SUPREME COURT CORPORATE AND COMMERCIAL LAW CONFERENCE

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TRANSCRIPT OF PRESENTATION BY DANIEL CRENNAN QC COMMISSIONER AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

SUPREME COURT OF NEW SOUTH WALES

ANNUAL CORPORATE LAW CONFERENCE

What is the Future of the Australian Business Corporation?

2019 Conference

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Banco Court, Supreme Court of New South Wales,
Level 13, Queen's Square, Sydney

JUSTICE BARRETT: It is my pleasure to introduce now Daniel Crennan who will continue the conspectus of the future of the corporation by looking at things from the point of view of the corporate regulator.

Daniel is very well placed to speak from that perspective, having held the position of Deputy Chair of ASIC since the middle of last year. His appointment as Deputy Chair came at an interesting time and was in its context an interesting appointment.

ASIC has had in the past some very outstanding lawyers at the top of its structure, including as Chair. Indeed, one of them is in this room today - or was before, I'm not sure whether he still is. The appointment of a Deputy Chair who is not only a lawyer but also a practicing member of the inner Bar with first-hand and contemporary in-court experience of significant commercial cases is I think a first.

In the wake of the Royal Commission it is a very significant first. A lot has been said in recent times about whether enforcement litigation should be a first, last or other resort for ASIC in cases of non-compliance. Speaking as someone who sat here in the corporations list for about a decade, I must say I was never aware of ASIC being a reticent participant in that arena.

It was interesting to see in the Financial Review just last week an opinion piece by three corporate solicitors expressing a hope that ASIC would tread carefully in taking any litigation-first approach. They put forward a number of reasons, including that regulators lose respect from the public when they lose cases, that a litigation-first approach will put corporations on the defensive and make them less amenable to transparency. In other words, I suppose, they will clam up and become inscrutable and that litigation has a disproportionate impact on individuals caught up in it.

One could debate whether these are in any abstract way good reasons to spurn the male fist in favour of some form of velvet or similar glove. Daniel, as I said, was

appointed to ASIC direct from the ranks of practicing silks. He was a member of the Victorian Bar for 16 years and became Queens Counsel in 2016. He has also had experience significantly in the current context as a director of public companies.

Unusually for a Victorian - although he did confess to me over the tea break he spent some formative years in Sydney - in earlier times he frequented the rugby field as a second row forward, which may add some special dimension to his performance in his present role.

A phrase that fell from the last speaker which I thought was particularly apposite as we move into this last session was "holding to account". Daniel?

MR CRENNAN: Thank you very much for those kind words. I hope I'm not too restricted in what I can say or what I can make an account of, but obviously as a regulator, we possess a particular position in society and public policy is beyond what I can in any meaningful way discuss.

The Australian Securities and Investments Commission is the conduct regulator of a wide range of industries in Australia, including financial services, credit, insurance, markets, corporations, and soon to be conduct regulator of superannuation. Its mandate is to supervise, investigate, pursue court outcomes and other outcomes with respect to misconduct, both by individuals and corporate entities in their sectors. It may pursue criminal prosecutions with the Commonwealth Department of Public Prosecutions against individuals and entities. ASIC also conducts joint investigations with the Australian Federal Police, most recently into alleged complex cyber crime in relation to superannuation funds.

ASIC does not have rule-making power or the power to issue penalties itself.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry which was referred to in passing earlier shone a powerful light on the financial services sector throughout 2018, and those stewards of it. The hearings dominated the media cycle, and the interim report, delivered in September 2018, and the final report, delivered on 1 February 2019, contained many case studies of misconduct in these sectors. The

final report contained 76 recommendations for legislative reform and other changes to the regulation of the sectors.

The Royal Commission made some criticisms of ASIC and its regulatory responses to misconduct in the past. On 13 March 2019, the Act containing provisions effecting penalties reform received Royal assent. This Act was responsive to recommendations contained in the ASIC Enforcement Review Task Force dated December 2017, predating the commencement of the Royal Commission. Thereafter, contraventions of provisions that contain the cornerstone obligations owed by financial services licensees and credit licensees to those to whom they provide services have attracted significant potential civil penalties. The Penalties Act also increased maximum civil penalties very significantly and increased maximum terms of imprisonment significantly for criminal conduct.

Much of the misconduct examined by the Royal Commission in its case studies arguably amounted to contraventions of these key provisions, which I will come to now - that is, the mandatory obligation contained in the relevant legislation on licensees to do all things necessary to ensure that the financial services covered by the licensee are provided efficiently, honestly and fairly, and that is in section 912 of the Corporations Act, and to do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly, and that is section 47 of the National Consumer Credit Protection Act.

