Now in its fourth edition, *Principles of Contemporary Corporate Governance* offers comprehensive coverage of the key topics and emerging themes in private sector corporate governance. It explains both the principles of corporate governance systems and their real-world application in an authoritative and engaging manner.

This fully revised and updated text has four parts: basic concepts, board structures and company officers; corporate governance in Australia; corporate governance in international and global contexts; and shareholder activism and business ethics. The coverage of international contexts, written by specialists, includes sections on the US, the UK, Canada, South Africa, the EU, the OECD, Germany, Japan, China and Indonesia, plus new sections on New Zealand and India. A new chapter on business ethics and corporate governance presents contemporary discussions on the topic and explores some of the broader legal issues.

*Principles of Contemporary Corporate Governance* is an indispensable resource for business and law students studying corporate governance, and also for academic researchers and practitioners wanting a deeper understanding of its underlying principles.

**Jean Jacques du Plessis** is Professor (Corporate Law) in the Deakin Law School, Deakin University.

**Anil Hargovan** is Associate Professor in the School of Taxation and Business Law at the University of New South Wales.

**Jason Harris** is Associate Professor in the Faculty of Law at the University of Technology Sydney.
PRINCIPLES OF CONTEMPORARY CORPORATE GOVERNANCE

Fourth edition

Jean Jacques du Plessis, Anil Hargovan and Jason Harris

Contributors

CONTENTS

Authors and contributors xvii
Preface xxi
Acknowledgements xxiv
Table of cases xxvi
Table of statutes xxx

PART 1  BASIC CONCEPTS, BOARD STRUCTURES AND COMPANY OFFICERS  1

1 The concepts of ‘corporate governance’ and ‘essential’ principles of corporate governance (with contributions by Jeanne Nel de Koker) 3

  1.1 The meaning of corporate governance  4
    1.1.1 Generally  4
    1.1.2 Origins of the corporate governance debate and some corporate governance and corporate law theories  6
    1.1.3 Proposed definition of ‘corporate governance’ 13

  1.2 ‘Essential’ principles of corporate governance 16

  1.3 Is ‘good corporate governance’ important and does it add value?  18

  1.4 Are corporate governance models converging?  19

  1.5 Conclusion 22

2 Stakeholders in corporate governance and corporate social responsibility 23

  2.1 Introduction 24

  2.2 Stakeholders in the corporation: An overview  26
    2.2.1 What is a stakeholder? 26
    2.2.2 Discussion of stakeholders 28
      2.2.2.1 Shareholders 29
      2.2.2.2 Employees 29
      2.2.2.3 Creditors 34
      2.2.2.4 Customers 35
      2.2.2.5 The community 36
      2.2.2.6 The environment 36
4.3 Definition of ‘officer’

4.3.1 Statutory definition 93

4.3.2 Senior employees and senior executives as ‘officers’ 94

4.3.3 Middle management as ‘officers’? 94

4.4 Types of company officer

4.4.1 Executive and non-executive directors 96

4.4.2 Independent non-executive directors 97

4.4.3 Lead independent directors or senior independent directors 101

4.4.4 The managing director, managing directors, the chief executive officer (CEO), executive directors and senior executives 103

