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Directors' Duties and Whistleblowing

The relationship between whistleblowing and directors' duties is not straightforward. Directors' core duties (duty of care, duties to act in good faith in the interests of the company and for proper purposes, and duties to avoid unauthorised conflicts and profits) are owed to the company and not directly to whistleblowers or employees. On the other hand, a company's reputation is a key factor in its success and one that is increasingly recognised in the application of the duty to act in good faith in the interests of the company and, more recently, in the application of the duty of care. Corporate codes may also contain material concerning whistleblowing and a question arises as to how binding these codes are and the consequences of non-compliance. This chapter explores the interaction between whistleblowing and directors' core duties, as well as the potential implications of non-compliance with whistleblowing provisions in corporate codes by companies and directors. The analysis relates primarily to Australian law but comparison is made with other Commonwealth jurisdictions.

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1. Introduction

Given the pivotal role played by directors in the oversight and direction of a corporation, the effectiveness of whistleblowing measures is very much influenced by directors' initiatives and responses. The chapter critically analyses the interaction between directors' duties and whistleblowing from an Australian perspective, as well as how this interaction may evolve. It does so within a wider context of developments in other jurisdictions, which this chapter also references. The specific focus of this chapter is on the potential liability of directors in relation to whistleblowing and, more specifically, in relation to any failure in a company's response to whistleblowing or in the implementation or monitoring of a whistleblowing policy. Such liability may arise from a number of sources. These include amended sections of the Corporations Act 2001 (Cth) resulting from new whistleblowing legislation, core directors' duties at general law and under statute, as well as the oppression remedy in the Corporations Act. The provisions of a company code may also provide a basis for liability, when combined with these other sources.

2. Definition of Director - Australia

Given that the focus of this chapter is on liability of directors, it is important to briefly outline the persons to whom directors' duties apply. In addition to persons formally appointed as directors, section 9 of the Corporations Act 2001 (Cth) defines the term 'director' to include de facto and shadow directors. Persons acting in the position of director but not formally appointed as directors are therefore included, as are persons in accordance with whose directions or instructions the board is accustomed to act.

It is also important to note that the duties in sections 180-184 of the Corporations Act (discussed below) apply to officers as well as directors and that the duties in ss 182-183 apply to employees. The term 'employee' is not defined in the Corporations Act.

The term 'officer' is defined in section 9 of the Corporations Act to include, amongst other categories:

> (a) a director or secretary of the corporation; or
> (b) a person:
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).

Section 9 then includes various categories of people such as receivers, administrators and liquidators. The concept of participation requires examination of the person's contribution to the relevant decision and focuses on the person's role in the ultimate act of making a decision, even if the final act of making the decision is taken by someone else.[1] The concern is to identify persons who are involved in the management of the company,[2] as opposed to third parties.[3] The definition of officer has included a director of a holding company of the company in question.[4] In the case of *Shafron v Australian Securities and Investments Commission*[5] the High Court held that the general counsel was an officer, because his role was not confined to providing advice and information to the board; instead, he played a large and active part in the formulation of the proposal approved by the board.[6]

The focus of this chapter is on directors.

3. Sources of directors' duties - Australia

There are a number of sources of directors' duties and a number of other obligations imposed on directors in Australia. Primary amongst these are the core general law duties (discussed in Sections 4-6 below) and the duties in ss 180-184 of the Corporations Act (also discussed below). Legislation may also impose liability on directors directly – for example, statutes regulating environmental protection and occupational health and safety impose liability on directors and officers. This has been a source of concern for directors and the Australian Institute of Company Directors has repeatedly stated that the extent of liability is too great, thus deterring potential candidates for directorship and deterring responsible risk-taking.[7]

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[1] See *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465, 477–80 [22]–[27] ('*Shafron v ASIC'*).

[2] See *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384 ('*Buzzle*').

[3] *Buzzle* (n 2).

[4] See *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 ('*ASIC v Adler*').

[5] (2012) 247 CLR 465.

[6] *Shafron v ASIC* (n 1) 477–80 [22]–[27]. Note that the officer was also company secretary, but argued that the relevant conduct was undertaken in his role as general counsel.

[7] See Australian Institute of Company Directors, 'The Honest and Reasonable Director Defence'

The recently enacted Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 inserted into the Corporations Act detailed provisions in relation to requisite whistleblower policies,[8] protection of whistleblowers,[9] compensation (and other remedies)[10] and prohibition of victimization.[11] Directors will need to make sure these are implemented and complied with, particularly in light of the requirements of the duty of care outlined in Section 6 below. This duty would also require directors to take steps to respond to, and address, any problem or issue identified by the whistleblower, quite apart from diligently monitoring and responding to the company's whistleblower system. As demonstrated below, the duty of care requires directors to monitor the company's business and this would include its whistleblowing arrangements.

The new provisions impose liability on companies and individuals.[12] Directors will therefore need to familiarize themselves with these provisions and take steps to comply. Contravention by the company, particularly if significant financial or reputational loss ensues, may lead to a stepping stones action (discussed in Section 6.2.3 below) against a director.

4. Outline of Directors' Duties - Australia

Directors are subject to core duties both at general law and under the Corporations Act 2001 (Cth) – it is these duties that are the focus of this chapter. The general law duties imposed on directors include duties to avoid unauthorised conflicts and profits from position, duties to act in good faith in the interests of the company and for proper purposes, a duty of care skill and diligence and duties to disclose and to retain discretions. The Corporations Act also imposes duties, the central duties being the duty of care and diligence (in s 180), the duties to act in good faith in the interests of the company and for proper purposes (in s 181), the duties to avoid improper use of position or information from position (in ss 182 and 183), duties to disclose material personal interests and, in the case of public companies, to abstain from participation in decision-making (ss 191 and 195). More specific duties pertain to insolvent trading (in s 588G) and financial benefits to related parties of public companies (in chapter 2E).

The duties in the Corporations Act differ in a number of ways from the general law duties. For example, whilst the general law duties are owed to the company, the statutory duties are not. In addition, it is well recognised that the statutory duties protect a number of stakeholders in addition to shareholders,[13] although the extent of

(Policy Paper, 7 August 2014).

[8] See, eg, s 1317AI.

[9] See, eg, ss 1317AA, 1317AAE, 1317AB(1).

[10] See, eg, ss 1317AD, 1317AE.

