

ASIC'S EXPECTATIONS OF DIRECTORS

BELINDA GIBSON* AND DIANE BROWN**

I INTRODUCTION

In recent years, the Australian Securities and Investments Commission ('ASIC') has undertaken a number of cases concerning the duties owed by directors and there is now a collection of significant cases that illustrate some of ASIC's expectations as to the conduct of directors. This article sets out the attributes that ASIC expects in a director of a listed company based on those cases.¹

ASIC commenced these cases to assure the integrity of Australia's capital markets and that the interests of corporations are not adversely and seriously jeopardised by directors failing in their duties. The proceedings commenced by ASIC recognise the responsibilities and powers of directors to manage the company,² and the impact that a failure to exercise those responsibilities in accordance with the law can have on the company, its shareholders, other stakeholders of the company and, more broadly, confidence in Australia's capital markets.

In managing a listed company, directors must necessarily delegate responsibilities to those executives commonly called 'management'. Accordingly, this article also considers the distinction between executive directors and non-executive directors, and issues around delegation and reliance.

* Deputy Chairman, Australian Securities and Investments Commission.

** Senior Executive, Australian Securities and Investments Commission.

1 This article is written in the context of directors of listed companies. However, ASIC expects directors of non-listed companies to also exhibit the attributes described in this article where relevant. Each year ASIC also undertakes a large number of cases concerning breaches of duties by directors of non-listed companies.

2 It is a replaceable rule that the business of a company is to be managed by or under the direction of the directors and that directors may exercise all the powers of the company except any powers that the *Corporations Act 2001* (Cth) ('*Corporations Act*') or the company's constitution requires the company to exercise in general meeting: *Corporations Act* s 198A.

II KEY CASES

Some of the significant cases that ASIC has undertaken in recent years relating to the duties of directors include the following. These cases demonstrate, and have informed, ASIC's expectations of directors.

A HIH

Both civil and criminal³ proceedings were taken against some of the directors and officers of HIH Casualty and General Insurance Ltd for breaches of duties under some or all of sections 180–183⁴ of the *Corporations Act*.⁵ The breaches related to the transfer of company funds and the subsequent purchase of company shares, and the accuracy of various disclosures made to shareholders, noteholders and the market.

ASIC commenced the civil action because the breaches identified as having been committed were numerous and serious,⁶ and the market had been misinformed. ASIC's action aimed to reinforce the expectation that directors will observe proper standards of conduct and not place personal interests ahead of those of the company.⁷

B One.Tel

ASIC commenced civil proceedings against some of the directors of One.Tel,⁸ alleging breaches of section 180 of the *Corporations Act*. ASIC claimed the directors had a duty to keep the Board informed of the company's financial position and that they had failed in that duty. In the case of the Chairman, ASIC claimed a failure to take reasonable steps to enable the Board to properly and effectively discharge its supervisory role, including taking reasonable steps to ensure the flow of financial information to the Board.

Settlements against the Chairman and one of the joint Managing Directors were reached, but ASIC failed to prove that the other joint Managing Director and the Finance Director had breached their duties.

3 ASIC undertook the civil action and the Commonwealth Director of Public Prosecutions ('CDPP') undertook the criminal action. The CDPP is responsible for the prosecution of offences against Commonwealth law including all Acts administered by ASIC. Accordingly, the decision to prosecute an offence is a decision to be taken by the CDPP.

4 On appeal, a finding that s 183 had been breached was overturned: *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 170 [774].

5 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253; *R v Adler* (2005) 53 ACSR 471; *R v Fodera* (2007) 65 ACSR 109; *R v Williams* (2005) 216 ALR 113; *R v Cassidy* [2005] NSWSC 410.

6 Australian Securities and Investments Commission, 'Court upholds penalties against HIH directors' (Media Release, 03-217, 8 July 2003).

7 Australian Securities and Investments Commission, 'Court finds former HIH directors Adler, Williams and Fodera breached their duties as directors' (Media Release, 02/92, 14 March 2002).

8 *Re One.Tel Ltd (in liq)* (2003) 44 ACSR 682; *Australian Securities and Investments Commission v Rich* (2003) 174 FLR 128; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1.

