Editorial

The long awaited federal election has certainly put a stop to legislative initiatives of a formal nature. But, there is no stopping the enthusiasm of some of the minor parties. The Australian Democrats have foreshadowed the introduction of a new Corporate Code of Conduct Bill (there is little chance of this being supported by the major political parties if the history of earlier version of the legislation in 2000 is anything to go by). The Australian Greens through Senator Kerry Nettle have foreshadowed legislation to punish "corporate killing". This initiative is one that has already been "tried" in other Australian jurisdictions but only the Australian Capital Territory has introduced legislation that formally introduces the concept of corporate manslaughter. A highly publicised Victorian experiment earlier this century was withdrawn after a deal of opposition and a recent report by a specialist government committee suggests that a further similar initiative is unlikely. New South Wales also has appointed a committee of inquiry into this area.

Senator Nettle indicates in her brief press statement in support of her initiative that the climate may well be changing for the introduction of such legislation. After describing the matter as a human rights issue, in which she supports the rights of workers to recover in cases where negligent acts lead to death, she discusses the inquiry into the James Hardie Group of companies and indicates that the relevant legislation focuses specifically "on incidents of extreme negligence and should pose no threat to the majority of employers who are doing the right thing". Again, whilst it is an interesting initiative, it is unlikely to lead to political support, whichever party wins the next federal election.

Unfortunately, from the perspective of the business community, the long awaited reforms to the *Trade Practices Act* as a result of the Dawson Report dealing with the processes for "clearing" mergers will now have to await the swearing in of a new Parliament. A change of government may well see some change to the processes that have been recommended by the Dawson Report; but this is purely speculation at this point of time. It is likely that changes to s 46 of the *Trade Practices Act* will be pursued whichever party wins office.

Since the last issue of the Review, there have been some quite interesting developments in the corporate law area which require a brief mention. Two interesting cases dealing with the forgiveness of corporate "misdeeds" by directors are worthy of note – the South Australian Full Supreme Court decision in *Carabelas v Scott* (2004) 177 FLR 334 (which has now gone on appeal in the High Court of Australia) and of perhaps greater significance, in a different context, *Edwards v Attorney General of New South Wales* [2004] NSWCA 272 (*Edwards*). The South Australian Full Supreme Court appears to have once again flirted with the notion that shareholders can forgive directors of actions which might also amount to a breach of statutory duty. The judgment of Chief Justice Doyle is painstaking to avoid that conclusion (although he suggested the division of opinion on this question is "divided"). Chief Justice Peter Young of the New South Wales Supreme Court in Equity, was a member of the New South Wales Court of Appeal which had referred to the *Edwards case* as a tantalising question from directors of The Medical Research and Compensation Foundation (MRCF) which had been established following the re-organisation of the James Hardie Industries Limited group of companies. These directors, who operated as both directors of a company limited by guarantee as well as trustees, wanted to obtain forgiveness in advance of decisions to compensate persons who had been injured by contact with asbestos. The MRCF had limited funds and there was a concern that by making payments in advance of formal claims, directors might be in breach of their duties. The New South Wales Court of Appeal (through Young CJ), confirmed that the courts can forgive breaches of duty which have occurred but that they had no power to forgive for an anticipated breach of duty. It is rather interesting that the court makes this comment in terms of the operation of s 1318(2) because the common law courts have suggested that shareholders can actually ratify in advance potential breaches of duty by directors.

We await of course with interest the report of David Jackson QC in relation to the James Hardie re-organisation. Calls for the further amendment to the *Corporations Act* to allow additional lifting of the corporate veil in appropriate circumstances appear quite unnecessary in the context of the development of a number of statutory exceptions to the notions of limited liability and the willingness of the courts to lift the corporate veil in appropriate circumstances.

A final comment in the context of corporate law concerns the very recent published reasons of the High Court of Australia in *Rich v ASIC* [2004] HCA 42 (9 September 2004). There were two judgments delivered by the majority judges – the joint judgment of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ on the one hand and McHugh J on the other, whilst Kirby J, not surprisingly, dissented. As readers will recall, the High Court had earlier in the year ruled that Rich and Silberman were entitled to claim privilege in relation to discovery applications made by ASIC against them in the context of civil penalty prosecutions of both directors. The lower courts had refused these claims for privilege on the basis that as these were civil penalty actions the disqualification and punishment of directors was basically protective rather than punitive. The High Court rejected this as an incorrect evaluation. In the majority's view, the differentiation that had been utilised in the past diverts

> attention from the relevant question which is where the privilege applies. That requires consideration of the kinds of relief which are sought in the proceedings. Neither the purpose which the applicant may have in seeking relief of that kind, nor the effects on persons other than the appellants of obtaining that relief, bears upon whether the proceedings expose the appellants to penalties. Yet an attempt to classify the proceedings as "punitive" or "protective" appears to require consideration of only those purposes or effects.
> ([2004] HCA 42 at [31])

In their view the attempt to classify these proceedings as either *protective* or *punitive* was elusive. In essence, their Honours looked at the effect of any major disqualification order or penalty. The forfeiture of office in a corporation was a penalty regardless of whether the penalty was also exacted in the form of a monetary payment or in another form. Once it was determined that the proceedings exposed the person to such a penalty, the proper course, in their view, was to refuse the relevant order for discovery.

Justice Kirby in his dissent suggested that the courts were once again needlessly restricting the regulator and the court in evaluating the claim. He added:

> The restriction has no foundation in the language of the [Corporations Act]. Judges should not insert it. Doing so seriously impedes the attainment of these [Corporations Act's] important purposes for corporate governance in this country.
> ([2004] HCA 42 at [132])

ASIC will now have to carefully reassess how it pursues its major initiatives in this area of enforcement. No doubt this decision will give added impetus to ASIC's use of alternative methods of enforcement – a rather false approach to the area of enforcement when so many weapons already are available to the regulator.

The articles and notes in this issue of the Review canvass a wide range of interesting questions. Moira Paterson examines why claims that information should be kept commercial-in-confidence may pose substantial threats to the public accountability that is required in so many areas of our law; Joshua Gans, Rajat Sood and Philip Williams criticise the important High Court decision on s 46 of the *Trade Practices Act* in *Rural Press* (supporting claims that the section may have some weaknesses in part of its operations) and Hanegbi and Bagaric examine the impact the superannuation industry on the Australian community and argue that current policy in this area should be reassessed. In addition, we publish notes in the Banking Finance, Industrial Law and Relations and Restrictive Trade Practices sections of the Review as well as a New Zealand newsletter.

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