
A Conceptual Assessment of Board Skills in ASX 100 Companies

Thea Voogt*

The legal standard of the skills required of directors is usually framed in reference to the specific duties they have, leaving a void in the conceptualisation of the skills of non-executive directors (NEDs) who dominate the composition of ASX 100 company boards. The skills of ASX 100 boards are nevertheless a matter of public record through the disclosure of skills matrices. This article relies on case law to construct a model of the skills required of directors of large listed companies. The model is applied as a conceptual assessment tool against ASX 100 company board skills and finds that there is a significant divergence between company-specific board skills and the legal conceptualisation of director skills. The article also finds that there is little consensus about a common skills set amongst ASX 100 company boards.

INTRODUCTION

Directors have the power to manage and direct the business of a company.¹ How they achieve this is informed and constrained by their legal duties. These are found within general law and statute law, and broadly require the directors to apply reasonable care, skill and diligence and to act with loyalty and good faith. Their conduct is also influenced by the circumstances of the company. In *ASIC v Rich* Austin J considered these to include the type of business, its size and nature, the division of duties between the board and management and whether the company is listed.²

This article focuses on the skills required of directors of the largest listed companies in Australia and answers three key questions. First, it determines whether there is a set of contemporary skills that large listed company boards have, or aspire to have, which is present across all sectors. It does this by analysing the disclosed skills of ASX 100 company boards. Secondly, it poses the question whether there is any particular legal standard for the skills of directors implicit in s 180 of the *Corporations Act 2001* (Cth), against which their individual conduct is assessed. Thirdly, on the basis that it is possible to construct a model of the legal standard of the minimum skills required of directors of large listed companies, this article considers whether, and if so the extent to which, disclosed ASX 100 company board skills differ from that conceptual standard. If it is found that there is divergence between the two perspectives, significant risks arise for large company boards and particularly non-executive directors (NEDs) since board composition at the largest listed companies in Australia is overwhelmingly weighted in favour of NEDs, many of whom are classified as being “independent”.³ On average, NEDs made up 84.9% of ASX 100 company boards in 2015, and all but one board had a majority of independent directors.⁴ Whereas executive directors are continuously present and are involved in the day-to-day activities of the company, NEDs have an intermittent oversight role, bringing independent judgment to bear on the activities of the company, focusing on strategy, performance, resources, key appointments (notably that of the managing director or chief executive officer (CEO)) and standards of conduct; NEDs add value by

* D Com, CA, Lecturer, TC Beirne School of Law, The University of Queensland.

¹ *Corporations Act 2001* (Cth) s 198A. Albeit a replaceable rule.

² *ASIC v Rich* (2009) 236 FLR 1, [7201].

³ See, eg J Farrar and P Hanrahan, *Corporate Governance* (LexisNexis Butterworths, 2017) 376; A Veljanovski, A Brooks and J Oliver, “Independent Directors and Australia’s Corporate Governance Model: A Survey of Independent Directors’ Views” (2009) 24 *Australian Journal of Corporate Law* 33, 33.

⁴ Australian Council of Superannuation Investors, “Board Composition and Non-Executive Director Pay in ASX200 Companies” (ACSI Annual Survey of S&P/ASX200 Board Composition and Non-executive Director Remuneration, 2016) 11.



effectively challenging management to constrain agency cost.⁵ If it is found that their practical skills are more aligned to this role, and that these differ from the legal conception, there is a risk that the conduct of NEDs may not meet an objective standard required of *all* directors, since, for better or worse, the judicial approach is to deny any systematic distinction of the content of the legal duties between NEDs and other directors.

To this end, this article begins by considering the evolution of the Australian practice to disclose the skills-mix and diversity that boards have or are looking to achieve. The board skills disclosed by ASX 100 companies are then analysed and categorised to present a summative perspective of contemporary Australian large listed company board skills. Attention then turns to a conceptual understanding of the legal skills required of all directors that enables the construction of a model of their minimum skills as it applies in a large listed company setting. A summation of the disclosed ASX 100 board skills are compared to the model of directors' minimum skills, resulting in a number of important findings. Since director skills straddle individual and board perspectives, the intercept between the skills of individual directors and issues of diversity, independent judgment, group fit and groupthink are considered. The article concludes by presenting a number of recommendations that make a theoretical contribution to the literature on directors' duty of care, skill and diligence, and that have practical application to strengthen board capabilities and disclosure practices in listed companies and in closing the information or expectation gap between how boards manage and direct companies, and investor and public perceptions thereof.

BOARD SKILL DISCLOSURE IN AUSTRALIA

Board composition is important in a number of different respects and has two perspectives. Notably, board composition underpins the division of responsibilities between the board and management, reflects diversity (which is arguably associated with better financial performance)⁶ and plays a key role in the board's ability to add value.⁷ It also has an external perspective as disclosure of several aspects of the composition of listed company boards is mandated by the *Corporations Act* (the names of the directors,⁸ details of other listed company directorships they hold,⁹ their qualifications, experience and special responsibilities¹⁰) and is recommended by the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (ASX Code) (the biographical details, qualifications, skills and experience of nominees¹¹ and diversity targets¹²). Board composition is also an important ongoing internal matter for the board, particularly in listed companies as the incumbent board recruits, selects and nominates directors (usually through its nomination committee) and shareholders merely confirm the incumbent-proposed slate of nominees.¹³

⁵ See, eg Committee on the Financial Aspects of Corporate Governance, *The Financial Aspects of Corporate Governance* (Committee on the Financial Aspects of Corporate Governance and Gee and Co Ltd, 1992) [4.16]; United Kingdom, House of Commons Business, Energy and Industrial Strategy Committee, *Corporate Governance*, Third Report of Session 2016–2017, HC702, 27–28; SM Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford University Press, 2008) 190; R Khurana, *Searching for a Corporate Saviour: The Irrational Quest for Charismatic CEOs* (Princeton University Press, 2011) 83–84, 90, 95, 105.

⁶ See, eg ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (ASX, 3rd ed, 2014) 11; A Kamalnath, "The Value of Board Gender Diversity Vis-à-Vis the Role of the Board in the Modern Company" (2015) 33 C&SLJ 90, 91–92; A Klettner, T Clarke and M Boersma, "The Impact of Soft Law on Social Change: Measurable Objectives for Achieving Gender Diversity on Boards of Directors" (2013) 28 *Australian Journal of Corporate Law* 138, 139, 161.

⁷ ASX Corporate Governance Council, n 6, 14.

⁸ *Corporations Act 2001* (Cth) s 295(1)(c).

⁹ *Corporations Act 2001* (Cth) s 295(11)(e).

¹⁰ *Corporations Act 2001* (Cth) s 295(10)(a).

¹¹ ASX Corporate Governance Council, n 6, 9.

¹² ASX Corporate Governance Council, n 6, 11.

¹³ See, eg ASX Corporate Governance Council, n 6, 9, 15; Financial Reporting Council, *The UK Corporate Governance Code* (The Financial Reporting Council Ltd, 2016) 11; OECD, *G20/OECD Principles of Corporate Governance* (2015) 21–22; S Kaczmarek, S Kimino and A Pye, "Antecedents of Board Composition: The Role of Nomination Committees" (2012) 20(5) *Corporate Governance: An International Review* 474, 474–475.

