AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS

Directors' section 180 duty of care and diligence & regulatory compliance obligations

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OPINION

Australian Institute of Company Directors
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Introduction

1 Companies in Australia are subject to significant regulatory oversight of their conduct and, for many large companies, this includes continuous monitoring and reporting either publicly or to regulatory agencies. Australian companies are expected to achieve environmental, social and corporate governance (**ESG**) standards that were unknown two generations ago. Against this background, modern directors face increased scrutiny of their oversight of a company's regulatory compliance obligations, notwithstanding their non-executive role. How does a director's duty of care and diligence under section 180 of the *Corporations Act 2001* (Cth) (**Corporations Act**) apply in relation to this form of non-financial risk?

2 We have been briefed to advise the Australian Institute of Company Directors (**AICD**) on questions as to a director's duty under s 180 as it applies to a company's regulatory compliance obligations. Section 180(1) requires directors and officers of a company to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they occupied the office. Some recent high profile cases alleging failure to comply with s 180(1) have included central allegations about oversight of a company's non-financial risks. The trend is expected to continue; there are increasing obligations on companies in key ESG areas such as climate emissions disclosure and transition management, cyber security risk management, and modern slavery reporting. Failures of companies to comply with these new obligations are likely to prompt intense examination of the role of directors in overseeing the company's discharge of these obligations.

3 The AICD's view is that there is a question as to whether the standard of care required in meeting various non-financial compliance obligations is clear, and whether defences such as the 'business judgment rule' (**BJR**) or section 189 'reliance on the advice of others' would be available in these circumstances.

4 We have been asked to advise on the following questions:

1. **Section 180 - interpretation**

   (a) When would a breach of a company's regulatory compliance obligations give rise to a breach of the section 180 duty of care and diligence?

   (b) Would the risk of non-compliance with a company's regulatory obligation give rise to a breach of a director's section 180 duty?

   (c) To what extent does liability attach to the board collectively versus individual directors?

   (d) To what extent is the standard of care different for the board chair or other NEDs with specific responsibilities (e.g. Risk Committee Chair)?

   (e) What evidence will help demonstrate directors' active oversight of non-financial risks? Should this be reflected in minutes of board meetings?

2. **Business Judgment Rule** (**BJR**) - Is the BJR defence available to directors in the case of an alleged breach of section 180 in relation to non-financial risk issues, particularly where it involves matters of a compliance nature? If so, in what circumstances?

3. **Reliance on advice** – Is section 189 'reliance on the advice of others' available to directors in the case of an alleged breach of section 180 in relation to non-financial risk issues, particularly where directors are reliant on the information they are provided by management and/or expert advisors? If so, in what circumstances?

4. **Mistake of fact** – Is the defence of 'mistake of fact' available to directors in the case of an alleged breach of section 180 in relation to non-financial risk issues? If so, in what circumstances?

5. **Delegation** - Is section 190 'delegation' available as a defence in the case of an alleged breach of section 180 in relation to non-financial risk issues? If so, in what circumstances?

5 We address each question in turn below.

6 Before doing so, we note that section 180(1) provides as follows:

> **180 Care and diligence—civil obligation only**
>
> ***Care and diligence—directors and other officers***
>
> (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.

7 We have been asked to focus our opinion on liability that might attach to directors in relation to indirect involvement in a corporate breach and alleged deficiency in their oversight and monitoring function. As requested by the AICD, our opinion does not cover in significant depth traditional section 180 cases that concern directors' responsibility for financial reporting or continuous disclosure obligations.

8 We also note that:

a. since this opinion was first prepared, the Federal Court of Australia has handed down its decision in *Australian Securities and Investments Commission v Bekier (Liability Judgment)*[1] (***Bekier (Liability Judgment)***). While the case did not turn on any novel legal principles, it is a significant decision on s 180(1) of the Corporations Act and involved the corporate regulator taking a case against an entire board of an ASX-listed entity for alleged breaches of their duties as directors. The Court found that two executives - being the former managing director of Star Entertainment Group Limited, and its former Chief Legal and Risk Officer and Company Secretary - each breached their duties under s 180(1). Their breaches arose in relation to the handling of risks associated with money laundering and criminal activity arising from Star's operations, and interactions, which the Court found to be misleading, with

[1] [2026] FCA 196 (Lee J).

one of Star's major lenders about the nature of transactions occurring within the casinos. Two other executives, Star's former Chief Casino Officer and former CFO, settled the case against them before trial, admitting they breached their respective duties. The Court has made orders disqualifying the four officers from managing corporations for periods of between nine months and seven years, and imposed pecuniary penalties ranging from $60,000 to $700,000.[2]

b. ASIC's case against the seven non-executive directors of Star, including the Chair of the Board, failed. However, the Court was critical of aspects of the conduct of certain non-executive directors even though no contraventions were established against them (given the terms of ASIC's pleaded case). The Court emphasised that the dismissal of ASIC's claims against the non-executive directors did not involve any endorsement of the quality of the Board's governance culture or practices, and remarked in the subsequent ***Penalty Judgment*** that "what was striking was not merely the foreseeability of risks at different points in time, but the failure of *all* directors (save in one limited respect) to pursue lines of inquiry with the rigour one might expect by those prepared to accept office as a director of a corporation conducting a business pregnant with inherent and obvious risks."[3]

c. As at the date of this update, the former managing director and the former Chief Legal and Risk Officer have each filed appeals against the findings of liability. ASIC has indicated it will not appeal the Court's decision to dismiss ASIC's claim against the non-executive directors.

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[2] The former managing director was disqualified from managing corporations for six years and ordered to pay a penalty of $700,000. The former Chief Legal and Risk Officer and Company Secretary was disqualified from managing corporations for seven years and ordered to pay a penalty of $400,000: *Australian Securities and Investments Commission v Bekier (Penalty Judgment)* [2026] FCA 756 (***Penalty Judgment***). In a separate, earlier judgment, the former Chief Casino Officer was ordered to pay a pecuniary penalty of $180,000 and disqualified from managing corporations for 18 months; while the former CFO was ordered to pay a pecuniary penalty of $60,000 and disqualified from managing corporations for nine months: *Australian Securities and Investments Commission v Hawkins* [2025] FCA 121.

[3] *Penalty Judgment* at [13]-[14].

d. We have updated this opinion to refer to legal principles confirmed and applied in the *Bekier (Liability Judgment)* and *Penalty Judgment*.

9 In summary our opinion is:

a. While a failure by directors to address the risk of non-compliance by the company with its regulatory obligations could give rise to a breach of director's duties under section 180, it is not the duty of a director to guarantee compliance by the company with all regulatory obligations or to eliminate all risks.

b. The question of whether a director has breached the duty is not to be judged with the benefit of hindsight. Almost always, the question of whether a director is liable for a breach of the s 180 duty in respect of a company's non-financial risks will arise *after* the risk has already manifested and the company has failed to comply with its obligations. With hindsight, and with the breach having already occurred, the probability of breach occurring may look far greater and the risk far more significant; but an evaluation of the performance of the director must consciously set to one side what occurred *after* the point in time at which the director was acting (or not acting).

c. The duty imposed by section 180 requires a director to be familiar not only with the commercial fundamentals of the company's business but also to understand key compliance obligations and risks to which the company is subject and to be in a position to monitor generally those risks, including by regular attendance and participation at board meetings.

d. Directors are likely to be at risk of breaching section 180 if they do not take appropriate action when there is a foreseeable risk of serious harm to the company – such as a substantial threat to the company's business model or loss of a licence which the company needs to continue to operate. What amounts to appropriate action will depend on the particular circumstances but it may include making enquiries of management, obtaining a plan from management or outside experts to address the risk of harm to the company, and monitoring and holding management accountable for the implementation

of that plan within a reasonable timeframe. If directors become aware of a serious risk of foreseeable harm to the company, their duty may require them to act promptly; for example, by making enquiries of management or seeking other advice outside and in advance of scheduled board meetings.

e. The board has collective responsibility for the management of the company and the directors may make collective decisions as a board, but the duty imposed by section 180 is placed on each director individually and liability under section 180 attaches to each director individually.

f. As a general proposition, the more knowledge a director has about the company's operations and the higher the degree of control that the director exerts over those operations, the more that will be expected of the director in exercising their powers and discharging their duties under section 180. Directors who have particular responsibilities are to be judged by what a reasonable person holding their particular responsibilities would do in that position in the company's particular circumstances. More may be expected of directors who are members of a board risk committee, especially the chair of that committee, in relation to monitoring compliance risks, than would be reasonably expected of non-executive directors who are not on the committee. It does not follow that directors have *less risk of breaching their duties* if they do not take on additional roles and responsibilities. The reason that more may be expected of a director on the board risk committee in relation to non-financial risks is because such a director should have more information and insight and control over the risks that the company faces. That is, more may be expected but those expectations are commensurate with the additional information and influence that a director should have in that position. Conversely, directors who are not on the risk committee may feel that they have less insight into the risks that the company faces than a director who is on the committee, and yet they still have shared responsibility as a member of the board for the board's overall management of non-financial risks. In each case, the director is judged having regard to the particular circumstances of the director.

g. There is a core, irreducible requirement for directors to take reasonable steps to be in a position to guide and monitor the company. If facts come to the attention of a director which awake their suspicion that something is amiss or that would have awoken the suspicion of a reasonable director in their position with their responsibilities, then the director has a duty to enquire further into the matter with a degree of care commensurate with the risk of harm. A director is not entitled to shut their eyes to corporate misconduct or other serious non-financial risks. While directors are often entitled to rely upon others – such as management or external advisers, unless the directors know, or by the exercise of ordinary care should know, facts that indicate that they should not so rely – directors are not excused from making enquiries by simply relying on the judgment of others.

h. We consider it prudent for directors to require that contemporaneous or near contemporaneous records are kept to evidence or record their active oversight of non-financial risks. This could be done by requiring accurate minutes of board meetings are kept which demonstrate that the directors have actively considered non-financial risks facing the company and taken appropriate action to seek to ensure those risks are managed appropriately.

i. As the *Bekier (Liability Judgment)* illustrates, while the legal standard under s 180 does not change, what is required of a director in a given case is sensitive to the company's risk profile and the particular context. Assessing whether a director has breached their duties under s 180(1) requires an evaluative judgment to be made taking into account the company's particular circumstances including its industry and regulatory environment as well as the particular director's responsibilities, knowledge, skills and experience. The role of directors – and particularly those operating in sectors that are exposed to elevated legal, regulatory and reputational risk – demands vigilance, engagement and scrutiny commensurate with foreseeable risks.

