

# TRANSCRIPT

## ENVIRONMENT, NATURAL RESOURCES AND REGIONAL DEVELOPMENT COMMITTEE

### Inquiry into the CFA training college at Fiskville

Melbourne — 9 November 2015

#### Members

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Mr Tim McCurdy — Deputy Chair

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#### Witness

Professor Bryan Horrigan, dean of the faculty of law, Monash University.

**The CHAIR** — Welcome, Professor Bryan Horrigan from Monash University, dean of the faculty of law. Thank you for taking some time today to make a presentation and answer questions. Before you commence, I will go through some of the formalities. As outlined in the guide provided, all evidence at this hearing is taken by the committee under the provisions of the Parliamentary Committees Act 2003 and other relevant legislation and attracts parliamentary privilege. Any comments made outside the hearing will not be afforded such privilege, which I am sure you are fully aware of. It is an act of contempt of Parliament to provide false or misleading evidence to the inquiry. All evidence given today is being recorded, and you will be given a proof of the transcript to check for accuracy before it is published. Thank you once again for coming to speak to us today. I would be pleased if you could commence. Perhaps, if you would not mind, prior to your presentation, could you tell us a little bit about yourself and your background?.

**Prof. HERRIGAN** — Thank you, Chair, and thank you for the privilege to be involved with the work of this committee. If I could perhaps take the preliminary time to give you a little bit of an idea of my expertise in this area, and then, secondly, help the committee by providing a broader context for public sector governance. My reason for doing that is that what is going on in the broader public sector environment affects the capacity and approaches to governance and compliance of any organisation within the public sector, and I will try to be mindful of focusing comments in that general way.

Thirdly, perhaps if it is of interest, I will talk about where, from the private sector and elsewhere, there are examples of corporate governance gaps and breakdowns, but my comments will be about public sector governance in general, not the specifics of this particular matter.

**The CHAIR** — We certainly understand that you do not have all the details, and we certainly will be asking you in the broader sense about governance. Thanks.

**Prof. HERRIGAN** — Sure. One matter of housekeeping: good corporate governance is about being transparent and declaring interests. I understand there is an earlier report that came from Monash University, *Fiskville Firefighters' Health Study*, but I have nothing to do with that part of the university. I am speaking as dean of the faculty of law in my own capacity as an expert in public and corporate law and governance. I have had more than 25 years in that area, both in practice full time and then as a consultant to an international law firm advising companies as well as state-owned enterprises, departments and other public sector bodies as well as private sector bodies about corporate governance matters. I have studied public and corporate law and governance from a public sector perspective mainly in my academic work, so I will bring both of those aspects of academic and practical experience to my assessment of corporate governance.

I am also speaking as someone who has not just advised people within government, company directors and others about corporate governance; I have skin in the game as someone who has to deal with this in a public sector context because I am part of Australia's most international university. As one of 10 deans at a large matrix organisation I am responsible for 4000 students and six locations on three continents in two hemispheres. I have hundreds of staff under my care, so as the CEO, effectively, of that organisation I have to confront issues of corporate governance for real. I will try to bring those perspectives to bear.

In setting a scene for public sector corporate governance it is often important to talk about what we mean by these terms, because governance is a bit like one of those things that means everything to everybody. When we are talking about it in the public sector context our ideas about how organisations are governed are often set from a private sector heritage, and that has mainly been in terms of ideas that have come from overseas and been absorbed in Australia at both federal and state levels that the governance of organisations is about how they are controlled and managed. But the trends in corporate governance and the regulation of the sector over time are more about identifying how and why an organisation is run, and for whom. That is not just a difference of words; it reflects a difference over time at both state and federal levels, and in some cases comparative developments overseas, in how we think about organisations and how they are governed from a command-and-control perspective to something that is not just about 'You'll do it because I say so' and it goes down the line.

That affects the regulation of corporate governance. It affects the practices that are built around the corporate governance arrangements of particular organisations. Often corporate governance for real — for those who have to deal with it in either a company, a university faculty, a public sector agency or a department — is about managing the tensions. The classic tension that gets talked about is what you would like to do, what you have planned to do and what would be ideal versus what capacities you have and what resources you have. But what

is often not noticed is that there are a whole heap of other tensions, and the game of successful corporate governance in finding solutions to anything is about how you manage the tensions. How do you manage tensions within the public sector? How do you manage the tensions which are institutional? How do you manage the tensions within an organisation? How do you manage the tension between personal and organisational factors and structural and other factors?

That is why it is a very complex beast to talk about corporate governance within any organisation and within a sector. It is why what you see depends on what you focus on. When I have done roundtable discussions with public sector bodies, mainly in the federal context, depending on which organisation you are talking to and depending on which phase in the era of public sector reform we are in, the conversation around governance can be all about structure, it can be all around process, it can be all around values or it can be all around results. It is all of those and more.

