

**THE DUTY TO CARE: PROGRESSIVE JUDICIAL  
INTERPRETATION OF THE DIRECTORS' DUTY OF CARE AND  
DILIGENCE**

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*This paper focuses on the current role of director obligations in respect of the dual public and private nature of the statutory duty of care and diligence. A discussion on the history and development of the duty will be undertaken to assist in explaining the current state and scope of directors' obligations. The appropriateness of penalties imposed on directors who breach the duty of care and diligence is another relevant aspect that will be analysed, especially in light of recent judgments which have clarified the extent of the duty.*

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I INTRODUCTION

Since the inception of the idea to establish companies as separate legal entities, great power has flowed to those who control them. Consequently, over the decades, directors have held progressively more powerful positions as the controllers of corporations. In Australia, directors are given managerial power

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and responsibility under the company constitution or replaceable rules.<sup>1</sup> They are the directing mind and will of corporations and have the power to influence its direction and corporate personality (such as the company's objectives).<sup>2</sup> To keep these corporate leaders accountable, the law has generated duties that directors must abide by. For example, a duty to act in the best interests of the company, a duty to act honestly and in good faith, and a duty of care and due diligence.<sup>3</sup>

The duty of care and due diligence has been codified in section 180(1) of the *Corporations Act*. It states that 'an officer must exercise the degree of care and diligence' that a 'reasonable person would exercise if they were a director or officer in the corporation's circumstances',<sup>4</sup> or if they held the same position, or 'had the same responsibilities within the corporation as the director'<sup>5</sup> or officer.

The statutory duty has a public and a private nature. This was discussed in the 2016 case of *Australian Securities and Investment Commission v Cassimatis*.<sup>6</sup> *Cassimatis* clarified that the private aspect of the duty relates to the duty of care only owed to the corporation, but that the content of the duty 'has been shaped by the private interests of the corporation'.<sup>7</sup> Further, the private nature of the duty is one owed between persons, which is 'evident in the liability of an officer to the corporation to compensate the corporation for loss'.<sup>8</sup>

<sup>1</sup> Elizabeth Boros, 'How Does the Division of Power Between the Board and the General Meeting Operate?' (2010) 31 *Adelaide Law Review* 169, 172; *Corporations Act 2001* (Cth) s 198A ('*Corporations Act*').

<sup>2</sup> *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 714; *Christian Youth Camps Ltd and Another v Cobaw Community Health Services Ltd and Another* (2014) 50 VR 256 (Maxwell P, Neave and Redlich JJA).

<sup>3</sup> *Corporations Act* (n 1) ss 180, 181, 184.

<sup>4</sup> *Ibid* s 180(1); Greg Golding, 'Tightening the Screws on Directors: Care, Delegation and Reliance' (2012) 35(1) *The University of New South Wales Law Journal* 266, 267.

<sup>5</sup> (*No 8*) [2016] FCA 1023, [530] (Edelman J) ('*Cassimatis*'). For the purposes of this discussion, an officer of a corporation is defined as 'as director or secretary of the corporation, or a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation', *Corporations Act* (n 1) s 9.

<sup>6</sup> *Cassimatis* (n 5) (Edelman J).

<sup>7</sup> *Ibid* [456] (Edelman J).

<sup>8</sup> *Ibid*.

Edelman J stated that ‘private wrongdoing is relational... it involves a breach of a duty in relation to another person’.<sup>9</sup> By contrast, a public duty of care can occur without being linked to another person. Further, Edelman J provided the example of traffic laws to illustrate this.<sup>10</sup> Specifically, his Honour stated that ‘a person who drives at 200km per hour on an empty street ... [will] breach a legislated public duty’, even if no person or property is damaged and therefore no private duty breached.<sup>11</sup>

*Cassimatis* is the leading judgment on the extent to which the public aspect of the duty operates. An analysis of the judgment will aid in the exploration of where the expansion of the duty of care and due diligence now lies.

## II THE TRADITIONAL APPROACH TO THE DUTY OF CARE

To analyse the operation of the duty of care and diligence in terms of both public and private obligations, it is necessary to consider the history of the section 180(1) *Corporations Act* duty. Directors’ duties were established in common law principles, which now co-exist with the statutory duties.<sup>12</sup> Edelman J in *Cassimatis* extensively discussed the historical roots of the duty to evaluate the boundaries of public and private obligations found in the corporate duty of care and diligence.<sup>13</sup>

The duty of care began as a liability resulting from ‘manifest breaches of trust and duty’ or from actions considered ‘grossly negligent’.<sup>14</sup> The idea of liability from gross negligence developed in the case of *Coggs v Barnard*,<sup>15</sup> where it was held that a bailee<sup>16</sup> was not ‘chargeable without an apparent gross neglect’ of the barrels entrusted to him.<sup>17</sup> Edelman J also commented that ‘for all practical purposes the rule may be stated to be’, that the failure to exercise

<sup>9</sup> Ibid [451] (Edelman J).

<sup>10</sup> Ibid [452] (Edelman J).

<sup>11</sup> Ibid.

<sup>12</sup> Kenneth Hayne, ‘Directors Duties and Company Creditors’ (2014) 38(2) *Melbourne University Law Review* 795, 804.

