        - *Chair of board?* Unclear – traditionally no (and no per *Hely-Hutchinson*), BUT arguably today chair a more important position, particularly in major public corps and so would have usual authority in many areas
        - *Secretary?* Does have usual authority with respect to administrative transactions eg. for car hire in *Panorama Developments v Fidelis*. Again, arguably power has increased since *Panorama* (1970s) and so may extend beyond administrative transactions
        - *Other executive officers?* Yes, within the scope of their office – eg. HR manager has authority to hire/fire on behalf of company
    - *Communicated acquiescence of BOD as a whole* – BOD's conduct (or lack of conduct) indicated it acquiesced to the agent's earlier course of dealings being on behalf of company. Thus impliedly ratifies past actions and grants agent authority to continue to bind corp to similar transactions – *Hely-Hutchinson*
        - Eg. in *Hely-Hutchinson*, Brayhead's BOD had known and allowed chair of Board Mr Richards to continue to enter indemnity contracts on its behalf – thus had authority to bind Brayhead to the indemnity contract
        - Cf *Freeman and Lockyer*, where Hoon was not consulted so no communicated acquiescence to Kapoor's transactions by BOD <u>as a whole</u>

Ostensible authority (ie. where the agent gives the appearance of authority to the contractor 3rd party). <u>Three elements per *Freeman and Lockyer*</u>

- *1. A holding out* – representation made to contractor that agent had authority to enter the relevant class of transaction on company's behalf
    - Eg. board permitting Kapoor to act as MD in trying to find purchaser held him out to have authority to engage Freeman and Lockyer as architects
    - Most often by BOD "equipping officer with title, status and facilities" that makes them appear authorised – *Pacific Carriers v BNP Paribas* [BNP's agent, high up in different department, had fancy office/title that made her look important but no safeguards implemented by BNP → thus held out]
        - Eg. armed agent with blank order form which he could sign – *Crabtree-Vickers*
- *2. By someone who had actual authority* either (i) generally or (ii) with respect to the relevant class of transaction/matter (ie. no need to trace chain of authority)
    - Holding out will need to come from BOD (s 198A) or from person actually authorised by it (s 198C-D) – eg. MD
    - Eg. in *Crabtree-Vickers*, ADMA's MD's powers were restricted by constitutional article, having no actual authority to enter into printer purchase from CV himself; in turn, as MD only had ostensible authority he was unable to hold out his brother as having ostensible authority to enter transaction
- *3. On which the contractor relied*, being induced into entering the contract/transaction
- NB in *Crabtree-Vickers* court said if A with ostensible authority gives B actual authority to enter contract, there would be an exercise of ostensible authority by A provided the contractor believed that the authority was being exercised by A through B
    - [although A had ostensible authority, held had not given B actual authority EVEN though had B had signed in A's name ie. "A per B"]

4. Indoor management rule

- At CL, outsiders deemed to have constructive notice of contents of corp's public documents
    - Thus deemed to know that corp was acting outside authority if it was acting contrary to constitution etc
    - **Today** constructive notice of public documents abolished by s 130
- **Rule:** outsiders entitled to assume acts within corp's constitutional power have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular – rule in *Turquand's case;* s 129(1)

- **BUT** lose protection if outsider has actual knowledge or is 'put on inquiry' (eg. if transactions is entered into for purposes apparently unrelated to the company's business)
    - Failure to make further enquiries may deprive outsider of indoor management rule – *Northside Developments* [Barclays put on inquiry as director entered contract where NS' major asset secured a loan to a company that NS had no interest in ie. no benefit to NS in transaction – only connection between companies was common registered office, director, secretary]
    - Cannot remedy forgery

5. Statutory assumptions

Per s 128, a person dealing with a company entitled to make the assumptions in s 129; company is unable to assert that the assumptions are incorrect:

- **Threshold test:** first must establish they are dealing with company!!
    - Conduct must be authorised by the company to an extent eg. can apply if person lacked authority for transaction but had authority to negotiate – *Frenmast*
        - Ie. can't be the act of a true stranger
    - Dealings must be with the contractor who is seeking to enforce – *Soyfer*
    - Dealings interpreted broadly – *Caratti*
    - Unilateral conduct is not dealing with the company
- NB assumptions only apply to companies registered under CA, so not foreign companies