Corporate governance will also involve issues of performance versus conformance or compliance, issues of risk, issues of reporting and issues of management of stakeholders, both inside and outside — the internal and external stakeholder management. Another thing that has become apparent in the trends over time is that each of these things does not always have just one meaning. So when we talk about an approach to risk, there are different ways to approach risk management both as a regulator and as an organisation, just as there are different approaches to something as simple as the way we all operate in our daily lives by checklists. Checklists can be very good or very bad, depending on how you use them. For simple situations where it is just a matter of ticking things off, checklists work really well. As the situation to be confronted becomes more complex, and if the approach to using the checklist is just a mindset of ‘We’re just ticking a box’, they start to lose their utility and increase the risk of using them in a way which is replacing judgement, not guiding judgement.

I use that simple example because it reinforces a very important point, which is that these things cannot be approached in just one way. Even something as simple as compliance is affected by mindsets and attitudes, trends over time and the drivers that affect a capacity to respond to these things. That is a very important factor to notice in discussions about governance and the context in which governance is exercised. It also leads to what has been a modern emphasis in the last decade or so — and this is a factor in the literature, it is a factor that is reflected in the approaches that state governments take and the federal government has taken to reforming corporate governance to introduce more of a values-based approach. We have public sector values enshrined in legislation as part of public administration acts and public sector agency acts. It is reflecting the modern emphasis that is given to having an equal recognition of what are called hard factors and soft factors in corporate governance.

To explain what that is: hard corporate governance factors are about structures and processes. That can include compliance processes. The soft factors are the things that often go to behaviours, attitudes and relationships. Even using those terms is open to criticism, because some people say, ‘When you call something soft, does that mean it’s less important?’, and the answer is no, because all organisations — companies, faculties, public sector bodies, departments and agencies — are human organisations. The judgements are made by humans. The compliance, the attitude and the approach to compliance is by human beings. The mindsets that human beings bring, the capacity and resources, the behavioural aspects, the relational aspects within an organisation and between different units of an organisation and the silo mentalities that can develop are just as important as the structural issues and the formal reporting issues. Even when it comes to reporting, the approach that is taken to reporting and the approach that is taken to risk can affect whether the reporting going on within an organisation is actually helping the organisation in advance to identify risks and bring them to the attention of the right people at the right time or whether it is an ‘everybody running around to cover themselves’ kind of exercise, where sending news up the chain that is bad news is frowned upon. Those are cultural aspects associated with what are called the soft aspects of corporate governance.

These cultural aspects, the behavioural aspects, the attitude aspects, the relationship aspects and the relationship management aspects are just as important in terms of successful corporate governance and, when it goes wrong, in terms of identifying what has gone wrong and what is better for the future. They are just as important as the hard factors, which is why we cannot just spend time talking about structures and processes. We have to talk about the other things. Many of the problems that can emerge in organisations often reflect a failure to value and recognise these soft factors equally or to recognise the interaction that goes on between hard and soft factors — between the structure and processes and the behaviours, culture and relationships.

Drawing back and distilling where in the last 20 to 30 years any organisation in the public sector has had to look for guidance on what has happened in corporate governance reform and its regulation, it is true that in Australia, as elsewhere, there have been some lessons drawn from the private sector. A lot of the ideas we draw about governance of organisations are drawn from the private sector, but it is the private sector at a point in time. It is the private sector from the last 20 to 30 to 40 years, which has had a shareholder-based approach. Shareholder-based approaches and models go so far and no farther in a public sector context.

Secondly, there have been various phases in the approach to corporate governance and its regulation over time: managerialism followed by new public management followed by what is called integrated and joined-up governance. I do not think there is much to mine today in trying to track what differences they have made, but they do reflect differences in the regulation over time and in what is put into the processes that are followed in corporate governance.

What we are doing here today, for example, is an example of what might be called participatory governance, which is part of the new phase of integrated governance, which has much more of a citizenship focus informing matters, where committees have public inquiries and sometimes receive evidence from experts and sometimes receive submissions. There are times when that would not have happened. That is an example of an aspect of the modern approach to corporate governance, which is about joined-up governance and participatory governance, not replacing but working with the formal aspects of lawmaking in governance.

For any organisation in a state the drivers of the response of any organisation to how it governs itself now and for the future are in response to obviously the trends over time in public sector governance, and those trends are themselves reflecting what has happened in the literature and what has happened in the private sector that can be transposed across. Importantly any organisation has to adapt its governance arrangements also to the regulation of public sector governance in that jurisdiction. In Victoria, for example, whether we are talking about a department of state or a state-owned enterprise or some other agency, they have to take account of the various legislation that would regulate public sector bodies. In this jurisdiction that includes the State Owned Enterprises Act, the Financial Management Act, the Public Administration Act and, in the case of statutory corporations, the particular act incorporating a statute and any other statute that imposes obligations upon a public sector entity and those who manage and steer it.

