

**AUSTRALIAN INSURANCE LAWYERS ASSOCIATION  
NATIONAL CONFERENCE  
KEYNOTE ADDRESS  
“INSURANCE LAW – A VIEW FROM THE BENCH”  
THE HON T F BATHURST  
CHIEF JUSTICE OF NEW SOUTH WALES  
SYDNEY  
19 SEPTEMBER 2013\***

1. I was invited today to give a view on insurance law from the Bench. That, of course, is a dangerous invitation to give a judge, because it allows us free reign to discuss whatever random topic interests us at the time. Whether others will share our fascination is less clear. Providing a view from the Bench also naturally tends to focus attention on liability insurance. I hasten to add that in addressing that topic today, I do not intend to disregard the essential role of insurance in responding to many other types of risk – the risk implicit in driving a car, undergoing an advanced medical procedure or owning a property in the Australian bush during summer, to name just a few.
  
2. Today, I want to focus on an issue that is often overlooked in discussions about the role of insurance in legal liability. That issue is the limitations that should be put on defendants’ – particular directors and company officers’ - ability to access insurance in response to findings of liability. To put it another

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\* I express my thanks to my Research Director, Ms Sienna Merope, for her assistance in the preparation of these remarks.

way, to what extent and in what circumstances do public policy considerations operate as a bar to indemnity? In that context, I will consider both public policy exclusions to recovery in relation to third party claims and the extent to which directors and officers can and should be able to indemnify themselves for fines and penalties.

### **The policy rationales**

3. First, however, it is necessary to answer this question: why have liability insurance in the first place and what public policy reasons exist for limiting the circumstances in which it is available?
  
4. On the one hand, liability insurance plays several essential roles. First, and obviously, it provides for compensation to plaintiffs who have suffered loss, in circumstances where it would not otherwise be available. At the same time, it insulates defendants from the potentially devastating financial consequences of a moment of carelessness, for example while driving. Particularly in the commercial sphere, liability insurance also plays an essential role in encouraging productive economic activity. By protecting individuals financially against the consequences of failure, insurance allows company officers, investors and others in the commercial community to take the risks that are necessary for successful entrepreneurship and in turn economic expansion.
  
5. That taking such risks is necessary for commercial success is well accepted. As Lord Macnaghten put it in 1891, in response

to a suggestion by one judge that a banker ought to investigate the validity of each indorsement of a cheque, “That is hardly a practical suggestion. A banker so very careful to avoid risk would soon have no risk to avoid”.<sup>1</sup>

6. In Australia, as you know, directors and other company officers can be held personally liable, either civilly or criminally, for a wide range of infringements, both pursuant to statute and the common law. Under the *Corporations Act* for example, directors can be sued personally by the company or the company’s liquidator for breaches of duty. In certain limited circumstances directors may also be liable to individual members. Directors and other officers may also be subject to civil penalty orders, to disqualification orders and, in circumstances where the breach was dishonest or reckless, to criminal penalties.<sup>2</sup> In order to protect directors’ from these significant risks, Directors & Officers’ insurance for personal liability is widely available. D&O insurance is generally paid for by the company – and ultimately therefore members and employees – and insures both the directors and officers, and the company in circumstances where the company has provided indemnity to those persons as part of the terms of employment.

7. The rationale for providing such insurance is clear. In its absence, capable and talented individuals may be unwilling to join boards of directors, particularly as non-executive directors,

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<sup>1</sup> *Governors and Company of the Bank of England v Vagliano Brothers* [1891] AC 107 at 157, cited in R Megarry, *A Second Miscellany at Law* (1973) p 269.

<sup>2</sup> *Corporations Act* 2001 (Cth) ss 180, 181, 184.

or may become excessively risk averse on boards, to the detriment of the individual company and the broader commercial community. D&O insurance also recognises that company officers may become personally liable in circumstances where they have scant moral responsibility, for example where uncertainty in the law means that while company directors may subjectively believe they are acting in accordance with their duties, they are later found not to be.

8. On the other hand however, there is a legitimate public policy concern that, in certain circumstances, the availability of D&O insurance can negate the very reasons why personal liability rather than merely corporate liability is imposed.
  