C GIO

ASIC commenced civil proceedings against certain directors and officers of companies in the GIO Group in relation to the accuracy of profit disclosures in the Part B Statement issued in response to a takeover offer.⁹

ASIC was concerned that the conduct of those directors and officers resulted in the market being given information about the financial situation of GIO which was seriously defective and misleading.¹⁰

D Vizard

ASIC commenced civil penalty proceedings against Mr Vizard, a non-executive director of Telstra, for misusing information gained by virtue of his position at Telstra to trade in shares for the purpose of making a profit.¹¹

ASIC commenced the proceedings as Mr Vizard held a privileged position as a director. His conduct had been motivated by personal gain and was a deliberate breach of his position of trust.¹²

E James Hardie

ASIC commenced civil penalty proceedings against the directors and some officers of James Hardie in relation to misleading statements on matters of strategic importance in an Australian Stock Exchange ('ASX') announcement and in various other public announcements.¹³

The objective in taking these proceedings was to reinforce the standards of corporate behaviour that are vitally important in ensuring public confidence in Australia's corporate sector and capital markets.¹⁴ ASIC claimed that there was no reasonable basis for making the statements and that the executives had failed to warn the Board that the ASX announcement was false or misleading.

9 *Australian Securities and Investments Commission v Vines* (2005) 55 ACSR 617; *Vines v Australian Securities and Investments Commission* (2007) 63 ACSR 505.

10 Australian Securities and Investments Commission, 'ASIC commences civil proceedings against former officers of GIO Insurance' (Media Release, 01/217, 20 June 2001).

11 *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57.

12 Australian Securities and Investments Commission, 'Steve Vizard banned for 10 years and fined \$390,000' (Media Release, 05-215, 28 July 2005).

13 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 230 FLR 1; *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205; *Australian Securities and Investments Commission v Hellicar*, *Australian Securities and Investments Commission v Brown*, *Australian Securities and Investments Commission v Gillfillan*, *Australian Securities and Investments Commission v Koffel*, *Australian Securities and Investments Commission v Terry*, *Australian Securities and Investments Commission v O'Brien*, *Australian Securities and Investments Commission v Willcox*, *Australian Securities and Investments Commission v Shafron* [2012] HCA 17.

14 Australian Securities and Investments Commission, 'ASIC commences proceedings relating to James Hardie' (Media Release 07-35, 15 February 2007).

F Fortescue Metals Group

ASIC commenced civil penalty proceedings against Fortescue Metals Group Ltd ('FMG') and the Executive Chairman of FMG in relation to misleading announcements to the market.¹⁵

ASIC alleged that FMG engaged in misleading and deceptive conduct and failed to comply with its continuous disclosure obligations when it announced various agreements with Chinese entities and failed to disclose important information regarding the nature of those agreements.

ASIC alleged that the Executive Chairman was knowingly concerned in the contraventions by FMG and that he breached his duty as a director to exercise care and diligence by failing to ensure that FMG complied with its obligations. ASIC further claimed that the Executive Chairman knew that there was a material difference between what the market had been told and what actually appeared in the agreements, but did not correct the position and instead continued making misleading statements over a six month period. ASIC also claimed the alleged conduct of FMG and its Executive Chairman resulted in the market being seriously misled as to the true status of FMG's project for over six months.

At the time of writing, this matter is on appeal to the High Court, with the Full Court of the Federal Court having overturned the trial judge's decision that section 180 had not been breached.¹⁶

G Centro

ASIC commenced civil penalty proceedings against the directors of Centro for breaches of section 180 of the *Corporations Act*. The alleged breaches arose from the financial report misstating the current liabilities of the company at a time when the Board had been actively considering the debt profile of the company, and not disclosing certain guarantees entered into after the balance date.¹⁷

Central to ASIC's decision to take this action is the responsibility of company directors and chief financial officers to take reasonable steps to ensure that information contained in financial reports and disclosed to the market is accurate, complies with relevant accounting standards, and is not misleading.¹⁸

15 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364.

16 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, 428.

17 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 ('*Centro Case*').

18 Australian Securities and Investments Commission, 'ASIC commences proceedings against current and former officers of Centro' (Media Release 09-202AD, 21 October 2009).