NB does not remove CL principles besides s 130's abolishment of constructive notice; dealings include 'purported dealings', not just those actually authorised – *Story v Advanced Bank* [forgery of one director's signature by another]

- NB applies irrespective of fraud/forgery – s 129(3)

Compliance with constitution – s 129(1)

- May assume corp's constitution / applicable replaceable rules have been complied with
- Replicates indoor management rule
- Eg. in *B&P Industries*, holding out as secretary under s 129(3) could not be relied on under s 129(1) as solicitor had knowledge that constitutional method of execution (requiring director + sec + resolution) had not been complied with

Director/secretary named on public ASIC record – s 129(2)

- May assume that anyone who appears to be a director/secretary based on ASIC info has been (a) duly appointed and (b) had authority to exercise powers customarily exercised by a director/secretary of similar company
- Replicates customary authority. Thus eg. secretary can clearly engage administrative transactions (eg. hiring cars in *Panorama Developments* would have been caught by ss 128, 129)
- Outsider need not actually look at ASIC register – *Lyford v Media Portfolio*
- Provides incentive for companies to update the ASIC record for director changes – contractors may get protection for dealings purportedly made on company's behalf by former directors/secretaries – eg. in *Ross v GVC Homes* appointed administrators after being removed as director but before ASIC updated → therefore valid transaction

Holding out of officers/agents – s 129(3)

- May assume anyone held out by company to be officer/agent has been (a) duly appointed and (b) has authority to exercise powers customarily exercised by a person of that kind in a similar company
- Replicates ostensible authority, albeit without the requirement that the contracting party rely on the holding out

1. **Does the statute make it clear that actions of the individual (officer, employee, agent) will make the corporation liable?** Ie. statutory vicarious liability
    - Consider object of statute, words used, nature of duty, person upon whom it is imposed, person by whom it would ordinarily be performed, person upon whom penalty is imposed – *Moussell*
    - Generally will be a strict liability / hybrid offence and no mens rea component (eg. deception/dishonesty)
    - Eg. due diligence defence suggests individual breach makes company liable
    - Acts are attributed to the company – for primary liability below acts are the company's

2. **If NSW offence, construe the statute and apply rules of attribution**
    - NB court may decide statute is not to apply to companies at all eg. only penalty is community service – *Meridien*
    - If statute allows, apply primary/general rules of attribution (ie. no mens rea on defendant themselves)
        - Primary rules ie. offence directly by company
            - Act by company through unanimous assent of members / board resolution
        - General rules ie. offence by agent and attributed to company
            - Agency, vicarious liability in tort
        - Eg. "without his actual fault or privity" precluded offence from being vicarious liability or requiring fault under company's primary rules in *Lennard's*
    - If mens rea component on defendant himself, statute may provide for 'directing mind and will' – construe it!!
        - Default rule is those at the top of the company hierarchy
            - Normally the BOD, MD and perhaps other superior officers – Lord Denning in *Tesco*
            - Constitution may be indicative of the hierarchy of the company, but must also inquire into whether company functionally operates in that way – Lord Dilhorne in *Tesco*
            - Examples
                - In *Lennard's*, Mr L was MD of ship company Lennard's – Lennard's tried to rely on defence that they didn't know about it – Mr L knew/had means of knowing about defects – he was directing mind and will – his knowledge was knowledge of Lennard's
                - In *Tesco*, store manager was not of sufficiently important stature
    - But in exceptional cases, those that are functionally in charge of a department/division
        - Consider the purpose / policy rationale and wording of the legislation – *Meridien*
        - Eg. in *Meridien*, Koo and Ng acquired 49% share in E for M without disclosure to Securities Commission because wanted to hide it from seniors – purpose of legislation was rapid disclosure of holdings → therefore appropriate to treat those in charge of company's market dealings as company's controller for this purpose

3. **If Cth offence, apply *Criminal Code Act* s 12**

Corps Act is a Cth statute!!

