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Directors' Duties, Corporate Culture and Corporate Governance

Professor Dimity Kingsford Smith

Australian Director's Duties: Are They Public Duties?

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I INTRODUCTION

In writing about how moral revolutions happen the philosopher Kwame Anthony Appiah observes that 'at the end of [a] moral revolution, as at the end of a scientific revolution, things look new. Looking back, even over a single generation, people ask, 'What were they thinking? How did we do *that* for all those years?'[1]

Rather than a revolution, my argument here is there is an evolution underway in the way we think about director's duties. The law now recognises in various ways, that interests greater than those of the commercial entity of a company, may be (and sometimes must be) considered and advanced by boards. This is instead of directors' decisions turning on exclusively private corporate interests, primarily those of the shareholders. Indeed, the law has recognised the public content of director's duties for a long time – and the recognition has deepened in recent judicial decisions.

In the community, in organised civil society and in some parts of the business world, it is expected that directors' may and even should take wider interests into account in the management of corporations: this expectation continues as a term of reference and prominent theme of the Royal Commission into Banking, Financial Services and Superannuation. It is also evident in aspirational and quasi-legal ideas such as the 'social license to operate'[2] and in the many codes, indices and transnational principles that constitute ideas and practices of corporate social responsibility.[3] The moral evolution can also be observed in a recent statement by Catherine Livingstone, the Chair of the board of the Commonwealth Bank of Australia. Acknowledging that there were too many instances of CBA's interests being put ahead of customers, she said: 'too often, a focus on profitability disadvantaged

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[1] Kwame Anthony Appiah, *The Honor Code: How Moral Revolutions Happen* (W. W. Norton & Company, 2010) xi-xii.

[2] M Carney 'Building Real Markets for the Good of the People' (Bank of England Governor's Mansion House Speech, June 2015) at: https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/building-real-markets-for-the-good-of-the-people.pdf ; J O'Brien et al 'Professional Standards and the Social License to Operate' *Law and Financial Markets Review*, 9:4, 283-292; ASX, *Review of the Corporate Governance Council's Principles and Recommendations* (Public Consultation, 2 May 2018) at: https://www.asx.com.au/documents/asx-compliance/consultation-paper-cgc-4th-edition.pdf

[3] T. Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in D. McBarnet, A. Voiculescu, and T. Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007: Cambridge UP) pp 529-564.

some of our customers. We agree that this imbalance is not acceptable.'[4] She went on to say that the board's strategy is to become 'a simpler, better bank that delivers balanced and sustainable outcomes for our customers, community, our people and shareholders.'[5] A more traditional approach to board and corporate priority was expressed the year before by the CEO of CBA: 'Number one, we are very focused on doing whatever we can to create long-term value for our investors. And number two is we know that a critical part of doing that is doing whatever we can to provide a predictable, reliable dividend.'[6]

This wider moral evolution is now a legal evolution. Directors are still required to weigh the interests that relate to the private nature of the corporation: but increasingly they must do so by also taking account of wider moral goods, and I would argue moral goods of a 'public 'character. As this area is truly one of evolution, not revolution, many of the instances I hope to enliven this argument with, are well known. My aim is to draw them together in the hope of showing how far towards having a 'public' character, director's duties have already progressed.

The titular question of this paper has done some shape-shifting since I first proposed it. Instead of debating the unarguable existence in Australian law of public elements or aspects of director's duties, here I concentrate on what I hope is a more trenchant question: what does it *mean* to say that director's duties have a 'public' quality? In doing so I concentrate on two core issues. 'What is the nature and effect of the 'public' character in director's duties?' and 'To whom do directors owe their duties with this 'public' character?'

The argument proceeds as follows. After this introduction Part II contains a preliminary and orienting consideration of what might identify 'publicness' in director's duties. This preliminary staging point is not to make redundant the larger question of this paper 'what does it mean to say that Australian director's duties are 'public'? Rather it is to provide underlying values as a 'working hypothesis',[7] or sign-posts before we embark, indicating what might show a legal evolution towards 'publicness' of Australian director's duties. As most readers are more familiar with the traditional private

[4] James Frost, 'CBA, Westpac admit pursuit of profits led to misconduct', *Australian Financial Review* (online), 7 November 2018 < https://www.afr.com/business/banking-and-finance/financial-services/cba-westpac-admit-pursuit-of-profits-led-to-misconduct-20181107-h17ltl>. From remarks delivered by the Chair at the CBA Annual General Meeting, 7 November 2018.
[5] Catherine Livingstone, *2018 Commonwealth Bank Annual General Meeting: Chairman's Address*, 7 November 2018 <https://www.commbank.com.au/guidance/newsroom/cba-agm-chairman-speech-201811.html>.
[6] Ian Narev, *Speech and Q&A*, Morningstar Individual Investor Conference Sydney, 6 October 2017 https://www.commbank.com.au/guidance/newsroom/Ian-narev-morningstar-speech-201710.html>.
[7] Chief Justice Allsop, Federal Court of Australia, *Values in Public Law*, The James Spigelman Oration, 27 October 2015 < http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20151027>.

conception of these duties, I do not dwell on that side of the hybrid character, except where comparison is useful for distilling the argument about 'publicness'.

Part III concentrates on three aspects in which public elements have been introduced to the law of Australian director's duties. The first is the presence of state prosecutors and more recently a publicly funded regulator as a plaintiff in the enforcement of director's duties. This is accompanied by the power to apply for sanctions with distinctly public purposes – to protect the public, to penalise directors found to have breached their duties and to deter those tempted to follow suit.

The second aspect in which I argue that public elements of director's duties can be observed is the identification of the public harm and responding purposes which animate the statutory duty of care and associated enforcement arrangements. Third, the text and context of statutory director's duties also reveal distinctive public aspects. While public elements are to be found in the text and enforcement arrangements of all the statutory duties of directors, I have concentrated the argument here on the statutory duty of care and diligence in section 180 of the Corporations Act. This is because of its centrality to company management, the number of recently decided cases, and because the recent decision in *Australian Securities and Investments Commission v Cassimatis* discusses the question of director's duties as 'public' duties, with judicial candour and erudition in equal measure.[8]

Part IV considers the key-stone issue of to whom the statutory duty of care is owed. If section 180 is truly a public duty, owed by directors to no-one in particular or to all the world (and this remains controversial), it is important to understand how and why that the numerous factors at play in that development. and understandable objections to extension of such a liability. Part V draws conclusions from the overall discussion.

II WHAT CONCEPTIONS OF 'PUBLICNESS' PROVIDE A USEFUL WORKING HYPOTHESIS?[9]

There is a variety of responses to the very idea that it is useful to reason about the categories of 'public' and 'private' in relation to law. Karl Llewellyn and the realists attacked the distinction as legally unsophisticated and to draw attention 'to the widespread perception that so-called private institutions were acquiring the coercive power that had

[8] *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)* [2016] FCA 1023.

[9] I am grateful to my CLMR and UNSW colleague Prof Pamela Hanrahan in whose paper 'Companies, Corporate Officers and Public Interests: Are We at a Legal Tipping Point?' (12 September 2018, on file with author) I was alerted to the publication by Donald C. Langevoort, 'Cultures of Compliance' (2017) 54 *American Criminal Law Review* 933 at 963 who suggests the idea of signs or 'goals' of publicness.

previously been reserved to governments.'[10] Verkuil has said that the distinction 'has been around forever, but it continues to fail as an organising principle.'[11] Stone writing about corporations is more realistic about the unstable nature of the distinction, and sees it as a barometer of how 'societal choices' about rules change the autonomy of decision-makers over time.[12]

My argument is that the lines between public and private, always very changeable and subject to 'back and forth'[13] have created hybrid director's duties, and that it is important to understand the 'public' side as well as we understand the private. The distinction between public and private is open-textured[14] but the general trend in processes and sometimes in substantive standards is 'for traditionally private bodies…even business corporations – to bear the obligations once associated almost exclusively with governments.'[15]

While 'public' values manifest differently, one author suggests there are at least four senses in which the distinction between public and private might be understood,[16] the overall effect is to diminish an entity's internal decision-making independence and to narrow 'the space in which an actor can be arbitrary, capricious and prejudiced.'[17] Instead of the non-interventionist approach explicit in the internal management rule of companies, individual directors and boards find themselves required to consider wider interests or community standards than those recognised by the traditional private duties of boards. Critics of this imperialism of the public sphere, such as Hilmer, say that rather than encouraging 'performance' this imposes 'conformance', stifling to management decision-making and

[10] Morton J. Horwitz, 'History of the Public-Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423, 1428; Stokes proposes that: "*if private property is to be legitimate within the framework of liberal society, it is also necessary to show that there are constraints which prevent it from becoming a source of power which threatens the liberty of the individuals or rivals the power of the state*." in Mary Stokes, 'Company Law and Legal Theory' in W. Twining (ed), Legal Theory and Common Law (Blackwell, Oxford, 1986) 155.