9. In the case of directors and officers, personal liability seeks to respond to the fact that such persons, along with other “gatekeepers” such as auditors, have a significant role to play in ensuring sound company practice and market integrity.<sup>3</sup> This “gatekeeper theory” suggests that holding directors and officers directly liable not only provides a deterrent to reckless behaviour by such officers, but will lead to better overall conduct by companies. This is because, the rationale goes, it will increase directors’ incentive to exercise due diligence and to act independently of management, to ensure that the company does not contravene the law.<sup>4</sup> Personal liability also seeks to respond to circumstances where directors’ and officers’

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<sup>3</sup> ASIC, ASIC Enforcement Outcomes: January to June 2013 (Report 360, July 2013), p 8.

<sup>4</sup> Vanessa Finch, “Personal Accountability and Corporate Control: The Role of Directors’ and Officer’ Liability Insurance” (1994) 57 *Modern Law Review* 880 at p 882- 883; Justice Black, “Directors Statutory and General Law Accessory Liability for Corporate Wrongdoing”, (NSW Supreme Court Annual Corporate Law Conference, 2013) p 2.

wrongdoing is motivated by self-interest rather than by seeking to recklessly maximise the interests of the company, therefore requiring a particularised deterrent.

10. In those circumstances, it can be argued that D & O insurance provides too much insulation from risk, creating a moral hazard by removing any chance that directors will have to meet liability from their personal funds. In this way insurance can be argued to “subvert public policy, encourage unscrupulous directors to pursue questionable activities and dull the incentives of honest directors to be attentive to their duties and act in the best interests of the company”.<sup>5</sup>

### **How does the law restrict availability of insurance?**

11. In Australia, the response to these competing imperatives has been a restriction on the availability of D&O insurance for certain conduct, both through rules of public policy and through the practice of the insurance industry. Most policies for example exclude cover for liability arising from a dishonest or fraudulent act or omission by the insured.<sup>6</sup> Exclusion of indemnity in those circumstances is also thought to be a rule of public policy.<sup>7</sup> Indemnity for liability resulting from acts intended by the insured is also excluded as a matter of public policy, as it is for all indemnity insurance. The court will also assume that the insurer

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<sup>5</sup> Vanessa Finch, “Personal Accountability and Corporate Control: The Role of Directors’ and Officer’ Liability Insurance” p 888.

<sup>6</sup> Kelly & Ball, *Principles of Insurance Law* (Hardcopy Service 43, August 2013) Lexis Nexis, Australia at [14.0140].

<sup>7</sup> Derrington and Ashton, *The Law of Liability Insurance* (2<sup>nd</sup> ed, 2005) Lexis Nexis, Australia at [10-268]

did not intend to cover loss intended by the insured, as a matter of construction.<sup>8</sup>

12. There are also, as you would know, limitations on the circumstances in which companies can indemnify their directors or meet the cost of D&O insurance held by directors personally. Under the *Corporations Act* companies cannot indemnify directors for pecuniary penalties imposed under section 1317G, or compensation orders under sections 1317H, 1317HA and 1317HB. Nor can they indemnify for liabilities arising out of a lack of good faith. Similarly, premiums for D&O insurance cannot be paid by a company for liability imposed due to a wilful breach of duty or breach of the prohibition on directions gaining a profit from their position.<sup>9</sup> There are similar provisions in the *Competition and Consumer Act* and the Australian Consumer Law.<sup>10</sup>

13. Notwithstanding these provisions and principles however, there remains a significant lack of clarity about the circumstances in which it will be deemed to be against public policy for directors or other company officers to access liability insurance. That uncertainty applies to both liability in relation to third party claims and statutory liability imposed on directors directly.

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<sup>8</sup> Dr Malcolm Clarke, "Insurance of Wilful Misconduct; the Court as Keeper of the Public Conscience" (1996) 7 *Journal of Insurance Law* 1, p. 2; Derrington and Ashton, *The Law of Liability Insurance* at [1-27]

<sup>9</sup> *Corporations Act* 2001 (Cth) s 199A, 199B.