<sup>13</sup> *Cassimatis* (n 5) [416]-[428] (Edelman J).

<sup>14</sup> Ibid [418] (Edelman J) citing *The Charitable Corporation v Sutton* (1742) 88 ER 500, 502.

<sup>15</sup> *Coggs v Barnard* (1703) 92 ER 107 (Lord Holt CJ and Powell JJ).

<sup>16</sup> A person or party to whom goods are delivered for a purpose, such as custody or repair, without transfer of ownership.

<sup>17</sup> *Cassimatis* (n 5) [418] (Edelman J) citing *Coggs v Barnard* (n 15) 111 (Lord Holt CJ and Powell JJ).

‘reasonable care, skill, and diligence’, was ‘gross negligence’.<sup>18</sup> Edelman J referred to *Overend and Gurney Company v Gibb*,<sup>19</sup> in which liability upon the directors of the failed company was denied, rather it was held that ‘gross negligence was a species of misfeasance’.<sup>20</sup> The idea that something more than *mere* negligence was required in order to find directors liable for a breach of their duties began to be accepted as the standard.<sup>21</sup> In general, this ensured the standard that was expected of directors during the 19<sup>th</sup> and early 20<sup>th</sup> century remained low.

In *Lagunas Nitrate Company v Lagunas Syndicate*,<sup>22</sup> it was stated that directors have always been held by the courts in a very ‘favourable position’ as compared with other agents; especially in respect of the degree of gross negligence required to produce liability to an action.<sup>23</sup> In *Re City Equitable Fire Insurance Company Limited*,<sup>24</sup> a company suffered considerable financial loss due to failed investments and the chairman’s fraud. The liquidator sued the directors for negligence.<sup>25</sup> It was found that a director ‘need not exhibit... a greater degree of skill than may reasonably be expected’ of a person with his ‘knowledge and experience’.<sup>26</sup> It was further held that ‘a director is not bound to give continuous attention to the affairs of his company’, rather ‘his duties are of an intermittent nature’.<sup>27</sup> Provided directors acted *intra vires*, to be held liable for a breach of duty, they needed to be grossly culpable rather than either taking business risks on the company’s behalf or by exercising their duties in a merely negligent manner.<sup>28</sup> These cases demonstrate the low standard directors were held to.

<sup>18</sup> Ibid [424] (Edelman J) citing *Thomas Giblin (Executor of Richard Lewis) v John Franklin McMullen* (1868) LR 2 PC 317, 337 (Lord Chelmsford).

<sup>19</sup> (1872) LR 5 HL 480; *Cassimatis* (n 5) [442] (Edelman J).

<sup>20</sup> *Cassimatis* (n 5) [442] (Edelman J).

<sup>21</sup> Ibid [425] (Edelman J).

<sup>22</sup> [1899] 2 Ch 392, 418; *Cassimatis* (n 5) [425] (Edelman J).

<sup>23</sup> *Cassimatis* (n 5) [425] (Edelman J).

<sup>24</sup> [1925] Ch 407 (Romer J).

<sup>25</sup> Ibid.

<sup>26</sup> Ibid [428]-[429] (Romer J).

<sup>27</sup> Ibid [429] (Romer J).

<sup>28</sup> *Cassimatis* (n 5) [426] (Edelman J); *Re City Equitable Fire Insurance Co Ltd* (n 24) [428] (Romer J).

## III PUBLIC GLOSS AS A RESULT OF THE STATUTORY FRAMEWORK

In 1958, Australia was the first in the British Commonwealth to codify the common law duty.<sup>29</sup> The first formulation of a statute to this effect provided a limited duty that stated, ‘a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office’.<sup>30</sup> This section preserved private director’s duties while leaving the obligation open to a broader interpretation that the duty was not only owed to the company.<sup>31</sup> Subsequently, the duty became a pathway to both public and private remedies.<sup>32</sup>

The duty developed further in evolving statutory frameworks. It was included in the Uniform *Companies Acts* for each state, 1962 for South Australia,<sup>33</sup> and in 1992, the *Corporations Act*<sup>34</sup> was amended to stipulate that a director or officer needs to exercise the care and diligence ‘that a reasonable person in a like position in a corporation would exercise in the corporation’s circumstance’.<sup>35</sup> At the time, the Explanatory Memorandum to the *Corporate Law Reform Bill 1992* stated that ‘a reasonable person’ was governed by an objective standard.<sup>36</sup> Consequently, moving the duty away from the subjective standard established in the common law. The objective standard recognised that it would be necessary to consider the specific qualifications and management responsibilities of the director or officer in question, in order to evaluate their standard of care in relation to the duty.<sup>37</sup> This new standard is assessed on a case-by-case basis, performed without consideration of hindsight.<sup>38</sup>

<sup>29</sup> John H Farrar, ‘The Duty of Care of Company Directors in Australia and New Zealand’ (1995) 6(2) *Canterbury Law Review* 228, 228.

<sup>30</sup> *Ibid* 228; *Victoria Companies Act 1961* (Vic) s 107.

<sup>31</sup> *Cassimatis* (n 5) [434] (Edelman J).

<sup>32</sup> *Ibid*.

