Indecent Exposure: Liability of Responsible Persons

28 February 2014

SPS 520 and SRS 520 require RSE licensees to identify those individuals involved in the operation of their superannuation funds who are their 'responsible persons'. Many (but not all) of those responsible persons are 'officers' of the RSE licensee for corporate law purposes. Whether or not a responsible person is an officer depends on the role they play in decision-making within the RSE licensee; the definition captures directors and senior managers, but not executive officers. Those captured by the definition are subject to the statutory duties imposed by Pt 2D.1 of the Corporations Act, including a duty of care and diligence. The standard of care expected of officers of RSE licensees under the Corporations Act reflects the high standard of care required of the RSE licensee itself as a professional trustee company. The recent 'stepping stone' cases brought by ASIC in the corporate law sphere suggest that failure by an officer to take reasonable care to prevent the jeopardy to the RSE licensee that can result from it breaching its statutory and general law obligations as a superannuation trustee could result in the officer being subject to a range of sanctions, including civil penalties and disqualification. Importantly, this is so even though these sanctions do not flow directly from breach of the 'reasonable care' covenants imposed on directors (but not other officers) by section 52A of the SIS Act.

Speaker:
Associate Professor Pamela Hanrahan
Melbourne Law School
P: + 61 2 8741 2501
E: p.hanrahan@unimelb.edu.au

Introduction

It is axiomatic that individuals who hold positions of responsibility in RSE licensees should be fit and proper to hold those positions. The operation of a superannuation fund is not an ordinary commercial business, nor is it an activity for well-meaning but unskilled amateurs or cynical careerists. There is little worse – as an adviser, a regulator or a fellow participant in the superannuation sector – than to sit across the table from someone you realise is a charlatan, or unqualified, or blinded by self-interest, when that person is making or implementing decisions that affect not only the future financial wellbeing of individual fund members, but also the strength and sustainability of Australia's broader retirement income policy. Well, perhaps there is something worse – coming to the realisation that the fund's board, whose job it should be to ensure these people have no place in the system, either cannot or will not see it.

Let me repeat that point. Persons who hold positions of responsibility in RSE licensees should be fit and proper to hold those positions. This is a lesson bitterly learned, for fund members and the revenue, from the collapse of Trio Capital in 2009.[1] After reforms made to the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) in 2012,[2] Australia now has a prudential standard in place requiring all RSE licensees to have a 'Fit and Proper Policy', approved by the board, under which the obligation to ensure that such persons are fit and proper sits with the RSE licensee itself. This is *Prudential Standard SPS 520 Fit and Proper* (SPS 520) made under section 34C of the SIS Act. Under the standard the RSE licensee is required to identify, and notify the Australian Prudential Regulation Authority (APRA) of, the people within the organisation who are its 'responsible persons'. The obligation to notify is contained in *Reporting Standard SRS 520.0 Responsible Persons Information* (SRS 520.0) made under section 13 of the *Financial Sector (Collection of Data) Act 2001* (Cth).

For the individuals identified as responsible persons under the standards, understanding their role and the legal duties and liabilities that flow from it is crucial. My longstanding research interest is in the way in which the general law (in particular, principles of equity) and the various statutes that govern financial services interact to 'responsibilise' individual

---

[1] For an explanation of Trio Capital, see Parliamentary Joint Committee on Corporations and Financial Services *Report: Inquiry into the collapse of Trio Capital* (May 2012); Department of Treasury *Review of the Trio Capital Fraud and Assessment of the Regulatory Framework* (2013); see also *R v Richard* [2011] NSWSC 866.

[2] *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth).

officers in companies that provide financial services, including RSE licensees. That is what I have been asked to look at today.

This paper considers three key questions for those identified as responsible persons, in light of some recent developments in corporate law. These are:

- Is a responsible person an 'officer' under the *Corporations Act 2001* (Cth) (Corporations Act)?
- If so, what then are the duties of a responsible person?
- What liability (if any) flows from a breach of duty?

The answer to the first question is: yes, in some cases but not all. Part II below explores the relationship between the statutory and general law definitions of 'officer' in company law, and the concept of the responsible person as it is defined in paragraphs 11 – 16 of SPS 520. In particular, it considers the way in which the definition of officer might be applied to responsible persons in light of the 2012 decision of the High Court in *Shafron v Australian Securities and Investments Commission*.[3]

The paper then goes on to ask, if a responsible person is an 'officer' for company law purposes, what consequences follow? Part III begins with a brief overview of the duties of officers of corporate RSE licensees, including the statutory duties imposed on directors and other officers by Pt 2D.1 of the Corporations Act, and the duties imposed on directors (but not other responsible persons) by section 52A of the SIS Act.[4]

It then focuses particularly on the way in which an officer's corporate law duty of care interacts with his or her obligations under trust law and superannuation law. Two important recent developments in the jurisprudence are considered. The first is the decision of Murphy J in December 2013 in the Prime Retirement Trust matter, dealing with the analogous duties of officers of a responsible entity of a registered managed investment scheme.[5] The second (and perhaps more significant) is emergence of the 'stepping stones' approach to enforcement in recent cases run by the Australian Securities and Investments Commission (ASIC). The stepping stone cases involve ASIC using section 180 of the

---

[3] (2012) 247 CLR 465; [2012] HCA 18 (*Shafron*).
[4] The duties and liabilities of directors of RSE licensees are discussed in P Hanrahan 'Directors' liability in superannuation trustee companies' (2008) 2 *Journal of Equity* 204. Note however that this article predates the introduction of the statutory covenants in section 52A(2) of the SIS Act.
[5] *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342.

Corporations Act to obtain civil penalties and disqualification orders against corporate officers in connection with failures by their companies to comply with certain regulatory requirements (including mandatory disclosure requirements). The discussion draws attention to the way in which principles of corporate law might result in sanctions being imposed on negligent officers of an RSE licensee in circumstances where those sanctions are not available directly under the superannuation laws themselves.