[11] See, eg, ss 1317AC, 1317G(1G).

[12] See, eg, s 1317AE.

[13] For discussion, see, eg, Jason Harris, Anil Hargovan and Janet Austin, 'Shareholder Primacy Revisited: Does the Public Interest Have Any Role in Statutory Duties?' (2008) 26(6) *Company and Securities Law Journal* 355; Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *Federal Law Review* 217.

this public interest element has not yet been clarified.[14] A corollary of these factors is that breach of statutory duty cannot be authorized or ratified by shareholders.[15] Another difference is that the statutory duties pertaining to the conflicts and profits rules are more specific than the equivalent general law duties, which have a broad ambit.[16] Remedies for breach of duty also differ significantly.

It is obviously important for directors to be on guard in cases of conflict or potential personal benefit. An example of a possible conflict in the context of whistleblowing would be the potential benefit to be derived from any whistleblowing payment or use of position to save one's own reputation in the event of any negative reports brought by whistleblowers. The focus of this chapter is not, however, on the general law and statutory duties regulating conflicts, profits and material personal interests. Instead the chapter analyses the potential application of the duty of care and the duty to act in good faith in the interests of the company in relation to whistleblowing. It also outlines the potential for an oppression action in circumstances in which directors do not comply with the provisions of a company's corporate code relating to whistleblowing. Although oppression is not a duty imposed on directors, it is frequently used by shareholders in circumstances potentially involving a breach of duty by directors.[17]

5. Duty to act in good faith in the interests of the company - Australia

In Australia the duty to act in good faith in the interests of the company is imposed both by general law and by s 181(1)(a) of the Corporations Act 2001 (Cth). The duty requires that directors act in good faith in what they believe are the company's interests in exercising their powers and performing their duties. It requires that directors consider the interests of the company and act in what they consider, in good faith, those interests to be. It is not an absolute duty to achieve the best outcome possible for the company. Neither is it simply a duty of good faith. Both elements combine to require directors to act in good faith in the interests of the company.[18]

Particular contexts in which the duty has been applied are group companies (in relation to which directors must consider the interests of the particular company rather than focusing on the interests of the group),[19] companies approaching insolvency (in

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[14] See, eg, *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, [453]–[455] ('*ASIC v Cassimatis [No 8]*').

[15] See, eg, *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574, 654 [381]; *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507, 523 [32] (Gleeson CJ and Heydon J). See also *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd [No 2]* (2005) 53 ACSR 305, 315 [33]–[34].

[16] See Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (Oxford University Press, 2019) ch 3.

[17] See ibid ch 12.

[18] In *Re Smith & Fawcett Ltd* [1942] Ch 304, Lord Greene MR said that directors' 'must exercise their discretion bona fide in what they consider — not what a court may consider — is in the interests of the company …': at 306. See also *Australian Securities and Investments Commission v Lewski* (2018) 93 ALJR 145, [71].

[19] See, eg, *Walker v Wimborne* (1976) 137 CLR 1 ('*Walker*'); *Sydlow Pty Ltd (in liq) v Melwren Pty Ltd (in liq)* (1994) 13 ACSR 144; *Maronis Holdings Ltd v Nippon Credit Australia Ltd* (2007) 38 ACSR 404; *Geneva Finance Ltd (recs and mgrs apptd) v Resource & Industry Ltd* (2002) 169 FLR 152; *Australian Securities and Investments Commission v Somerville* (2009) 77 NSWLR 110.

which context directors must also consider the interests of creditors),[20] nominee directors (who must act in good faith in the interests of the company despite any duty – real or perceived – to the nominator)[21] and conflicted directors (who, despite authorisation of a conflict, must act in good faith in the interests of the company and who may also breach the duty to act in good faith in the interests of the company in circumstances of conflict).[22]

5.1 Stakeholder Interests

The general law duty is owed to the company. As outlined above, the duty in s 181(1)(a) is not specifically owed to the company and it is well established that the duties in the Corporations Act protect a number of stakeholders. This can be seen in the judgment of Ward J in *International Swimwear Logistics Ltd v Australian Swimwear Company Pty Ltd:*

> 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.[23]

Furious debate has raged, and continues to rage, over what the interests of the company are. The view that the interests of the company consist only of short term profit maximization is outdated. On the other hand, directors who promote the interests of stakeholders with no regard to benefit to the company are arguably in breach of the duty. The key point for the purposes of this chapter is that stakeholders such as employees do not have standing to bring an action for breach of this duty and the duty is not owed to individual employees. Instead, employees are one group of stakeholders whose interests directors must consider in complying with their duty to act in good faith in the interests of the company. There is of course specific legislation protecting the interests of employees.

5.2 Section 1324

In terms of potential standing, section 1324 of the Corporations Act provides that '[w]here a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute' a contravention (or attempted

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[20] See, eg, *Westpac Banking Corporation v Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1; *ANZ Executors & Trustee Co Ltd v Qintex Australia Ltd (recs and mgrs apptd)* [1991] 2 Qd R 360; *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557; *Walker* (n 19).

[21] See, eg, *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (Pt 1) (NSW) 307; *Australian Institute of Fitness Pty Ltd v Australian Institute of Fitness (Vic/Tas) Pty Ltd [No 3]* (2015) 109 ACSR 369; *Hawkes v Cuddy* [2009] EWCA Civ 291; *Scottish Co-Operative Wholesale Society Ltd v Meyer* [1959] AC 324.

[22] See, eg, *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623 ('*ASIC v Warrenmang*'); *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1; *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* (2011) 86 ACSR 393; *Re Wan Ze Property Development (Aust) Pty Ltd* (2012) 90 ACSR 593.

[23] [2011] NSWSC 488, [106]. See also *ASIC v Cassimatis [No 8]* (n 14) [453]–[455].

contravention) of the Act, or other involvement in a contravention of the Act,[24] the court may, on the application of ASIC, or of a person whose interests have been, are, or would be affected by the conduct, grant an injunction, on such terms as the court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the court it is desirable to do so, requiring that person to do any act or thing.