Unsurprisingly, perhaps, the regulator historically, at least prior to 13 March 2019, typically entered into enforceable undertakings with firms it suspected of contravening these key provisions, rather than pursue bare declarations of contravention from this and other courts. Typically, these undertakings contained no admission of contravention but merely an acknowledgement of the regulator's concerns. The Royal Commission itself expressed some scepticism as to the efficacy of enforceable undertakings in effecting enduring deterrence.

Where the regulator's role in administering the key provisions of section 912A and section 47 may once more comfortably have resided in the protective aspects of its regulatory responses to misconduct, with the introduction of significant civil penalties the regulator's role is

clearly more punitive - that is, the regulator is more likely to respond by utilising enforcement and litigation where it takes the view that significant misconduct has been engaged in by a licensee.

These important reforms introducing penalties for contraventions of these cornerstone obligations may go some way to the exploration of the scope and dimension of these duties, such that the purpose of a corporate licensee may, in some way, inform an examination of whether or not such a licensee has breached its duty to act efficiently, fairly and honestly. I will elaborate on that in a moment.

So too, a stated purpose of a company that, for example, increases its opportunities or chances of accessing certain species of capital - and I think enlightened shareholders were referred to - may inform an examination of whether or not a director, as a steward of a company possessing that particular design, may not have acted within the company's best interests within the meaning of section 181 of the Corporations Act.

So too, disclosure requirements may include or extend to non-financial risks, such as regulatory risks that are peculiar to a particular industry or endeavour. A publicly listed mining company, for example, may be subject to the strictures of particular State-based environmental or remediation lease or licence requirements or conditions. ASIC released a report in September 2018 on climate risk disclosure by Australia's listed companies, which does discuss possible disclosure issues in this regard, and I have referred to that in the footnote.

Beyond those types of possible outcomes, or at least the application of legal theory and argument within ASIC's remit, under the current legislative framework in Australia the regulator's interest in a company's purpose, beyond compliance with the law it administers generally and good governance, could best be described as presently somewhat agnostic. However, in this paper I will discuss recent developments in Australia that may shed light on the role of corporate purpose in the current and emerging legislative framework in which ASIC operates.

I will commence by discussing fairness. I will consider that in some detail and, to refer to something that Justice Edelman observed, it might in fact be a

statutory manifestation of the communitarian theory.

As a starting premise, existing law in Australia already requires good corporate conduct. Good corporate citizens are unlikely to attract the regulator's attention.

As set out above, financial services licensees and credit licensees are, and have been for some time, legally obliged to act efficiently, honestly and fairly. Whether societal norms and concepts of value-driven corporate purposes will be capable of residing within the regulator's remit will necessarily await the development of jurisprudence arising from this and other obligations.

To fairness. Treating customers fairly is the third of six key norms of conduct outlined in the Royal Commission final report. The Royal Commission acknowledged that fairness "may lie at, or at least close to, the heart of community standards and expectations about dealing with consumers".

There is an emerging body of law with respect to the content of the "efficiently, honestly and fairly" obligation. In ASIC v Westpac Banking Corporation, Justice Beach observed that the meaning of this obligation is not in doubt and referred to Justice Foster's construction of the statutory obligation, which was:

> The words "efficiently, honestly and fairly" must be read as a compendious obligation meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty ...

et cetera. I got that right for once.

Justice Foster further noted that the words connote a requirement of competence in providing advice and complying with the law, of evenhandedness in dealing with clients, and sound ethical values and judgment in matters relevant to a client's affairs.

Justice Foster also noted that "honestly" can include

conduct that is not criminal but is somehow morally wrong. When combined with the word "fairly", it connotes a person, "who not only is not dishonest but is also ethically sound".

Most recently, indeed yesterday, the full Federal Court handed down a decision in which it had cause to examine the scope of the section 912A obligation, in Australian Securities and Investments Commission v Westpac Securities Administration Limited. I won't comment on the judgment, but I will refer to some of Chief Justice Allsop and Justice O'Bryan's observations as to the operation of the section the 912D obligation.

Chief Justice Allsop observed that:

> The phrase has been held to be compendious as a single, composite concept, rather than containing three discrete behavioural norms. That said, if a body of deliberate and carefully planned conduct can be characterised as unfair, even if it cannot be described as dishonest, such may suffice for the proper characterisation to be made.

