whole. Duties of good faith differed from duties of care, especially after the latter came to be judged against an objective standard. Thus, paradoxically, the CLERP proposal for a business judgment rule, although ostensibly calculated to pull back from common law developments like *Daniels v Anderson*, which it was said were productive of uncertainty, at the same time asserted that the statutory formulation of the business judgment rule would do little more than clarify and confirm the position that had been reached at common law.

IV The Statutory Business Judgment Rule

The CLERP proposal led to the enactment of a statutory business judgment rule in the form of s 180(2) of the *Corporations Act*. It provides that there will have been no breach of the duty in s 180(1) to act with reasonable care and diligence where a director has made a business judgment in good faith for a proper purpose, without material interest in the subject matter, and on the basis of a rational belief that the judgment was in the best interests of the corporation. As such, the terms of the provision are closely modelled on the American business

[50] Ibid 440–3 [1437].

[51] *Harlowe's Nominees* (n 9) 493.

[52] *Howard Smith* (n 9) 832.

judgment rule[53] as codified in the American Law Institute's *Principles of Corporate Governance* in 1992.[54] Correspondingly, the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 predicted that

> the statutory formulation will provide a clear presumption in favour of a director's judgment. In particular, while the substantive duties of directors will remain unchanged, absent fraud or bad faith, the business judgment rule will allow directors the benefit of a presumption that, in making business decisions, if they have acted on an informed basis, in good faith, and in the honest belief that the decision was taken in the best interests of the company, they will not be challenged regarding the fulfilment of their duty of care and diligence.[55]

In the events which have since occurred, however, none of that has come to pass. On the present state of authority, s 180(2) does not provide a clear presumption or, indeed, any presumption in favour of directors. Following the decision of Austin J in *ASIC v Rich*,[56] it has been generally accepted that s 180(2) operates only as a defence casting the onus on the director to defend his or her decision-making.[57]

Austin J considered that there were two reasons which favoured that construction. The first was that, if the onus of proof of rebutting a presumption in favour of a defendant director were to be borne by the plaintiff, the enactment of the statutory business judgment rule would have the effect of adding to the elements to be proved by the plaintiff.[58] His Honour considered that such an outcome would run counter to what he considered to be the clear intention expressed in the Explanatory Memorandum and second reading speech that there should be no reduction in the duties demanded of directors. The second reason was that his Honour took the view that it would be unusual if, as part of the evidentiary burden of establishing breach of the statutory duty of care and diligence in s 180, a plaintiff might be required to establish that the defendant's

[53] See Deborah A DeMott, 'Legislating Business Judgment: A Comment from the United States' (1998) 16 *Company and Securities Law Journal* 575; *Ford, Austin and Ramsay* (n 27) [8.310.27].

[54] The American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (American Law Institute Publishers, 1994) vol 1, 166 § 4.01.

[55] Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 17 [6.4].

[56] *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1.

[57] See, eg, *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, 427 [197]–[198] (Keane CJ, Emmett J and Finkelstein J agreeing); *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, 589 [485].

[58] *Rich* (n 56) 148–9 [7266]–[7269].

business judgment was made otherwise than in good faith for a proper purpose, because that would amount to proving the more serious contravention of the duty in s 181.[59]

The decision in *ASIC v Rich* was also bad news for directors hoping that the concept of business judgments would be construed generously. Austin J noted that it was not clear how far 'the concept of business judgment [was] extended into the realm of management, organisation and planning'.[60] He accepted that, on account of the broad statutory language and the position adopted in the United States, a wide interpretation of the definition in s 180(3) of business judgments appeared attractive. But his Honour determined that the concept was limited by the reference to a decision 'to take or not to take action'.[61] That directed attention to 'whether the director or officer has turned his or her mind to the matter'.[62] And thus, as his Honour concluded,

> the discharge by directors of their 'oversight' duties, including their duties to monitor the company's affairs and policies and to maintain familiarity of the company's financial position, is not protected by the business judgment rule, because the discharge or failure to discharge those duties does not involve any business judgment as defined.[63]

Although that interpretation has been followed consistently in subsequent cases,[64] some commentators have observed that, apart from the passages of the extrinsic material which expressed an intention not to lessen the duties of directors, there were other stronger passages, to which Austin J did not refer, that left little doubt that it was the legislature's intention that the provision would operate as a presumption in favour of providing directors with the benefit of the doubt unless the identified additional elements could be proved.[65] Equally, as some commentators have observed, if the provision only creates a defence, it

[59] Ibid 149 [7269].

[60] Ibid 150 [7272].

[61] Ibid 150 [7271].

[62] Ibid 151 [7277].

[63] Ibid 151 [7278].

[64] See, eg, *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 352–3 [387], 356 [406], 376–7 [511]; *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers* [2006] QCA 335, [247]–[248]; *Fortescue Metals* (n 57) 427 [197].