Over the past decade, documenting the competency and skills perspectives of board composition has emerged as an important practical tool for boards and their nomination committees and, lately in Australia, as a source of information for investors. For example, the 2007 Canadian Ontario Securities Commission's National Policy 58-201 states that nomination committees should introduce a detailed individual competency and skills gap analysis of current and potential directors.¹⁴ Similarly, the Toronto Stock Exchange guidelines require boards to prepare an internally applied written statement about the characteristics of those on the board and in management who are responsible for strategic planning and risk identification, often formulated as a skills matrix.¹⁵

In 2010 the Australian Securities Exchange (ASX) introduced skills matrices as a recommended board nomination committee tool to identify gaps in skills that could necessitate the appointment of new directors.¹⁶ In 2014 skills matrices were elevated into the public domain when the most recent iteration of the ASX Code recommended the practice to disclose a skills matrix, setting out the skills-mix and diversity the board has, or is looking to achieve, without disclosing commercially sensitive information. Preparing and then disclosing board skills as a matrix holds a number of benefits. First, the board may use it to identify gaps in collective board skills. Secondly, it may highlight areas of director professional development that require training. Thirdly, the skills matrix, prepared by the board, reinforces their accountability in director nomination and election processes. Finally, it provides investors with valuable information.¹⁷

Set against these benefits, it is important to recognise that skills matrices have four inherent limitations. First, the matrices are the result of self-evaluation, which is invariably subject to some degree of subjectivity. Secondly, using historical or existing skills to prepare the matrix may deliver a different outcome to using an aspirational skills approach. Thirdly, there may be divergence between disclosed and actual director skills. Fourthly, skills matrices are inherently succinct.

The progressive step to recommend the disclosure of board skills matrices should also be viewed against the backdrop of the generality of the ASX Code's recommendations about board composition. These suggest that the board must have an appropriate size, composition, skills-mix and commitment (interpreted in this article as diligence, time availability and the absence of over-boarding) to discharge its duties effectively.¹⁸ What may be assessed as appropriate skills is largely left to the discretion of boards, since the ASX Code only recommends one "skill" for all directors, doing so in a footnote: understanding accounting matters to fulfil their responsibility in relation to financial statements.¹⁹

The ASX Code seemingly debunks the proposition that all directors need not have any other skills beyond an understanding of accounting matters in two ways. First, rather than prescribing exact duties assigned to directors, the ASX Code suggests that their particular duties will be influenced by the skills of the board and management respectively, as these play a role in facilitating the appropriate division of duties between them. Secondly, Recommendation 2.6 envisages induction for new directors and opportunities for all directors to *develop* and maintain the skills required to perform their role, which specifically includes ongoing briefings on developments in accounting standards.²⁰

The limited specificity about recommended director skills in the ASX Code is not dissimilar to other leading codes. For example, the corporate governance codes of the UK, Singapore, New Zealand, South

¹⁴ R Leblanc, "External Disclosure of Leading Governance Assessment Practices: What Shareholders Should Be Asking and Companies Should Be Disclosing" (2007) 4(3) *International Journal of Disclosure and Governance* 167, 169–170.

¹⁵ R Maharaj, "Corporate Governance, Groupthink and Bullies in the Boardroom" (2008) 5(1) *International Journal of Disclosure and Governance* 69, 78–79; R Maharaj, "Corporate Governance Decision-making Model: How to Nominate Skilled Board Members, by Addressing the Formal and Informal System" (2009) 6(2) *International Journal of Disclosure and Governance* 106, 112, 115–116.

¹⁶ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments* (ASX, 2nd ed, 2010) 19; M Errity and D Stuckey, "The Latest Trends in Board Practices" (2012) May/June *The Corporate Governance Advisor* 22, 22.

¹⁷ ASX Corporate Governance Council, n 6, 15; A-M Moodie, "Board Capabilities Matrix" (2015) July *Governance Directions* 330, 330, 331.

¹⁸ ASX Corporate Governance Council, n 6, 4, 6, 9, 18.

¹⁹ ASX Corporate Governance Council, n 6, 18.

²⁰ ASX Corporate Governance Council, n 6, 9, 18.

Africa and the widely adopted G20-OECD code all require an *appropriate* balance of skills, experience, independence and knowledge of the company,²¹ without articulating how this should be achieved. The Singapore code lists examples of core competencies directors should have – accounting/finance, business/management experience, industry knowledge, strategic planning experience, and customer-based experience/knowledge.²² Similarly, the South African code suggests that board members must have business, commercial and industry experience, sufficient working knowledge of the company, its industry and the economic, social and environmental context in which it operates, as well as of key laws, rules, codes and standards applicable to the company.²³

What elevates the ASX Code beyond the universal acceptance of the principle of balanced board skills is the *outcome* of the practice that listed companies should disclose their board skills. It is within this company-specific disclosure that scholars, investors and the public are able to gain valuable insights into contemporary Australian board skills present within listed companies that play a key role in how boards discharge their duties effectively and are able to add value.²⁴

ASX 100 COMPANY BOARD SKILLS

To investigate these insights within the largest listed companies in Australia, this research considered the content of the skills matrices disclosed by ASX 100 companies in their 2016 annual reports or accompanying corporate governance statements. Of the ASX 100 group determined as at 30 June 2016, 93 companies disclosed skills matrices, resulting in 93 datasets. Of the remaining companies, one was headquartered in the UK, two held primary listings in the US and one was an externally managed investment fund. The fifth stated that it had a skills matrix and that details were included in the nomination committee charter, but the charter was not publicly available. The sixth company disclosed that its board deemed this type of detailed disclosure inappropriate, while the seventh listed some relevant existing skills (industry, financials, regulatory, business acumen, listed/board experience) in its governance statement, but not in the form of a skills matrix, and was excluded from the analysis. The 93 datasets represented all 11 of the ASX sectors as shown in Table 1.

TABLE 1. ASX Sector Representation in Datasets

Sector	Number of datasets	Percentage
Consumer discretionary	11	12
Consumer staples	7	8
Energy	5	5
Financials	18	19
Health care	6	7
Industrials	9	10
Information technology	2	2
Materials (incorporating metals and mining)	19	20
Real estate	8	9
Telecommunication	3	3
Utilities	5	5
Total	93	100%

²¹ OECD, n 13, 22; Financial Reporting Council, n 13, 5, 10; Institute of Directors in Southern Africa, “King IV Report on Corporate Governance for South Africa 2016” (2016) 28, 40; ASX Corporate Governance Council, n 6, 14–15; Monetary Authority of Singapore, *Code of Corporate Governance* (2012) 6; NZX, *NZX Corporate Governance Code* (2017) 3, 9, 10.

²² Monetary Authority of Singapore, n 21, 6.

²³ Institute of Directors in Southern Africa, n 21, 43.

²⁴ ASX Corporate Governance Council, n 6, 4, 14.

An initial review of each dataset revealed significant similarities between matrices. It was therefore possible to prepare an initial list of disclosed board skills as basis for the analysis and categorisation of the datasets. As the disclosed skills in each dataset were analysed and categorised, the initial list was expanded and initial skills' descriptions enhanced. Skills that only appeared in one board skills matrix and could not be categorised together with other skills were excluded from the analysis, since the purpose was to gain insights into more widely disclosed contemporary listed company board skills. For completeness, the skills that were excluded on this basis were: learning and development; influencer and negotiator; crisis management; commitment; critical and innovative thinker; emotional intelligence; performance discipline; and targeted growth. Table 2 presents the summative results of the analysis, categorisation and presence of disclosed board skills in ASX 100 companies, ranked in frequency.

Reflecting on the summative perspective presented in Table 2, while categories such as "legal", "communication", "risk management" and "marketing" may be readily classified as "skills", some are arguably more related to the characteristics or attributes of boards, while others represent tools or pathways that could result in directors being appropriately skilled for the position, hence the further categorisation of disclosed skills in Table 2 as either "skills", "characteristics" or "tools".