<sup>33</sup> *Companies Act 1962* (SA); The University of Melbourne, ‘Key Documents in the History of Australian Corporate Law’ (Web Page) <<https://law.unimelb.edu.au/centres/ccl/resources/history/key-documents-in-the-history-of-australian-corporate-law>>; Farrar (n 29) 228.

<sup>34</sup> *Corporations Act 1989* (Cth).

<sup>35</sup> Farrar (n 29) 228.

<sup>36</sup> Explanatory Memorandum, *Corporate Law Reform Bill 1992* (Cth) 83 (‘*Corporate Law Reform Bill 1992*’), cited in Farrar (n 29) 229.

<sup>37</sup> Farrar (n 29) 229.

<sup>38</sup> *Ibid*.

The duty developed in *Daniels v Anderson*<sup>39</sup> exemplifies the application of the new objective standard. This case commented that the idea that duties were owed only in equity was ‘outdated’,<sup>40</sup> and by the late 20<sup>th</sup> century, common law and equity had acknowledged that what had previously been described as ‘mere’ negligence now constituted grounds for which a breach of duty could be established. The current duty in section 180(1) of the *Corporations Act* maintains that the dual private and public nature is assessable at an objective standard.

#### IV CASSIMATIS CASE

Application of the current statutory duty of care and diligence requires close examination of the individual facts; applying the test of what expectations are placed on an average, ‘reasonable person’ in specific and relevant circumstances.<sup>41</sup> This was examined in *Cassimatis* where Edelman J explored the scope and nature of the duty.<sup>42</sup> The result of the judgment was the determination that the duty of care and diligence is owed to the company itself, as well as extending categories beyond the purely traditional interests of the company.<sup>43</sup> The judgment has initiated discussions as to what exactly the interests of a company now are.

Storm Financial Limited (‘Storm’), was a profitable financial advice company.<sup>44</sup> In *Cassimatis*, Storm’s directors had a general financial investment model of advice which the company promoted. A breach of the duty of care and diligence arose due to the advice being given to a class of clients. That class exclusively consisted of people over 50 years of age who were retirees or near retirees with limited income, assets, or prospects of rebuilding capital following significant loss.<sup>45</sup> The model of advice was promoted as a ‘manageable risk’, meaning ‘investing in an asset whose value could rise and fall but in such a way that, over a longer time frame, there would be a high

<sup>39</sup> *Daniels v Anderson* (1995) 37 NSWLR 438, 492 (Clarke, Sheller, Powell JJA) (‘*Daniels v Anderson*’); Golding (n 4) 267, citing *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 405 (Malcolm CJ).

<sup>40</sup> *Cassimatis* (n 5) [427] (Edelman J) citing *Daniels v Anderson* (n 39) (Clarke, Sheller, Powell JJA).

<sup>41</sup> *Ibid* [488] (Edelman J).

<sup>42</sup> *Ibid* [479]-[495] (Edelman J).

<sup>43</sup> *Ibid* [472]-[482] (Edelman J).

<sup>44</sup> *Ibid* [9] (Edelman J).

<sup>45</sup> *Ibid* [18] (Edelman J).

degree of certainty that the value would rise'.<sup>46</sup> Storm advised all clients of the described class to follow the same investment strategy, thus providing advice which was non-discriminatory and not appropriately tailored to each client.<sup>47</sup>

Although the directors managed Storm in good faith, by having 'an extraordinary degree of control over the company' being the only shareholders, the directors created 'an environment in which... it was almost inevitable that' this model 'would be applied to people with a high degree of financial vulnerability within [this] class'.<sup>48</sup> The directors exposed Storm to a 'foreseeable risk of harm greater than that which a reasonable director, acting with the required degree of care and diligence' would actually 'permit Storm to be exposed' to.<sup>49</sup> Therefore, it was held that the directors of Storm breached their duty of care and diligence by advising vulnerable investors to follow an inappropriate investment model,<sup>50</sup> and that the directors should have been aware of the potential possibility of harm to the corporation, which was not purely financial.<sup>51</sup>

One of the key concepts presented in this case is that harm should be understood as harm to 'any of the interests of the corporation'.<sup>52</sup> This means that harm may not be solely financial, instead harm to the company may arise from non-monetary interests, such as a company's reputation.<sup>53</sup> It meant that the scope of the duty was larger than what had previously been believed.<sup>54</sup> The decision effectively broadened the situations in which the duty of care and diligence could be invoked. The outcome of *Cassimatis* and the broadening of the operation of the duty of care and diligence presented an unclear expansion

<sup>46</sup> Ibid [9] (Edelman J).

<sup>47</sup> *Cassimatis* (n 5) [679]-[698] (Edelman J) cited in Rosemary T Langford, 'Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52 – Dystopian Accessorial Liability or The End of 'Stepping Stones' as We Know It?' (2020) 37(5) *Company and Securities Law Journal* 362, 365.

<sup>48</sup> *Cassimatis* (n 5) [21] (Edelman J).

<sup>49</sup> Ibid [33] (Edelman J); Andrew Lacey, 'The risk of a director/officer of a corporation assuming vast responsibilities – ASIC v Cassimatis (No 8) [2016] FCA 1023' (Web Page, 12 October 2016) <<https://mccabecurwood.com.au/asic-v-cassimatis/>>.

