



## Take on Board

# Transcript – Helen Bird

Helga Svendsen 0:00

Today on the Take on Board Podcast, I'm speaking to Helen Bird about the role of regulation including enforcement in governance. First, let me tell you about Helen. Helen is a member of corporate governance consultation panel at the Australian Securities and Investment Commission (ASIC) and she's on the Professional Education Committee at the Risk Management Institute of Australasia. She is a legal academic and the discipline leader of governance studies at Swinburne Law School. Helen credits Swinburne with really putting an industry focus into her work, which has led to her appointments at both ASIC and the Risk Management Institute of Australasia. Helen is a regular media commentator and features regularly in ABC TV's Business Report and the Financial Review. She's also written on governance issues for the diligent Institute. And I should say Helen is also a fabulous tweeter about governance issues. So I strongly recommend that you follow her on Twitter for some really good topics as well. So welcome to the Take on Board Podcast Helen.

Helen Bird 1:03

Thank you for having me.

Helga Svendsen 1:05

So, Helen, before we dig into that topic around regulation and enforcement in governance, let's dig a little bit deeper about you. Tell me what was your earliest experience of governance

Helen Bird 1:18

It comes in a bit of a roundabout story. But I grew up in country, North Queensland and my family were very much interested in the stock market. So from a very early age, I listened to the radio reports with my grandparents, and they used to test me on on the various stocks along with the price of vegetables and the price of meat. And so I didn't perhaps appreciate but they were buying and selling stocks in various companies. And one day I answered the phone. And a gentleman asked to speak to my mother. And I said, Oh, look, she's not here at the moment. I think I was all about 12. And he said, Well, I need to speak to her. It's rather important. I suppose I could take a message and he said, Okay, and then he proceeded for 30 minutes to speak to me about the benefits of a takeover of a listed Corporation in Queensland and why this was a good decision for her as an investor, which I of course, immediately realized she obviously had a lot more shares in this company than I would ever known. And after half an hour, I said, Yes, well, I'll relay your message. So

having heard all of the insights about how the company was run, and the markets it was in and what the takeover target would do for the company, I had to then tell my mother, whose first remark was, why didn't you just say, call me at work? I have to say, I think when I look back on it that, you know, I must have sounded All right, because whatever I did, it never occurred to him. I was a child. But I came from a very early age and interest in the things that I do today.

Helga Svendsen 2:50

And so having two questions in that, (a) you relayed the message to your mother. What advice did you give her about the takeover? And secondly, (b) what did you do what was her decision?

Helen Bird 3:02

As it was I sort of vaguely knew that there must have discussed it because I can hear conversations. And I think she was in two minds about it. So I knew that and that's possibly why I paid particular attention to what the gentleman was saying. I think in the end, she was resigned to the takeover and that allowed it to occur as far as it affected her.

Helga Svendsen 3:20

Right, resigned to it, though others do know didn't exactly embrace it with enthusiasm, despite his best efforts.

Helen Bird 3:27

No, I don't think so. But I certainly as I said, it definitely ignited in me a real interest in how these things worked, and why the chairman of a company would be ringing my mother to discuss buying shares and it was all kind of very interesting. And, you know, I have to say that I look back on some of the things that I experienced in today's world and those conversations still are in the back of my head.

Helga Svendsen 3:51

That's so interesting, and even I have to fish more about this. I feel like the man on the end of the phone, even though asking more questions or they had by the sounds of things he was telling me about how big a shareholder was she in this company, because that is so interesting that the chair is picking up the phone and ringing, cold ringing people by the sounds of things.

Helen Bird 4:13

Yes. And she bought in a float. And that, of course, was a very typical thing to do at the time. And she was the 10th largest shareholder.

Helga Svendsen 4:20

Right. And was he calling the top 10? Was she 10 on the list? Yes, I think so. All right, interesting. I'll go on her and go on her for being what sounds like the whole family was really active in these sorts of things.