Section 180 interpretation

Q1(a) - When would a breach of a company's regulatory compliance obligation give rise to a breach of the section 180 duty of care and diligence?

10 The fact that a company breaches a regulatory compliance obligation does not necessarily mean that any of its directors have breached their duties under section 180.[4] However, there are situations in which a director will be in breach of their duty to the company under section 180 by reason of the director's conduct in causing or permitting the company to breach the law or failing to take steps to prevent the company from breaching its regulatory obligations.

11 The statutory standard of care and diligence imposed by section 180 requires directors to take reasonable steps to place themselves in a position to guide and monitor the management of the company.[5] As well as being familiar with the commercial fundamentals of the company's business, the duty imposed by section 180 likely now requires a director to be in a position to understand what are key compliance obligations and risks to which the company is subject and be in a position to generally monitor those risks including by regular attendance and participation at board meetings.

12 Companies are subject to a myriad of compliance obligations which their directors might need to consider. As well as obligations under the Corporations Act, these may include regulations relating to work, health and safety, employee entitlements, environmental regulations, privacy and cyber-security risks, modern slavery reporting, counter-terrorism and anti-money laundering, and anti-bribery and corruption laws, to name but a few. It is not practical, or expected by courts, that a director – particularly a non-executive director – will do a deep dive into whether the company is complying with every single regulatory obligation to which it might be subject or to even be familiar with every such obligation. In large complex entities it could, at times, be impossible for directors to have a line of sight

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[4] *DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Potts* (2022) 405 ALR 70; [2022] NSWCA 165 (***DSHE v Potts***) at [113].

[5] Re *HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72; [2002] NSWSC 171 (***ASIC v Adler***) at [372(8)] (Santow J).

on the risk of breach of every regulatory obligation. Additionally, while executive directors may have full-time positions within the company, non-executive directors generally do not, and are not expected to, work full-time fulfilling their director's duties. It is, however, likely to be important for all directors to gain at a minimum an understanding of the regulatory environment in which the company operates that would be sufficient for the directors to be in a position to understand key risks and fulfil their duty to guide and monitor management of the company.

13 Importantly, section 180 does not impose a wide-ranging obligation on directors to ensure that the affairs of a company are conducted in accordance with the law.[6] It also does not demand omniscience or impose a "standard of perfection" on directors.[7]

14 Section 180 does require directors to take account of the interests of the company, including any threats to those interests. The interests of the company are not limited to its financial and commercial interests. They include its compliance with the law.[8] The opinion of Bret Walker AO SC and Gerald Ng dated 22 February 2022 regarding the content of directors' "best interest" duty, which is published on the AICD's website, together with the AICD's July 2022 practice statement entitled "Directors' "best interests" duty in practice" address the "best interests" duty generally.

15 A company has a real and substantial interest in the lawful or legitimate conduct of its activity independently of whether the illegality will be detected or cause loss.[9] One reason for that interest is the company's reputation and its existence as a vehicle for lawful activity.

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[6] *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502; [2015] FCA 589 (***ASIC v Mariner***) at [444] (Beach J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052 (***ASIC v Maxwell***) at [104] and [110] (Brereton J); *Australian Securities and Investments Commission v Warrenmang Pty Ltd* (2007) 63 ACSR 623; [2007] FCA 973 at [22]-[23] (Gordon J); *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229 (***ASIC v Rich***) at [7238] (Austin J).

[7] *Bekier (Liability Judgment)* at [360] and [1953].

[8] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1013 (***ASIC v Cassimatis (No 8)***) at [540] (Edelman J).

[9] *ASIC v Cassimatis (No 8)* at [482].

16 A failure by the company to comply with legal obligations may give rise to a range of risks: reputational, litigious, regulatory, and the potential for undermining relationships with customers, employees, financiers, investors and regulators. These risks are likely to be amplified as the failure to comply is repeated. The fact that others in the industry may be doing the same thing is not likely to remove the risks to the interests of the company.[10]

17 Whether or not a director will be held to have breached section 180 in a situation in which the company has contravened a regulatory compliance obligation will depend on whether there was a foreseeable risk of harm to the company's interests against which the director ought to have guarded. It is not necessary for the harm to the company's interests to be likely to occur in order for the risk of it to be foreseeable. For example, if there is a real risk that certain conduct could result in the company losing a licence that is necessary for the company's ongoing business operations (such as a financial services business losing the Australian Financial Services Licence it is required to hold under s 911A of the Corporations Act), the directors' duty will not be satisfied if the directors take no steps to guard against that risk, even if the directors do not consider it likely that the conduct will result in the company losing its licence (for example, because the directors assess that it is unlikely that the regulator will take action to cancel the licence). If, however, viewed at the time of the relevant conduct, the risk of harm was far-fetched or fanciful, or no reasonable person in the director's position would have foreseen that the conduct would cause the company to breach the law or have other detrimental consequences for the company, then the director will not be held to have breached their section 180 duty of care. That is not to say that directors <u>will</u> be liable if a risk manifests that was not far-fetched or fanciful; rather, it is a negative proposition that the duty to exercise reasonable skill and diligence would not extend to guarding against fanciful risks.

18 Directors are likely to be at risk of breaching section 180 if they do not take appropriate action when there is a foreseeable risk of serious harm to the company

[10] *DSHE v Potts* at [152].

which may arise out of contraventions by the company of particular regulatory compliance obligations and a reasonable person in the director's position ought to have been aware of that. That may occur if it is reasonably foreseeable that the company's contravention of its compliance obligation could pose a threat to its continued existence or expose it to:

a. a potential loss of a regulatory licence it needs to operate;

b. substantial penalties, for example, in the tens of millions of dollars. For smaller companies, a substantial penalty may be significantly less than that;

c. significant regulatory action from the ACCC, ASIC, APRA or a similarly powerful regulator which may embroil the company in expensive and prolonged legal proceedings;

d. other expensive legal proceedings, including class actions;

e. significant reputational damage, including through adverse political or media attention, which may affect the willingness of its customers, suppliers, financiers and other creditors to deal with it, or its employees to stay with it, and divert resources to the management of these issues;

f. loss of trust in the company or its management by regulators and stakeholders such as current and potential investors, employees, customers, suppliers or financiers; or

g. breaching covenants in its significant debt facilities, particularly if there is a real possibility that the financier may not waive those breaches.

19 Increased vigilance on the part of directors may also be required to comply with their duty under section 180 in relation to compliance risks faced by the company where there is a matter involving a conflict of interest. Where there is a transaction involving the potential for conflict between interest and duty, "the duty of care and diligence falls to be exercised in a context requiring special vigilance, calling for scrupulous concern on the part of those officers who become aware of the

transaction to ensure that any necessary corporate approvals are obtained and safeguards are put in place."[11]

20 In determining whether a director has breached their section 180 duty in a case involving a contravention by the company of a regulatory compliance obligation, a court will consider:

a. what was the foreseeable risk of harm to the company flowing from the contravention, including the magnitude of harm;

b. what were the potential benefits which could reasonably be expected to accrue to the company from the conduct;

c. whether the risks to the company's interests obviously outweighed any potential countervailing benefits;

d. whether there were reasonable steps which could have been taken to avoid jeopardising the company's interests and, if so, what would have been the burden on the director and the company of taking alleviating action to avoid the breach or reduce the risk of foreseeable harm.

21 The court is to consider these matters from the perspective of a reasonable person who is a director, in the company's circumstances, having the responsibilities of the particular director whose conduct is being questioned.[12] It is a forward-looking exercise to try and understand what a reasonable director would have done in the context of the circumstances as they existed at the time of the relevant conduct, without the benefit of hindsight.[13] It is not an exercise that is amenable to exact calculation.