<sup>50</sup> *Cassimatis* (n 5) [25] (Edelman J).

<sup>51</sup> Ibid [482]-[483] (Edelman J).

<sup>52</sup> Ibid [480] (Edelman J) citing *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449-50 (Ipp J).

<sup>53</sup> Ibid [481] (Edelman J).

<sup>54</sup> Ibid.

of the public nature of the duty. However, *Cassimatis* did affirm that a contravention of the duty of care and diligence can be both a public and private wrong, consequently declaring that the duty does have a public nature, such as being owed to shareholders, and does not merely consist of a private duty owed to the interests of the company.<sup>55</sup>

#### A Public Interest Enforcement and Appropriateness of Penalties

The statutory duty of care is also demonstrated to have a public aspect through the method of public enforcement by the Australian Securities and Investments Commission ('ASIC'), imposing punitive remedies and penalties such as director disqualification orders.<sup>56</sup> This public aspect of enforcement acts as a general deterrent to the public to avoid bad corporate behaviour.<sup>57</sup> ASIC is specifically empowered to seek these public sanctions which are for public purposes, such as protection and deterrence, given the fact that the *Corporations Act* section 180(1) duty is a civil penalty provision.<sup>58</sup> In *Cassimatis*, Edelman J stated that 'the public prosecution, injunctions, sanctions, and inability to waive or ratify show that there is', at a minimum, 'a public duty which is parasitic upon the private duty'.<sup>59</sup> The disqualification of directors also disallows them from having the same opportunity in another corporation, which further protects the public, and in this sense, a civil penalty involves public rights.<sup>60</sup>

Given the public nature of the duty and the public penalties, it could be expected that when ASIC exercises its enforcement powers, it would turn its attention to the breaches which are 'in the public interest and will have the greatest impact on deterring future contraventions',<sup>61</sup> and that 'it is in the public interest to pursue directors'.<sup>62</sup> ASIC would also consider the impact that the enforcement action would have on the public perception of proper company

<sup>55</sup> Langford (n 47) 366.

<sup>56</sup> Jason Harris et al, 'Shareholder primacy revisited: Does the public interest have any role in statutory duties?' (2008) 26 *Company and Securities Law Journal* 355, 370.

<sup>57</sup> *Cassimatis* (n 5) [433]-[434] (Edelman J).

<sup>58</sup> Harris et al (n 56) 365, citing *Corporations Act* (n 1) s 1317E.

<sup>59</sup> *Cassimatis* (n 5) [459] (Edelman J).

<sup>60</sup> Langford (n 47) 421, citing *ASIC v Forge* (2004) 213 ALR 574 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ).

<sup>61</sup> Harris et al (n 56) 373.

<sup>62</sup> *Ibid.*



behaviour and other impacts to the public. ASIC's high success rate in a wide range of factually different duty of care cases, where the main penalty is disqualification from managing companies, would suggest that the civil penalty is appropriate for the breach.<sup>63</sup>

There has historically been a perception that Australian laws have been inadequate in punishing poor corporate behaviour and breaches of duty;<sup>64</sup> however, now that the civil penalty operates and encompasses a broad range of director conduct, there is a consensus among scholars, such as Vicky Comino and Michelle Welsh,<sup>65</sup> that the civil penalty regime has been a success.<sup>66</sup>

Some criticisms of the appropriateness of penalties imposed by ASIC are that they are fact specific; penalties are applied based on the context of the case and are not strictly applied.<sup>67</sup> Thus, the process can be long and penalties appear inconsistent and inadequate. For a wealthy director of a large company, the maximum pecuniary penalty of \$450,000 could represent a proportionately minor obstruction to their wealth and could therefore be regarded as an inadequate deterrent.<sup>68</sup> In *ASIC v Vizard*,<sup>69</sup> the maximum pecuniary penalty of \$200,000 per contravention that the legislation stipulated for insider trading, was criticised for being too low.<sup>70</sup> In *ASIC v Hellicar*<sup>71</sup> ('the Hardie case'), the court dealt with a breach of duty where the directors approved the release of a

<sup>63</sup> Ian Ramsay and Benjamin Saunders, 'An Analysis of the Enforcement of the Statutory Duty of Care by the Australian Securities and Investments Commission' (2018) 36(6) *Company and Securities Law Journal* 497, 497-9.

<sup>64</sup> Golding (n 4) 272.

<sup>65</sup> See Vicky Comino, 'The Enforcement Record of ASIC since the Introduction of the Civil Penalty Regime' (2007) 20 *Australian Journal of Corporate Law* 183; Michelle Welsh, 'Eleven Years On – An Examination of ASIC's Use of an Expanding Civil Penalty Regime' (2004) 17 *Australian Journal of Corporate Law* 175; 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.

<sup>66</sup> Golding (n 4) 272.

<sup>67</sup> Ibid 274.

<sup>68</sup> Golding (n 4) 275, citing *ASIC v Adler* (2002) 42 ACSR 80 (Santow J).

<sup>69</sup> (2005) 145 FCR 57 (Finkelstein J).

<sup>70</sup> Golding (n 4) 275, citing *ASIC v Vizard* (2005) 145 FCR 57 (Finkelstein J).