TABLE 2. Summative ASX 100 Board Skills

Skill	Number of boards that included the skill in their skills matrix	Percentage of boards that disclosed the skill	Categories		
			Skill	Characteristic	Tool
Governance, corporate governance, regulations, government relations	88	95	✓		
Executive leadership, leadership, executive experience, management	88	95			✓
Industry experience	85	91			✓
Strategy, strategy implementation	70	75	✓		
Risk, risk management	67	72	✓		
Remuneration, human resources, people matters	67	72	✓		
Capital management, funds management, mergers and acquisitions, investment management, joint ventures	67	72	✓		
International or global experience	55	59			✓
Technology, digital, innovation	55	59	✓		
Corporate social responsibility, ESG principles, health and safety	46	49	✓		
Financial expertise, understanding, capability	46	49	✓		
Financial literacy, acumen	43	46	✓		
Customers, marketing	41	44	✓		
Legal	34	37	✓		
Communication, stakeholder engagement, public relations	13	14	✓		

TABLE 2. *continued*

Listed company board experience	13	14			✓
Board experience and efficiency in board operations	12	13			✓
NED experience	12	13			✓
Diversity, gender diversity	7	8		✓	
Culture	7	8		✓	
Judgment, integrity	4	4		✓	
Change and emerging issues	2	2	✓		

A number of observations flow from this summative perspective. First, the presence of experience in various forms is a standout feature of disclosed contemporary large listed company board skills in Australia. Secondly, NEDs, who are in the majority on boards, are not involved in the day-to-day activities of the company. However, a significant number of disclosed skills categories attach to the usual or expected functional areas of a business: human resources; funds management; technology; finance; and marketing and communication. Beyond the appointment of a managing director or CEO and specific obligations for financial reporting,²⁵ the practical duties of NEDs rarely extend to detailed decisions about functional matters. Thirdly, looking at skills with the highest frequency (leaving experience aside), it may be argued that the disclosed emphasis on governance and strategy appropriately reflects the intermittent, oversight-focused role of majority NED-led listed company boards. Similarly, the significant presence of human resources skills is associated with one of the most important board governance responsibilities, which is to appoint a CEO.²⁶ Fourthly, the analysis and categorisation resulted in the presence of a large number of skills that may be associated with boards across the ASX 100 grouping. While it is possible that all these skills are present at the whole-board level, it is less likely to be the case in reference to each individual director. Associated with this observation is the significant result that no one skill was found to be present in all the datasets, which begs the question how the summative practical perspective compares to a legal perspective of the skills that *all* directors should have to fulfil their legal duties, if there is one.

CONCEPTUALISING THE LEGAL STANDARD OF THE SKILLS OF DIRECTORS

The skills of directors are part and parcel of the broad legal duty to apply reasonable care, skill and diligence. The duty arises from a number of sources in Australia. First, it can arise from a contract between a director and the company, requiring a general duty, or specific duties within the company, associated with particular skills. Secondly, it is an equitable duty upon directors to act honestly and to diligently exercise reasonable skill, as can be objectively assessed.²⁷ Thirdly, the duty arises under the common law tort of negligence when the director does not exercise reasonable care, skill and diligence. Lastly, the duty arises from statute, expressed in s 180 of the *Corporations Act*.²⁸ Essentially, the same standard of conduct applies, irrespective of whether a general law or corporate law perspective of care, skill and diligence is used,²⁹ and it is thus appropriate to use s 180 of the *Corporations Act* to conceptualise director's skills required under the law as articulated by the courts, noting that the section's scope extends beyond directors to other officers as defined,³⁰ and that it applies in the same way to *all* directors, since the section makes no distinction between executive and NEDs.

²⁵ *Corporations Act 2001* (Cth) ss 198C, 295, 303.

²⁶ ASX Corporate Governance Council, n 6, 8.

²⁷ Farrar and Hanrahan, n 3, 217–219.

²⁸ *Corporations Act 2001* (Cth) s 180.

²⁹ P Hanrahan, I Ramsay and G Stapledon, *Commercial Applications of Company Law* (CCH Australia Ltd, 15th ed, 2014) 234–235.

³⁰ *Corporations Act 2001* (Cth) ss 9, 180(1).

Nearly 100 years ago, Romer J addressed the skills required of directors in the seminal judgment of *Re City Equitable Fire Insurance* when he stated that a director “need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience”.³¹ Since then community expectations of directors have increased dramatically, true to Sir Douglas Menzies’ prediction that “the narrow conception of the duties of a director is ... no longer the case so far as most companies and most directors are concerned and there can be no doubt that, as time goes on, it will become progressively less the case”.³² In Menzies’ era, the emerging trend was to appoint directors in full-time executive positions, which is different to the current norm to appoint (arguably) independent NEDs, largely in response to prominent corporate collapses in the early 2000s. Nevertheless, to Menzies the benefit of full-time executive director appointments was to raise the skills of directors beyond narrow specialist skills, taking advantage of their “capable and wise counsel and leadership”.³³ At its core, these remain the qualities that now result in independent NEDs – regarded by Bainbridge as the corporate governance success story of the decade³⁴ – bringing an “independent judgement to bear on issues before the board and to act in the best interests of the entity and its security holders generally”.³⁵ It is submitted that the extent to which boards are able to effectively use their powers to direct the business of the company is predicated, to a large extent, on their ability to clearly express their leadership, particularly about strategic matters in listed companies where directors are far removed from day-to-day corporate activities.

Turning to case law in Australia, the Australian Securities and Investments Commission (ASIC) has instituted civil proceedings against directors and officers in reference to their duties under s 180 of the *Corporations Act*, but the number of cases to draw from remains low.³⁶ Cases that considered “skill” are focused on whether directors, and particularly officers, have met their objective duty of care attached to positions that require specific skills. Notable examples are *ASIC v Vines*, which considered the responsibilities of a director who also served as chief financial officer;³⁷ in *Morley v ASIC* the position of the chief financial officer of James Hardie Industries Ltd was considered,³⁸ as well as that of the company secretary, in *Shafron v ASIC*,³⁹ who had a legal background.⁴⁰ Austin and Ramsay suggested that the courts’ emphasis on the specific duties of specific directors will remain unchanged as the emergence of a core group of professional NEDs has not resulted in a particular profession linked to their grouping when compared to the position of doctors, architects, accountants, engineers etc.⁴¹ This position leaves a potential void in the conceptualisation of the skills applicable to nearly all of the directors appointed to large listed company boards in Australia, since almost 85% fill non-executive positions.⁴²

Looking ahead, and focusing on NEDs as their grouping is most relevant in large listed companies, perhaps the only notable development in defining a specific skill-set for some NEDs (beyond those associated with specific board committee roles commonly found in corporate governance codes)⁴³ is

³¹ *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, 429.

³² D Menzies, “Company Directors” (1959) 33 ALJ 156, 156.

³³ D Menzies, n 32, 156.

³⁴ Bainbridge, n 5, 78.

³⁵ ASX Corporate Governance Council, n 6, 9.

³⁶ G Golding, “Tightening the Screws on Directors: Care, Delegation and Reliance” (2012) 35(1) *UNSW Law Journal* 266, 273.

³⁷ *ASIC v Vines* (2003) 182 FLR 405, 417.

³⁸ *Morley v ASIC* (2010) 247 FLR 140, [1083], [1085], [1088], [1090], [1118], [1130], [1133].

³⁹ *Shafron v ASIC* (2012) 247 CLR 465, 465, 470, 475.

⁴⁰ *Morley v ASIC* (2010) 247 FLR 140, [884], [889], [905], [922], [929].

⁴¹ RP Austin and IM Ramsay, *Ford, Austin and Ramsay’s Principles of Corporations Law* (LexisNexis Butterworths, 16th ed, 2015) 513–514.

⁴² Australian Council of Superannuation Investors, n 4.

⁴³ ASX Corporate Governance Council, n 6, 14, 15, 21.

the emerging global trend to appoint digital NEDs who are able to “create value through new digital opportunities” by driving the evolution of digital strategies in companies.⁴⁴ While the specialised contribution that digital NEDs make through their disruptive-technology-related skills might again not be relevant to all directors, it does point to the impact that change and innovation can have on director skills generally, and on board composition. Directors’ duty to keep up to date with developments and to maintain the skills and knowledge to perform their role effectively feature prominently in corporate governance codes;⁴⁵ and, as an extension thereof, in the UK code change and entrepreneurial board leadership are aligned.⁴⁶

ASIC v Rich is one of the few cases to have specifically considered the skills of NEDs, but it did so in relation to Greaves, who had a specific non-executive role as chair of the board and chair of the audit committee of One.Tel Ltd. The question before the Court was whether he had to fulfil special “responsibilities” in his role as chair of the board, which were different to that of the other NEDs, and whether his qualification and skill as a chartered accountant as well as his experience in listed companies as finance director and chief financial officer elevated his responsibilities when compared to the other NEDs.⁴⁷ Austin J considered several corporate governance publications in assessing Greaves’ responsibilities and, while recognising that these sources are “not suitable to constitute legal duties”,⁴⁸ stated they nevertheless deserved consideration as part of the Court’s role to articulate and apply a standard that reflects contemporary community expectations. Austin J concluded there might be a higher standard for the responsibilities of the board chair,⁴⁹ now taken to be an independent director.⁵⁰ While this conclusion does not set a skills standard for all directors, Austin J’s sentiment that it is better to consider corporate governance literature than to rely on “unassisted armchair reflection”⁵¹ underpins the approach in this article that the recommended practice in the ASX Code to disclose board skills is relevant in providing insights into the practical contemporary approaches that boards have to governance.