Part IV looks briefly at a related point, also arising out of recent developments in corporate law. This concerns the potential for responsible persons (whether or not they are officers of the RSE licensee) to incur personal liability by being concerned or implicated in a breach of duty by the RSE licensee. Because the RSE licensee is a fiduciary, it is important to understand (so far as we can) what the approach taken by the Court of Appeal in Western Australia in the *Bell Group* case[6] might mean for responsible persons, having regard to the second limb of the rule in *Barnes v Addy*.[7]

Part V concludes.

Officers

So, are responsible persons officers?

A responsible person of an RSE licensee is defined in paragraphs 11 – 16 of SPS 520. Paragraph 11 begins by specifying, for an RSE licensee that is a body corporate:

(a) a director of the RSE licensee;
(b) a secretary of the RSE licensee;
(c) a senior manager of the RSE licensee;
(d) an RSE auditor who is appointed to conduct any audit of an RSE for which the RSE licensee is trustee, or of any connected entity of the RSE licensee;
(e) an RSE actuary who is appointed to perform an actuarial function under RSE licensee law; and
(f) a person who performs activities for a connected entity of the RSE licensee where those activities could materially affect the whole, or a substantial part, of

[6] *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; [2012] WASCA 197.
[7] (1874) 9 LR Ch App 244 at 252; 43 LJ Ch 513.

the RSE licensee's business operations, or its financial standing, either directly or indirectly.

Paragraph 12 makes it clear that a person need not be an employee of an RSE licensee to be a responsible person if they are within one of the definitions in paragraph 11. In some circumstances a consultant, contractor or employee of another entity may be a responsible person.

Paragraphs 13 and 14 allow for APRA to make a written determination that a person is or is not a responsible person. In essence that determination turns on whether the person 'plays a significant role in the management or control of the RSE licensee', or their activities 'may materially impact on the interests, or reasonable expectations, of beneficiaries, or the financial position of the RSE licensee, any of its RSEs or connected entities, or any other relevant prudential matter'.

The next important definition in SPS 520 is 'senior manager' in paragraph 16, which means a person (other than a director of the RSE licensee) who:

(a) makes, or participates in making, decisions that affect the whole, or a substantial part, of the RSE licensee's business operations;
(b) has the capacity to affect significantly the RSE licensee's business operations or its financial standing;
(c) may materially affect the whole, or a substantial part, of the RSE licensee's business operations or its financial standing through their responsibility for:
    (i) enforcing policies and implementing strategies approved by the Board;
    (ii) the development and implementation of systems used to identify, assess, manage or monitor risks in relation to the RSE licensee's business operations; or
    (iii) monitoring the appropriateness, adequacy and effectiveness of risk management frameworks; or
(d) is otherwise an executive officer of the RSE licensee.

The footnote to paragraph 16(b) says that paragraphs 16(a) and (b) are intended to be interpreted consistently with the definition of 'senior manager' (in relation to a corporation) in

section 9 of the Corporations Act;[8] the footnote to paragraph 16(d) says that 'executive officer' has the meaning given in section 10(1) of the SIS Act.

It is clear that a person who comes within paragraph 11(a) or (b) (that is, a director or secretary) is an officer of the RSE licensee. Those described in paragraph 16(a) and (b) above are also caught. This is because the definition of an 'officer' in section 9 of the Corporations Act includes, among others:

(a) a director or secretary of the corporation; or

(b) a person:

  (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

  (ii) who has the capacity to affect significantly the corporation's financial standing; or

  (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).

A person described in paragraph 11(f) or 16(c) or (d) of SPS 520 will only be an officer of the corporation if they are within this Corporations Act definition.[9] Some but not all will meet this test.[10]

A person does not have to be the ultimate decision-maker to come with the Corporations Act definition of officer. In *Shafron*, the High Court adopted what some have considered an expansive interpretation of paragraph (b) of the Corporations Act definition of officer as it applies to people below board level.[11] The appellant in *Shafron* was the general counsel and company secretary of James Hardie Industries Ltd (JHIL). Because he was one of two company secretaries of JHIL, it is clear that he was caught by paragraph (a) of the definition; however the Court of Appeal in New South Wales had also concluded that he was within the

---

[8] That definition exactly mirrors paragraphs (b)(i) and (ii) of the Corporations Act definition of officer.
[9] For a detailed discussion of the Corporations Act definition of officer, see RP Austin and IM Ramsay *Ford's Principles of Corporations Law* 15th ed, LexisNexis Butterworths, 2013 at [8.020].
[10] It is unlikely that RSE auditors and actuaries, who are responsible persons by operation of paragraphs 11(d) and (e) of SPS 520, would be officers under company law principles.
[11] See T Bednall and V Ngomba 'The High Court and the C-suite: Implications of *Shafron* for company executives below board level' (2013) 31 *Company and Securities Law Journal* 6.

paragraph (b)(i).[12] The High Court was not required to decide the point because it considered that the appellant's duties as an officer extended to the discharge of all of his functions at JHIL including as general counsel and did not apply only to those functions that attached to the statutory office of secretary. However the plurality[13] did comment extensively on paragraph (b)(i) of the definition, at [23] – [27]. Their Honours made several points about the proper construction and application of paragraph (b)(i). These include the following observation, at [25]:

> [E]ach of the three classes of persons described in para (b) of the definition of "officer" is evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition. Persons identified in the other paragraphs of the definition all hold a named office in or in relation to the company; those identified in para (b) do not. Persons identified in the other paragraphs all hold offices for which the legislation prescribes certain duties and functions; those identified in para (b) do not. Persons identified in the other paragraphs of the definition are bound by the legislation to make certain decisions and do certain acts for or on behalf of the corporation; those identified in para (b) are identified by what they do (subpara (i)), what capacity they have (subpara (ii)) or what influence on the directors they have had and continue to have (subpara (iii)). There being these differences between para (b) of the definition and the other paragraphs (especially para (a)), it is not to be supposed that persons falling within para (b)(i) must be in substantially the same position as directors: those to whom the management and direction of the business of the company is usually… given.