[11] Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatisation of Government Functions Threatens Democracy and What We Can About It* (Cambridge University Press, 2007) 78.

[12] Christopher D. Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?' (1980) 130 *University of Pennsylvania Law Review* 1441, 1455.

[13] Ibid 1508. For a longer view on the changing balance between public and private see Morton J. Horwitz, 'History of the Public-Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

[14] H.L.A Hart, The Concept of Law (Oxford University Press, 3rd ed, 2012).

[15] Stone, above n 12, 1507.

[16] Randy E. Barnett, 'Four Senses of Public Law-Private Law Distinction' (1987) 4 *Harvard Journal of Law & Public Policy* 267.

[17] Stone, above n 12, 1439.

damaging to companies.[18] Like Karl Llewellyn and the realists, those who support a greater influence of public values see those as a way to temper power[19] and protect the interests of those whom private power effects.[20]

So, what might be the sign-posts of 'publicness'? When government steps into a traditionally private law domain, it often concentrates on increasing accountability and responsibility of decision-makers, commonly through changes to enforcement. A full-blooded response may not stop at reformed or extended standing rights for private parties, or even the creation of offences and powers for prosecutions by the state. Rather, it may go further and include the creation, empowerment and funding of a regulator to supervise, detect, investigate and bring action against deficient decision-makers. So, a first sign or value of the conception of 'publicness' is usually an *increase in accountability and responsibility* of decision-makers.

A second sign of publicness is a greater opportunity for those affected by the resolutions or determinations of decision-makers, to participate in or have their interests considered in the process of decision-making. This may be through greater disclosure to them of the facts, policies or arguments going into the decision-making. It may be through an opportunity to put forward their interest, their circumstances and the consequences for them of the options before the decision-maker. 'Publicness' may be conceived of as *taking account of the interests of others affected by a decision* and may be captured in ideas of fairness,[21] or of greater 'voice' in the process of decision-making.[22] An example of this is the requirement of directors to 'consider the interest' of creditors in board decisions in certain circumstances.[23]

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[18]. F Hilmer *Strictly Boardroom*, (Information Australia, in association with The Sydney Institute, 1998) *passim*.
[19] M Krygier *Tempering Power*, *in* CONSTITUTIONALISM AND THE RULE OF LAW 34 (Maurice Adams et al. eds., 2017).
[20] M Stokes above note 10.
[21] D Kingsford Smith, 'Can There be a Fair Share? Fairness Regulation and Financial Markets' in J. Sarra (ed), Explorations of Fairness, Peter Wall Institute for Advanced Studies (Toronto Canada, Carswell Thompson, Feb 2013).
[22]Albert O. Hirschman, *Exit, Voice or Loyalty: Responses to Decline in Firms, Organisations and States* (Harvard University Press, 1972); Langevoort, above note 9, 963.
[23] *Bell Group Ltd (in liq) v Westpac Banking Corporation* [No's 9 and 10] (2009) 39 WAR 1; *Westpac Banking Corporation v Bell Group Ltd (in liq)* [No 3] (2012) 44 WAR 1; the desirability of directors 'considering the interests of creditors' is not agreed by everyone: The Hon Justice KM Hayne AC, 'Director's Duties and Companies Creditors' (2014) 38 *Melbourne University Law Review* 795, *passim.*

Wider purposes and scope of the benefit to be weighed in the exercise of power by a decision-maker is a third marker of 'publicness'. This is the area where we encounter the idea of public harm and parallel public duty. If we consider the careless management of companies to be a public harm, then as with section 180, the legislature may impose a public duty to mitigate the occurrence of that harm. In this way regulation adopts wider purposes and distributes to a wider group of beneficiaries, the goods of publicly mandated processes and standards of conduct. With a public duty the fact 'that the regulated conduct may harm particular individuals is of secondary, if any, importance'[24] and private loss and damage to an individual or entity need not be shown to establish liability. Of course, the same facts which enliven a breach of a public duty may also establish a private right of action, if personal loss and damage to a plaintiff in an appropriate relation, has occurred. This neatly illustrates the public and private hybridity that I am arguing now characterises Australian director's duties.

There are many emblems of the public domain, but a fourth and the last considered here, is *more demanding requirements of reasonableness and rationality*. One of the changes to section 180, particularly in the CLERP reforms enacted in 1999, was from a subjective standard of director's conduct, to one to be judged objectively taking account of accepted practice in the kind of company and responsibilities of their position.[25] Rationality in director decision-making is subjected to procedural requirements in decision-making. These involve appropriate information-seeking and other steps to develop a belief in the interests of the company, that only a reasonable person in their position could hold about the subject matter of their judgment or decision.[26] This greater procedural rationality, as Whincop and

[24] Barnett, above n 16, 268.

[25] "*The draft provisions have been rewritten to clarify that whether the officer has breached the standard of care and diligence is determined both by regard to the corporation's circumstances and the officer's position and responsibilities within the corporation (proposed subsection 180(1))*." in Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth), [6.25].

[26] "*The essential difference between s 180(1) and former s 232(4) is that the new section removes the reference to "in a like position in a corporation", and inserts a reference to "the office held by" and a reference to "the same responsibilities" as the defendant director*."as per Austin J in *Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 341, 351[44]; See also *Daniels v Anderson* (1995) 37 NSWLR 438, 505 (Clarke Ja and Sheller JA) and *Australian Securities and Investments Commission v Healey* (2011) 278 ALR 618, 625-626 (Middleton J) for discussion on the need to be informed about finances of the company and the general environment the company is in.

Keyes argued 20 years ago, 'draws implicitly from public law norms and concepts.'[27] In the instances just mentioned it uses the procedures of information seeking and developing reasonable grounds for action – rather than the relative freedom of the principles permitting director autonomy in internal management.

Public and private are changeable characterisations of degree on a spectrum with overlapping elements. I use public and private characterisations here for simplicity of argument, though theoretically and empirically it is inappropriate to treat them as on two sides of a dividing line. My argument is that s180 is a hybrid provision, with legal elements both public and private. Practically, circumstances will often dictate which of these elements dominates. It is likely that a small proprietary company used as a passive investment vehicle for family assets, will have fewer triggers for its directors to consider interests external to the company and fewer occasions to consider the public interest. By contrast the directors of a bank, at the centre of the Australian economy, with 50,000 employees and millions of customers, must have regard to a broad range of interests and public-regarding matters and the law expects the decision-making processes of its directors to be both reasonable and rational.

III DIRECTOR'S DUTIES AND THE LEGAL (R)EVOLUTION OF 'PUBLICNESS'.

This paper opened with Anthony Kwame Appiah's observations about moral revolutions. In that discussion Appiah also observed that 'arguments against each of the practices [that changed] were well known and clearly made a good deal' before the moral revolution occurred. 'It wasn't …that people were bowled over by new moral arguments.'[28] With the 'public' nature of director's duties we are talking about a legal evolution, and Appiah's insights about the gradual adoption of change apply in this setting too. It will be clear that 'publicness' in Australian director's duties is not recent and has evolved gradually for over a century.