ASIC v Macdonald sheds light on two further aspects of the skills of directors in listed companies – their experience and background. The case focused on whether the board of James Hardie Industries Ltd had approved an ASX announcement. The announcement dealt with the establishment of the fully-funded Medical Research and Compensation Foundation to take responsibility for managing and paying asbestosis claims against the company. ASIC alleged that the CEO, the company secretary (who was also the general counsel), the chief financial officer and seven NEDs breached their duty of care by not applying themselves appropriately when they considered the announcement and therefore failed to fulfil their monitoring role. The defence of two of the NEDs was that they were phoned in during the meeting. Gzell J considered that they should have asked to see a copy of the ASX announcement,⁵² reinforcing the principle that the days of the sleeping director had long passed.⁵³ His Honour further considered that the seven NEDs were not entitled to rely solely on the executive directors or experts regarding the content of the announcement. They each had an obligation to consider the adequacy of the financing arrangement given that the risks attached thereto were high, and that they ought to have appreciated that there was insufficient funding to pay for the potential claims, taking into account their experience and

⁴⁴ T Voogt, “Articulating Care, Skill and Diligence Standards for Non-executive Directors” (2017) 35 C&SLJ 128, 146.

⁴⁵ See, eg Financial Reporting Council, n 13, 13; OECD, n 13, 60.

⁴⁶ Financial Reporting Council, n 13, 7.

⁴⁷ *ASIC v Rich* (2003) 174 FLR 128, [62]–[72].

⁴⁸ *ASIC v Rich* (2003) 174 FLR 128, [70].

⁴⁹ *ASIC v Rich* (2003) 174 FLR 128, [62]–[72].

⁵⁰ ASX Corporate Governance Council, n 6, 18.

⁵¹ *ASIC v Rich* (2003) 174 FLR 128, [72].

⁵² *ASIC v Macdonald (No 11)* (2009) 256 ALR 199, 245.

⁵³ See, eg P Bryans and C Giavris, “Impact of the James Hardie Decision on Directors’ Duties” (2009) 28 *Australian Resources and Energy Law Journal* 129, 131; JG Hill, “Centro and the Monitoring Board – Legal Duties Versus Aspirational Ideals in Corporate Governance” (2012) 35(1) *UNSW Law Journal* 341, 358.

backgrounds.⁵⁴ Therefore, it is submitted that the lesson from *ASIC v Macdonald* is that to be able to properly consider the associated risks directors must have a sufficient knowledge and understanding of the business, and must be able to draw on relevant experience to recognise the risks in the first instance to be able to bring their own judgment to bear. Even if they were to rely on information and advice provided by others,⁵⁵ their reliance ought to be predicated upon “reasonable” actions.⁵⁶

The Role of Risk in Director Skills

Assessing whether a director had applied “reasonable” care and diligence often hinges on whether they considered the reasonable foreseeability of the risks to the company.⁵⁷ However, this consideration does not imply that risk should be eliminated or avoided, since risk-taking is an essential element of a successful business. *Vrisakis v ASIC* confirmed that participating in foreseeable risk does not automatically constitute a breach of care and diligence:

... the mere fact that a director participates in conduct that carries with it a foreseeable risk of harm to the interests of the company will not necessarily mean that he has failed to exercise a reasonable degree of care and diligence in the discharge of his duties.⁵⁸

What is relevant is whether a director had applied sufficient and appropriate risk management skills to consider and balance the foreseeable risk of harm against the potential benefits arising from it.⁵⁹ In understanding the balance between risk and benefit, *ASIC v Vines*⁶⁰ and *ASIC v Cassimatis*⁶¹ relied on the three factors established by Mason J in *Wyong Shire Council v Shirt*:

The perception of the reasonable man’s response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant’s position.⁶²

In the case of NEDs, this balancing act is affected by the practical limitations of their involvement in the business of the company, even when they are highly qualified. In *ASIC v Cassimatis* Edelman J considered the defendants’ reliance on evidence that even highly qualified and experienced NEDs, in this case Hutley and Nelson, could not have reasonably foreseen that Storm Financials Pty Ltd would contravene s 945A(1)(b) or s 945A(1)(c) of the *Corporations Act*,⁶³ when providing advice to investors.⁶⁴ For example, Hutley was previously employed as a risk advisor director in leading assurance firm, KPMG, and held a certificate in financial planning. In fulfilling his oversight duty, he asked the defendants, Mr and Mrs Cassimatis, for significant relevant information.⁶⁵ Edelman J concluded that, while Hutley and Nelson became reasonably familiar with the Storm business,⁶⁶ “there were real limitations upon the

⁵⁴ *ASIC v Macdonald (No 11)* (2009) 256 ALR 199, 251, 257–259.

⁵⁵ *Corporations Act 2001* (Cth) s 189.

⁵⁶ A Gibbs and J Webster, “Delegation and Reliance by Australian Company Directors” (2015) 33 C&SLJ 297, 297, 304, 305.

⁵⁷ See, eg *ASIC v Rich* (2009) 236 FLR 1, [7193]–[7197]; *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47; *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [293], [327], [331], [497].

⁵⁸ *Vrisakis v ASIC* (1993) 11 ACSR 162, 212.

⁵⁹ *Vrisakis v ASIC* (1993) 11 ACSR 162, 218–219; *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [486].

⁶⁰ *ASIC v Vines* (2005) 55 ACSR 617, 859.

⁶¹ *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [486].

⁶² *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–48.

⁶³ *Corporations Act 2001* (Cth) ss 945A(1)(b), 945A(1)(c).

⁶⁴ *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [19], [363].

⁶⁵ *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [19], [364], [369].

⁶⁶ *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [19], [371].

extent to which they understood the details of Storm’s business and its model. These limitations were natural given their constraints as non-executive directors”.⁶⁷

The Duty to Become Familiar with the Business

The assessment in *ASIC v Cassimatis* that Hutley and Nelson had in fact become reasonably familiar with the business sits at the core of the objective duty upon all directors in s 180 of the *Corporations Act* to “exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise”.⁶⁸ *AWA Ltd v Daniels* was instrumental in formulating the standard associated with this duty when Rodgers J contrasted the differences in the roles and responsibilities of management (focused on the day-to-day activities of the corporation) and those of the directors (who are tasked with guiding and monitoring management and exercising oversight). Importantly, Rodgers J stated that *all* the directors must obtain a general understanding of the business of the company and the effect that a changing economy may have on its business, and all must bring an informed and independent judgment to bear on matters that come before the board,⁶⁹ categorising this obligation as a non-delegable duty.⁷⁰ This duty takes into account the evolving nature of business and the impact that change has on its leadership, neatly summarised in the South African code:

New global realities are testing the leadership of organisations on issues as diverse as inequality, globalised trade, social tension, climate change, population growth, ecological overshoot, geopolitical tensions, radical transparency and rapid technological and scientific advancement.⁷¹

While Rodgers J held the opinion that NEDs did not have to pay continuous attention to the company’s affairs,⁷² on appeal Clarke and Sheller JJA rejected the proposition that there was a difference between their legal duties when compared to the duties of other directors.⁷³ Their views relied on Pollock J’s proposition in the American case of *Francis v United Jersey Bank* that, while directors were not required to inspect the day-to-day activities of corporations, they nevertheless had an obligation to stay informed about the business and financial affairs of the corporation.⁷⁴

Along similar lines, in *ASIC v Rich* Austin J summarised the diligence of directors as a five-point standard, but which he applied specifically to the NED.⁷⁵ First, his Honour stated that directors are under an obligation to become familiar with the fundamentals of the business or businesses of the company. Secondly, they have to stay informed about the activities of the company. Thirdly, they must monitor its affairs. Fourthly, they must maintain familiarity with the financial status of the company “by appropriate means” (which includes reviewing financial statements and board papers) and make further inquiries as becomes necessary. Lastly, the directors must be able to hold an informed opinion about the financial position of the company. Albeit in a much earlier case in reference to a company’s ability to pay its debt under the *Companies Code* of Victoria, Tadgell J came to the same conclusion that all directors should obtain, at the least, an understanding of the business of the company and should bring an informed and independent judgment to bear on decision-making.⁷⁶

⁶⁷ *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, [19], [371].