22 Whether or not a director will be held to have breached their duty under section 180 very much depends on the particular facts of the case including the company's particular circumstances, the particular director's role and responsibilities, what

[11] *ASIC v Adler* at [372(14)] (Santow J).
[12] *ASIC v Cassimatis (No 8)* at [676]; *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533; [2020] FCAFC 52 at [474] per Thawley J.
[13] *ASIC v Cassimatis (No 8)* at [485]-[487]; *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117 at [90].

they actually knew or should have known or realised or queried, and what they did or did not do in performing their role. It is a fact-intensive assessment.[14]

23 The balancing exercise to be undertaken by a court in assessing whether a director has breached their duty under section 180 is of the kind described, in relation to the tort of negligence, as follows:

> "The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."[15]

24 The company's circumstances referred to in section 180(1)(a), which will be taken into account in the assessment, include:

a. all of the relevant commercial and other circumstances of the company including – without seeking to be exhaustive – the type of company, the size and nature of the business it carries on, the market and regulatory environment within which it operates, whether it is listed or unlisted, the terms of its constitution, the composition of its board of directors, the competence of its management, the competence of its advisers and the distribution of responsibilities within the company including as between the directors and as between the directors and officers;[16]

b. the breach or potential breach of the law by the company; and

c. the conduct of the company.

25 Where a company operates in a sector subject to intensive regulation, or where its activities present elevated non-financial risks such as money laundering, terrorism

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[14] *DSHE v Potts* at [123].

[15] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

[16] *ASIC v Maxwell* at [100] (Brereton J); *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; [2009] NSWSC 287 at [240] (Gzell J); *Australian Securities and Investments Commission v Flugge* (2016) 342 ALR 1; [2016] VSC 779 (***ASIC v Flugge***) at [1871] (Robson J).

financing, work, health and safety, environmental, privacy or critical infrastructure risks, the level of attention that the s 180 duty requires of directors is calibrated accordingly. This does not change the legal standard but does affect what is reasonably expected of the company's directors as the industry and regulatory environment in which the company operates is part of the "company's circumstances" under s 180(1)(a).[17]

26 In the *Bekier (Liability Judgment)*, Lee J emphasised that the casino industry in which Star operated is a high-risk context, being highly regulated and vulnerable to criminal influence and infiltration and other risks to the integrity of its operations. His Honour stated:

> "One would hope that someone proposed to be a director of a corporation conducting a high-risk enterprise such as a casino would recognise that they are being asked to guide and monitor the management of the company operating in a singularly high-risk context. Their obligation, after all, is to perform their role at a level of diligence that a reasonable director or officer, acting in the corporation's *specific circumstances* would achieve.
>
> … A director, whether executive or non-executive, is *required* to take reasonable steps to place themselves in a position to guide and monitor the management of the company and is expected to take a diligent and intelligent interest in the information available to them, understand that information, and apply an enquiring mind to their responsibilities. Non-executive directorships of public companies, particularly those conducting high-risk enterprises, are not just tokens or glittering prizes decorating a CV; the job requires intelligent people prepared to engage actively. In such a context one would expect directors to approach their task understanding the discharge of their duties requires more than formal compliance. It can require a willingness to interrogate, to probe, and, where necessary, to challenge."[18]

27 Lee J also observed in the *Penalty Judgment* that:

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[17] *Bekier (Liability Judgment)* at [1944]-[1945]; see also [373]-[375].
[18] *Bekier (Liability Judgment)* at [1944]-[1945].

"corporate governance failures seldom arise because information is entirely absent. More commonly, they arise because "the watchman sees the sword coming and does not blow the trumpet"; or because warning signs are insufficiently pursued; or because obvious questions are left unasked. The duty imposed by s 180(1) exists to guard against precisely those failures."[19]

Q1(b) - Would the risk of non-compliance with a company's regulatory obligation give rise to a breach of a director's section 180 duty?

28 It is not necessary for the company to actually breach the law or to be found to have breached the law in order for a director to breach their duties under section 180.[20] The failure of a director to address the risk of non-compliance by the company with its regulatory obligations could give rise to a breach of the director's section 180 duty. But it is not the duty of the director to guarantee compliance by the company nor to eliminate all risks.

29 Failing to consider, with reasonable care and diligence, whether the company is <u>at risk</u> of breaching a regulatory obligation may be sufficient in some circumstances to support a finding that the director has breached their section 180 duty. This will particularly be the case where:

a. there is a real possibility of catastrophic or extremely serious consequences for the company if it does breach the relevant obligation, that risk ought to have been clear to the director, and the risk of harm obviously outweighs the countervailing benefits to the company from engaging in the conduct giving rise to the risk; or

b. the company has not breached the regulatory obligation but has incurred substantial loss or other harm to its interests which would have been avoided if the director(s) had acted earlier to address and alleviate the risk of the company breaching the obligation. That could occur, for example, in situations where the company avoids breaching the regulation by shutting

[19] *Penalty Judgment* at [287].
[20] *DSHE v Potts* at [113]; *Australian Securities and Investments Commission v Wilson (No 3)* [2023] FCA 1009 (***ASIC v Wilson***) at [128]-[135] (Jackson J).

down its business for a significant period or incurring immense expenditure in circumstances where that could have been avoided if reasonable steps had been taken much earlier to address the risk.

30 As mentioned in our answer to question 1(a) above, for section 180 to be breached, there must be at least a foreseeable risk of harm to the company's interests.[21] If there is no foreseeable risk of harm, then there will be no breach of section 180. However, a risk that a company will be found to have broken the law or, conceivably a risk that it will be perceived to have broken it, is a risk of harm.[22]

31 Depending upon the circumstances, a company's contravention might be a material fact relevant to the question whether a director failed to meet the standard mandated by s 180(1) *by exposing a company to risk*, but it is not an "essential ingredient of liability."[23] As the *Bekier (Liability Judgment)* illustrates, a director could breach their s 180 duty because they fail to act appropriately in the face of the *risk* of regulatory intervention, without needing to know the foreseeability of any particular regulatory intervention.[24] Indeed, the exposure of the company to reputational harm, even without the risk of regulatory intervention, may be sufficient.[25]

32 In determining whether a director has breached their section 180 duty in a situation in which there is a risk of breach by the company of a compliance obligation but no proof the company actually breached the law, the court will analyse whether and to what extent the company's interests were jeopardised, and if they were, whether the risks obviously outweighed any potential countervailing benefits, and whether there were reasonable steps which could have been taken to avoid the risks.[26]

33 Much will turn on the factual circumstances, including the director's particular role and what information they had available to them which may have suggested there

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[21] *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 449 to 450 per Ipp J; *ASIC v Cassimatis (No 8)* at [465], [479]-[484], [540]; *Australian Securities and Investments Commission v Mitchell (No 2).* (2020) 382 ALR 425; [2020] FCA 1098 (***ASIC v Mitchell***) at [1431].
[22] *ASIC v Wilson* at [131] (Jackson J).
[23] *Bekier (Liability Judgment)* at [117].
[24] *Bekier (Liability Judgment)* at [1421].
[25] *Bekier (Liability Judgment)* at [1425].
[26] *ASIC v Maxwell* at [110].

was a risk which required further investigation and consideration as to how the risk of breach of a company's regulatory obligation might be avoided.

34 One of the challenges for directors is that risks tend to look more likely in hindsight after they have manifested. In most cases, companies have not deliberately courted the risk; and so the manifestation of the risk is a surprise to the company and to its directors. And public commentary, and enforcement action, is almost always concerned with a risk for a company that has manifested. The combination of these things might create a sense for a director that they are heavily exposed to unexpected events and dangers and this can create the temptation to descend from the boardroom into the detail of operations or to exercise a high degree of scepticism towards management. The problem is that this might create more exposure for a director, if the director departs from the conventional role and puts themselves closer to the minutiae of operations. In the *Bekier (Liability Judgment)*, the Court reiterated that non-executive directors are not required to be involved in the affairs of a company at the operational level and are not expected to have the same knowledge of the company's operational activities as executive directors.[27]

35 It is not possible to eliminate all risk of exposure to an allegation of a breach of a director's section 180 duty any more than it is possible to eliminate all risks for a company. So a considered and system-based approach to a company's risks is important.

36 Where there is a significant risk to the interests of the company – including having regard to the potential consequences to the company, directors should seek a plan from management – or outside experts if appropriate – for the risk to be addressed, critically assess whether the plan is realistic and adequate, and then take steps to seek to ensure that management is held accountable for implementing the plan within a timeframe that is reasonable in the circumstances. Depending on the circumstances, it may be appropriate for directors to require updates or reports on the issue from management or appropriate experts at subsequent board meetings

[27] *Bekier (Liability Judgment)* at [370].

or, if the situation is urgent, by communications with the directors outside of board meetings or by holding ad hoc board meetings at which the issue is addressed.

Q1(c) - To what extent does liability attach to the board collectively versus individual directors?

37 While the board has collective responsibility for the management of the company and the directors may make collective decisions as a board, the duty imposed by section 180 is placed on each director individually and liability under section 180 attaches to each director individually.

38 Directors' powers to manage the business of a company and to exercise the powers of the company are given to them collectively and must generally, subject to proper delegation, be exercised by the board as a whole. Section 198A of the Corporations Act provides that the business of a company is to be managed by or under the direction of the directors, and the directors may exercise all the powers of the company except any powers that the Corporations Act or the company's constitution require the company to exercise in general meeting. The company's constitution will usually govern how the directors are to proceed and it is common for a majority vote of directors to prevail where not all directors agree to a proposed resolution.

