



Australian Corporate Governance

澳大利亚公司法

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Introduction

- What does the future hold?
 - Greek mythology (**Theseus**), to lawyers (**Saint Ives**) to lessons from **Nelson Mandela**?
 - What am I going to cover today?
- Global governance trends and the ‘trickle down’ effect for Australian companies?
 - Adams, M; “Global trends in corporate governance” (2012) vol 64 (9) *Keeping Good Companies* pages 522 - 526.

www.austlii.edu.au/au/journals/ALRS/2012/



Introduction

- **Big picture ideas of (R)evolution**
 - Not covering the following:
 - OECD growth results for Oz in May 2012
 - Insolvency rate in Australia – highest!
 - Superannuation/ASX – billion \$ down
 - European crisis – Greece leave Eurozone?



Background

	BHP Billiton (1st)	CBA (2nd)	Westpac (3rd)	Telstra (7th)	Woolies (9th)	Investa Office (100th)
Market	\$102.1b	\$87.15b	\$76.29b	\$47.9b	\$36.5b	\$1.74b
Price	31.79	54.74	24.77	3.85	29.62	2.83
2011	All	ASX	Public	Pty	New	Insol
Co's	1,839,772	1,850	20,000	1,800,000	163,276	10,757



Beyond **legislative** reform:

- Personal Liability for Corporate Fault Reform Bill 2012 – draft release
- Future of Financial Advice (FOFA) reform
- Personal Property & Securities Act 2009
 - Commenced operation 30 January 2012
- Work, Health and Safety legislation
 - National, once State/Territories pass aspects
- Comp & Consumer Act 2010 – ACCC - ACL
- Corruption legislation – internationally



Current case law on duties:

- ASIC v Adler, Williams & Fodera (2002)
 - R v Adler (2005) R v Williams (2005)
- ASIC v Vines, Robertson & Fox (2005)
- James Hardie litigation (2009, 2010, **2012 HCA**)
- AWA litigation (1986) AWA v Daniels(1992) Mr Koval (**2012**)
- AWB litigation (Andrew Lindberg, CEO) (2009/2010/**2012**)
- ASIC v Fortescue Metals Group & Forrest (2009/2011/?????)



Officers

- There are key questions, scholars are asking
- What are the definitions of Officer and Director?
 - What are the changes to directors' duties and other roles?
 - CFO, general counsel, company secretary?
 - Impact of case law and legislation
 - Diversity in the boardroom add value?
 - Gender & culture (race/ethnicity) - technology