[65] See Wesley Bainbridge and Tim Connor, 'Another Way Forward? The Scope for an Appellate Court to Reinterpret the Statutory Business Judgment Rule' (2016) 34 *Company and Securities Law Journal* 415, 425–6.

is, at best, a defence of marginal utility in view of the relief-from-liability provisions in ss 1317S and 1318.[66] Nonetheless, as matters now stand, although the enactment of s 180(2) of the *Corporations Act* was unquestionably motivated by an intention to create a presumption in favour of directors, and the drafting of the provision was modelled on the more generous American business judgment rule, the effect of s 180(2) according to *ASIC v Rich* is entirely different and of little, if any, practical utility.

These points are amply illustrated in a study conducted by Jenifer Varzaly. Writing in October 2012, she recorded that, following the introduction of s 180(2) in March 2000, the provision was not considered in any reported decision of an Australia court until 2003.[67] The greatest number of decisions in which it was considered took place between 2006 and 2010 — the end of that period corresponding to the effects of the global financial crisis. In the 10 years following the enactment of the statutory business judgment rule, there was only one case in which the defence was successfully invoked, and that was by a receiver, not a director.[68] She concluded that s 180(2) has provided neither business confidence nor legal certainty.

V Position in the United Kingdom

As much of Australia's company law derived at some point from the company law developed in the courts of England, it is informative to contrast the position under s 180 of the *Corporations Act* with the position that now applies in the United Kingdom following the adoption of the *Companies Act 2006* (UK) in light of the recommendations of the Company Law Review.[69] Section 174(1) of the *Companies Act* imposes a duty to exercise reasonable care, skill and diligence which, in terms, is close to the requirements of s 180(1) of the *Corporations Act*. Section 174(2) provides some content to that obligation. In 2013, in *Brumder v Motornet Services and Repairs Ltd*, Beatson LJ in the Court of Appeal described the obligation as being 'in two parts':

66 See Neil Young, 'Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standards of Conduct Required of Directors under Sections 180–184 of the Corporations Act' (2008) 26 *Company and Securities Law Journal* 216, 222–3.

67 Jenifer Varzaly, 'Protecting the Authority of Directors: An Empirical Analysis of the Statutory Business Judgment Rule' (2012) 12 *Journal of Corporate Law Studies* 429, 439.

68 Ibid 456.

69 See Company Law Review Steering Group, *Modern Company Law for a Competitive Economy* (Final Report, 26 July 2001).

> The first part, in section 174(2)(a), is that a director must exercise the care, skill and diligence that would be exercised by a reasonably diligent person with 'the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company'. This objective test sets the floor. The second part of the definition, in section 174(2)(b), will displace it where the particular director under consideration has greater knowledge, skill and experience than may reasonably be expected.[70]

Significantly, however, by operation of s 170(4), the duties imposed on directors by the *Companies Act* are to be understood and applied 'in the same way as common law or equitable principles'. And, in its reporting prior to the enactment of the *Companies Act*, the Law Commission and Scottish Law Commission recorded:

> The courts currently do not judge directors with the wisdom of hindsight and do not 'second-guess' directors on commercial matters. There is nothing to suggest that this long-established judicial approach would not apply.… Accordingly, we do not recommend a statutory business judgment rule.[71]

Assuming that to be a correct assessment of the position, it appears, therefore, that, despite the absence of a statutory business judgment rule like s 180(2) of the *Corporations Act*, directors in the United Kingdom are in a decidedly more privileged or protected position than directors in this country.

There is also a further dimension to the position in the United Kingdom of present relevance, which is what is called the 'enlightened shareholder value' approach provided for in s 172 of the *Companies Act*.[72] That section requires a director to act in a way that he or she considers in good faith would most likely promote the success of the company for the benefit of its members as a whole, but in doing so to have regard, amongst other matters, to the likely long-term consequences of any decision; the interests of employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the

70 [2013] 1 WLR 2783, 2796 [46]; see also at 2798 [55].

71 Law Commission and Scottish Law Commission, *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties* (Law Com No 261, Scot Law Com No 173, September 1999) 53 [5.28]–[5.29].

72 See Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"' (2007) 29 *Sydney Law Review* 577; Collins C Ajibo, 'A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory' (2014) 2 *Birkbeck Law Review* 37.

desirability of maintaining a reputation for high standards of business conduct; and the need to act fairly between members of the company.

Seemingly, that approach owes more than a nod to continental European — particularly German — communitarian conceptions of a directorial duty to act not only for the benefit of shareholders, but also for the benefit of all so-called stakeholders, including creditors, employees, suppliers, customers and communities within which the company operates.[73] It does not go as far, however, as a full European pluralist approach of requiring consideration of communitarian interests as valid in their own right, as opposed to a means to achieve shareholder value, and it certainly does not go as far as some of the constituency statues in the United States, which expressly provide that directors are not required to give dominant effect to any constituency, even shareholders.[74] It may also be that, because of the paramount consideration of company success, s 172 ultimately makes no real difference at all to the law that went before. But, against that, as Professor Keay has written,[75] s 172 does provide directors in the United Kingdom with express legislative permission to look at interests other than short-term shareholder interests, and so may alleviate the concern of some directors who say that they feel morally obliged to operate in the best interests of shareholders in a 'common-sense way' acceptable to society. Arguably, it permits directors in the United Kingdom to favour the interests of creditors over shareholders, or to spend company resources promoting a perceived societal interest in circumstances where such actions and expenditures are unlikely to have a perceptible positive effect on short-term shareholder value or where such actions may not even be supported by a significant percentage of shareholders.