Preliminaries
- Body corporate can be found liable for any offence – s 12.1(1)

Physical element

- Conduct by employee, agent or officer within actual or apparent authority or actual or apparent scope of employment must be attributed to company – s 12.2

For actions based on <u>negligence</u>, a corp may be criminally liable if the body's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officer) – 12.4(2)(b)

- Corporate negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to a failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate – 12.4(3)(b)

For actions based on a <u>higher level of subjective intent (ie. intention, knowledge, recklessness)</u> there are several options

BOD / high managerial agent

- The body corporate's **BOD** intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence – 12.3(2)(a)
- A **high managerial agent** of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence (12.3(2)(b) and the corporation did not 'exercise due diligence to prevent the conduct or the authorisation or permission' (12.3(3))

Corporate culture

- A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance – 12.3(2)(c)
- The body corporate failed to create and maintain a corporate culture that required compliance – 12.3(2)(d)
- Definition
    - Corporate culture defined as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place' – 12.3(6)
    - Factors relevant to whether a culture of non-compliance existed includes
        - Whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate – 12.3(4)(a)
        - Whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence – 12.3(4)(b)

4. Do any individuals have accessorial liability?

- Can operate in a dual capacity – *Hamilton v Whitehead* [even though W had committed acts on behalf of the company, W could still be charged as an accessory]

Duty to act in good faith and for benefit of company as a whole, for a proper purpose

Fiduciary duties per *Bell Group*, even though they could require some positive action (per Drummond AJA in *Bell*; cf *Breen v Williams*)

<u>Duty to act in good faith for the benefit of the company as a whole</u>

1. **Subjective test:** Directors must subjectively exercise their powers in good faith, in what they consider to be the best interests of corporation as a whole – *Smith v Fawcett*; confirmed in *Bell v Westpac* [thus D able to exercise constitutional power to refuse share registration to prevent transfer of shares to other D's son]

    - Application or tort principles may be relevant: magnitude of risks, probability of occurrence, expense difficulty and inconvenience of taking alleviating action – *Wyong Shire* per Mason J; cited in *ASIC v Cassimatis* (2020)
- Further issues
    - *Where directors are the only shareholders*
        - This may impact content of duties owed to the corp, but cannot release directors/officers from their duties under s 180(1), which have a public aspect – *ASIC v Cassimatis* (2016)
    - *Conflict of interest*
        - NB even if director has conflict of duty such that they should abstain from voting/presence (s 195), their special knowledge means they have positive obligation to warn corp of any downsides before leaving – *ASIC v Adler; Wheeler*
    - *Positive duties?*
        - D may act to create a positive duty to protect the company's interest – *Adler; Wheeler*
- If an officer, apply same test – *Shafron v ASIC*
    - Obligations not limited to discharge responsibilities imposed on officer under CA, but include whatever responsibilities officer had within the corp
    - Eg. breached in *Shafron* when general counsel/secretary failed to inform CEO and BOD that company required to disclose certain info to ASX and that actuarial info about projected asbestos didn't match historic info
- Remedy**:** civil penalties provision, so activates civil penalties

2. **If so, they've also breached modern CL/equitable duty:** statutory duty mirrors the duty at CL and in *ASIC v Adler*. GL duties are preserved by s 185; apply concurrently with s 180(1) duty
    - Key distinction: both equity and tort require loss + causation (equity following the law in this area – *Wheeler*), whereas the statute does not
        - Also these can be ratified by GM whereas statute can't – see below
    - Remedy: gives CL damages / equitable compensation but NOT rescission of the decision (unlike some other DD breaches). Decision remains valid

3. **NB if so, if an executive director, also in breach of implied duty of care in their service contracts – *ASIC v Adler***

4. **If they are in breach, can they avail themselves of a safe harbour?**
    - Delegation?
        - s 198D provides that D can delegate any of their powers
        - However, per s 190, (1) director responsible for exercise of that power as if it had been exercised by D themselves UNLESS (2) believed on reasonable grounds that delegate would exercise power in conformity with duties AND that on reasonable grounds, in good faith, after making proper inquiries that delegate was competent
        - In *ASIC v Healey*, court held that directors' statutory financial reporting responsibilities were not delegable to management despite the latter's integral role in the discharge of the board responsibility
    - Reliance on information? What if decision was reasonable on basis of information D had?
        - Per s 189, if D relies on info/professional advice (eg. accountant, lawyer), from employee, professional advisor, committee of directors AND did so in good faith and *after making an independent assessment of the info/advice*, then won't be in breach
        - Ie. must still bring their independent mind to the issue!
            - *What is reasonable in context of info/delegation?* Should consider risk/nature of the transaction etc – *ASIC v Healey* [could not