THE PUBLIC SECTOR DUTY OF CARE AND DILIGENCE

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Every Australian jurisdiction has imposed a duty of care and diligence on directors and other officials of public sector entities. This duty is modelled on the duty applicable to directors and officers of corporations and plays a significant role in setting governance standards in the public sector. This article examines the interpretation of the duty and its effectiveness in setting governance standards across the public sector. It argues that there is evidence of an emerging community expectation that entities which carry out governmental functions or manage public resources should be required to take reasonable care and diligence in the exercise of those functions, but that this standard has received only incomplete recognition in Australian legislation. The article argues further that the public sector duty of care presents significant difficulties in interpretation given that some of the key concepts relating to the private sector duty are not readily translatable to the public sector and that the mechanisms for enforcement in every jurisdiction are inconsistent, ineffective and lack a clear policy rationale. The consequence is that the duty of care and diligence does not play a significant role in setting governance standards in the public sector.

I INTRODUCTION

Public sector entities provide an ever-increasing range of government services in Australia and are collectively responsible for managing hundreds of billions of dollars of public funds annually.[1] In contrast to private actors, who are free to pursue

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1 'In 2017–18, Australian Government agencies will have responsibility for administering approximately $464.3 billion in expenses': see Commonwealth, *Budget 2017–2018: Agency Resourcing – Budget Paper No 4,* Parl Paper No 133 (2017) 1.

their own interests, government is seen as a 'trust', carried out for the benefit of 'the people'.[2] The proper stewardship of public resources is therefore a matter of importance to the broader community and mismanagement has the potential to harm its interests. Accordingly, ensuring effective governance in public sector entities is crucial for the integrity of government administration.

A key feature of governance in the private sector is the duty owed by directors and officers of companies under the *Corporations Act 2001* (Cth) ('*Corporations Act*') and the general law to act with reasonable care and diligence in the performance of their functions.[3] That duty, which reflects community expectations as to the management of corporations, plays an important role in setting governance standards in the private sector.[4] The private sector duty has also served as a model for a duty of care imposed by all Australian jurisdictions on directors and other officials of public sector entities.[5] This suggests that the standard applicable under the public sector duties was intended to be commensurate with that prevailing in relation to the private sector duty, and that the public sector duties were intended to be interpreted in a similar fashion as the private sector duty. The enactment of the public sector duties in all Australian jurisdictions, and the significant role played by the duty in the private sector context, suggests that the duty was intended to play an important role in public sector governance. However, notwithstanding the almost identical wording, the philosophies underpinning the private sector duty (discussed in Part II) and the public sector duties (discussed in Part III) are very different.

This article examines the effectiveness of the public sector duty of care in setting governance standards across the public sector. It argues that the public sector duty of

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2 Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224; Paul Finn, 'A Sovereign People, A Public Trust' in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995) vol 1.

3 *Corporations Act 2001* (Cth) s 180(1); *Daniels v Anderson* (1995) 37 NSWLR 438. This duty is referred to in this article as 'the private sector duty of care'.

4 Commonwealth of Australia, 'ASIC Enforcement Review Taskforce Report' (18 December 2017) 79; Rosemary Teele Langford, Ian Ramsay and Michelle Welsh, 'The Origins of Company Directors' Statutory Duty of Care' (2015) 37 *Sydney Law Review* 489, 516–7.

5 *Public Governance Performance Accountability Act 2013* (Cth) s 25 ('*PGPA Act*'); *Public Service Act 1999* (Cth) s 13(2); *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Government Owned Corporations Act 2001* (NT) s 20; *Government Owned Corporations Act 1993* (Qld) s 76; *Public Corporations Act 1993* (SA) s 15(1); *Government Business Enterprises Act 1995* (Tas) s 24(3); *State Service Act 2000* (Tas) s 9; *Public Administration Act 2004* (Vic) s 79(1)(e); *State Owned Enterprises Act 1992* (Vic) s 36(2); *Statutory Corporations (Liability Of Directors) Act 1996* (WA) s 10. The *Territory-owned Corporations Act 1990* (ACT) contemplates that territory-owned corporations to which the Act applies will be created under Commonwealth law, and therefore subject to the duty of care in s 180(1) of the *Corporations Act*: Explanatory Memorandum, Territory Owned Corporations Bill 1990 (ACT) 2. See also *Public Service Act 2008* (Qld) s 187(1)(a); *Public Sector Management Act 1994* (WA) s 80(d). These duties, together with any equivalent duty owed under the common law, are referred to in this article as 'the public sector duty of care'.

care has an uncertain policy rationale, inconsistent coverage across the jurisdictions, faces significant difficulties in interpretation, and lacks effective mechanisms for its enforcement. The consequence is that the duty of care and diligence does not seem to have played a significant role in setting governance standards in the public sector.

I argue that there is some evidence of an emerging standard that officers and directors, and potentially all employees, of all public sector entities should be subject to a duty of care and diligence, but that this standard has received only incomplete recognition in Australian legislation. This standard reflects a community expectation that public sector entities which carry out governmental functions or manage public resources should be subject to a duty to take reasonable care and diligence in the exercise of those functions.[6] However, the majority of Australian jurisdictions apply the duty of care more narrowly. One explanation for this is the uncertain policy role played by the duty of care. The duty was originally enacted in most jurisdictions as part of government programs to corporatise key State assets, with the intention of applying private sector standards of governance.[7] More recent articulations of the duty have considered it to be a component of governance across the public sector more broadly.[8] Many non-corporate public sector entities perform functions which are as significant as those carried out by government owned corporations. As such, there does not appear to be a legitimate policy basis for excluding non-corporate entities from the application of the duty; nor does this appear to be consistent with contemporary community expectations relating to the management of public resources.

I argue that the public sector duty of care presents significant difficulties in interpretation given that some of the key concepts relating to the private sector duty are not readily translatable to the public sector. In particular, establishing a contravention of the duty of care requires the applicant to demonstrate that the officer's impugned conduct has caused jeopardy to the interests of the entity. In the private sector context, ascertaining the company's interests is not typically a difficult exercise, and is usually equated with the company's shareholders or (when nearing insolvency) its creditors. By contrast, a public sector entity's interests cannot be so easily identified. Many public sector entities perform public functions, and their interests cannot simply be equated with any one or more stakeholders whose actions stand to be affected by the entity's actions. Further, in many cases assessing whether there has been harm to the interests of a public sector entity is a policy question which the courts will be reluctant to undertake. There is, therefore, considerable

6 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 2013, 3447–8 (David Bradbury, Assistant Treasurer); Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2004, 1549–51 (Steve Bracks, Premier).

7 See Part IIIB below.

8 Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) 2 [16], 7 [46], 12–14 [79]–[86] ('PGPA Bill'); Explanatory Memorandum, Public Administration Bill 2004 (Vic) 1.

uncertainty in applying the key test for liability under the duty, which presents an obstacle to bringing proceedings for breach of the duty.

I also argue that the mechanisms for enforcement in every jurisdiction are inconsistent, ineffective and lack a clear policy rationale. Likely as a result of these deficiencies, there have been few, if any, cases in which an allegation of breach of the duty was made, and none in which a breach was found to have occurred. By contrast, many cases have been successfully brought in the private sector context. Thus, the private sector duty of care is vigorously enforced, establishing a high standard of care and diligence, while there is little or no meaningful enforcement of the public sector duty, despite higher expectations of governance and accountability in the public sector.[9]

Because of uncertainty in its interpretation, and the unsatisfactory nature of the enforcement mechanisms, the public sector duty is unlikely to play a meaningful role in setting governance standards in the public sector. The result is that there is a significant mismatch between the standards applicable to directors and officers in the private and public sector contexts. The private sector duty of care imposes a high standard on directors of companies with the realistic prospect of significant liability. By contrast, the public sector duty of care presents very limited prospects for liability, with low applicable penalties and minimal enforcement, similar to the position which prevailed under the private sector duty of care and diligence prior to the 1990s.

II THE PRIVATE SECTOR DUTY OF CARE

A The Duty of Care and its Precursors

The private sector duty of care and diligence is owed under the common law and the *Corporations Act*. Under the common law, directors owe a duty to take reasonable care in the performance of their duties. This duty is an objective one, not limited by the director's experience or ignorance, although the particular skills and experience of a director are relevant in assessing the standard of care.[10] The duty incorporates what is sometimes referred to as a 'minimum standard of competence',[11] such that directors are required to familiarise themselves with the business of their

9 Explanatory Memorandum, PGPA Bill 2013 (Cth) 13 [86].

10 G P Stapledon, 'The CLERP Proposal in Relation to Section 232(4): The Duty of Care and Diligence' (1998) 16 *Company and Securities Law Journal* 144.