4.4.5 Chairperson 103

4.4.6 Alternate director 105

4.4.7 Secretary 105

4.5 Training and induction of directors

4.5.1 Training 107

4.5.2 Induction 108

4.6 Ethical behaviour of directors 109

4.7 Remuneration of directors and executives

4.7.1 A controversial and politically sensitive issue 112

4.7.2 Disclosure of remuneration and emoluments in Australia 116

4.7.3 Some provisions of the ASX CG Principles and Recommendations dealing with remuneration 117

4.7.4 Further measures to counter excessive remuneration of directors and executives 118

4.8 Board diversity

4.8.1 Another controversial and politically sensitive issue 121

4.8.2 Gender diversity and quota legislation 122

4.8.3 Quota legislation 123

4.8.4 Developments regarding gender quotas at the European Union (EU) level 125

4.8.5 Impact of women in the corporate world 129

4.9 Conclusion 130

PART 2 CORPORATE GOVERNANCE IN AUSTRALIA 131

5 Regulation of corporate governance 133

5.1 Overview 134

5.2 Regulation generally 135

5.3 Objectives in regulating corporate governance 137

5.4 Sources of regulation in Australia 138

5.4.1 ‘Hard law’ 138

5.4.1.1 Statutory regulation – corporate law 138
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.4.1.2</td>
<td>Statutory regulation – other than corporate law</td>
<td>140</td>
</tr>
<tr>
<td>5.4.1.3</td>
<td>‘Corporate governance and the judges’ – the place of judge-made law</td>
<td>140</td>
</tr>
<tr>
<td>5.4.2</td>
<td>‘Hybrids’</td>
<td>141</td>
</tr>
<tr>
<td>5.4.2.1</td>
<td>ASX Listing Rules</td>
<td>141</td>
</tr>
<tr>
<td>5.4.2.2</td>
<td>ASX CG Principles and Recommendations</td>
<td>142</td>
</tr>
<tr>
<td>5.4.2.3</td>
<td>Accounting standards</td>
<td>142</td>
</tr>
<tr>
<td>5.4.2.4</td>
<td>Auditing standards</td>
<td>142</td>
</tr>
<tr>
<td>5.4.3</td>
<td>‘Soft law’</td>
<td>142</td>
</tr>
<tr>
<td>5.4.4</td>
<td>The role of market forces</td>
<td>143</td>
</tr>
<tr>
<td>5.5</td>
<td>Towards a regulatory framework for the effective supervision of financial markets in Australia – analysis</td>
<td>144</td>
</tr>
<tr>
<td>5.5.1</td>
<td>G20/OECD guidelines for achieving an effective governance framework</td>
<td>144</td>
</tr>
<tr>
<td>5.5.2</td>
<td>Division of responsibilities between the ASX and ASIC</td>
<td>145</td>
</tr>
<tr>
<td>5.6</td>
<td>Conclusion</td>
<td>147</td>
</tr>
<tr>
<td>6</td>
<td>The role of the regulators: ASIC and the ASX</td>
<td>148</td>
</tr>
<tr>
<td>6.1</td>
<td>Introduction</td>
<td>149</td>
</tr>
<tr>
<td>6.2</td>
<td>The Australian Securities and Investments Commission (ASIC)</td>
<td>150</td>
</tr>
<tr>
<td>6.2.1</td>
<td>Overview</td>
<td>150</td>
</tr>
<tr>
<td>6.2.2</td>
<td>Statutory powers under the ASIC Act</td>
<td>151</td>
</tr>
<tr>
<td>6.2.3</td>
<td>The role of ASIC in corporate governance</td>
<td>152</td>
</tr>
<tr>
<td>6.2.4</td>
<td>ASIC enforcement patterns</td>
<td>155</td>
</tr>
<tr>
<td>6.3</td>
<td>The Australian Securities Exchange Ltd (ASX)</td>
<td>157</td>
</tr>
<tr>
<td>6.3.1</td>
<td>Slow to get out of the blocks</td>
<td>157</td>
</tr>
<tr>
<td>6.3.2</td>
<td>Rapid change in attitude since the end of 2002</td>
<td>157</td>
</tr>
<tr>
<td>6.3.3</td>
<td>ASX CG Principles and Recommendations</td>
<td>158</td>
</tr>
<tr>
<td>6.3.3.1</td>
<td>Changes</td>
<td>158</td>
</tr>
<tr>
<td>6.3.3.2</td>
<td>Structure</td>
<td>158</td>
</tr>
<tr>
<td>6.3.3.3</td>
<td>Recommendations</td>
<td>159</td>
</tr>
<tr>
<td>6.3.3.4</td>
<td>The roles of and relationship between the ASX and ASIC</td>
<td>159</td>
</tr>
<tr>
<td>6.4</td>
<td>Conclusion</td>
<td>161</td>
</tr>
<tr>
<td>7</td>
<td>Accounting governance</td>
<td>163</td>
</tr>
<tr>
<td>7.1</td>
<td>Overview</td>
<td>164</td>
</tr>
<tr>
<td>7.2</td>
<td>Impetus for CLERP 9: Responding to corporate collapses</td>
<td>165</td>
</tr>
<tr>
<td>7.3</td>
<td>Key CLERP 9 reforms</td>
<td>166</td>
</tr>
<tr>
<td>7.3.1</td>
<td>Audit reform</td>
<td>166</td>
</tr>
<tr>
<td>7.3.2</td>
<td>Corporate disclosure</td>
<td>167</td>
</tr>
<tr>
<td>7.3.2.1</td>
<td>Remuneration of directors and executives</td>
<td>167</td>
</tr>
<tr>
<td>7.3.2.2</td>
<td>Financial reporting</td>
<td>168</td>
</tr>
</tbody>
</table>
8 Auditors and audits

8.1 Introduction: The audit role and where it fits into corporate governance 175
  8.1.1 Overview of the audit role 175
  8.1.2 The link between the audit role and corporate governance 176

8.2 CLERP 9 changes to the audit role 178

8.3 Auditor independence
  8.3.1 Overview of rationale behind independence requirement 179
  8.3.2 General requirement for auditor independence 180
  8.3.3 Meaning of ‘conflict of interest situation’ 180
  8.3.4 Disclosing and resolving conflicts 181
  8.3.5 Specific independence requirements – minimising conflicts of interest through employment and financial restrictions 181
  8.3.6 Auditor rotation 182
  8.3.7 Disclosure of non-audit services 183

8.4 Auditors and the AGM 184

8.5 Auditors’ duties 184

8.6 Reducing the legal exposure of auditors 185
  8.6.1 Overview of auditors’ liability 185
  8.6.2 Registration of audit companies 187
  8.6.3 Proportionate liability 187

