

CONTENTS

<i>Authors and contributors</i>	<i>xvii</i>
<i>Preface</i>	<i>xxi</i>
<i>Acknowledgements</i>	<i>xxiv</i>
<i>Table of cases</i>	<i>xxvi</i>
<i>Table of statutes</i>	<i>xxx</i>

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

2.2.2.7	Government	41
2.2.2.8	All stakeholders have vested interests in the sustainability of corporations	42
2.3	Stakeholders' interests and the corporation: The role of the law	42
2.3.1	The Australian position	43
2.3.2	Overseas position: A snapshot	44
2.3.2.1	OECD	44
2.3.2.2	European Union (EU)	45
2.3.2.3	United States	47
2.3.2.4	United Kingdom	50
2.3.2.5	Canada	52
2.4	Stakeholder interests, good governance and the interests of the corporation: A mutual relationship	53
2.4.1	General analysis	53
2.4.2	Case study of James Hardie's asbestos compensation settlement	57
2.4.2.1	Impetus for the corporate restructure	58
2.4.2.2	Key features of the separation plan	59
2.4.2.3	Public announcement of the separation plan	60
2.4.2.4	Scheme of arrangement and relocation to The Netherlands	60
2.4.2.5	Jackson Report and its significance	61
2.4.2.6	Aftermath	63
2.5	CSR and directors' duties	66
2.6	Conclusion	69
3	Board functions and structures (with contributions by Jeanne Nel de Koker)	71
3.1	Higher community expectations of directors	72
3.1.1	Initially low standards of care, skill and diligence expected of directors	72
3.1.2	Legal recognition of changed community expectations of directors	74
3.2	The organs of governance	76
3.3	Board functions	77
3.4	Board structures	81
3.5	Conclusion	86
4	Types of company directors and officers (with contributions by Jeanne Nel de Koker)	88
4.1	Overview	89
4.2	Definition of 'director'	90
4.2.1	De jure and de facto directors covered	90
4.2.2	Shadow directors	91
4.2.3	Nominee directors	92

4.3	Definition of ‘officer’	93
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	96
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	107
4.5.1	Training	107
4.5.2	Induction	108
4.6	Ethical behaviour of directors	109
4.7	Remuneration of directors and executives	112
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 <i>ASX CG Principles and Recommendations</i> dealing with remuneration	117
4.7.4	Further measures to counter excessive remuneration of directors and executives	118
4.8	Board diversity	121
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

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

7.3.2.3	Continuous disclosure	169
7.3.2.4	Shareholder participation	170
7.3.3	Miscellaneous reforms	170
7.3.3.1	Officers, senior managers and employees	170
7.3.3.2	Enforcement	171
7.3.3.3	Proportionate liability	171
7.4	Accounting standards	171
7.5	Conclusion	172
8	Auditors and audits	174
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	179
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

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

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 <i>Sarbanes-Oxley Act of 2002</i> – 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 <i>Dodd-Frank Wall Street Reform and Consumer Protection Act 2010</i> (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 <i>Companies Act 1993</i> (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 <i>Companies Act 71 of 2008</i>	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 <i>Companies Act 2013</i>	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	<i>Companies Act 2013</i>	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 <i>Principles of Corporate Governance</i>, and corporate governance in Germany, Japan, China and Indonesia	310
12.1 Introduction	311
12.2 European Union (EU)	311
12.2.1 Enhancing corporate governance	311
12.2.2 The European Corporate Governance Forum (ECGF)	313
12.2.3 The EU single market	315
12.2.4 The significance of continued EU corporate harmonisation	316
12.2.5 Recent harmonisation initiatives legalised through EU Directives	316
12.2.6 Reflection	319
12.3 G20/OECD <i>Principles of Corporate Governance</i>	320
12.3.1 Background	320
12.3.2 Broad aims and application	321
12.3.3 Structure	321
12.3.4 Ensuring the basis for an effective corporate governance framework	322
12.3.5 Disclosure and transparency	323
12.3.6 Conclusions on G20/OECD <i>Principles</i>	324
12.4 Germany	324
12.4.1 Background to the corporate governance debate	324
12.4.2 The German Corporate Governance Code (GCGC)	327
12.4.2.1 Background to adoption	327
12.4.2.2 Structure and explanatory nature of the Code	329
12.4.2.3 Some noteworthy provisions of the Code	330
12.4.3 Employee participation at supervisory board level – codetermination	333
12.4.4 The German board structure	337
12.4.5 Conclusions on Germany	337
12.5 Japan (by Souichirou Kozuka and Luke Nottage)	338
12.5.1 Introduction	338
12.5.2 Historical transformations in Japanese corporate law and practice	339
12.5.3 Japanese corporate forms and internal governance mechanisms	341
12.5.3.1 Overview	341
12.5.3.2 The board of directors and choice in governance structures	343
12.5.3.3 Directors' duties and derivative actions	345
12.5.4 Shareholder versus bank finance	348
12.5.4.1 Overview	348
12.5.4.2 Takeover regulation	348
12.5.4.3 New firms in the IPO market	352
12.5.4.4 Main banks	353
12.5.5 Core employees	356
12.5.6 Conclusions on Japan	358

12.6	China (by Vivienne Bath)	359
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 – <i>Basic Norms for Internal Control of Enterprises</i>	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)	387
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 <i>direksi</i>	390
12.7.3.3	The <i>dewan komisaris</i>	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 <i>dewan komisaris</i>	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 <i>direksis</i>	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	436
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	445
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
	<i>Index</i>	452