The section on first reading appears very broad. It has been held that, in terms of showing that a person's interests have been affected, the 'interests' referred to in the section are those 'of any person (which includes a corporation) which go beyond the mere interest of a member of the public'.[25] It is therefore not necessary 'that personal rights of a proprietary nature or rights analogous thereto are or may be affected nor need it be shown that any special injury arising from a breach of the Act has occurred'.[26] This might suggest that employees as persons affected by a breach of s 181 (or the other statutory directors' duties) would have standing under s 1324. However, the section has been interpreted restrictively to-date. For example, there has been some doubt as to whether section 1324 can be used in cases involving breach of the statutory directors' duties in sections 180–183 of the Corporations Act 2001 (Cth),[27] although the better view is arguably that it can.

Section 1324(10) allows for damages in lieu of an injunction to be granted. However, this provision has been given a narrow interpretation, such that damages will not be granted where there is no prospect that an injunction would be granted. It has also been held that section 1324(10) does not permit damages to be awarded to a creditor for contravention of a civil penalty provision.[28] This may, however, change in future given the expansive wording of the section. If this eventuates then the section may provide standing for employees to bring action in the event that the whistleblowing provisions are breached and this amounts to a breach of the core duties in ss 180-183.

5.3 Reputation and Culture

[24] Section 1324 provides that '[w]here a person has engaged, or is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute: (a) a contravention of this Act; or (b) attempting to contravene this Act; or (c) aiding, abetting, counselling or procuring a person to contravene this Act; or (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person to the Act; or (f) conspiring with others to contravene this Act, the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing'.

[25] See *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 8 ACLR 609, 613.

[26] Ibid.

[27] *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128. Cf *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 73 FCR 161; *Emlen Pty Ltd v St Barbara Mines Ltd* (1997) 24 ACSR 303, 306; *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* (2013) 93 ACSR 421, 440–6 [58]–[91]; Katy Barnett, 'A Reconsideration of s 1324(10) of the *Corporations Act 2001* (Cth): Damages in Lieu of an Injunction' (2018) 36(4) *Company and Securities Law Journal* 370.

[28] See *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2013] 2 Qd R 27; *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233, 358–60 [397]–[402].

Returning to an analysis of s 181, which incorporates the concept of the company's interests, it is clearly in a company's interests to maintain a good reputation. Correct handling of whistleblowing is important in this regard. As noted by Dixon, wrongdoing that is corrected by the company in a timely manner will avoid external disclosures and potential reputational and financial damage.[29] The importance of a company's reputation was emphasised (albeit in obiter) by Edelman J in *Australian Securities and Investments Commission v Cassimatis [No 8]*. His Honour said:

> Mr and Mrs Cassimatis' duty to consider *Storm's* interests when managing the corporation does not require a narrow construction of Storm's interests which is limited only to the interests of its shareholders … A corporation has a real and substantial interest in the *lawful* or *legitimate* conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss. One reason for that interest is the corporation's reputation. Corporations have reputations, independently of any financial concerns, just as individuals do. Another is that the corporation itself exists as a vehicle for lawful activity. For instance, it would be hard to imagine examples where it could be in a corporation's interests for the corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable and was reasonably considered by the director to be virtually undetectable during a limitation period for liability.[30]

These remarks were made as concerns the application of the duty of care (discussed below) but are equally relevant in considering what a company's interests are for the purposes of the duty to act in good faith in the interests of the company.

The importance of reputation is also noted in the ASX Corporate Governance Principles, which also draw a connection between stakeholder interests and reputation. The fourth edition of the Principles emphasises the need to act lawfully, ethically and responsibly.[31] The commentary to principle 3 states:

> In formulating its values, a listed entity should consider what behaviours are needed from its officers and employees to build long term sustainable value for its security holders. This includes the need for the entity to preserve and protect its reputation and standing in the community and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators.[32]

Although s 181 does not directly incorporate the requirements of the ASX Corporate Governance Principles, the commentary on reputation in those Principles is indirectly relevant to a consideration of the company's interests in maintaining a good reputation. In addition, in terms of the company's interests, the provisions of the ASX Corporate Governance Principles are particularly important for listed companies given that such companies must comply with these or explain their departure.[33] Directors of listed companies seeking to comply with their duty to act in good faith in the interests of the company should bear these Principles in mind.

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[29] See Olivia Dixon, 'Honesty Without Fear: Whistleblower Anti-Retaliation Protections in Corporate Codes of Conduct' (2016) 40(1) *Melbourne University Law Review* 168, 171.

[30] *ASIC v Cassimatis [No 8]* (n 14) [482]–[483]. Note that this decision has been appealed.

[31] For example, Principle 3 of the ASX's *Corporate Governance Principles and Recommendations* states that '[a] listed entity should instil a culture of acting lawfully, ethically and responsibly': ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019) 16 ('*ASX Corporate Governance Principles*').

[32] *ASX Corporate Governance Principles* (n 31) 16. See also commentary to Recommendations 3.4, 7.4 and 8.1.

[33] *ASX Corporate Governance Principles* (n 31) 2.

Also tied in with these requirements is the increasing emphasis on culture.[34] At one point, the regulator proposed the imposition of liability on management in relation to poor culture, but this was replaced by monitoring of culture by ASIC.[35] The importance of culture – particularly in the sense of treating customers fairly – has been brought to the fore in the proceedings of the Banking Royal Commission.[36] Whistleblowing is intimately tied in with company culture – protection of whistleblowers indicates good corporate culture.

In summary, although the key duty to act in good faith in the interests of the company is owed to the company and cannot be directly enforced by employees, the duty encompasses consideration of stakeholder interests, including those of employees. It is also conducive to a company's reputation, and therefore in its interests, to handle whistleblowing appropriately. This is a factor that should be borne in mind in discharging the duty to act in good faith in the interests of the company.

5.4 Comparison with the UK

An interesting comparison can be made with the equivalent duty of directors under the UK *Companies Act 2006* (UK). This duty requires directors to act in what they consider, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole and in so doing have regard to the interests of a number of stakeholders including employees. Despite the intention of effecting an 'enlightened shareholder value' approach, the section in fact arguably entrenches shareholder primacy more directly than the equivalent general law or statutory duty in Australia. This is because the bottom line is the success of the company for the benefit of the members as a whole.[37] In light of the perception that s 172 has not achieved its purpose, the UK government has recently initiated a suite of reforms. None of these reformulate the duty in s 172 itself – change is instead effected via reporting and via provisions of a new Corporate Governance Code[38] and Guidance on Board Effectiveness.[39]

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[34] See generally Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (Final Report, 26 June 2014); Financial System Inquiry Committee, *Financial System Inquiry: Final Report* (Final Report, November 2014). See also Australian Securities and Investments Commission, *Culture, Conduct and Conflicts of Interest in Vertically Integrated Businesses in the Funds-Management Industry* (Report No 474, March 2016); Greg Medcraft, 'Culture Shock' (Speech, ASIC Annual Forum, Sydney, 21 March 2016). Culture is also mentioned multiple times in the fourth edition of the *ASX Corporate Governance Principles* (n 31): see, in particular, Principle 3.