11 See, eg, Justice Michael Kirby, 'The Company Director: Past, Present and Future' (Speech delivered at the Australian Institute of Company Directors, Hobart, 31 March 1998) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_company.htm>; R P Austin, 'The Incorporated Superannuation Trustee' (Speech delivered at the Superannuation Lawyers Association of Australia Conference, Queensland, February 2004).

company, guide and monitor the company's affairs, regularly attend board meetings, keep informed about the activities of the company and maintain 'a reasonably informed opinion of the company's financial capacity'.[12]

The statutory formulation of the duty is contained in section 180(1) of the *Corporations Act*:

> 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:
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> (a) were a director or officer of a corporation in the corporation's circumstances; and
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> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.[13]

Similar duties have a long history in Australian company legislation.[14] The Uniform *Companies Acts* imposed a duty on directors to 'act honestly and use reasonable diligence' in the discharge their duties.[15] The *Companies Act 1981* (Cth) section 229(2) separated the duty of honesty, requiring officers of corporations to 'exercise a reasonable degree of care and diligence' in the exercise of their powers and the discharge of their duties.[16] This duty was reproduced in the *Corporations Act 1989* and subsequently amended in order to 'reinforce' that the standard of care was an objective one.[17] As amended, section 232(4) provided that 'an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances', when exercising his or her powers.[18]

The *Corporations Act* duty has essentially the same content as that owed under the common law.[19] The duty is objective, defined by reference to the circumstances

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12 *Daniels v Anderson* (1995) 37 NSWLR 438, 500–5 (Clarke and Sheller JJA); *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 125–6 (Tadgell J).

13 *Corporations Act* s 180(1).

14 Langford, Ramsay and Welsh, above n 4; R P Austin and Ian M Ramsay, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) [8.305.3].

15 See s 124(1) in the uniform *Companies Acts* which were adopted by all Australian states and territories between 1961 and 1963: *Companies Ordinance 1962* (ACT); *Companies Act 1961* (NSW); *Companies Ordinance 1963* (NT); *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA) ('Uniform *Companies Acts 1961–62*').

16 *Companies Act 1981* (Cth) s 229(2).

17 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) 7 [18], 24 [82]. This followed a recommendation of the Cooney Committee: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (November 1989) 29 [3.28].

18 *Corporations Act 1989* (Cth) s 232(4), as amended by the *Corporate Law Reform Act 1992* (Cth) sch 3.

19 *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 459 [63], 472–3 [137], 477 [152] (Spigelman CJ), 554 [587] (Ipp JA), 593 [779], 611 [875] (Santow JA); *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1, 12 [31] (Hamilton J); *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 611 [7192] (Austin J); *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623, 628 [22] (Gordon

of the corporation and the office and responsibilities held by the particular officer. The 'circumstances' of the company which inform the content of the duty include the type of company, the provisions of the company's constitution, the nature of the company's business and the composition of the board.[20] The 'responsibilities' of the director refers to the actual distribution of functions in the corporation, not merely those tasks formally delegated to the director[21] and also encompasses any special skills or expertise possessed by the director or officer.[22]

Important cases on section 180(1) and its predecessors have placed emphasis on the interests of the company in determining breach. The courts have held that a director will only breach the duty if 'it was reasonably foreseeable that the relevant conduct might harm the interests of the company'.[23] In order to establish a contravention, the applicant must prove that the director failed to perform his or her duties with the degree of care and diligence that a reasonable person would have exercised as a director or officer of a corporation in the corporation's circumstances, occupying the office held by the defendant, with the same responsibilities within the corporation, and that failure was likely to cause harm to the interests of the company.[24] There is a large scholarly literature devoted to examining the question of how the interests of the company should be determined.[25] The courts have held that the company's interests means 'the corporate entity itself, the shareholders, and, where the financial position of the company is precarious, the creditors of the

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J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 397 [99] (Brereton J). In *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 472 [136] Spigelman CJ noted that the while Parliament had reference to the common law duty when enacting the statutory standard, its enactment in legislation meant that the nature of the duty was to be approached as a question of statutory interpretation.

20 *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, 582 [440] (Beach J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 397 [100] (Brereton J); *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 614 [7201] (Austin J). See also *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623, 629 [25] (Gordon J).

21 *Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 341, 352 [50] (Austin J); *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 614 [7202] (Austin J); *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 454–5 (Ipp J).

22 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205, 358 [819] (Spigelman CJ, Beazley and Giles JJA).

23 *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449–50 (Ipp J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 398 [102] (Brereton J).

24 *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 31 [85] (Austin J); *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449–50 (Ipp J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 398 [102] (Brereton J); *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 313 [537] (Edelman J).

25 See, eg, Jean J du Plessis, 'Directors' Duty to Act in the Best Interests of the Corporation: "Hard Cases Make Bad Law"' (2019) forthcoming *Australian Journal of Corporate Law*.

company'.[26] While the interests of a company have often been considered in economic terms and equated with the interests of the shareholders,[27] in *Cassimatis* Edelman J held that 'the concept of harm should not be confined narrowly' and that 'the foreseeable risk of harm to the corporation which falls to be considered in section 180(1) is not confined to financial harm'.[28] Accordingly, a company's interests include the avoidance of harm to the company's reputation,[29] and ensuring compliance with the law, irrespective of whether or not such compliance is profitable.[30] Determination of liability, therefore, requires an assessment of the potential benefits of a particular decision or course of action as against the foreseeable risk of harm,[31] to be judged by what a reasonable person carrying out the functions and duties of the director in the particular circumstances of the corporation at the time would have done.[32]

Section 180(2) of the *Corporations Act* sets out a defence to liability known as the 'business judgment rule'.[33] If an officer makes a business judgment[34] and made the judgment in good faith for a proper purpose, had no material personal interest in the subject matter of the decision, informed himself or herself to the degree necessary and rationally believed that the judgment was in the best interests of the corporation, the officer is taken to have met the requirements of his or her statutory and common law duties of care.[35]

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26 *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449–50 (Ipp J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 398 [102] (Brereton J).

27 See, eg, *Greenhalgh v Arderne Cinemas Ltd [No 2]* [1951] Ch 286; *Parke v Daily News* [1962] Ch 927.

28 *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 301–2 [480]–[483] (Edelman J).

29 *Australian Securities and Investments Commission v Flugge* (2016) 342 ALR 1.

30 *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 301–2 [480]–[483] (Edelman J).

31 *Australian Securities and Investments Commission v Doyle* (2001) 38 ACSR 606, 641 [222]; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 399–400 [105] (Brereton J); *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 557 [598], [600] (Santow JA); *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 611–12 [7193]–[7194], 613 [7197] (Austin J); *Gamble v Hoffman* (1997) 24 ACSR 369, 373–4; *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449–50 (Ipp J).

32 *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 561 [619] (Santow JA); *Australian Securities and Investments Commission v Macdonald [No 11]* (2009) 256 ALR 199, 247 [239] (Gzell J).

33 The business judgment rule was enacted by the *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1 pt 2D.1 cl 180(2), following the recommendations found in the Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors' (Proposals for Reform Paper No 3, Commonwealth of Australia, 1997). For discussion see Anne Finlay, 'CLERP: Non-executive Directors' Duty of Care, Monitoring and the Business Judgment Rule' (1999) 27 *Australian Business Law Review* 98.

34 This is defined as 'any decision to take or not take action in respect of a matter relevant to the business operations of the corporation': *Corporations Act* s 180(3).

35 *Corporations Act* s 180(2).

The *Corporations Act* contains provisions relating to delegation and reliance, however, consideration of these issues is typically subsumed within a consideration of compliance with section 180(1). Directors are permitted to delegate their powers,[36] but are responsible for the actions of the delegate unless certain conditions are satisfied.[37] In determining the extent to which an officer is permitted to rely on others consistent with the proper exercise of his or her duties, the question 'will turn on similar considerations as those that determine the overall standard of care for an individual director', namely the circumstances of the company, the respective skills of the officer and the delegate, the risks of delegation and whether there is any cause for suspicion.[38]

Section 180(1) is a 'civil penalty provision',[39] punishable under part 9.4B of the *Corporations Act*.[40] The *Corporations Act* provides that where a court 'is satisfied that a person has contravened a civil penalty provision', which includes section 180(1), 'it must make a declaration of contravention'.[41] A declaration of contravention provides the basis for the court to make a range of further orders, namely disqualifying a person from managing corporations for a specified period,[42] imposing a pecuniary penalty of up to $200 000,[43] or ordering a person to pay compensation where a corporation suffered damage as a result of the contravention.[44]

Prior to the 1990s, the standard of care was considered to be extremely low,[45] perhaps due to judicial reluctance to interfere in management decisions made by directors.[46] Directors were not subject to a minimum standard of competence,[47] they

36 *Corporations Act* s 198D.

37 *Corporations Act* s 190.

38 *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 585–6 [731] (Santow JA), cited in *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 331–2 [170] (Middleton J) and *Australian Securities and Investments Commission v Macdonald [No 11]* (2009) 256 ALR 199, 248–9 [249] (Gzell J). See also *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 467 (Ipp J).

