



UNSW Business School

A new line of sight, or a glass darkly? An update on the regulatory environment

Professor Pamela Hanrahan
AICD Australian Governance Summit
Sydney, March 2020

Truth in advertising...

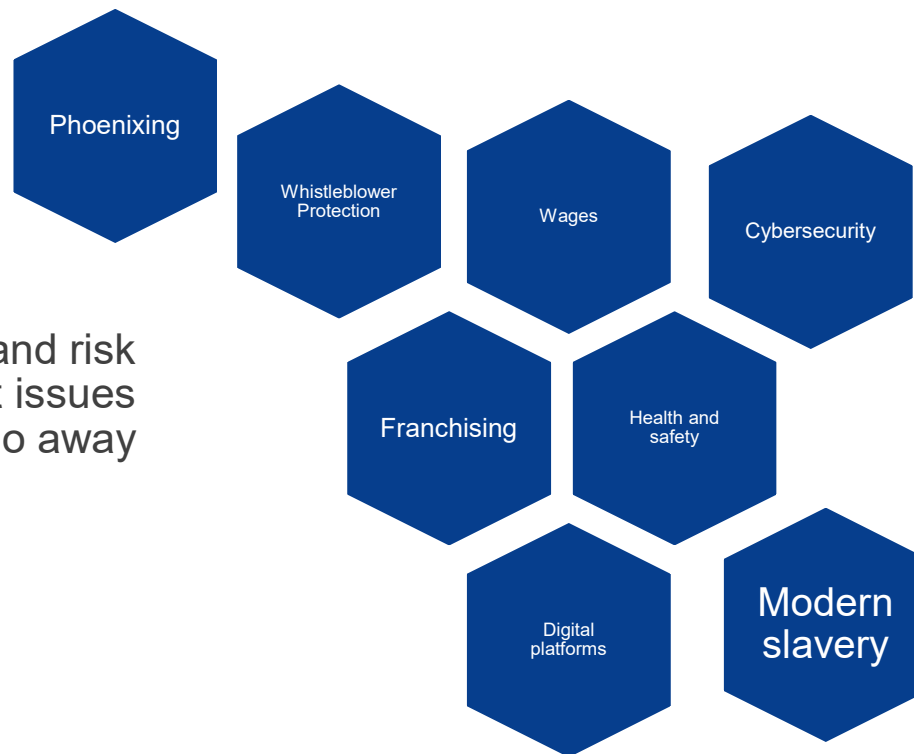
A rapid update:

- Developments in the director liability and regulatory environments
- Issues impacting director and manager responsibilities
- Future trends

Keep an eye on:

- Implementation issues in recent reforms
- Legislative program from the Hayne Royal Commission, which is having flow-on implications (including FAR)
- ALRC's corporate criminal responsibility reference
- Reporting and disclosure, including about climate risk
- Enforcement – where's the risk?

Implementation and risk
management issues
never go away



Word of the year – purpose?

- If last year's word was 'culture', is this year's 'purpose'?
- The US Business Roundtable seems to think so. It said, 'While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders' – naming customers, employees, suppliers, communities, and shareholders. The upshot is: 'We commit to deliver value to all of them, for the future success of our companies, our communities and our country'.
- The narrative around purpose is changing – the question for me is whether this has legal as well as governance implications. In other words, are we legally required or permitted to do (or not do) something different?
- There is a debate we are **not** having (but should) about the purpose of business regulation – what can and should the law and regulators do?

Post-Hayne legislative agenda

- Predictably, there is a raft of sector specific legislative reform
- But the big picture issue is the process and quality of that reform. How do we get better, not just more, law?
- Commissioner Hayne talked about the difficulties of simplification, but he said, 'the very size of the task shows why it must be tackled'
- What is the 'downside' of certainty and safe-harbours?



The BEAR (still) matters

- In 2018 we said: “The BEAR matters, even if you are not a director or senior executive of an ADI. If it comes in, the temptation to extend that approach to other sectors may be strong”
- Remember for individual officers and executives it is about accountability mapping, accountable person obligations, remuneration, and disqualification
- In 2019, we repeated that comment
- In 2020, we have the FAR on the table



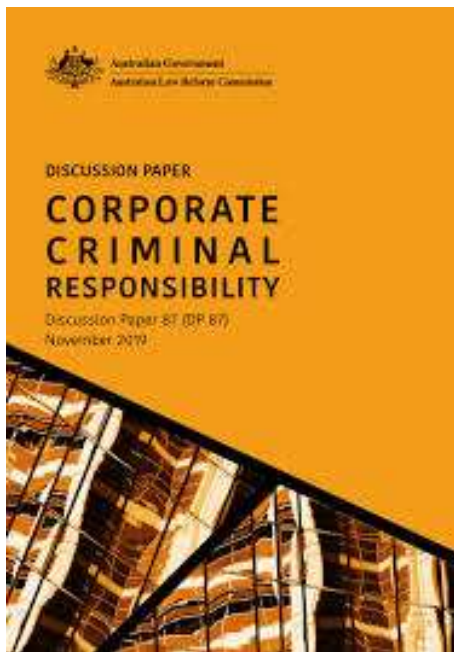
A bridge too...