<sup>71</sup> (2012) 247 CLR 345, 346 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

misleading announcement on the Australian Stock Exchange (ASX).<sup>72</sup> As an example of the unexpected and inconsistent nature of the penalties, when directors were asked of their opinion, 38 per cent reported that they believed the penalties imposed in the *Hardie* case were too harsh; however, more than 80 per cent believed that the penalties imposed in the *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 (*'Centro'*) case were either reasonable or too lenient.<sup>73</sup> Therefore, banning orders as part of the pecuniary penalty are an effective enforcement mechanism of laws and deterring breaches of duty, despite the sentiment that such measures may be insufficiently stringent.<sup>74</sup>

The application of civil penalties as a method of punishment in duty of care and diligence breaches is an attempt to reflect responsive regulation.<sup>75</sup> This is a successful method of enforcement when businesses are motivated by a sense of social responsibility.<sup>76</sup> In this sense, penalties are appropriate because focusing on 'cooperation rather than punishment or incapacitation as a means of regulation' begins to reflect 'the well-known utilitarian principle that the measures used for social control' should be the 'least drastic necessary to achieve that goal'.<sup>77</sup> Consequently, penalties are appropriate in breach of duty cases because they are imposed based on the facts of each case and with a range of punitive and deterrent considerations in mind.

#### V FUTURE RAMIFICATIONS FROM CASSIMATIS

Abiding by the duty of care and diligence is important for extra-legal purposes, such as company self-regulation, corporate social responsibility, and overall effective corporate governance.<sup>78</sup> This is because the duty requires directors to actively engage in foreseeable risk management and be aware of the possible consequences to the company and public. To adhere to this duty, directors must balance public interests with the need to take on business risks,<sup>79</sup> which often

<sup>72</sup> Ibid.

<sup>73</sup> Golding (n 4) 274.

<sup>74</sup> Ibid.

<sup>75</sup> Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33(3) *Melbourne University Law Review* 908, 909.

<sup>76</sup> Ibid 910.

<sup>77</sup> Ibid.

<sup>78</sup> Golding (n 4) 266.

<sup>79</sup> Ibid.

involves entrepreneurial decision-making in respect of investments in financial markets that are inherently uncertain.<sup>80</sup> The decision in *Cassimatis* broadened the situations in which the duty of care and diligence can be utilised against directors, thus, directors have increased exposure to liability due to the duty, even while taking business risks.

The 'business judgment rule' exists to allow sufficient room and protection for directors to take on entrepreneurial risks.<sup>81</sup> The rule stipulates that no breach of the duty of care under *Corporations Act* section 180(1) will occur 'where a director has made a business judgment in good faith for a proper purpose', 'without material interest in the subject matter', and 'on the basis of a rational belief that the judgment was in the best interests of the corporation'.<sup>82</sup> The rule does not provide any clear presumption in favour of directors.<sup>83</sup> In *ASIC v Rich*,<sup>84</sup> it was accepted that the business judgement rule operates as a defence with the onus on the director to defend their decision-making.<sup>85</sup> Further, it was not clear how far the concept of the rule extended 'into the realm of management, organisation and planning'.<sup>86</sup> The business protection exists for directors to optimise efficiency, exploit new opportunities and exercise their discretion for the good of the business (and ultimately the community through the supply of goods and services), yet when the courts have assessed the standard of the duty, case law indicates that a director's conduct during the course of fulfilling business obligations has often been inadequate to protect public interests.<sup>87</sup>

#### A *The Extent of Public Obligations*

To determine the extent of the public aspect of the duty of care, an examination of the nature of the public obligations intended to be imposed on corporations is required. There exists some protection provided by the business judgment rule. Yet, the decision in *Cassimatis* and the heightened community expectations of corporations around social responsibility, due to the fact that

<sup>80</sup> Ibid 267.

<sup>81</sup> *Corporations Act* (n 1) s 180(2).

<sup>82</sup> Geoffrey Nettle, 'The Changing Positions and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402, 1416; *Corporations Act* (n 1) s 180(2).

<sup>83</sup> Nettle (n 82) 1416.

<sup>84</sup> (2009) 236 FLR 1 (Austin J).

<sup>85</sup> Nettle (n 82) 1417.

<sup>86</sup> *ASIC v Rich* (2009) 236 FLR 1, 150 [7272] (Austin J).

<sup>87</sup> *Golding* (n 4) 266; *ASIC v Healey* (2011) 196 FCR 291.

business and commerce complexity has grown considerably and will continue to grow,<sup>88</sup> indicates a broad interpretation. It is also of increasing importance to the community that corporations are managed in consideration of the communities in which they operate.<sup>89</sup>

This idea was expressed in *Cassimatis*, where Edelman J concluded that ‘the interests of the corporation include the interests of the shareholders’.<sup>90</sup> Courts have also noted that a company’s interests extend beyond the company itself to its shareholders and creditors,<sup>91</sup> and involves the avoidance of harm to the overall reputation of the company and shareholders, as well as compliance with the law.<sup>92</sup> This is a risk of harm which, in *Cassimatis*, the directors failed to mitigate for the benefit of any potential outside public interests. The directors owed a duty of care and diligence to provide their clients with sound advice and to take precautions to prevent giving inappropriate advice on a case by case basis.<sup>93</sup> It was found that there was a statutory norm of conduct imposed in the duty.<sup>94</sup> Even though the directors, Mr and Mrs Cassimatis, were the exclusive shareholders in Storm, they were nevertheless found to be in breach of the duty.<sup>95</sup> Greenwood J confirmed this by stating that the duty ‘goes beyond simply the interests of the shareholders’,<sup>96</sup> and ‘its burden is a matter of public concern not just private rights’.<sup>97</sup> This finding meant that there exists some public duty under *Corporations Act* section 180(1).