39 *Corporations Act* s 1317E(1), item 1.

40 The regime contained in the *Corporations Act* combines a hybrid of both private and public elements: *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 295–301 [446]–[478] (Edelman J).

41 *Corporations Act* s 1317E(1).

42 *Corporations Act* s 206C: the court must be satisfied that the disqualification is justified, having regard to the person's conduct and any other matters the court considers appropriate.

43 *Corporations Act* s 1317G(1): the court may make a pecuniary penalty order where a person has contravened a civil penalty provision, and the contravention materially prejudices the interests of the corporation or its members or its ability to pay its creditors, or is serious.

44 *Corporations Act* s 1317H(1): ASIC and the corporation may apply for a compensation order under s 1317J.

45 Greg Golding, 'Tightening the Screws on Directors: Care, Delegation and Reliance' (2012) 35 *University of New South Wales Law Journal* 266, 268; *Daniels v Anderson* (1995) 37 NSWLR 438, 494 (Clarke and Sheller JJA).

46 Senate Standing Committee on Legal and Constitutional Affairs, above n 17, 22 [3.11].

were only liable for gross or culpable negligence[48] and a lack of skill would exonerate a director accused of negligence.[49] Prior to the introduction of the civil penalty provisions, breach of the duty of care was punishable as a criminal offence, although subject to low penalties.[50] The high burden of proof applicable in criminal prosecutions, together with an apparent reluctance to impose criminal sanctions on company directors for breach of the duty of care, ensured there was a low success rate in obtaining convictions.[51] Key decisions in the 1990s imposed a significantly increased standard of care.[52]

Recent research on the duty of care found that litigation involving section 180(1) has increased over time and that the corporate regulator, the Australian Securities and Investments Commission ('ASIC'), has had a strong success rate, having won over 80 per cent of reported section 180 cases. ASIC has succeeded in establishing liability in a wide variety of factual situations and the courts have awarded a variety of penalties for breaches of the duty of care, ranging from relatively minor penalties to significant periods of disqualification from managing companies, pecuniary penalties and compensation orders.[53]

B Purpose of the Duty of Care

Scholars have debated the purpose of directors' duties, typically from the perspective of competing conceptions of the corporation. Under managerialist theories, legal duties are considered to provide 'an accountability mechanism to constrain management power and to strengthen shareholder controls'.[54] Perhaps the most common explanation is that corporate governance is designed to mitigate the 'agency problem' by aiming to align the interests of managers with those of the

47 Kane Loxley, '"Unashamedly More Interventionist" Courts and the Fading Significance of a Director's State of Mind' (2014) 32 *Company and Securities Law Journal* 486, 488; Julie Cassidy, 'Directors' Duty of Care in Australia – A Reform Model?' (2008) 16 *Asia Pacific Law Review* 19, 24.

48 Senate Standing Committee on Legal and Constitutional Affairs, above n 17, 22 [3.11].

49 *Re Denham & Co* (1883) 25 Ch D 752, 767–8 (Chitty J).

50 *Companies Act 1981* (Cth) s 229(2) imposed a criminal offence, punishable by a penalty of $5000, for breach of the duty of care; Uniform *Companies Acts 1961–62* s 124(3) provided that an officer who breached the duty was liable to the company for any profit made or for any damage suffered by the company as a result of the breach, and was guilty of an offence subject to a penalty of £500.

51 Michelle Welsh, 'The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company and Securities Law Journal* 370, 371.

52 See, eg, *Daniels v Anderson* (1995) 37 NSWLR 438.

53 Ian M Ramsay and Benjamin B Saunders, 'An Analysis of the Enforcement of the Statutory Duty of Care by ASIC' (2019) 36 *Company and Securities Law Journal* 497.

54 Paul Redmond, 'The Reform of Directors' Duties' (1992) 15 *University of New South Wales Law Journal* 86, 90.

shareholders.[55] However, Australian law has not adopted any one theory of corporate law to the exclusion of the others, and so no one theory of itself is likely to provide a comprehensive answer to the question of the purpose of directors' duties. The power and control exercised by directors is sometimes cited as the justification for the imposition of duties on them.[56]

Although there is an extensive scholarly literature relating to directors' duties, a clearly articulated rationale has not accompanied the imposition of the private sector duty of care in Australia. Given the significant changes in the applicable standard over the course of the twentieth century, that rationale would likely have changed over time. Brief statements of policy have been made in various parliamentary documents. The Cooney Committee considered that directors' duties resulted from the significance of companies to society as a whole, their 'profound effect on how we live'[57] and their potential to affect employees and their environment. Because of this broader impact, 'the individuals who run the corporate sector have a responsibility to the community which sustains them'.[58] The Australian Treasury has adopted the agency analysis of directors' duties, which has been briefly noted, also arguing that directors' duties provide shareholders with adequate means of holding the managers to account.[59] Another goal that has been apparent is to achieve a balance between setting appropriate standards of care while not unduly fettering entrepreneurial behaviour. As such, Parliament has desired to remove uncertainty with the operation of the law.[60]

In several important cases the courts have relied on the concept of community expectations, as evidenced in part by changes in the law applicable to directors, to ground a more exacting standard of care.[61] In important cases in the 1990s, courts held that, in contrast to earlier jurisprudence, ignorance or 'supine indifference' was no longer a shield against liability.[62] Instead, directors had statutory obligations to monitor their company's financial performance, and the introduction of insolvent trading provisions required directors to be diligent in the management of their company.[63] The standard therefore evolved over time in response both to key

55 Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd ed, 2009) 35; R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law & Corporate Governance* (LexisNexis, 2005) 212 [5.4].

56 See, eg, Julian Svehla, 'Directors' Fiduciary Duties' (2006) 27 *Australian Bar Review* 192.

57 Senate Standing Committee on Legal and Constitutional Affairs, above n 17, 14 [2.29].

58 Ibid.

59 Corporate Law Economic Reform Program, above n 33, 8–9.

60 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 4 [2.9].

61 *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 125–6 (Tadgell J); *Daniels v Anderson* (1995) 37 NSWLR 438, 499, 503 (Clarke and Sheller JJA).

62 See, eg, *Daniels v Anderson* (1995) 37 NSWLR 438, 493 (Clarke and Sheller JJA).

63 Ibid 494, 500 (Clarke and Sheller JJA).

legislative developments as well as problem areas such as the need to ensure that directors are financially literate. Another important development is that the courts have begun to recognise the importance of stakeholders other than shareholders when considering the impact of directors' breaches. Some of the cases brought by ASIC for breach of the duty of care involved conduct that had a significant detrimental effect on other people, such as investors and creditors.[64]

III THE PUBLIC SECTOR DUTY OF CARE

A The Duty of Care

All Australian jurisdictions have enacted a public sector duty of care and diligence. Typically, some variant of the duty is contained in numerous pieces of legislation within a jurisdiction. All states, and the two self-governing territories, impose the duty on directors or officers of government corporations.[65] Victorian and Commonwealth legislation apply the duty to a much broader range of entities than in other jurisdictions. The *PGPA Act* duty of care applies to all officials of Commonwealth entities[66] and in Victoria a duty of care applies to all directors of 'public entities' in addition to the duty applicable to directors of state business corporations.[67] Tasmanian legislation and the Commonwealth public service legislation impose a duty of diligence on public sector employees;[68] in other jurisdictions, the legislation provides for the making of codes of conduct,[69] which typically impose obligations analogous to the duty of care.[70] Finally, many jurisdictions have enacted a variety of other statutes, such as local government legislation and legislation establishing universities, which impose a duty of care.[71]

Given the wide variety of legislation imposing a duty of care, it seems that the duty is intended to be an important feature of public sector governance and

64 See, eg, *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209; *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd [No 2]* (2005) 53 ACSR 305; *Australian Securities Commission v Donovan* (1998) 28 ACSR 583.

65 *Territory-owned Corporations Act 1990* (ACT); *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Government Owned Corporations Act 2001* (NT) s 20; *Public Corporations Act 1993* (SA) s 15(1); *Government Business Enterprises Act 1995* (Tas) s 24(3); *State Owned Enterprises Act 1992* (Vic) s 36(2); *Statutory Corporations (Liability of Directors) Act 1996* (WA) s 10.

66 *PGPA Act* s 25.

67 *Public Administration Act 2004* (Vic) s 79(1)(e). 'Public entity' is given a broad definition: s 5.

68 *Public Service Act 1999* (Cth) s 13(2); *State Service Act 2000* (Tas) s 9.

69 *Public Service Act 2008* (Qld) s 187(1)(a); *Public Sector Act 2009* (SA) ss 14–15; *Public Sector Management Act 1994* (WA) s 80(d).

70 See, eg, Public Service Commission, 'Code of Conduct for the Queensland Public Service' (Queensland Government, 1 January 2011) 12; Commissioner for Public Sector Employment, 'Code of Ethics for the South Australian Public Sector' (Government of South Australia, July 9 2015) 11.