39 Liability under section 180 does not attach to a board collectively. Where the board makes a collective decision, for example, to approve or permit a course of action that results in the company breaching the law and thereby substantially prejudicing the company's interests, the question as to whether or not a particular director will be held to have breached section 180 will depend on the role and performance of that director in the making of that decision including having regard to the company's circumstances and the particular responsibilities and knowledge that director had.

40 Each director's position may be different. Some may have executive responsibilities or be on a board committee with particular responsibility for risk – others will not. At the time of making a relevant decision, each may have different

levels of knowledge about the potential risk of harm to the company's interests. For example:

a. One director may be aware of something important that the other directors are not, e.g. something that indicates there is a significant risk of the company breaching the law and the potentially serious consequences to the company from that;

b. A second director may not have such detailed knowledge but still be on notice of circumstances which ought to have alerted them to ask more questions or oppose the course of action without further investigation or advice;

c. A third director may have asked questions of or obtained assurances from management or other appropriately qualified people prior to the board meeting which suggested the proposed course of action posed little to no risk to the interests of the company;

d. A fourth director may not be aware of any circumstances which would put them or a reasonable person in their position on notice of the risk to the interests of the company from the proposed course of conduct.

41 It is frequently the case that only one or some directors, and not the whole board, are alleged to fall short of the standard required by section 180. Commonly this is the managing director, finance director and/or chairperson as they will often have access to information not available to other directors which may mean that they are more likely to find themselves in situations where they are expected to do something with that information with a view to protecting the interests of the company.

42 If one or two directors have information which they ought to have followed up or raised with the whole board, and their failure to do so sets the company on a path of breaching a regulatory compliance obligation, those directors may be particularly at risk of breaching their duty under section 180 if the company's interests are seriously threatened or harmed by the conduct. In that scenario, the other directors who did not have the relevant information may be in a position to credibly say that if the information had been shared with them, they would have

taken steps to investigate and prevent the company from breaching the regulatory compliance obligation.

43 A director who makes enquiries regarding management's handling of certain compliance obligations and is unsatisfied with the response should, at a minimum, raise the issue with the other directors so that the board can consider what further steps, if any, should be taken to address the issue. If the director who made the initial enquiries remains unsatisfied with the way in which the issue is being dealt with by management and the rest of the board (or the majority), then the director may be placed in the difficult position of needing to at least consider whether it is appropriate to resign, including to avoid personal risks in relation to ongoing regulatory compliance breaches. That will be an individual decision for the director to make in the particular circumstances, including having regard to the seriousness of the potential breach of the compliance obligations with which the director is concerned.[28] If the director considers the compliance issues are relatively minor and unlikely to have any significant effect on the company, then the director may feel comfortable staying on the board notwithstanding the director disagreeing with the company's approach to the particular issue. Even for more serious issues, the director might reasonably consider that it is in the best interests of the company for the director to stay on the board to continue to monitor the issue and agitate further for the company to take action to address the issue as appropriate – at least until a point is reached at which the director considers the continued position to be untenable.

44 In some circumstances, each and every member of the board may breach their duties under section 180 by their conduct in joining in a decision of the board or failing to take some action which any reasonable person in their individual

[28] The director may also need to consider whether they are under any obligation to further report the issue outside the organisation, for example, if the director is aware of a serious criminal offence having been committed. For example, in New South Wales, section 316 of the *Crimes Act 1900* (NSW) makes it an offence for an adult not to report a serious indictable offence unless there is a reasonable excuse for not reporting it. The obligation applies to an offence punishable by imprisonment for life or for a term of 5 years or more if the offence is committed wholly or partly in NSW or has an effect in NSW. The obligation could come into play if a director knows or believes such an offence has been committed and believes that he or she has information that might be of material assistance in securing the apprehension of the offence or the prosecution or conviction of the offender.

circumstances ought to have taken. For example, if each of the directors is aware of a potentially serious risk (such as a major contamination spill) which could be avoided by relatively modest action or expenditure and all the directors decide not to cause the company to take that action and incur that modest expenditure, then each of the directors may well be considered to be in breach of their duties under section 180.

45 Executive directors, and the chief executive officer or managing director in particular, occupy a distinctive position. As illustrated in the *Bekier (Liability Judgment)*, they are likely to bear responsibility for ensuring that the board is appropriately informed of matters material to its governance role, including serious legal, regulatory and reputational risks. In the *Bekier (Liability Judgment)*, the former managing director was found to have breached s 180(1) by not ensuring that information he had or had been alerted to about material and serious risks was drawn to the attention of the Board.[29]

Q1(d) - To what extent is the standard of care different for the board chair or other NEDs with specific responsibilities (e.g. Risk Committee Chair)?

46 The standard of care that is required by section 180 is fixed by reference to the degree of care and diligence that a reasonable person would exercise if they (a) were a director of a company in the company's circumstances; and (b) occupied the office held by, and had the same responsibilities within the company as, the director.

47 The responsibilities of any director will include responsibility that is imposed on directors by the Corporations Act or other regulations. However, the responsibilities also extend to whatever responsibilities the particular director has within the company.[30] This may be informed by any relevant contract of service or letter of appointment between the company and the director, as well as the company's constitution, board charter, committee charters and any relevant

[29] *Bekier (Liability Judgment)* at [1427]-[1431] and [1455]-[1461].
[30] *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465; [2012] HCA 18 at [18]-[19], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

corporate governance policies. An officer's responsibilities are not divisible between the different hats that the officer wears.[31]

48 The word 'responsibilities' in section 180 encompasses the tasks that fall within the particular director's bailiwick and directs attention to the factual arrangements operating within the company and affecting the director. It includes "arrangements flowing from the experience and skills that he or she brings to bear to the office, and also any arrangements within the board or between the person and the executive management affecting the work that the person is expected to carry out."[32]

49 Directors who have particular responsibilities, such as being the board chair, or chair or member of a Risk Committee, are to be judged by what a reasonable person holding those particular responsibilities would do in the position of director in the company's particular circumstances.

50 While an executive director will usually have greater responsibilities attached to their position than will a non-executive director, in some circumstances non-executive directors may become very involved in the management of the day-to-day operations of the company or the management of particular issues. Where that occurs, each non-executive director will be judged by reference to the particular responsibilities they take on. As a general proposition, the more knowledge a director has about the company's operations and the higher the degree of control that the director exerts over those operations, the more that will be expected of the director in exercising their powers and discharging their duties under section 180. But that is not to suggest that a director could reduce their risk of personal liability by shielding themselves from relevant information. That is for two reasons. First, more is expected of a director who receives more information because of their particular role but in a way commensurate with the benefits of that additional information for managing the risks of the company. Secondly, the duty of directors also extends to informing themselves adequately to discharge their role. A director who chooses to 'put their head in the sand' is courting danger and exposing

[31] See *Bekier (Liability Judgment)* at [1521]-[1528].
[32] *ASIC v Rich* (2009) at [7202] (Austin J); *ASIC v Mitchell* at [1407] (Beach J).

themselves to significant risk of being held to be in breach of their duty to the company.

Role of the chair

51 Ordinarily, a core function of a non-executive director who is chair of the board is to preside at board meetings and to exercise procedural control of those meetings. He or she may have a casting vote but otherwise has no greater authority than an ordinary director other than to facilitate discussion and bring relevant agenda items to an appropriate close.

52 While the chair is not some sort of directorial overlord, in practice, the chair may have greater responsibility for the performance of the board as a whole than other directors have because the chair has the power and authority to manage board meetings and agendas.[33]

53 Much will depend on the particular company's circumstances and the arrangements in place with the particular director who is a chair of the board, however, it is common for the chair of a board to have many additional responsibilities which go beyond procedural duties and which will impact on what would be reasonably expected of a director in the chair's position under section 180. These include:

a. The power, authority and responsibility for setting the agenda items for board meetings. Ordinarily it is the function of a chair to settle the agenda of the meetings of the board: at least he or she exercises a significant influence upon it.[34] The chair can discharge that responsibility in consultation with the CEO or managing director.[35] Typically, the company secretary will also be involved. In settling the agenda items for board meetings, the chair is in a position to arrange for proposals to be brought forward for consideration by the directors at their meetings;

[33] *ASIC v Mitchell* at [1409].
[34] *Woolworths v Kelly* (1991) 22 NSWLR 189 at 225 (Mahoney JA).
[35] *ASIC v Mitchell* at [1410].

b. The power, authority and responsibility to ensure that the board has sufficient information, whether presented in written or oral form, to enable the board to meaningfully consider, discuss and decide on the agenda items before the board at the relevant meeting. That responsibility may be discharged in consultation with others such as the CEO;[36]

c. The power, authority and responsibility to manage the board to ensure that sufficient time is allowed for the discussion of complex or contentious matters. In some circumstances, it may be necessary for the chair to arrange meetings outside ordinary scheduled board meetings so that board members are thoroughly prepared;[37]

d. The chair should promote constructive and respectful relations between the board and the executive management, and seek to ensure that the chair has a workable and productive relationship with the CEO, particularly where the CEO is not a director.[38] Recognising that the relationship between the chair and the CEO is often closer than the relationship between the CEO and other directors, the chair should be astute to the information asymmetry that may arise from that close relationship with the CEO (in the sense of the chair having more information than other board members) and seek to ensure that information is appropriately shared with other directors where it is relevant to their responsibilities and the decisions to be made by the board;

e. The chair's role may also involve seeking to ensure that the board members work effectively together as well as facilitating the effective contribution of each director;[39]

f. The chair may have greater responsibility than other directors for defining and ensuring that the board sets and implements the corporate culture of the organisation in the sense referred to in s 12.3(6) of the Criminal Code (Cth) meaning "an attitude, policy, rule, course of conduct or practice existing