[35] Liability may be imposed on companies based on corporate culture: see *Criminal Code Act 1995* (Cth) s 12.3.

[36] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).

[37] See also GC100, *Guidance on Directors' Duties: Section 172 and Stakeholder Considerations* (October 2018).

[38] See Financial Reporting Council, *UK Corporate Governance Code* (July 2018).

[39] See Financial Reporting Council, *Guidance on Board Effectiveness* (July 2018) ('*Guidance on Board Effectiveness*').

The striking feature of these provisions is the emphasis on engagement with the workforce. This aspect is the subject of specific provisions in the UK Corporate Governance Code and the Guidance on Board Effectiveness. Principle E of the Code states:

> The board should ensure that workforce policies are consistent with the company's values and support its long-term sustainable success. The workforce should be able to raise any matters of concern.[40]

The Code and Guidance on Board Effectiveness contain provisions protecting employees who raise concerns and recommendations as to whistleblowing policies.[41] Provision 5 of the UK Corporate Governance Code emphasizes the importance of engaging with the workforce and requires premium-listed companies to adopt (on a comply or explain basis) one or a combination of a director appointed from the workforce, a formal workforce advisory panel or a designated non-executive director.[42] The Guidance on Board Effectiveness sees workforce broadly, including not only direct employees but also agency workers, self-employed contractors, and remote workers.[43] In addition, legislation has been introduced to require additional disclosure of corporate governance arrangements.[44]

Although the bottom line of the core duty is therefore promoting the success of the company for the benefit of the members as a whole,[45] there is clear emphasis in these other requirements and recommendations on the need to engage with the workforce.

The provisions in the UK Corporate Governance Code on whistleblowing are less detailed than the new provisions in the fourth edition of the ASX Corporate Governance Principles, discussed below. The position in the UK, as in Australia, remains that the duty itself is not owed to employees. Directors who ignore employee concerns, and in the context of this chapter, whistleblowing, may in certain circumstances fail to act in good faith in the interests of the company.

6. Duty of care - Australia

Directors and officers owe a duty of care, skill and diligence both at general law and under s 180 of the Corporations Act. The duties are alike in content.

6.1 Outline of duty

[40] The Code and Guidance emphasize the importance of this final requirement, with Provision 6 of the Code stating: 'There should be a means for the workforce to raise concerns in confidence and — if they wish — anonymously. The board should routinely review this and the reports arising from its operation. It should ensure that arrangements are in place for the proportionate and independent investigation of such matters and for follow-up action. Provision 2 of the UK Corporate Governance Code requires the annual report to 'include an explanation of the company's approach to investing in and rewarding its workforce.'

[41] See *Guidance on Board Effectiveness* (n 39) [57]–[60].

[42] Provision 5 also states: 'If the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective.' See also *Guidance on Board Effectiveness* (n 39) [34], [47], [50]–[60], [130].

[43] *Guidance on Board Effectiveness* (n 39) [50].

[44] See, eg, Companies *Act 2006* (UK) ss 414CZA, 426B.

[45] Note, however, the more recent shift to long term sustainable success: for detail, see Langford (n 16) ch 10.

Section 180(1) of the Corporations Act provides:

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
> (a) were a director or officer of a corporation in the corporation's circumstances; and
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Section 180(2) provides a business judgment rule for directors who make a judgment in good faith for a proper purpose; do not have a material personal interest in the subject matter of the judgment; inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and rationally believe that the judgment is in the best interests of the corporation.

The Australian duty imposes an objective test, but incorporates subjective elements in that regard is had to the company's circumstances, and the director or officer's position and responsibilities within the company, in assessing whether the director or officer has exercised reasonable care and diligence.[46] The following factors have been found to be relevant in this respect:

(a) the type of company
(b) the provisions of its constitution
(c) the size and nature of the company's business
(d) the composition of the board
(e) the director's position and responsibilities within the company
(f) the particular function the director is performing
(g) the experience or skills of the particular director
(h) the terms on which he or she has undertaken to act as a director
(i) the manner in which responsibility for the business of the company is distributed between its directors and its employees and
(j) the circumstances of the specified case.[47]

The Court considers what an ordinary person with the knowledge and experience of the director in question might be expected to have done in the circumstances, if they were acting on their own behalf.[48]

One of the key emphases of more recent cases, particularly in Australia, concerning the duty of care is the exact duties and responsibilities of the relevant director. The duty of care affixes to these duties and responsibilities—directors who have more extensive duties and responsibilities are subject to increased liability. This can be seen in the cases involving James Hardie.[49] These cases concerned a misleading release to

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[46] See, eg, *Trilogy Funds Management Ltd v Sullivan [No 2]* (2015) 331 ALR 185, 229 [201] ('*Trilogy*'); *ASIC v Adler* (n 4) [372]; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, [100] ('*ASIC v Maxwell*'); *Australian Securities and Investments Commission v Healey [No 2]* (2011) 196 FCR 430, [165].

[47] See, eg, *ASIC v Maxwell* (n 46).

[48] *Trilogy* (n 46) 229 [202].

[49] *Australian Securities and Investments Commission v Macdonald [No 11]* (2009) 230 FLR 1 ('*ASIC v Macdonald [No 11]*'); *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205; *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345; *Shafron v*

the Australian Securities Exchange regarding the level of funding for asbestosis victims. The executive and non-executive directors were all found to have breached section 180(1) by voting to approve the draft announcement when they ought to have known that it was misleading.[50] However, those directors and officers with more extensive roles and functions were held to have engaged in a number of other contraventions of the duty of care due to their positions and responsibilities.[51]

Courts often assess compliance with the duty of care by balancing the foreseeable risk of harm to the company flowing from the contravention with the potential benefits that could reasonably be expected to have accrued to the company from the conduct.[52] This is done through the lens of the company's circumstances and the director's position and responsibilities. Directors who have significant responsibilities and exercise significant control in circumstances where a breach of the law is likely are therefore more vulnerable to liability.

