

AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

Essential Director Update:16

Your duties. Your update.

Presentation facilitated by:
Graham Bradley AM FAICD

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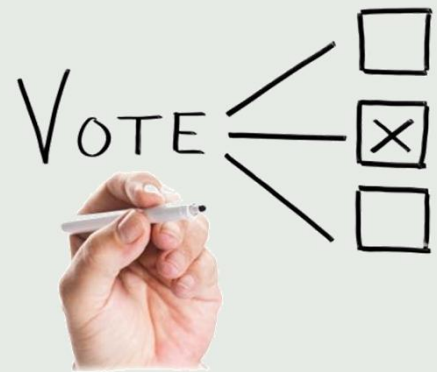
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Poll: Are you a director of any of the following entities?

(Select all that are applicable)

- A. A listed company
- B. A family company
- C. A SME
- D. A Not-for-profit
- E. Education and health
- F. An APRA regulated entity
- G. Other

VOTE




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Today's facilitator



Graham Bradley AM FAICD

Graham is a professional company director and is currently Non-Executive Chair of HSBC Bank Australia, Stockland Corporation, EnergyAustralia Holdings and Virgin Australia International Holdings. He is a director of Hongkong and Shanghai Banking Corporation Limited and GI Dynamics. In 2013 he was appointed Chair of Infrastructure NSW.

Graham was Managing Director of Perpetual Limited from 1995—2003.

Prior to joining Perpetual, Graham was National Managing Partner of law firm, Blake Dawson (now Ashurst). Before this, Graham was a partner of McKinsey & Company, a leading international firm of management consultants.

Graham was President of the Business Council of Australia from 2009—2011. He was formerly Deputy President of the Takeovers Panel. Graham also devotes time to a range of non-profit organisations, including the State Library of NSW as a Foundation director.

Graham was made a member of the Order of Australia in 2009 in recognition of his contribution to business, medical research and the arts. He was acknowledged by the Australian Institute of Company Directors NSW as the "Distinguished Fellow for 2012" in recognition of his contribution to good corporate governance in Australia.

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Today's Agenda

- Corporate Culture
- Director Independence
- Risk Management
 - Risk Committees
 - Shareholder Activism
 - Tax Risk Management
 - Honest Director Defence
- Diversity on Boards
- Digital Disruption
- Brief Regulatory Updates
- Not-for-Profit Developments



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Board responsibility for corporate culture

- Recent cases**
 - Target revenue recognition fraud
 - Bank reference rate manipulation
 - BHP / Samarco tragedy
 - VW emissions fraud
- Focus by ASIC and APRA**
 - ASIC — seeks enforcement powers where 'bad culture' leads to breach of law
 - APRA — board confirmation of sound risk management culture (CPS 220)



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VW Case Study

- Surely the board didn't know!**
- Germany's two-tiered governance model:**
 - Management board with Chair / CEO
 - Supervisory Board, appoints management
- What did management / CEO / boards know?**
- What did they do?**
- Cost: \$20 billion and counting**



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ASIC v Cassimatis (August 2016)

- S.180 duty of care and diligence case against Storm Financial directors
- Duty of care to protect the company from harm, including reputational harm
- Storm's high risk financial advice breached Corporations Act and directors "should reasonably have known" this would harm the company
- S.180 is private duty owed to the company, but also a public duty
- Sole director—sole shareholder defence rejected
- Opens door to wider director liability?



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.....But what should directors do about corporate culture?

- **Set tone-from-the-top**
 - Articulate values / expectations
 - Monitor a range of metrics
 - Ensure consequences for breach
- **Engage with cross-section of employees**
 - Spend time outside the boardroom
- **Remain alert — smell the smoke!**
 - Ask the right questions
 - Pay incentives align with values?
 - How are complaints handled?
 - Does bad news travel quickly to the board?



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Poll: Board responsibility for corporate culture

Should directors bear civil liability for a bad corporate culture?

Yes

No

Undecided

VOTE



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Do independent directors add value?

- **Article of faith in Australian governance**
 - ASX CGC Recommendations / AICD policy
 - Numerous reviews, here and abroad
 - Industry super fund board proposal
- **But conflicting academic research**
 - Swan's analysis: more informed and incentivised directors is better
 - Frino analysis supports NEDs
- **But correlation is not causation**



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Do independent directors add value?

- **US investors are catching up**
 - Open letter from Buffett, Dimon, Fink et al
 - 'Truly independent boards are vital to effective governance'
 - 'Diverse boards make better decisions'
 - 'Every board needs a strong leader who is independent of management'



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Do independent directors add value?

- **Independence is a necessary but not sufficient qualification**
 - Diligence and application
 - Sound business judgement
 - Robust collegiality
 - Constant curiosity
 - Courageous integrity



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Questions on corporate culture and director independence



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Should your board have a Risk Committee?

- **ASX Principles now recommend a risk committee (7.1)**
 - Standalone or combined
 - To review RM 'framework'
 - Clear charter, independent directors
- **Typical responsibilities cover:**
 - OH&S / WH&S risk
 - Environmental risk
 - Regulatory compliance
 - Cyber / systems / fraud risk
 - Treasury / funding risk
 - Risk appetite / controls
- **Committee's proper role: assist the board fulfil its responsibility...**
 - Ultimate responsibility rests with the board



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CSR activism

- **A challenge for boards and fund managers**
 - Divestment risk for listed companies
 - Litigation risk
 - Pressure on lenders
- **Shareholder-proposed resolutions at CBA, AGL and Origin**
 - CBA – direct company to report on customers' GHG emissions
 - Or change constitution to require report
- **CBA case clarifies role of board**
 - S198A ... business of company to be managed 'by or under the direction of the directors'
 - Shareholders have 'no part of play' in the board's exercise of its power ... but how far can directors delegate to management?