Helen Bird 4:34

After lunch every day, we'd listen to what was called a Queensland Country Reports which we'd have the stock market report and the meat market report and the vegetable market report and then I would be tested by my grandparents on the prices. I used to without knowing it. I was admittedly playing into the stock back again, a very early age as well, but I had money that

Helga Svendsen 4:54

Oh, my good well, you might have second hand had some money in it. Why that is a good on your grandparents and good on your mum. And even dare I say it, the chair that rang you he may not have known you were 12 years old, but in my head, I'm kind of liking that he didn't know it was a 12 year old and on the end of the phone and he thought, well, that's okay. I'm still going to handle this information over. I think that's a beautiful story. I asked that question a lot of people. And that is just a fantastic answer. So thank you.

Helen Bird 5:27

I really should finish by telling you that I was one of four and my siblings would be sitting around the table at the same time. But immediately following lunch, they would take off.

Helga Svendsen 5:35

They didn't stick around for the test?

Helen Bird 5:37

No, they said you were perfect. You're the bunny.

Helga Svendsen 5:41

Oh, that's interesting. So what are your siblings doing now? I'm guessing they're not governance specialists?

Helen Bird 5:46

You'd be thinking correctly.

Helga Svendsen 5:50

Or I'm trading on the vegetable stock market, whatever that may be.

Fantastic, oh, well thank you. That is I love that story, it tells us so much about governance and a bit a little bit of a peek into your history as well and, and regional Queensland. For today we are talking about governance and the role of regulation and the role of enforcement in governance. And, you know, as I mentioned earlier, you're a, I think, a fabulous tweeter of governance things. And this conversation came about because you recently tweeted, inverted commas "Clive Palmer finally feels the force of the law", and linked to a story about how ASIC had investigated and then charged Clive Palmer, with breaches of directors duties and fraud, which seems to me to be a great open up for our conversation. So can you tell us a bit about what this is about and why it's important?

Helen Bird 6:49

I think one of the themes that always come through when I'm teaching is that people are very intimidated by regulation, particularly corporate regulation and enforcement actions that are taken. And you know, the great majority of us are law abiding citizens, good directors conscientious want to do the right thing. And really, the law for them and regulation in particular can be a force for good. It can be an educated tool, it can help us to better understand what we need to do in those positions. But there are also a group of people for whom law almost represented opportunity, a strategic chance to do things and, and sometimes the actions that follow from that can have very deep consequences for the people involved. Now, one of the things that the case involving Clive Palmer involves is it's so much as not even this particular case that this particular proceeding that has extreme but a whole character of actions that have been involving him over time that I just sort of feel when finally you heard that action was being brought by a sick after many different investigations, that it was only a matter of time, but finally the time had arrived. Now I should be hesitating to say all of these are allegations now. If it is proved and and Clive Palmer deserves his day in court to prove his innocence or otherwise, but the background to a lot of what the controversies about him concern really had nothing to do with the proceeding that we just identified then there

that most of the concerns with Clive Palmer, his time and involvement with something called Queensland Nickel, and there were a lot of hearings about that particularly by the administrator and then subsequent liquidator of Queensland Nickel, because employees were not paid their entitlements and money that was otherwise available to pay entitlements was discovered to have gone to practice less than or appropriate other causes or events. So there were lots of question marks asked over that. And it revealed a lot about how carefully the structure of Queensland Nickel Group had been set up to protect various players in the game, including this department. Now, the current case that you're referring to is one that comes off the side of that in the sense and it an investigation that has taken place in relation to his company called Mineralogy, the mining company that he owns. But what was suggested was that he allowed all he was participating in some transfers of funds for the benefit of a company called Cosmo Developments. In essence, this is a claim that he used money from one company to fund a media program, which was essentially to help him get elected in the last federal election. And that wasn't an honest use of funds. It wasn't authorized for a legitimate purpose, and we're talking something in the order of \$2.2 million. So it's not an insignificant sum. And so ASIC has taken an action against him coming out of that, both under the corporations law and under Queensland laws that are subject to fraud by dishonestly gaining an advantage or benefit, which he was said to have done. But one of the comments I'll make about regulation is sometimes the smaller action get taken anything, this is nothing compared to where there's apparently a shortfall of \$17 million at Queensland Nickels, which is a far greater concern about the amounts of money involved. But sometimes it's necessary for the regulator to have a win and a success. And they pick something smaller because it's actually manageable and doable, even though there are other bigger issues still in the frying pan that have yet to be brought.