III DUTY OF CARE AND DILIGENCE

The duties of directors under statute are broadly set out in Part 2D.1 of the *Corporations Act*. Other duties, such as keeping financial records and preparing reports to shareholders, are found in other parts of the *Corporations Act*.¹⁹

The significant actions that ASIC has taken in relation to directors of listed companies have generally concerned section 180, the duty to act with care and diligence. ASIC has asserted that a breach of section 180 can arise because of a breach of another statutory provision.²⁰ ASIC may make that claim where:

- the director knew there was a risk of a contravention of a statutory provision;
- the director was in a position to prevent the contravention and did not take reasonable steps to prevent the contravention; and
- the breach of the statutory provision seriously jeopardised the interests of the company.

If a director knows there is a risk of contravening a statutory provision, which will seriously jeopardise the interests of the company, ASIC expects the director to take reasonable steps to prevent the contravention. For a director not to do so may harm the company and the integrity of capital markets.

Whenever it is claimed that a breach of section 180 arises, ASIC believes that each director must be able to understand, and demonstrate an understanding of, the company's financial affairs, the business of the company and how the company is run. This is relevant to the directors' responsibilities, as set out in the board charters of many companies, to monitor and guide management and to communicate key matters to the market.

The decision in the *Centro Case* demonstrates the necessity for directors to have sufficient financial literacy to be able to form an opinion that the financial report of the company accurately presents the financial position of the company.²¹ It has long been held that directors must be sufficiently abreast of the company's financial affairs to be able to form an opinion as to the company's solvency.²²

Familiarity with the business of the company²³ means knowing what is significant to the company's financial and business performance and its key stakeholders. As part of this, ASIC expects directors to understand the major

19 *Corporations Act* ss 286, 292, 302.

20 See, eg, *Australian Securities and Investments Commission v Citofresh International Ltd (No 2)* (2010) 77 ACSR 69; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No. 5)* (2009) 264 ALR 201.

21 (2011) 196 FCR 291. See, eg, *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 132–3 [7205]–[7206], Austin J also accepted ASIC's submission that the statutory standard of skill includes a standard of competence in reading and understanding financial material, which is not dependent on the director's subjective inexperience or lack of skill.

22 See, eg, *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 126 (Tadgell J).

23 The requirement for a director to be familiar with the business of the company and how it is run can be traced back to at least *Re Australasian Venezolana Pty Ltd* (1962) 4 FLR 60, 66 (Eggleston J).

aspects of the economic environment within which the company operates, the key risks facing the company and how they are managed, and the robustness of material assumptions underlying budgets, forecasts and other business transactions. In other words, each director must understand the company's business model and the gearing of the business.

ASIC expects each director to have this competency. Shareholders in listed companies are entitled to expect that each and every director understands the financial and business performance of the company. It is at the very centre of the role of directors that they monitor and guide management, and that is not possible without an understanding of the company and its business. Directors must take reasonable steps to acquire, and maintain, that knowledge. They must know the business in order to reduce the risk of decisions being made that cause serious harm to the company.

This does not require that directors must know everything about the company. In the *Centro Case*, ASIC did not argue that the directors needed a working knowledge of all of the accounting standards relevant to the company's financial statements.²⁴ The directors were, however, required to know of a very significant matter to the company's business – its current liabilities – at a crucial time: when the economy was experiencing a credit crunch.

The cases that ASIC has taken also show an expectation that each director will apply an inquiring mind to those matters that come before the board for decision. Again, the *Centro Case* is a recent demonstration of what ASIC expects of directors in this regard. As Middleton J said:

[e]ach director armed with the information available to him was expected to focus on matters brought before him and to seriously consider such matters and take appropriate action. This task [approving the financial statements] demands critical and detailed attention, and not just 'going through the motions' or sole reliance on others, no matter how competent or trustworthy they may appear to be.²⁵

Directors have knowledge of the company and other expertise that may be lacking, or missed, by those assisting the board. It is reasonable to expect that decisions of the board will have the advantage of the knowledge and expertise of the directors.²⁶ This necessarily requires that each director be aware of, and have considered, the information provided to them and that they assess that information against their knowledge of the company. Each director must then bring his or her own judgment to bear on the matter.

This may also involve constructively challenging management. Where relevant, for example, if a recommendation does not appear to be in the best interests of the company given the director's knowledge of the company, ASIC expects directors to ask questions of management. It is vital that directors do not uncritically adopt the work of management on issues of importance to the company.

24 (2011) 196 FCR 291, 358 [288] (Middleton J).

25 *Ibid* 332 [174].