71 See, eg, *Local Government Act 1989* (Vic) s 76BA(d); *Deakin University Act 2009* (Vic) s 15(2)(b); *University of Melbourne Act 2009* (Vic) s 15(2)(b).

employment. The duty applies not only to government owned corporations but a broader range of entities, depending on the legislation applicable in each jurisdiction; for this reason, the terminology of 'public sector entity' is used in this article.

In every jurisdiction, the content of the public sector duty of care is modelled on the *Corporations Act* or its predecessors. Queensland, the Australian Capital Territory and the Northern Territory expressly apply or assume the operation of the duties in the *Corporations Act*[72] and the Commonwealth and Tasmania impose a duty closely modelled on section 180(1).[73] The duty found in the *PGPA Act* provides:

> An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person:
>
> (a) were an official of a Commonwealth entity in the Commonwealth entity's circumstances; and
>
> (b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.[74]

The duties in the remaining jurisdictions reflect earlier formulations of the private sector duty. In New South Wales and Western Australia the duty is modelled on the wording of the *Corporations Act 1989*,[75] requiring the officer (to cite the words of the Western Australian legislation) to exercise the degree of care and diligence 'that a reasonable person in that position would reasonably be expected to exercise in the corporation's circumstances'.[76] In Victoria and South Australia the duty reflects the even earlier *Companies Act*,[77] requiring directors to exercise a 'reasonable degree of care and diligence' in the performance of their functions.[78]

In addition to the more general wording of the duty of care, the South Australian legislation specifies minimum governance standards, requiring directors to take reasonable steps to keep informed about the corporation's affairs, take reasonable steps to obtain sufficient information and advice to be able to make 'conscientious and informed decisions', and 'exercise an active discretion with respect to all matters to be decided by the board or pursuant to a delegation'.[79] This is similar to the

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72 *Government Owned Corporations Act 1993* (Qld) s 76; *Territory-owned Corporations Act 1990* (ACT); *Government Owned Corporations Act 2001* (NT) s 20.

73 *PGPA Act* s 25; *Government Business Enterprises Act 1995* (Tas) s 24(3).

74 *PGPA Act* s 25(1).

75 *Corporations Act 1989* (Cth) s 232(4).

76 *Statutory Corporations (Liability Of Directors) Act 1996* (WA) s 10. To similar effect is *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3).

77 *Companies Act 1981* (Cth) s 229(2).

78 *State Owned Enterprises Act 1992* (Vic) s 36(2); *Public Corporations Act 1993* (SA) s 15(1). See also *Public Administration Act 2004* (Vic) s 79(1)(e) (which adds a requirement of 'skill').

79 *Public Corporations Act 1993* (SA) s 15(1).

minimum objective standard of competence required by the private sector duty of care.

The provisions of the *Corporations Act* relating to business judgments, delegation, reliance and enforcement[80] have been adopted in a haphazard and inconsistent fashion. A business judgment defence exists in the jurisdictions which apply the *Corporations Act,* and also Tasmania, which adopts almost identical wording.[81] Thus, officers may be protected against liability in relation to 'any decision to take or not take action in respect of a matter relevant to the business operations' of the entity, where they satisfy the relevant criteria. In the absence of judicial interpretation, it is unclear to what extent this protection would apply in relation to 'regulatory' or statutory operations of the entity. The paucity of cases relating to the public sector duty make this a largely moot issue.

Tasmania is the only jurisdiction to have enacted provisions relating to reliance on information or advice, closely following the *Corporations Act* provisions.[82] The *Corporations Act* provisions also apply in the jurisdictions which have expressly adopted that Act. Although the delegation of power is a very common feature of the functioning of public sector entities, the lack of express provisions may not be especially significant, given that, as noted above, the extent of an officer's permissible reliance is subsumed within the consideration of the officer's overall compliance with the duty of care. The *PGPA Act* contains no equivalent of the business judgment rule;[83] although the explanatory memorandum to the PGPA Bill stated that the government intended to make rules providing for the exercise of business judgments and reliance on advice,[84] no such rules have been made.[85]

The mechanisms for enforcement of the public sector duty of care vary considerably and, with the exception of Tasmania, differ significantly from the position under the *Corporations Act*. Only Tasmania follows the private sector model closely: the legalisation confers power on the court to order that a person be disqualified from managing a government business enterprise, and to impose pecuniary penalties.[86] Under the *PGPA Act*, the primary consequence is termination of employment.[87] Breach of the duty remains a criminal offence in three

80 *Corporations Act* ss 180(2), 189, 190 and pt 9.4B.

81 *Territory-owned Corporations Act 1990* (ACT); *Government Owned Corporations Act 2001* (NT) s 20; *Government Owned Corporations Act 1993* (Qld) s 76; *Government Business Enterprises Act 1995* (Tas) s 24(4).

82 *Government Business Enterprises Act 1995* (Tas) s 27.

83 A business judgment rule was formerly contained in s 22(2) of the *Commonwealth Authorities and Companies Act 1997* (Cth), which has since been repealed.

84 Explanatory Memorandum, PGPA Bill 2013 (Cth) 26 [188].

85 *PGPA Act* s 25(2) provides: '[t]he rules may prescribe circumstances in which the requirements of subsection (1) are taken to be met'.

86 *Government Business Enterprises Act 1995* (Tas) s 29.

87 *PGPA Act* s 30(1).

jurisdictions;[88] in two of these jurisdictions the maximum penalties are very low,[89] while the applicable penalties in Tasmania are much higher.[90] In Victoria, the minister may bring proceedings in the name of the corporation to recover damages or profits from a person who contravenes the duty of care;[91] the Western Australian legislation provides that the corporation may recover the amount of any damage suffered by the corporation as a result of a contravention of the duty.[92] The New South Wales and South Australian legislation provides that, following conviction of a person for an offence for contravening the duty of care, the court may order the person to pay compensation to the corporation.[93] Breach of the duty contained in public sector legislation is typically punished through employment disciplinary measures such as reprimand or termination.[94]

Several jurisdictions preserve the applicability of common law duties and causes of action.[95] As noted, there is a close relationship between the common law and statutory duties, with legislative developments affecting the common law duty and vice versa. It is possible, although perhaps unlikely, that the broad applicability of the duty of care in the Commonwealth, Victoria and Tasmania[96] will prompt further developments in the common law. If the imposition of duties on an increasing range of public sector employees and officials is taken to indicate a changed community expectation that all officials of public entities are to be held to a duty of care and diligence modelled on the duty applicable to directors and officers of companies, then the courts could potentially extend the application of the existing common law duty. The courts may, however, be unwilling to make such a significant extension to the reach of the duty without legislative development.

B Purpose of the Duty of Care

There is no consistent policy rationale for the public sector duty of care. In most jurisdictions the duty was enacted as part of corporatisation and privatisation statutes. Corporatisation is a process designed to increase efficiency in public sector entities

88 Criminal sanctions for breach of the private sector duty of care were abolished in 1993: *Corporate Law Reform Act 1992* (Cth) s 17; Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [61], [114].

89 *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Public Corporations Act 1993* (SA) s 15(4).

90 *Government Business Enterprises Act 1995* (Tas) s 24(3).

91 *State Owned Enterprises Act 1992* (Vic) s 37. See also *Public Corporations Act 1993* (SA) s 21(2).

92 *Statutory Corporations (Liability of Directors) Act 1996* (WA) s 14. Breach of the duty is also subject to a penalty of $5000: s 10.

93 *State Owned Corporations Act 1989* (NSW) sch 10 cl 8; *Public Corporations Act 1993* (SA) s 21(1). See also *Statutory Corporations (Liability of Directors) Act 1996* (WA) s 13.

94 See, eg, *State Service Act 2000* (Tas) s 10.

95 *PGPA Act* s 31; *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(11).

96 *PGPA Act* s 25; *Public Service Act 1999* (Cth) s 13(2); *State Service Act 2000* (Tas) s 9; *Public Administration Act 2004* (Vic) s 79(1)(e).

and align their structure and governance with commercial practice; the underlying rationale is that replicating private sector structures will enable public entities to perform more efficiently in a competitive environment.[97] Under this model, the private sector duty of care is applied to corporate government entities as one aspect of the adoption and application of private sector standards of governance.[98] That is, the duty was intended to apply narrowly to government entities which adopted corporate structures, and not as a broader governance mechanism across the public sector.