8.7 Qualifications of auditors 188

8.8 Uniform auditing standards 188

8.9 Audit oversight 189

8.10 Audit committees 190

8.11 Conclusion 192

9 Directors’ duties and liability 193

9.1 Introduction 194

9.2 Part 9.4B: Civil penalty provisions or pecuniary penalty provisions 197
  9.2.1 Overview 197
  9.2.2 The civil penalty provisions 199
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.2.2.1</td>
<td>Section 180: Duty of care and diligence – civil obligation</td>
<td>199</td>
</tr>
<tr>
<td>9.2.2.2</td>
<td>Section 181: Duty of good faith – civil obligation</td>
<td>202</td>
</tr>
<tr>
<td>9.2.2.3</td>
<td>Sections 182 and 183: Duty not to use position or information to gain personally or cause detriment to the corporation</td>
<td>203</td>
</tr>
<tr>
<td>9.2.2.4</td>
<td>Part 2E: Duty relating to related-party transactions</td>
<td>204</td>
</tr>
<tr>
<td>9.2.2.5</td>
<td>Parts 2M.2 and 2M.3: Duty relating to requirements for financial reports</td>
<td>205</td>
</tr>
<tr>
<td>9.2.2.6</td>
<td>Part 5.7B: Duty to prevent insolvent trading</td>
<td>205</td>
</tr>
<tr>
<td>9.2.2.7</td>
<td>Reform of insolvent trading</td>
<td>209</td>
</tr>
<tr>
<td>9.2.2.8</td>
<td>Chapter 5C: Duties relating to managed investment schemes</td>
<td>209</td>
</tr>
<tr>
<td>9.2.2.9</td>
<td>Chapter 6CA: Duty relating to continuous disclosure</td>
<td>210</td>
</tr>
<tr>
<td>9.2.2.10</td>
<td>Insider trading</td>
<td>210</td>
</tr>
<tr>
<td>9.2.2.11</td>
<td>Relief from civil liability</td>
<td>211</td>
</tr>
<tr>
<td>9.3</td>
<td>Case studies regarding civil penalty provisions or pecuniary penalty provisions</td>
<td>212</td>
</tr>
<tr>
<td>9.3.1</td>
<td>Overview</td>
<td>212</td>
</tr>
<tr>
<td>9.3.2</td>
<td>ASIC v Adler (2002) 41 ACSR 72</td>
<td>213</td>
</tr>
<tr>
<td>9.3.2.1</td>
<td>Summary of the facts</td>
<td>213</td>
</tr>
<tr>
<td>9.3.2.2</td>
<td>Contraventions of civil penalty provisions</td>
<td>214</td>
</tr>
<tr>
<td>9.3.2.3</td>
<td>Court orders</td>
<td>216</td>
</tr>
<tr>
<td>9.3.3</td>
<td>ASIC v Macdonald (No 11) (2009) 256 ALR 199 – James Hardie litigation</td>
<td>217</td>
</tr>
<tr>
<td>9.3.3.1</td>
<td>Background and summary of the facts</td>
<td>217</td>
</tr>
<tr>
<td>9.3.3.2</td>
<td>Legal issues</td>
<td>218</td>
</tr>
<tr>
<td>9.3.3.3</td>
<td>Judicial decisions and the significance of the litigation</td>
<td>219</td>
</tr>
<tr>
<td>9.3.3.4</td>
<td>Court orders</td>
<td>224</td>
</tr>
<tr>
<td>9.3.4</td>
<td>ASIC v Rich (2009) 75 ACSR 1</td>
<td>225</td>
</tr>
<tr>
<td>9.3.4.1</td>
<td>Background and basic facts</td>
<td>225</td>
</tr>
<tr>
<td>9.3.4.2</td>
<td>Legal issue</td>
<td>225</td>
</tr>
<tr>
<td>9.3.4.3</td>
<td>The decision and its significance</td>
<td>226</td>
</tr>
<tr>
<td>9.4</td>
<td>Conclusion</td>
<td>230</td>
</tr>
<tr>
<td>10</td>
<td>Enforcement of directors’ duties</td>
<td>231</td>
</tr>
<tr>
<td>10.1</td>
<td>Introduction</td>
<td>232</td>
</tr>
<tr>
<td>10.2</td>
<td>The statutory derivative action: Part 2F.1A</td>
<td>233</td>
</tr>
<tr>
<td>10.2.1</td>
<td>The case for introducing a statutory derivative action</td>
<td>233</td>
</tr>
<tr>
<td>10.2.2</td>
<td>Eligible applicants</td>
<td>234</td>
</tr>
<tr>
<td>10.2.3</td>
<td>Cause of action</td>
<td>235</td>
</tr>
<tr>
<td>10.2.4</td>
<td>Leave of court required to institute the action</td>
<td>236</td>
</tr>
<tr>
<td>10.3</td>
<td>Oppressive conduct of affairs: Part 2F.1</td>
<td>236</td>
</tr>
<tr>
<td>10.3.1</td>
<td>Types of conduct covered</td>
<td>236</td>
</tr>
<tr>
<td>10.3.2</td>
<td>Who may apply for relief</td>
<td>237</td>
</tr>
<tr>
<td>10.3.3</td>
<td>Nature of relief available</td>
<td>238</td>
</tr>
</tbody>
</table>
10.4 Section 1324 injunctions 238
  10.4.1 Introduction 238
  10.4.2 Section 1324(1) 238
  10.4.3 The court’s discretion 239
  10.4.4 Remedies in particular 239

10.5 Criminal liability of directors 240
  10.5.1 The importance of the criminal sanction in corporations law 240
  10.5.2 Selected criminal offences directors and other officers can commit under the Corporations Act 243
    10.5.2.1 General 243
    10.5.2.2 Specific offences for breaches of duties 243

10.6 Conclusion 244

PART 3 CORPORATE GOVERNANCE IN INTERNATIONAL AND GLOBAL CONTEXTS 245
11 Corporate governance in the United States, the United Kingdom, New Zealand, Canada, South Africa and India 247
11.1 Introduction 248
11.2 United States (US) 248
  11.2.1 Background to the corporate governance debate in the US 248
  11.2.2 The American Law Institute’s involvement in the corporate governance debate 249
    11.2.2.1 Basic aims of the project 249
    11.2.2.2 Impact and importance of the project 250
    11.2.2.3 Some of the key aspects addressed 250
  11.2.3 The Securities Exchange Commission (SEC) 251
  11.2.4 The Sarbanes-Oxley Act of 2002 – the US response to collapses such as Enron and WorldCom 252
    11.2.4.1 Backdrop 252
    11.2.4.2 Aims and objectives 253
    11.2.4.3 Some perspectives on SOX and its effects 254
  11.2.5 NYSE: Sections 303 and 303A – corporate governance rules 255
    11.2.5.1 Background 255
    11.2.5.2 Summary of the most important NYSE corporate governance rules 256
  11.2.6 The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (the Dodd-Frank Act) 257
  11.2.7 Future reforms of financial regulation 259
11.3 United Kingdom (UK) (by Jeanne Nel de Koker) 259
  11.3.1 The development of corporate governance in the UK 259
  11.3.2 The Cadbury Report and codes of best practice 260
  11.3.3 The role of the Financial Reporting Council (FRC) 261
11.3.4 The UK approach to corporate governance 262
  11.3.4.1 The ‘comply or explain’ principle 262
11.3.5 Corporate Governance Codes in the UK from 1992 to 2016 263
11.3.6 The Stewardship Code 265
11.3.7 The Corporate Governance Code for SMEs 266
11.3.8 Corporate culture 267