If that is so, it is more than a little ironic that, having eschewed the adoption of a statutory business judgment rule such as s 180(2) of the *Corporations Act*, the United Kingdom has now, by means of the enlightened shareholder value approach articulated in s 172, gone considerably further than we have in Australia in acknowledging the many and complex considerations that feed into business judgments. It is also potentially significant. It is becoming increasingly common for Australian company directors to favour the interests of others over shareholders. The subject of directors preferring the interests of creditors, or at least having regard to them, was explored by the Hon KM Hayne in his 2014 Harold Ford Memorial Lecture.[76] One also reads in the financial press of an increasing predilection on the part of Australian public company directors to

73 Keay (n 73) 578, 605.

74 Ibid 594–7

75 Ibid 599–602.

76 Hayne (n 27).

pursue communitarian causes with no necessary connection to the improvement of shareholder value. Consider, for example, the campaigns of Qantas and Australian and New Zealand Banking Corporations Ltd in favour of same-sex marriage, Westpac Banking Corporation's widely publicised refusal to fund the Adani coal project, the decision by Westfarmers-owned Blackwood to phase out fossil fuels in its commercial distribution business, and the campaigns of other companies to encourage the adoption of the Finkel recommendations for a clean energy target. Yet, in contrast to the position in the United Kingdom, in Australia there is no legislative indication that communitarian causes fall within the realm of business judgments entrusted to directors. And, potentially, that may make a difference if and when Australian directors who deploy company resources to promote communitarian causes are called out for it.

VI Position in South Africa

Lastly by way of comparison, it is pertinent to contrast directors' duties in Australia with directors' duties in South Africa, where the law goes considerably further in protecting directors, not just in relation to business judgments, but also in relation to the exercise of powers and the performance of directorial functions. Under s 76(4) of the South African *Companies Act 2008*, a director is generally taken to have acted in the best interests of the company, and with the required degree of care, skill and diligence, if the director was reasonably diligent in informing himself or herself of the matter, had no material financial interest in the subject matter of the decision, and made the decision on a rational basis believing it to be in the best interests of the company. As Professor du Plessis has written, that provides directors with a degree of protection that members of other professions would likely envy.[77] But, as du Plessis also contends, that may be regarded as defensible on the basis that directors are not really members of a profession as such. In South Africa, as in Australia, there is no specific qualification or training required before becoming a director and no college or institute with the function of enforcing professional standards in the same way as does the College of Surgeons or the Legal Profession Admissions Board. What then does it mean, he asks, to speak of the standards of a reasonable director other than what appears in retrospect would have been the best or better course to take? Directors are expected to make risk-based decisions and, unless they make a decision which no reasonable person would make

[77] Jean J du Plessis, 'Open Sea or Safe Harbour: American, Australian and South African Business Judgment Rules Compared (Part 2)' (2011) 32 *Company Lawyer* 377, 381–2.

in their place, it might be thought that there are powerful commercial and economic reasons why directors should not be held liable for making them, or at least should be given the benefit of doubt.

VII Conclusion as to the Australian Business Judgment Rule

For those and other reasons, the present construction of the statutory business judgment rule in s 180(2) has been heavily criticised for failing to ensure the rebuttable presumption in favour of directors that appears to have been envisaged by the legislature.[78] There is, too, understandable concern about the limited interpretation which has been given to the statutory conception of 'business judgment', given that the greater part of board activity is characterised by what Professor Manning has described as the 'continuing flow of supervisory process, punctuated only occasionally by a discrete transactional decision'.[79]

Consequently, while there is now 'a core, irreducible requirement of involvement in the management of the company',[80] the business judgment rule or defence remains an uncertain area of those statutory changes. In view of the more beneficent approach to directorial business judgments that obtains in the United Kingdom, in South Africa, and in the jurisprudence of the United States, it is perhaps open to ask whether the time has come to reassess the situation in Australia.[81]

In her book *Solvency in Financial Accounting*, Julie Margaret posited of *ASIC v Rich* that the process and its outcome were such as to suggest that something might be seriously wrong with the system.[82] The case took eight years, generated in excess of 16,000 pages of transcript, occupied three years' of hearings and two further years to produce the 3,000-page judgment, cost $40 million, and the result was the dismissal of the claim. As Margaret also observed, however, as indeed Austin J ultimately found, such cases are not always the result of directors deceiving others for their own gain, or, it might be added, doing less than is required of them. Often, much of the financial suffering that results

[78] Legg and Jordan (n 40) 416–18; Bainbridge and Connor (n 65) 425–6.