In this respect, as outlined in Section 5.3 above, in *ASIC v Cassimatis [No 8]* Edelman J opined that a company's interests are not limited to merely financial interests[53] – in balancing the risk of harm against the potential benefit of a particular act or omission a court will not, according to Edelman J balance or weigh these factors as though by a common metric. Thus an economically justifiable decision to release a large amount of toxic waste based on the fact that the cost of disposing of the waste lawfully outstripped the cost of a penalty, could still result in a breach by the director(s) concerned of s 180.[54] This is partly because corporations have interests in their reputations and also in complying with the law. This should be borne in mind in responding to whistleblowers.

6.2 Application in relation to whistleblowing

There are a number of ways in which the duty of care may be activated in relation to whistleblowing. Firstly, directors must be careful to comply with the requirements of this duty when faced with a report by an employee or other party. This is particularly the case for executive directors tasked with setting up and monitoring a company's whistleblowing policy. Secondly, the duty of care requires directors to implement and ensure the efficacy of a company's whistleblowing policy. Thirdly, any reporting on whistleblowing must be accurate and not misleading. Fourthly, 'stepping stones' liability may be imposed on the basis of failure to properly deal with whistleblowing. Fifthly a company's reputation is increasingly relevant in the application of the duty of care – the damage to reputation caused by inadequate responses to whistleblowing

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ASIC (n 1).

[50] *ASIC v Macdonald [No 11]* (n 49) 66–7 [330]–[336] (as concerns non-executive directors), 68–9 [346]–[349] (as concerns the chief executive officer).

[51] Ibid 68–9 [346]–[349], 75–7 [390]–[406].

[52] See, eg, *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, 584 [450]–[451] ('*ASIC v Mariner*'); *ASIC v Cassimatis [No 8]* (n 14) 301–3 [479]–[487]; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 140 [7238]; *ASIC v Warrenmang* (n 22) 628–9 [22]–[23].

[53] *ASIC v Cassimatis [No 8]* (n 14) [483]. Note that this decision has been appealed.

[54] Ibid [485].

or failure to protect whistleblowers should be borne in mind in this respect. These points are now discussed.

6.2.1 Application in relation to whistleblowing systems

As concerns the first and second points, directors are required to act with care, skill and diligence in exercising their powers and performing their duties. The duty also requires sufficient monitoring.[55] Given the importance of a person's position and responsibilities and the company's circumstances in the application of the duty of care, a company's failure in relation to whistleblowing policies may have different impacts on different directors in terms of the application of the duty of care. Executive directors are likely to bear greater responsibility.

6.2.2 Reporting

As concerns the third aspect, reporting is taking on an increasing role in ensuring accountability of directors.[56] Indeed, some commentators see reporting requirements as a key way to make companies more socially responsible and to change corporate behaviour.[57] A focus on reporting (as the impetus for increased corporate social responsibility including whistleblowing) has a number of advantages. First, it arguably creates a level playing field, allowing investors to choose between companies in light of such disclosure. Secondly, directors' core duties would attach to these requirements in that, as mentioned, a breach of the duty of care, or of the duty to act in good faith in the interests of the company, could potentially be made out in relation to misleading or inadequate disclosure.

Companies are subject to numerous reporting requirements. Investors are also demanding greater reporting, which has associated derivative benefits such as better relationships with regulators and marketing opportunities. Directors need to comply with reporting obligations and should be wary of misleading or negligent reporting.[58] The duty of care may be breached where reporting is negligent or misleading. Stepping stones liability, as outlined below, could attach to misleading reporting.

In this respect, section 1317AI of the Corporations Act requires public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a policy with information about: the protections available to whistleblowers; how and to whom an individual can make disclosure;

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[55] Although the core focus of a number of cases is the need for directors to monitor the financial situation of the company, this is not exclusively so: see, eg, *Daniels v Anderson* (1995) 37 NSWLR 438.

[56] For evaluation see Gill North, *Effective Company Disclosure in the Digital Age* (Wolters Kluwer, 2015).

[57] See Jean Jacques du Plessis, 'Disclosure of Non-Financial Information: A Powerful Corporate Governance Tool' (2016) 34(1) *Company and Securities Law Journal* 69; Jean Jacques du Plessis, 'Shareholder Primacy and Other Stakeholder Interests' (2016) 34(3) *Company and Securities Law Journal* 238.

[58] For a discussion of potential liability see Robert Baxt, 'The Importance of a Culture of Compliance' (2013) 41(2) *Australian Business Law Review* 106; Jean J du Plessis and Andreas Rühmkorf, 'New Trends Regarding Sustainability and Integrated Reporting for Companies: What Protection Do Directors Have?' (2015) 36(2) *Company Lawyer* 51; Paul L Davies and Sarah Worthington, *Gower's Principles of Modern Company Law* (Sweet & Maxwell, 10th ed, 2016) 781–3 [21–8]–[21–9].

how the company will support and protect whistleblowers; how investigations into a disclosure will proceed; how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures; how the policy will be made available; and any matters prescribed by regulation.[59] Failure to comply with the requirement to have and make available a whistleblower policy will be an offence of strict liability.[60]

The ASX Corporate Governance Requirements are also relevant in this respect. Currently, under Listing Rule 4.10.3 ASX listed entities are required to measure their corporate governance practices against the ASX Corporate Governance Principles and where they do not conform to disclose the fact and the reasons why. Recommendation 3.2, which relates to codes of conduct, is discussed in Section 7 below. Directors of listed companies need to take care in reporting against these principles.

Recommendation 3.3 of the fourth edition of the ASX Corporate Governance Principles states:

A listed entity should:

(a) have and disclose a whistleblower policy; and

(b) ensure that the board or a committee of the board is informed of any material incidents reported under that policy.[61]

The commentary states:

In most cases, the best source of information about whether a listed entity is living up to its values are its employees. They should be encouraged to speak up about any unlawful, unethical or irresponsible behavior within the organisation through an appropriate whistleblower policy. The board or a committee of the board should be informed of material incidents reported under the entity's whistleblower policy, as they may be indicative of issues with the culture of the organisation.