11.4 New Zealand (by Susan Watson) 268
  11.4.1 Background and history of corporate governance in New Zealand 268
  11.4.2 Financial Markets Authority corporate governance in New Zealand: principles and guidelines (FMA Guidelines) 270
  11.4.3 NZX Corporate Governance Best Practice Code (NZX Code) 278
  11.4.4 New Zealand Corporate Governance Forum (NZCGF) Guidelines (Forum Guidelines) 279
  11.4.5 Institute of Directors’ Code of Practice for Directors (IOD Code) 280
  11.4.6 The Companies Act 1993 (NZ) 281

11.5 Canada 281
  11.5.1 Overview 281
  11.5.2 Regulatory environment 282
  11.5.3 National Policy 58–201: Corporate governance guidelines 285
  11.5.4 National Instrument 58–101: Disclosure of corporate governance practices 287
  11.5.5 National Instrument 52–110 and Companion Policy 52–110CP: Audit committees 287
  11.5.6 Future directions 290

11.6 South Africa (by Irene-marié Esser) 291
  11.6.1 Introduction 291
  11.6.2 The King III (2009) and IV (2016) Reports 293
  11.6.3 The Companies Act 71 of 2008 295
  11.6.4 Corporate social responsibility (CSR) and South African company law 296
  11.6.5 Conclusions on South Africa 298

11.7 India (by Indrajit Dube) 298
  11.7.1 Introduction 298
  11.7.2 Regulatory framework for corporate governance 299
  11.7.3 Background to the Companies Act 2013 300
  11.7.4 Development of Corporate Governance Code and Clause 49 in the Listing Agreement 301
  11.7.5 Statutory provisions 303
  11.7.6 Impact of Satyam 304
  11.7.7 Companies Act 2013 306
  11.7.8 Reforms brought by SEBI 308
  11.7.9 Conclusions on India 308

11.8 Conclusion 309
12 Corporate governance in the EU, the G20/OECD Principles of Corporate Governance, and corporate governance in Germany, Japan, China and Indonesia

12.1 Introduction

12.2 European Union (EU)
   12.2.1 Enhancing corporate governance
   12.2.2 The European Corporate Governance Forum (ECGF)
   12.2.3 The EU single market
   12.2.4 The significance of continued EU corporate harmonisation
   12.2.5 Recent harmonisation initiatives legalised through EU Directives
   12.2.6 Reflection

12.3 G20/OECD Principles of Corporate Governance
   12.3.1 Background
   12.3.2 Broad aims and application
   12.3.3 Structure
   12.3.4 Ensuring the basis for an effective corporate governance framework
   12.3.5 Disclosure and transparency
   12.3.6 Conclusions on G20/OECD Principles

12.4 Germany
   12.4.1 Background to the corporate governance debate
   12.4.2 The German Corporate Governance Code (GCGC)
      12.4.2.1 Background to adoption
      12.4.2.2 Structure and explanatory nature of the Code
      12.4.2.3 Some noteworthy provisions of the Code
   12.4.3 Employee participation at supervisory board level – codetermination
   12.4.4 The German board structure
   12.4.5 Conclusions on Germany

12.5 Japan (by Souichirou Kozuka and Luke Nottage)
   12.5.1 Introduction
   12.5.2 Historical transformations in Japanese corporate law and practice
   12.5.3 Japanese corporate forms and internal governance mechanisms
      12.5.3.1 Overview
      12.5.3.2 The board of directors and choice in governance structures
      12.5.3.3 Directors’ duties and derivative actions
   12.5.4 Shareholder versus bank finance
      12.5.4.1 Overview
      12.5.4.2 Takeover regulation
      12.5.4.3 New firms in the IPO market
      12.5.4.4 Main banks
   12.5.5 Core employees
   12.5.6 Conclusions on Japan
12.6 China (by Vivienne Bath)  
12.6.1 Introduction 359  
12.6.2 Government and legislation 360  
12.6.3 Corporate entities 363  
  12.6.3.1 State-owned enterprises 363  
  12.6.3.2 Foreign investment enterprises 365  
  12.6.3.3 The private sector and companies under the Company Law 366  
12.6.4 Corporate governance – issues and resolutions 368  
12.6.5 Controlling the board of directors and the managers – the supervisory board 369  
12.6.6 Increasing the duties of directors 371  
12.6.7 Independent directors 374  
12.6.8 Committees 375  
12.6.9 Controlling shareholders and protection for minority shareholders under the Company Law 376  
12.6.10 Disclosure requirements 379  
12.6.11 Imposing additional requirements on the sponsors of public offerings 380  
12.6.12 Higher standards of accounting and internal control – Basic Norms for Internal Control of Enterprises 380  
12.6.13 Direct intervention – the case of dividends 381  
12.6.14 Enforcement 382  
12.6.15 Consequences of breach 383  
12.6.16 Conclusions on China 385  