[79] Bayless Manning, 'The Business Judgment Rule and the Director's Duty of Attention: Time for Reality' (1984) 39 *Business Lawyer* 1477, 1494.

[80] *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113, 140 [108].

[81] See Tony D'Aloisio, 'An Update on ASIC's Priorities for 2007/2008 and How these Relate to AICD Members' (Paper, Australian Institute of Company Directors Luncheon, Sydney, 26 November 2007) 7; Legg and Jordan (n 40) 407–8. Cf Young (n 66) 218–19.

[82] Julie E Margaret, *Solvency in Financial Accounting* (Routledge, 2012) 100–1.

from corporate failure is due to the economic system, national and international conditions, and the limitations of generally accepted accounting standards. Business can be inherently risky. Therefore, should not the statutory business judgment rule be more attuned to those considerations?

Sir Owen Dixon famously wrote of what a court might do, consistently with traditional methods of judicial reasoning, when it has the feeling that there is something wrong with the conclusion dictated by a hitherto understanding of the law.[83] Speaking in the context of the rule in *Foakes v Beer*,[84] Sir Owen posited that it would be in complete accordance with orthodox judicial method for the court to re-examine the essentials of the formation of a simple contract at common law and the elements inherent in the theory of estoppel with a view to ascertaining whether in truth, upon a correct analysis of the situation, the objectionable conclusion that a creditor cannot bind himself to take less than the whole of the debt inevitably flowed from the logical application of principle properly understood.[85] Granted that is a long way from directors' duties. But might it be that an analogous approach could be invoked if the correct construction of s 180(2) were ever to be put in issue in a court of appeal? Of course, the latter is a question of statutory construction, which is not entirely the same as the correct approach to the ascertainment of what Sir Owen described as true legal principle. But to go back some 70 years to another area of law, is it possible that then-Justice Dixon's approach to statutory construction in *Brennan v The King* offers an insight into how something similar could be done in this context?[86]

Either way it is doubtful that it will be decided within the near future. It is now eight years since *ASIC v Rich* was decided and no one has yet challenged the construction of s 180(2) endorsed in that decision in an appellate court. Further, apart from some recent suggestions of reviving a proposal to enact a safe harbour provision allowing for reasonable risk taking in insolvent trading,[87] there has been no indication from a government of either persuasion of an inclination to amend s 180(2) to bring it into line with what was originally said to be intended. So far as appears, no one suggests that the considerations which led CLERP to favour the introduction of the statutory business judgment rule in 1997 are no longer valid. But the realpolitik of the situation appears to be that the will to grapple with them has gone.

83 Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468.

84 (1884) 9 App Cas 605.

85 Dixon (n 83) 473.

86 (1936) 55 CLR 253, 263.

87 Joanna Mather, 'Insolvency Safe Harbour for "Diligent" Directors', *The Australia Financial Review* (Sydney, 28 March 2017) 6.

VIII Duties of Union Officers

A *Historical Development*

That leads by way of contrast to the duties of union officers and how they compare with modern directorial duties. Superficially, the duties of directors and union officers might now be thought of as relatively similar and yet, in some fundamental respects, they remain significantly different.

It has been recognised for a long time that union officers in Australia, like company directors, are subject to fiduciary duties.[88] In 1955, the Commonwealth Court of Conciliation and Arbitration in *Carling v Platt* held that a union officer bore a fiduciary relationship to the union because

> at all relevant times and in all relevant circumstances [the officer] was far more than an ordinary servant or agent. He was a member of the inner council of his organization. He occupied the highest position of trust. Not only was he Secretary-Treasurer he was also a member of the Finance Committee and a member of the Committee of Management. To all intents and purposes therefore he was in a position similar to that occupied by a director of a company and beyond all doubt stood in the necessary relationship.[89]

Another case often cited as establishing the fiduciary position of union officials is the 1977 decision in *Allen v Townsend*, in which Evatt and Northrop JJ held that committee members of a union organisation owe a fiduciary duty to members because committee members responsible for managing union organisations are 'to be compared with directors of incorporated bodies', and, '[s]ubject to necessary adaptations, similar principles of law should apply to regulate the exercise of powers' by union officers.[90]

Those principles were later applied by Gray J in *Scott v Jess*, a case concerning the use of union funds to create publications adverse to some of the persons running for office in union elections.[91] It was there held that a union officer must exercise powers bona fide and not for an extraneous purpose. Later again, the Full Court of the Federal Court in *Ludwig v Harris* expanded upon the duty, holding that it requires that officers act 'for purposes honestly and reasonably

[88] See generally Michael Christie, 'Legal Duties and Liabilities of Federal Union Officials' (1986) 15 *Melbourne University Law Review* 591.

[89] (1953) 80 CAR 283, 292–3 (Dunphy J); see also at 306–7 (McIntyre J).