Then finally there are the whole-of-organisation governance arrangements, which will be drawing upon the regulatory environment and responding to it and indeed complying with the public sector regulation that applies to that organisation. That translates down into plans, strategies, protocols, reporting lines, compliance procedures and so on.

But there are differences obviously in how a private sector organisation will view its governance and its accountability from a public sector organisation. Public sector bodies have to deal with parliaments, parliamentary committees, oppositions, governments, media, lobby groups, stakeholder groups and ministerial advisory groups. There are a range of multiple accountability mechanisms that actually come into play in the accountability aspects and the relationship management aspects of any organisation that is a public sector organisation in its approach to its governance arrangements.

People sometimes think governance is about what happens inside the organisation, but increasingly it is not. It is about how the organisation manages its outside relationships and its inside relationships and its integration between them, and compliance and the approach to compliance are only one aspect of that. I could speak to some of the ways in which, finally, corporate governance issues and corporate governance breakdowns can arise in some contexts, but perhaps that is enough of a scene setter to enable the committee to pursue what would be of help.

**The CHAIR** — Thanks for that presentation; that was very interesting. I suppose we are sort of looking at a historical situation as well as the current, but in terms of legislative requirements and the compliance of a public sector organisation, how do you see governments ensuring that there is compliance in that sort of area? You would sort of think that the public sector would be the model in terms of complying with other arms of government regulation or legislation. Do you think it has improved overall? I guess that is the first question. And could you give us any insights into what was occurring maybe in the 70s and 80s, even the 90s, in a general way?

**Prof. HARRIGAN** — In general terms I think we have become more sophisticated in our approach both to the regulation of corporate governance in the public sector and in the practice of it. There would have been a strong emphasis 30 years ago upon governance being about the financial aspects and financial management, which is why we still have them called that and why we have in all the states financial management acts or financial management and auditing and accounting acts. It has been a strong focus on that that has driven everything else in terms of reporting and getting the financial probity and the financial management aspects right. That is also an important aspect of corporate governance in the private sector, but because it is public money being used in the public sector there is even more reason for that to be an important aspect of governance.

So I suppose I would view it as a broadening out from a focus that was driven by financial management, auditing and accounting to these broader aspects of governance that I have talked about. And accordingly we have seen, at state level in particular, other acts being brought into play to deal with evolutions in how the state governments in Australia have approached governance. So, for example, one broad change has been that while there has been a policy of privatisation in some jurisdictions, other jurisdictions have kept public assets and public entities within the government fold and have corporatised them. So they have made them run more commercially, and that has meant they have had to have, in addition to financial management acts, corporatisation acts or state-owned enterprise acts, which set up ‘You’ll need a board, you’ll need to have these sorts of results and you’ll be subject to these sorts of obligations’ and so on. Thirdly, the introduction of the public sector values into legislation to be a guiding force is a reflection of other changes going on.

I cannot sit here and say that every single organisation in the public sector in Victoria or in every other state and federally has lifted its game, but I can say that the sophistication and multiplicity of the regulatory requirements that organisations in the public sector have to respond to has increased, so the number and the sophistication of the response has had to improve.

**The CHAIR** — Is that in what you call the hard corporate governance — doing the sort of checklists and things — or in the soft as well?

**Prof. HARRIGAN** — It goes to both, because again it is about how you approach it. So if you take a tick-a-box mindset to compliance, it is all about: what acts might affect us, where might we be liable, what do we have to look at out for and are we covered by insurance? Tick. Tick. Tick. Tick. If you are looking at what makes a successful organisation, there is no corporate governance study that I am aware of that says if you just do compliance and do it very well, you will be a successfully governed corporation. The success of an organisation in achieving its public sector aims and achieving the values that it says it lives by — including a public sector agency — includes but is not limited to compliance. It has to go to questions of performance and outcomes and how it manages all of its internal and external relationships, so it is an inclusive but not an exhaustive thing to do compliance; and even then, as I foreshadowed, there is not just one way of doing compliance. There are different ways for an organisation and for regulators to approach how they are going to approach compliance. A regulator might say, ‘We can identify high-risk, medium-risk and low-risk areas, and we are going to put most of our resourcing, attention and priority and our actions in the high-risk areas rather than making everyone jump through these hoops’. We all encounter this as individuals, or perhaps those who still visit hotels do. I say this as an example because it happened to me the other day: I walked into a hotel and I was asked for identification. That is an example of a very simple rule — a checklist: ask everybody who comes in for their ID and provided they are over 18 they will get in. The easiest way to implement that as a mindset is to say, ‘No exceptions — just ask everybody’. But the more complex the situations you face are, the more complex the systems in play and the more complex the response has to be in terms of the corporate governance arrangements for doing business, whatever your business is, and how you respond to risks, what you are looking for in your reporting and so on.

**The CHAIR** — In terms of perhaps more in the past in terms of public sector bodies and public sector regulatory bodies as a separate thing, do you think there was a bit more leniency or a little bit more casual checking of public sector entities by regulators because they just assumed that the right thing was being done or because they were part of the public sector? Do you think that could have occurred?