He goes on to say:

> The provision is part of the statute's legislative policy to require social and commercial norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction, but nevertheless an abstraction to be directed to ...

and this is a quote from Justice Gummow:

> ... the "infinite variety of human conduct revealed by the evidence in one case after another".

I won't take you to the full quotation. That will be in the paper that will be available.

His Honour goes on to say:

> The word "fair" in its adjectival form, directed to conduct, includes a meaning of "free from bias, dishonesty, or injustice; that which is legitimately sought, pursued, done, given, etc ..."

Just to note a couple of observations from Justice O'Bryan, he made these observations:

> Although not the subject of argument on this appeal, I have considerable reservations about the view that the words "efficiently, honestly and fairly", as used in s 912A(1)(a) of the Act should be read compendiously in the manner suggested by Young J in Story. His Honour gave two reasons for interpreting the phrase in that manner. The first is that it is impossible to carry out all three tasks concurrently.

That might be of some interest, given the topic of this conference. He goes on to give some examples and he talks about the disjunctive nature of the obligation. As I said, those quotations will be available in the paper.

> It is clear from this judgment and others that precede it that the obligation of fairness in dealing with the customers will no doubt be of acute importance going forward in the emerging jurisprudence which has effectively been initiated by an alteration in the regulatory response to contraventions of these very important cornerstone obligations, given the penalties that the regulator is now able to pursue through the courts.

> I will just give some examples from overseas jurisdictions, firstly starting with the United States. Under the Dodd-Frank Act, it is unlawful for providers of financial products and services to engage in unfair, deceptive or abusive acts or practices. The Act establishes a three-limbed test for unfairness, which captures an act or practice which (a) causes or is likely to cause substantial injury to consumers; (b) the injury is not reasonably avoidable by consumers; and (c) the injury is not outweighed by countervailing benefits to consumers or to competition. Subparagraph (b) highlights the question of asymmetry, which I will come back to.

Guidance issued by the Consumer Financial Protection Bureau, "CFPB", provides additional information on the interpretation of these three elements of unfair practice and examples of enforcement action to demonstrate how the standard of unfairness might be applied - that substantial injury generally involves monetary harm; can include a small amount of harm to a large number of consumers; and that actual injury is not required in each case. It provides an example of economic injury suffered when a mortgage servicer did not release a security interest in a property after the borrower had repaid the total amount due on the mortgage. Then (b) that the avoidance of injury does not mean that the consumer could have made a better choice but, rather, whether the act or practice hinders a consumer's decision-making capacity, including changes to the nature of a product without the consumer's knowledge.

A further example is contained in the paper.

This three-pronged test reflects the Federal Trade Commission's definition of "unfairness" contained in the Policy Statement of Unfairness published in 1980 and later codified into the Federal Trade Commission Act. Prior to that publication, United States courts had typically identified that a practice was unfair where it offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to assumers.

I will just refer to one case, which is LabMD v Federal Trade Commission. The court considered an appeal against a cease and desist order against the plaintiff made on the basis that its failure to design and maintain a reasonable data security program invaded consumers' right to privacy, constituting an unfair act or practice. Whilst ultimately finding that the FTC cease and desist order was unenforceable, the court made a number of useful observations about determining unfairness by linking the test with established legal standards of fairness.

Put another way, an act or practice's "unfairness" must be grounded in statute, judicial decisions - ie the common law - or the Constitution. An act or practice that causes substantial injury but lacks such grounding is not unfair within Section 5(a)'s meaning.

There are further aspects of that quotation which I won't take you to now.

To go to the United Kingdom, the UK financial services legislation, as has been referred to in part earlier, contains a number of provisions that impose a standard of fairness on firms when dealing with consumers in relation to contracts, including the Unfair Contracts Term Act, the Unfair Terms in Consumer Contracts Regulations and the Consumer Credit Act. The Consumer Protection from Unfair Trading Regulations also places on traders, including financial services firms, a general prohibition on unfair commercial practices.

A practice is deemed to be unfair if it is found to be misleading or aggressive or otherwise where it contravenes the requirements of professional diligence and it materially distorts, or is likely to distort, the economic behaviour of the average consumer with regard to the product. That's also of some interest, one would think.

These provisions are supplemented by a principles-based regulatory model which sets out 11 principles, which I won't go to now, and in a sense that is not dissimilar to the Royal Commission's observations, referred to by Justice Edelman earlier, in that a principle is that a firm must pay due regard to the interests of its consumers and treat them fairly.