26 See, eg, *Daniels v Anderson* (1995) 37 NSWLR 438, 505 (Clarke and Sheller JJA).

ASIC is aware of recent discussion around the overload of information to directors. Directors should question management about the extent and quality of information being provided to them, and agree on the information that is necessary for directors to understand the business and fulfil their role. This is not, of course, an invitation to directors to say 'do not tell me' about an issue that should properly be considered by the board. It is a suggestion that directors require management to be disciplined in its preparation of relevant material.

In determining what is expected of directors under section 180, ASIC will not limit a director's responsibility merely to their field of expertise. A director's responsibility is greater than merely representing their field of expertise. For example, non-executive directors appointed because of their background and experience in the United States would not be excused from understanding the need not to issue misleading statements to the Australian market.²⁷

Even outside the area of a director's expertise, he or she must still bring their experience and knowledge to the board's consideration of a matter. A director, irrespective of background, is expected to pay attention to the company's affairs. He or she cannot abdicate responsibility in areas where they have less expertise than others to the others.²⁸ However, a director may determine that delegation to persons of greater expertise is appropriate.

There will also be cases where, because of a director's particular expertise and experience, ASIC will argue that it is appropriate that a director be held to have 'special responsibilities'. Or, as the Court of Appeal has recently put it, '[t]he postulated reasonable person in s 180(1) embraces any special skill or expertise the director or officer possesses'.²⁹

ASIC sought to establish that a director had a special responsibility because of their skills and expertise in the action taken against the Chairman of One.Tel.³⁰ In that case, ASIC argued that the Chairman, as a foundation Director, Chairman of the Board, Chairman of the Finance and Audit Committee and the person with the highest qualification and expertise in financial matters amongst the directors, should have been more active and vigilant with respect to the Group's financial circumstances.

Shareholders elect directors based on their expertise and experience. This is consistent with the requirement for the directors' report each year to include details of each director's qualifications, experience and special responsibilities.³¹ ASIC believes that it is reasonable to then require a director to use his or her expertise to assist the board's deliberations.

27 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205, 366 [865] (Spigelman CJ, Beazley and Giles JJA). It is noted that the discussion of the Court of Appeal was in the context of certain assumptions, which the Court of Appeal held were not proven.

28 *Centro Case* (2011) 196 FCR 291, 298 [18] (Middleton J).

29 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205, 358 [819] (Spigelman CJ, Beazley and Giles JJA).

30 *Australian Securities and Investments Commission v Rich* (2003) 174 FLR 128.

31 *Corporations Act* s 300(10)(a).

ASIC does, however, distinguish a non-executive director with a specific expertise from a person currently working full-time utilising that expertise. The non-executive director is not held to the same standard and does not have the same responsibility as, for instance, a practitioner. However, they are expected to make the board aware of the processes or information it may need regarding matters relating to their expertise.

IV DISTINCTION BETWEEN DIRECTORS

As the discussion above suggests, ASIC will distinguish between directors. One of the most significant distinctions is between executive directors and non-executive directors. Executive directors have additional responsibilities, and required skills, as contemplated by their executive position. It is expected that the standard of care and diligence they will exercise is that expected of a reasonably competent executive in their profession.³²

Cases brought by ASIC have also established additional responsibilities further distinguishing executive directors from non-executive directors.

In the proceedings taken in relation to HIH, a duty of executive directors to ensure compliance with, or put in place, appropriate processes to guard against corporate misconduct, was established.³³

In *Australian Securities and Investments Commission v McDonald (No 11)*, ASIC claimed that the Chief Executive Officer had a duty to advise the non-executive directors of the limitations of the expert reports upon which the Board was relying to make a statement to the market.³⁴ At first instance, the Court supported such an obligation of executive directors.³⁵

In another case, the Court accepted ASIC's submission that a chief executive officer may reasonably be expected to have more information available to him or her and to be more diligent than other board members.³⁶

ASIC recognises that executive directors have operational responsibilities that non-executive directors do not. This gives executive directors better access to information and it is only appropriate that it requires them to ensure that other directors are not denied relevant information or left unaware of significant matters.

Another distinction between directors that ASIC has made is between the chairman and other directors. ASIC expects a chairman to take reasonable steps

32 See, eg, *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 347 (Santow J), citing *Permanent Building Society v Wheeler* (1994) 14 ACSR 109, 287–8; *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229, [7206].

33 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 348 (Santow J). (2009) 230 FLR 1.