The Court went on to consider what was necessary for a person to 'participate in making' decisions for the purposes of paragraph (b)(i). The appellant argued that his role was limited to providing advice and information to the board to enable it to make a decision, which was not sufficient to amount to participation in the making of that decision. In the event, the Court considered his role was not limited in that way, and that as one of the three most senior executives at JHIL he had 'played a large and active part in formulating the proposal that he and others chose to put to the board as one that should be approved'. The Court observed at [26] that:

> … participating in making decisions should not be understood as intended primarily, let alone exclusively, to deal with cases where there are joint decision-makers. The case of joint decision-making would be more accurately described as "making decisions (either alone or with others)" than as one person "participating in making decisions". Rather, as the Court of Appeal rightly held (at [892] – [893]), the idea of "participation" directs attention to the role that a person has in the ultimate act of

---

[12] *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205; [2010] NSWCA 331 at [894] – [898].
[13] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

> making a decision, even if that final act is undertaken by some other person or persons. The notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed…

The decisions in which the person participates must be ones that 'affect the whole, or a substantial part, of the business of the corporation'.

Therefore people who are senior managers within paragraph 16(a) and (b) are officers, and *Shafron* suggests a broad reading of what it means to participate in decision-making.

But paragraph 16(c) is wider, and people caught by it are likely not to be officers in the company law sense. It extends to people whose particular role – in enforcing policies or implementing strategies and in risk management – has the potential to affect 'materially' (as distinct from 'significantly') the whole, or a substantial part, of the RSE licensee's business operations or its financial standing.

And paragraph 16(d) is wider again. It refers to a person who is an 'executive officer' as that term is defined in section 10 of the SIS Act. This is, in relation to a body corporate, a person 'by whatever name called and whether or not a director of the body, who is concerned, or takes part, in the management of the body'.

The language in paragraph 16(d) is based on the definition of 'executive officer' that had appeared in the Corporations Act and its predecessors before the commencement of the CLERP 9 reforms in 2004.[14] There is considerable case law on what it means to be concerned in or to take part in management[15] that indicates it is a wider concept than any of the three used in paragraph (b) of the current definition of officer in the Corporations Act.[16] The omission of executive officers from the Corporations Act definition of officer is said to have resulted in an 'inadvertent narrowing' of the persons captured by this definition.[17] In the report documenting the failure of HIH Insurance, Owen J noted that 'the failure to include a person 'concerned in' management which was considered by [Ormiston J in *Bracht*] to have had a significant effect in expanding the scope of operation of the definition of 'executive

---

[14] *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).
[15] *Corporate Affairs Commission v Bracht* [1989] VR 821 (Ormiston J); *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474 (Burchett J); *Australian Securities and Investments Commission v Vines* (2005) 55 ACSR 671 (Austin J).
[16] I am grateful to Tim Bednall and Victoria Ngomba of King & Wood Mallesons for sharing their research on the (now repealed) definition of executive officer in the Corporations Act with me for the purposes of this paper.
[17] Corporations and Markets Advisory Committee *Corporate Duties Below Board Level* (April 2006) at 11.

officer', was a material omission' from the Corporations Act definition adopted in 2004. Justice Owen went on to observe that:

> … the deletion of that expansive terminology had the effect that the class of persons to whom the definition of 'officer of a corporation' applied was significantly smaller than the class of persons embraced by the definition of 'executive officer'. Further, in relation to the suggestions that [the new definition of "officer" in section 9] was intended to embody, in statutory terms, the decision of Ormiston J, it seems curious that the legislature would retain the definition of 'executive officer' in much the same terms, given that it was that definition, after all, to which the decision of Ormiston J was addressed.[18]

Further, as the High Court makes clear in *Shafron* at [27], in interpreting the current definition of officer 'very little assistance is to be had from considering decisions about the application of other statutory expressions such as those directed to whether a person is concerned in or takes part in the management of a company'.

So, in short, a person does not 'self-identify' as an officer of an RSE licensee for company law purposes simply by being named under SRS 520.0 as a responsible person of that licensee. However there is overlap between the two definitions. Those who are responsible persons because of the operation of s 11(a) and (b) and 16(a) and (b) are always officers. Those covered by paragraph 11(f) and 16(c) may well be, but only if they come with one of the three limbs of paragraph (b) of the Corporations Act definition as interpreted by the High Court in *Shafron*. Importantly, whether a person participates in making decisions of the required character to bring them within paragraph (b)(i) of that definition requires examination of what contribution that person actually makes to the making of a decision. However someone who is a responsible person only because they are an executive officer will not be an officer of the RSE licensee for company law purposes, and will not become one by the mere fact of notification to APRA under SRS 520.0.

Duties

This Part looks at the duties and liabilities of responsible persons who are officers of the RSE licensee. In understanding the pattern of officers' liability it is important to remember that some duties apply only to directors, some duties apply to directors and other officers, and some apply more generally, for example to all employees of the RSE licensee or to 'any person' engaging in conduct in relation to the fund.

---

[18] HIH Royal Commission, *The Failure of HIH Insurance* (April 2003) Vol I at 124 - 5.

The focus here is on the statutory duties imposed on directors and other officers by the Corporations Act, and on directors by the SIS Act. Corporate officers also owe duties to their company at general law, including a duty of care and duties arising from the fiduciary relationship that exists between an officer and his or her company.

Absent the intervention of statute or certain special circumstances, the officers of a trustee company (including a superannuation trustee) do not, generally speaking, owe any duties directly to beneficiaries under the law of trusts and are not merely by the fact of their office in a fiduciary relationship with trust beneficiaries. Instead the trustee's duties to beneficiaries are owed by the company, and the officers' duties are owed to the company.[19] That said, there are fiduciary-type restrictions on officers of a corporate trustee acquiring trust property.[20] And the fact that a person is an officer of a trustee company impacts on the content of the duties owed by that person to the company itself, in various ways. These include that the officer's duty of care to the company mirrors the company's duty of care to the beneficiaries, which incorporates the so-called 'prudent investor rule' and in the case of a professional trustee company incorporates a higher standard of care and diligence.[21]

The key statutory duties arising under the Corporations Act and the SIS Act are summarised in the following table. The SIS Act duties are imposed only on directors of the RSE licensee. However all of the Corporations Act duties apply to officers below board level as well, which includes those responsible persons who are 'senior managers' as defined. The duties in sections 182 and 183 of the Corporations Act, which relate to misuse of position and misuse of information, apply to all employees of the RSE licensee.