In Director-General of Fair Trading v First National Bank, the House of Lords considered the meaning of "fairness" in this context, which deemed the term to be unfair where it causes significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, presumably for the pursuit of profit, in a manner and to an extent which is contrary to the requirements of good faith.

As you can see, courts throughout the world are looking at the concept of fairness to endeavour to prevent the asymmetry between the provider of the services, whether they be credit/financial services or otherwise, and the consumer, who is, more often than not, in a position which is naturally out of balance with the position of the provider.

In his judgment, Lord Bingham considered relevant considerations in determining whether a contract term should be found to be unfair by reference to standards of fair dealing. Lord Bingham said:

> Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor ...

To turn briefly to Canada, the Financial Services Commission of Ontario released guidance on the fair treatment of customers to ensure that there is common understanding between the FSCO, which is now the FSRA, and its licensees as to what it means to treat consumers fairly. The guideline sets out standards of conduct and product design that are required to meet licensee obligations to treat customers fairly, including those covered by existing statutory requirements. Licensees are expected to ingrain fairness in their company culture, act with due diligence, promote services clearly and honestly, recommend products that are suitable for a consumer based on their specific needs, disclose and manage potential conflicts of interest and keep consumers appropriately informed, and some other matters. There are other aspects of that and the Ontario Insurance Act contained in the paper, but I won't go to them now.

The concept of the obligation of fairness in commercial dealings is certainly not confined to Australian legislation, as you can see. This concentration on the concept of fairness in the legislative framework in which ASIC regulates the commercial activities of the providers of financial services and credit will no doubt throw up a significant body of jurisprudence, including the decision that was delivered yesterday.

This should go a long way, one would hope, to addressing the British Academy's position, at least as to the importance of a purpose consistent with the proper and fair treatment of customers - that is, the adherence to

a purpose that is consistent with acting in such a way to customers - that is, fairly - that does not prefer shareholder primacy or profit to the detriment of the interests of the customer.

I apologise for speaking about fairness for such a long period of time, but from a regulatory perspective, it is one of the cornerstones of our regulatory activity when dealing with the relationship between the provider and the consumer.

I will say a little bit about corporate social responsibility, a concept which has been around for some time, and social licence to operate, which has been widely debated in the regulatory contexts and elsewhere.

In 2014, the Governance Institute of Australia published a discussion paper entitled "Shareholder primacy: Is there a need for change?" The paper examines case studies and societal expectations with respect to a number of identified issues, such as hydraulic fracking, poker machines, obesity and plastic beverage containers, not confined to Australia, of course, but significant societal issues from time to time in Australia.

In the paper, the authors refer to two inquiries, which I think were referred to earlier, one by the Corporations and Markets Advisory Committee, CAMAC, and a second undertaking by the Parliamentary Committee on Corporations, PJC. They were some time ago, in 2006. However, in summary, those inquiries found that there was no need for change in the Corporations Law in Australia in circumstances where the current law - and I think this is concordant with some of the comments earlier - was sufficiently flexible to ensure that corporations and their stewards, the directors and officers, are able to be held to account for its and their actions that affect stakeholders beyond shareholders.

There are well-known criticisms of the shareholder primacy concept as not being consistent with the law. For example, in her 2002 paper, Professor Stout observed that shareholders do not own the corporation:

> Rather, they own a type of corporate security commonly called "stock". As owners of stock, shareholders' rights are

quite limited. For example, stockholders do not have the right to exercise control over the corporation's assets.

That is not controversial, I wouldn't have thought.

Shareholders' rights are set out in Australian legislation in Chapter 2F of the Corporations Act and are limited to actions arising from the oppressive conduct of affairs and derivatives actions, sections 232 to 241 of the Corporations Act. Shareholders can, of course, act in concert - and this was referred to earlier - to alter the composition of the board contrary to the recommendations of the board in particular circumstances.

The GIA paper poses the question: Should stakeholder interests be dealt with in Corporations Law or by social policy intervention? The authors note that some precedent exists for impacts of corporations on stakeholders through laws other than Corporations Law, for example, workplace health and safety laws which protect another set of important stakeholders, the employees, another set of stakeholders referred to in the work of the British Academy.