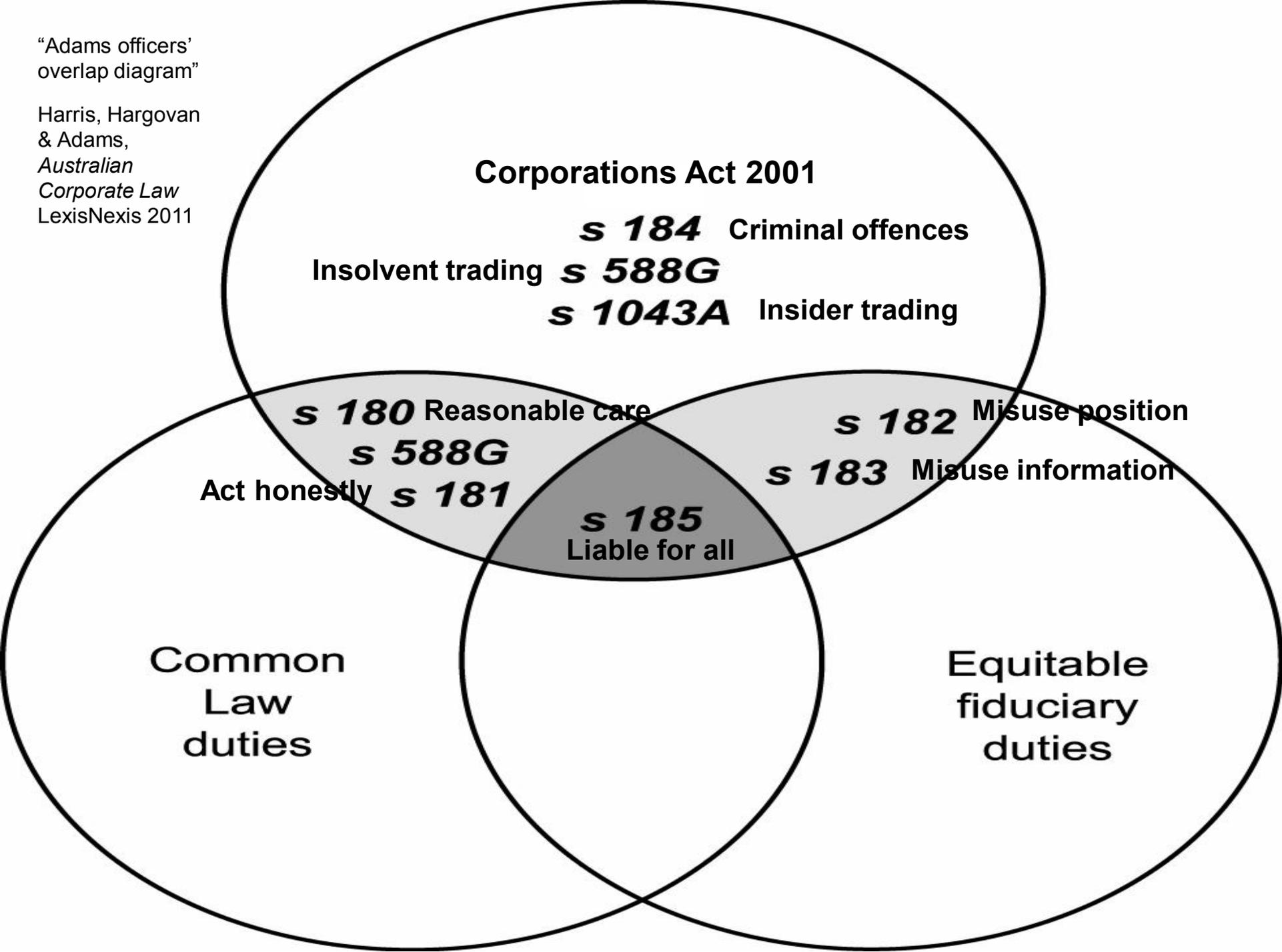


Definitions officers

- The law is reasonably stable as to the meaning of who is an officer (s 9 definition in Corps Act) and who is a director:
 - Case law has recently helped explain the definitions:
 - *Hodgson v Amcor* [2012] – broader meaning
 - *Chameleon Mining* [2012] – *de facto* roles
 - In 99.9% of cases it is really obvious!

“Adams officers’
overlap diagram”

Harris, Hargovan
& Adams,
*Australian
Corporate Law*
LexisNexis 2011





Background

ASIC	1995	2001	2010	2011
Jailed	12	25	12	16
Successful	81%	71%	91%	90%
Litigation	74	150	156	202
Misconduct	7,287	6,946	13,372	15,634

From 2000 to 2010 there were 220 officers sent to jail

Data: ASIC *Annual Reports*



Officers' duties

- Aus Wheat Board (AWB)
 - ASIC v Lindberg [2012] VSC 332
 - \$100,000 plus banned
 - Five other executives pinged

- RBA-NPA (Securrency scandal)
 - On-going litigation
 - Reputational damage to RBA



Centro

- Centro litigation
- mistakes in 2007 accounts!
 - ASIC v Healey – financial literacy test
 - Slap on the wrist
 - Class actions:
 - PwC, Centro \$200m settlement,
 - » \$15m lawyers, \$60m IMF (\$125m shareholders)
- Kirby v Centro Properties – privilege in documents



AWA

- AWA case – Amalgamated Wireless Australasia
 - 23 year old Andrew Koval – FOREX dealer
 - 1986 lost \$50m,
 - but managed to transfer \$1.5m to New York bank account
 - Fled country in 1993 – co-accused convicted
 - AWA case on auditors' liability and directors' duties
 - AWA v Daniels (1992) 9 ACSR 383 (trial)
 - Daniels v AWA (1995) 37 NSWLR 438 (appeal)
- Mr Koval is finally convicted in August 2012!



James Hardie

James Hardie litigation

- Lessons to be learnt ASIC v Hellicar [2012] HCA 17
 - 86 pages (315 paragraphs) clear judgment
 - Case does not change general law of directors
 - Expectations and standards the same
 - Significant event needs board & management focus
 - Silence cannot be interpreted by Chair as assent
 - Boilerplate resolutions can be dangerous (pre-draft)?
 - Clear procedures for delegation of decisions
 - » Media Releases to ASX etc
 - Approval of board minutes and evidence
 - Role of external expert advisors



James Hardie

James Hardie litigation

- Lessons to be learnt Shafron v ASIC [2012] HCA 18
 - Cannot split roles of company sec and general counsel
 - Duty of care in s 180 clear
 - Peter Shafron fell short of the standard expected:
 - » Failed to advice Board on cash-flow model given by external consultants for asbestos claims
 - » Failed to advice CEO and Board so consider information about the Deed of Covenant and Indemnity to be disclosed to ASX (continuous disclosure rules LR3.1)
- Check roles and D&O policy – reality not words...