---

[19] *Bath v Standard Land Co Ltd* [1911] 1 Ch 618 at 627 per Cozens-Hardy MR; *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 522; 18 ACSR 459 at 475 per Finn J. See also RP Austin, HAJ Ford and IM Ramsay *Company Directors: Principles of Law and Corporate Governance*, LexisNexis Butterworths, 2006 at 624; PF Hanrahan *Funds Management in Australia: Officers' Duties and Liabilities*, LexisNexis Butterworths, 2007 at [5.87] – [5.92].

[20] *Ex parte James* (1803) 8 Ves 337; 32 ER 358.

[21] *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 516-7; 18 ACSR 459 at 470; *Australian Securities and Investments Commission v Parker* (2003) 21 ACLC 888 [2003] FCA 262 at [114]; *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (No 3)* [2013] FCA 1324 at [541] – [543].

Key statutory duties of officers of RSE licensees

Duty to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a company in the company's circumstances, and occupied the office held by, and had the same responsibilities within the company as, the director or officer	Corporations Act s 180	Directors and other officers
Duty to exercise their powers and discharge their duties in good faith in the best interests of the RSE licensee and for a proper purpose	Corporations Act s 181	Directors and other officers
Duty not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to the RSE licensee	Corporations Act s 182	Directors, other officers and employees
Duty not to improperly use information gained through being an officer or employee to gain an advantage for themselves or someone else or to cause detriment to the RSE licensee	Corporations Act s 183	Directors, other officers and employees
Duty to exercise a reasonable degree of care and diligence for the purposes of ensuring that the RSE licensee carries out the MySuper obligations	SIS Act s 29VO	Directors
Duty to act honestly in all matters concerning the fund	SIS Act s 52A(2)(a)	Directors
Duty to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as a prudent superannuation entity director would exercise in relation to an entity where he or she is a director of the trustee of the entity and that trustee makes investments on behalf of the entity's beneficiaries	SIS Act s 52A(2)(b)	Directors
Duty to perform the director's duties and exercise the director's powers as director of the RSE licensee in the best interests of the beneficiaries	SIS Act s 52A(2)(c)	Directors

Where there is a conflict between the duties of the director to the beneficiaries, or the interests of the beneficiaries, and the duties of the director to any other person or the interests of the director, the RSE licensee or an associate of the director or RSE licensee, duty to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; to ensure that the duties to the beneficiaries are met despite the conflict; to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and to comply with the prudential standards in relation to conflicts[22]	SIS Act s 52A(2)(d)	Directors
Duty not to enter into any contract, or do anything else, that would prevent the director from, or hinder the director in, properly performing or exercising the director's functions and powers as director of the RSE licensee; or prevent the corporate trustee from, or hinder the RSE licensee in, properly performing or exercising the RSE licensee's functions and powers as trustee of the entity	SIS Act s 52A(2)(e)	Directors
Duty to exercise a reasonable degree of care and diligence for the purposes of ensuring that the RSE licensee carries out the covenants referred to in section 52 of the SIS Act[23]	SIS Act s 52A(2)(f)	Directors
Duty to ensure repayment in approved deposit funds	SIS Act s 53(2)(b)	Directors
Duty not to engage in certain types of dishonest, misleading or deceptive conduct in relation to financial products and financial services	Corporations Act Pt 7.10	Any person

The personal liability that can flow from breach of these statutory duties is discussed below. Breach of the Corporations Act duties can (depending on the circumstances) result in criminal, civil penalty or civil liability for an officer, and be the basis for an order disqualifying them from managing corporations. In contrast, breach of the SIS Act covenants by directors only gives rise to potential civil liability, and three general defences (including a due diligence defence) are available to directors under that legislation. This difference in the

[22] By operation of section 52A(3) of the SIS Act, the directors' obligation under the covenant in section 52A(2)(d) is expressed to override any conflicting duty they have under Pt 2D.1 of the Corporations Act.
[23] Reasonable care is defined for this purpose in section 52A(5) of the SIS Act.

consequences that flow from a breach of duty is why understanding the interaction between the two statutory regimes is so important, particularly for officers below board level.

Officers' duty of care

There are a number of things we could say about the statutory and general law duties of officers of RSE licensees, but I want to focus particularly on their duty of care.

We are not yet at the stage where the general law recognises a duty of care owed by the officers of the corporate trustee of a superannuation fund to beneficiaries of that fund, although there is probably no doctrinal impediment in the law of negligence to a court eventually taking that step. Perhaps legislation has simply overtaken the general law in this regard. As the table above makes clear, officers of an RSE licensee do owe statutory duties to act with care, skill and diligence in carrying out their functions. If duties are 'owed' to the people who have legal standing to bring proceedings in respect of breach of duty, then the SIS Act duties imposed by sections 52A(2)(b) and (f) are owed to any person who may suffer loss or damage as a result of a the breach of that duty, including (presumably) fund members.[24] The duty in section 180(1) of the Corporations Act is owed to the RSE licensee as a corporate entity, certainly, but it is also owed to the community as whole because ASIC has standing to bring proceedings in respect of a breach of that duty even where the breach does not actually result in compensable loss or damage to the corporation itself (that is one of the significant lessons of the stepping stone cases, explained below).

The duty in section 180(1) of the Corporations Act applies to directors and other officers, which includes responsible persons who are 'senior managers' as defined. It is a duty on officers to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were an officer of a company in the company's circumstances, and occupied the office held by, and had the same responsibilities within the company as, the officer.