[27] Michael Whincop and Mary Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and Publicisation of Private Corporate Law' (1997) 25 *Federal Law Review* 51, 55.
[28] Appiah, above n 1, xii.

The Public Nature of Director's Duties Enforcement and Sanctions.

Although this paper asks 'what does it mean to say that director's duties are 'public?', it is clarifying to recall the private duty of skill, care and diligence in its general law analogue.[29] In this long standing and more familiar private duty the director owes their duty to the company. Usually, though infrequently, it is the company which enforces the duty if it is breached. In Australia, in terms of private enforcement, it is not only shareholders who, standing in the shoes of the company might sue directors.[30] Private enforcement which benefits the company, may also be initiated by company officers and ex-officers,[31] liquidators[32] and other persons 'whose interests have been, or are likely to be affected by the conduct' contravening the Corporations Act by the director or officer.[33] Widening of the class of plaintiffs who may enforce the company's rights, beyond the shareholders, modestly increases the prospects for enforcement of director's duties. As with traditional actions by the company for duty breaches by directors, such actions are infrequent and confront numerous obstacles.[34] A final signature requirement of establishing the director's breach of duty is that loss or damage was suffered by the company caused by the breach of duty.

Public Enforcement: Public enforcement of director's duties, including the duty of care began early in Australia. As Langford, Ramsay and Welsh point out, public enforcement of this duty began in with the introduction of an offence in 1958,[35] providing for prosecution of a duty which in its original form had entered the law in 1896.[36] As Justice Nettle observes it was from 1958 'that director's duties were to be thought of and enforced as part of the public law, and not just part of the law of private obligations.'[37] Public prosecution of director's duties, though since 1999 not of the duty of care, continues today. [38]

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[29] Ibid.
[30] *Corporations Act 2001* (Cth) s 236.
[31] Ibid.
[32] Ibid ss 588M, 588P.
[33] Ibid ss 1324, 1325.
[34] Abe Herzberg, 'Why are there so few Insolvent Trading Cases?' (1998) 6 *Australian Insolvency Law Journal* 77.
[35] Rosemary Teele Langford, Ian Ramsay and Michelle Welsh, 'The Origins of the Statutory Duty of Care in Australia' (2015) 37(4) *Sydney Law Review* 489, 490.
[36] Ibid 492 in reference to their discussion of the 1896 provision and the fact that there was no public enforcement mechanism.
[37] Hon Justice Geoffrey Nettle, 'The Changing Position and Duty of Company Directors' (2018) 41(3) *Melbourne University Law Review* 2, 8.
[38] *Corporations Act 2001* (Cth) s 184.

The introduction in 1993 of ASIC powers for civil enforcement of director's duties, [39] including the duty of care,[40] is perhaps the most obvious and unique feature of the evolving 'publicness' of Australian director's duties. In the comparable jurisdictions of the US[41] and the UK[42] while director's duties are prosecuted, there are fewer avenues for civil public enforcement of director's duties and these are generally privately enforced. Empowerment of ASIC as a plaintiff makes available public resources for civil enforcement: this is particularly salient for the statutory duty of care which is at the heart of company management and absent a prosecution power. This has filled in the enforcement spectrum[43] so that enforcing director accountability and responsibility may more consistently and proportionately respond to the culpability of the case,[44] rather than depending on the contingencies of private enforcement. Instead, enforcement is governed by a publicly consulted on and disclosed enforcement policy, which should guide the public-regarding rationality of enforcement decisions. In the ensuing 25 years, public civil enforcement of the statutory duty of care has become an important influence on Australian corporate governance, its directors and officers[45] including of large listed Australian companies, sometimes the entire Board.[46]

Public Sanctions: The public character of civil regulatory enforcement of the statutory duty of care is deepened by the nature and purposes of the civil sanctions that ASIC may apply for. All of the statutory director's duties, including the duty of care, are civil penalty provisions. Civil penalty actions, are so called because breaches of duty are required to be proved according to the rules of civil procedure and evidence, yet may result in sanctions which are personal and share some qualities of criminal sanctions. For example, the making of a declaration of contravention of a civil

[39] *Corporations Act 2001* (Cth) ss 1317E, 1317J(1).
[40] The *Corporate Law Reform Act* 1992 introduced the concept of civil penalties into the Corporations Law. The civil penalty provisions were introduced into the former Corporations Law Pt 9.4B by amendments which took effect in 1993.
[41] Hilary A. Sale and Robert B. Thompson, 'Market Intermediation, Publicness, and Securities Class Actions' (2015) *Georgetown Law Faculty Publications and Other Works* 1526; Marc I. Steinberg, *The Federalization of Corporate Governance* (Oxford University Press, 2018).
[42] Directors Disqualification Act 1986 now the Companies Act 2006 (Strategic Report and Directors' Report) Regulation 2013.
[43] Australian Securities & Investments Commission, *Information Sheet 151 – ASIC's Approach to Enforcement* (September 2013) at 5-6 <http://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf>; Australian Law Reform Commission, *Principled Regulation Report – Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002).
[44] Rather than having to choose between the poles of criminal prosecution (reserved for the most serious transgressions) or negotiated sanctions such as enforceable undertakings (involving no admission of wrong-doing) neither of which may be appropriate.
[45] *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 247 CLR 465.
[46] *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 247 CLR 345; *Australian Securities and Investments Commission (ASIC) v Healey* (2011) 196 FCR 291.

penalty provision,[47] shares aspects of the public denunciation inherent in a finding of guilt in criminal proceedings: it requires specification of the person who contravened the provision and particulars of the conduct which constituted the contravention.[48] Likewise a pecuniary penalty order[49] shares aspects of fines as criminal sanctions. While disqualification[50] consequent upon a finding of breach of a civil penalty provision does not involve a custodial sentence it is considered penal:[51] they share a purpose and effect of protecting the public from further damage by removing the liable director from the management of companies. Further emphasising the public nature of civil penalty enforcement against directors, only ASIC has standing to apply for civil penalty orders consequent upon a declaration of contravention.[52] By contrast, compensation, which may also be obtained against directors on application by a corporation, is a statutory remedy similar in nature to general law damages for breach of duty.[53]

Concentrating on the public aspects to be considered in director disqualification, it has been held that the class of persons whom disqualification is to protect is wider than shareholders, and at the very least includes creditors and potential creditors.[54] Protection for the public also includes consumers and individuals who deal with a company, [55] such as suppliers or employees. It is not to be limited to the commercially unsophisticated, nor limited to public companies.[56] The interest of protecting the public should be paramount and outweighs hardship to the disqualified director or officer.[57] The more serious the contravention (eg involving dishonesty), the longer the term of disqualification and the greater the weight to be given to risk of return to old practices should the period of disqualification be short. In these circumstances it should be remembered that the disqualification is protective for the public, both current and in the future.[58] General deterrence is also relevant, but the protective purpose is distinctly primary.

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[47] *Corporations Act 2001* (Cth) s 1317E(1).
[48] Ibid s1317E(2).
[49] Ibid s 1317G. A sanction originally conceived as a type of 'civil fine' but now characterized as invoking privileges against penalties: *Rich v Australian Securities and Investments Commission (ASIC)* (2004) 220 CLR 129; [2004] HCA 42, [30]-[38].
[50] Given standing at *Corporations Act 2001* (Cth) s 206C(1)(a)(i) and the availability as a civil sanction confirmed at *Corporations Act 2001* (Cth) s 1349.
[51] *Rich v Australian Securities and Investments Commission (ASIC)* (2004) 220 CLR 129, [44] '[e]lements of retribution, deterrence, reformation and mitigation as well as the objective of the protection of the public inhere in the orders and periods of disqualification made under the legislation' (McHugh J).
[52] *Corporations Act 2001* (Cth) s 1317J(1).
[53] Ibid s 1317J(2) and also in the alternative on the traditional general or common law principles and remedies.
[54] *Australian Securities and Investments Commission (ASIC) v Adler* [2002] NSWSC 483, [77]-[85].
[55] Ibid [79].
[56] Ibid [85]-[86].
[57] Ibid [80], [87].
[58] Ibid.