12.7 Indonesia (by Miko Kamal)  
12.7.1 Introduction 387  
12.7.2 The national code of corporate governance 388  
12.7.3 The Indonesian two-tier board model 388  
  12.7.3.1 The general meeting of shareholders (GMS) 389  
  12.7.3.2 The direksi 390  
  12.7.3.3 The dewan komisaris 390  
12.7.4 Corporate governance ‘champions’ 391  
  12.7.4.1 Banking companies 391  
  12.7.4.2 State-owned enterprises 392  
  12.7.4.3 Insurance companies 392  
12.7.5 Some core features of the Indonesian corporate governance model 393  
  12.7.5.1 Independent commissioner/s 393  
  12.7.5.2 The supporting committees of the dewan komisaris 394  
  12.7.5.3 Internal and external auditors 395  
  12.7.5.4 Risk management 395  
  12.7.5.5 Business ethics and anti-corruption 396  
  12.7.5.6 Sharia supervisory board 397
12.7.5.7 Some additional requirements for members of direksis 397
12.7.6 Conclusion on Indonesia 397

12.8 Conclusion 398

PART 4 SHAREHOLDER ACTIVISM AND BUSINESS ETHICS 401

13 Shareholder activism 403

13.1 Introduction 404

13.2 What is shareholder activism? 406

13.3 What attracts shareholder activism? 407

13.4 Does shareholder activism add value? 407

13.5 Characteristics of shareholder activism 407

13.6 Internal activism 409

13.6.1 Overview 409

13.6.2 Obtaining information 409

13.6.3 Convening members’ meetings 409

13.6.4 Distributing information to members 410

13.6.5 Voting at members’ meetings 410

13.7 Court action 411

13.7.1 Individual actions 411

13.7.2 Class actions 412

13.8 Case studies 414

13.9 Conclusion 417

14 Business ethics and corporate governance (by Suzanne Le Mire) 418

14.1 Introduction 419

14.2 The case for business ethics 421

14.2.1 The significance of the modern corporation 421

14.2.2 What are business ethics? 421

14.3 The causes of ethical problems 425

14.3.1 Bad apples 425

14.3.1.1 A case study of the HIH collapse 426

14.3.1.2 Managing bad apples 429

14.3.2 Bad cases 430

14.3.2.1 A case study of the LIBOR scandal 430

14.3.2.2 Managing bad cases 432

14.3.3 Bad barrels 432

14.3.3.1 A case study of the GM ignition switch 432

14.3.3.2 Managing bad barrels 435
### 14.4 Mechanisms that regulate business ethics

14.4.1 Legal consequences 436
14.4.2 Market mechanisms 437
14.4.3 Disclosure 438
14.4.4 Gatekeepers 440
14.4.5 Whistleblowers 442

### 14.5 Organisation-level approaches

14.5.1 Leadership 445
14.5.2 Corporate culture 446
14.5.3 Codes of conduct 447
14.5.4 Structures 449
14.5.5 Complaints handling 449

### 14.6 Conclusion 450

**Index** 452
Authors

Jean Jacques du Plessis is a Professor (Corporate Law) in the Deakin Law School, Deakin University. He developed and taught a 1-year corporate governance Graduate Diploma in South Africa in 1998 (this was one of the first such courses in the world). He also developed a Corporate Governance Postgraduate Unit (MLM706) for Deakin University in 2004 and redirected the content of that Unit to reflect the content of the first edition of *Principles of Contemporary Corporate Governance*. Jean also publishes actively in the area of corporate governance, with more than 100 articles published in refereed Australian and international journals. He is co-author of 10 books, published in Australia, Germany and South Africa. He is an Alexander von Humboldt Scholar and received the Anneliese Maier Research Award from the Alexander von Humboldt Foundations for a 5-year period (2013–18). He assisted the South African Government with its Corporate Law Reform Program. This resulted in the South African Companies Act 71 of 2008, which became law in April 2012. He has been involved in that Reform Program since 2004. He was also the Head of the Deakin Law School (2000–02), President of the Corporate Law Teachers Association (CLTA) (2008–09) and became a graduate of the Australian Institute of Company Directors (AICD) in October 2011. Jean teaches in the areas of corporate governance, corporate law and business law. He was co-editor of the *Deakin Law Review* in 2012 and currently serves on the editorial board of the *European Journal of Economics and Management*.

Anil Hargovan is an Associate Professor in the School of Taxation and Business Law at the University of New South Wales (UNSW). His research interests are in the area of corporate and insolvency law, a discipline in which he has presented many conference papers and published widely in refereed Australian and international law journals. His academic work, which includes over 110 publications, has been cited by the Corporations and Markets Advisory Committee and the judiciary. He has been a guest editor of the *Australian Journal of Corporate Law* and currently serves on the editorial board of the *Insolvency Law Bulletin*. Anil has authored and co-authored several books, including *Australian Corporate Law* (LexisNexis, 2016). He was President of the Corporate Law Teachers Association (CLTA) in 2011–12 and is currently a member of the Executive Committee of the CLTA. Anil currently serves on the Corporate Governance Subject Advisory Committee and on the Applied Corporate Law Subject Advisory Committee at the Governance Institute of Australia. He has conducted the Corporate Governance course in the MBA program at the Australian Graduate School of Management at UNSW.
Jason Harris is an Associate Professor in the Faculty of Law at the University of Technology, Sydney (UTS), where he teaches corporate law, insolvency and commercial law. Jason is the President of the Australian Corporate Law Teachers’ Association (CLTA) for 2017. Jason’s research interests are primarily in the area of directors’ duties, corporate groups and disclosure obligations. Jason has written extensively on these areas. He has published 12 books and over 90 articles in scholarly and professional journals. Jason’s research has been cited in the Federal Court of Australia and the Supreme Courts of NSW, South Australia and Western Australia, and by the Corporations and Markets Advisory Committee. Jason is a Fellow of Governance Institute of Australia (and is the Chair of its National Education Committee), a member of the Corporations and Insolvency Committees of the Law Council of Australia, a member of the academic executive committee of the Banking and Financial Services Law Association and an academic member of the Australian Restructuring, Insolvency and Turnaround Association.