[36] *ASIC v Mitchell* at [1411].
[37] *ASIC v Mitchell* at [1412].
[38] *ASIC v Mitchell* at [1414].
[39] *ASIC v Mitchell* at [1413].

within the body corporate generally" or a set of shared values and assumptions, which could be highly relevant to the approach taken within the company to compliance and other non-financial risks;[40]

g. The chair may also have greater responsibility than other directors for defining and ensuring that the board sets and implements an appropriate corporate governance structure within the company, being the framework of rules, relationships, systems and mechanisms under which authority is exercised and controlled within the company;[41]

h. More generally, the chair is responsible for monitoring the performance of the board, board members and board committees;[42]

i. The chair often has a role in ensuring that there is appropriate communication with and the taking into consideration of the interests and concerns of members;[43] and

j. The chair also often has a public facing role in representing the board and the company to outside parties.[44] This may involve the chair representing the company in meetings or dealings with major investors, regulators, government agencies or before Parliament.

Chair and members of a board risk committee

54 To the extent that the chair of the board risk committee, or members of the risk committee more generally, have additional responsibilities that are not shared by other directors, then those additional responsibilities will be taken into account in assessing whether the director has complied with the standard of care and diligence required of them under section 180.

55 More may be expected of directors who are members of a board risk committee, especially the chair of that committee, in relation to monitoring compliance risks than would be reasonably expected of non-executive directors who are not on that

[40] *ASIC v Mitchell* at [1416].
[41] *ASIC v Mitchell* at [1417].
[42] *ASIC v Mitchell* at [1418].
[43] *ASIC v Mitchell* at [1419].
[44] *ASIC v Mitchell* at [1420].

committee. That is because the responsibilities of directors who are members of the risk committee are likely to require those directors to pay particular attention to compliance risks in order to assist the Board to guide and monitor the management of the company in respect of those risks. By taking up an appointment to the committee, a director will be taken to have accepted the additional responsibilities that come with the role regardless of whether or not they are paid, or paid any additional amount, for taking on those further responsibilities.

56 The charter of the board risk committee will usually set out the role and responsibilities of the committee and its chair. For example, it might cover things such as the risk committee's role in:

a. monitoring and assisting the board in reviewing key and emerging risks facing the company including both financial and non-financial risks that could threaten the company's business model, performance, solvency or reputation;

b. monitoring and assessing the effectiveness of the company's risk management systems and controls and making recommendations and reporting to the board on whether the company is operating within the risk appetite set by the board;

c. meeting with the company's chief risk and compliance officer on a regular basis without other members of management being present, and having open lines of communication, agreed with the CEO, between the risk committee chair and the chief risk and compliance officer between meetings; and

d. reporting to the board following each risk committee meeting and referring matters to the board as appropriate.

57 The chair of a board risk committee will ordinarily have many of the same responsibilities in relation to the risk committee that the chair of the board has in relation to the board. These will include the responsibility for settling the agenda for risk committee meetings and seeking to ensure that members of the risk committee have sufficient information and adequate time available at committee meetings to enable them to meaningfully consider, discuss and decide whether or not to take further action in relation to any agenda items.

58 The chair of the risk committee should seek to ensure that the committee operates effectively, that matters involving significant risk to the company's interests are escalated to the whole board where appropriate, and that the chair of the committee is available to executives such as the chief compliance officer, chief risk officer or senior legal counsel as appropriate, for example, if any of those people contact the chair about a serious compliance risk facing the company.

59 If and to the extent that the chair of the risk committee fails to carry out their duties as a reasonable person would do in their position, with their responsibilities, in the company's circumstances, then the chair could be in breach of section 180. It is quite possible that could occur even where another non-executive director of the company who engages in the same conduct at a board meeting as the chair of the risk committee, but without having the chair's additional responsibilities, is held not to be in breach of their duty under section 180.

Q1(e) - What evidence will help demonstrate directors' active oversight of non-financial risks? Should this be reflected in minutes of board meetings?

60 Non-financial risks can encompass operational risks, compliance risks, conduct risks, cyber risks, as well as ESG factors including climate change risks.

61 Contemporaneous documents that show directors have actively sought out information regarding non-financial risks and meaningfully engaged with material provided to them in relation to those risks are likely to be critical to both (i) ASIC and other potential litigants' decisions as to whether or not to pursue claims against a director for a breach of section 180; and (ii) the determination of any case that may be brought against a director for an alleged failure to comply with section 180 in relation to those risks.

62 In a speech given to the AICD's corporate governance summit in March 2022, ASIC's then-Chair, Joe Longo, sought to encourage directors to focus on ensuring that risks, and in particular the non-financial risks facing their specific organisation, are being managed effectively, and stated:

> 'ASIC is acutely aware that there is no one-size-fits-all approach to governance. The costs and consequences of poorly handled non-financial

risks can be immense and, at the extreme, catastrophic. However, establishing the structures and information flows within your control, getting the people and practices right so as to seek out the "known unknowns" that might otherwise endanger your business, is a very achievable objective.'[45]

63 ASIC Report 631[46] set out ASIC's Corporate Governance Taskforce's observations on director and officer oversight of non-financial risk based on interviews and a review of documents provided by seven very large financial institutions. For the purpose of its report, published in 2019, the Taskforce adopted a definition of non-financial risk which captures:

a. **operational risk** – the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events and includes legal risk but excludes strategic and reputational risk

b. **compliance risk** – the risk of legal or regulatory sanctions, material financial loss, or loss to reputation an organisation may suffer as a result of its failure to comply with laws, regulations, rules, related self-regulatory organisation standards and codes of conduct applicable to its activities

c. **conduct risk** – the risk of inappropriate, unethical or unlawful behaviour on the part of an organisation's management or employees.

64 Relevantly, the findings of the Taskforce included that:

a. There was no strong trend of directors actively seeking out adequate data or reporting that measured or informed them of their overall exposure to non-financial risks;

b. Material information about non-financial risk was often buried in dense, voluminous board packs;

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[45] 'ASIC's corporate governance priorities and the year ahead', Speech by ASIC Chair delivered on 3 March 2022; https://asic.gov.au/about-asic/news-centre/speeches/asic-s-corporate-governance-priorities-and-the-year-ahead/

[46] *Corporate Governance Taskforce: Director and officer oversight of non-financial risk report*, published in October 2019: https://asic.gov.au/regulatory-resources/find-a-document/reports/corporate-governance-taskforce-director-and-officer-oversight-of-non-financial-risk-report/

c. Fractured or informal flow of information up to the board and around the board table meant that some boards did not always have the right information to make fully informed decisions;

d. Where information did make its way to the board, there was little evidence in the minutes of some organisations of substantive active engagement by directors;

e. In relation to the operation of Board Risk Committees, there was little evidence in minutes of directors actively engaging with the substance of proposals submitted by management or information reported to them, in terms of offering alternative viewpoints or driving action by management.

65 The report also stated that:

> "While minutes are not the sole source of evidence of the extent of directors' stewardship, the minutes reviewed would not on their own support an argument that directors were exercising active stewardship."

66 If the minutes of board meetings or other contemporaneous documents show that directors have sought and substantively considered information concerning non-financial risks, and appropriately tested management in relation to those risks, e.g. by asking questions and holding management to account in respect of action required to manage those risks, that is likely to greatly assist directors to avoid proceedings for breach of section 180 and to successfully defend any actions that may be brought.

67 In our view it is likely to be helpful to have these matters accurately recorded in the minutes of board or board committee meetings, even if not in a high level of detail. While it is no doubt helpful for directors to regularly obtain briefing papers on non-financial risks from management, and others where appropriate, that alone is unlikely to be sufficient to demonstrate the directors' active oversight of those risks. A simple reference in minutes to the board having "noted" a particular paper in the board pack relating to non-financial risk may not persuade the regulator or a court that the directors have substantively and appropriately engaged with the relevant issues if the directors' conduct is later called into question. References in the

minutes to the time taken by the board to discuss those papers and question management about the risks identified and actions being taken to manage them – as well as to matters to be followed up – will be more compelling evidence of active oversight, particularly if the board takes steps to ensure that the status of action items is followed up and addressed at or before subsequent board meetings.