More recently, the duty has been rearticulated in Victoria and the Commonwealth to have a public interest and accountability focus. The Victorian *Public Administration Act 2004* was enacted to promote high standards of governance and create a consistent framework across all entities in the public sector.[99] According to the then Premier, the Bill represented a broader focus than financial efficiency, recognising that 'the fundamental role of the public sector is to serve in the public interest'.[100] The aims of the PGPA Bill included the introduction of high standards of governance and accountability for all Commonwealth entities, regardless of their formal structure.[101] The second reading speech referred to community expectations in connection with the duties applicable to public officials (including the duty of care), arguing that the duties reflected 'community expectations that public resources will be managed prudently and efficiently'.[102] These duties are based on the *Corporations Act* duties and aim to align the Commonwealth, private and not-for-profit sectors.[103] In these jurisdictions, therefore, the duty of care is a component of governance across the public sector, and reflects a perceived change in community expectations regarding the management of public resources.

The purpose of the public sector legislation varies depending on the jurisdiction. For example, the Commonwealth *Public Sector Act 1999* was introduced (among

97 Queensland Treasury, 'Corporatisation in Queensland: Policy Guidelines' (White Paper, March 1992); Victoria, *Parliamentary Debates*, Legislative Assembly, 10 November 1992, 633–5 (Alan Stockdale, Treasurer); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 29 November 1990, 4813 (Trevor Kaine, Chief Minister).

98 Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1993, 2707 (Keith De Lacy, Treasurer); New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 May 1995, 52 (Bob Carr, Premier); Victoria, *Parliamentary Debates*, Legislative Assembly, 10 November 1992, 634 (Alan Stockdale, Treasurer).

99 Explanatory Memorandum, Public Administration Bill 2004 (Vic) 1.

100 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2004, 1549–51 (Steve Bracks, Premier).

101 Explanatory Memorandum, PGPA Bill 2013 (Cth) 2 [16], 7 [46], 12–14 [79]–[86].

102 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 2013, 3447–8 (David Bradbury, Assistant Treasurer).

103 Explanatory Memorandum, PGPA Bill 2013 (Cth) 7 [47]; Joint Committee of Public Accounts and Audit, Parliament of Australia, 'Advisory Report on the Public Governance, Performance and Accountability Bill 2013' (Report No 438, Commonwealth of Australia, June 2013) 42–4.

other things) to harmonise the employment arrangements in the public sector with those in the private sector;[104] the legislation in Queensland aimed to 'establish a high performing apolitical public service that is responsive to Government priorities and focused on the delivery of services in a professional and non-partisan way'.[105]

The legislation in Victoria and the Commonwealth (and Tasmania) provides some evidence of a developing community expectation that public sector entities which manage public resources should be subject to a legally enforceable duty to manage those resources prudently. However, in some jurisdictions the duty applies to a narrow class of entities, such as government owned corporations. Given that non-corporate public entities perform important governmental functions, there does not appear to be a legitimate policy basis for excluding non-corporate entities from the application of the duty.

C The Regulatory and Decision-Making Context

It is important to note the context within which the public sector duty of care exists. There is an extensive regulatory overlay applicable to the public sector, including administrative law and judicial review, investigatory bodies such as ombudsmen and anti-corruption commissions, criminal offences for serious misconduct, the tort of misfeasance in public office, as well as 'soft' regulation such as public sector codes of conduct.[106] These may, in some cases, overlap with the public sector duty of care, in that a breach of the duty may also provide the basis for other legal consequences, such as judicial review of a decision made by a public sector entity. Further, there may be some convergence in the standards applicable under these schemes. Some commentators have argued that Australian corporate law is increasingly adopting characteristics of public law;[107] as argued by Ross Grantham:

> In place of the private law, substantive rights model, corporate law in Australia has instead come to focus on the process of decision-making and the creation of largely

104 Explanatory Memorandum, Public Service Bill 1999 (Cth) 2–3.

105 Explanatory Memorandum, Public Service Bill 2008 (Qld) 1.

106 See, eg, Public Service Commissioner, 'Direction No 1 of 2015 under the *Government Sector Employment Act 2013* (NSW)' (Public Service Commission (NSW), 20 April 2015) 3–5, which implements Public Service Commission, 'Code of Ethics and Conduct for NSW Government Sector Employees' (NSW Government, 2015); Victorian Public Sector Commission, 'Code of Conduct for Victorian Public Sector Employees' (Victorian Government, 1 June 2015). In some jurisdictions the applicable code has been enacted by statute, eg, *Public Service Act 1999* (Cth) s 13; *State Service Act 2000* (Tas) s 9.

107 Michael J Whincop and Mary E Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law' (1997) 25 *Federal Law Review* 51.

> internal governance processes and procedures as the means of regulating the behaviour of the participants in the corporate enterprise.[108]

It is also the case that public sector entities are subject to many more external decision-making constraints than those applying in the private sector. In their seminal work *The Modern Corporation and Private Property* Berle and Means noted that the modern corporation had become a means of aggregating shareholder wealth under a unified direction, with the shareholders retaining virtually no control over the funds they have contributed to the enterprise. As such, directors are largely free to pursue management of their company with few external constraints.[109] While later research has noted the importance of institutional shareholders in governance,[110] it remains true that directors have substantial freedom to make decisions and determine the strategy and direction of the company. By contrast, public sector entities are subject to many constraints. Legislation in many jurisdictions requires government owned corporations to prepare a corporate plan or statement of corporate intent in consultation with the minister or the voting shareholders, specifying such matters as the corporation's objectives, undertakings and performance targets, which the corporation is required to comply with.[111] In many jurisdictions the minister has power to issue directions to government corporations[112] and under the *PGPA Act* Commonwealth entities are required to comply with applicable government policy.[113] Further, when establishing public entities, governments often circumscribe their purposes and functions, and require them to comply with specific obligations.[114]

In addition, the conventions of responsible government provide a constitutional framework within which public sector entities function. Under the convention of individual responsibility, ministers are responsible to Parliament for the actions and

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108 Ross Grantham, 'The Proceduralisation of Australian Corporate Law' (2015) 43 *Federal Law Review* 233, 238.

109 Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Harcourt, Brace & World, revised ed, 1968) ch 1. See also Senate Standing Committee on Legal and Constitutional Affairs, above n 17, 7 [2.1], [2.3].

110 G P Stapledon, *Institutional Shareholders and Corporate Governance* (Clarendon Press, 1996).

111 *State Owned Corporations Act 1989* (NSW) s 21; *Government Owned Corporations Act 1993* (Qld) pts 7 and 8; *State Owned Enterprises Act 1992* (Vic) ss 41–2.

112 *State Owned Corporations Act 1989* (NSW) s 20P; *Government Owned Corporations Act 1993* (Qld) s 115; *State Owned Enterprises Act 1992* (Vic) ss 16C, 41(9)–(11), 45. See further Christos Mantziaris, 'Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?' (1998) 26 *Federal Law Review* 309.

113 *PGPA Act* ss 21–2.

114 See, eg, 'State Owned Enterprises (State Body – VicForests) Order 2003' in Victoria, *Victorian Government Gazette*, No S 198, 28 October 2003, ss 3(2), (3), (5)–(7); 'State Owned Enterprises (State Body – State Owned Enterprise for Irrigation Modernisation in Northern Victoria) Order 2007' in Victoria, *Victorian Government Gazette*, No G 51, 20 December 2007, 3199 ss 5, 7.

decisions taken within their department,[115] although the precise nature of that responsibility, including the extent to which ministers should be considered accountable for the actions of non-departmental entities, is a matter of debate.[116] Irrespective of the personal responsibility of the portfolio minister, public bodies are typically required to report to Parliament.[117] The point for present purposes is that responsible government provides a framework for political accountability for the actions of public sector entities, although the precise contours of this responsibility will depend on matters such as the provisions of the relevant governing legislation.

Accordingly, the public sector operates within a much more highly regulated and externally constrained environment than the private sector. Despite this regulatory overlay, the public sector duty of care remains important. It is frequently noted that institutions of public sector governance are modelled on private sector governance,[118] and directors' duties are considered to be a key component of ensuring meaningful corporate governance in the private sector.[119] A well-drafted duty subject to effective enforcement may drive governance standards in the public sector in the same way it has done in the private sector. Further, the legislatures in every Australian jurisdiction have considered it desirable to enact some variant of the public sector duty of care. This indicates that the duty is intended to serve some important policy goal, however faintly that policy rationale may have been articulated, and apply to conduct not otherwise captured by the regulation applicable to public sector entities.

D Interpreting the Duty

This section considers the interpretation of the public sector duty of care in light of the jurisprudence on the equivalent private sector duty. I argue that the duty of

115 See, eg, A H Birch, *Representative and Responsible Government: An Essay on the British Constitution* (Allen & Unwin, 1964) 141–2; Sir Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 207–8.

116 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 200; Ian Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009) 104–13.