Parliament’s intention with this section is to establish an objective standard for the degree of care and diligence directors must attain or discharge in exercising

<sup>88</sup> *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115.

<sup>89</sup> Jason Harris et al (n 56) 355.

<sup>90</sup> *Cassimatis* (n 5) [523] (Edelman J).

<sup>91</sup> *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); Benjamin B Saunders, ‘The Public Sector Duty of Care and Diligence’ (2019) 42(2) *The University of New South Wales Law Journal* 652, 658.

<sup>92</sup> Saunders (n 91) 658, citing *Australian Securities and Investments Commission v Flugge* (2016) 342 ALR 1 (Robson J).

<sup>93</sup> Langford (n 47) 367.

<sup>94</sup> *Ibid* 369.

<sup>95</sup> *Ibid* 368.

<sup>96</sup> *Ibid* 368, citing *Cassimatis v ASIC* [2020] FCAFC 52; 275 FCR 533 (Greenwood, Rares and Thawley JJ).

<sup>97</sup> *Ibid*.

a power conferred on them.<sup>98</sup> As supported by the *Cassimatis* judgment, the nature of the public obligation under the statutory duty of care is determinative on the circumstances of the case, the position and obligations of the directors, and a consideration of a broad range of reasonably foreseeable harm.<sup>99</sup> It was also found in *Daniels v Anderson* that ‘the nature of the duty is shaped by the role and responsibilities’ that the individual ‘has within the company’s circumstances’.<sup>100</sup>

The public aspect of the duty does exist, despite the need for an analysis of these determinative factors. However, the range of factors that need to be considered casts doubt on the extent of the public aspect. How far the public nature of the duty extends remains inconclusive in the absence of further cases analysing *Cassimatis*.

### B Corporate Governance

The directors of Storm exposed the company to a foreseeable risk of harm by not reasonably considering or investigating ‘the advice’s subject matter in relation to investors in the [vulnerable] class’.<sup>101</sup> The *Corporations Act* section 180(1) duty of care and diligence carries with it a private aspect in respect of any harm to the company, but it could also be argued that it implies a duty to balance the important public principles of corporate governance and corporate social responsibility.

Corporate governance refers to the ‘control of corporations and to systems of accountability by those in control’.<sup>102</sup> It extends to accountability in terms of self-regulation and formulating norms of best practice by which all corporations should operate.<sup>103</sup> Governance keeps companies accountable to the public and aims to prevent abuses of power. It is considered one of the reasons for the statutory duty of care and diligence is that ‘directors’ duties resulted from the significance of companies to society as a whole...’ as well

<sup>98</sup> Ibid.

<sup>99</sup> *Cassimatis* (n 5) [530] (Edelman J).

<sup>100</sup> Jason Harris and Anil Hargovan, ‘Still a sleepy hollow? Directors’ liability and the business judgement rule’ (2017) 31(3) *Australian Journal of Corporate Law* 319, 321 citing *Daniels v Anderson* (n 36).

<sup>101</sup> *Cassimatis* (n 5) [681] (Edelman J).

<sup>102</sup> John H Farrar, ‘Corporate governance and the judges’ (2003) 15(1) *Bond Law Review* 101, 167.

<sup>103</sup> Ibid.

as ‘their potential to affect employees and their environment’.<sup>104</sup> The codification of the duty of care and diligence has allowed society to impose more robust mechanisms of enforcement and regulation on directors. It has provided a minimum expectation of corporate managerial behaviour which is reflected in the business judgment rule,<sup>105</sup> and in so doing, set the standard of care to be taken when considering business risks and the interests of the wider community at a minimum.<sup>106</sup> The business judgment rule provides a level of protection to directors when taking risks, which can operate to the detriment of public interests.<sup>107</sup> This raises doubts about its effectiveness in supporting effective corporate governance accountability to the public.

In *Rich v ASIC*,<sup>108</sup> Kirby J stated that being a director is a ‘privilege to be earned each day’ which has the possibility of being ‘withdrawn for misconduct but also for incompetent, improper or lax activities in the functions of corporate management’.<sup>109</sup> The sensitive balance between business risks and public interest impacts, means that directors ‘have a responsibility to the community which sustains them’,<sup>110</sup> and that directors have ‘obligations that extend beyond the narrow conception of the protection of shareholder wealth’.<sup>111</sup> These sentiments could suggest that the duty extends to stakeholders or even a class within a community, in order to give effect to a purpose of responsibility and accountability within the public aspect of the duty.