**Prof. HARRIGAN** — It is hard to say without doing both a proper study across the jurisdiction and a point-in-time study and within particular organisations. So anything I say would be anecdotal in response to that. But we do know that because of the different way in which the public sector is set up the way in which

regulators of the private sector operate is different, because not all areas of the public sector have a particular regulator in the way we might have an environmental regulator, a corporate regulator, a financial services regulator and an insurance regulator in the private sector. We have got particular regulators for particular purposes of the public sector, then we have got bodies charged with developing good governance practices — public service merit commissions and so on. We have certainly departments and agencies that administer acts that will bind public sector bodies if they do not have immunity, as much as they will bind private sector bodies.

**The CHAIR** — Health and safety legislation.

**Prof. HARRIGAN** — That is right — health and safety, workplace, environmental matters and so on. So the regulator is just as involved there. But again, as you identified, Madam Chair, the fact that it is all within the one sector means that even though it is a different entity doing the investigation it is still all within the one sector and all of the agencies and the departments in the end have to account for their financial matters. Treasury is involved in other ways. So there are different dynamics and drivers that are affecting the regulatory environment for public sector governance in a way that does not quite happen in the private sector.

**The CHAIR** — And often the same people may move around in the organisation. Do you think that is a bit of an issue?

**Prof. HARRIGAN** — Again, without studies, I would say no more so than in the private sector or indeed in universities. Universities are classic hybrid creatures — part public, part private — in some contexts. The movement is indicative of what is the real issue, which is the capacity and the continuity of institutional memory and whether we have protocols and things in place so that if someone goes we still have the right capacity and that if they go that the knowledge, the history and the learning has not gone with them. Those are very common governance arrangement issues for any organisation, particularly in the public sector, if there is going to be a lot of movement.

**The CHAIR** — Okay, thanks.

**Mr RICHARDSON** — Thank you, Bryan for coming in today. I have just a couple of questions. In terms of compliance with legislation as a general point for the public sector, how well has the public sector evolved with their statutory authorities over that time, and has that interaction between agencies improved over time as well?

**Prof. HARRIGAN** — My sense is that it has improved over time. Again, I cannot give you studies about that. My experience has not been Victoria-specific, so I am not making comment about this jurisdiction in particular, but looking at the patterns across Australia over time, yes, it has improved. Again, there are multiple factors driving that. You have got more players involved, you have got more areas that are being regulated and you have got the sophistication that I have identified. But the more players and the more regulators and the more needs to comply, you then also get the requisite increase in the complexity of more of a need to break outside of silos — both silos within organisations and across organisations; silos that operate within a sector, this arm of the public sector dealing with this arm; more need to have the communication channels; and the management of the external and internal relationships even better, because the rest of it has become more complex.

If you like, there is a bit of a cause and effect here as well in terms of where, if you do not lift your game over here to match what you have to do to lift your game over here with compliance and governance, you can start to have some problems — not necessarily compliance problems that will identify themselves, but real problems in terms of something being missed or the left arm not knowing what the right arm is doing and so on.

**Mr RICHARDSON** — Generally there are I guess two ways of doing that in the public sector. There is that self-regulation and self-monitoring, but there is also oversight on occasion from the Auditor-General or the various regulatory authorities. How effective is that, the contrast between self-regulation and the Auditor-General, but then also the implementation of any recommendations forthwith of an inquiry or an investigation? How have you found it in terms of its effectivity between those two approaches?

**Prof. HARRIGAN** — You need both, and, depending upon the problem, you may require both. It is possible some could be handled by one rather than the other. But like in the private sector, self-regulation needs to be against a standard. The standard needs to be objective and known and it needs to be communicated and it needs to be monitored. There would be lots of organisations in the private sector, for example, that have signed up to codes of conduct, but whether they are actually complying with them, and whether anyone is checking, or

whether it is just nice advertising, is a separate matter. If we are going to go down the path of those two outcomes, if we are going to have self-regulation, it is self-regulation plus what else as a check and balance to make sure that the self-regulation is going to work. In the private sector self-regulation is often an attempt by an industry to keep at bay extra government regulation. That ought not be a factor in the public sector context. But my point here is that if we are going to have self-regulation, it is self-regulation plus checks and balances.

In terms of having a regulatory authority, again, we do not have just one. Again, where there is a multiplicity of players, the question will be their own approach to how they exercise their responsibility as a regulator and the interaction and communication between the regulators, because, again, lots of compliance problems or issues may not have just one cause. That is how companies approach it. Companies may very well have an environmental policy, a social policy, a financial policy and a financial audit committee and risk committee, but at the end of the day, successful companies have an integrated approach to their corporate governance. They have an integrated approach to risk management. They do not just have trade practices or competition compliance and this compliance and that compliance. They take an integrated and holistic approach to their compliance and their risk identification and their reporting. It is not only integrated in its approach to risk and compliance, it is integrated in the sense that it is there to inform the internal decision-making, to identify the real risks, to make sure the right information is brought to the attention of the right people in the organisation to then do something.