[90] (1977) 31 FLR 431, 483–4.

[91] (1984) 3 FCR 263, 287–8 (Gray J); see also at 269, 272 (Evatt and Northrop JJ).

believed by the [officers] to be in the interests of the members of the union or association as a whole'.[92]

In 1993, French J said in *Robertson v State Public Services Federation* that office holders in union organisations 'hold a position of trust which involves the maintenance and advancement of the interests of union members' and that '[t]here are obviously strong fiduciary elements involved in the discharge of the duties of such office'.[93]

B *Development of Statutory Duties*

Like the duties of company directors, however, the general law duties of union officers have been progressively augmented by statutory provisions. One of the earliest in the federal sphere was s 140 of the *Conciliation and Arbitration Act 1904* (Cth), which provided that the rules of union organisations could not 'impose upon applicants for membership, or members, of the organization, conditions, obligations or restrictions which … [were] oppressive, unreasonable or unjust'.[94] Under s 141 of the same Act, a member of an organisation could apply to the court for orders requiring the observance of the rules of the organisation. Similar provisions were included again in the *Industrial Relations Act 1988* (Cth).[95] Statutory provisions imposing positive duties upon union officers in respect of the exercise of their powers (as opposed to financial or auditing requirements) were first introduced into the *Workplace Relations Act 1996* (Cth) in 2002.[96]

C *Current Position*

Chapter 9 of the *Fair Work (Registered Organisations) Act 2009* (Cth) ('*Registered Organisations Act*') now imposes obligations on employees and 'officers' of registered organisations, including, relevantly, associations of employees, in respect of the financial management of the organisation.[97]

Like s 180(1) of the *Corporations Act*, s 285(1) of the *Registered Organisations Act* imposes an obligation on a union officer to exercise powers and discharge duties 'with the degree of care and diligence that a reasonable person

[92] (1991) 30 FCR 377, 379 (Beaumont J, Black CJ agreeing).

[93] (1993) 49 IR 356, 363.

[94] See generally *Williams v Hursey* (1959) 103 CLR 30.

[95] *Industrial Relations Act 1988* (Cth) ss 196, 208, 209.

[96] *Workplace Relations (Registration and Accountability of Organisations) Act 2002* (Cth).

[97] *Fair Work (Registered Organisations) Act 2009* (Cth) s 283 ('*Registered Organisations Act*').

would exercise' if in the position of the officer. Like s 180(2), s 285(2) provides a form of business judgment rule: there will be no breach of s 285(1) if the officer makes the judgment in good faith for a proper purpose, does not have a material personal interest in the judgment, is informed as to the subject matter of the judgment to an extent that he or she reasonably believes to be appropriate, and rationally believes that the judgment is in the best interests of the organisation.

But there are substantial differences between the two regimes. To begin with, the maximum civil penalty for a company director's contravention of a civil penalty provision is $200,000,[98] and it has been a strict liability criminal offence for a company to pay insurance premiums to indemnify directors from penalties for wilful breaches.[99] By contrast, until November 2016, the maximum civil penalty for contravention by a union officer of a civil penalty provision under the *Registered Organisations Act* was only $10,800,[100] and, even now, it is only $21,000,[101] or $252,000 for serious contraventions, meaning where it is established that the contravention materially prejudiced the interests of the organisation or the organisation's ability to pay its creditors, or, tautologically, is otherwise serious.

Secondly, whereas ss 199A–199C of the *Corporations Act* prohibit a company from exempting or indemnifying a director from civil penalties for breach of duty, any penalties imposed on a union officer may be passed on to the union and borne by the membership even though the action of the officer that resulted in the penalty was a breach of an obligation owed to the membership. Company directors might wish that they enjoyed similar protection, and there are some credible arguments in support of such an approach. It has been suggested that to permit it would better ensure the existence of insurance cover to satisfy shareholder claims.[102] But Parliament has determined that directors should not be indemnified by their companies. Why then should not union officers be treated likewise?

[98] *Corporations Act 2001* (Cth) ss 1317E, 1317G.

[99] Ibid s 199B.

[100] *Registered Organisations Act* (n 97) s 306(1)(b).

[101] The *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) increased the maximum penalty under the *Registered Organisations Act* from 60 penalty units to 100 penalty units. Effective from 1 July 2017, the *Crimes Amendment (Penalty Unit) Act 2017* (Cth) increased penalty units from $180 to $210.

[102] See generally Ian M Ramsay, 'Liability of Directors for Breach of Duty and the Scope of Indemnification and Insurance' (1987) 5 *Company and Securities Law Journal* 129; Shaun Ansell, 'Directors' and Officers' Liability Insurance: Recent Reforms and Developments in Australia and New Zealand' (1995) 23 *Australian Business Law Review* 164.