### C Social Responsibility and Public Interests

Corporate Social Responsibility (CSR) is the idea that a company functions by public consent and that ‘its basic purpose is to serve constructively the needs

<sup>104</sup> Saunders (n 91) 661, citing 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) 14 [2.29].

<sup>105</sup> *Corporations Act* (n 1) s 180(2).

<sup>106</sup> Harris et al (n 56) 366.

<sup>107</sup> Harris et al (n 56).

<sup>108</sup> (2004) 220 CLR 129, 171 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); Harris et al (n 56) 366.

<sup>109</sup> Harris et al (n 56) 366.

<sup>110</sup> Saunders (n 91) 661.

<sup>111</sup> Harris et al (n 56) 355.

of society to the satisfaction of society'.<sup>112</sup> This interaction between the function of business and society is still evolving in line with society's values and the expectation that companies reflect society and accept broader responsibilities to the public is greater than ever before.<sup>113</sup>

Public interests broadly include the interests of any 'neighbours who are impacted by the company's actions'.<sup>114</sup> There are clear public interests in the provision of CSR initiatives. While they are not a duty imposed by law, they can apply to stakeholders more broadly than shareholder interests and encompass the idea that corporations have a social responsibility to maintain the rule of law and consider that their actions will have a potential impact on the planet and the future.<sup>115</sup>

#### VI *The Public Interest of Gender Equity*

One possible expansion of the duty of care and diligence may be the broadly held public interest in corporations supporting gender equity. Achieving gender diversity quotas could be beneficial to a company, leading to higher economic benefits and an improved public reputation.<sup>116</sup>

As of 2021, every company in the ASX 200 index has at least one female director, partly driven by building pressure from various investors, including large superannuation funds and advocacy groups, such as *Women on Boards*, *Champions of Change* and the *Australian Institute of Company Directors*.<sup>117</sup> Some financial institutions are linking gender equity targets and companies' borrowing costs, which is a trend which is expected to continue.<sup>118</sup> A notable example arose in August 2021 when Coles declared that it had refinanced debts with loans which were linked to three key sustainability targets, one being

<sup>112</sup> Shaw, Lisa, et al, 'SAGE Brief Guide to Corporate Social Responsibility', (2011, 1<sup>st</sup> ed, SAGE Publications) 4 referencing the Committee for Economic Development *Social Responsibilities of Business Corporations* 1971.

<sup>113</sup> Ibid.

<sup>114</sup> Pamela F Hanrahan, 'Companies, Corporate Officers and Public Interests: Are We at a Legal Tipping Point?' (2019) 36 *Company and Securities Law Journal* 665, 667.

<sup>115</sup> Ibid.

<sup>116</sup> Anne Hyland, 'Higher borrowing costs for companies not hitting gender targets', *The Sydney Morning Herald* (Blog Post, 21 September 2021) <<https://www.smh.com.au/business/companies/gender-parity-targets-need-teeth-says-smith-gander-20210917-p58sjr.html>>.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

increasing the proportion of women in leadership roles.<sup>119</sup> If Coles does not meet this target, it will end up paying more interest on the loan.<sup>120</sup> These issues relate to public opinion and corporations are identifying these issues as ideals of social responsibility. In this regard, meeting these targets may become a public interest of the company and disregard of them, or actively working against them, could lead to a breach of the duty of care and diligence.

Friedman suggests that the sole responsibility of a corporate executive is to ensure business is conducted in a way that achieves the goals of the shareholders, that being 'to make as much money as possible while conforming to the basic rules of the society'.<sup>121</sup> This narrow view of a businesses' purpose does not align with recent developments in gender equity values. Given that it is now possible to inextricably link financial performance with social responsibility targets, diminishing the persuasiveness of Friedman's argument that businesses cannot have duties that extend to social responsibilities.<sup>122</sup>

This public interest relates to various stakeholders who would be affected by the social and financial implications, including employees. It would then be the social responsibility of the corporation to work towards that gender equity ideal,<sup>123</sup> social values which are also reflected in fair work and anti-discrimination legislation.<sup>124</sup> Companies and directors who act in the best interests of wider stakeholders could be considered as socially progressive.<sup>125</sup> This progresses shareholder value long term, attracting employees and more investors with similar values.<sup>126</sup>

The scope of the duty of care extending to the company's conscious contribution to the benefit of society by championing gender diversity and equality, can be considered as a reflection of modern corporate social

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Friedman, Milton, 'A Friedman Doctrine: The Social Responsibility of Business is to Increase Its Profit' (The New York Times Magazine, 13 September 1970).

<sup>122</sup> Ibid.

<sup>123</sup> Hanrahan (n 114).

<sup>124</sup> Most notably, the *Fair Work Act 2009* (Cth), *Fair Work Regulations 2009* (Cth), and the *Equal Opportunity Act 1984* (SA).

<sup>125</sup> Kate Stary, 'Gender Diversity Quotas on Australian Boards: is it in the best interests of the company?', University of Melbourne (Web page, 2015) 4 <<https://law.unimelb.edu.au/centres/ccl/research/research-reports-and-research-papers>>.

<sup>126</sup> Ibid.



responsibility. Systematic and wilful disregard for this clear public interest could result in a breach of the *Corporations Act* section 180(1) duty of care.