Helga Svendsen 10:24

As a lawyer has previously done litigation, sometimes if he can get that when it actually brings others into line, even though they might be bigger fish to fry.

Helen Bird 10:34

Well, what you can say is, and he's demonstrated this himself is that he's very good at playing the system. And he has done a number of things over the in the course of the Queensland Nickel inquiries, which was just stretched out the time required to take those inquiries for hearings, but he had have the resources and the legal ability to do that. So there are certain people not only who flout the law in the sense that they don't comply with but there are also people who know that once you get into litigation with us to kind of play that game and make it as painful as long as possible. Yes, he will. Let's just say he's headquartered in that that area.

Helga Svendsen 11:13

And, you know, dare I say it, I know you're on the corporate governance panel as well. But, you know, ASIC has had allegations, shall I say, that might be too strong a word. But there's been word

that ASIC hasn't always been as strong as they could be as strong a cop on the beat as they could be. So, you know, so?

Helen Bird 11:36

I think a lot of that criticism came out of the banking Royal Commission. And it was a perception that when you went to ASIC with a problem, they offered to settle a case using what's called an enforceable undertaking as a legal instrument, but it's really basically a very specialized form of settlement. And the objection to the use of settlements rather than court cases was was happening behind closed doors, the parties involved a large, ASIC might not have been striking very good deals. Certainly in the sense they were letting people off. They might have contravened the law, but they didn't even have to admit it. If they did admit it, the consequences were much milder than they would have been had they gone to court and been ordered by a judge to take certain action. But there was a perception that if you had a problem, all he had to do was go into ASIC and say look, sorry about that. Can we do some kind of arrangement by way of settlement. So coming out of the Royal Commission, Commissioner Haydon argued that that was the worst possible way to go about enforcing the law, but it sent no deterrent message to the parties and that they weren't frightened of ASIC and also there was evidence that ASIC didn't enforce these agreements. If people fail to comply with them, that we saw things broke down and they weren't fixed. Have a couple of comments to make. Partly, I guess I sort of see it as fence sitting here. I don't really have a view one way or the other. I think there was a sustained view that enforceable undertakings have been used, and they have been favored by parties at the big end of town. But on the other side of the equation, as it isn't like all organisations subject to a budget, and the government continued to cut their budget starting from about 2014, which meant they had to do as much as they could with a limited amount of funds. Now, if you're involved in enforcement against people who are well funded, and we're talking the big end of town, the average court case was in the order of five to \$6 million. So if you had an enforcement budget that might around to say \$20 million, you could use it up very quickly on a couple of cases and not really see a lot of benefit. I give us an example of this in the case of Storm Financial, which was against the directors of Storm Financial. Mr and Mrs. Cassimatis that case started in 2010. And in all the way the High Court, but before it got to being a court case, there was a massive investigation into what happened. So and financial was a financial advisory and insurance broking service, actually mainly in Queensland, and they encouraged people to invest by lending money against their houses and various other things which were affected by the global financial crisis. At the height of the collapse, the customers of Storm Financial collectively lost something in the order of \$850 million. So it was a huge investigation to find out what went on and subsequent proceedings against the Cassimatis and after in 2018 when judgment was handed down, the court ordered that they pay \$70,000 by way of the phone, each director plus now banned from being involved in the management of a company for a further seven years.