Complex characterisations have been argued to distinguish the 'protective' character of sanctions for breach of director's duties, by comparison with their 'penal' character, [59] a character particularly prominent when prosecuted as offences. As the majority of the Australian High Court observed: 'Just as a law may bear several characters, a proceeding may seek relief which, if granted, would protect the public but would also penalise the person against whom it is granted. That a proceeding may bear several characters does not deny that it bears each of those characters.'[60] In a complementary way the wider insight pursued here is that the regime of Australian statutory director's duties, particularly the standing and enforcement aspects, constitute a scheme of regulation comprising varying levels of public and private.

The public character is most intense where prosecution of a director is the avenue chosen. All the defendant protections and privileges of the criminal law are available and prosecutorial independence is maintained by having proceedings brought not by ASIC but by the Commonwealth Director of Public Prosecutions. At the other end of the scale corporations may bring private actions against directors for compensation for breach of duty, without a declaration of contravention.[61] Here the plaintiff is the company or a liquidator[62] and civil rules of evidence and procedure apply. The plaintiff corporation must prove that it has suffered loss. The 'compensation' has no penal quality: it is not for contumelious disregard of the plaintiff's interests,[63] and is not in the nature of exemplary damages. Neither the measure nor purposes are expressed to be for specific or general deterrence. Although provided for by statute, compensation is a remedy not a sanction, and is restorative in nature.

In between, an ASIC action for a civil penalty order is a hybrid of public purposes and civil procedure and rules of evidence. The debate over whether the sanctions of pecuniary penalty order (civil fine) and director disqualification are penal or protective of the public already mentioned, [64] only serves to further emphasise the overall public purposes of statutory director's duties and the linked civil penalty regime. It is well understood that alongside disqualification or banning for public protection,

[59] *Rich v Australian Securities and Investments Commission (ASIC)* (2004) 220 CLR 129; [2004] HCA 42.
[60] Ibid [35] relying on Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press, 1964) 248-252.
[61] *Corporations Act 2001* (Cth) s 1317H.
[62] The shareholders, current or past officers under the *Corporations Act 2001* (Cth) s 236 or the liquidator of an insolvent company under the *Corporations Act 2001* (Cth) s 588M.
[63] *Ali v Hartley Poynton Limited* [2002] VSC 113, [593]-[630].
[64] *Rich v Australian Securities and Investments Commission (ASIC)* (2004) 220 CLR 129, [35]..

penal purposes are also for the benefit of the public.[65] To the extent that punishment or retribution are effective specific or general deterrents, they too have public protective purposes as does defendant reform. [66] Greater personal accountability and responsibility is sought, than can be achieved by director's duties at general law. Likewise, a wider range of public purposes is pursued, than when compensating corporate loss and damage.

Public Harms, Public Interest and ASIC's Enforcement Discretion.

One of the sign-posts of the public quality of a law or sanction, is that it addresses a public harm or has a wide-spread beneficial public purpose. Because the harm is potentially wide-spread, the corresponding public purpose or public interest served by the law or sanction, may also be wide.

Public Harms and Statutory Purposes: Since its original enactment in 1896 the director's statutory duty of care has addressed a potentially wide public harm being the misuse of the corporate form. Addressing this public harm has become an even clearer purpose with the introduction of civil penalties and accompanying statements about the wide public interest in better enforcement. Both the 1896 and subsequent 1958 versions of the statutory duty of care were responses to corporate frauds.[67] In both cases those supporting the enactments thought 'something must be done to protect the public',[68] and that setting out clearly the principles to govern director's duties in the provisions 'would be a deterrent to misconduct'[69] by directors and officers, an inference being that such deterrence would be for the benefit of the public.

The 1958 text was re-enacted as section 124 of the Uniform Companies Act 1961[70] and then replaced by section 229(2) of the Companies Act 1981 (Cth),[71] it was enacted yet again without material amendment as section 232(4) in 1989.[72] As far as can be found, there is no further

[65] *Rich v Australian Securities and Investments Commission (ASIC)* (2004) 220 CLR 129, [44] '[e]lements of retribution, deterrence, reformation and mitigation as well as the objective of the protection of the public inhere in the orders and periods of disqualification made under the legislation' (McHugh J).
[66] Robert Baldwin, 'The New Punitive Regulation' (2004) 67(3) *The Modern Law Review* 351; Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalisation: Justifications and Limits' (2012) 15(4) *New Criminal Law Review: In International and Interdisciplinary Journal* 542.
[67] Langford, Ramsay and Welsh, above n 35, 492. See note 19.
[68] Ibid 493. See note 29.
[69] Ibid 504. See note 91.
[70] Nettle, above n 37, 8.
[71] As applied to NSW by the *Companies (Application of Laws) Act* 1981 (NSW), in operation from 1 July 1982.
[72] Section 232(4) came into existence without material change from the previous S229(2) in the Corporations Act 1989 (Cth). Substantial changes were made to s 232(4) to clarify that the standard of care was objective, by the *Corporate Law Reform Act* 1992 (Cth).

substantial comment on the purposes of the statutory duty and the public harm to be addressed, in any of these numerous re-enactments until further changes were made in 1992.

In 1992 two recommendations to amend the statutory duty of care by a Senate Committee[73] were amongst those adopted by the government. One recommendation enacted provided that the statutory duty of care should be objective.[74] The other was the introduction of civil penalty provisions with the sanctions already discussed. In adopting the Senate's recommendation for the introduction of the civil penalty sanctions, the government said: 'the government's view is that the enforcement of the duties of directors is important because a breach of these provisions could have adverse consequences for many stakeholders, including shareholders, other directors, creditors, employees and the general community.'[75] In his Second Reading Speech the Attorney General stated: 'The Bill also provides that where a director breaches his or her duty, but is not acting with any dishonest or fraudulent intent, the director should no longer be exposed to criminal sanctions and possible gaol terms. But it also says that shareholders should be protected against breaches by the substitution of appropriate civil penalties, including pecuniary penalties and disqualification in the case of serious breaches.'[76] Here the Attorney seemed to be arguing that, as a matter of enforcement discretion, directors should not be exposed to criminal penalties unless dishonest, since for appropriate cases, civil penalty alternatives were being enacted.

The issue of removing criminal prosecution for breach for the duty of care remained on the legislative agenda, however. In 1999 criminal penalties for a contravention of the statutory duty of care and diligence were finally removed[77] and civil penalties remained: in the same enactment a business judgment rule was introduced in s180(4) and section 232(4) was replaced with section 180(1).[78]

In 2001 the formulation of Section 180(1) produced by the legislative changes in 1999 was included in the current Corporations Act 2001 without material change, and after a long history, has not been altered by the Parliament for nearly 20 years.

[73] The Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into the Social and Fiduciary Duties and Obligations of Company Directors (November 1989, AGPS, Canberra).
[74] *Corporate Law Reform Act 1992* (Cth) enacted a new s 232(4), which reinforced that the duty of care is an objective one.
[75] Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3611 [10] – 3620.
[76] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2400 (Michael Duffy).
[77] *Corporate Law Economic Reform Program Act* 1999 (Cth).
[78] In the same legislation, a statutory business judgment rule was introduced as s 180(2.

Judicial Recognition of Public Harms and Public Interests: That Australian director's duties serve public purposes which may address public harms, has also been observed by the courts, though this has been expressed in differing ways.