One case study as to how corporations may be subject to a panoply of legal obligations that stand outside of the Corporations Law proper is the mining industry. As with the Toronto Stock Exchange and the Johannesburg Stock Exchange, the Australian Stock Exchange has a significant number of junior explorer companies listed. The purpose, put one way, of a junior explorer is to identify mineral assets and attain access to them. In Australia and elsewhere, in order to attain access to the assets for the purposes of exploiting them and thereby producing profit and return for shareholders' investment, the junior explorer must satisfy a number of legal conditions to be entitled to that access. For example, the company must comply with laws, often State laws, that relate to environmental impact, remediation, indigenous land use and native title issues. In one sense, the junior explorers in Australia are well versed in having a social licence to operate, or something along those lines.

Some of the British Academy's concerns, therefore, relating to the environment, social expectations and employees are probably, to an extent at least, addressed in

existing current Australian legislation, in which this regulator may or may not be directly or indirectly interested. It is not for this regulator to opine as to whether the current legislative framework in which it operates is sufficient for regulating any particular corporate purpose. Rather, this paper hopefully illustrates some ways in which the existing legal framework might relate to a corporations purpose that transcends, deliberately so, the pursuit of profit.

I will just turn to directors' duties, to the stewards of the corporation. In Australia, company directors are required to act with due care and diligence and in the best interests of the company, in summary, sections 180 and 181 of the Corporations Act. When taking a long-term view, factoring in the interests of the multitude of stakeholders beyond shareholders alone as well as the company's reputation is arguably consistent in considering the best interests of the company.

If a director fails to act in the best interests of the company with respect to non-financial risks, environmental, social and governance, or "ESG", issues might impact future cashflows, asset values, intangible assets such as reputation and ultimately the longevity of the company. Mismanagement of these non-financial risks may readily become a financial risk over time.

As observed before, our society and others have also come to expect much more from companies than short-term shareholder returns, and much has been said of that thus far. Internationally, there is also recognition that a range of factors can affect the long-term interests of a company. The UK Financial Reporting Council's July 2016 report, "Corporate culture and the role of boards", noted that intangible assets such as reputation, IP and customer base - I'm not sure how they valued reputation, but IP certainly has been capable of value for some years - today account for 80 per cent of total corporate value. Forty years ago that figure, they say, was under 20 per cent. With figures such as those, behaviour that compromises customers, behaviour that is unfair, certainly has the potential to impact on a company's long-term interests.

Taking by way of an example a hypothetical example, a board may spectacularly fail to meet a purpose that relates to a societal expectation or an ESG issue, such

that the corporation is disentitled to have access to necessary capital, such that the dependance of the company's maintenance of and meeting that purpose affects that access. That might - and I'm only saying might - give rise to a derivative action under Chapter 2F.2 of the Corporations Act for breaches of section 180 and/or 181 of the Act. That is, the shareholders might be given leave to sue the directors in the name of the company for failing to act in the best interests of the company.

As far as I know, that is a purely hypothetical example. The flexibility of the directors' duties provisions will no doubt continue to be tested by the regulator and private parties before the court if a company's purpose - that is, non-financial purpose or societal purpose, whatever it might be - is perceived to be relevant to a particular case.

Speaking of capital, one might imagine that the British Academy's work might, in part, relate to access to capital rather than pure law enforcement per se. That flexibility - that is, the flexibility of the common law and statutory law in this country - may, in time, address some of the British Academy's concerns, particularly when a company self-identifies a non-financial purpose and adherence to that purpose provides a benefit to that company such as access to capital, but other benefits themselves.

I will just turn to, briefly, the Corporate Governance Task Force which ASIC established this year, which is one of its new enhanced supervisory initiatives - that is non-enforcement initiatives - to gain better insights into the governance practice of our largest listed companies.

The task force has recently completed a comprehensive review of how the boards of seven of the country's largest financial services companies oversee the management of non-financial risk. It is currently completing its next review regarding the oversight of decisions regarding variable remuneration for executives.

I will just speak about this in summary form, but ASIC's review found that, firstly, whilst boards were setting risk appetites for non-financial risks, often management was operating outside of those approved appetites. Boards need to actively position themselves to

hold management accountable, in ASIC's report, to operate within their stated appetites.

A second key finding was that monitoring of risk against appetite, put broadly, often did not enable effective communication of the company's risk position.

ASIC's third key finding was that material information about non-financial risk was often buried in dense board packs hundreds of pages long. Boards should, in ASIC's report and recommendations, require management to make reports using a clear hierarchy and prioritisation of non-financial risks.

A fourth finding was that board risk committees are not operating as effectively as they should be. I have gone into more detail in the paper, but I will just leave that there.