It cost \$65 million to run that case, investigations and court expenses. And there's just a limit to how much as you can do with it. It's, you know, it's a huge investment. So I think we have to balance off the fact that we've got practical limits to what you can do. It has a very large remit of things it can prosecute. And the final thing is that there are cases that have been settled. Not every case can be

run in court. But following the Royal Commission, the federal government listened to the complaints and they gave ASIC a significantly larger budget of \$400 million to prosecute cases coming out of the Royal Commission, creating the expectation that ASIC will in fact do this, and as it gets self announced, they would change their policy to what they call why not litigate. So instead of settling cases, they first off ask Is this the sort of case that the public interest requires us to bring as a court case rather than settle. And they now have the means to do that. But we still talking about incredibly well resourced defendants who are going to take every opportunity. And that means that we're not talking quick results. And even in the most reasonable of cases, an outcome that takes six years is entirely predictable. We'll see actions taken now that we didn't have to see, we will respond to the argument that ASIC hasn't perhaps been as tough as it could be. But by the time the court results come out, I wonder if anyone will remember the reason why they were brought in the first place because memories are quite short.

Helga Svendsen 16:50

It's interesting. I wonder whether, you know, when when we started talking about this in the Clive Palmer case, and having like a, you know, almost a small manageable case to take on and getting a win that has an impact on others. I'm guessing that ASIC now being slightly better resourced as having this slightly more proactive approach, the why not approach to litigation and taking some of these up has a impact, not just on those that action is taken against, but those that you don't have to take action against because they go, okay, maybe we are going to get caught out. We better not do that.

Helen Bird 17:26

Well, I think that's only just a good supposition on your part. In fact, that's what evidentially has been shown to be the case. There's a quite a lot of research done on this. And it's not even unique to corporations law. But there is a belief held that you need to have a few court cases using your most significant and serious remedies, against parties and hopefully a few wins, not because you need every case to run that way. In fact, it's much better if you settle a lot of cases, but in order to put pressure on parties to see the consequences of not engaging and resolving the matter are very severe. And so in a sense, it puts a puts a bit more of a reality check on, you may well have all the resources that you want, but do you want to tie them up in this way? Do you want to wreck your reputation? Do you want to go along this path? Or would you rather just try and accept that you've done the wrong thing, and perhaps pay less or fine accepts a period of increased supervision by the regulator and get on with it? And again, I hesitate to say these are there's lots of complaints made to ASIC. But the number of cases that filter through to the enforcement stage are not that high. And the general desire, I believe, of most citizens, including in the corporate context is generally to do the right thing. But there is just a group of people out there who need to be reminded the consequences of not doing the right thing. Difficult, expensive, and we need to demonstrate that through court cases.

Helga Svendsen 18:56

Yeah, absolutely. I couldn't agree more. I think people are generally in this for all of the right reasons. By and large, we do generally hear about those, you know, hear about the worst case examples in almost everything that includes for directors. But that doesn't mean that's what everybody is doing. But it is still a good way of just reminding people to literally be on their best behavior.

Helen Bird 19:19

Yeah, but also in a governance context. I mean, if you are the subject of an enforcement proceeding, chances are pretty high, your governance is woeful, really, we don't want to go there want to have good systems, good standards, good systems internally, that mean, this is never going to be a concern of your average corporation. In a sense, if you get to regulation and enforcement, you failed. That's how I see it. You've got to come back and say, what can we do to make sure we're standards are so high? That's never going to be an issue for our organisation?

Helga Svendsen 19:49

Well, what a fantastic question, what can organisations do, what can boards what should they be doing to make sure that their standards are higher in the boardroom so that they don't get to this point? And we again, we know most of them don't. But what are some of the proactive things that boards shouldn't, could and should be thinking about?