The duties imposed by the covenants in section 52A(2)(b) and (f) of the SIS Act are expressed to apply only to directors of the RSE licensee; they are (respectively) a duty to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as a prudent superannuation entity director would exercise in relation to an entity where he or she is a director of the trustee of the entity and that trustee makes investments

[24] Section 55 of the SIS Act.

on behalf of the entity's beneficiaries; and a duty to exercise a reasonable degree of care and diligence for the purposes of ensuring that the RSE licensee carries out the covenants referred to in section 52 of the SIS Act. A 'superannuation entity director' is a person whose profession, business or employment is or includes acting as director of a corporate trustee of a superannuation entity and investing money on behalf of beneficiaries of the superannuation entity. The reference in section 52A(2)(f) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a superannuation entity director would exercise in the circumstances of the corporate trustee.

As with the law of negligence generally, these statutory provisions do not make the officers of RSE licensees the *de facto* guarantors of successful outcomes for fund members, or even of the perfect performance by the RSE licensee of its statutory and general law obligations to those members. Instead they require, of the officers to whom they apply, that the officer bring to the task at hand the level of care, skill and diligence that we would expect of a reasonable person in their situation. 'Their situation' is the crucial concept here. What matters is that these people are officers of RSE licensees.

Many of us have long been of the view that directors and officers of public offer superannuation and investment trustee companies have a heightened duty of care, compared with that which arises in ordinary (non-fiduciary) commercial companies or in what I might describe as gratuitous or private trusts.[25] The decision late last year of Murphy J in the Prime Retirement Trust case, dealing with the duties of officers of the responsible entity of a registered managed investment scheme, is entirely consistent with that view. In that case the directors of a responsible entity had taken various steps that resulted in the payment to the trustee in its personal capacity, out of trust funds, of fees to which it had not been entitled prior to the taking of those steps (which included passing resolutions to amend the scheme constitution to allow for payment of the fees without member approval, based on equivocal legal advice as to whether the resolution could be passed conformably with the Corporations Act and the trust deed). What Murphy J identifies in the judgment as the 'Five Principle Factors'[26] in this matter, all of which really go to a trustee and its controller misusing

---

[25] Hanrahan, above n 19, Ch 7, in particular at [7.9] – [7.14].

[26] These are captured by his Honour at [2013] FCA 1342 at [16]. They go to the circumstances in which the reasonableness of the conduct of the officers was to be assessed in that matter. In summary, in assessing the reasonableness of the officers' conduct in taking the steps involved to facilitate the payment of the relevant fees, his Honour had regard to the fact that the fees were to be payable to the trustee (and through it to person who controlled the trustee, Mr Lewski) from the trust fund while it was a trustee; that the steps taken created self-evident conflicts of interest; that the fees had uncommercial characteristics; that they were substantial; and that

its position to expropriate trust assets, indicated that, in his Honour's words, the trustee and the directors 'were required to exercise a high level of care and diligence and to be cautious about dealing with [the trustee's] conflicts'[27] in taking those steps.

Justice Murphy makes a number of observations at [531] – [543] about the duty of care owed by officers of corporations that are professional trustee companies, that are apposite to officers of RSE licensees. Those observations repay close reading. Importantly, following the approach taken by Finn J in *Australian Securities Commission v AS Nominees Ltd*[28] and subsequent authorities, his Honour refers to 'the requirement that a professional trustee exercise a higher standard of care and take a cautious approach' (at [536]) and accepts that 'the standard of care and caution expected of a corporate trustee must flow through to its directors' (at [541]). Justice Murphy goes on to refer with approval to the observation of Santow J in *Australian Securities and Investments Commission v Adler* that where a transaction involves a potential for conflict between interest and duty, 'the duty of care and diligence falls to be exercised a context requiring special vigilance, calling for scrupulous concern on the part of those officers who become aware of that transaction to ensure than any necessary corporate approvals are obtained and safeguards put in place'.[29]

The Prime Retirement Trust matter is a timely reminder to all officers of professional funds management firms, including RSE licensees (whether for-profit or not), that the standard of care, skill and diligence against which their performance will be measured is a heightened one, that reflects the special position and responsibilities of the company they serve. This is true in applying each of the statutory duties of care, including the duty imposed by section 180(1) of the Corporations Act.[30]

---

the fees were gratuitous 'in the sense that no, or no equivalent, countervailing benefit was provided to members in return for them'.

[27] [2013] FCA 1342 at [17].

[28] (1995) 62 FCR 504.

[29] (2002) 168 FLR 253 at [372.14], cited at [2013] FCA 1342 at [542].

[30] In *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 at [191], Middleton J held that the duty of care imposed on officers of responsible entities by section 601FD(1)(b) corresponds to the duty in section 180(1) of the Corporations Act. Murphy J expresses agreement with that principle at [2013] FCA 1342 at [535], however his Honour's subsequent observations seem to suggest that a different (lower) standard is applied under section 180. This cannot be correct. Section 180 requires that that officer exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were an officer of a company *in the company's circumstances*, and occupied the office held by, and had the same responsibilities within the company as, the officer (emphasis added). The company's circumstances are that of a professional trustee company of the kind that Murphy J describes, and therefore the standard of care and diligence required of the officer under section 180(1) is that of an officer of a professional trustee company.

Liability for breach of duty

The fact that officers of an RSE licensee are subject to a duty of care *qua* officers is important, because of the consequences that may flow from breach of that duty.

It is tempting, looking at the SIS Act in isolation, to say that the policy intention was to create a 'liability-lite' regime for the individuals involved in running superannuation funds. The duties of care imposed by the SIS Act apply only to directors (and not other officers); they (arguably) apply only in connection with the discharge of specific parts of the directors' responsibilities; and breach of the duties only gives rise to civil (not civil penalty or criminal) liability.[31] Further, a number of defences to liability are available to directors. Specific defences to liability are available under section 55(5) where the loss is connected with the making of an investment by or on behalf of the trustee, or the management of reserves by the trustee. Also, there are various general defences to liability under section 323 of the SIS Act; it is a defence to a claim based on a contravention of the section 52A covenants if the director establishes:

- that the contravention was due to reasonable mistake; or
- that the contravention was due to reasonable reliance on information supplied by another person; or
- that the contravention was due to the act or default of another person, or an accident, or some other cause beyond the defendant's control, and the director took reasonable precautions and exercised due diligence to avoid the contravention.