34 *Ibid* 71 (Gzell J). The Chief Executive Officer did not appeal, but on appeal this obligation can be inferred from statements made in relation to another officer: *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205, 390, [956]–[957] (Spigelman CJ, Beazley and Giles JJA).

36 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No. 5)* (2009) 264 ALR 201, 377 [892] (Gilmour J).

to ensure the board, as a whole, can monitor management and the company's performance.

There is a series of cases that hold that a chairman has specific authority of a procedural kind when chairing meetings of directors or members.³⁷ Other decisions note that a chairman may have functions and responsibilities which extend beyond procedural matters, for example, settling the agenda and the performance of the board and each of its members.³⁸

In *Australian Securities and Investments Commission v Rich*, ASIC presented expert opinion evidence of the responsibilities ordinarily undertaken by a chairman of a listed company. ASIC also presented a number of governance publications by leading commentators which Austin J determined were relevant to ascertaining the customary responsibilities and role of a chairman of a listed company.³⁹

Accordingly, ASIC considers that the chairman of a listed company is responsible to a greater extent than any other director for the performance of the board. To enable the board to perform effectively, a chairman is expected to take reasonable steps to ensure the board is properly informed and has the appropriate committees, policies and other mechanisms to allow it to fulfil its duties.

V DELEGATION AND RELIANCE

In addition to distinguishing between directors, ASIC also accepts that much of a company's activities must necessarily be delegated from the board to management and from management to employees. The law clearly contemplates that a director can delegate,⁴⁰ except where prevented by law (for example, approving final accounts).⁴¹

When delegating their powers, ASIC expects directors to consider two questions: (1) whether the matter is an appropriate one to delegate, and (2) what the terms of the delegation are.

When deciding to delegate, ASIC would expect the following matters to be considered:

- Whether the directors possess or have acquired a familiarity with the subject.

37 See, eg, *Australian Securities and Investments Commission v Rich* (2003) 174 FLR 128, 142 (Austin J); *AWA Ltd v Daniels* (1992) 7 ACSR 759, 867 (Rogers CJ).

38 See, eg, *AWA Ltd v Daniels* (1992) 7 ACSR 759, 867 where Rogers CJ said that a chairman is 'responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, for formulating the policy of the board and promoting the position of the company'.

39 *Australian Securities and Investments Commission v Rich* (2003) 174 FLR 128, 147 [70].

40 *Corporations Act* s 190.

41 In the *Centro Case*, the approval of the financial statements could not be delegated as the *Corporations Act* required directors to form an opinion: (2011) 196 FCR 291, 321 [124] (Middleton J).

- Whether the matter is fundamental to the strategic direction, reputation or business of the company.
- Whether the matter is likely to be price-sensitive (but regard must also be had to the obligation under Listing Rule 3.1 for immediate disclosure).
- The extent to which the interests of the company will be jeopardised by a failure to manage any risks associated with the matters.⁴²

Directors should consider whether the delegate is an appropriate delegate. This goes beyond the competency of the person and includes, for example, that the delegate has no conflict of interest.⁴³ After a matter has been delegated, it is expected that directors will continue to consider if the delegation is appropriate and, if not, take corrective action.

Having regard to the seriousness of the matter and the company's circumstances, directors should also consider whether, and if relevant, how, the delegate's performance is monitored.

ASIC also acknowledges that directors will need to rely on information or advice from others. This is clearly contemplated by the law.⁴⁴

Directors must only appoint an adviser if they are appropriate. ASIC has taken action where reliance was placed on a person for whom there were no reasonable grounds for believing that the advice was within the person's professional or expert competence.⁴⁵ ASIC would expect that directors also ensure that any adviser is properly briefed and provided with sufficient information or access to properly and adequately perform their task.

ASIC also requires reliance to be reasonable. In the matter involving GIO, the Court found it was unreasonable in the circumstances for the Chief Financial Officer to continue to rely on advice about GIO's exposures to liability for claims in respect of Hurricane Georges without taking some steps to verify that advice. Those circumstances included the fundamental importance of the advice, the fact that the advice was based to a significant degree on material which had not been substantiated or verified, there being little margin for error, and there being confusing or contradicting advice.⁴⁶

It is ASIC's expectation that a director would consider any advice received in the context of the company's circumstances, his or her own knowledge, and any qualifications or exclusions in the advice. Advice upon which directors are to

42 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205, 359 [821]; *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430, [67]; *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 348 [372].