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Tax risk management

- **ATO tax risk governance review guide**
 - Buck stops with the board
 - Endorse tax risk management policy
 - Recommends regular control testing
- **Voluntary tax transparency code**
 - Enhanced public disclosures
 - \$100 million + turnover:
 - Effective tax rate, home and away
 - 'Reconcile' accounting profit and tax paid
 - \$500 million + turnover:
 - Tax strategy (incl. ATO 'dealings')
 - Federal, state and local taxes



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Tax risk management

- **Multinational tax avoidance**
 - Diverted profits tax (Google Tax)
 - Stronger transfer pricing scrutiny
 - Panama papers aftermath



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Honest and reasonable director defence

- **Australia's 'draconian' insolvency laws**
 - Personal liability when company trades when insolvent
 - Unable to pay debts as and when due
 - Reynolds' wine case
- **Renewed interest in protecting honest and reasonable director**
 - Government's Innovation agenda
 - Treasury Discussion Paper
 - AICD response, not unanimously supported
- **A broader 'safe harbour' defence is merited**
 - Beyond insolvency
 - But will this reform be once again stillborn?



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Poll: Risk management

Does your board have a separate Risk Committee?

Yes

No



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What's next?



Webinars - November

- Director Liability Update - New lessons for directors**
Thursday 10 November, 12:00pm to 1:00pm AEDT
Member complimentary
- A data-driven future: The opportunities and risks in data technology and cyber resilience**
Monday 21 November, 12:00pm to 1:00pm AEDT
Member complimentary
- Key skills a director should have in an age of innovation and transformation**
Wednesday 23 November, 12:00pm to 1:00pm AEDT
- Evaluating Board Finances Part 1: Interpret, analyse and question financial statements**
Tuesday 29 November 12:00pm to 1:00pm AEDT

DPD units will automatically appear in your online DPD record early in the next month

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Gender diversity on boards

- ASX200 female directors**
 - Up from ~10% to 24% from 2009 to 2016
- Female appointments at 40% June 2016 YTD**
 - AICD targets 30% by 2018
 - Australian Chapter of the 30% Club
 - Continues Chair's mentoring program
- 'Cognitive diversity'**
 - Not just gender or ethnicity
 - Give me business-savvy directors (Warren Buffett)
 - With courageous integrity!



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'Digital disruption' – threat & opportunity!

- Accelerating innovation**
 - Driven by plummeting cost of computer power
 - 'Big data' / data analytics / industrial analytics
 - Sensors / predictive algorithms
 - Machine learning / cognitive computing
- Revolutionary business models**
 - AirBnB / Uber / Blockchain
 - New risks but also strategic opportunities



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Director education on digital technologies is essential

- Invest board time
- Invite 'experts' to the board
- Consider 'Chief Disruption Officer'
- Create partnerships
- Maybe recruit expert director
- ... but beware 'deference risk'



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Poll: Digital disruption

Is digital disruption a key topic for discussion on your board?

Yes

No



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Regulatory developments

- **Harper review**
 - New round of microeconomic reforms
 - Section 46 effects test controversy
 - Strengthened ACCC process and penalties
- **Enhanced audit reporting**
 - Applies to listed entities (15/12/16)
 - Key Audit Matters (KAMs) for listed entities
 - Post-Centro practice
- **ASIC enforcement — Prime Trust**
 - ASIC lost on appeal
 - Resolved on 19/7/2010 but lodged with ASIC on 23/8/2006
 - Breach of duties case filed 22/8/2012



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Regulatory developments

- **Cartels / Misuse of Market Power Cases**
 - ACCC lost egg producers case (no agreement)
 - Also lost Flight Centre (agent is not competitor) and Pfizer case (no market power)
 - But won Renegade Gas (agreement not to quote)
 - Lesson: remember Volkswagen
- **Unfair Contracts (12 November 2016)**
 - Courts can void unfair contracts
 - Small firms < 20 employees
 - < \$300,000 (\$1 million over 12 months)
- **ANZ late fees case**
 - Not a penalty
 - Not 'out of all proportion' to costs
 - Not unfair or unconscionable



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Non-profit sector developments

- **ACNC survives: new rules for 54,000 charities**
 - Charities Passport will now develop
 - 500,000 other NFPs still state / ATO regulated
- **Uniform regulation?**
 - MOUs with states
 - WA and ACT legislated to exclude advocacy bodies
- **New 'Open Market' approach to government funding**
 - Eg. Aged care and disability
 - More competitors, new entrants
 - Need for new skills on NFP boards




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Final questions?



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Director Professional Development

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What's next?



Webinars - December

- Successfully governing IT and cybersecurity**
Monday 5 December, 12:00pm to 1:00pm AEDT 
- International Essential Director Update**
Tuesday 6 December 5:00pm to 6:30pm AEDT (90 minutes)
Member complimentary 
- An introductory guide to directors' legal duties - Navigating the regulatory landscape**
Monday 12 December 12:00pm to 1:00pm AEDT 
- Evaluating Board Finances Series Part 2 - Financial Ratios and Dashboards**
Tuesday 13 December 12:00pm to 1:00pm AEDT 

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