117 See, eg, *PGPA Act* ss 41–4, 46; *State Owned Enterprises Act 1992* (Vic) s 55.

118 Public Accounts and Estimates Committee, Parliament of Victoria, *Report on the Inquiry into Corporate Governance in the Victorian Public Sector* (2005) 11, 121, 195; Explanatory Memorandum, PGPA Bill 2013 (Cth) [47]; Meredith Edwards et al, *Public Sector Governance in Australia* (ANU Press, 2012) 1–2; Meredith Edwards, 'Public Sector Governance – Future Issues for Australia' (2002) 61 *Australian Journal of Public Administration* 51, 52. Note that '[t]he corporatisation frameworks adopted by Australian governments differ in the degree in which they emulate the private sector and in the autonomy they give to boards': Productivity Commission, 'Financial Performance of Government Trading Enterprises, 1997–8 to 2001–02' (Research Paper, Commonwealth of Australia, 2003) xiv, 35, 39.

119 Ian M Ramsay, 'The Corporate Governance Debate and the Role of Directors' Duties' in Ian M Ramsay (ed), *Corporate Governance and the Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1997) 10–13.

care presents significant difficulties in its application to public sector entities. The question of the interests of public sector entities, and what consequences follow from contravention, is much more complex than for private sector entities. Further, given the broader or public nature of the functions performed by public sector entities, assessing whether there has been harm to the interests of a public sector entity is often a policy or political question not readily suited to judicial determination.

The duties contained in five jurisdictions are either closely modelled on,[120] or apply,[121] section 180(1) of the *Corporations Act*. It can be expected, therefore, that the significant body of jurisprudence relating to section 180(1) would be relevant to the interpretation of the duties contained in these jurisdictions. The remaining jurisdictions reflect an earlier formulation of the private sector duty.[122] In these jurisdictions, the concepts and jurisprudence relating to section 180(1) remain highly relevant, for two reasons. First, there is a 'symbiotic relationship' between the statutory and common law duties of care: the courts have held that the duties have essentially the same content, with the common law duty informing the content and interpretation of the statutory and duty, and vice versa.[123] As such, in the public sector there is likely to be a single common law duty of care reflecting community expectations, the content of which is informed by the jurisprudence on section 180(1). That common law duty would in turn be a significant factor in determining the scope of the duties of care applicable to directors of public sector entities under State legislation. Secondly, the courts have emphasised that community expectations have been a key driver of the standard applicable under the duty of care.[124] It would be surprising if those expectations allowed for different standards applicable merely because of differences in wording adopted by the legislatures. These differences are therefore arguably less significant than may first appear.

Accordingly, it seems likely that the approach to the interpretation of the public sector duties of care, however worded, is to be informed by the analysis under the equivalent private sector duties. How might the jurisprudence on section 180(1) and

120 *PGPA Act* s 25; *Government Business Enterprises Act 1995* (Tas) s 24(3).

121 *Territory-owned Corporations Act 1990* (ACT); *Government Owned Corporations Act 2001* (NT) s 20; *Government Owned Corporations Act 1993* (Qld) s 76.

122 *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3), *Statutory Corporations (Liability of Directors) Act 1996* (WA) s 10, which are similar to the wording of *Corporations Act 1989* (Cth) s 232(4); and *State Owned Enterprises Act 1992* (Vic) s 36(2), *Public Corporations Act 1993* (SA) s 15(1), which are similar to the wording of *Companies Act 1981* (Cth) s 229(2).

123 *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 459 [63], 472–3 [137], 477 [152] (Spigelman CJ), 554 [587], 593 [779], 611 [875] (Santow JA); *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1, 12 [31] (Hamilton J); *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 611 [7192] (Austin J); *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623, 628 [22] (Gordon J); *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 397 [99] (Brereton J).

124 *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 125–6 (Tadgell J); *Daniels v Anderson* (1995) 37 NSWLR 438, 499, 503 (Clarke and Sheller JJA).

its predecessors be translated into the public sector context? Part II noted that the standard of care is an objective one, tailored to the specific circumstances of the entity and the responsibilities held by the official in question. The question is assessed by reference to what a reasonable person who held those responsibilities in those circumstances would have done. As with the private sector equivalent, this is an infinitely contextualised analysis requiring detailed examination of the relevant facts which makes it difficult to generalise.

A second important aspect of the private sector duty is that, as discussed above, there is an irreducible minimum content to the duty of care, requiring directors to maintain familiarity with the business of the company, keep informed about its activities and financial capacity, guide and monitor the company's affairs and regularly attend board meetings.[125] In some cases, translating these requirements into the public sector context may be difficult. The range of public sector entities, and the range of officers and officials appointed to roles within public sector entities, are extremely broad, and what is necessary to properly discharge the duty of care may vary greatly depending on the role and entity. Given the range of officials and employees who are subject to this duty, establishing an objective minimum standard of care would be impossible. A standardised duty of care derived from the private sector context may be inapt for the public sector context. Further, the standard contemplated in the private sector context would, in many cases, be inapplicable – for instance, a low-ranking official could not be expected to have an informed opinion of the entity's financial performance, and would not be entitled to attend board meetings.

To what extent, therefore, could the public sector duty be interpreted in an analogous fashion to the private sector equivalent, by imposing an irreducible minimum standard of care? One possibility is that the duty may impose a minimum core requirement of competence for the particular role in question. In the private sector context, the particular skills and experience of a director are relevant to the standard of care applicable to that director.[126] Thus, it may be that where a person is appointed to a position in a public sector entity based on their skill and experience in similar roles, the person is subject, by virtue of the duty of care, to a minimum standard of competence in that position.

Recent research on the statutory duty of care found that the most common category of liability was causing the company to breach the law, or failing to prevent the company from breaching the law or engaging in actions which were inherently

125 *Daniels v Anderson* (1995) 37 NSWLR 438, 500–5 (Clarke and Sheller JJA); *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 125–6 (Tadgell J).

126 G P Stapledon, 'The CLERP Proposal in Relation to Section 232(4): The Duty of Care and Diligence' (1998) 16 *Company and Securities Law Journal* 144.

likely to constitute a breach of the law, even if no breach actually occurred.[127] Public sector entities operate in a much more highly regulated environment than private sector entities. If liability of this nature is applied with equal vigour in the public sector context, this could potentially open up significant areas of personal liability for breaches of law by officers of public sector entities.

A further issue is the question of the interests of the entity. As noted, the test for liability for breach of the duty of care is jeopardy to the interests of the company;[128] accordingly, establishing whether there has been a contravention of the duty requires an analysis of the interests of the entity and whether the defendant's conduct caused harm to those interests. One relevant issue in this context is the question of whose interests are to be equated with those of the company. According to J D Heydon, directors owe their duties to the company, even though in fulfilling that duty they may have to take the interests of other persons into account, such as the interests of shareholders, employees and persons who have contracted with the company.[129] Company law also gives considerable freedom to directors to determine the direction of the company and imposes few external constraints on decision-making. The courts are reluctant to interfere with management decisions made in good faith.[130]

The considerations in public sector entities are somewhat different. It is true that public sector entities have economic and reputational interests which can be harmed by actions taken by their directors and officers, and so to that extent their interests can be analogous to those of private sector entities. However, the position of public sector entities differs in two important ways. First, their interests are often qualified and altered in key ways by legislation or government policy. Secondly, many public sector entities have broader interests that cannot easily be measured.

Public sector entities have functions that go beyond making profit; indeed, many public sector entities are required to undertake actions that are not in their interests, considered from a purely commercial angle. Legislation circumscribes the ability of the directors to determine the interests of the corporation. The legislation in the Australian Capital Territory and Northern Territory sets out objectives which

127 Ramsay and Saunders, above n 53.

128 *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 313 [537] (Edelman J).

129 J D Heydon, 'Directors' Duties and the Company's Interests' in P D Finn (ed), *Equity and Commercial Relationships* (Law Book Co, 1987) 134.

130 *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 627 [7253]–[7254] (Austin J); *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449–50 (Ipp J); *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493 (Barwick CJ, McTiernan and Kitto JJ); *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832 (Lord Wilberforce); *Overend & Gurney Co v Gibb* (1872) LR 5 HL 480, 495 (Hatherley LC); *Grimwade v Mutual Society* (1885) 52 LT 409, 416 (Chitty J); Neil Young, 'Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required of Directors under Sections 180–184 of the *Corporations Act*' (2008) 26 *Company and Securities Law Journal* 216, 222; Redmond, above n 54, 113; Golding, above n 45, 271.

government corporations are to comply with.[131] In some jurisdictions government corporations may be given directions by the relevant minister, including directions to perform functions that are not in their commercial interests.[132] This necessarily affects the content of the duty owed by officers of those corporations; indeed, the New South Wales and Queensland legislation states that when determining the degree of care and diligence applicable to a relevant government owned corporation, regard must be had to the applicability of the legislation and any directions given by the relevant minister.[133] A director could legitimately harm the interests (commercially considered) of the company by acting diligently, and could also benefit the entity's commercial interests by acting negligently.