Perhaps something else that might be thought of, not necessarily as an alternative solution, if we are looking at possible solutions in the abstract to problems in the public sector and their agencies — but itself as something that could work with either or both, and which is a reflection of trends over time in both private sector and public sector contexts — more and more we are seeing the development of not so much hard and fast rules, that it is comply or do not comply and then someone comes after you with a ruler in an enforcement sense, but it is a principle-based approach to regulation. We are seeing lots and lots of things that are developed — they have some teeth to them. For example, corporate governance in the private sector in Australia, we now have not just what is in the Corporations Act, but we have a body which has relevant stakeholders from the private sector and regulators and others setting standards for good corporate governance, principles which are followed on a comply-or-explain basis. There are lots of other frameworks available in public and private sector contexts, particularly internationally, that use a principle-based framework.

The advantage of principle-based frameworks over rule-based frameworks is that you are allowing more capacity for judgement. You are recognising the complexity of the kinds of governance situations that organisations confront, whatever sector they are in. It can promote better understanding of what is actually required, including what level of judgement is required by an organisation and within it. It can work with other solutions. It can work with a regulator. A regulator may issue a principle-based set of guidelines to try to raise awareness and educate those within an industry about the kinds of problems they are trying to address, rather than everyone approaching it from what I would call the old mindset of saying, ‘There’s the law, there’s the regulator sitting up there with a really big stick, and if you talk to them, or if they focus on you, be afraid’.

If people are responding from that kind of attitude and mindset, you get a form of behaviour that is different from if you say, ‘We’re focusing on the real areas of risk. Here is the framework within which we want you to operate. We need you to tell us and report against this framework. We need you to identify risk within this framework. If there is something different about you, tell us, and that is going to inform how we approach you and how we regulate you’. Again, that is a much more complex approach to regulation. But complex situations and complex systems very rarely have one-size-fits-all, simplistic, blunt, tick-a-box solutions.

**Mr RICHARDSON** — That follows on that there is then a logical extension of continuous reporting, assessment and the like. What sort of processes, or what should authorities, the public sector, be looking to do on an annual or a six-monthly basis to see if they are complying and updating that approach and complying with regulations across the board?

**Prof. HARRIGAN** — There has to be a benchmark of standards. We are just talking in the abstract here. Good corporate governance practices and reporting in the private sector and in other contexts — there is an identifiable standard. The standard has traction with the stakeholders. They may even have some input into it. Everyone knows what the standards are. You report against it, and those reports are public. There are ways to work with transparency and the public nature and the regularity of review. Every year companies in Australia that are bound by those guidelines have to put in a report. Directors have to put in a report. Everyone knows you

have to do that. It is built into the normal annual reporting cycle and the decision-making cycle, and the governance arrangements can be structured accordingly around what do the directors need to sign off, what do they need to see and in the requirements of what you put in the report.

You do not have too many rules or principles. There are eight. Even large corporations in Australia are governed by basically eight principles of corporate governance against which they report. Of course one of them is about how you recognise and manage risk. You can build into what you are asking people to report against the areas of focus that you want them to direct attention to when it comes to their corporate governance arrangements and reporting on what they do.

Generally speaking, other things that work with the daily business of government are usually the best way to go, rather than adding on extra things. We can always add in more regulators, and if we need to, we do. But the approach the regulators take is important. Working with the committee systems is important. So there will be a home committee. Just as a department administers legislation, committees have responsibility for particular areas of portfolios and legislation. It could be part of committee oversight and responsibility. It can also involve the public. There are other frameworks.

Corporate social responsibility is another area of mine. Corporate social responsibility at the moment is driven by not so much the hard law but law other than laws imposed by governments, much of which is driven by the civil society sector or by the business sector coming to agreement around, particularly in the area of business and human rights, how they might approach reporting and compliance and involving civil society organisations in working with business and government in reporting on human rights abuses. So the monitoring and oversight by independent parties can be an important part of the checks and balances and also keeping it real, because if it is just up to any organisation — a faculty, a public sector agency or a company — to just basically report on what it is totally in control of and there is no way for anybody to be able to assess, ‘Are you reporting on the right sorts of things, and can we trust what you are saying?’, then that is more limited than something that has inherent verifiability around it.

I do not mean by that — again, it is all about approaches — that you have something that has to be submitted that someone goes through line by line. That is not necessarily the right way to approach the compliance aspect of independent verification monitoring as well. I am simply pointing to, from a good corporate governance point of view, how independent monitoring by people other than those involved in making a decision can be part of inherent checks and balances.