68 It is important to note that we do not suggest that it is necessary for board minutes to record every question asked, answer given or view expressed during a discussion of non-financial risks. That is not the purpose of minutes. Minutes are not required to record everything that is said at a board or committee meeting and would likely become unduly cumbersome and less useful if they were to purport to do so. Courts recognise that minutes are not expected to be transcripts of words spoken at the meeting and nor do they need to record arguments for or against resolutions. That said, it is important for all directors to seek to ensure that the minutes accurately refer to the matters discussed. While the duty to ensure minutes are kept rests on the company (under section 251A of the Corporations Act), ultimately it is the directors' responsibility to require the company to comply with those obligations. In most cases, courts will regard the minutes as important evidence as to what occurred at the relevant meeting. Minutes that are kept and signed in accordance with section 251A of the Corporations Act are evidence of the board or committee meeting to which they relate unless the contrary is proved.[47]

69 Active oversight of non-financial risks can be recorded in other ways than in the minutes, for example, in emails sent between directors or from a director to management. Individual directors could also make and keep their own notes of matters considered and questions asked to show their active oversight of non-financial risks. But there are risks and benefits to this approach. It could be very helpful if the notes show that the director has adequately informed him/herself, questioned appropriately and used proper care and diligence in considering non-financial risks. However, as noted in the AICD's director tool on Board Minutes[48],

[47] Section 251A(6) of the Corporations Act.

[48] https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/board/board-minutes-director-tools.pdf

taking individual notes can create risk - ambiguous, inconsistent or incomplete records might be used against a director in subsequent proceedings.

70 In *Australian Prudential Regulation Authority v Kelaher*[49], Jagot J held that the absence in board minutes of a detailed record of discussion or consideration about matters before the board does not support the conclusion that such discussion or consideration did not occur. However, the absence of any contemporaneous record showing directors actively considered and monitored non-financial risks will likely not assist a director in defending an allegation that they breached their section 180 duties. It may also increase the risk that, if proceedings are brought against a director, the director will need to give evidence in court, and be subject to cross-examination, in order to avoid the court drawing an inference from other evidence that the director did not actively and appropriately consider and address the risks to the interests of the company from relevant non-financial risks. The experience of giving evidence is usually highly stressful and time-consuming for the director as well as carrying substantial risk to the director's reputation and the outcome of the proceedings if it does not go well.

71 If directors seek to diligently oversee non-financial risks in discussions, including asking appropriate questions of management, but do not maintain any contemporaneous record evidencing that activity – the directors are likely to be at a significant disadvantage if they need to try to defend allegations of a breach of section 180 some years down the track from when the relevant conduct occurred. It is difficult for most people, directors included, to try to accurately recall conversations they had years ago and of which they have no contemporaneous record and which may not have had the significance at the time which they will later have in the context of a court proceeding concerning an alleged breach of section 180. If the best a director can do is reconstruct a narrative as to what they think they may have done, said or been told – or if, as occurred in the *Bekier (Liability Judgment)*, the court forms the impression that a witness has engaged in reconstruction[50] – the court may find the director's account unreliable and not be

[49] (2019) 138 ACSR 459; [2019] FCA 1521 at [142].
[50] *Bekier (Liability Judgment)* at [175], [209]-[211] and [1501]-[1503].

persuaded by the director's version of events in the absence of corroborating evidence from contemporaneous documents or another witness. If that occurs, the director may be subject to adverse credit findings by the Court and that may contribute to a finding that the director has breached their s 180 duties. Accurate contemporaneous records showing the directors actively considered and addressed the relevant non-financial risk should help a director avoid that fate.

72 On the other hand, because once a risk has manifested it can look far more serious and far more likely than it did before it manifested, contemporaneous records in relation to earlier consideration by the board or individual directors of the possible risk that the company may face – before the risk has manifested – may look as if they evidence a lack of consideration of the risk (because they do not demonstrate the level of concern that seems warranted with hindsight once the problem has eventuated). Courts tend to have an appreciation of the objective context in which documents are written. However, there is a risk that a contemporaneous record may be regarded by a regulator, or other possible plaintiff, as evidencing a lack of consideration because of what is not recorded there.

73 Courts are likely to give greater weight to contemporaneous or near contemporaneous documents than to fallible human memory, especially when the lapse of time between the events in question and the hearing is long and especially when the witness has an interest in the outcome[51] - as a director will do if they are being sued for a breach of section 180.

74 Accordingly we consider it prudent for directors to require accurate minutes of board meetings be kept which demonstrate that the directors have actively considered non-financial risks facing their company and taken appropriate action to seek to ensure those risks are managed appropriately.

75 In the *Bekier (Liability Judgment)*, the Court was critical of the level of oversight and scrutiny exercised by the directors as evidenced in the Board minutes. The judge observed that the contemporaneous minutes "disclose little by way of sustained scrutiny or insistence upon explanation in circumstances where risks were

[51] *ASIC v Wilson* at [113] (Jackson J).

obvious" and that the material was "not a portrait of directors actively pressing management with difficult questions as to whether the business was being conducted ethically, lawfully and to the highest available standard".[52] While the sparse contemporaneous record made it difficult for ASIC to establish what the non-executive directors actually knew or discussed, it also assisted the Court to find that the executives had not drawn relevant material risks and information to the attention of the Board and hence find the executive officers, including the managing director, had breached their respective duties under s 180.

76 As acknowledged in the *Bekier (Liability Judgment)*, board packs for public companies frequently extend to hundreds of pages and can be oppressive. Nevertheless, directors cannot rely upon an inability to cope with the volume of information provided to them in board packs as an excuse for not exercising proper oversight. Rather, boards can and should control the information that they receive in board packs so that directors are provided with information in a form that is both comprehensive and capable of proper digestion. All directors, whether executive or non-executive, are *required* to take reasonable steps to place themselves in a position to guide and monitor the management of the company, and are expected to take a diligent and intelligent interest in the information available to them, understand that information, and apply an enquiring mind to their responsibilities.[53] As Lee J put it, directors "cannot content themselves by being passive recipients of information."[54]

77 The Court observed in the *Bekier (Liability Judgment)* that a way of addressing information overload, at least in part, could be through the principled and transparent use of emergent technology. The Court referred to the AICD's December 2025 publication entitled "*AI use by directors and boards: Early Insights*"[55] and noted that there is considerable potential for AI, if appropriately utilised, to assist directors in the discharge of their duties. However, the use of AI-generated

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[52] *Bekier (Liability Judgment)* at [1951].
[53] *Bekier (Liability Judgment*) at [395].
[54] *Bekier (Liability Judgment*) at [1956].
[55] Available at https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-resources/ai-use-by-directors-and-boards.pdf

summaries as a substitute for careful reading and interrogation of board materials warrants caution, including because inadequately deployed or misdirected AI may increase risk and legal exposure rather than mitigate it. Any use of AI should be controlled and transparent, and it is prudent for boards to discuss and deliberately govern any AI use by formal adoption of policies.[56]

Business Judgment Rule

Q2 - Is the BJR defence available to directors in the case of an alleged breach of section 180 in relation to non-financial risk issues, particularly where it involves matters of a compliance nature? If so, in what circumstances?

78 The statutory BJR defence is contained in sections 180(2) and (3), which provide:

> *Business judgment rule*
>
> (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of [section 180(1)], and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.
>
> (3) In this section:
>
> ***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

79 As construed by the courts to date, section 180(2) places an onus on the director to defend his or her decision-making by adducing evidence sufficient to persuade the court that:

a. the director made the judgment in good faith for a proper purpose; and

[56] *Bekier (Liability Judgment)* at [393]-[394] and [396].

b. the director did not have a material personal interest in the subject matter of the judgment; and

c. the director informed themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

d. the director rationally believed that the judgment was in the best interests of the company.

80 If the director can do all of that, the director might be able to rely on the BJR defence in seeking to defend an allegation that the director breached section 180 in relation to non-financial risk issues – providing the conduct concerns a 'business judgment' made by the director.

81 The BJR defence is limited to situations in which a director makes a "decision to take or not take action". It is not available where the director does not turn their mind to a matter, even if that occurs honestly and for good reason.

82 Even where the director has turned their mind to the matter, the availability of the BJR defence is likely to be severely restricted in the case of non-financial risk issues, particularly those concerning compliance risks, including having regard to the way in which courts have construed the concept of what is a 'business judgment'.

83 Relevantly:

a. It has been held that the discharge by directors of their 'oversight' duties, including their duties to monitor the company's affairs and policies and to maintain familiarity of the company's financial position, is not protected by the business judgment rule, because the discharge or failure to discharge those duties does not involve any business judgment as defined in section 180(3).[57]

b. To similar effect, Professor Ramsay has expressed the view that the types of oversight and monitoring responsibilities that non-executive directors typically have in a large corporation are excluded from the protection of the

[57] *ASIC v Rich* (2009) at [7278] (Austin J).