Helen Bird 20:07

Well, I mean, I think overall, the most important thing is to be well informed. And that is informed about what are your obligations? But what about trends and issues that are affecting your industry? So what I guess I'd say is governance is dynamic. Governance is ongoing, and it's constantly changing and disrupting itself. For example, at the moment, you probably argue that one of the things that we should be starting to inquire about is the role of AI, and what it does in how that's affecting governance, and not necessarily the board level, but in lower levels of your organisation, and what reporting you should have about that at a higher level, what skills your directors should have in relation to that? So that what I guess it means is that we've always spent a lot of time talking about the importance of having directors with experience in various areas, and we still do need that. But I think we also have to acknowledge that there's an educational component of what we do. And we shouldn't be intimidated by that we should embrace it. We should embrace the opportunity to be well informed. And we as directors should be asking our boards, what kind of board lessons are you giving us? What kind of refreshes are you take offering us to make sure we remain current for you. And that can take many forms. It can be engaged in a consultant to come in and assist you in particular ways you can encourage your directors or governance staff to do further courses. You can attend seminars and podcasts and all of these things. But you've got to be asking yourself the



question in the first place and an enquiring mind about what's going on inside an organisation needs to be an inquiring mind about what is happening in relation to governance across the, you know, across the country, international trends, and in that regard, trends that are tangentially connected to do to good governance, like as I suggested, got technology.

Helga Svendsen 21:58

In regards to AI and technology and how it's showing up in the boardroom, whether directly or indirectly, what have you saying?

Helen Bird 22:05

Well, I think it's a very mixed result at this present point. I think that I don't know whether how widely it is used but my sense is that people are moving towards having poor use of iPads and portals and that kind of thing. So you don't have a paperless, you have a paperless trail now, that has a sort of mixed benefit, you'll see that we can be snowed with a lot more paper if it's not actually written down, but it can be put on the screen. For example, during the Royal Commission, I recall witnesses for the Commonwealth Bank saying the board papers, we're getting up to 1000 pages for every board meeting. And well, I mean, I'm sure there is value in all the material at the end of the day, there's also a question mark that I have a sense of chronic unease about that. That is, what are you hiding? Why can't you summarize down to it's at that point that you need to know because no one's suggesting anyone today full time to spend their life reading more papers. And the so it does trouble me on that level. But the other things that you supposedly able to benefit from using technologies was supposed to have increased reporting from lower levels of the organisation about things like risk management, and specific issues that affect the way in which people report their information or based on technology now. Now, if you don't know the form in which that information is being collected, the way in which it's being stored, the security with which it's been taken, you can ask questions about whether or not this is all being attended to in appropriate ways. And, you know, we can say all that that'll come with time. But the recent Westpac - Austrack, matter demonstrates how easy it is for these things to be neglected, with the best of intentions. I had read to read the statement of claim and the difference in that matter, and the problems that beset Westpac was started in 2010, when they introduced systems inside Westpac to manage some of the issues in that case, and they had 33 upgrades, so they computer software technology following on from that, and at each point, there were further complications. So nobody up the top of the organisation had any knowledge of any of this and wasn't aware that other concern. In the meantime \$11 billion was transferred by Westpac overseas, including possibly to sites in the Philippines where there's allegations of child sex exploitation practices going on. But that \$11 million dollars, is no record of where it went, or the records are incomplete. That's a seriously concerning number and the governance issue. It's not that you have to know what the contents were but you have to know what's been done properly, to know that somebody has taken charge and responsibility for it. And what was very clear and is very clear with technology is there is no overall end to end sense of responsibility within organisations. And the trouble is, as a director, how do you feel comfortable about something when you've got no idea where it begins and where it ends?