In *Cassimatis*, Edelman J emphasised that harm should be understood as affecting ‘any of the interests of the corporation’.<sup>127</sup> Therefore, if a company’s interests expand to stakeholders and shareholders, in line with the broad considerations of this extended public duty, then the directors should take care to mitigate, or instead become liable, for any harm that might result from socially negative actions or the financial impact of missing gender targets. In fact, there is an argument that ‘engaging in activities that benefit the whole society is the *quid pro quo* for the privileges of incorporation conferred by the polity, including limited liability’.<sup>128</sup> Activities that benefit the whole society would include environmental, social, and economic impacts,<sup>129</sup> which draw on the idea of a corporation’s need to balance long term societal impacts against short term financial gains.<sup>130</sup>

## II *The Public Interest of Environmental Concerns*

Other societal impacts can have financial repercussions for companies, such as the impact of climate change. This concern may be relevant to the duty of care and diligence when it can also carry a risk of harm to the interests of the company.<sup>131</sup> It is conceivable that ‘directors who fail to consider climate change risks...[may] be found liable’ for breaching their ‘duty... in the future’ due to a more liberal interpretation of the current public aspect of the statutory duty.<sup>132</sup> This also means that ‘the duty of directors to take care in protecting and promoting the corporation’s interests’ may extend to ‘thinking about the negative impact of harmful acts to the public interest’.<sup>133</sup>

Applying this to directors, companies with operations directly linked to the effect on global temperature, such as emissions or the damage or destruction of environmental areas which help decrease emissions, should be expected to reasonably foresee its impact and the risk of harm, and be subject to a duty of

<sup>127</sup> *Cassimatis* (n 5) [480] (Edelman J).

<sup>128</sup> *Hanrahan* (n 114) 669.

<sup>129</sup> *Ibid* 670.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid* 671.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid* 681.

care in that regard.<sup>134</sup> The class of persons involved could be people located in Australia, or the duty of care could be towards the environment itself, limited to the geographical location of the company or its site of impact. A duty of care towards the environment in this regard directly relates to the idea of CSR, by holding corporations who have global reach to account when it comes to their individual environmental impact.<sup>135</sup>

Both the public interest arguments of gender equity and environmental concerns are issues of CSR and contribute towards a company's reputation. Reputation is a relevant interest of a company noted by the fact that its importance is becoming more recognised and crucial to its survival. Now, with the connectivity of social media and growing social awareness and morals, reputation is inextricably linked to a company's performance. This is evidenced by the growing movement of *cancel culture*, an important tool in achieving social justice where the public withdraws support for a company based on controversial views or actions that it holds.<sup>136</sup> Further, the ASX Corporate Governance Principles reference the importance of reputation and standing of a company in the community.<sup>137</sup> Part of the duty of care is to consider the extent of foreseeable risk of harm, including the harm done to reputation and adverse market impact.<sup>138</sup> All this shows that public reputation and social responsibility are relevant factors in the application of a director's duty of care and diligence, and should result in a wider public interest scope in respect of that duty.<sup>139</sup>

## VI CONCLUSION

*Cassimatis* determined that the duty of care and diligence contained both a public and private duty, developed from a long history that was slow to change, and with low expectations regarding the standard of negligence. This duty of care and diligence is essential in mandating aspects of CSR and governance.

<sup>134</sup> Ibid 670.

<sup>135</sup> Ibid 669-670.

<sup>136</sup> Kian Bakhtiari, 'Why Brands Need to Pay Attention to Cancel Culture', *Forbes* (Blog Post, 29 September 2020) <<https://www.forbes.com/sites/kianbakhtiari/2020/09/29/why-brands-need-to-pay-attention-to-cancel-culture/?sh=2e42f493645e>>.

<sup>137</sup> Pamela F Hanrahan, 'Directors' Duties and Public Interests' (Speech, 11 April 2018) <<https://ssrn.com/abstract=3434936>> 1.

<sup>138</sup> *ASIC v MacDonald (No 11)* [2009] NSWSC 287, 558 (Gzell J); Hanrahan (n 137) 6.

<sup>139</sup> Hanrahan (n 137) 13.

The penalties imposed in these cases are thus reflective of the complex facts of each case and in contemplation of responsive regulation.

Arguing for a broader interpretation of the extent of the duty of care and diligence enables the duty to protect the interests of the public shareholders to a greater extent. This may cause issues where directors may not be protected from liability solely by relying on the business judgment rule. While directors' duties create minimum standards of acceptable behaviour (like through the duty of care and diligence), extra-legal factors such as a company's reputation ensure that directors strive for higher ethical standards than those required of them by law.

There is arguable scope for the extension of the duty of care and diligence to a greater variety of these stakeholder issues given that the company's best interests are effectively comprised of the interests of its stakeholders. In turn, this may cause ASIC to exercise its enforcement powers over breaches of the duty of care and diligence which are in the public shareholder interest which would lead to greater accountability for companies.

It is clear from *Cassimatis* that a public aspect of the duty of care and diligence exists. The limitations on the scope of this duty remain unclear; however, given the proliferation of large corporations with numerous stakeholders, there is arguably room for the scope to develop in line with these stakeholder interests, including a push toward responsibility and accountability by directors.