⁶⁸ *Corporations Act 2001* (Cth) s 180(1).

⁶⁹ *AWA Ltd v Daniels* (1992) 7 ACSR 759, 864–867.

⁷⁰ G Flint, “Non-Executive Directors’ General Law Duty of Care and Delegation of Duty: But Do We Need a Common Law Duty of Care?” (1997) 9(2) *Bond Law Review* 198, 213.

⁷¹ Institute of Directors in Southern Africa, n 21, 3.

⁷² *AWA Ltd v Daniels* (1992) 7 ACSR 759, 762.

⁷³ *Daniels v Anderson* (1995) 37 NSWLR 438, 502, 505.

⁷⁴ *Francis v United Jersey Bank* (1981) 432 A 2d 814, 819–823.

⁷⁵ *ASIC v Rich* (2009) 236 FLR 1, [7203].

⁷⁶ *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 126.

In practical terms, directors will, of necessity, delegate matters to others and rely on information provided by others, as is permitted by ss 189 and 190 of the *Corporations Act*. In *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* Jacobs ACJ, Prior and Mulligan JJ recognised that in large and complex companies directors often rely to a large extent on the knowledge and experience of others, but that this reliance must be counterbalanced by the exercise of independent judgment on the part of directors.⁷⁷ It is thus so that the protection afforded directors under ss 189 and 190 relies to a large extent on their proper (sceptical) inquiry and on their knowledge of the company.⁷⁸

In contemporary large listed companies director reliance is further nuanced, as NEDs rely almost exclusively on executive management teams. The NEDs' choice of a CEO, who is routinely responsible for leading the executive team, is therefore amongst their most important decisions.⁷⁹ CEO succession necessitates independent judgment on the part of NEDs of the skills, qualities and characteristics required of a CEO whose role is to operationalise the board's strategy and culture, since managerial primacy in the context of large listed companies is situated in the executive.⁸⁰

It is submitted that independent judgment, proper inquiry, gaining a reasonable understanding of the business and assessing how changes will impact the company – relevant to a director's monitoring role and when they delegate – are necessarily premised on the director having appropriate skills and experience; a director can only understand the company's position if they have the skills to be able to assess the information put before them and to work out what it means.

To this end, it is submitted that a director's experience and knowledge must be relevant to the content of the duty and its discharge by directors. Corporate governance research has long considered experience to be an important attribute of directors.⁸¹ But experience is gained from different contexts. Veljanovski, Brooks and Oliver's research into the type of experience regarded as most important by Australian independent directors revealed that 89.4% of respondents considered business experience as important, contrasted to 42.7% who thought that previous board experience was required.⁸² This research into ASX 100 board skills returned similar low results for the disclosure of board experience,⁸³ but revealed that industry experience was a skill disclosed by 91% of boards. It is submitted that industry experience could be beneficial and perhaps crucial in some cases to allow the directors to appropriately monitor and direct the company, that in turn requires of them to set the corporate strategy. In this regard, Recommendation 5 and Recommendation 8 of the "Corporate Governance in UK Banks and Other Financial Industry Entities" (Walker Review) are relevant, indicating that in financial institutions banking experience is very important in the recruitment, selection and interview process for NEDs.⁸⁴

⁷⁷ *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* (1990) 3 ACSR 207, 225.

⁷⁸ *Corporations Act 2001* (Cth) ss 189, 190; K O'Donnell et al, "Getting it Right: Director's Assessment of Information" (2015) 30(2) *Managerial Auditing Journal* 117, 120, 122, 124–126; J Cassidy, "James Hardie: The Resurrection of Re City Equitable and Beyond?" (2009) 37 ABLR 312, 317–319.

⁷⁹ R Fisman et al, "Governance and CEO Turnover: Do Something or Do the Right Thing?" (2014) 60(2) *Management Science* 319, 319, 321, 322; NF Sharpe, "Questioning Authority: The Critical Link Between Board Power and Process" (2012) 38(1) *The Journal of Corporation Law* 1, 4, 5, 13.

⁸⁰ Khurana, n 5, 83, 84, 90, 95, 96, 105, 106; J Marcel, AP Cohen and GA Ballinger, "Are Disruptive CEO Succession Viewed as a Governance Lapse? Evidence from Board Turnover" (2017) 43(5) *Journal of Management* 1313, 1314, 1315; Sharpe, n 79, 5, 13; TW Fitzsimmons and V Callan, "CEO Succession: A Capital Perspective" (2016) 27 *The Leadership Quarterly* 765, 770, 775–776.

⁸¹ See, eg B Gibson and D Brown, "ASIC's Expectations of Directors" (2012) 35(1) *UNSW Law Journal* 254, 259–261; JS Keeves, "Directors' Duties – ASIC v Rich – Landmark or Beacon?" (2004) 22 C&SLJ 181, 183–185, 188; T Josev, "Tailoring Directors' Duties to 'Contemporary Community Expectations': New Directions for the Courts Post-ASIC v Rich" (2004) 22 C&SLJ 553, 554–555; Flint, n 70, 201, 206.

⁸² Veljanovski, Brooks and Oliver, n 3, 48–49.

⁸³ See Table 2: listed company board experience, 14%; board experience, 13%; NED experience, 13%.

⁸⁴ D Walker, "A Review of Corporate Governance in UK Banks and Other Financial Industry Entities" (UK Government, 2009) 15.

The Centro-liability Case and Financial Literacy

The discussion above, in reference to *AWA Ltd v Daniels*, *Francis v United Jersey Bank*, *ASIC v Rich* and *Commonwealth Bank of Australia v Friedrich*, explains why the obligation to become and remain familiar with the business of the company is centremost to the objective duty upon all directors. Within this duty, *ASIC v Rich* emphasised the obligation to pay attention to the financial affairs of the company. *ASIC v Healy* (the “Centro-liability case”) was instrumental in formulating financial literacy as a key component of the duties of all directors. The case focused on the misclassification of \$1.5 billion of interest-bearing debt as being non-current, while these were in fact due and payable soon after the release of the Centro group’s 2007 annual report,⁸⁵ ultimately resulting in its demise when it became unable to service the debt.

Central to the proceedings was how the directors of a large listed company should “apply their own minds to, and carry out a careful review of, the proposed financial statements and the proposed directors’ report”⁸⁶ to ensure that it was consistent with their knowledge of the affairs of the company. Middleton J determined the directors must *read, understand* and *consider* if the financial statements and directors’ report agree with their knowledge of the corporation before expressing an opinion thereon, as is required by s 295(4) of the *Corporations Act*.⁸⁷ His Honour’s decision made it clear that the adoption of the annual financial statements is a non-delegable act on the part of each director.⁸⁸ They should use all their accumulated knowledge in carrying out these roles and functions and must maintain familiarity with the financial status of the corporation, even if this falls outside of their particular field of expertise.⁸⁹ While the application of many accounting standards nowadays involve complexity,⁹⁰ the classification of debt between the short and long term does not. Hence, the financial literacy enunciated by Middleton J focuses on basic accounting knowledge,⁹¹ and does not imply accounting or financial competence “beyond that of the honest and competent director”.⁹²

Diligence and Skill

Returning to Austin J’s conception of diligence, in practical terms, while executive directors are continuously involved in the day-to-day activities of the company, the diligence of NEDs is often linked to an intermittent time commitment associated with predetermined scheduled board meetings.⁹³ So too is it associated with the regularity of board committee meetings as the ASX Code recommends that audit committees should consist solely of NEDs, nomination and remuneration committees of a majority of independent directors, and risk committees of a sufficient number of independent directors.⁹⁴

In *Daniels v Anderson*, Rodgers J considered that case law had established that a director is not bound to attend all board meetings, though they “ought to attend whenever, in the circumstances, he is

⁸⁵ *ASIC v Healey* (2011) 196 FCR 291, [9], [10].