Thus, it can be in the interests of a public sector entity to undertake actions which are not profitable and which would likely amount to gross mismanagement in the private sector; for example, one key function of a public sector entity may be to spend the vast majority of its revenue for social welfare purposes.[134] It may also be in the interests of a public sector entity to undertake actions which are unpopular, thereby damaging the reputation of the entity; for example, an entity may consider it necessary to approve increases in water prices, which may be deeply resented by the community.[135]

It is also the case that many public sector entities have broader, 'public' interests that cannot easily be quantified, whether economically or otherwise. Section E below gives a case study to illustrate this point. Assessing jeopardy to interests such as these is likely to be a policy or political question which the courts would be reluctant to undertake. Accordingly, while some interests of public sector entities can be measured in economic or reputational terms, not all interests can be so measured. To the extent that the content of the public sector duty of care owed in a particular case is determined by reference to such matters, determining whether there has been a breach of the duty will not be readily suited to judicial determination.

A final question of significance is that of whose interests are to be equated with those of the public sector entity. As noted, the interests of a private sector company are typically identified by reference to the shareholders, or, in some cases, the creditors. A public sector entity's stakeholders may not be so easily identified.

131 *Territory-owned Corporations Act 1990* (ACT) s 7; *Government Owned Corporations Act 2001* (NT) s 4.

132 *Territory-owned Corporations Act 1990* (ACT) s 17; *Government Owned Corporations Act 1993* (Qld) s 112; *State Owned Enterprises Act 1992* (Vic) s 45(1)(a).

133 *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(9); *Government Owned Corporations Act 1993* (Qld) s 123. See also *Public Corporations Act 1993* (SA) s 15(6).

134 See, eg, the National Disability Insurance Agency.

135 See, eg, Essential Services Commission, *Water Price Review* (1 July 2018) <https://www.esc.vic.gov.au/water/water-prices-tariffs-and-special-drainage/water-price-reviews/water-price-review-2018>.

Where an entity has broader or public functions, such as a regulatory or enforcement function, or an advisory or research function, it would be difficult to identify a particular stakeholder who is harmed by a director's negligent conduct. Instead, 'the community' in a more general sense is harmed by the failure.

E Case Study: ASIC's Enforcement Record

This section aims to illustrate the points made in the previous section by taking a case study, namely how the public sector duty of care may apply to the enforcement activity of the corporate regulator, ASIC. It aims to illustrate the point that many public sector entities have broader interests that cannot easily be quantified, and the point that it may be difficult to identify who the relevant stakeholders are with respect to a public sector entity.

ASIC is a Commonwealth entity for the purposes of the *PGPA Act*[136] and so ASIC officials are subject to the duty of care and diligence. Under its governing legislation, ASIC is obliged, among other things, to strive to maintain the performance of the financial system and to promote the confident and informed participation of investors and consumers in the financial system.[137] In achieving these objectives, one of ASIC's key functions is to take enforcement action where it considers that companies or directors have breached the law.

ASIC has been strongly criticised for its enforcement record. Commentators have doubted ASIC's effectiveness, pointing to its failure to take action[138] while others have criticised ASIC for pursuing expensive and ultimately unsuccessful proceedings.[139] Some scholars have argued that ASIC's enforcement strategy is not achieving its intended policy goals, as evidenced by the large numbers of criminal proceedings brought in proportion to civil proceedings.[140] As such, it does not reflect the 'pyramid model' envisaged by the Cooney Committee,[141] whereby a range of

136 *Australian Securities and Investments Commission Act 2001* (Cth) s 8(1A): see *Official Trustee in Bankruptcy v Galanis* (2017) 318 FLR 22, 33 [64] (Bryant CJ, Aldridge and Austin JJ).

137 *Australian Securities and Investments Commission Act 2001* (Cth) s 1.

138 See, eg, Ian Verrender, 'Banking Royal Commission: How ASIC Went Missing in Action with the Banks', *ABC News* (online), 25 Apr 2018 <http://www.abc.net.au/news/2018-04-23/banking-royal-commission-how-asic-went-mia/9685792>; Adele Ferguson, Ben Butler and Ruth Williams, 'Scrutinising ASIC: Is it a Watchdog or a Dog with No Teeth?', *Sydney Morning Herald* (online), 23 November 2013 <https://www.smh.com.au/business/scrutinising-asic-is-it-a-watchdog-or-a-dog-with-no-teeth-20131122-2y1s0.html>; Ian Verrender, 'Scrap ASIC and Give Us a Real Regulator', *ABC News* (online), 30 June 2014 <http://www.abc.net.au/news/2014-06-30/verrender-scrap-asic-and-give-us-a-real-regulator/5558578>.

139 See, eg, Anil Hargovan, 'Sharp Message to ASIC as Forrest Wins High Court Appeal', *The Conversation,* 3 October 2012 <https://theconversation.com/sharp-message-to-asic-as-forrest-wins-high-court-appeal-9934>.

140 Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908; Jasper Hedges et al, 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) 40 *Melbourne University Law Review* 905.

141 Senate Standing Committee on Legal and Constitutional Affairs, above n 17, 190–1.

enforcement options are available to regulators which increase in severity from persuasion and warnings through to incarceration or incapacitation at the apex.[142] In a small number of cases ASIC was criticised by the court for the way it had handled the litigation.[143]

Given these criticisms, the application of *PGPA Act* duties to ASIC raises the question as to whether one or more ASIC officials breached their duty of care in relation to the enforcement actions taken by ASIC. Under the analysis undertaken above, the precise legal test will be whether the official failed to perform his or her duties with the degree of care and diligence that a reasonable person would have exercised in those circumstances and holding the same responsibilities, and that failure was likely to cause harm to ASIC's interests. Given ASIC's objectives as noted above, its 'interests' for the purpose of this test would likely include the strength of, and investor confidence in, the Australian financial system.

The impact of any one piece of enforcement action on the integrity of the financial system is likely to be negligible; as such, the relevant question is the impact of ASIC's enforcement record as a whole. This then raises questions about ASIC's overall strategy and approach to enforcement. Should ASIC devote the greater part of its regulatory resources in relation to pursue public or private companies? Should ASIC be ambitious in testing the limits of the duties and obligations in the *Corporations Act*, seeking to impose liability in novel situations where liability has not previously be imposed? Should it rather pursue actions which are more likely to be successful but which do not extend the interpretation and application of the law? Should ASIC institute fewer criminal and more civil proceedings, so as to conform more closely to the regulatory pyramid? Applying the duty of care across the full spectrum of public sector activity would make analysis of such issues unavoidable. However, these are policy questions which, in the author's view, are more readily suited to political debate rather than judicial determination.

IV ENFORCEMENT OF THE PUBLIC SECTOR DUTY

This Part discusses enforcement of the public sector duty, which varies widely from jurisdiction to jurisdiction. It argues that the mechanisms for enforcement of the public sector duty of care are inconsistent, ineffective, and lack a clear policy

142 Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 85, 141–2.

143 See, eg, *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 642 [7319], 643 [7321], 644 [7328] (Austin J); *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205, 329 [673]–[678], 339 [728], 339 [731]–[732], 341 [741]–[742], 344 [756], 345 [766], 347 [775]–[777] (Spigelman CJ, Beazley and Giles JJA), although this was overturned on appeal: *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345.

rationale. These deficiencies are reflected in the paucity of cases considering the duty; indeed, the author was not able to locate a single case in any jurisdiction in which a court held that there had been a breach of the public sector duty of care.[144] There is thus a vast difference between the areas of conduct to which the duty of care potentially applies and the likelihood of legal consequences being imposed in relation to that conduct. It should be noted that this section only considers legal enforcement mechanisms and not 'softer' forms of enforcement due to the difficulty in evidencing the prevalence and effectiveness of such mechanisms.

Under the *PGPA Act*, the primary consequence for contravention of the duty is termination of employment.[145] Any notice of termination is required to be tabled before each House of Parliament within 15 sitting days after giving the notice.[146] The author was not able to locate any notice of termination that has been tabled in this manner. One likely explanation for this is the burdensome and public nature of the tabling requirement, such that Commonwealth entities would undertake this process only in the most serious of cases.[147] Tabling such a notice would also likely raise concerns about the effectiveness of management within the relevant entity, which the senior officers of the entity would presumably wish to avoid. Another likely explanation is that the complexity of the inquiry required in determining breach is not readily suited to determination by the executive. The question of whether the duty of care has been breached is a complex factual inquiry, requiring analysis of the responsibilities of the official, the circumstances of the entity and whether the official's actions jeopardised the interests of the entity. As noted in Part III, the correct interpretation of the duty in the public sector context as a matter of law is itself a complex matter which is yet to be determined by the courts. It seems unlikely, therefore, that the enforcement mechanism in the *PGPA Act* will be often used. The *PGPA Act* does not set out any other legal consequences for breach or

144 Searches were conducted for cases in relation to the *PGPA Act*; *Public Service Act 1999* (Cth) s 13(2); *Territory-owned Corporations Act 1990* (ACT); *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Government Owned Corporations Act 2001* (NT) s 20; *Public Service Act 2008* (Qld) s 187(1)(a); *Public Corporations Act 1993* (SA) s 15(1); *Government Business Enterprises Act 1995* (Tas) s 24(3); *State Service Act 2000* (Tas) s 9; *Public Administration Act 2004* (Vic) s 79(1)(e); *State Owned Enterprises Act 1992* (Vic) s 36(2); *Statutory Corporations (Liability Of Directors) Act 1996* (WA) s 10; *Public Sector Management Act 1994* (WA) s 80(d). In 2013, it was noted that 'since 1999, there had been only one prosecution of a Commonwealth authority official under the criminal provision of the [*Commonwealth Authorities and Companies Act 1997* (Cth)]': Joint Commission of Public Accounts and Audit, above n 103, 46. There have been a small number of cases where judicial review of a decision to terminate a public sector employee's employment based on conduct that breached the duty was sought: eg *Weeks v Commissioner of Taxation* [2013] FCAFC 78; *Cunningham v Centrelink* (Unreported, Fair Work Commission, Drake SDP, 13 October 2003).