**Mr RICHARDSON** — I appreciate that. Thanks, Bryan.

**Mr RAMSAY** — Just a quick one, thanks, Bryan. Brand Fiskville has taken a battering over the last 12–14 months. There is a perceived negative culture in its occupational health and safety standards back in the early days. There appears to be a breach of trust to those they were training in relation to providing safety. I am saying ‘perceived’ because it has not been verified. There has been a loss of confidence in the board and its governance protocols in relation to its activities, and even our regulators have come under some scrutiny in relation to their roles in the activities that they should have been involved in but were not.

So my question is: do you have a view about the best approach that organisations can take to acknowledge that they have not handled specific incidents or situations well, and what would you suggest to us would be a good strategy for an organisation like Fiskville to admit to mishandling situations in the past or not complying with regulations? How are we going to get over this brand Fiskville that we currently have at the moment, in your eyes?

**Prof. HARRIGAN** — Again, I cannot speak to the veracity of any of the things that you are putting, and I know you are putting them as perceptions, so there are perceptions out there and — —

**The CHAIR** — We did ask you to come in to talk generally about good governance. We did not provide any information regarding Fiskville for you to look at, so I understand if it is not — —

**Prof. HARRIGAN** — I will not speak to the specifics, but — —

**Mr RAMSAY** — You do not have to use Fiskville — an organisation.



**Prof. HARRIGAN** — If I can take it as an abstract question, because I do not want to dodge trying to help where it is possible to speak at a level of focusing on what sorts of things do we look at here, the sorts of things you have just thrown at me — if we are talking about any organisation, but we will pick one in the public sector — the cultural issues, the board governance issues, trust issues, if we put a corporate governance frame around it, the organisation is looking at something that it is about the interaction between the hard and soft corporate governance factors and how the organisation and its members respond to their perception of the regulatory drivers around them.

It is inherently in the centre of the things we have been talking about because — and it is not my thought; I am channelling someone else; I cannot tell you the author of it — strategy drives structure, and structure drives decisions about resourcing. All three — strategy, structure and resourcing — are aspects of corporate governance in any organisation, and culture eats structure, strategy and resourcing for breakfast every day. Many organisations in the public sector and the private sector have to come to grips with that the culture can make or break everything.

Issues about trust within levels of an organisation and trust between a board and members, a board and employees, these are all right in the middle of hard and soft governance and relationship management and all these things. For any organisation that has the kinds of things you have talked about, whatever other frame you might put around it, my first response is: this is right in the centre of corporate governance frame territory.

What you do about it? My experience in the private sector and advising companies and others is that again it matters how it is approached in terms of what are you trying to do here? Is it a fault-finding mission, or is it how do we improve things from a systems point of view? If we have learnt anything about complex systems, we know that complex systems need to have a number of responses. It may well be that attention needs to focus on what the compliance and regulation says, how the regulators approach that — whether they are new regulators that are brought in or old — how the organisation has responded in the past, what have the attitudes been to compliance and what have been the practices on compliance. But that is a backward-looking thing.

If we are looking forward, and you had an organisation in the abstract where you had issues of trust within the organisation, different perceptions about what compliance means and what was the object of the compliance, subject over many decades to different philosophies and mindsets, both within the sector and within an organisation about compliance, you can understand where there might be some awareness-raising and communication issues. You have to make it safe for an organisation and its people to be able to have a discussion about the culture and about the approach to compliance from a forward-looking point of view in terms of, 'Here is the new governance framework within which we have to operate, and it is based on these values and on these identified things. From here, we are going to have to meet this. That is going to have cultural issues for us; it is going to have relationship-management issues; it is going to have communication-with-others issues. How are we going to approach this going forward?'

In keeping the conversation a forward-looking conversation, which makes it safe to have these discussions, rather than a backward-looking discussion, I suspect will be part of any successful solution, because otherwise what happens, if I put my advising people in practice as a lawyer hat on, if everyone is looking at everything through the prism of, 'How can fault be found with me, or am I going to get sued?', it is very difficult to have an open discussion about how we need to change things if all the time the board or someone else is looking over their shoulder saying, 'How might this come back to hurt us?'

If we are in solution mode and we are in forward-looking mode the way in which that is approached as a complex solution of regulation and regulators and of the organisation going forward may well have to be de-linked from whatever is involved with a backward-looking exercise. Otherwise it is difficult to see how, if there is a trust issue, you can rebuild trust. You have to create the conditions for trust to be rebuilt, and the trust is not just as it has been in many private sector contexts. A corporate governance failure of a corporation can sometimes be a failure of the corporation and/or of its board and/or of the corporation, its board and its members and/or of the approach by regulators and/or, as we saw with the GFC, whatever else is going on in the system. So all of those things need to be unpacked, even in a backward-looking exercise, to get to what was the real cause of the problem.

**Mr YOUNG** — Thank you for coming in today. I am relatively new to the world of government and governance, so I am on a very steep learning curve with all this sort of stuff, and I actually take quite a bit away from what you have been speaking about. I just want to know your thoughts on an example of a board or even

an executive officer deliberately pushing their political agenda that is outside the scope of an organisation and what impact that could have on the organisation.