BJR defence as they are not matters that involve a decision to take or not take action.[58] We do not necessarily share that view.

c. In *ASIC v Mitchell*, the judge stated that he was inclined to the view that a decision by the chairperson of Tennis Australia to include or not include information to be provided to the board was not a "business judgment" even though that information flow ultimately feeds into the board's decision which did concern business operations and the words "in respect of a matter" in the definition of 'business judgment' in section 180(3) are of broad compass.[59]

d. The Explanatory Memorandum to the Bill that introduced the BJR defence stated, among other things, that:

> "The operation of the business judgment rule will be confined to cases involving decision making about the ordinary business operations of the company. For example, the decision to undertake a particular kind of business activity promoted in a prospectus would be the kind of business judgment to which the proposed rule may apply. However, compliance (or otherwise) with the prospectus requirements imposed by the Law would not be a decision to which the proposed rule could apply. In this regard, s 180(3) specifically provides that a business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation."[60]

e. Further, it has been held that the BJR is not available to excuse a director from a breach of section 180 where the director's want of diligence results in a contravention of another provision of the Corporations Act where that other provision contains its own exculpatory provisions enacted for the benefit of the director.[61]

84 There are however some decisions by directors related to compliance with the law which are likely to be characterised as relating to the company's business operations and therefore potentially covered by the BJR. For example:

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[58] *Ford, Austin & Ramsay's Principles of Corporations Law* at [8.440.12].
[59] *ASIC v Mitchell* at [1441] (Beach J). Irrespective of whether the BJR defence could be invoked, the judge was not satisfied in any event that the chairperson had contravened section 180(1).
[60] Explanatory Memorandum to *Corporate Law Economic Reform Program Bill 1998* at [6.8].
[61] *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364; [2011] FCAFC 19 at [199] per Keane CJ.

a. A decision by the non-executive chair and other non-executive directors of a company not to approve the release of a pathfinder prospectus to analysts because of a concern about its completeness has been held to be a business judgment.[62]

b. Matters of planning, budgeting and forecasting are matters relevant to the business operations of the company for the purposes of s 180(3), because they provide a financial framework within which business operations are conducted.[63] A budgeting decision made by the board to provide (or not provide) funds for the company to address particular compliance risks, such as investing in or upgrading IT assets to enable the company to comply with privacy laws, cyber-risk requirements or anti-money laundering regulations, is in our view a decision to take or not take action relevant to the company's business operations and should be capable of attracting the BJR defence.

85 We also consider that the BJR defence could operate more widely than the existing case law suggests in relation to the exercise by directors of their oversight and monitoring duties. In exercising their oversight duties and reading the board packs for each meeting, a director may make many decisions including deciding to seek or not seek further information or advice in relation to a matter concerning the company's business operations, e.g. on reading a board paper about the risks of modern slavery in the company's operations and supply chains and actions to address those risks. It is not evident why those decisions ought not to be considered to be decisions "to take or not take action in respect of a matter relevant to the business operations of the corporation", so as to have the potential to attract the BJR defence if the director can otherwise satisfy the requirements in section 180(2).

86 Of course, for the director to be able to enliven the presumption created by section 180(2) that the director is taken to have complied with section 180(1), the director must establish the criteria in section 180(2) including that the director has informed

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[62] *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324; [2018] VSC 347 at [679]-[681].

[63] *ASIC v Rich* (2009) at [7274] (Austin J).

themselves about the subject matter of the judgment to the extent that they reasonably believe to be appropriate.

87 The reasonableness of the director's belief in that regard will be assessed by reference to:

a. The importance of the business judgment to be made;

b. The time available for obtaining information;

c. The costs related to obtaining information;

d. The director's confidence in those exploring the matter;

e. The state of the company's business at that time and the nature of competing demands on the board's attention; and

f. Whether or not material information is reasonably available to the director.[64]

88 With respect to the requirement in s 180(2) that the director must have rationally believed that the decision was in the best interests of the company, it has been held that a director's belief will be rational if it is based on reason or reasoning, whether or not the reasoning was convincing and therefore reasonable in an objective sense, but it would not be a rational belief if there was no arguable reasoning process to support it.[65]

89 While there is some scope for the BJR defence to be available to directors in respect of an alleged breach of section 180 in relation to non-financial risk issues, it is unclear from the existing case law how courts are likely to apply the BJR to compliance-related obligations particularly where the directors have actively monitored or considered an issue. Much is likely to depend on a close analysis of the particular factual circumstances that arise when such a breach is alleged.

90 If directors, in the course of discussion at a board meeting, consciously turn their minds to a matter, and collectively reach a decision, the Court indicated in the *Bekier (Liability Judgment)* that it would expect such a conclusion, and the basis for

[64] *ASIC v Rich* (2009) at [7283] and [7284] (Austin J*); ASIC v Mitchell* at [1437], [1439] (Beach J).
[65] *Pacific Current Group Ltd v Fitzpatrick* [2024] FCA 1480 at [284]–[285] (Beach J).

it, to be recorded in the board minutes.[66] The absence of contemporaneous evidence showing a conscious judgment has been made may make it difficult to prove the defence.

91 In *Bekier*, the former managing director unsuccessfully sought to rely on the BJR defence. While the Court accepted that a decision to refrain from doing something may constitute a business judgment, the evidence suggested that the director had not turned his mind to the matter, which was fatal to his BJR defence.[67] Additionally, the Court held the former managing director's reliance on the BJR defence was unsustainable as he did not satisfy the requirement in s 180(2)(c) to inform himself about the subject matter of the judgment to the extent he reasonably believed to be appropriate. This was in circumstances where he did not perceive there was any issue and made no enquiries to inform himself through management whether the company should suspend or terminate its relationship with a customer that exposed the company to significant regulatory and reputational risks.[68]

Reliance on advice

Q3 - Is section 189 'reliance on the advice of others' available to directors in the case of an alleged breach of section 180 in relation to non-financial risk issues, particularly where directors are reliant on the information they are provided by management and/or expert advisors? If so, in what circumstances?

92 While directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company, they are generally entitled to rely upon others unless they know, or by the exercise of ordinary care should know, facts that indicate that they cannot or should not so rely.[69] In our view, that applies to non-financial risks in a similar way to which it applies to other risks. Directors cannot, however, substitute reliance on advisers and management

[66] *Bekier (Liability Judgment)* at [1467].
[67] *Bekier (Liability Judgment)* at [1433]-[1434].
[68] *Bekier (Liability Judgment)* at [1435]-[1436].
[69] *ASIC v Maxwell* at [101] (Brereton J); *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; [2011] FCA 717 (***ASIC v Healey***) at [167] (Middleton J); *ASIC v Wilson* at [119] (Jackson J).

for their own attention to, and examination of, important matters falling within the board's responsibilities.[70]

93 Section 189 of the Corporations Act creates a statutory presumption as to the reasonableness of reliance by a director on information if certain conditions are satisfied. The section provides:

> **189 Reliance on information or advice provided by others**
>
> If:
>
> (a) a director relies on information, or professional or expert advice, given or prepared by:
>
> (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
>
> (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence; or
>
> (iii) another director or officer in relation to matters within the director's or officer's authority; or
>
> (iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and
>
> (b) the reliance was made:
>
> (i) in good faith; and
>
> (ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; and
>
> (c) the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;
>
> the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved.

[70] *ASIC v Healey* at [169], [174], [175] (Middleton J).

94 Section 189 requires that where a director relies on information, professional or expert advice, they must do so in good faith and only after having made an independent assessment of the information or advice. Independent assessment requires that the director:

a. considers the relevant information or advice, which may involve listening to colleagues in a board meeting and/or reading a briefing paper or advice where the information or advice is in written form; and

b. assesses the information or advice, bringing the director's own mind to bear on the issue using such skill and judgment as he or she may possess.[71]

95 Section 189 does not require the director's assessment to be comprehensive or conducted from a position of scepticism.[72] However, the type of independent assessment required may vary according to the director's knowledge of the company and the complexity of its structure and operations. Some information or advice will require greater scrutiny by the director having regard to these factors than other information or advice. Some knowledge that the director possesses might require the director to scrutinise the information or advice more carefully than might otherwise be required.[73]

96 Further, there must be evidence that the director in fact relied on the information provided and that, at the time, the director had reasonable grounds for believing:

a. where the information or advice was provided by an employee, that the employee was reliable and competent in relation to the matters concerned;

b. where the advice was from a professional adviser or expert, the matters in relation to which the advice was given were within the person's professional or expert competence;

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[71] *ASIC v Mitchell* at [1459] (Beach J).
[72] *ASIC v Mariner* [2015] FCA 589 at [533].
[73] *Ford, Austin & Ramsay's Principles of Corporations Law* at [7.270.60]; *Re Idyllic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 1276 (***ASIC v Hobbs***) at [1525] (Ward J).

c. where the information or advice comes from another director or officer of the company, it is provided in relation to matters within that director's or officer's authority; and

d. where the information or advice comes from a committee of directors (on which the director did not serve), the information or advice is in relation to matters within the committee's authority.

97 Section 189 will not be available where the director has not in fact relied on others or the director knows that the person who provided the information or advice is dishonest or incompetent. Where a director believes that an employee is honest and competent but the employee has a track record of providing inaccurate or unreliable information to the board whether on the particular issue or more generally, it may be necessary for the director to subject what they are told by that person to increased scrutiny before relying on it. If the director does not do that, then the court may find that the director's reliance on the information or advice was unreasonable.

98 Similarly, section 189 is unlikely to assist a director where it ought to have been apparent to the director that it was not reasonable to rely upon advice because it was based on inadequate information, was relevantly qualified or was predicated on a factual scenario which was known not to be the case.[74] Section 189 will also not be available where it ought to have been obvious to the director that the person who provided the advice was not suitably qualified or experienced to provide it, having regard to the issues at stake. For example, if a director of a large ASX-listed entity seeks to rely on legal advice about a complex multi-million dollar transaction involving numerous regulatory issues where the advice is provided by a newly graduated lawyer rather than an experienced legal practitioner with specialist expertise in the field, it may be expected that the court would be satisfied that the director's reliance on the advice was not reasonable in the circumstances.