43 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 354–65 [396]–[453] (Santow J). See also 348 [372], where Santow J cited *Biala Pty Ltd v Mallina Holdings Ltd* (1994) 15 ACSR 1, 62: 'Knowledge that the delegate is dishonest or incompetent will make reliance unreasonable' (Rowland J).

44 *Corporations Act* s 189.

45 *Australian Securities and Investments Commission v Citrofresh International Ltd (No 2)* (2010) 77 ACSR 69.

46 *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 609–11 [863]–[874] (Spigelman CJ, Santow and Ipp JJA).

rely must be appropriately tested. This is consistent with a director's duty to act with care and diligence as discussed earlier.

The discussion of the Court of Appeal in *Morley v Australian Securities and Investments Commission* offers valuable advice on when directors can rely on others.⁴⁷

VI OTHER DUTIES

ASIC has also taken action to enforce the statutory duties found in sections 181–183 of the *Corporations Act*.

Section 181 requires directors to act in good faith in the best interests of the corporation and for a proper purpose. In addition to the obligations in Division 2 of Part 2D.1 of the *Corporations Act*, directors with a material personal interest must be conscious of their obligations under this duty. ASIC believes there are circumstances where it will not be sufficient for a director to declare his or her interest and simply abstain from further board deliberations on that matter.

ASIC expects that a director with a material personal interest would need to consider:

- whether he or she possesses knowledge that the transaction will be capable of causing serious harm to the company;
- whether the company will have access to all relevant information (including the information known to the conflicted director that the transaction will be capable of causing serious harm to the company); and
- whether the expertise of, or available to, the non-interested directors is sufficient to assess the risks and merits of the transaction.

Conflicted directors are expected to assess whether there are any other reasonable steps they could take to protect the company from suffering any serious harm if the transaction is completed.

To assist directors with their responsibilities in relation to related party transactions, in 2011 ASIC issued a revised Regulatory Guide 76: *Related Party Transactions*. That guide set out our guidance to promote better disclosure and governance for related party transactions.⁴⁸

Finally, ASIC expects directors to be honest and not act recklessly. Directors must not:

- conceal relevant information or misrepresent information;⁴⁹
- fail to make reasonable enquiries or give any thought to the consequences of their actions;⁵⁰ or

47 (2010) 274 ALR 205, [808]–[821], [984]–[988].

48 Australian Securities and Investments Commission, *Related Party Transactions*, Regulatory Guide 76, 30 March 2011.

49 See, eg, *R v Adler* (2005) 53 ACSR 471; *R v Fodera* (2007) 65 ACSR 109.

50 See, eg, *R v Williams* (2005) 216 ALR 113; *R v Cassidy* [2005] NSWSC 410.

- use their position to seek an advantage for themselves or others, or to cause detriment to the company.⁵¹

ASIC will consider bringing criminal proceedings under section 184 of the *Corporations Act* where a director's deliberate dishonesty, recklessness or misuse of position or information is a serious breach of their responsibilities. Seriousness may be indicated by the amount of money improperly gained or capable of being gained, a failure to undertake a fundamental function expected of the director, actions that compromise the ability of others, including fellow directors, the regulator, the auditor and other gatekeepers, to fulfil their responsibilities to the company and/or the market, or actions that adversely affect the rights of other parties.

ASIC will consider taking civil proceedings where the conduct is less serious. ASIC may also take civil action even where there are elements of criminal conduct if that is the most appropriate regulatory action in the circumstances.

VII CONCLUSION

Directors are important gatekeepers. The proper exercise of their functions is an essential part of maintaining the integrity of Australia's capital markets and the confidence of investors. Accordingly, ASIC has taken proceedings against directors of listed companies where a breach of their duties has eroded market integrity, adversely affected the interest of the corporation or where it was necessary to demonstrate the conduct expected of such directors. ASIC will not shy away from future action necessary to maintain market confidence.

ASIC's expectations of directors are derived from the obligations of directors under law and recognise both commercial realities and the decisions of the court. While the exact conduct required may depend on the circumstances, it is essential that directors exercise their powers carefully, diligently, honestly and in the best interests of the corporation. It is hoped that this article has provided some guidance on the expectations for directors held by ASIC.

51 See, eg, *Clarke v The Queen* (2004) 50 ACSR 592; *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57; *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253.