Sometimes the public interest is found in the proper management of companies: for example 'Section 180(1) imposes a statutory duty much like the duty at common law. Its public policy value is to ensure that boards of directors of companies are composed of individuals with suitable skills to monitor the actions of management and to perform any special tasks for which they are appointed.'[79]

At other times the public interest in director's compliance with their duties is identified as the delivery of accurate information to the market and the public: 'the public was misled. The public was led to believe there were sufficient funds in the Foundation to meet all legitimate present and future asbestos claims. That was not so. That is a serious matter. The market was acting on a false premise."[80] In a similar vein "The managing director must not mislead the board or withhold material information from it, and is also responsible for ensuring that the ASX and the investing public are properly and accurately informed. The managing director must be rigorous in ensuring that there is a reasonable factual basis for public statements on behalf of the company, especially statements that might influence the share price."[81] Following this comment on the obligations of the managing director, in the same case Austin, J made remarks to similar effect in relation to the finance director.[82]

Sometimes a wider and more variegated version of the public interest in the duties of directors is identified by the courts: "A director is an essential component of corporate governance. Each director is placed at the apex of the structure of direction and management of a company. The higher the office that is held by a person, the greater the responsibility that falls upon him or her. The role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors."[83]

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[79] *Australian Securities and Investments Commission v Macdonald (No 12)* (2009) 259 ALR 116, 133 [99] (Gzell J)

[80] Ibid 176 [358].

[81] *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 75 ACSR 1, 619 [7219].

[82] Ibid 619 [7223].

[83] *Australian Securities and Investments Commission v Healey* (2011) 278 ALR 618, 625 [14].

At other times the courts identify a public interest in the proper enforcement of sanctions against errant directors, primarily through the civil penalty provisions: "ASIC as plaintiff is acting as an agency of the Commonwealth and not as a private litigant, and like the prosecutor in criminal proceedings, is the guardian of the public interest with a responsibility to ensure that justice is done."[84] Likewise: "ASIC is not seeking to right a wrong to AWB. It is pursuing the public good of seeking to punish the defendants for their alleged contravention of their duties as officers of AWB.'[85] A particular public purpose of enforcement noted by the courts is the protection of the public,[86] especially as investors: 'The law is concerned with the protection of investors by endeavouring to ensure that the information upon which they make their investment decisions is materially accurate and complete. Issues of high public policy are involved."[87]

The law is also concerned with public protection more widely including of individuals that deal with companies, including consumers, creditors, shareholders and investors.[88] In particular, orders disqualifying directors 'are orders designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards.'[89] As well as protection of the public, since the high court's decision in *ASIC v Rich* it has also been recognised that disqualification orders are penal in nature and deterrent in effect, which may also have protective effects in the public interest.[90]

Sometimes a mix of the public interest purposes of section 180(1) and enforcement by civil penalty provisions is referred to: 'The concepts of public interest, public policy and commercial reality in the context of corporate governance encompass considerations of community confidence in the management of commercial businesses by directors. Various indicators point to the fact that there is a public interest in the enforcement of the duties owed by directors to their companies. Indeed, the role of the State (via ASIC) in the enforcement of statutory duties, the existence of civil penalty provisions, and the ability for directors to be held criminally liable for their actions, confirms the recognition of a public interest in the enforcement of directors' duties.[91] Finally, in *ASIC v Adler*

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[84] *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 75 ACSR 1, 134-135 [533].
[85] *Australian Securities and Investments Commission (ASIC) v Flugge; sub nom AWB Ltd (No 1), Re* (2008) 252 ALR 566, 604 [101].
[86] See discussion above surrounding notes 57 and 58.
[87] *Australian Securities and Investments Commission v Vines* (2005) 55 ACSR 617, 861 [1078].
[88] *Australian Securities Commission v Roussi* (1999) 32 ACSR 568, 570 [13].
[89] *Australian Securities and Investments Commission v Hutchings* (2001) 38 ACSR 387, 395
[90] *Rich v Australian Securities and Investments Commission (ASIC)* (2004) 220 CLR 129, [44] (McHugh J) note 49 above.
[91] *International Swimwear Logistics Ltd v Australian Swimwear Company Pty Ltd* [2011] NSWSC 488 [106].

Justice Santow conducted a wide-ranging review of the mix of public interests involved in director's duties, including that under s180(1), and the civil penalty provisions. [92]

The Public Interest Expressed in Enforcement Policy: ASIC's enforcement policy[93] also considers the purposes of director's duties. A leading consideration is the nature of the conduct and extent of the harm or loss caused by any suspected breach. Does this 'impact on market integrity or the confidence of investors and financial consumers…the amount of money lost and the impact of that loss on the people affected.'[94] Here the public interest is in a safe and orderly market and in mitigating the human impact of large financial losses on a wide range of participants. Another factor is whether 'misconduct is widespread or part of a growing trend, and whether taking enforcement action will send an effective message to the market'.[95] ASIC makes plain that its enforcement decisions are conditioned by choosing the best remedy for a specific context, whilst juggling many considerations: these include regulatory cost and effectiveness; a balance of protective and penal purposes; and formal enforcement and negotiated avenues for resolution.[96]

The nature and content of this polycentric enforcement discretion is quintessentially public, a conclusion reinforced by the wide-spread character of its intended beneficiaries. It contrasts sharply with the singularity of private enforcement of director's duties. Those actions are sometimes bought by the company at the board's instigation, or (rarely) pursued by shareholders vindicating the interests of the corporation in proper internal management and derivatively their own private financial interest, or by liquidators in creditors' interests.

Public Features of the Statutory Director's Duty of Care in Australia.

To this point we have concentrated on the public harm, public purposes and public enforcement and sanctions relating to the duty of care in s180 of the Australian Corporations Act. Now it is appropriate to turn to the statutory duty of care itself, and to examine the possible ways in which it may display elements or principles of a public duty.

The Text of the Director's Statutory Duty of Care: It is commonplace that general law (common law and equity) duties may co-exist with statutory analogues. Often the latter are created to reform the

[92] *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80, 97- 98 [56]; 105 [79]-[80] (Santow J).
[93] Australian Securities and Investments Commission, above n 43.
[94] Ibid 4.
[95] Ibid.
[96] Ibid.

general law:[97] to clarify principles and concepts; to have the law better resonate with current commercial standards or community expectations; or to overcome obstacles to the practical realisation of rights and duties. Accordingly, the statutory text of s180 imposing a duty of care on Australian directors contains elements and concepts different to those in the general law duty.

Judicial interpretation of the text of the statutory duty has identified how these elements and concepts differ from those in the general law. The penal nature of some civil penalty consequences of breaching the statutory negligence duty already discussed, has also moved the Australian courts to elevate procedural protections for director defendants, whilst proof of liability remains at the civil standard. Realising these protections has also shaped the interpretation of the statutory duty and the understanding of its elements. Together these developments provide several distinctions between the general law and statutory duties: in the latter the public character of the statutory director's duty of care is evident, to which we now turn.

The discussion in Australia of the public character of director's duties and specifically the duty of care, has been elevated since the Federal Court decision in *ASIC v Cassimatis* in late 2016.[98] There it was noted that 'Private wrongdoing is relational. It involves a breach of duty in relation to another person. ...This principle of private law does not apply to public duties. A public duty to take care can and often does arise without being in relation to a person. There are few, if any, places in the world where a person who drives at 200km per hour on a public road does not seriously breach a legislated public duty. If no person is damaged then no private duty to a person is breached. But the public duty is breached.'[99]

Consideration of the text of s180(1) reveals that the duty of a director or officer of an Australian corporation to 'exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise' is open and general. The duty is nowhere expressed to be in relation to any beneficiary or owed to any entity. In particular the text of the section does not expressly state that the duty of care is owed to the company. Nor does the statutory text restrict the 'powers' to be exercised and 'duties' to be discharged by directors to the private kind derived from a corporate constitution. The text leaves open and general the possibility, indeed the modern reality, that directors will be required to exercise powers and discharge duties

[97] D Kingsford Smith, 'Interpreting the Corporations Law Purpose, Practical Reasoning and the Public Interest' (1991) 21(2) *Sydney Law Review* 161.
[98] *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)* [2016] FCA 1023.
[99] Ibid [451]-[452].

under general and statute law derived otherwise than from the corporation. [100] This of course includes powers and duties other than from the Corporations Act itself. Many of these general powers and duties will be public in nature, and owed to the public or sections of it, such as employees of or investors in the corporation.