<sup>10</sup> *Competition and Consumer Act* 2010 s 77; Australian Consumer Law s 229.

14. One thing that must be noted in this regard is that indemnity will always first depend on the terms of the insurance contract. In most cases, issues as to public policy will not arise, because the relevant insurance contract will exclude liability in circumstances where it might offend policy. Further, challenges to liability cover will often be based on the construction of the relevant clause, and that clause may be construed so as not to be contrary to policy. What I will focus on however is the situation in which a contract that squarely purports to indemnify directors and officers against liability in certain circumstances may be unenforceable for public policy reasons.

15. First, let's consider liability in relation to claims by third parties. There are a few concrete propositions that can be made in this regard. First, there does not appear to be any objection to a director being insured for liability to a third party in circumstances where they have breached a civil obligation through negligence. For example, under section 180 of the *Corporations Act* directors have a duty to exercise due care, skill and diligence in the exercise of their powers and obligations. That duty is breached through negligence and is also a civil penalty provision.

16. It is uncontroversial, I think, to assert that if a director is found liable to the company or to a third party for loss incurred as a result of a breach of section 180, he or she can be insured against that liability. In fact, under the *Corporations Act* the company could also pay for the insurance policy. It is obviously within the policy of the law for people to ensure themselves

against liability incurred through negligence, and I do not believe anyone has suggested that this circumstance is altered because the duty is also subject to a civil penalty provision, which is intended to have a deterrent effect.

17. At the other end of the spectrum, it seems equally clear that a director or officer cannot be indemnified for loss incurred through wilful criminal acts. Such insurance is deemed to be contrary to the policy of the law, in accordance with the principle *ex turpi causa oritur non actio* - that is, that no action can be founded on illegal or immoral conduct.<sup>11</sup> In the 1899 Queens Bench Case, *Burrows v Rhodes*, the principle was stated as follows:

“It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.”<sup>12</sup>

18. This principle would seem to suggest for example that directors are not able to indemnify themselves for losses incurred due to conduct that constitutes a reckless or dishonest breach of their duties to act in the best interests of the company

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<sup>11</sup> Derrington and Ashton, *The Law of Liability Insurance* at [2-265]; *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 All ER 545 at 554: “for my part I unhesitatingly accept the principle that a person cannot insure against a liability consequent on the commission of a crime, whether of deliberate violence or otherwise – save in certain circumstances, where for example, compulsory insurance is required and enforceable even by the insured.”

<sup>12</sup> *Burrows v Rhodes* [1899] 1 QB 816 at 828; see also *Haseldine v Hosken* [1933] 1 KB 822.



and for a proper purpose or of their obligation not to profit from their position. Pursuant to section 184 of the *Corporations Act*, as you know, such breaches constitute criminal offences.

19. Between the two extremes of intentional criminal conduct and civil negligence, things are much less clear. First, consider the realm of criminal conduct. While *wilful* criminal conduct has been deemed “uninsurable”, it has at times been accepted that a person can insure for liability to third parties incurred as a result of negligent acts, even if those acts are also criminal.

20. There have for example been several cases in which insurance companies have been held liable to meet claims by drivers found guilty of manslaughter through grossly negligent dangerous driving.<sup>13</sup> In *James v British Insurance General Company* for example, in upholding the third party motor insurance policy of a drunk driver who killed another driver, the Court stated:

“It was gross negligence or reckless negligence, negligence of the kind which constitutes criminality; but nevertheless it was negligence, and was not the wilful or advertent doing of the act. In such circumstances as these there is not, in my view, on the part of the person who does the act, that degree of criminality which in the doing of a known unlawful act makes it against public policy that the perpetrator should be indemnified in respect of it.”<sup>14</sup>

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<sup>13</sup> *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311; *Australian Aviation Underwriting Pty Ltd* (1988) 12 NSWLR 121.

<sup>14</sup> [1927] 2 KB 311 at 323.