Contributors

Vivienne Bath is Professor of Chinese and International Business Law at the University of Sydney. She has first-class honours in Chinese and in Law from the Australian National University (ANU), and a Master of Laws from Harvard University. Prior to joining the Faculty of Law, she was a partner in international firm Coudert Brothers, working in the Hong Kong and Sydney offices and specialising in commercial law, with a focus on foreign investment and commercial transactions in the People’s Republic of China. Vivienne is the co-author of Burnett and Bath, International Business Law in Australasia (Federation Press, 2009) and has published widely in the area of Chinese law and international business law. She is a frequent participant in conferences and seminars focusing on developments in international economic law and the Chinese legal regime.

Indrajit Dube (PhD) is an Associate Professor at Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology Kharagpur, India. His areas of specialisation include corporate laws and corporate governance. He has numerous publications in refereed journals published from India and abroad. His writings are mainly focused on independent directors, directors liability, integrated reporting, corporate social responsibility, and corporate governance in energy sector. He has several books to his credit. His book on corporate governance, published by LexisNexis Butterworths, is widely referred in national and international institutes of eminence. He has conducted about 20 funded projects from agencies both national and international. He has led the team on development of institutional framework of the Indian Institute of Corporate Affairs, New Delhi, India’s premier Institute of Corporate Law Governance and Research, set up under the aegis of the Indian Ministry of Corporate Affairs. He has also been a Visiting Faculty member at the University of Western Ontario, Canada (2010), and the University of British Columbia, Canada (2011). He delivered the Kirby Lecture Series at the School of Law, University of New England, Australia (2016). He participated in multi-stakeholder expert consultations in Toronto in support of the mandate of Prof. John G. Ruggie, the Special Representative of the United Nations on Business and Human Rights (2009).

Irene-marié Esser is a Professor Extraordinarius at the University of South Africa (UNISA), a Visiting Professor at the Open University, UK and a Senior Lecturer in Commercial Law at the University of Glasgow. She is also an expert panel member of the EU/Africa Chamber of
Commerce. In South Africa she was Professor and Co-Subject Head of Corporate Law at UNISA until March 2013, when she relocated, with her family, to Edinburgh, Scotland. Irene-marié obtained her LLB at Stellenbosch University (2001), her LLM at the University of Aberdeen, Scotland (2003) and her LLD at UNISA (2008). She is also an admitted attorney of the High Court of South Africa. Irene-marié’s research interests are primarily in the area of directors’ duties, corporate social responsibility and stakeholder protection, and she publishes widely in this field. She was a contributor of the first edition of the leading textbook Henochsberg on the Companies Act 71 of 2008 and contributes to the company law chapter in the Annual Survey of South African Law. She is also the co-editor of the Corporate Governance Annual Review. During 2009 Irene-marié received the ‘Women in Research: Youngest staff member with a doctorate degree’ award at UNISA, as well as the Principal’s Prize for Excellence in Research. During 2016 Irene-marié was awarded, as co-winner, the prize for the best article published in the Journal of Contemporary Roman Dutch Law for the co-authored work: Esser and Delport, ‘Shareholder protection in terms of the Companies Act 71 of 2008’. Irene-marié has also been presenting workshops and seminars for professionals working in the field of corporate governance, and a 4-day workshop on board governance, for eight years, at the University of Johannesburg. She redeveloped this course extensively during 2015. Irene-marié acted as an external advisor to the South African King IV Report on Corporate Governance. She currently teaches Corporate Governance, Corporate Social Responsibility and Company Law and supervises postgraduate research students in South Africa and the UK.

Miko Kamal is a legal governance specialist. He is the principal of Miko Kamal & Associates. He completed his Doctor of Philosophy (PhD) at Macquarie University, Sydney, in 2012. His thesis was titled ‘The Role of Board of Commissioners in Creating Good Governance of Indonesia’s State-owned Enterprises’. Miko also completed a Master of Law (Commercial Law) in 2003 at Deakin University, Australia, and a Bachelor of Law (Constitutional Law) in 1996 at Bung Hatta University, Indonesia. His work has been published in several international and national academic and professional journals and books, and in print media. His main focus is on anti-corruption policies and strategy, governance (private and public sectors) and boards of commissioners in state-owned enterprises. He is a licensed advocate and member of the Indonesian Advocates Association (PERADI) and has been practising since 1996. He teaches at Bung Hatta University in addition to working as a lawyer. At the end of 2016, the Government of Padang appointed him as a chief of commissioner of a municipality-owned enterprise.

Souichirou Kozuka is a Professor at Gakushuin University, Tokyo. He holds a PhD in Law from Tokyo University and taught at Chiba University and Sophia University before starting to teach at Gakushuin University. As well as researching in his field – commercial law and corporate law – he has also been active in comparative law studies, being a correspondent of UNIDROIT and an associate member of the International Academy of Comparative Law (IACL). He has helped establish contacts with Japanese law specialists outside of Japan on many occasions. He is a program convenor (in eastern Japan) of the Australian Network for Japanese Law (ANJeL) and serves on the editorial board of the Journal of Japanese Law (Zeitschrift für japanisches Recht), which is published in Germany.

Suzanne Le Mire is an Associate Professor at the Adelaide Law School and Deputy Executive Dean of the Faculty of the Professions, University of Adelaide. Suzanne’s research and teaching
interests are focused in the areas of corporate law and professional ethics. She is particularly interested in the role and regulation of independence in a number of contexts, including corporate and superannuation boards, judges, regulators and lawyers. As well as holding a number of senior university roles in recent years, including Associate Dean (Learning and Teaching) and Dean of Law, Suzanne has been a distinguished overseas visitor at the Chinese University of Hong Kong and the University of Mannheim, Germany, and visiting scholar at University College London.