⁸⁶ *ASIC v Healey* (2011) 196 FCR 291, [13].

⁸⁷ *Corporations Act 2001* (Cth) s 295(4).

⁸⁸ *Golding*, n 36, 278–279.

⁸⁹ *ASIC v Healey* (2011) 196 FCR 291, [13], [15], [16], [17], [18], [21].

⁹⁰ See, eg Robert Bruce, Interview with David Tweedie, Chairman of the International Accounting Standards Board (Institute of Chartered Accountants in England and Wales, 17 October 2010); EW Trott, “The Struggle to Simplify Accounting”, *cfo* (online), 22 January 2015 <<http://ww2.cfo.com/gaap-ifs/2015/01/struggle-simplify-accounting/>>.

⁹¹ *ASIC v Healey* (2011) 196 FCR 291, [206], [288].

⁹² *Healey and ASIC* [2000] AATA 9, 10.

⁹³ S Cole, “Mind the Expectation Gap: The Role of a Company Director” (White Paper, Australian Institute of Company Directors, 2012) 20, 21.

⁹⁴ ASX Corporate Governance Council, n 6, 6, 14, 29, 31.

reasonably able to do so”.⁹⁵ In *Vrisakis v ASIC* Malcolm CJ suggested that the expectation of modern company directors is that they attend “all meetings unless exceptional circumstances, such as illness or absence from the State prevent him or her from doing so”.⁹⁶

Attendance at meetings is influenced by the time that directors are able, or willing to devote, to the company’s affairs. Neither the *Corporations Act* nor the ASX Code sets a standard for the hours that directors should devote to their role. In fact, little Australian-specific guidance on director time commitments is available. While the Australian National Employment Standards contained in the *Fair Work Act 2009* (Cth) limits full-time employment hours to 38 hours per week, executive director employment agreements can contain an acknowledgment that they may be required to exceed this standard.⁹⁷ Insofar as NEDs are concerned, BHP Billiton Ltd (dual listed on the ASX and London Stock Exchanges, and usually amongst the largest 20 companies by market capitalisation on these exchanges) requires a time commitment of at least 50 days per year.⁹⁸ Elsewhere, Recommendation 3 of the Walker Review suggests that an appropriate time commitment for NEDs in large UK banks should be 30–36 days per year.⁹⁹

Directors’ ability to diligently apply their skills is also influenced by the extent to which they may be “over-boarded”. Unsurprisingly, the *Corporations Act* does not impose a limit on the number of directorships that may be held. Similarly, the ASX code is absent of recommendations. But there is a legal obligation to disclose all board positions held by listed company directors.¹⁰⁰ Over-boarding is an important consideration for shareholders when they express their appointment rights, evident from the policies adopted by proxy advisors such as Institutional Shareholder Services, a leading global proxy advisory service. Their current practice applied to Australian listed companies is to support director elections where the upper limit of a NED’s board positions is five, with any appointment held as chair counted as two.¹⁰¹

Constructing a Model of the Minimum Skills Required of Directors of Large Listed Companies

Based on the analysis and discussion above, the authorities have, arguably, not resulted in the articulation of skills required by *all* directors. What is clear is that *all* directors stand under two specific non-delegable obligations when they discharge their duties with care and diligence. First, each of them must become, and remain familiar with, the business of the company. Secondly, each of them must read, understand and consider if the financial statements and directors’ report agree with their knowledge of the corporation.

But, using a deductive approach – taking into account the two obligations, the role that risk plays in how directors discharge their duty of care and diligence, and considering the intermittent practical participation of NEDs – a conceptual model of the minimum skills applicable to all directors of large listed companies can be extrapolated. The model, presented in Table 3, links each proposed skill to relevant purposes associated with the duties of directors of large listed companies that emerged from the analysis and the discussion of case law presented above.

⁹⁵ *Daniels v Anderson* (1995) 37 NSWLR 438, 601.

⁹⁶ *Vrisakis v Australian Securities Commission* (1993) 11 ACSR 162, 170.

⁹⁷ JHC Colvin, J Turnbull and M Blair, *Executive Appointments and Disappointments* (Australian Institute of Company Directors, 2013) 42–43.

⁹⁸ BHP Billiton, *Letter of Appointment NED* (17 February 2017) <https://www.bhp.com/-/media/documents/ourapproach/governance/170914_termsofappointmentofnonexecutivedirectors.pdf?la=en>; BHP Billiton, *FAQs* <<https://www.bhp.com/investor-centre/shareholder-information/faqs>>.

⁹⁹ Walker, n 84, 14.

¹⁰⁰ *Corporations Act 2001* (Cth) s 295(11)(e).

¹⁰¹ Institutional Shareholder Services, *Australia Proxy Voting Guidelines Update: 2015–2016 Benchmark Policy Recommendations* (2015) 8.

TABLE 3. Conceptual Model of the Skills of Listed Company Directors

Skill	Purposes associated with the skill	Examples of skills evidence
Leadership	Managing and directing the business of the company Appointing a CEO able to operationalise board strategy Guiding the executives and management Setting clear strategic goals	Board experience
Business acumen	Understanding the business Becoming familiar with the fundamentals of the business Remaining reasonably familiar with the business Bringing an independent judgment to bear on matters before the board	Experience in similar businesses Experience in the same industry Executive experience Business background
Financial literacy	Understanding the financial statements and directors' report Remaining familiar with the financial status of the company Remaining up to date with the financial affairs of the company Forming an opinion about the financial position of the company	Financial, accounting, auditing qualifications Board experience
Oversight and delegation	Monitoring the executives and management Monitoring the affairs of the company Bringing an independent judgment to bear on matters before the board Appointing a CEO able to operationalise board strategy Guiding the executives and management Recognising significant risks	Board experience Executive experience Business background Experience in the same industry
Risk management skills	Bringing an independent judgment to bear on matters before the board Applying an appropriate degree of inquiry Balancing foreseeable risk and the potential benefits arising from it	Experience in executive director or senior management positions Board experience Experience as member of a board audit committee or risk committee Business background
Change management skills	Keeping up to date with developments in business Remaining reasonably familiar with the way that the business changes Assessing the impact and risk of change in the business Proactively considering the impact of change on the business and business strategy	Evidence of ongoing formal skills renewal Experience in the same industry Reputation as change agent Entrepreneurial endeavours
Strategy skills	Guiding the executives and management Directing the business of the company	Board experience Executive experience Management consultancy experience
Legal skills	Understanding their legal duties, which are complex and require interpretation of case law as evidenced from the analysis and discussion above	Board experience Legal qualifications Corporate governance qualifications

The proposed model of the eight skills required of all directors of large listed companies is the result of a conceptual legal approach, largely unaffected by other circumstances relevant to each company. While the specific skills required to perform specific duties remain relevant to the circumstances of each

director (less so in the case of NEDs who rarely have specific duties), these ought to be layered over the presence of the eight skills in the model.

HOW DO ASX 100 COMPANIES FARE AGAINST THE MODEL?

If it is accepted that the eight skills proposed in the model are relevant to all directors of large listed companies, it is now possible to assess how ASX 100 company boards fare when their disclosed skills are compared to the proposed conceptual standard for director skills. The results of the comparison are presented in Table 4.