99 There is a core, irreducible requirement for directors to take reasonable steps to be in a position to guide and monitor the company. In order to effectively do that in

[74] *ASIC v Hobbs* at [2451], [2461]-[2465], [2474]-[2476] (Ward J).

respect of non-financial risks, it is likely to be both appropriate and necessary for directors to obtain and rely on information and advice from management and others. The extent to which it is reasonable for a director to rely on that information or advice will depend on the particular circumstances. If regulation relating to a non-financial risk specifically gives responsibility for the risk to the directors or the circumstances indicate that the risk of harm to the company's interests is particularly significant, then greater attention is likely to be required from the directors to the matter than will be required of them in respect of other less serious non-financial risks.

100 If facts come to the attention of a director which awake their suspicion that something is amiss or that would have awoken the suspicion of a reasonable director in their position with their responsibilities, then the director has a duty to enquire further into the matter with a degree of care commensurate with the risk of harm. A director is not entitled to shut their eyes to corporate misconduct or other serious non-financial risks. They are not excused from making enquiries by relying on the judgment of others. Depending on the circumstances, it may not be sufficient for the director to seek to discharge their duty simply by making enquiries with and accepting assurances from senior management who may themselves be implicated in the misconduct.[75] They may need to make further enquiries or seek to have the matter independently reviewed or investigated by competent external advisers.

Mistake of fact

Q4 - Is the defence of 'mistake of fact' available to directors in the case of an alleged breach of section 180 in relation to non-financial risk issues? If so, in what circumstances?

101 A 'mistake of fact' defence was introduced in section 1317QC of the Corporations Act with effect from 13 March 2019.[76] The section states:

[75] *ASIC v Flugge* at [1872]-[1874].
[76] *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*.

1317QC Mistake of fact

(1) A person is not liable to have a declaration of contravention or an order under Division 1 made against the person for a contravention of a civil penalty provision if:

(a) at or before the time of the conduct constituting the contravention, the person:

(i) considered whether or not facts existed; and

(ii) was under a mistaken but reasonable belief about those facts; and

(b) had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

(2) For the purposes of subsection (1), a person may be regarded as having considered whether or not facts existed if:

(a) the person had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

(b) the person honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

(3) A person who wishes to rely on subsection (1) or (2) in proceedings for a declaration of contravention or an order under Division 1 bears an evidential burden in relation to that matter.

(4) In subsection (3), ***evidential burden*** , in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

102 As section 180 is a civil penalty provision, the 'mistake of fact' defence in section 1317QC should be available to directors in the case of an alleged breach of section 180 of the Corporations Act in relation to non-financial risk issues.

103 To avail themselves of the defence, a director will need to be in a position to adduce or point to evidence that suggests at least a reasonable possibility that the director considered whether or not facts existed, the director was under a mistaken but reasonable belief about the existence of facts at or before the time of the relevant conduct, and had those facts existed, the director's conduct would not have constituted a breach of section 180.

104 Where successfully invoked by a director, the 'mistake of fact' defence will prevent a court from making a declaration of contravention against the director (under s 1317E) in relation to an (alleged) breach of section 180 and protect the director

from having consequential orders made such as a pecuniary penalty order (s 1317G), a disqualification order (s 206C) or a relinquishment order requiring the director to pay to the Commonwealth an amount equal to the benefit derived and detriment avoided because of the (alleged) breach of section 180. The 'mistake of fact' defence will also be available in respect of compensation orders sought against a director under s 1317H requiring the director to compensate the company for damage suffered resulting from the director's (alleged) breach of section 180.

105 Unlike the BJR defence, the availability of the 'mistake of fact' defence is not limited to *business judgments* – that is decisions to take or not take action in respect of a matter relevant to the business operations of the company. That may make it more amenable to being applied in relation to alleged breaches of section 180 in relation to non-financial risk issues than the BJR. The 'mistake of fact' defence may also be available where the director has a material personal interest in the subject matter of the judgment, which is another circumstance in which the BJR is not available.

106 The mistake of fact defence will not be available unless a director is able to adduce or point to evidence showing that, at the time of the conduct constituting the alleged breach of section 180:

i. they had turned their mind to whether or not facts existed;

ii. they were under a mistaken belief about the existence of facts; and

iii. that belief was reasonable.

107 Further, the mistake of fact defence will <u>not</u> be available:

a. where the director was under a mistaken belief about the existence of facts but that belief was not reasonable, e.g. because the director did not make any enquiries to seek to confirm the existence of the facts in circumstances where a reasonable director in their position would have done so; or

b. where the director unreasonably assumed that circumstances had not changed since the last time the director had considered whether those facts existed.

108 In practice, it remains to be seen if the 'mistake of fact' defence does offer directors any significant protection in cases involving an alleged breach of section 180 concerning non-financial risks. At this stage, we consider the defence is likely to be of little utility to directors because, in most cases, if a director is unreasonably mistaken regarding an important matter, that is likely to indicate that the director has been negligent in discharging their duties. If a director is in a position to meet the evidential burden required to successfully invoke the 'mistake of fact' defence, then we think it is unlikely that the court would in any event be satisfied that the director has failed to exercise their powers and discharge their duties with the degree of care and diligence required by section 180. This is because we expect that the evidence that the director would need to adduce or point to in order to rely on a 'mistake of fact' defence under s 1317QC is likely to be highly persuasive in indicating that the director has not fallen short of the degree of care and diligence required by section 180 in the first place. Of course, each case will need to be assessed on its own particular facts and it may be that a scenario will emerge in which the 'mistake of fact' defence turns out to be of real utility to a director.

Delegation

Q5 - Is section 190 'delegation' available as a defence in the case of an alleged breach of section 180 in relation to non-financial risk issues? If so, in what circumstances?

109 Unless the company's constitution provides otherwise, section 198D of the Corporations Act entitles the directors of a company to delegate any of their powers to: (a) a committee of directors; or (b) a director; or (c) an employee of the company; or (d) any other person. Section 198D also provides that the delegate must exercise the powers delegated in accordance with any direction of the directors, and that the exercise of the power by the delegate is as effective as if the directors had exercised it.

110 Section 190(1) of the Corporations Act provides that, if the directors delegate a power under section 198D, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.

111 Section 190(2) contains a defence. It provides that a director is not responsible under section 190(1) if:

> a. the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution (if any); and
>
> b. the director believed:
>
> i. on reasonable grounds; and
>
> ii. in good faith; and
>
> iii. after making proper inquiry if the circumstances indicated the need for inquiry;
>
> that the delegate was reliable and competent in relation to the power delegated.

112 The defence in section 190(2) is only available where:

a. the directors, i.e. the board, have delegated a power under section 198D. It does not apply where an executive officer, such as a managing director, delegates any of his or her executive powers to other corporate officers[77]; and

b. the director seeking to rely on the defence establishes that he or she <u>believed on reasonable grounds</u>:

i. <u>at all times</u> that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Corporations Act and the company's constitution; and

ii. in good faith and after making proper enquiry, if the circumstances indicated the need for inquiry, that the delegate was reliable and competent in relation to the power delegated.

113 Although the existence of a belief on reasonable grounds must be determined on the particular facts in each case, the following may be important in determining reasonableness of the director's belief[78]:

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[77] *Austin & Black's Annotations to the Corporations Act* at [2D.190].

[78] *ASIC v Adler* at [374(11)-(12)] (Santow J).

(a) the function that has been delegated is such that it may properly be left to the person(s) to whom it was delegated;

(b) the extent to which the director is put on inquiry, or given the facts of a case, should have been put on inquiry, for example, where the director becomes aware that the delegate has a conflict of interest, has acted inappropriately, or is not following the company's usual procedures in relation to the exercise of the power delegated;

(c) the relationship between the director and delegate must be such that the director honestly holds the belief that the delegate is trustworthy, competent and someone on whom reliance can be placed;

(d) the risk involved in the transaction or activity and the nature of the transaction or activity;

(e) the extent of steps taken by the director, for example, inquiries made or other circumstances engendering "trust".

114 In order to satisfy the requirement that the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution, the directors should maintain due oversight so that they can be reasonably satisfied that the delegated powers are being exercised appropriately. This does not require the directors to become involved in operational matters concerning non-financial risks but, depending on the circumstances, it may require the directors to obtain some ongoing reporting and to respond appropriately to changing circumstances such as if they become aware of a significant increase in risk that poses a threat of serious harm to the company.

115 If the directors just 'set and forget' once they make a delegation in relation to management of non-financial risks, and do not seek to place themselves in a position to guide or monitor the delegate or the ongoing exercise of the delegated powers in any way, then the defence in section 190(2) might not be available to them and they may breach section 180 by failing to exercise their powers and discharge their duties with the degree of care and diligence that would be expected

of a reasonable person in the director's position, with the director's responsibilities, in the company's circumstances.

August 2024 (updated October 2026 to refer to the decisions of the Federal Court in *Australian Securities and Investments Commission v Bekier (Liability Judgment)* [2026] FCA 196 and *Australian Securities and Investments Commission v Bekier (Penalty Judgment)* [2026] FCA 756)

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