145 *PGPA Act*, s 30(1); Explanatory Memorandum, PGPA Bill 2013 (Cth) [206].

146 *PGPA Act*, s 30(4).

147 Explanatory Memorandum, PGPA Bill 2013 (Cth) 29 [211].

mechanisms for enforcement of the duty of care.[148] The consequence is that the *PGPA Act* duty of care is unlikely to provide meaningful accountability for officials of Commonwealth entities. By contrast, there is some evidence that Commonwealth agencies have relied on the provisions of the *Public Service Act* to terminate the employment of employees who have breached the duty.[149]

The Queensland, Australian Capital Territory and Northern Territory legislation applies or assumes the operation of the *Corporations Act*. The civil penalty enforcement mechanisms contained in the *Corporations Act* apply in Queensland and the Australian Capital Territory;[150] it appears, however, that no case has been brought for breach of the duty as applicable in these jurisdictions. The Northern Territory legislation applies only part 2D.1 (which sets out the duties of directors and officers, including the duty of care), and not part 9.4B (which sets out the civil penalty enforcement provisions) of the *Corporations Act*, and so there appears to be no mechanism to enforce breaches of the public sector duty of care in the Northern Territory.[151]

In New South Wales, South Australia and Tasmania, breach of the duty of care is a criminal offence, punishable by a fine or (in Tasmania) imprisonment,[152] which is significantly out of step with the position under the *Corporations Act*. The low penalties applicable are unlikely to be a significant deterrent.[153] Further, breach of the private sector duty of care was a criminal offence prior to 1993, and the success rate in prosecutions brought against directors for breach of duties was low given the high standard of proof applicable in criminal proceedings. The Cooney Report recommended that criminal sanctions should be imposed only where conduct is 'genuinely criminal in nature', namely cases of fraud or dishonesty.[154] The introduction of the civil penalty provisions in 1993 has led to a marked increase in the success rate.[155] The experience in the private sector context therefore suggests

148 *Deputy Commissioner of Taxation v Frangieh [No 3]* (2017) 321 FLR 1, 119–20 [672] (Harrison AsJ); *Shamir v Commonwealth* [2015] FCA 1463, [11] (Pagone J).

149 See, eg, *Weeks v Commissioner of Taxation* [2013] FCAFC 78; *Cunningham v Centrelink* (Unreported, Fair Work Commission, Drake SDP 13 October 2003).

150 *Government Owned Corporations Act 1993* (Qld) s 76; *Territory-owned Corporations Act 1990* (ACT).

151 *Government Owned Corporations Act 2001* (NT) s 20.

152 *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Public Corporations Act 1993* (SA) s 15(4); *Government Business Enterprises Act 1995* (Tas) s 24(3).

153 *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(3); *Public Corporations Act 1993* (SA) s 15(4); *Statutory Corporations (Liability Of Directors) Act 1996* (WA) s 10.

154 Senate Standing Committee on Legal and Constitutional Affairs, above n 17, 188–91. The government accepted these recommendations: Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3611 (Senator Richardson).

155 Ramsay and Saunders, above n 53.

that if these duties remain punishable as criminal offences they will continue to be under-utilised and have little impact.

Tasmanian legislation confers on the court powers which are similar to those conferred by the *Corporations Act*, namely power to make a disqualification order and impose a penalty of up to $200 000.[156] There is no reported case in which an order has been made under these provisions.

Proceedings may be brought to recover compensation for breach in Victoria and Western Australia, which may be seen as the standard private remedy, as contrasted with, for example, pecuniary penalties or disqualification.[157] Michelle Welsh has argued that the proper role of a public regulator is to use its enforcement powers strategically to encourage individuals to comply with the law rather than seeking compensation where companies have suffered loss. That is, its role is not to vindicate the private interests of an aggrieved company, but to act in the broader public interest.[158] Recent research has indicated that this is in fact the approach adopted by the corporate regulator.[159]

In Victoria, proceedings may be brought by the minister to recover damages from a person who contravenes the duty of care.[160] There appears to be no reported decision in which an order has been made under this power. One possible explanation for this is the conventions of responsible government, under which the minister is, or may be considered to be, responsible for the entities in his or her portfolio. While as a general statement of principle ministers 'are not responsible to Parliament for the activities of statutory authorities over which they have no control',[161] they retain significant powers in relation to government corporations, including the power to issue directions.[162] Further, the *Public Administration Act* specifically states that the board of a public entity is accountable to the minister for the exercise of its functions and that the minister is responsible to Parliament in respect of 'the exercise by the public entity of its functions' and 'the exercise by the Minister of his or her powers in relation to the public entity'.[163] Accordingly, the minister may be reluctant to bring proceedings against a director of an entity where such proceedings may draw public attention to mismanagement, which could

156 *Government Business Enterprises Act 1995* (Tas) s 29.
157 *State Owned Enterprises Act 1992* (Vic) s 37; *Statutory Corporations (Liability Of Directors) Act 1996* (WA) s 14.
158 Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217.
159 Ramsay and Saunders, above n 53.
160 *State Owned Enterprises Act 1992* (Vic) s 37.
161 George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 110.
162 *State Owned Enterprises Act 1992* (Vic) ss 16C, 41(9)–(11), 45.
163 *Public Administration Act 2004* (Vic) s 85.

potentially lead to criticism of the minister. As such, this enforcement mechanism is unlikely to be often used.

Another difficulty with regard to the Victorian position is that compensation for loss suffered by the corporation is the only consequence prescribed in the legislation. However, as noted above, state owned corporations in Victoria may be required to act in ways which are not in the commercial interests of the corporation.[164] Accordingly, an officer of a government corporation may act in breach of the applicable duty of care, but cause no harm to the economic interests of the corporation, leaving such breaches without remedy under the current legislation.

The legal position and practice relating to enforcement of the public sector duty of care are far from satisfactory. Few – if any – proceedings have been brought for breach of the duty. This contrasts markedly with the many successful cases that have been brought for breach of the equivalent private sector duty.[165] Whatever the purpose of the public sector duty of care, in its current form in Australian jurisdictions it seems unlikely to provide meaningful accountability for the officers and officials of public sector bodies to whom it applies. As noted, the private sector imposed an extremely low standard prior to the 1990s. That standard increased significantly, albeit in a piecemeal fashion, as the courts imposed liability in an expanding range of factual scenarios. Such progressive evolution of the public sector standard will not occur without effective mechanisms for enforcing the duty. Experience in the private sector context suggests that, in order to be meaningful, the public sector duties should be amended so that they are punishable as civil penalties, and enforced by an independent regulator.

V CONCLUSION

The Western legal tradition maintains a fundamental distinction drawn between the 'public' and the 'private',[166] with higher standards and duties of accountability typically imposed on holders of public office. The standards of governance applicable to company officers is widely considered to be increasing: one commentator recently wrote that the increased responsibility attached to boards of directors is '[a]rguably the defining development in modern corporate governance'.[167] There is a successful enforcement regime for the enforcement of directors' duties, and liability has been imposed in a wide range of factual scenarios. This cannot be said of the equivalent duties in the public sector context. The public

164 *State Owned Enterprises Act 1992* (Vic) s 45.

165 See Ramsay and Saunders, above n 53.

166 William J Novak, 'Public-Private Governance: A Historical Introduction' in Jody Freeman and Martha Minow (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 25.

167 Loxley, above n 47, 486.

sector duty of care presents significant difficulties in interpretation, has an unclear policy rationale and there is no reported case in which a breach was successfully argued. Accordingly, there is no evidence that the public sector duty of care has had any impact in shaping governance standards in the public sector context. To adapt an epithet of Ross Parsons, it seems that the law only expects officials of public sector entities to be 'as stupid and as incompetent' as they happen to be.[168]

168 Ross W Parsons, 'The Director's Duty of Good Faith' (1967) 5 *Melbourne University Law Review* 395, 395.