Further, it is open to a fund, by its governing rules, to indemnify a director out of fund assets against any civil liability he or she may incur as a director, provided he or she acted honestly

[31] The statutory obligation on directors to comply with the covenants in section 52A sits in section 55(1) of the SIS Act. A contravention of subsection (1) is not an offence and a contravention of that subsection does not result in the invalidity of a transaction, but may give rise to civil liability under section 55(3). Although the SIS Act does contain a civil penalty regime, section 55(1) is not a civil penalty provision for this purpose. Section 55(3) provides that 'a person who suffers loss or damage as a result of conduct of another person that was engaged in in contravention of section 55(1) may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention'. However where the action is against a director for breach of duty, leave of the court to proceed is first required under section 55(4A); in deciding to whether to grant leave, the court must take into account whether the applicant is acting in good faith and there is a serious question to be tried.

and did not 'intentionally or recklessly' fail to exercise, in relation to a matter affecting the fund, the degree of care and diligence that the director is required to exercise.[32]

The liability regime for the Corporations Act is quite different. Each of the relevant provisions in Pt 2D.1 of the Corporations Act is a civil penalty provision for the purposes of Pt 9.4B of the Corporations Act. This means that, where there has been a breach of duty, ASIC may apply to the Court for a declaration of contravention under section 1317E.

If the contravention materially prejudices the interests of the RSE licensee or 'is serious', the Court may further order the payment of a pecuniary penalty of up to $200,000, under section 1317G.[33] A declaration of contravention can also be the basis for a disqualification order against the individual, under section 206C of the Corporations Act.[34] Where a breach is made out, the Court can also order the officer to compensate the RSE licensee for damage suffered by it that resulted from the contravention, under section 1317H. Damages include for this purpose any profits made by the officer resulting from the contravention. Further, intentional or reckless conduct that contravenes section 181, 182 or 183 is an offence by virtue of section 184 of the Corporations Act.

The company cannot indemnify an officer against a liability owed to the company itself, or a liability for a pecuniary penalty order under s 1317F or a compensation order under s 1317H, because of s 199A of the Corporations Act.

For individuals who are responsible persons and who come within the Corporations Act definition of an officer, it is important to recognise both the broader reach of the Corporations Act duties (which apply to all officers, not just directors) and the more serious consequences of breach of those duties (which include civil penalty consequences) compared with the SIS Act duties. This is particularly so because of the second of the recent developments in corporate law that I want to discuss, which is the 'stepping stones' development.

---

[32] Section 57 of the SIS Act.

[33] There is a fascinating debate in the *Vines* penalty appeal (2007) 63 ACSR 505; [2007] NSWCA 126, between Santow JA on the one side, and Spigelman CJ and Ipp JA on the other, about when a contravention is 'serious'. For Santow JA, 'the question … of whether a contravention is serious is not to be determined simply by reference to its consequences' (at [158]). It is the nature of the conduct, not the outcome of it, that determines whether conduct is serious. For Spigelman CJ and Ipp JA, however, the seriousness of the consequences is the determining factor (at [229]).

[34] Disqualification can be ordered when it is 'justified': for a discussion of the policy considerations related to disqualification, see *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [41] per McHugh J.

Stepping stones

In an article in the *Federal Law Review* in 2012, Herzberg and Anderson identify an important recent line of cases brought by ASIC against individual corporate officers that they describe as the 'stepping stone' cases. The cases apply the law of directors' duties to impose civil pecuniary penalties and disqualification on individual officers whose breach of duty lies in causing or allowing their company to contravene a regulatory requirement contained in the Corporation Act. The term 'stepping stone' comes from Keane CJ's description of ASIC's proceedings in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd.*[35] Herzberg and Anderson describe the stepping stones approach as an enforcement strategy by ASIC that:

> … applies directors' duties in a novel context. The first stepping stone involves an action against the company for contravention of the [Corporations Act]. The establishment of corporate fault then leads to the second stepping stone; a finding that by exposing their company to the risk of criminal prosecution, civil liability or significant reputational damage, directors contravened their statutory duty of care with the attendant civil penalty consequences'. [36]

To date, ASIC has used the strategy primarily in respect of breaches of the mandatory disclosure laws that apply to listed companies – examples include the James Hardie,[37] Fortescue,[38] Citrofresh,[39] and Centro proceedings.[40] The stepping stones approach has also been used in a number of cases where promoters have raised funds from the investing

---

[35] (2011) 190 FCR 364; 81 ACSR 563; [2011] FCAFC 19 at [10].
[36] A Herzberg and H Anderson 'Stepping stones – From corporate fault to directors' personal civil liability' (2012) 40 *Federal Law Review* 181 at 182.
[37] *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; 71 ACSR 368; [2009] NSWSC 287; *Australian Securities and Investments Commission v Macdonald (No 12)* (2009) 259 ALR 116; 73 ACSR 638; [2009] NSWSC 714; *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205; 81 ACSR 285; [2010] NSWCA 331; *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460; [2012] NSWCA 370; *Australian Securities and Investments Commission v Hellicar* (2012) 286 ALR 501; 88 ACSR 246; [2012] HCA 17.
[38] *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201; 76 ACSR 506; [2009] FCA 1586; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364; 81 ACSR 563; [2011] FCAFC 19; *Forrest v Australian Securities and Investments Commission* (2012) 291 ALR 399; 91 ACSR 128; [2012] HCA 39.
[39] *Australian Securities and Investments Commission v Citrofresh International Ltd (No 2)* (2010) 77 ACSR 69; [2010] FCA 27; *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 29. The director also directly contravened s 1041H of the Corporations Act, by personally making the misleading statements: *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211; 66 ACSR 688; [2008] FCAFC 120 at [100] – [105].
[40] *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430; 85 ACSR 654; [2011] FCA 1003. See also *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; 83 ACSR 484; [2011] FCA 717.