Also distinctive about the text of s180(1), though by omission, is the absence of a requirement to show loss to the corporation to constitute a breach of the public duty when ASIC is the plaintiff. This was observed in *Vrisakis v Australian Securities Commission*[101] about a predecessor to s180(1): that unlike in private tort, liability could be found 'without any damage having been sustained.'[102] Rather, it is only necessary to show a foreseeable likelihood of loss from the balance of the risk of harm and potential benefit, potentially arising from a director's decision or action.[103] Instead the public duty is argued to be a norm of conduct which may require consideration of the public interest, possibly separate from the interest of the corporation.[104] The clearest examples are judgments of liability for failure by directors to carefully and diligently monitor arrangements for corporate compliance with statutory provisions revealed by instances of corporate illegality.[105] The absence of a requirement to show loss in the text of the civil penalty section is both a departure from the private law elements of tort and more significantly for directors, a sign-post suggesting a departure from the relational private law setting where directors owe their duty only to the company.

Features in the Context of the Statutory Director's Duty of Care Suggesting its Public Character:
There are several other features of the Australian director's statutory civil penalty duty of care which suggest a public character. These features while not always expressly in the text of the section, have force of law derived from the statutory indicia of the duty, and have been noted judicially or relied on in judicial decisions. The first is that the s180(1) duty is not, by contrast with private duties under

[100] Ibid [470].
[101] *Vrisakis v Australian Securities Commission* (1997) 9 WAR 395.
[102] Ibid 449.
[103] Ibid 449-450.
[104] *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)* [2016] FCA 1023, [462], [481].
[105] The so-called 'stepping stone' cases: *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 247 CLR 345; *Australian Securities and Investments Commission (ASIC) v Mariner Corp* (2015) 241 FCR 502; *Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group* (2011) 190 FCR 364, 370; Abe Herzberg and Helen Anderson, 'Stepping Stones – from Corporate Fault to Director's Personal Civil Liability' (2012) 40(2) *Federal Law Review* 181; Rosemary Teele Langford (ed), 'Directors' Duties' (2017) 35 *Company & Securities Law Journal* 342.

the contractual setting of a corporate constitution, able to be excluded, waived or ratified.[106] The only avenue to relief from the duties is by court order allowing exoneration from the consequences of breach where the director has acted honestly 'and ought fairly to be excused for the contravention.'[107] Exoneration may be better late than never, but it is also rarely granted.[108] Next, all the civil penalty director's duties apply not only to directors, but also extend to the very senior management of companies, below board level. They apply to those who are 'officers' of the corporation.[109] Officers are those who make or participate in 'decisions that affect the whole, or a substantial part, of the business of the corporation' or 'have a capacity to affect the corporation's financial standing'[110] and are usually immediate delegates of the board. If harm is to be avoided to the corporation, or to the interests of the public under a public duty, it is logical that the scheme of the statutory director's duties has been extended to executives with significant power to affect all those interests.[111]

Third, while allowing for the variety of companies, management responsibilities and arrangements for the delegation and exercise of authority within a company, s180(1) provides an objective standard of care and diligence for both directors and officers.[112] This is higher and more consistent than the older subjective standard.[113] Surely an objective standard is more appropriate for a public duty which has a potentially wide application, and where a knowable standard can be adduced in expert evidence. This is important because of the serious sanctions which may follow from a breach. Fourth, the serious civil penalty sanctions for breach which partly lend the duty its public character, have led to the courts requiring proof at the civil standard as required by the legislation[114] but additionally that 'the evidence give rise to reasonable and definite inference and not merely to conflicting inference of equal degree of probability.'[115] The NSWCA rejected a higher duty of care

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[106] *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, [457]; *Angus Law Services v Carabelas* 226 CLR 507, 523 [32]; *Forge v Australian Securities and Investments Commission (ASIC)* (2004) 213 ALR 574, 654-655 [378]-[383].

[107] *Corporations Act 2001* (Cth) s 1317S; the shareholder consent under consideration in *ASIC v Maxwell* [2006] NSWSC 1052 might be grounds for an exoneration rather than altering the underlying duty or forgiving a breach.

[108] *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, [785]-[824].

[109] *Corporations Act 2001* (Cth) s 9.

[110] Ibid.

[111] See Explanatory Memorandum for the definition of 'officer'.

[112] *Corporations Act 2001* (Cth) s 180(1)(a), (b); Directors and officers may not argue a lack of skill or experience to avoid liability and their duty of care is influenced by the circumstances: *Australian Securities and Investments Commission (ASIC) v Vines* [2005] NSWSC 738, [1085] upheld on appeal *Vines v Australian Securities and Investments Commission (ASIC)* (2007) NSWCA 75.

[113] *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

[114] *Corporations Act 2001* (Cth) s 1332

[115] *ASIC v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1585 [82]; see also *Briginshaw v Briginshaw* (1938) 60 CLR 336.

despite the serious sanctions,[116] but a higher standard of proof responding to the gravity of the breaches alleged and the possible consequences has been adopted. This is not the criminal standard of proof, but at the higher reaches of the civil standard required for establishing a private tort claim.

IV TO WHOM MIGHT THE 'PUBLIC' DUTY OF CARE BE OWED?

The reader will recall that the question of this paper is 'what does it mean to say that the director's duty of care is 'public'?' To this point we have identified a number of features surrounding the statutory duty, that have been argued to be 'public' in nature and effect. First, a greater level of public enforcement, especially by ASIC and a modest extension in standing beyond shareholders in the statutory derivative action; second, in authoritative pre-enactment sources and judicial decisions the identification of public harms in the mis-management of corporations and responding legislative purposes; and third, text and context of the statutory duty of care which show it to be a norm of conduct which (put shortly) requires the careful and diligent management of companies in the public interest. If we are to conclude that Section 180(1) is a 'public' duty as these features suggest, then to whom is that public duty owed? Private law director's duties are owed to the company, and in Australian law aside from the liberty to 'consider the interests of creditors',[117] only the share-holders' interests are *required* to be considered.[118]

This paper is about legal evolution and slow changes in community standards effected though the public sphere. There is no need to see or predict a dramatic break from the current legal position that director's duties are owed to the company, both at general law and in relation to the statutory duties. There are however, two theatres of contemporary Australian corporate law, where it is credible to suggest that changes will develop. The first is in the area of standing to sue for breach of statutory duties. The second is in the ratification of statutory director's duties: or to be more precise, the possibilities that remain for general law ratification of those duties to alter the standard of care that directors must discharge.

Traditionally, a public duty is owed to the world at large, or as put in *Cassimatis '*often does arise without being in relation to a person'[119] in any way nominated. Taking further Justice Edelman's example of a breach of public duty in driving at 200 km/hour, does that mean that anyone in the

[116] *Vines v Australian Securities and Investments Commission (ASIC)* (2007) NSWCA 75.
[117] Above note 23.
[118] *Westpac* above note 23.
[119] *ASIC v Cassimatis* note 8 para 452.

world catching a driver in the act, can enforce such a public duty (regardless of loss)? How would it play out if we followed this logic of public duties to the full in relation to section 180(1)? A public duty may have normative but little practical legal effect, unless it is grounded in a right, such as standing to sue.[120] Unless it is accompanied by standing rights, a public duty such as s180(1) remains a duty of imperfect of obligation.[121] Imperfect, because though a positive norm of conduct, there is no legal means to compel proper discharge of the duty.

The s180 duty when enforced by ASIC is *partially* perfected, though as argued above wider and different public interests are protected as well, by comparison with the narrower interests enforceable by the company at general law. When a company applies for compensation for breach of s180, the duty is further perfected, in a fashion and measure similar but not identical to the general law. The same is the case where shareholders successfully obtain leave to sue for statutory compensation as derivative plaintiffs.