Box 3.3 provides suggestions for the content of a whistleblower policy:

. Link the policy to the organisation's statement of values;

. Clearly identify the types of concerns that may be reported under the policy and how and to whom reports may be made (including to senior executives and the board;

. Explain how the confidentiality of the whistleblower's identity is safeguarded and the whistleblower is protected from retaliation or victimisation;

. Outline the processes to follow up and investigate reports made under the policy;

. Provide for the training of employees about the whistleblower policy and their rights and obligations under it;

[59] Note the overlap with the *ASX Corporate Governance Principles* (n 31).

[60] See s 1317AI(4).

[61] *ASX Corporate Governance Principles* (n 31) 17 (footnotes omitted).

. Provide for the training of managers and others who may receive whistleblower reports about how to respond to them; and

. Incorporate a periodic audit or review of the policy and related procedures to check if whistleblower reports were appropriately recorded, investigated and responded to and whether any changes are required to the entity's whistleblower policy or .procedures ….[62]

6.2.3 Stepping Stones Liability

As mentioned above, one way in which the application of the duty of care may result in liability for directors as concerns whistleblowing is via the stepping stones model of liability.[63] This model, which originated in Keane J's judgment in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd*,[64] could give rise to a breach of the duty of care (or other core duty) by directors in circumstances in which the company breaches, or risks breaching, the law. Stepping stones liability has traditionally consisted of two elements. The first is a breach of the law (whether the Corporations Act or some other law) by the company. In the case of whistleblowing this may consist in a breach of the new whistleblowing provisions in the Corporations Act or, as mentioned by Dixon, occupational health and safety legislation, anti-discrimination legislation or workers' compensation legislation.[65]

The second 'stepping stone' is a finding that the director has breached the duty of care in allowing, or in failing to prevent, the breach. A number of stepping stones actions have concerned companies failing to comply with disclosure requirements. In *Australian Securities and Investments Commission v Maxwell* ('*ASIC v Maxwell*')[66] certain group companies were found to have contravened various provisions of the Corporations Act in relation to the issue of debentures, which were issued to fund group property development activities. One of the issues was whether the relevant director had breached his duties in ss 180(1), 181(1) and 182(2) of the Corporations Act by permitting, allowing and participating in the various contraventions committed by the companies.

Stepping stones liability is arguably not, however, limited to circumstances in which the company actually breaches the law – a potential breach suffices. Stepping stones liability is in fact in many ways a straightforward application of the duty of care – just as other acts or omissions by a director may result in loss to the company and

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[62] Ibid.

[63] For discussion and evaluation see Vivienne Brand, 'Foreign Bribery Regulation in Australia and "Stepping Stones" Director Liability' (2017) 45(3) *Australian Business Law Review* 199; Maeve McGregor, 'Stepping-Stone Liability and the Directors' Statutory Duty of Care and Diligence' (2018) 36(3) *Company and Securities Law Journal* 245; Tim Bednall, '*Australian Securities and Investments Commission v Flugge*: Section 180 Strikes Again' (2018) 36(1) *Company and Securities Law Journal* 61; Rosemary Teele Langford, 'Stakeholder Interests and the Duty of Care' (2017) 35(5) *Company and Securities Law Journal* 342.

[64] (2011) 190 FCR 364.

[65] See Dixon (n 29) 170.

[66] (2006) 59 ACSR 373.

therefore a finding of breach of the duty of care by the relevant director, so too may a positive action or omission connected with the company's compliance with the law.[67]

Ensuring that the company complies with obligations relating to whistleblowing is therefore something to which directors should be attentive (quite apart from provisions that impose liability on directors) – a company's failure to so comply may found a claim for breach of the duty of care by the director. In addition, as mentioned, in this respect one of the interests directors should bear in mind in seeking to comply with the duty of care is the importance of the company's reputation.

It is, however, important to adopt a balanced perspective as regards stepping stones liability. As stressed by Brereton J in *ASIC v Maxwell:*

> [Sections] 180, 181 and 182 do not provide a backdoor method for visiting on company directors accessorial civil liability for contraventions of the *Corporations Act* in respect of which provision is not otherwise made.[68]

Courts are reluctant to treat s 180 as a general obligation on the directors to conduct the affairs of the company in accordance with the general law or the Corporations Act. Brereton J made the following comments, which have been repeated in many subsequent cases:

> It is a mistake to think that ss 180, 181 and 182 are concerned with any general obligation owed by directors at large to conduct the affairs of the company in accordance with the law generally or the *Corporations Act* in particular; they are not. They are concerned with duties owed to the company.[69]

These comments highlight the fact that directors are not automatically liable for breach of the duty if the company breaches the law. In other words it does not flow necessarily from a finding that an entity has contravened the Corporations Act that the officers must have contravened their duty of care to the company. In the case of *Australian Securities and Investments Commission v Mariner,* Beach J stated:

> After all, one expects management including the directors to take *calculated* risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s 180. Moreover, a failed activity pursued by the directors which causes loss to the company does not of itself establish a contravention of s 180.[70]

In *ASIC v Cassimatis* Edelman J pointed out that the duty in s 180(1) is not a duty of strict liability – '[n]or is it a duty which requires the director to take every possible

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[67] In this respect see also *ASIC v Cassimatis [No 8]* (n 14) 218 [4]–[7], 339 [697].

[68] *ASIC v Maxwell* (n 46) [110] (Brereton J).

[69] Ibid [104]. In *ASIC v Mariner* (n 52), Beach J stated that 'The duty owed under s 180 does not impose a wide-ranging obligation on directors to ensure that the affairs of a company are conducted in accordance with law. It is not to be used as a back-door means for visiting accessorial liability on directors. Further, it is not to be used in a contrived way in an attempt to empower the court to make a disqualification order under s 206C by the artificial invocation of s 180 (a civil penalty provision), when such a route is not otherwise available directly.': at [444].