public illegally, for example without the required prospectus or product disclosure statement, or without first registering a registrable managed investment scheme.[41]

We should be very interested in this development because it points to a pathway for imposing personal liability on individual officers in circumstances where their company has failed to discharge some legal or regulatory obligation. The officer's liability can include civil penalty liability, even where the regime that creates the primary (corporate) obligation does not envisage individual civil penalty liability for officers in those circumstances, and even where the company itself did not in fact suffer a loss as a result of the individual's negligence.[42] There is no reason, from a pleading point of view, that the first stepping stone identified by Herzberg and Anderson needs to be a breach of a Corporations Act requirement. It could equally be a breach of an obligation imposed on the company by the SIS Act or some other applicable law.

The stepping stone cases have to be approached with some care. Courts say they are reluctant to treat section 180(1) of the Corporations Act as general obligation on corporate officers to conduct the affairs of the company in accordance with the Corporations Act in particular, or the law generally. As the authors of *Company Directors: Principles of Law and Corporate Governance* point out, directors 'are not presumptively liable to their company simply because they have caused their company to contravene a law, and therefore their liability depends upon any particular statutory imposition for involvement in the contravention and, subject to that, whether they are in breach of [their] other duties… such as the duties of honesty, good faith, propriety and care'.[43] In *Australian Securities and Investments Commission v Maxwell*, Brereton J said it is:

> … a mistake to think that ss 180, 181 and 182 are concerned with any general obligation owed by directors at large to conduct the affairs of the company in accordance with law generally or the Corporations Act in particular; they are not. They are concerned with duties owed to the company.
>
> …

---

[41] *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1025 (*Maxwell*); *Australian Securities and Investments Commission v Elm Financial Services Pty Ltd & Ors* (2005) 55 ACSR 411; *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd & Ors* (2008) 69 ACSR 1; *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623; [2007] FCA 973.

[42] This development is explored at considerable length in T Bednall and P Hanrahan 'Officers' liability for mandatory corporate disclosure: two paths, two destinations?' (2013) 31 *Company and Securities Law Journal* 474.

[43] Austin, Ford and Ramsay, above n 9, at [11.6].

> There are cases in which it will be a contravention of their duties, owed to the company, for directors to authorise or permit the company to commit contraventions of provisions of the Corporations Act. Relevant jeopardy to the interests of the company may be found in the actual or potential exposure of the company to civil penalties or other liability under the Act, and it may no doubt be in breach of a relevant duty for a director to embark on or authorise a course which attracts the risk of that exposure, at least if the risk is clear and the countervailing potential benefits insignificant.[44]

Similarly, in *Australian Securities and Investments Commission v Warrenmang Ltd*, Gordon J said:

> … directors' duties provisions are not concerned with any general obligation owed by directors to conduct the affairs of the company in accordance with the law generally or the Corporations Act. Moreover, the directors' duties provisions do not necessarily make a director liable for a breach by the company of another provision in the Corporations Act. The corollary is that it cannot be said that every breach by a company of the Corporations Act necessarily gives rise to a breach of the directors' duties provisions.[45]

These comments emphasise that it does not flow automatically from a finding that an entity has contravened a regulatory requirement, that the officers must have contravened their duty of care to the company. What matters is whether, in a particular instance, each officer has taken reasonable care to protect against a foreseeable risk of harm to the company resulting from their own action (or inaction). This is what Brereton J describes as the 'jeopardy to the interests of the company' that may be found in the actual or potential exposure of the company to civil penalties or other liability.

The key point is that the significant consequences to an RSE licensee that may flow from a contravention by it of its obligations under the SIS Act mean that its officers must take reasonable care to protect against the foreseeable risk to its interests of such contraventions occurring. The stepping stones cases demonstrate that this can include a risk of civil proceedings against the company and is not limited to risk of prosecution or civil penalty proceedings or some form of licensing or other regulatory action.[46] Unlike the tort of negligence, there is no requirement in section 180(1) to prove that the defendant's negligence actually caused loss or damage to the company in order to make out the elements of the contravention. As Santow JA observes in the *Vines* penalty appeal,

---

[44] (2006) 59 ACSR 373; [2006] NSWSC 1025 at [104].
[45] (2007) 63 ACSR 623; [2007] FCA 973 at [22].
[46] See e.g. the decision of Goldberg J in the *Citrofresh* liability decision (2010) 77 ACSR 69; [2010] FCA 27.

'detriment is not an essential ingredient for breach of [the equivalent of section 180(1)], although it is commonly found'.[47]

Knowing assistance

There is one final matter related to responsible persons' liability that I want to touch on before we finish. It concerns the implications of the decision of the Court of Appeal in Western Australia in the *Bell Group* case on what is generally referred to as the second limb of the rule in *Barnes v Addy*. As we know, the second limb of the rule in *Barnes v Addy* is that a stranger (that is, a person other than the trustee itself) can be liable to beneficiaries in respect of a breach of trust if 'they assist with knowledge in a dishonest and fraudulent design on the part of the trustees'.[48]

The 'knowing assistance' limb has always been of special significance to officers of trustee companies. In *AS Nominees*, Finn J describes the rule '(conservatively) as one which exposes a third party to the full range of equitable remedy against a trustee if the person knowingly or recklessly assists in or procures a breach of trust or fiduciary duty'. His Honour observed that:

> … this form of liability is one of no little significance to the directors of a trust company for the very reason that, often enough, it will be their own conduct in exercising the powers of the board that causes the company to commit a breach of trust. They are, in other words, peculiarly vulnerable to this rule.'[49]

The *Bell Group* decision is a difficult one for a number of reasons, not least the length of the three separate judgments of the acting judges of appeal (Lee, Drummond and Carr AJJA). Among other things the case concerned whether various banks could be liable under the second limb of the rule in *Barnes v Addy* for having knowingly assisted in a breaches of the duties owed by the directors of the Bell companies to those companies. A number of the legal issues raised by the judgments about the nature and content of the directors' duties, the operation of the two limbs of the rule in *Barnes v Addy*, and the proper basis for calculating equitable compensation, were expected to be agitated before the High Court[50] but the parties reached a commercial settlement late last year, before the appeal was heard.