Jeanne Nel de Koker is a researcher who teaches corporate and commercial law at an undergraduate and postgraduate level at Deakin University, Australia. Jeanne graduated from the Faculty of Law of the University of the Orange Free State with a B.Iuris, an LLB and an LLM in Constitutional Law. She was admitted as an Advocate of the High Court of South Africa and practised as a member of the Bar. She was a senior lecturer in the Department of Business Law and Taxation at Monash University, Australia, deployed to their new South African campus to develop and present their commercial law courses. She has delivered more than 25 academic papers at national and international conferences and published 13 articles in national and international peer-reviewed journals. Jeanne authored chapters in Anti Money Laundering Guide (Thomson Reuters, 2015) and The Changing Family (Hart Publishing, 1998). Most recently, Jeanne and Jean du Plessis co-edited Disqualification of Company Directors (Routledge, 2017).

Luke Nottage is Professor of Comparative and Transnational Business Law in the Faculty of Law at the University of Sydney, Associate Director (Japan) at its Centre for Asian and Pacific Law, Program Director (Comparative and Global Law) at the Sydney Centre for International Law, and founding Co-Director of the Australian Network for Japanese Law. He specialises in commercial and consumer law, and has published over 100 works, including Nottage, Wolff and Anderson (eds) Corporate Governance in the 21st Century: Japan’s Gradual Transformation (Elgar, 2008) and Puchniaik, Baum and Nottage (eds) Independent Directors in Asia (CUP, 2017). Luke is qualified in New South Wales and New Zealand, has worked closely with law firms in Japan since 1990, and is a Director of Japanese Law Links Pty Ltd. He has served as expert witness or consulted for many other law firms worldwide, as well as for ASEAN, the OECD, the European Commission, the Japanese Cabinet Office and the UN Development Programme.

Susan Watson is a Professor of Law at the University of Auckland Faculty of Law, where she is the Deputy Dean. She researches and teaches corporate law and corporate governance. She is the joint editor and author of Company and Securities Law in New Zealand (Thomson Reuters), collections Contemporary Issues in Corporate Governance, Corporate Governance After the Financial Crisis and Innovations in Corporate Governance (Edward Elgar). She is also the author of over 60 articles and book chapters. ‘How the Company Became an Entity – A New Understanding of Corporate Law’, published in the Journal of Business Law, won the 2015 Legal Research Foundation Sir Ian Barker Published Article Award. This award is given for the best article, essay or discrete book chapter published by a New Zealand-based author.
PREFACE

The modern corporation knows few bounds – its widespread use in business and the corporatisation of essential services means that it permeates almost every aspect of our daily lives. It is companies, small and large, that drive economies and that can create economic prosperity for countries. However, all is not bright and shining; companies, especially large multinational public companies, have been the cause of considerable harm to the environment and society generally because of pollution, exploitation of employees and not providing safe working environments. There are too many examples in too many countries to name them all, but as this book originated in Australia, the James Hardie case, where many suffered tremendously because of exposure to asbestos, with little or no respect by the company for those who suffered, is a prime example of why it is of considerable importance that companies are governed properly. We discuss the James Hardie case in detail in Part 2.4.2, as well as in Part 14.2.3 from a business ethics perspective. Principles of corporate governance have a vital role to play in protecting consumers, shareholders, creditors, the environment and society, and in ensuring that companies act responsibly as well as legally.

Since the appearance of the first edition of Principles of Contemporary Corporate Governance in 2005, developments have gained velocity, and the volume of materials on corporate governance has grown exponentially. This made the appearance of a second edition in 2011 inevitable. The global financial crisis that emerged in about 2008 and global financial uncertainties in the European Union (since 2008) made us predict in 2011 (in the Preface to the second edition of this book) that the discipline of corporate governance would retain its prominence in future. That has indeed been the case, and it was a main motivation for us to bring out the third edition and now this fourth edition of Principles of Contemporary Corporate Governance.

Again we looked at the book in its entirety and asked how we could keep it relevant and contemporary. We decided not to simply add more materials to the book and make it a monstrous work. Rather, we decided to stick to our original approach of focusing on the fundamental and contemporary principles of corporate governance. However, we also wanted to include more of the corporate governance themes and issues that have become particularly prominent in recent years. It meant that we had to delete some of the dated discussions to make place for new contemporary corporate governance themes and pressing issues. In this era of globalisation, we expanded the coverage on comparative corporate governance by adding a part on corporate governance in New Zealand (written by Susan Watson) and on India (written by Indrajit Dube) to complement the other jurisdictions we cover in Part Three of this book.
Part One (Chapters 1–4) introduces the reader to basic concepts, different types of board structures and different types of company officers. Chapters 1 and 2 deal with basic corporate governance principles and the all-inclusive stakeholder approach. We aim at stimulating debate on the dominant corporate shareholder primacy model. We contrast some prominent corporate governance theories, such as the shareholder primacy theory, the enlightened shareholder value theory, the stakeholder theory and the director primacy theory. In addition, we discuss disclosure of, and reporting on, non-financial information by way of different forms of voluntary reporting, such as integrated reporting, sustainability reporting and corporate responsibility reporting, which encompasses more than just corporate social responsibility (CSR). We also emphasise the importance of responsible behaviour by corporations and the creating of long-term, sustainable growth for corporations. In Chapter 3 we contrast the unitary and two-tier board systems and point out the virtues of both. In that chapter we draw attention to the fundamentally important difference between the managerial role of management and the supervisory or governance role of the board of directors. In Chapter 4 we deal with directors’ and executives’ remuneration and the importance of board diversity, with a focus on gender diversity.