If a plaintiff is 'a person whose interests have been, are or would be affected by conduct'[122] constituting a contravention of the *Corporations Act*, including the statutory duty of care, then they may apply for an injunction. Standing under section 1324 is generally given a broad and remedial interpretation,[123] 'consistent with the objects of the legislation in protecting the public in respect of the commercial interests of corporations.'[124] Standing to apply for injunctions responding to breaches of director's duties have been granted to shareholders[125] and creditors.[126] Although there

[120] D.N. MacCormick, 'Rights in Legislation' in P.M.S. Hacker and J. Raz (eds) Law Morality and Society (Oxford, 1977), 199 and 204-205.
[121] A duty of imperfect obligation is one of charity or gratitude which cannot be enforced by law. Kant makes a distinction between perfect obligations and imperfect obligations in his *Critique of Practical Reason*. Sen applies this concept to human rights to extend the different types of obligations that a right imposes upon human agents. It is his repost to the idea that because there is no legal obligation, an obligation might be ignored. *Life, Liberty and the Pursuit of Happiness: Human Rights and Immigration.* See also Campbell 'Perfect and Imperfect Obligations' *The Modern Schoolman* 52 (1975) 285-94.
[122] S1324 (1) *Corporations Act*
[123] *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 2 ACLC 57.
[124] Ibid and S Bottomley et al *Contemporary Australian Corporate Law*, (CUP 2018) 400.
[125] *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* above note .
[126] *Airpeak Pty Ltd v Jetstream Aircraft Ltd* [1997] FCA 303.

are practical obstacles[127] and controversial limits to the remedy[128] the cases indicate that the court should consider the public interest in curtailing contraventions in deciding to grant an injunction.[129] For other potential plaintiffs, the s180(1) duty remains one of imperfect obligation. One way to vindicate s180(1) as a public duty more widely, is to assert that it implies a private right of action against a breaching director. Speaking practically this would likely occur only when loss or damage gives reason to sue, though legally no proof of loss is required. Speaking theoretically, this could perfect the director's public duty by conferring on *any* individual or entity a right of action for breach of statutory duty.

Theoretical, is however, the state in which standing of those in the general public is likely to remain. In a recent review of the state of the Australian authorities for implying a private right to sue for the tort of breach of statutory duty owed to the world at large, Foster concludes: 'It is true to say that in recent years the action for breach of statutory duty has more often been denied than accepted in areas outside that of workplace safety. … more recently the presumption now usually applied is the opposite one, at least where a penalty is prescribed by the statute: that the criminal penalty alone is deemed to be the main means of enforcement of the statutory right, unless there are good reasons … otherwise.'[130] Generally, 'The court finds that the implication of what Parliament has enacted is that Parliament intended to legislate for the protection of a class of persons which includes the claimant. … One important piece of evidence tending to show that Parliament intended such protection is that the legislation makes further and better provision for protection of an already recognised 'common law' right.' [131] As we have discussed standing to sue in common or general law, is limited to the company or derivatively to shareholders and has never been available to the general public .

However, more recently a greater importance has been accorded to rights created by statute. Here the courts likewise fall back on the normal rules of statutory interpretation, to establish whether

[127] If there is no likelihood of a further contravention and no injunction is available, no damages in lieu of an injunction are available either.

[128] Especially in relation to damages in lieu of an injunction under s1324(10) see *McCracken v Phoenix Constructions (Qld) Pty Ltd* (2012) 289 ALR 710; though for a reconsideration of the position Katy Barnett, 'A Reconsideration of s 1324(10) of the Corporations Act 2001 (Cth): Damages in Lieu of an Injunction' (2018) 36 *Company & Securities Law Journal* 370, 372.

[129] CAC v Lombard Nash International Pty Ltd (1986) 11 ACLR 566; Barnett ibid.

[130] Neil Foster, 'The Merits of the Civil Action for Breach of Statutory Duty' (2011) 33(1) *Sydney Law Review* 67, 73.

[131] Ibid 71. See also *O'Connor v S. P. Bray Ltd* (1936) 56 CLR 397, 464, 478 (Dixon J) and *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 404 (Kitto J).

there is an implication of a personal and private right of action. Overall, 'The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation.'[132]

In short, since 1958 standing to enforce director's duties has increased from solely the company, to include the Director of Public Prosecutions, ASIC, plaintiffs with 'interests [which] have been, are or would be affected by conduct' described under section 1324 and a modest increase in those who can apply for leave to bring a statutory derivative action. This experience of 60 years suggests the practical likelihood of the public duty in s180 bringing on a rash of actions is remote. However, it is also the case that over that 60 years the combination of statutory public duties and wider standing rights have slowly transformed our understanding of what is required of directors to include the public interest and in some circumstances to consider the interests of third parties such as creditors. My guess is that the opportunities to be heard that wider standing affords, and the greater accountability and responsibility exacted by public plaintiffs such as ASIC, will continue this slow evolution of the conduct standards required of Australian directors.

Standing to vindicate a public duty is one emblem of 'publicness', and while it may import consideration of the public interest, it says nothing directly about to whom the duty is owed. The 1896 version of the statutory duty expressly provided that 'Every director shall be under an obligation to the company to use reasonable care and prudence'[133] and did in fact replicate the general law in having the duty expressly owed to the company. This conclusion was confirmed by the accompanying grant of standing to the company to seek compensation for damage by reason of the 'culpable neglect to use such care and prudence' by the director.

None of the subsequent versions of the statutory duty replicated this express statement that the director's duty was owed to the company. However, all of them, along-side provision for an offence or civil penalties (and for a short period both), included a mechanism for the company to seek compensation from an errant director. In these ways the statutory duty was both public in that there was no limit specified on to whom the duty was owed, and a statutory grant of standing to the company to vindicate its interests in a fashion reminiscent, though not identical with the general

[132] *Sovar v Henry Lane Pty Ltd* (1967)116 CLR 397, 405 (Kitto J).
[133] Note 35 above.

law. Given this hybridity, and that the director's statutory duty has not been expressed as owing to the company since 1910, (or more accurately since 1958 has been continuously expressed as owed to no-one), can we still say that the duty is owed to the company? I think we must, though it is a point of departure, not a destination.

The cases on ratification of breaches of the statutory director's duties by the shareholders in general meeting, show us how the evolution of the statutory public duty might over time change our conception of to whom the duty is owed. One reason ratification is provoking about the beneficiary of the statutory duty of care, is that it involves a direct engagement between public and private interests. On one hand the review of pre-legislative materials and judicial decisions shows a surprisingly wide round-up of interests external to the company mentioned as relevant to, if not the beneficiaries of, statutory director's duties. On the other hand, corporation law is strongly conceptualised as involving private property, contractual rights and liberal autonomy of action in the private sphere.[134]

Though few decisions are in relation to the duty of care, the weight of authority on ratification of statutory duty denies directors a release from the consequences of breach of the statutory conduct standards.[135] Some decisions indicate the types of interests the statutory duties seek to protect, and which cannot be derogated from by a vote of the shareholders in general meeting. Ratification of a statutory duty has been denied when it would damage the rights of third-parties transacting with a company,[136] in part because the duty 'involve[s] public rights.'[137] It has also been observed that the availability of a pre-cursor of the current s1317S expressly providing for relief of directors from the consequences of breach of statutory duty, was further evidence that 'contraventions of the civil penalty provisions cannot be ratified by shareholders.'[138]

The ratification cases also consider, still only as obiter, whether a resolution of the shareholders can alter (usually diminish) the strictness of the statutory standards of conduct required of directors. This is an even more trenchant question for the distinction between the 'public' and 'private' law of companies, and the question of to whom directors owe their statutory duties. In *Carabelas* the