21. Similarly, in *Australian Aviation Underwriting Pty Ltd v Henry*, the NSW Court of Appeal held that an insurance policy which excluded liability for death and disablement arising from the insured person's own criminal act did not extend to excluding liability for negligent or inadvertent criminal acts.<sup>15</sup> In that case the insured had been killed while engaging in "culpable driving" and the claimant was his estate.

22. On the other hand, outside the motor vehicle accident context, courts have found insurance policies not to cover what they deem "illegal activity", even where another court has acquitted the insured of the relevant criminal charges.

23. Take the case of *Gray v Barr* for example, which rivals a Shakespearian tragedy in its facts.<sup>16</sup> In 1965, Mr and Mrs Barr, co-owners of a prosperous business in ladies' blouses at Tooting, moved to a country house in Warlingham. The couple's harmonious existence was shattered when shortly after their move, Mrs Barr and a neighbouring farmer, Mr Gray, fell in love. The two began an affair, with Mr Gray becoming increasingly infatuated.

24. Matters came to a head one evening in May 1967. At a dinner at the local country club, Mrs Barr had told her husband of her intention to give up Mr Gray and return to living with him. Hand in hand, they went home together. Shortly after they

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<sup>15</sup> (1988) 12 NSWLR 121 at 124-125.

<sup>16</sup> *Gray v Barr* [1971] 2 QB 554

arrived home however, Mrs Barr went missing. Frantic and assuming she had gone back to Mr Gray, Mr Barr loaded his shotgun and set out for Mr Gray's neighbouring farm. He entered the house and, seeing Mr Gray at the top of the stairs, demanded to know where his wife was. Mr Gray told him that she was not there, but Mr Barr advanced up the stairs, determined to see inside the bedroom. Mr Gray blocked his way. Mr Barr fired a shot into the ceiling to warn Mr Gray. Understandably believing himself threatened, Mr Gray attempted to wrestle the gun from Mr Barr. The latter fell backwards and in the fall his gun discharged for a second time, tragically killing Mr Gray.

25. The next morning Mrs Barr was discovered unconscious in the woods nearby, where she had attempted to commit suicide by taking an overdose of sleeping pills. She was rushed to hospital, and survived. At a criminal trial three months later, Mr Barr was acquitted of both murder and manslaughter charges. The couple was reunited.

26. Mr Gray's widow then brought an action against Mr Barr for the pecuniary loss she and her children had suffered as a result of her husband's death. Mr Barr sought indemnity under his "Home and Hearth" policy, which insured him against legal liability for damages arising from bodily injury to any person caused by accidents. In holding that the claim was barred by public policy, the English Court of Appeal held that indemnity was excluded because Mr Barr had committed manslaughter.

27. Lord Denning held that the insurance company was entitled to go behind the jury's verdict in Mr Barr's criminal trial to make this finding and that manslaughter having been committed, Mr Barr's actions were in some way wilful, taking them outside cases of negligence.<sup>17</sup> Lord Justice Salmon held that, even accepting the shooting was an accident, having threatened violence with a gun Mr Barr could not then be innocent of the consequences that followed.<sup>18</sup> The fact that a jury had acquitted him of manslaughter was not a bar to this conclusion.

28. What this case demonstrates - apart from the fact that life really is stranger than fiction - is that outside the motor accident context, it is not clear whether unlawful actions committed through recklessness or negligence will be a bar to indemnity in third party actions. It is arguable that motor accidents raise particular considerations because "in the great majority of cases motor car accidents are due to the breach by the driver...of some enactment".<sup>19</sup> However, all liability policy is predicated on some form of wrongdoing. Moreover, the countervailing, but often unacknowledged policy objective of ensuring that the victims of negligent criminal behaviour receive compensation applies whether the criminal behaviour relates to driving or not. Perhaps what these cases demonstrate most strongly is that "public policy is an unruly steed which should be cautiously ridden".<sup>20</sup>

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<sup>17</sup> [1971] 2 QB 554 at 567-569.

<sup>18</sup> [1971] 2 QB 554 at 581.

<sup>19</sup> *Australian Aviation Underwriting Pty Ltd* (1988) 12 NSWLR 121 at 125, citing *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327.