Part Two (Chapters 5–10) deals with corporate governance in Australia. We have updated this part with the latest developments and we also discuss some of the most significant new Australian cases on directors’ duties and liability.

Part Three (Corporate governance in international and global contexts), in common with earlier editions, offers a concise and updated discussion of the United States (US), the United Kingdom (UK), Canadian, German, Japanese and Chinese corporate governance models. Having added new parts in the third edition on the European Union (EU), Indonesia and South Africa, we added New Zealand and India to the fourth edition. In Chapter 12 we continue to discuss the OECD Principles of Corporate Governance, and updated the entire book with references to the 2015 G20/OECD Principles of Corporate Governance.

In Part Four we focus on ‘Shareholder Activism and Business Ethics’. Chapter 13 gives an overview of the role of shareholder activism as one of the checks or balances in ensuring that companies adhere to good corporate governance practices. Chapter 14 has been completely re-written by Suzanne Le Mire, with a renewed focus on ‘Business ethics and corporate governance’. The chapter now combines academic discussions with case studies, some broader legal issues and other more general aspects impacting on business ethics.

The fourth edition will again broaden the perspectives and understanding of all people interested in corporate governance and corporate regulation and management, including company secretaries, compliance officers, judicial officers, lawyers, accountants, academics and students of law and business management.

With the third edition we added Jason Harris as author and relied on the specialised expertise of four new contributors, Irene-marié Esser (South Africa), Miko Kamal (Indonesia), Souichirou Kozuka (Japan) and Jeanne Nel de Koker (Australia) – our contributors from the previous editions, Vivienne Bath (corporate governance in China) and Luke Nottage (corporate governance in Japan) updated their parts extensively. The current edition is now enriched further by the contributions of Susan Watson (on New Zealand), Indrajit Dube (on India) and Suzanne Le Mire (on Business ethics and corporate governance).
We would like to acknowledge the input of Mirko Bagaric as author of the first three editions of this book and thank him for giving us permission to use some of the parts he wrote in the past.

Jean du Plessis (Deakin University)
Anil Hargovan (University of New South Wales)
Jason Harris (University of Technology Sydney)
May 2017
ACKNOWLEDGEMENTS

The authors and Cambridge University Press would like to thank the following for permission to reproduce material in this book.

**Figures 3.1–3.6**: Reproduced with permission from Robert Tricker. **Extracts** from ASX Corporate Governance Council material: © Copyright 2017 ASX Corporate Governance Council. Association of Superannuation Funds of Australia Ltd, ACN 002 786 290, Australian Council of Superannuation Investors, Australian Financial Markets Association Limited ACN 119 827 904, Australian Institute of Company Directors ACN 008 484 197, Australian Institute of Superannuation Trustees ACN 123 284 275, Australasian Investor Relations Association Limited ACN 095 554 153, Australian Shareholders’ Association Limited ACN 000 625 669, ASX Limited ABN 98 008 624 691 trading as Australian Securities Exchange, Business Council of Australia ACN 008 483 216, Chartered Accountants Australia and New Zealand, CPA Australia Ltd ACN 008 392 452, Financial Services Institute of Australasia ACN 066 027 389, Group of 100 Inc, The Institute of Actuaries of Australia ACN 001 797 557, Financial Services Council ACN 080 744 163, Governance Institute of Australia Ltd ACN 008 615 950, Law Council of Australia Limited ACN 005 260 622, National Institute of Accountants ACN 004 130 643, Property Council of Australia Limited ACN 008 474 422, Stockbrokers Association of Australia ACN 089 767 706. All rights reserved 2017. **Extracts** from Supreme Court of Western Australia reproduced with permission. **Extract** from James McConvill, ‘Revisiting holding company liability for subsidiary company debts in Australia: A response to the James Hardy controversy’ © 2005 ResearchOnline@ND. **Extract** from Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation © 2017 Department of Premier and Cabinet. Reproduced under Creative Commons Attribution 4.0 International. **Extract** from Redefining the Corporation: Stakeholder Management and Organizational Wealth by James E. Post, Lee E. Preston and Sybille Sachs. Copyright © 2002 by the Board of Trustees of the Leland Stanford Jr. University. All rights reserved. Used by permission of the publisher, Stanford University Press, sup.org. **Extract** from Corporate Governance 2nd Edition by Christine Mallin (2007) reproduced by permission of Oxford University Press. **Extracts** from the Federal Register of Legislation (www.legislation.gov.au) reproduced under Creative Commons Attribution 4.0 International (CC BY 4.0) (https://creativecommons.org/licenses/by/4.0/). **Extracts** from CLERP (Audit Reform & Corporate Disclosure Bill Commentary on the Draft Provisions – Corporate Law Economic Reform Program No. 9 (October 2003) reproduced under Creative Commons Attribution 3.0 Australia (CC BY 3.0 AUS). **Extracts** from the Report of the HIH Royal Commission (Owen Report), The Failure of HIH Insurance – Volume 1: A Corporate Collapse and its Lessons reproduced under Creative Commons Attribution 3.0 Australia (CC BY 3.0 AUS). **Extract**s from German Corporate Governance in International and European

Extracts from the New York Stock Exchange Listed Company Manual used with permission of the NYSE Group, Inc. © 2017 NYSE Group, Inc. Note that book only contains a summary of the NYSE material created by the authors, and may not contain the most up-to-date information. Readers should refer to wallstreet.cch.com/LCM for the most current information.


Every effort has been made to trace and acknowledge copyright. The publisher apologises for any accidental infringement and welcomes information that would redress this situation.