A possible answer is that, until relatively recently, it was thought that a judge of the Federal Court had power in an appropriate case to make an order restraining a union from paying a penalty imposed on an officer of the union. In late 2016, the Full Court of the Federal Court held that that was not the case.[103] Special leave to appeal to the High Court against that decision has been granted. But as things stand, there is no limit to the indemnification of union officers in respect of civil penalties.

A third difference between the two regimes is that it has recently been suggested that, compared to the multi-million dollar maximum penalties which apply in the United States,[104] the maximum penalties that may be imposed on directors under the *Corporations Act* are seriously inadequate and should be very substantially increased. In principle, it might be thought that the same should apply to union officers. But as the current penalties in the *Registered Organisations Act* were set only late in 2016, it might be assumed that no such increases are contemplated.

Interestingly, the principal arguments put before the Royal Commission into Trade Union Governance and Corruption against increasing the maximum penalties applicable to union officers to similar levels to those applicable to company directors cited supposed differences between the two positions. In essence it was said that corporations are organised for profit, and the maximum penalty which applies to directors applies to the whole range of corporations including multi-billion dollar undertakings.[105] By contrast, it was contended, unions are comparatively small, simple organisations with non-commercial purposes, many of which are conducted by volunteers who might be deterred from involvement if faced with the prospect of such large penalties.

Yet, as will be appreciated, that supposed distinction will commonly not ring true. Many companies are small, a substantial number of them are either not-for-profit or charitable, many are conducted by volunteers, and there has been no noticeable degree of reticence on their part in accepting office. Furthermore, as Commissioner Heydon noticed, in some states, officers of unions registered under state law were subject under state law to significant civil penalties, and to

[103] *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* (2016) 247 FCR 339.

[104] See Adele Ferguson, 'ASIC Needs More Power and Attitude', *The Australian Financial Review* (Sydney, 27 March 2017) 40.

[105] *Royal Commission into Trade Union Governance and Corruption* (Final Report, December 2015) vol 5, ch 3, [84]–[93].

criminal penalties, with no noticeable detrimental effects upon the willingness of persons to act in those organisations.[106]

A fourth difference is that, under s 184 of the *Corporations Act*, a director's dishonest or reckless failure to exercise his or her powers and discharge his or her duties in good faith in the interests of the corporation is a criminal offence punishable by up to five years' imprisonment and a fine of up to 2,000 penalty units, which, as of today, means $420,000.[107] Arguably, that is a relatively modest maximum penalty for a dishonest or reckless breach of a directorial duty compared to, say, the maximum penalty of up to 10 years' imprisonment to which an unemployed person might be subject for dishonestly obtaining Centrelink payments,[108] or the maximum penalty of up to 10 years' imprisonment to which a Victorian adolescent might be liable for criminally damaging a railway carriage with a spray can.[109] But even so, few would doubt that the criminal penalties applicable to dishonest or reckless breaches of directorial duties provide a powerful deterrent against such offending. Between 2001 and 2009, ASIC initiated 85 criminal prosecutions for contraventions of s 184 of the *Corporations Act*, suggesting that the criminal liability provisions are an important part of the machinery seeking to address and prevent corporate misfeasance, particularly in the context of corporate insolvency.[110] It was not however until the amendments made to the *Registered Organisations Act* in late 2016 that union officials were subjected to similar criminal penalty provisions and it remains to be seen whether those provisions will be enforced with the same vigour or success with which ASIC has pursued directors.[111]

Fifthly, the obligations of directors under the *Corporations Act* are expressed generally. By contrast, the obligations of union officers under the *Registered Organisations Act* are expressly limited by s 283 to the exercise of powers and duties that relate to the financial management of the union. And although union officers are also subject to common law and equitable duties that are not so

[106] Ibid vol 5, ch 3, [103].

[107] *Corporations Act 2001* (Cth) sch 3.

[108] *Criminal Code Act 1995* (Cth) s 134.2.

[109] *Crimes Act 1958* (Vic) s 197(1).

[110] See *Cooney Report* (n 40) 187–90 [13.1]–[13.12]; Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908, 921–2. See also Helen Anderson et al, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement* (Report, February 2017).

[111] See Joel Silver, '"For the Union Makes Us … Rich?" Preventing Trade Union Corruption in Law after the Health Services Union Saga' (2013) 18 *Deakin Law Review* 127.

limited,[112] the latter cannot be enforced by the General Manager of the Fair Work Commission or the Registered Organisations Commissioner under the legislative scheme.[113] The result is to leave the union to enforce breaches of broader common law and equitable obligations and, since the union may be under the control of the persons against whom such proceedings are to be brought, the likelihood of enforcement is limited.

Finally by way of comparison, and perhaps most significantly, whereas a director's statutory duty under s 181(1) of the *Corporations Act* is to act in good faith in what is objectively the best interests of the company as a whole, s 286 of the *Registered Organisations Act* limits the obligation of a union officer to acting in good faith in what the officer subjectively believes to be the best interests of the organisation.