Table 4 was constructed by placing the eight skills included in the model on the x-axis. Next, each of the 22 categories of disclosed ASX 100 board skills presented in Table 2 were classified into four categories, shown in bold print on the y-axis. The first category represents those disclosed ASX board skills with descriptions that largely match that of the eight skills in the model. The second category represents those ASX board skill descriptions that largely match any proposed purposes associated with the eight skills as described in Table 3.

By way of clarification, the ASX board skill description “remuneration, human resources, people matters” was associated with the purpose attached to “legal” skills due to the significant presence of human resources-related duties typically assigned to boards in the ASX Code, some of which are connected to the *Corporations Act*,¹⁰² while others are likely governed by the complex area of labour law. Secondly, this skill description was also associated with the purpose attached to “leadership” and “oversight and delegation” on the basis that the board’s role in appointing a CEO is one of its most important responsibilities. The ASX board skill description “technology, digital, innovation” was associated with the purpose of “change management”, representing a significant manifestation of change in most businesses. Technology must reside prominently with the board,¹⁰³ and as a consequence it is the board’s responsibility to increase their understanding of technology and its associated risks so that the company’s strategy adapts accordingly.¹⁰⁴ Lastly, the ASX board skill description “communication, stakeholder engagement, public relations” was associated with the purpose attached to “legal” skills considering directors’ obligations in relation to ongoing disclosure as conceived in the *Corporations Act*.¹⁰⁵

TABLE 4. Comparison of Conceptual Director Skills to Disclosed ASX 100 Board Skills

Model skills →	Leadership	Business acumen	Financial literacy	Oversight and delegation	Risk management	Change management	Strategy	Legal
ASX 100 skills with matching descriptions to those proposed in the model								
Executive leadership, leadership, executive experience, management	95%							
Financial expertise, understanding, capability			49%					
Financial literacy, acumen			46%					
Strategy, strategy implementation							75%	

¹⁰² See, eg the directors’ right to appoint a managing director: *Corporations Act 2001* (Cth) s 198C.

¹⁰³ See, eg Institute of Directors in Southern Africa, n 21, 6, 41, 62–63; T Voogt, “Tall Trees and Digital Literacy: Lessons from *Palkon v Holmes*” (2017) 31(3) *Australian Journal of Corporate Law* 344, 344, 354–357.

¹⁰⁴ Deloitte Global Center for Corporate Governance, *Courage Under Fire: Embracing Disruption* (Deloitte, 2017) 18; Ernst & Young, *Digital Savvy Boards – How Important Are They?* (Board Matters, 2016) <<http://www.ey.com/au/en/issues/business-environment/ey-boardmatters-digital-savvy-boards-how-important-are-they>>.

¹⁰⁵ See, eg *Corporations Act 2001* (Cth) ss 295, 298, 299, 674.

TABLE 4. *continued*

Risk, risk management					72%			
Legal								37%
ASX 100 skills associated with the purpose of the skills proposed in the model								
Governance, corporate governance, regulations, government relations				95%				95%
Remuneration, human resources, people matters	72%			72%				72%
Technology, digital, innovation						59%		
Communication, stakeholder engagement, public relations								14%
Judgment, integrity				4%				
ASX skills or tools that build business acumen								
Industry experience		85%						
International or global experience		59%						
Listed company board experience		14%						
Board experience and efficiency in board operations		12%						
NED experience		12%						
ASX skills not directly associated with the skills proposed in the model								
Capital management, funds management, mergers and acquisitions, investment management, joint ventures								72%
Corporate social responsibility, ESG principles, health and safety								49%
Customers, marketing								44%
Diversity, gender diversity								7%
Culture								7%

The third category in Table 4 focuses on one skill in the model – business acumen. ASX board skill descriptions that represent tools that would result in business acumen are listed in this category. The last category lists those ASX board skill descriptions that could not be associated with any of the eight skills in the model. The percentages included in Table 4 represent the frequency with which each ASX board skill description is disclosed by the ASX 100, taken from Table 2.

Taken overall, the comparison presents clear evidence that there is divergence between disclosed board skills amongst ASX 100 companies and the proposed legal standard of director skills in listed companies. While this overall finding does not imply that directors' actual skills are different to the proposed legal standard, it nevertheless raises a number of related questions and highlights significant risks for large listed company boards and directors in Australia.

First, not one ASX 100 board disclosed the presence of all the skills included in the model, whether directly or associated with the purpose of each skill. This position draws into question whether NED-dominated boards have an appropriate understanding of the standard of skills against which each director's conduct is assessed. If this is in fact the case, the position may be attributed, in part, to limited case law dealing specifically with the skills required of NEDs. This is the case even in reference to the one clearly enunciated skill required to meet the one "specialist" duty that all directors have – financial literacy; not all ASX 100 boards disclose that they have this skill, whether nuanced as a basic or expert level skill. This finding may point to a lingering problem within the wider economy that individual board member's ability to read, understand and consider financial statements and directors' reports have not yet been fully addressed in Australia, despite the significant attention given to this obligation following the Centro-liability case.

Secondly, skills matrices can act as an important self-assessment tool for boards. Any misconception about the skills relevant to *all* directors points to a fundamental and underlying risk that directors may not be appropriately equipped to fulfil their duties, or may be focusing their professional development activities in less fundamental areas. As directors invariably rely on each other, it may be that using a skills matrix as basis for their reliance on each other may be misplaced.

Thirdly, if it is assumed that the directors of the largest listed companies in Australia are in fact appropriately skilled, it may be that skills matrices are presented in annual reports and corporate governance statements to meet the ASX Code's disclosure recommendations, more so than being a genuine representation of board skills. Associated with this concern is the risk that shareholders may assume that director recruitment references disclosed board skills. It may be that the board uses an entirely different tool to fulfil its obligations in relation to director recruitment and board composition. If that is so, it draws into question how boards give shareholders an adequate understanding of the skills used as a benchmark against which they propose nominees. Even though the directors act as appointment agents for the shareholders, the shareholders should nevertheless be placed in a position to bring them to account. If skills matrices are not relevant as a recruitment benchmark, that point should be clarified.

Fourthly, in some matrices, tasks are ostensibly viewed as skills, since several functional business areas are used to describe director skills (eg human resources, marketing). It is submitted that this approach has the potential to widen the expectation gap between the oversight-focused, intermittent, actual work of NEDs and the perception that boards make functional decisions and are involved in the day-to-day activities of the company. While experience in functional business areas has relevance in relation to the skill of business acumen, merely listing functional areas as skills does not clarify how particularly NEDs will use these skills in fulfilling their duties.

Fifthly, whether in reference to case law, or in reference to recommended board roles and responsibilities presented in the ASX Code, NED-dominated large company boards are far removed from the day-to-day activities but remain responsible for these. It is thus essential that they are able to set and communicate clear and appropriate strategy, and are able to apply strong risk-management skills to anticipate, identify and assess the risk of harm against the company. The finding, taken from Table 4, that strategy and strategy implementation, and risk and risk management are disclosed in less than three-quarters of skills matrices is concerning.

On the positive side, ASX 100 boards have a clear understanding of the important role that experience plays in making directors suitably skilled for the position. Five different nuances of experience were found in ASX 100 skills matrices, with industry experience disclosed in 85% of matrices. It is also significant to note that 49% of boards pay attention to skills around corporate social responsibility, environmental, social and governance (ESG) principles, health and safety. Despite corporate social responsibility being a contested and elusive concept, it has existed in one form or another since the 1950s, and there have been several developments over the past 10 years that have resulted in boards giving significant attention thereto.¹⁰⁶ Even if it is argued that board attention is focused on disclosure (eg in sustainability reports, though these are not yet mandatory in Australia) and transparency and dialogue about ESG factors, these aspects are nevertheless related to the directors' obligation to work towards long-term shareholder wealth as there has been exponential growth in institutional investors committed to considering ESG factors in their investment decisions.¹⁰⁷ The Commonwealth Corporations and Markets Advisory Committee's 2006 report entitled "The Social Responsibility of Corporations" devotes a chapter to directors' duties towards social responsibility and, in the context of s 180 of the *Corporations Act*, frames this against their duty to consider the risk of foreseeable harm.¹⁰⁸

¹⁰⁶ Farrar and Hanrahan, n 3, 547–548; Australasian Investor Relations Association, "ESG Engagement: Recommended Practices for Listed Entities – Navigating the New Landscape of Heightened Investor Scrutiny" (2017) 9–10.