Background to JHI case (2009)

- 23rd April Justice Gzell of NSW Supreme Court handed down 194 page judgment on **ASIC v Macdonald (No 11)** [2009] NSWSC 287
- 45 hearing days, 12 defendants, including the old company (JHI – ABN 60 Pty Ltd) and current entity – JHI NV



Background to JHI case (2009)

- 2001 JHI group reorganised themselves via “Scheme of Arrangement” to Netherlands after being founded as an Australian business in 1895 and listed on ASX in 1951. Business case reasons, not avoiding liability for asbestos claims!
- 15th February 2001 made DRAFT media release (ASX announcement) that MRCF (trust) was “fully funded”
 - Actual ASX announcement occurred on 16th February 2001
 - \$293 million worth of assets placed in the MRCF to cover claims



Background to JHI case (2009)

- JHI started warning workers and consumers of asbestos in 1978 and stopped production in 1987.
- 50% of NSW Dust Diseases Tribunal are related to JHI products
- Jackson QC Report in 2004 found liability was at least **\$1.573 billion** by end of 2003



Litigation of JHI case (2009)

- ASIC commenced civil action in February 2007 for 52 allegations of contraventions of the Corporations Act 2001.
- ASIC also briefed the Commonwealth DPP to bring a criminal prosecution
 - this was abandoned in September 2008 for insufficient evidence



General lessons of case

- ASIC was originally successful in 33 of the 52 allegations under the CA2001:
 - all defendants were held to have breached the CA2001
- ASIC failed on 19 allegations linked to dishonesty



2009 Contraventions

Position	CA2001	Breaches
old JHI	Misleading/false	six
Current JHI NV	s1041H misleading	three
CEO	s180 (duty of care)	ten
Lawyer	s180 (duty of care)	six
CFO	s180 (duty of care)	one
Seven non-exec	s180 (duty of care)	one each



Appeal of JHI case (2010)

- Morley v ASIC NSW Court of Appeal
 - non-executive director successful
 - Executive officers still held liable
- Key question Peter Shafron's capacity as company secretary and general counsel
- Really 2012 HCA decisions important
 - Penalties awaiting NSW Supreme Court



Diversity

There is a lot of debate around the need for diversity - **Gender is obvious**

- Latest ASX/AICD figures show 13.8% of ASX200
 - Up from 11.2% in 2010
 - 68 new female appointments (one in three)
- Top 20ASX have 20% female directors (17.3% top100)
- European Union outlines a board quota on gender

– **Culture/race/ethnicity is lagging**

– **Technology**

- Generation baby-boomer or “X” or “Y”?
- Privacy concerns with data – need to embrace



Global corporate governance:

Adams, M; “Global trends in corporate governance” (2012)
vol 64 (9) *Keeping Good Companies* pages 522 - 526.

Scholars around the world are asking questions about the role of corporate governance; its impact on share-price; its links to failures; convergence!

- European financial crisis and post-2008 GFC
 - Has this been an example of governance failure?



Global corporate governance

Convergence debate shows arrogance to Anglo-American approach to law and regulation

- see opinion: Adams (KGC,2002)
 - see empirical: Klettner, Clarke & Adams (AJCL, 2010)
- Changing nature of corporate governance
- Keil & Nicholson “Boards that work” 2003

Global trends

The access to information, via the internet, has revolutionised the ability to compare and contrast different jurisdictions

- Multi-national, transnational, global entities operate
- Principles from CalPERS influence
- ISO new global standard 30300 series
- Dr Bob Tricker discusses “culture of governance”
- Ann-Maree Moodie on “International governance”



Role of global governance

What a comparison of world views at the CSA national conference in December 2011 between:

- David Thomas on “BRICs economy”

versus

- Satyajit Das on “vulnerable economic state”

Source: *Keeping Good Companies*, Feb 2012.

- Since the 2000s there has been much debate on global governance John Farrar; Anona Armstrong; Roman Tomasic; Bob Tricker – Dignam & Galanis 2009 book



Two key resources on global issues in governance have occurred in the last year:

- Deloitte published a report covering a large number of countries and directors entitled:
 - “Director360° ” (Deloitte, UK 2011)
- “10 Focus: Corporate governance & development – An update” by Professors Claessens & Yurtoglu (Global Corporate Governance Forum, January 2012, available online)



Resource

- **Director360° report** (Deloitte, UK 2011)
- Very useful downloadable resource
- 215 directors (clients) interviewed in 12 countries
- Looking at priorities, strategy, risks etc over 24 mths
- Half directors experiencing high levels of scrutiny by regulators
- 85% felt they were developing strategy
- Majority felt getting balance between governance and performance, but compliance was a distraction



Conclusion

- How do we get from Theseus to Mandela?
- Easy to be side-tracked by technical information (spend 45 minutes talking about James Hardie litigation – what did Lucy Deane know in 1898?)
- Predicting the future is really hard – hindsight is a wonderful thing!