Some commentators have argued that that should also be the limit of a non-executive company director's obligations,[114] and it is notable that that is what was originally proposed as part of s 181(1) of the *Corporations Act*. It was removed on an opposition motion at the Senate Committee stage,[115] and, in November 2000, the Companies and Securities Advisory Committee reported that a subjective limitation should not be revived because, as s 181(1) stands, it is consistent with the common law test of acting in the best interests of the company.[116] Evidently, there is force in that too. As Professor Ford sometimes observed, the danger of a subjective test as identified by Bowen LJ more than 130 years ago in *Hutton v West Cork Railway Co* is that 'you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational'.[117] But, if so, why then is a subjective standard of care a sufficient standard of care for union officers?

The principal argument put against subjecting union officers to an objective standard of skill and care is that unions have a range of different and competing interests to represent and thus that it would not be practicable to determine

112 *Registered Organisations Act* (n 97) s 291.

113 See ibid ss 305, 310.

114 CA Riley, 'The Company Director's Duty of Care and Skill: The Case for an Onerous but Subjective Standard' (1999) 62 *Modern Law Review* 697; Jean J du Plessis, 'Open Sea or Safe Harbour: American, Australian and South African Business Judgment Rules Compared (Part 1)' (2011) 32 *Company Lawyer* 347, 350; du Plessis, 'Open Sea or Safe Harbour (Part 2)' (n 77) 380.

115 Commonwealth, *Parliamentary Debates*, Senate, 13 October 1999, 9622–6.

116 John Kluver, Companies and Securities Advisory Committee, *Sections 181 and 189 of the Corporations Law and Directors of Corporate Group Companies* (Report, 8 November 2000) 2.

117 (1883) 23 Ch D 654, 671.

what is objectively in the best interests of the union as a whole. Implicitly, however, that underestimates the complexities involved in ascertaining the best interests of a corporation, not least in cases where communitarian considerations such as those listed in s 172 of the *Companies Act 2006* (UK) are to be weighed in the balance. And in any event, according to general law conceptions of the duties of a union officer, a union officer's belief as to the best interests of the union must be at least reasonable.[118] The problem is that, without the powers of enforcement provided by the *Registered Organisations Act*, the general law obligations of union officers are unlikely to be enforced.

IX Duties of Public Officials

That leads finally, and briefly, to the fiduciary duties of public officials and the consequences of their breach. As Professor Finn has written, beyond the company or the trust, the most fundamental of fiduciary relationships is that which subsists between the state, its agencies and the people.[119] It is also a trust of long standing. Even by the mid-17th century, its existence was an established mode of thinking reflecting enlightenment conceptions that public power is fiduciary and that those who exercise it do so as trustees for the people.[120] During the late 18th and early 19th centuries there developed a body of criminal and civil law applying to governmental officials regulating the uses and exercise of their trusts.

Aspects of that body of law were considered by the High Court in the early 20th century in *Wilkinson v Osborne*,[121] *Horne v Barber*[122] and *R v Boston*.[123] More recently, in the proceedings in the New South Wales Supreme Court against Mr Obeid for the common law offence of misconduct in public office, Beech-Jones J, whose ruling was upheld by the Court of Criminal Appeal,[124] concluded on the basis of earlier authorities that a parliamentarian is under an obligation not to use his or her position to promote his or her 'own pecuniary

118 *Ludwig* (n 92) 379.

119 Paul Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995) 131. See also Stephen Gageler, 'The Equitable Duty of Loyalty in Public Office' in Tim Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016) 126.

120 Finn (n 119) 132–3.

121 (1915) 21 CLR 89, 98–9.

122 (1920) 27 CLR 494, 499–501.

123 (1923) 33 CLR 386, 393, 402–3.

124 *Obeid v The Queen* (2015) 91 NSWLR 226, 254–6 [143]–[150].

interests (or those of their families or entities close to them) in circumstances in which there is a conflict, or a real or substantial possibility of a conflict between those interests and their duty to the public'.[125] In some jurisdictions, that common law offence has been replaced with statutory offences.[126]

In the federal sphere, the need for members of Parliament to avoid conflict between their public duty and pecuniary interests finds expression in s 44(v) of the *Constitution*, which was recently considered by the High Court in *Re Day [No 2]*.[127] What is not as clear, however, is whether that trust or duty effectively goes any further than requiring the parliamentarian to avoid conflicts of duty with pecuniary interest.

In *Australian Capital Television v Commonwealth*, Mason CJ observed that, under the Australian constitutional system of representative government, parliamentarians exercise sovereign power on behalf of the people; of necessity, they are accountable to the people for what they do; and they have a responsibility to take account of the views of the people on whose behalf they act.[128] His Honour said nothing however about the means of enforcement of that obligation and there is little reason to suppose that he considered that it could be enforced otherwise than through the ballot box.