¹⁰⁷ ASX Corporate Governance Council, n 6, 30; Australasian Investor Relations Association, n 106, 9; Institute of Directors in Southern Africa, n 21, 5, 33, 97.

¹⁰⁸ Corporations and Markets Advisory Committee, "The Social Responsibility of Corporations" (2006) 90.

Lastly, “diversity” appears as a skill in 7% of matrices. It may be argued that diversity is currently more focused on *reportage* about change, expressing how board composition shows increasing gender, race and ethnic representation, rather than to explain how diversity impacts shareholder value. For example, the Australian Institute of Company Directors set the target that by 2018 ASX 200 company boards should be comprised of 30% women.¹⁰⁹ Nevertheless, there is evidence of a value proposition in diversity.¹¹⁰ For one, the differences in directors’ knowledge, skills, experience, age, culture, race and gender can counteract “groupthink”;¹¹¹ groupthink negatively impacts the independent judgment that directors should bring to bear on decisions before them. While there is an expectation that *all* directors should have a core set of skills along the lines of those proposed in the model developed in this article, board diversity relies on differences between individual directors to have a positive whole-board outcome. There is thus a tension between the obligation of each director to meet the legal skills standard and the notion that “[t]he modern board of directors thus is properly understood as a production team whose product consists of a unique combination of advice giving, ongoing supervision, and crisis management”.¹¹²

AN INDEPENDENT MIND, GROUP FIT AND GROUPTHINK

The differences in the knowledge, skills, experience and perspectives of directors work against bounded rationality at board level,¹¹³ suggesting that it would be inappropriate to use one mould from which to cast all “perfectly skilled” directors. Expanding on this analogy, while all directors ought to have the same core skills frame, their outer layers should be different.

In large listed companies where CEOs may still significantly influence board composition, even in the presence of independent NED-led nomination committees, differences, particularly in director backgrounds to counter board CEO capture through network appointments, are particularly important.¹¹⁴ There is a risk, though, that the differences between directors are so pronounced that they are unable to work together effectively. Elms, Nicholson and Pugliese defined “group fit” as “interpersonal compatibility between individuals and their work group”.¹¹⁵ Given the intermittent nature of the role of NEDs, they must be able to work together effectively. Their ability to work together has a follow-on effect on the level of trust that must exist between them (as they invariably rely on each other), and between the board and the executive team. The “group fit” between the directors may consequently be as important as the independent mindset and different perspectives they bring to their role.

However, the coherence in or influence of the group over individual conduct has proven to be “a major obstacle in translating the statutory model of director primacy into the real world of corporate governance”,¹¹⁶ if it results in flawed independent thought, prejudice or a desire to achieve a comfortable early consensus that are all characteristics of “groupthink”.¹¹⁷ In short, while diversity of gender, race,

¹⁰⁹ Deloitte Global Center for Corporate Governance, *Women in the Boardroom: A Global Perspective* (5th ed, 2017) 34–35.

¹¹⁰ See, eg Kamalath, n 6, 91–92; Klettner, Clarke and Boersma, n 6, 139, 161.

¹¹¹ Institute of Directors in Southern Africa, n 21, 12; J Roberts, T McNulty and P Stiles, “Beyond Agency Conceptions of the Work of the Non-executive Director: Creating Accountability in the Boardroom” (2005) 16 *British Journal of Management* S5, S9; Financial Reporting Council, n 13, 2, 11, 14; United Kingdom, House of Commons Business, Energy and Industrial Strategy Committee, n 5, 54–55, 65–66.

¹¹² Bainbridge, n 5, 161.

¹¹³ Bainbridge, n 5, 90–91.

¹¹⁴ Khurana, n 5, 83–84; Fisman, n 79, 321–322; Sharpe, n 79, 13; B Balsmeier, A Buschwald and S Zimmermann, “The Influence of Top Management Corporate Networks on CEO Succession” (2013) 7 *Review of Managerial Science* 191, 192, 197, 217; DH Zhu and JD Westphal, “How Directors’ Prior Experience with Other Demographically Similar CEOs Affects Their Appointment Onto Corporate Boards and Consequences for CEO Compensation” (2014) 57(3) *Academy of Management Journal* 791, 796, 807.

¹¹⁵ N Elms, G Nicholson and A Pugliese, “The Importance of Group-fit in New Director Selections” (2015) 53(6) *Management Decision* 1312, 1312.

¹¹⁶ Bainbridge, n 5, 100.

¹¹⁷ S Wheeler, “Independent Directors and Corporate Governance” (2012) 27 *Australian Journal of Corporate Law* 168, 184.

ethnicity, backgrounds, skill and experience acts to counter groupthink, “too much” diversity also has negative consequences if it works against “group fit”.

CONCLUSION AND RECOMMENDATIONS

In Australia the skills that listed company boards have, or aspire to have, have become a matter of public record through the disclosure of board skills matrices recommended in the ASX Code. This article detailed the results of an analysis of the skills matrices disclosed by ASX 100 companies, revealing that there is no one skill disclosed by all ASX 100 boards seen as essential to their role. As far as disclosed board skills go, there is seemingly no absolute consensus about the contemporary skills required to direct large listed companies. Beyond this finding, there is broader consensus that four skills are important to most ASX 100 boards. At least three quarters disclose the following skills: governance; executive leadership; industry experience; and strategy and strategy implementation.

Similarly, this article presented evidence that there is no direct consensus about the legal standard for the skills required of NEDs, who overwhelmingly dominate large listed company boards. Case law does, however, allow for the conceptualisation of a model of the skills required of directors of large listed companies. The model presented in this article puts forward the proposition that all directors of large listed companies should have eight skills: leadership; business acumen; financial literacy; oversight and delegation; risk management; change management; strategy; and legal skills. As such, the model makes a theoretical contribution to a deeper understanding of the skills required of NEDs who are often not assigned specific tasks requiring specific skills.

The model is instrumental in the overall finding presented in this article that disclosed board skills in ASX 100 companies are different to the proposed legal standard applicable to all directors. While it may be that disclosed board skills are different to practical director skills, this finding nevertheless draws into question whether boards, and importantly individual directors, have a sufficient understanding of the skills legally required of them that may result in five significant risks discussed above.

To address these risks, three key recommendations are proposed. First, whether spearheaded by ASIC, the ASX or the business sector, corporate governance in Australia will benefit from a robust discussion that seeks to better align practical board skills and directors’ legal duties. While director skills invariably evolve and adapt to changing business conditions, there is nevertheless an expectation that these should support conduct that passes a legal standard, objectively assessed. This article has shown the difficulties that exist in defining a legal standard of the skills applicable to NEDs who are usually not assigned specific duties. This position compounds the existing pressures on the pool of possible NEDs in Australia who find themselves in an increasingly complex regulatory environment.

Secondly, skills matrix disclosure, simply for the sake of compliance with the ASX Code, achieves little. Boards should consider using more narrative in conjunction with their skills matrices to clarify how a matrix was developed, whether it is relevant to director recruitment, to disclose the extent to which individual directors in fact have the disclosed skills and how those relate to a legal standard.

Thirdly, governance and disclosure practices in Australia can benefit from more focused recommendations in future iterations of the ASX Code setting out best practice for the skills of directors using a conceptual legal framework. More focused skills recommendations have several practical benefits: a) they act as a tool that can increase board accountability for board composition; b) they increase boards’ understanding of the essential skills required to manage and direct a company; and c) they can assist in closing the gap that exists between perceptions of what directors do, compared to their actual oversight and leadership-focused role. It is within this expectation gap that the fundamentally flawed idea exists that skilled directors never fail.