Treasury's FAR proposal paper floated three things that should be watched very closely by all directors and executives

- The first was to turn the accountability obligations into civil penalties
- The second was to allow the regulators to decide who it would apply to
- The third was to allow the Minister to extend it to other FS entities without going back to Parliament

The ALRC inquiry



Key issues to watch:

- When a corporation is liable for something done by a person associated with it (the attribution issue)
- When an executive is responsible for an offence committed by the corporation (the personal liability issue)
- The burden of proof point – like s 8Y of the *Taxation Administration Act*

Climate, equity, justice: disclosure?

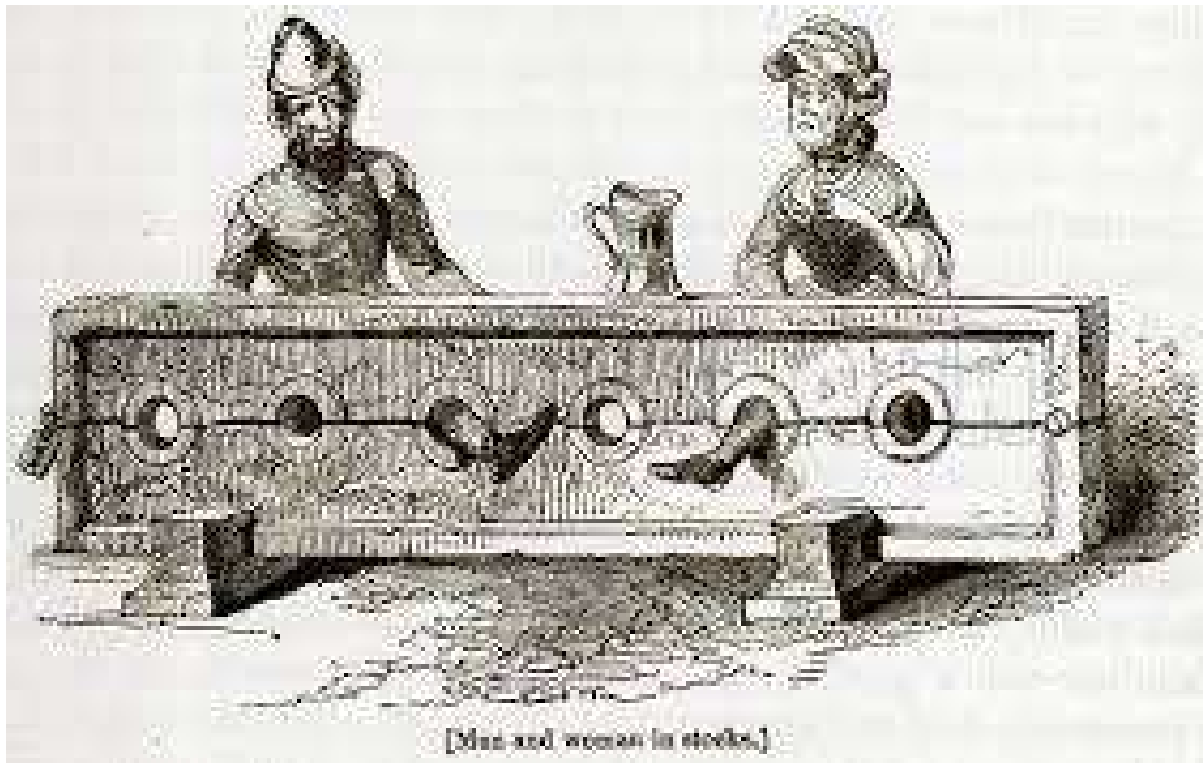
- An ESG issue or a financial issue?
- Towards standardised reporting: alignment between reporting frameworks based the the Task Force on Climate-related Financial Disclosures (TCFD) recommendations
- Why report? What is it achieving?
- What are the outstanding liability issues in the Australian corporate reporting framework – misleading or deceptive conduct plus securities class actions?

BlackRock CEO says:

BlackRock has been engaging with companies for several years on their progress towards TCFD- and SASB-aligned reporting. This year, we are asking the companies that we invest in on behalf of our clients to: (1) publish a disclosure in line with industry-specific SASB guidelines by year-end, if you have not already done so, or disclose a similar set of data in a way that is relevant to your particular business; and (2) disclose climate-related risks in line with the TCFD's recommendations, if you have not already done so. This should include your plan for operating under a scenario where the Paris Agreement's goal of limiting global warming to less than two degrees is fully realized, as expressed by the TCFD guidelines.

Regulators and regulatory overlap





Looking forward – accountability in NFPs?

Is there an accountability deficit in NFP?

Interim report of the Aged Care Royal Commission said:

It is time for a reality check. The aged care sector prides itself in being an 'industry' and it behaves like one. This masks the fact that 80% of its funding comes directly from Government coffers. Australian taxpayers have every right to expect that a sector so heavily funded by them should be open and fully accountable to the public and seen as a 'service' to them.

- The final report is due in November 2020, with the Disability Royal Commission to report in April 2022