<sup>20</sup> *Gray v Barr* [1971] 2 QB 554 at 581.

29. Another complicated question is whether liability insurance would be available in circumstances where a claim is brought on the basis of a civil wrong, but the conduct of the insured is clearly factually criminal. This is a live issue in the case of directors and officers. I mentioned section 184 of the *Corporations Act* earlier, which establishes that reckless or intentional breaches by directors of their good faith, proper purposes and no profit obligations are criminal offences. The reality however, is that a company or liquidator will often have little interest in establishing the criminal liability of directors and in fact may want to avoid doing so, because establishing dishonesty would take the behaviour outside the scope of the defendant's insurance policy. Further, the higher burden of proof and onerous rules of evidence in criminal cases may dissuade claims being brought on this basis if there is an alternative. Consequently, cases alleging breach of the duties I have mentioned will often be brought on the basis that directors have breached their civil obligations. That is, it will be alleged that directors have breached their obligations under sections 181, 182 and 183 of the *Corporations Act* or equivalent equitable duties.

30. In those circumstances, if the facts nonetheless strongly indicate intentional or reckless behaviour, can indemnity be excluded on public policy grounds by "going behind" the pleadings and holding that the insured's behaviour is criminal? Doing so would seem to be in line with the view that the key question is not how the claim is framed but rather its substance. As the learned author of *Colinvaux's on Insurance* put it: "if the

third party makes a claim against the assured which is plainly based on allegations of fraud but in respect of which damages for negligence are sought, the court is entitled to consider the underlying nature of the claim and to hold it to be outside the scope of the policy".<sup>21</sup>

31. Even beyond the realm of criminality, there are public policy uncertainties. Can liability insurance extend to exemplary damages for example? On the one hand, such damages are intended to have a deterrent and punitive effect, which would appear to be undermined by the availability of insurance. That said however, some insurance policies do in fact provide cover in such circumstances and at least in the UK, public policy has been held not to be a barrier to insurance for exemplary damages.

32. In *Lancashire County Council v Municipal Mutual Insurance Ltd*,<sup>22</sup> the English Court of Appeal unanimously held that a public liability insurance policy held by a local authority extended to indemnifying for exemplary damages. The Court found that while such damages are intended to have a deterrent and punitive effect and that while permitting indemnity would reduce that punitive effect, it would not entirely remove it, as an insured may well face higher insurance costs and problems obtaining renewal in the future.<sup>23</sup> The Court also noted the countervailing public interest in holding parties to their contracts

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<sup>21</sup> R. Merkin, *Colinvaux's Law of Insurance* (9<sup>th</sup> ed, 2010) Thomson Reuters: London at p. 865.

<sup>22</sup> [1996] 3 All ER 545.

<sup>23</sup> [1996] 3 All ER 545 at 555.

and in improving the plaintiffs' prospects of recovering the sum awarded.<sup>24</sup> This approach seems to provide policy justification for permitting insurance against such damages.

### **Fines and Penalties**

33. The issue of deterrence brings me to the second area I would like to discuss, namely whether directors and officers can insure for penalties or fines imposed on them, rather than for damages claimed by third parties.

34. Clearly fines imposed for intentional criminal activity could not be indemnified against. However, it would seem to me outside this context uncertainty would arise about whether indemnity is excluded, in the same way that it does in relation to third party claims. There is also of course the additional factor that fines and penalties have a strong deterrent and punitive rationale, which would seem to be undermined by insurance. The position in relation to exemplary damages that I have just mentioned however, would suggest this is not an absolute bar to the availability of insurance.

35. In the context of directors and officers, the issue of indemnity for penalties clearly arises in situations where directors can be held liable for criminal activity arising from negligence or recklessness. As many of you would know for example, under section 27 of the *Work Health and Safety Act 2011* (NSW) a company officer can be held criminally liable for failing to exercise due diligence to ensure "that the person conducting

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<sup>24</sup> [1996] 3 All ER 545 at 555.

the business” complies with their health and safety obligations. This provision is the result of the new model legislation and there are therefore equivalent provisions in other jurisdictions. Being based on due diligence, these criminal offences require no mens rea, being judged by an objective negligence standard.<sup>25</sup> In terms of the seriousness of the criminal conduct therefore, there would seem to be at the least an analogy with culpable driving.