[70] *ASIC v Mariner* (n 52) [452].

step to avoid a foreseeable risk of contravention of legislation.'[71] Tying this in with accepted jurisprudence on s 180(1), his Honour noted that the steps that a reasonable director must take for the purposes of s 180(1) 'will always depend on all of the corporation's circumstances.'[72]

7. Corporate Codes

Recommendation 3.2 of the fourth edition of the ASX Corporate Governance Principles states that '[a] listed entity should (a) have and disclose a code of conduct for its directors, senior executives and employees; and (b) ensure that the board or a committee of the board is informed of any material breaches of that code.'[73]

Many companies incorporate whistleblowing policies within these corporate codes of conduct. A detailed study of listed companies by Dixon demonstrates that the majority of the ASX 200 listed entities publish a Code that promises protection from retaliation for any employee who reports any act of misconduct in good faith.[74]

However, it is one thing to propound such programs and another to ensure that they are properly implemented and monitored. Compliance is also emphasised by judges and academics[75] and is particularly important due to provisions in the Criminal Code on culpable corporate culture.[76] The commentary to the current ASX Corporate Governance Principles Recommendation 3.2 states:

> For a code of conduct to be effective, all employees must receive appropriate training on their obligations under the code. Directors and senior executives must speak and act consistently with the code (again, setting the "tone from the top") and reinforce it by taking appropriate and proportionate disciplinary action against those who breach it."[77]

As noted above, depending on a person's position and responsibilities, negligence in implementing and maintaining a company's whistleblowing policies may in some circumstances amount to a breach of the duty of care. Departure from the provisions of a corporate code may also lead to reputational damage. The importance of

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[71] *ASIC v Cassimatis [No 8]* (n 14) [529].

[72] Ibid [530].

[73] ASX, *Corporate Governance Principles* (n 31) 16 (footnotes omitted). Commentary to Recommendation 3.1 of the third edition of the *ASX Corporate Governance Principles* suggested that the code should '[i]dentify the measures the organisation follows to encourage the reporting of unlawful or unethical behavior. This might include a reference to how the organisation protects "whistleblowers" who report violations in good faith': see ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd ed, 27 March 2014) 20.

[74] Dixon (n 29) opines that whistleblower protection policies positively influence organizational behavior and culture have a regulatory effect through signaling appropriate behavior: at 172.

[75] See, eg, *Re Chemeq Ltd; Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511, [84]–[86]; Brand (n 63); Baxt (n 58); Sulette Lombard and Vivienne Brand, 'Whistleblowing and Corporate Governance: Regulating to Reap the Governance Benefits of "Institutionalised Whistleblowing"' (2018) 36(1) *Company and Securities Law Journal* 29.

[76] See *Criminal Code Act 1995* (Cth) ss 12.2, 12.3.

[77] See *ASX Corporate Governance Principles* (n 31) 17. For further discussion of the legal impact of corporate codes, see TF Bathurst and Naomi A Wootton, 'Directors' and Officers' Duties in the Age of Regulation' in Pamela Hanrahan and Ashley Black (eds), *Contemporary Issues in Corporate and Competition Law: Essays in Honour of Professor Robert Baxt AO* (LexisNexis Butterworths, 2018) 3.

renewing and monitoring a company's compliance with whistleblowing procedures and protections is therefore evident.

Although corporate codes are voluntary and compliance with such codes is not monitored by ASIC or ASX,[78] it is pertinent to note that in Canada oppression actions have been successful in circumstances in which there has been non-compliance with the provisions of a company's code. It is submitted that this is a real possibility in Australia and that directors should be careful to ensure that the company complies with the provisions of its company code relating to whistleblowing and more generally. The oppression action is briefly outlined in the next section and relevant Canadian jurisprudence is highlighted.[79]

8. Oppression

Of the remedies available to shareholders in Australia under the Corporations Act, the oppression remedy has proved successful and popular. The oppression remedy is frequently employed (in Australia and other Commonwealth jurisdictions) in circumstances involving breach (or potential breach) of directors' duties. This is significant given the often liberal standing requirements, the absence of a requirement to first obtain leave of the court (which applies to derivative actions), and the broader test that applies as compared to actions for breach of duty.

The oppression remedy in section 232 of the Corporations Act has two limbs. The first is 'contrary to the interests of the members as a whole' and the second is 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member of members whether in that capacity or in any other capacity'. Section 232 states:
The Court may make an order under section 233 if:

(a) the conduct of a company's affairs; or
(b) an actual or proposed act or omission by or on behalf of a company; or
(c) a resolution, or a proposed resolution, of members or a class of members of a company; is either:
(d) contrary to the interests of the members of a whole; or
(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

The concept of 'the affairs of a corporation' is defined very broadly in s 53.[80] Australian jurisprudence holds that the test of fairness is objective.[81]

In Australia, it will be harder to make out oppression in relation to a decision that is made in good faith by reference to relevant considerations.[82] Courts are, however,

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[78] Dixon (n 29) notes that while the ASX requires companies to disclose whether they have a Code, the ASX plays no ongoing role in monitoring or enforcing the Code: at 203.
[79] Corporate codes form part of corporate culture. As noted above, corporate culture has received enormous focus in recent years: see nn 34, above. For discussion of corporate culture see [Greg Golding's chapter].
[80] *Australian Securities Commission v Lucas* (1992) 36 FCR 165.
[81] See, eg, *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 ('*Wayde*'); *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692, 704.
[82] See, eg, *Wayde* (n 81).

reluctant to review business judgments, and mere dissatisfaction with management is insufficient to constitute oppression.[83] Whilst the oppression remedy is most commonly applied in the context of small companies,[84] it is not limited to this context, although it will rarely apply to listed companies.[85]

Section 234 confers standing on members (and former members in certain circumstances) and persons whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into the company's affairs or matters connected with the company's affairs.

Section 233(1) gives the court broad discretion to make such order or orders as it thinks appropriate, and courts have shown a willingness to exercise this discretion.[86] Examples given in section 233 include an order that the company be wound up;[87] an order that the company's constitution be modified or repealed;[88] an order for regulating the conduct of the affairs of the company in the future;[89] an order for the purchase of a member's shares by other members or by the company;[90] an order directing the company to institute, defend, or discontinue specified proceedings, or authorizing a member of the company to institute, prosecute, defend, or discontinue specified proceedings in the name and on behalf of the company;[91] an order appointing a receiver (or receiver and manager) of property of the company;[92] an order requiring a person to do a specified act or thing;[93] and an order restraining a person from engaging in specified conduct or from doing a specified act.[94]

There are many examples of the oppression remedy being successfully argued in situations potentially involving breach of directors' duties.[95] It is therefore entirely possible that an oppression action could be brought in situations in which a director breaches their duties in the context of whistleblowing. It is, however, notable that proof of breach of duty alone does not found an oppression action – the circumstances