As Isaacs and Rich JJ observed in *Boston*, when a man becomes a member of Parliament, he becomes a public officer in the very real sense that his duties include watching the conduct of the executive on behalf of the general community and, if needs be, calling it to account.[129] But as Isaacs and Rich JJ also observed, it is a trust only in a metaphorical sense. The law is clear that it will not allow a member of Parliament to be put in a position where his own personal interest might lead him to act prejudicially to the public interest, by weakening his sense of obligation of due watchfulness, criticism and censure of the executive. That would run counter to what Rich J described in *Horne v Barber* as 'the obligations and the responsibility of the trust towards the public implied by the position of representatives of the people'.[130] But, apart from liability for a common law offence of misconduct in public office, or possibly for damages for misfeasance in public office,[131] it might be thought implicit in these decisions

125 *R v Obeid [No 2]* [2015] NSWSC 1380, [75].

126 See, eg, *Criminal Code Act 1995* (Cth) s 142.2. See also Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 17.

127 (2017) 343 ALR 181.

128 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138.

129 *Boston* (n 123) 402–3.

130 *Horne* (n 122) 502.

131 *Northern Territory v Mengel* (1995) 185 CLR 307. See also *Roncarelli v Duplessis* [1959] SCR 121; Aronson (n 126).

that the only sanction for a parliamentarian's breach of duty is the risk of his or her being voted out of office. And since, by definition, a duty is not a legal duty unless it is legally enforceable, that suggests that the scope of a parliamentarian's fiduciary duty is limited, although its exact parameters remain to be seen. In effect, a parliamentarian's duty is subject to the most beneficent of business judgment rules.

It is open to ask why that is so. After all, if a company director and, to a lesser extent, a union officer, are legally bound to act bona fide in the best interests of the entity in which they hold office, why should not a parliamentarian who may hold the fate of the nation in his or her hands be bound to do at least as much? Misfeasance in public office requires proof that an officer acted knowingly in excess of power and at least with reckless indifference as to the risk of harm.[132] Should not the law recognise that a parliamentarian's 'trust' gives rise to a legally enforceable obligation at least to act bona fide in what the parliamentarian honestly believes to be the best interests of the electorate, just as a company director and a union officer are bound to act bona fide in the interests of the bodies whom they are appointed to represent?

Perhaps the answer is that, practically speaking, such a duty would be unenforceable. A cynic might suppose that a given parliamentarian's refusal to pass legislation of vital importance to the nation is the result of that parliamentarian preferring political advantage over the national interest. But, short of a confession or, perhaps, a trail of questionable political donations, who could prove — how could one prove — that a parliamentarian does not honestly believe that his or her political advantage is in the best interests of the nation? It would be different if, like a director, a parliamentarian's belief were required to be reasonable as well as being honest. Then, the opportunities for alleging breach of duty would surely be boundless. It would be like the increase in the scope of advocates' liability that is sure to follow the recent decision of the High Court concerning advocates' immunity in *Attwells v Jackson Lalic Lawyers*.[133] But in that event, where would lie the end of litigation?

Of course, nothing is forever. Perhaps, the day might come when the law is prepared to recognise that parliamentarians, like directors, are subject to a legally binding duty to act with reasonable skill and care. But I venture to think that, if that ever were to occur, one could not get odds on statutory intervention to reverse it.

132 *Mengel* (n 131) 357 (Brennan J); *Sanders v Snell* (1998) 196 CLR 329, 346–7 [42] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153–4 [11] (Gummow, Hayne, Heydon and Crennan JJ).

133 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1.

X Conclusion

What conclusions are then to be drawn from these few observations? I suggest four. First and foremost, one cannot any longer say, as Professor Ford wrote in the first edition of *Principles of Company Law*, that directors' duties are *not* very demanding. By reason of legislative changes that have been made to directors' duties over the last 40 years, they are demanding. And, perhaps, as Professor Ford might have done if he were still here, it is open to question whether they have become so demanding compared to other jurisdictions, and to those in similar fiduciary positions, as to require some downward revision.

Second, the statutory business judgment rule provided for in s 180(2) of the *Corporations Act*, at least as it has been interpreted, has signally failed to achieve the objective of its propounders of establishing a clear presumption in favour of the rectitude of a director's business judgments where the director has acted on an informed basis, in good faith, and in the honest belief that his or her decision is in the best interests of the company. How much different would have been the ways in which directors' duties developed if s 180(2) had been construed as achieving that objective? Presumably, directors' duties in this country would now be closer to the position in the United Kingdom or possibly even to that which obtains in South Africa. But, for the time being at least, the possibility of change on that front does not appear to be likely.

Third, the statutory duties of union officers have followed a delayed, although ultimately similar, path of historical development to duties of company directors: both owe their origins to an imperfect analogy to the position of trustees and are now the subject of increasing statutory intervention as those obligations have come to be understood as a matter of public concern. Even so, there remain substantial differences between the two regimes and it is open to ask why they should not be more closely aligned.

Finally, while it is not inconceivable that there might one day evolve a parliamentarian's duty to act with reasonable skill and care like the duty of a director, it might be supposed that, unlike the duties of directors, it will not be legislative intervention that precipitates that change.