Helga Svendsen 25:12

Yeah, and even sometimes when it's set up to do, AI can only do as it is instructed, it's not an objective system in and of itself. Again, I had a conversation with somebody recently about the use of AI, essentially, to get real time culture surveys by, you know, particular apps or programs or whatever it may be, basically reading emails and picking up on the types of words that are put in there. And that gives you a real time indicator of cultural within the organisation. In some ways, I think that would be amazing to be able to get that in real time. But I also worry about where how it's set up, you know, and what the back end kind of rules are around that and what sort of cultural is measuring because it's, it's it's not objective. It's only as objective as the people who put it together who are also in and of themselves, not objective. So making sure it's set up, right?

Helen Bird 26:05

How you interpret those words what significance you attach them as a function of who you are and your skill base thing with AI not just that you've got technology to deal with, you've also got to have expertise, not just in AI, but in your specific area. So if your field is culture, and you've got to be a culture expert with an AI background, if you're at risk then the same and so as a consequence, again, this whole sense of we are not really facing up to the full extent it's in added to not taken away from the burden of governance, I think,

Helga Svendsen 26:41

Hmm, yeah. Oh, I knew the time would go too quickly. In this conversation, Helen, we're barely touched on all the things are. But you know, we might just be able to get you back at some stage in the future. But from the conversation that we've had today, what are the key points you want? Pay To take away from this conversation?

Helen Bird 27:02

I think the first thing I would say is there's been a lot of stuff about governance in the paper. And I think we need to be aware that a lot of it's driven by big corporations and events get complicated when you have big corporations, and most of us are not like that. And most of us, run honorable institutions and do good things. And we are still all learning and living in a world that is right now completely out of control because of a virus that none of us predicted. And it demonstrates the need to be always aware and well informed and vote about your organisation and informed about the world you participating, which for me, or the ecosystem is governance. So I just would encourage you to be open embrace learning, learning and a range of ways and not being frightened of it not being put off by it and not allowing someone on your board to say, you don't need that.

Helga Svendsen 27:51

People often talk about their tone from the top within an organisation and if a board it's not just around the way people interact with each other, but having a curious board. In our Learning Board and a learning organisation will help that flow I think to the rest of the organisation to.

Helen Bird 28:05

This is the great thing about a board, depending on how you see it, I guess. But decision making is collective on the board. So you get on and have issues that you resolve collectively. But responsibility from the law point of view is individual. So you need to be satisfied in yourself, that you're aware that you have made, asked the right questions, that you know what the right questions are to ask, that you're aware of the skills that you should have and what is not being dealt with? Or is being pushed under the carpet. You want to board you collectively responsible but you're also individually curious. And I would say the sense I have is that you need to engage as an individual in your own learning, and take it as your journey as opposed to what the board requires.

Helga Svendsen 28:50

Well, now speaking of learning and being curious, is there a resource you would like to share with the take on board community?

Helen Bird 28:56

Only that we, of course, actively continue to debate these issues whenever we can, and about a week ago, we conducted a Q&A ourselves on governance and issues affecting us coming out of COVID-19. And I'd encourage you to watch that it's been filmed and recorded and the details of where it will be available to watch. I will disclose if you have a look on my LinkedIn page, or Twitter, I'll find it on Twitter as well. But it's not yet currently available. But if you missed it, you can actually watch it at a later date.

Helga Svendsen 29:27

Can we put a link to that in the show notes?

Helen Bird 29:29

Providing I can give you the detail but yes.

Helga Svendsen 29:31

Fantastic. Excellent. So we'll make sure there's a link to that in the show notes so people can easily find it is not to say you shouldn't follow her on Twitter because or on LinkedIn as the case may be. Oh, fantastic. Thank you so much for being with me today on the Take on Board Podcast, Helen. Like I say, I knew we would have a lot to cover. And I, you know probably knew in my little heart of hearts that we wouldn't get through everything that we wanted to talk about in this particular conversation. But hey, there might be an opportunity for more in the future. To say thank you so much for being here and sharing your wisdom with the take on board community.

Helen Bird 30:04

Thank you. Good luck to all. Bye.