---

[47] *Australian Securities and Investments Commission v Vines* (2007) 63 ACSR 505; [2007] NSWCA 126 at [158].
[48] 918740 LR 9 Ch App 244 at 252 per Lord Selborn LC;
[49] (1995) 18 ACSR 459 at 475-6.
[50] Special leave granted [2013] HCA Trans 049.

For us, a key question left by the Court of Appeal's decision is: what would amount to a 'dishonest or fraudulent design' on the part of the trustee, sufficient to trigger the application of the knowing assistance limb of the rule n *Barnes v Addy*? It is settled law that breach of trust and breach of fiduciary duty are foundations for claims based on this limb. In *Bell Group*, the directors' duty to act in good faith in the best interests of the company was characterised as fiduciary for this purpose. This appeared inconsistent with the position adopted by the High Court in *Breen v Williams* that fiduciary duties are limited to the proscriptive obligations not to obtain any authorised benefit from the relationship, and not to be in a position of conflict, and that a positive obligation (such as an obligation to act in the interests of another person) is not strictly fiduciary.[51]

In a sense, the debate about whether the best interest duty is fiduciary or not misses the real question. The question is not whether a particular duty is properly described as fiduciary (which is a question that a colleague of mine might describe as 'theological'), but rather whether a particular conduct by a trustee, in which another person knowingly assists, is conduct that attracts the operation of the rule in *Barnes v Addy*. A fiduciary relationship arises when in a person (such as a trustee or a director) is given powers or discretions in circumstances where they are obligated to exercise those powers or discretions in the interests of another person.[52] This carries with it fiduciary duties; when we use the expression 'fiduciary duties' in Australia we generally mean the fiduciary proscriptions to which the Court in *Breen* referred (that is, the no conflicts rule and the no profits rule)[53] and not the 'best interest' obligation itself.

However I have always thought that breach of the best interest obligation would be sufficient to provide the foundation for a claim based on the second limb of *Barnes v Addy*,[54] although breach by the trustee of its duty of care probably would not.[55] The uncertainty over the implications of the *Bell Group* decision is really about whether a person who 'knowingly

---

[51] (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ.
[52] In *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [177] the Full Federal Court (Finn, Stone and Perram JJ) said that, while there is no generally agreed and unexceptional definition', a person may be treated in equity as a fiduciary 'when and insofar as that person has undertaken to perform some function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest'.
[53] This issue is discussed in P Hanrahan 'The relationship between equitable and statutory 'best interest' duties in financial services law' (2013) 7 *Journal of Equity* 46 at 60.
[54] See Hanrahan, above n 19 at [11.25].
[55] See Millet LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1; *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* (1997) 26 ACSR 544 at 580.

assisted' in a breach of the duty of care by a trustee could be liable under the second limb, either because the trustee's duty of care is a fiduciary duty (suggested obiter by Lee AJA at [840]) or because a person who is a fiduciary has breached any duty owed to another and the breach is 'more than a trivial breach and is also too serious to be excusable because the fiduciary has acted honestly, reasonably and ought fairly to be excused' (per Drummond AJA at [2112]).[56] There was no allegation in the *Bell Group* case that the directors had breached section 180 of the Corporations Act; the *Barnes v Addy* claim against the banks was founded on a breach by the directors of the 'best interest' duty in section 181. Accordingly it may be that we cannot draw too much from this. And the best interest duty may always have had an element of care built into it; Conaglen says the best interest duty can be understood 'as a composite of the duties to act in good faith, with the requisite degree of care, and only for proper purposes'.[57]

It is interesting in this regard to note that involvement in a contravention of section 181 of the Corporations Act can attract a civil penalty liability, but involvement in a contravention of section 180 does not.

Conclusion

This paper began by asking whether, if he or she is identified as a 'responsible person' under SPS 520, an individual is necessarily an 'officer' of the RSE licensees for company law purposes. Directors, company secretaries and senior managers of an RSE licensee are officers for company law purposes. *Shafron* suggests that we should take a broad view of who participates in decision-making in companies, and is therefore treated as a senior manager for this purpose. But someone who is a responsible person only because they are an executive officer – that is, because they are concerned, or take part, in management – is not an officer of the company.

---

[56] It is worth noting here that courts will not relieve officers from liability for negligence on the basis that they were 'merely' negligent, for example under section 1317S. See Austin and Ramsay, above n 9, [8.420].
[57] M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties*, Hart Publishing, London, 2010 at 56. See also GT Thomas 'The duty of trustees to act in the 'best interests' of their beneficiaries' (2008) 2 *Journal of Equity* 177; MS Donald '"Best" interests?' (2008) 2 *Journal of Equity* 245; D Mendoza-Jones 'Superannuation trustees: governance, best interests, conflicts of interest and proposed reforms' (2012) *Company and Securities Law Journal* 297; Hanrahan 'Best interests', above n 53.

Corporate officers are subject to the statutory duties in Pt 2D.1 of the Corporations Act, including a statutory duty of care. Their duty extends to exercising reasonable care, skill and diligence to avoid jeopardy to the company's interests through exposure to the potentially serious consequences that could follow from the company breaching its obligations under the superannuation laws. As the recent 'stepping stone' cases brought by ASIC show, being found to have breached the duty of care can have significant consequences for an officer, including the imposition of civil pecuniary penalties and ongoing disqualification orders. These go far beyond the civil liability that might be imposed on a director of an RSE licensee who breaches the duties of care imposed by the covenants in section 52A of the SIS Act.