36. Several academic commentators, however, have argued that liability insurance is not available for criminal fines arising pursuant to workplace injuries, and courts have expressed reluctance about the availability of insurance for these penalties. In May this year for example, the Magistrates Court of South Australia sentenced a company director for failures to take reasonable steps to ensure the company’s compliance with its OH&S obligations under that State’s workplace health and safety legislation.<sup>26</sup>

37. In determining the appropriate penalties, Magistrate Lieschke noted that the director in question had obtained indemnity pursuant to a company insurance policy which included indemnification for criminal fines, thereby avoiding the vast bulk of the anticipated penalty. He went on to state:

“In my opinion [these] actions have also undermined the Court’s sentencing powers by negating the principles of both specific and general deterrence. The message his

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<sup>25</sup> N. Foster, “You can’t do that! Directors insuring against criminal WHS penalties” (2012) 23 *Insurance Law Journal* 109, p. 114.

<sup>26</sup> *Hillman v Ferro Con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22.



actions send ... is that with insurance cover for criminal penalties for OHS offences there is little need to fear the consequences of very serious offending, even if an offence has fatal consequences...I add that the Court was faced with the reality that an insurance company had granted indemnity...and that the Court had no ability to challenge that fact...Whether such indemnities should be outlawed under the current Act and under the new Act are policy considerations for Parliament.”<sup>27</sup>

38. For my own part, I must admit I share Magistrate Lieschke’s concerns about allowing insurance for a criminal fine in circumstances where negligence has led to the death of an employee. After all, in addition to having a deterrent effect, such fines also serve the other aims of the criminal law including retribution and rehabilitation.

39. What the case demonstrates however, are the difficulties surrounding “where to draw the line” in relation to public policy. It also highlights that regardless of whether courts would find such a policy unenforceable if it were challenged, in practice, although many insurance policies do exclude “fines and penalties” from the definition of insurable loss, policies indemnifying criminal conduct of this nature continue to exist. If such insurance is in fact contrary to public policy, that situation would seem to me unsatisfactory. In that context I note that while section 272 of the *Work Health and Safety Act* provides that any term of a contract that seeks to modify the operation of

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<sup>27</sup> *Hillman v Ferro Con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22 at [80]-[83].

the Act is void, but does not specifically prohibit insurance for criminal liability.

40. Moving away from the criminal realm the next obvious question in relation to penalties imposed on directors is whether the public policy exception for intentional criminal conduct should be extended to prevent recovery for civil penalty provisions under the *Corporations Act*, for example a penalty imposed for failure to act in the best interests of the company. A related issue is whether directors should be able to recover for loss of income incurred due to being subject to a disqualification order under s 206C of the *Corporations Act*, consequent on breaching a civil penalty provision.

41. At the moment, I would suggest, it is widely accepted that directors can indemnify themselves in such circumstances. While some D&O insurance policies have an unqualified exclusion on fines and penalties, others provide for some cover for “pecuniary penalties” and I am aware of cases where such insurance has been available and utilised.

42. The question of whether indemnity should be available for civil penalties, or for the personal financial consequences of breaching a civil penalty provision is a difficult one.

43. On the one hand allowing insurance in such circumstances tends to negate, or at least significantly undermine the deterrent and punitive goals that underlie the imposition of such penalties. These goals, which form an important part of ASIC’s corporate

regulation strategy, were clearly articulated in *ASIC v Vizard*,<sup>28</sup> where Justice Finklestein, in imposing a disqualification period longer than the one sought by ASIC, stated:

“My real concerns here are with punishment for retributive purposes and general deterrence, but principally the latter. Indeed general deterrence is of primary importance in cases of this kind. A message must be sent to the business community that for white collar crime ‘the game is not worth the candle’...”<sup>29</sup>

44. Further, civil penalties, although not criminal in nature, nonetheless occupy a somewhat “hybrid position” between the civil and criminal law. As Thomas Middleton puts it:

“civil penalty proceedings ... are like criminal proceedings in that they have a punitive purpose; they involve a contest between the state ... and the individual; and they are concerned with public wrongs and moral culpability, and not merely conduct causing damage”<sup>30</sup>

45. The punitive “penal” nature of civil penalties and disqualification orders is reflected in the procedural protections given to defendants in such proceedings, including the right, upheld by the High Court in *ASIC v Rich*, to resist discovery on the ground that it might tend to expose that person to a civil penalty or banning order.<sup>31</sup> It is interesting to note in that

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<sup>28</sup> (2005) 145 FCR 57

<sup>29</sup> (2005) 145 FCR 57 at 68

<sup>30</sup> Dr Thomas Middleton, ‘The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, APRA, the ACCC and the ATO — Suggested Reforms’ (2008) 30 *Australian Bar Review* 282

<sup>31</sup> *Rich and Anor v ASIC* (2004) 220 CLR 129.

context that section 1349 of the *Corporations Act*, which came into force in 2008, has limited the availability of penalty privilege in relation to disqualification orders, but not in relation to the imposition of civil penalties. What this says about the differing punitive or deterrent goals of each penalty is not clear.

46. The factors I have outlined tend to point away from insurance being available, at least in relation to civil penalties. Nonetheless, I am wary of the public policy exception for criminal penalties being extended in this way. To my mind, excluding indemnity for civil penalty provisions would be at odds with the general acceptance that insurance is available for the civil consequences of negligent behaviour. Breaches amounting to civil penalty provisions may often be the result of honest but careless behaviour. Indeed, as the recent Court of Appeal decisions in *Bell v Westpac* show, that is true not only in relation to breaches of the duty of due care and diligence, but also directors' duties to act in the best interests of the company and for proper purposes.

47. No doubt, the exclusion of indemnity in these circumstances would also cause great consternation in boardrooms across the country, and justifiably so. Because companies are incapable of indemnifying directors for civil penalties pursuant to section 199A of the *Corporations Act*, the availability of directors and officers insurance may be the only thing standing between a director and personal bankruptcy. Of course, it could be said – well, opening the risk of bankruptcy is exactly what makes the deterrent role of civil penalty provisions effective. That may be

true. However the policy concern I mentioned earlier, that good directors will be dissuaded from sitting on boards if they are open to too great a level of risk, is a real and valid one.

48. It must be remembered that there are ever increasing obligations on company directors and advisors, in particular auditors. It is not enough for non-executive directors to simply provide strategic direction to the company. They also have to have knowledge of the company's operation and its ongoing financial position.<sup>32</sup> Although I have a degree of cynicism about the claims which are made from time to time, that the incremental increases in the responsibility of directors will lead to half the board seats in Australia being vacant, it does not seem to me unreasonable that directors should be able to protect themselves from liability for civil penalties as well as liability to third parties. It must be remembered that the deterrent effects of disqualification and of the significant loss of reputation that inevitably flows from such a finding remain. One has only to remember the opprobrium directed towards the James Hardie directors to appreciate this.

49. What I do think is undesirable however is the lack of clarity around these issues. At the moment, the market's best guess seems to be that insurance for criminal penalties is likely to be deemed illegal or unenforceable by the courts, and that it is not clear if a similar situation applies in relation to civil penalties.

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<sup>32</sup> See *ASIC v Healey* (2011) 278 ALR 618.

50. I have spoken on previous occasions about the need for certainty in the legal rules applicable to commercial activity. That need is acute in this context. Directors and officers need to know whether their policies are enforceable and will protect them against the risk of personal liability and possible bankruptcy. Insurers need to be able to properly assess variables in order to accurately price risk. ASIC needs to assess how insurance may affect its corporate regulation strategy. At present, it is questionable whether sufficient clarity exists to enable those assessments to be made satisfactorily. I therefore commend this to you as a topic that would benefit from further discussion.

51. It remains only for me to thank you for inviting me this morning. All the best for the coming two days, and thank you for the work each of you does through this conference and other forums to advance education and debate about insurance law in this country.