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[83] See generally *Re G Jeffrey (Mens Store) Pty Ltd* (1984) 9 ACLR 193, 198.
[84] See Robert P Austin and Ian M Ramsay, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 808 [10.435].
[85] See ibid 809 [10.435.3]. See also *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 345–6 [98]–[111].
[86] See, eg, *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 ('*Fexuto*'); *LPD Holdings (Aust) Pty Ltd v Phillips* (2013) 281 FLR 227.
[87] *Corporations Act 2001* (Cth) s 233(1)(a).
[88] Ibid s 233(1)(b).
[89] Ibid s 233(1)(c).
[90] Ibid ss 233(1)(d), (e).
[91] Ibid ss 233(1)(f), (g).
[92] Ibid s 233(1)(h).
[93] Ibid s 233(1)(j).
[94] Ibid s 233(1)(l).
[95] See, eg, *Dwyer v Lippiatt* (2004) 50 ACSR 333; *Vadori v AAV Plumbing* (2010) 77 ACSR 616; *Re Cheal Industries Pty Ltd; Fitzpatrick v Cheal* (2012) 264 FLR 313; *Re B Personal Pty Ltd* [2016] VSC 211; *Exton v Extons Pty Ltd* (2017) 53 VR 520; *Harrington v Sensible Funerals Pty Ltd* (2007) 61 ACSR 359; *Wallington v Kokotovich Constructions Pty Ltd* (1993) 11 ACSR 759; *Sanford v Sanford Courier Service Pty Ltd* (1986) 10 ACLR 549; *Spence v Rigging Rentals WA Pty Ltd* [2015] FCA 1158; *Strategic Management Australia AFL Pty Ltd v Precision Sports & Entertainment Group Pty Ltd* (2016) 114 ACSR 1; *Hannes v MJH Pty Ltd* (1992) 7 ACSR 8; *Western Ventures Pty Ltd v Resource Equities Ltd* (2005) 53 ACSR 568; *Patterson v Humfrey* (2014) 291 FLR 246; *Cowling v Mekken* [2015] VSC 196; *Inform Numbers Australia Pty Ltd v Angelovski* [2014] VSC 537.

must also constitute one of the two limbs in s 232(d) or (e). Conversely, proof of breach of directors' duty is not necessary in order to found an oppression action, so that if directors' conduct or omissions in responding to whistleblowers satisfies s 232(d) or s 232(e) then an oppression action may be successful.

One of the bases of oppression actions is departure from legitimate (or reasonable) expectations. This term describes an understanding or expectation a member has which, because of equitable considerations, can make it unfair for a party to exercise legal rights. Austin and Ramsay note that Australian courts have continued to use the term 'legitimate expectations' in their consideration of the oppression remedy although views differ regarding how useful the term is.[96]

In Canada it has been held that 'reasonable expectations' can be created by codes of conduct, particularly where published on a website, as well as by other public documents.[97] In *Firebird Global Master Fund II Ltd v Energem Resources Inc*[98] Fitzpatrick J examined the reasonable expectations of the plaintiff, which in her view included that the company would comply with its legal obligations,[99] that the company's directors and officers were required to abide by relevant statutory and regulatory requirements,[100] that shareholders can rely on written and public pronouncements as to what corporations will do[101] and then said:

> Finally, it is not unusual in this day and age for companies to have codes of conduct. Many publish these codes on their websites, just as Energem did in this case. Again, it is not unreasonable for Firebird to expect that Energem would respect its own code of conduct.[102]

There is no reason why similar reasoning could not be applied in an oppression action in Australia. Companies should therefore take care in framing company codes of conduct and in ensuring compliance with such codes.

9. Conclusion

This chapter has provided an overview of the potential application of directors' duties in relation to whistleblowing with particular focus on Australia. Directors should be particularly mindful of the duty of care and the duty to act in good faith in the interests of the company in ensuring compliance with, and reporting on, such requirements. Compliance with whistleblowing policies and corporate codes should be carefully monitored as part of meeting these core duties.

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[96] See RP Austin and IM Ramsay, LexisNexis, *Ford, Austin & Ramsay's Principles of Corporations Law* (online at July 2018) [10.450.15] citing *Fexuto* (n 86) 745; *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 395, [45]; *Ananda Marga Pracaraka Samgha Ltd v Tomar [No 6]* (2013) 94 ACSR 199, [464]; *Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd* (2014) 88 NSWLR 689, [201].
[97] See, eg, *Firebird Global Master Fund II Ltd v Energem Resources Inc* (2011) 86 BLR (4th) 290 (British Columbia Supreme Court), [102] ('*Firebird*'). See also *Themadel Foundation v Third Canadian General Investment Trust Ltd* (1998) 38 OR (3d) 749; *Deutsche Bank Canada v Oxford Properties Group Inc* (1998) 40 BLR (2d) 302 (Ontario Supreme Court); *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560, [80].
[98] *Firebird* (n 97).
[99] Ibid [90].
[100] Ibid [91].
[101] Ibid [94]. See also ibid [100].
[102] Ibid [102].

In providing detailed outline and analysis of directors' core duties, this chapter complements that of Greg Golding, who provides closer detail on the proposed revamped Australian victimisation offence and compensation regimes, as well as on corporate liability and corporate culture.

It has been demonstrated that, as with other important policies and procedures within a corporation, directors may breach their core duties in not properly or adequately responding to, or monitoring, whistleblowing. Such breach is not, however, automatic and depends on the elements of each relevant duty being applied and satisfied. It has been shown that, for the purposes of both the duty of care and the duty to act in good faith in the interests of the company, the company's interests include its reputation. It has also been shown that directors owe their duty to the company and not to employees directly but that the interests of employees and of other stakeholders need to be considered in considering the interests of the company.

Reporting is taking on a key role for directors and companies, and inadequate or misleading reporting on whistleblowing is something directors should be wary of in seeking to comply with their duties. The oppression remedy, which does not impose a duty on directors as such, is increasingly used in circumstances of breach of directors' duty and has potential application in circumstances of non-compliance with a corporate code. Although the focus of the chapter is on Australian law, the law on directors' duties in other Commonwealth jurisdictions has been referred to and is relevant to the interpretation and development of Australian law. Indeed, given common origins, it is unsurprising that jurisprudence on directors' duties in a number of Commonwealth jurisdictions evinces parallel developments and cross-fertilisation. Thus the principles outlined in this chapter in relation to whistleblowing and directors' duties could be expected to be of relevance to a range of common law jurisdictions.