**Prof. HARRIGAN** — Let us again treat it as an abstract question, because we are talking about, presumably, boards in a public sector context.

**Mr YOUNG** — Yes.

**Prof. HARRIGAN** — So if we keep it as a discussion about how a board operates in a public sector context, the first thing is that we use the term ‘board’, but the governance reviews at commonwealth level and state level from before the Uhrig review in the 90s to beyond identified that there are different kinds of boards. If we have a public sector board that is, say, a state-owned enterprise under the State Owned Enterprises Act and it is regulated by that act, there are directors duties on the board. Even if it is not a state-owned enterprise, if it is some other kind of board, the one rule in corporate governance about the role of the board is that the board and its members have to act in the exercise of the interests of the members of the organisation, however we define what the interests of the members of the organisation are. When it is in the public sector, the interests of the public factor in the equation of what is in the best interests of the organisation.

That is the primary duty of a board member, whatever role they fulfil and whatever the legal duties in the statute. That is the primary corporate governance duty. So there are ways in the public sector for ministers and for public sector policies to be brought to the attention of the board and for ministerial instructions to be given to the board. There are proper ways for this to happen, and there are improper ways for it to happen. Again, good corporate governance is about things operating transparently and operating according to the levers that have been set up. Governments, and this is not peculiar to this jurisdiction and many state jurisdictions, have reserved right under the law to make public sector bodies, whether they are state-owned enterprises or not, aware of relevant policies that they want those bodies to administer and take account of. That is different from a particular individual pursuing what they perceive as a particular political agenda regardless of a particular mechanism by which policies are communicated to a board.

Again, if you put a corporate governance frame around it, the solutions start to identify themselves, because the primary obligation is to act in the interests of the organisation. That means it is a duty beyond your self-interest or your agendas or what axes you have to grind as a member. It is even beyond — and this is a difficult thing for many people, when they become members of something, to realise — that you are not there representing a constituency. If you are member of a board, your legal obligation is to act in the best interests of the organisation. That does not mean you ignore your constituency, but you cannot simply replicate your constituency as the answer to what decision you should make as a board member. Whether your constituency is the minister who appointed you or the group that elected you, part of your expertise may be to make the board aware of the needs and interests of the particular constituency.

I want to be clear here: I am not saying that the constituency is irrelevant to your obligation as a board member. The reason why we have certain board members from certain constituencies is because we recognise that the diversity needed on a board has to reflect diverse experiences and perspectives. So it is actually part of the expertise you are looking for in the membership of a board. But there are ways in which, first of all, the members then have to go about exercising their responsibility, which is to make a decision in the best interests of the organisation, which will preclude certain things that you have alluded to. In addition there are ways for the government properly to have policy come to the attention of the board so that all of the members know that this is a policy we are bound by or this is a ministerial direction we have received, rather than its operating by discussions with only one or two people.

There have been those sorts of occasions in the past in various contexts where ministers in Australia have not always exercised the formal mechanisms available to them but have tried to exercise informal influence — either them or their advisers. Again you can understand in a human sense how and why that happens; all the more reason for the corporate governance arrangements to have the appropriate checks and balances to make sure that where there has to be an interface back with the government, it happens appropriately. There are multiple mechanisms that have been used and are available to do that.

**Ms WARD** — Thanks, Bryan. You made an interesting statement earlier that culture can make or break everything. I thought that was very good. In your mind how is culture passed on from one generation to the next, and how hard is it to change entrenched culture within an organisation?

**Prof. HARRIGAN** — Culture change is perhaps the most difficult organisational change. Culture is affected by a number of things: the tone and modelling by those at the top of an organisation is important because staff and others role model the behaviour they see. So the culture is affected by whether the leaders of an organisation walk the talk and whether they model appropriate values and so on.

Culture can obviously be affected by the personnel and their longevity — you know, have they been in one role and one organisation for a long period of time versus have they moved around? There are strengths and weaknesses to both kinds of constituencies. The more people move, the more need there is for the training to be brought up to speed with what you need to do to do this job and so on, but the more they stay and form entrenched attitudes and the more they rise within an organisation, their way can become the dominant way.

So probably those examples are more apt, but at almost every point we could translate culture change into, ‘So what will this mean in terms of who we will have as staff and how we refresh and renew staff? What will this mean in terms of bringing in new perspectives to the organisation? What does this mean in terms of the way in which the compliance area form their attitude about compliance? What does it mean for how we structure things going forward?’. You could probably translate it into that in almost every corporate governance arrangement discussion we have there will be a cultural aspect, and it will be informed by those — what I have loosely labelled bluntly — soft corporate governance factors.

**Ms WARD** — We have seen movement between agencies, including the story that we are looking at, but it happens often generally that you will be in a decision-making role in one organisation and then you will move over to another in another, and they are semi-interlinked but not quite. Can you see that there can be conflict of interest there, or how do you manage that if there is a conflict of interest?