The Royal Commission has demonstrated what impact poorly managed non-financial risk can have on a company, and certainly Australians have lost hundreds of millions of dollars arguably, in large part, because of mismanagement of that risk.

Non-financial risk does result in financial costs, if they are not managed properly, and ASIC's message to firms is to take these risks seriously and ensure they are managed effectively and transparently and, in fact, in the context of today's conference perhaps that is part or embedded within a purpose that is not driven by the pursuit of profit.

I will speak briefly about deterrence. It relates to the fairness imperative which I was referring to earlier and the legislative framework in which we are able to regulate the law and enforce the law. The regulator was identified by Commissioner Hayne as the fourth line of defence. The first was public policy, second the consumer and, third, the firms themselves. ASIC now has a greater range of power and penalties, as I have referred to, as a result of legislative reform.

As referred to above, one area that we have already seen strength in are these penalties. For example, maximum imprisonment penalties for the most serious offences increased to 15 years, and civil penalties for companies

have significantly increased, now at 525 million, and maximum civil penalties for individuals have increased to just over a million.

In addition to increasing existing penalties, civil penalties apply to a greater range of conduct, and I have referred to the licensee's failure to act efficiently, honestly and fairly, but also civil penalties attaching to failure to report breaches and defective disclosure.

In ASIC's view, a primary purpose of penalties in relation to this misconduct we regulate is deterrence, both general and specific. Two aspects of effective deterrence are the perception of being caught and the perception of being meaningfully punished. Once again, the thrust of these reforms addresses primarily the British Academy's concerns as to the treatment of customers to their detriment in the interest of shareholder primacy or profit.

For reasons discussed earlier, the scope of the obligations of fairness and directors acting in the best interests of companies may develop jurisprudentially to address some of the British Academy's other concerns.

Thirdly, as discussed earlier with the junior miner example, there exists a panoply of legal obligations that address many of, for example, the ESG concerns which may or may not be relied upon by private citizens or the regulator in bringing actions again under the Corporations Law.

Beyond that analysis, any public policy issues are not in the purview of the regulator and I won't be speaking about them. I am conscious of the time. The paper does also refer to our new power of intervention - that is, the product intervention power - which I don't really have time to go to in sufficient detail to do it justice, but it is there in the paper for you to read if you wish. The regime is designed in a way that places responsibility with the businesses to consider their products in light of the customers' objectives, financial situation and needs.

So, too, one would think that that can form part of a purpose of an organisation that provides such services which, in turn, protects the consumer of the services and other stakeholders no doubt.

To sum up, ASIC's expectations of corporations now and

into the future, in summary ASIC's vision for the future of Australian corporations is one that is fair, compliant and not causing consumer harm. We want to see Australia's corporations contributing to a fair, strong and efficient financial system that works for all Australians. As a conduct regulator, ASIC expects the corporation will, firstly, obey the law; secondly, act fairly - this is in no particular order - in accordance with the law; and, thirdly, work to create corporate governance structures that guard against non-financial risks and lead to positive outcomes, and that may very well include the identification of non-financial purposes, review products considering the design distribution obligations and ensure that products meet the objectives, financial situation and needs of their customers, and be prepared for ASIC to use its expanded remit and strengthened powers to take action when corporations break the law or sell products that cause significant harm to customers.

If customers fail in their task, the regulation and more intervention reforms - which I think we all agree is not preferable - become more likely. If companies break the law, they can expect court-based outcomes. How corporate purposes that transcend the pursuit of profit inform the enforcement of the law by the regulator will depend in large part on the legal framework in which the regulator operates and how the courts respond to the regulator's cases.

I endeavoured to identify at least some illustrative examples where a corporation's purpose might be relevant to the regulator and ultimately, therefore, to the court. Whether or not any of that analysis addresses some of the British Academy's concerns probably warrants further discussion, which I understand will take place shortly. Thank you.

JUSTICE BARRETT: Thank you, Daniel, for emphasising in our discussion of purpose that financial services and corporations law are built firmly on a foundation of fairness, the concept one tends to just assume, but which is strongly there in the regulatory scheme as a unifying theme, both explicitly and implicitly.

Thank you, too, for reminding us that corporations legislation is not to be viewed as the only body of law that corporations need to look at to decide how they should

conduct themselves; that they, like all of us, are citizens with responsibilities to society regardless of corporate law concepts.

I did hear the words "social licence to operate", but only fleetingly. Thank you very much and please thank Daniel again.

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