[134] *Gambotto v WCP* (1992) 182 CLR 432.
[135] *Angas Law Services (in liq) v Carabelas* [2005] HCA at [32]
[136] *Forge v ASIC* [2004] NSWCA 448 at [374] to [384], the third-party right being either as a preference shareholder or a creditor (characterisation was contested) and eventually conceded as the latter [357]. At: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2004/448.html
[137] Ibid McColl JA, (Handley and Santow, JJ agreeing) at [381].
[138] *Forge v ASIC* note 136 at [382].

liquidator on behalf of the company argued that any 'appropriation' of company property by a director would be in breach of the statutory conduct standards of 'propriety'.[139] Two justices of the High Court disagreed saying:

> 'This proposition concerning "appropriation" is too broad. It insufficiently allows for the significance from case to case of the commercial context, and assumes a standard of conduct that is inflexible. The starting point must be the general duty of a director to act in the best interests of the company. The best interests of the company will depend on various factors including solvency.'[140]

Less emphatically, two other members of the court seemed to agree: 'In a particular case, their [the shareholders] acquiescence in a course of conduct might affect the practical content of those [directors] duties. It might, for example, be relevant to a question of impropriety.'[141]

Turning back to the statutory duty of care, the High Court's obiter view is also relevant to whether the general meeting can, prospectively, alter the content of statutory duties in relation to a transaction, especially one involving parties external to the company. At general law it is argued shareholders of 'a solvent company have wide freedom to take honest but stupid business risks in authorising or ratifying acts of acts of directors provided the acts are not fraudulent'.[142] If shareholders can prospectively release directors to act on the company's behalf in such a way, then as one commentator has put it, there is a risk standards of company management set by the legislature may be avoided by the backdoor.[143] It might be possible to reduce the level of the duty of care more widely if as in *Whitehouse v Carlton Hotel Pty Ltd*, from incorporation the company's constitution can provide a reduction in the level of the statutory duties, as was speculated in that case might be possible in relation to general law duties.[144]

These matters point up the dance which continues between the private law origins of corporation law, and the public interest of the state in standards for their proper management. Sometimes the public duty in section 180(1) is treated as if it is the private general law duty with additional standing and sanctions. At other times it is described (and sometimes acted on) as a general conduct standard

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[139] In the then relevant s229(4) of the Companies Code, a pre-cursor to the current section 182 of the *Corporations Act.*

[140] *Angas Law Services v Carabelas* above note at para 67.

[141] Ibid at [32]

[142] A proposition put to the court in *Forge v ASIC* [2004] NSWCA 448 at [355] but not discussed and where the ratio for rejecting the effectiveness of ratification of both general and statutory duties turned on other matters. But see the authorities there cited in support of this view, at least for ratification at general law.

[143] I Devendra 'Statutory Director's Duties, the Civil Penalty Regime and Shareholder Ratification: What Role Does the Public Interest Play?' (2014) 32 *C&SLJ* 399 at 412.

[144]

intended to protect substantially wider interests than only those of the company. It seems likely that, incrementally, rules granting wider standing will bring forward new constituencies and new types of claims to be treated with care and diligence, in competition with the interests of shareholders. With a greater number of claims, it also seems plausible that over time the elements of the public duty will develop interpretively and diverge from the private law version. Perhaps this development will eventually incorporate other interests, alongside the company, as the beneficiaries of the statutory director's duty of care. It is in this characteristically common law fashion, that it is possible to imagine the evolution of legal change to a duty of company directors owed more widely than to their company: in short, a duty with a more 'public' character.

V PUBLIC DUTIES OF DIRECTORS? OBJECTIONS AND CONCLUSIONS

This paper asks 'what does it mean to say that director's duties are 'public?' The subsidiary questions have inquired about the nature and effect of the director's statutory duty of care, and to whom it is owed. Along the way it has been argued that four sign-posts suggest the statutory duty of care has this 'public' quality. An increase in the accountability and responsibility of decision-makers; a greater opportunity for those affected by the resolutions or determinations of decision-makers, to participate in or have their interests considered in the process of decision-making; wider purposes and scope of the benefit to be weighed in the exercise of power; and finally, more demanding requirements of reasonableness and rationality in decision-making. The overall approach has been to suggest that there is a slow moral and legal evolution towards requiring company directors to take account of more public-regarding matters in board decision-making.

In answering the question 'what does it mean to say that director's duties are 'public?' it is not difficult to see the additional accountability and responsibility of directors coming from the increase in standing and more intrusive and personal nature of sanctions, which have developed since 1958. The increase in standing over time has also provided greater opportunity, mostly for ASIC, to represent the interests of those affected by the decisions of directors, particularly investors and the public interest in properly informed markets. While modest increases in standing have been afforded some other plaintiffs, the public duty remains one of imperfect obligation for the great majority of those whose interests might be affected in a general way by director's decisions.

The wider purposes and scope of the director's public statutory duty of care have evolved over the last 60 years. These purposes of mitigating harm and encouraging the proper management of companies in the public, not only the private interest, have been recognised by the courts, especially in consideration of sanctions. The wider scope of the beneficiaries of the duty is also evident in the

all-inclusive text of the duty, and in its character as a conduct norm rather than solely as an avenue to liability and compensation. Finally, in developments such as the objective standard of the statutory duty of care, and the information seeking requirements of the business judgment rule, it is possible to see a modest change towards both procedural and substantive requirements of reasonableness and rationality.

Meanwhile the fact that in both the public and private law versions of the duty of care that duty is owed to the company, remains the most significant objection to the argument made here. In *Cassimatis*[145] Justice Edelman identified this feature as the leading objection to the director's duty of care being accepted as a truly public duty. He pointed out that 'the section and its predecessors are concerned with duties owed to the corporation.'[146] Further, the overall scheme of the civil penalty provisions and the text of the duty in s180(1), expresses the obligations of the director in the same way, whether the duty is the basis of a private action for compensation (by the company), or owed publicly and enforced by disqualification or civil penalty by ASIC. Interpretively, meaning continues to be found not from the sign-posts and norms of public law, but by using the background of general law director's duties, which are owed to the corporation.[147]

Justice Edelman also noted that if the duty of care were owed at large, it 'might be a very difficult duty … to consider public interest at large which might even be contrary to the interest of the corporation.'[148] In the same vein, Nietsch observes that 'excessive liability…can result in disproportionate controls'[149] suffocating lawful and worthwhile business endeavour. The result could be that 'liability would unfairly and disproportionately subject the director to business risks that should be borne by the company itself' [150] or more accurately by its shareholders. By contrast with shareholders, the directors do not enjoy the benefits of limited liability.

Relatedly, in a regulated setting corporate illegality will often require reporting a breach to the regulator, and that in turn may after investigation, reveal failures in, say, monitoring and supervision by the board. Extension of rights to sue for breach of statutory duty inherent in greater 'publicness' may lead to directors not co-operating with the regulator or 'even encourage the active obstruction

[145] *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)* above note 8.
[146] Ibid [474].
[147] D Kingsford Smith above note 97.
[148] Ibid [476].
[149] Michael Nietsch, 'Corporate Illegal Conduct and Directors' Liability: An Approach to Personal Accountability for Violations of Corporate Legal Compliance' (2018) 18(1) *Journal of Corporate Law Studies* 151, 153.
[150] Ibid 164.

of prosecution for corporate crime.'[151] This in turn might disrupt and render less effective the public law enforcement of the underlying statutory duty.

These objections and practical reasons caution that taking an evolutionary approach to increasing the 'public' quality of director's duties is most apt for enduring legal change. Legal change cannot lag too far behind the public's expectations of the conduct of director's decision-making. The tempering of corporate power through law, is an important aspect of the legitimacy of corporations and the decisions of their boards. There are reasons for optimism that the dance between legislature, courts and regulator that has gone on for at least 60 years in the characteristically common law fashion described here will eventually incorporate other interests, alongside the company, as the beneficiaries of the statutory director's duty of care. As Appiah reminds us, (r)evolutions in values and opinions occur, and the history of change in the Australian director's duty of care in the last 60 years shows too, that such changes also happen in the law.

[151] Nietsch above note 149 at 174.