**Prof. HARRIGAN** — The short answer is yes, there can be conflicts of interest, and then it is just a question of how you manage it. This is again not uncommon in the private sector context. Corporate groups, multinational corporations or even corporations within Australia that have a number of companies, parent companies of subsidiaries, all part of a group, or even if they are not owned by one another they are in some kind of relationship and they have common directors and common shareholdings.

Again, let us try to go back to first principles, just like we did in some of our discussions today about it, if you put a corporate governance framework around it and you go back to first principles, you can start working your way towards an answer from a corporate governance viewpoint. On this one you start with the principle that you cannot wear more than one hat in the same matter. That is why we do not let judges also be investigators and also prosecute and also be jury.

Whenever we have a situation where we are in the same chain of decision-making where someone is effectively reviewing or signing off on something that they had an involvement in in another capacity in another organisation, you have inherently got an issue of potential conflict of interest. And it may be unavoidable. There may be very good reasons why that set of organisations needs to have those relationships. Someone who is from a major supplier or who has a major trading relationship might very well need to be on the board of the company. But when it comes to making the decision about who gets the contract, they have got an inherent conflict of interest.

Then the question is how you manage it. Do you make sure they are not part of any decision? Do you ensure that someone else is signing off on the decision and it is not a perfunctory thing? Do you try where possible to make sure that nobody across different organisations is going to be in the chain in different ways in different roles and just take that as the basic measure? There is a number of different ways you can approach it.

**Ms WARD** — What are your suggestions on how to rebuild trust in an organisation if that trust has been lost or is being lost?

**Prof. HARRIGAN** — It depends who we are talking about. It will matter whether we are talking about the leaders of an organisation, the staff in an organisation or the constituencies that need to deal with the organisation. We are not just talking about an internal thing here; we are talking about outside constituencies that are serviced by an organisation. I go back to an earlier point that unless the conditions — first of all, people will invest trust or reinvest trust when they feel it is safe to do so. Unless it is made safe, whatever ‘safe’ means — and these things are not happening in a neutral environment; you do not just come and say, ‘All right; we are going to rebuild trust today’, where there has been a history of fear or anxiety or worry about, ‘Are

people coming after me?', or, 'Is it my fault?', or whatever. You have got to break through that somehow by creating the conditions to say, 'We are real about this. We are hitting the reset'.

So part of it is that you need to create conditions of trust that will let you hit the reset, that will let people feel it is okay and that it is worth them reinvesting their trust. That as a touchstone is pretty important in terms of whatever you do as an action in a forward-looking sense. There are lots of things — and the literature talks about culture, trust, candour and rebuilding. There is lots of literature to be mined about this, but for the purposes of this discussion I am just trying to distil some important starting points.

**Ms WARD** — No, that is good. Thank you.

**The CHAIR** — Can I just ask a quick question following on from that. When you are talking about acting in the interests of the organisation, is that about protecting reputation? Would you see that as the key element of acting in the interests of the organisation?

**Prof. HARRIGAN** — In a private sector context the answer would definitely be yes, because in a modern world where the reputation of a company can be made and lost in an instant with the wrong photo or the wrong picture going around the internet overnight or instantly, and where corporations are focusing a lot on knowledge and expertise, the reputation of the company is one of its most important assets. If that is all we were talking about, then obviously one of the important interests of the company is protecting its good reputation.

I cannot see any reason why we would not be concerned about that in a public sector context either, because we want the public to feel and believe, and we want it to be true, that our public sector agencies model good behaviour, that they are model citizens whether it comes to their role as regulators, their role as providers of service to the public and so on. So I cannot see up-front a reason why you would take the reputation of the body out of the equation in terms of what is necessary to preserve the good reputation of this organisation. I imagine that would be part of, in the abstract, something that an organisation could focus on when they are making decisions about what is beneficial for the organisation. That is different from when you are under attack and you are trying to stop things being talked about because you are worried about what the impact might be on the day-to-day media reporting. That is very different from what is integral to the sustained good reputation of a company, so I will differentiate between those two.

**The CHAIR** — I was thinking more of, say, James Hardie, asbestos, trying to cover up — 'There was never anything wrong with asbestos' — because of reputation. That is the sort of thing.

**Prof. HARRIGAN** — Again, I cannot make a comment on James Hardie, but the end does not justify the means. It is a legitimate end for an organisation to say, 'We have a justified good reputation'. It is an absolutely okay thing for a board member and a board to focus on, 'What do we need to do to promote and to protect our hard-earned good reputation?', which by the way is not because of the board; it is because of the staff and the employees and the relationships and so on. That is a perfectly legitimate thing to focus on, but that is a worthy end and a worthy means to that end. That is very different from, 'We must protect our reputation at all costs. The share price will go through the floor if we go out and say this, so we just have to cover it up'. The ends do not justify the means there. That is a misuse of means to an otherwise valid end.

**The CHAIR** — Thanks very much for coming in today. That concludes the hearings for today.

**Committee adjourned.**