Directors' liability
for company actions

Duties of directors

For the most part, directors’ duties fall under the Corporations Act 2001 which sets out the way in which the company is run – that is, proper financial accounts, decisions being made with due care and diligence and in good faith, no improper use of a director’s position or information, and providing strategic guidance.

However, there are also a significant number of federal, state and territory laws which make directors liable for the actions of their companies. For example, directors can be liable if a company does not pay its taxation or causes environmental damage. Some of these laws may be quite obscure and of little interest to most organisations but many of them affect virtually every business. Directors must be aware of company activities and the legal environment in which they operate.

Various governments around Australia are aware of the difficulty these laws create for directors. The Council of Australian Governments’ Directors’ Liability Reform is seeking to harmonise the imposition of personal criminal liability for corporate fault across Australian jurisdictions. Some progress with this has been made with the Personal Liability for Corporate Fault Reform Act 2012 which reforms a number of federal laws. However, it has to be said that the overall progress has been slow and directors must remain very wary of their personal liability for their company’s actions.

The discussion below focuses on some of those personal liabilities which apply to most organisations.

Taxation

Where a corporation commits a taxation offence, a person who takes part in the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly (Federal Taxation Administration Act 1953, s 8Y). An example of such an offence is failing to furnish a return or other information.

Company directors have an obligation to ensure that the company meets its pay as you go (‘PAYG’) withholding payment obligations. The director of a company which fails to pay a PAYG withholding amount on or before the due date can become personally liable for a penalty equal to the unpaid amount. When an amount remains outstanding, the Australian Taxation Office may issue a director penalty notice. The director penalty notice regime also applies to a director where a company does not meet its superannuation guarantee obligations.

Each state and territory has a number of taxes such as payroll tax or land tax which an organisation may have to pay. In every state and territory, there is a Taxation Administration Act which allows for the recovery from directors where taxation obligations are not met by a corporation or makes directors liable for breaches by their corporations.
Workplace Health and Safety

Workplace health and safety (‘WHS’) is a major consideration for any board on a number of different levels. There is the moral driver for boards to set the tone of caring for employees’ safety, which can be combined with the commercial imperative to ensure that an organisation’s people are always seen as its most important asset. Overarching those considerations is the legal environment which means that directors can face imprisonment for WHS breaches. Under the Model Act being applied through most of Australia, directors have a duty of due diligence to ensure that the person conducting the business complies with WHS obligations. Where there are serious breaches, then a director can be imprisoned.

Anti-Competitive Conduct

The relevant law is the Federal Competition and Consumer Act 2010 which is overseen by the Australian Competition and Consumer Commission (‘ACCC’). The conduct prohibited includes anti-competitive arrangements, misuse of market power and exclusive dealing.

The law relating to anti-competitive conduct is important for all directors because it affects almost every business and because of the extremely severe penalties involved in breaches of the law. Most directors are aware that offences in this area can carry penalties of millions of dollars against directors because of high profile cases (for example, the Visy case). Directors should also be aware that there can be prison sentences of up to 10 years for a breach of some of the anti-competitive provisions of the Competition and Consumer Act 2010.

On a more positive note, directors should make use of these laws to ensure that competitors do not engage in anti-competitive behaviour against their business.

‘Cartel conduct’ draws particularly heavy penalties (10 years’ imprisonment). It is a breach of the Competition and Consumer Act 2010 for competitors to have a contract, arrangement or understanding containing a cartel provision and a further breach to put it into effect. A ‘cartel provision’ is one that has the purpose or effect of fixing, controlling or maintaining prices and/or the purpose of:

- allocating customers, suppliers or territories
- preventing, limiting or restricting output
- bid rigging (such as collusive tendering)

Consumer Protection

On 1 January 2011, the new Australian Consumer Law (which is set out in Schedule 2 of the Competition and Consumer Act 2010) commenced operation. It applies throughout Australia and can lead to severe penalties against directors who are knowingly involved in a breach of the law. The wide coverage of the prohibition against false or misleading representations means that it should be the focus of all organisations in marketing and selling their goods or services.

A court may, on application by the regulator, make an order disqualifying a person from managing corporations if the court considers that the disqualification is appropriate and the court is satisfied that the person has contravened, attempted to contravene or been involved in a contravention of certain provisions of the Australian Consumer Law. As an example, the Federal Court, in ACCC v Halkalia Pty Ltd (No 2) (2012) FCA 535, imposed a disqualification of 15 years on a director of a company which had made an ‘egregious’ series of contraventions of Australian consumer protection laws – a disqualification well and truly on par with those given under the Corporations Act 2001.

E-Business

Virtually every business now conducts marketing and transactions through electronic means such as the Internet and mobile devices. There are three particular areas of e-business which can lead to liability for directors.

First, all organisations must ensure that their website is kept up to date with such things as prices and the nature of goods or services. Websites can be, and should be, updated contemporaneously with changes in prices. Directors must ensure that processes are in place to make sure that the organisation’s website is always current and avoid the risk of breaching the consumer protection laws.

Second is the issue of ‘spamming’. Marketing by sending advertising and information through email and mobile telephones is very common and useful. However, the Federal Spam Act 2003 provides that a person must not send, or cause to be sent, a commercial electronic message that has an Australian link unless the person receiving it has consented to receiving the message. There have been a number of cases where directors have been fined very heavily for breaches of this Act. For example, in Australian
Communications and Media Authority v Clarity1 Pty Ltd (2006) FCA 1399, the Federal Court awarded a pecuniary penalty of $4.5 million against the company and $1 million against its managing director for contravening the Spam Act 2003.

Third, the Do Not Call Register, set up under the Federal Do Not Call Register Act 2006, is regulated by the Australian Communications and Media Authority. People can list their telephone or fax number on this Register and then it is against the law for unsolicited telephone calls or faxes to be made or sent to that number without consent. In Australian Communications and Media Authority v FHT Travel Pty Ltd (2011) FCA 550, a company and its sole director were found to have breached the Do Not Call Register Act 2006 in relation to thousands of marketing calls which had been made to people who had placed their names on the register. The court ordered the company to pay a fine of $120,000. As for the sole director, who was in bankruptcy, the court said:

"...it seems to me that as a matter of public policy, it would be undesirable that she come out of bankruptcy with a substantial debt. Any debt would, I infer, be a debt incurred after the bankruptcy and so continue to be payable. In those circumstances, I decline to impose a penalty upon the [sole director]. However I indicate that had I chosen to do otherwise, the range would have been that specified by the applicant, namely $10,000 to $20,000."

Environmental Law

Each state and territory has an Environmental Protection Act (or equivalent) which makes directors personally liable for breaches by their corporations.

Every organisation which has a physical presence (office, factory, warehouse) must comply with environmental protection laws. There is no national law – in fact, this is one area where every level of government (federal, state and local) has relevant laws. In many cases, environmental laws make directors personally liable for breaches by their organisations. Other features common to many of these laws include:

- wide coverage (noise, air, water, land, waste, hazardous materials);
- very heavy penalties for both organisations and directors;
- defence of due diligence.

Broadly, the laws require organisations conducting activities in a State or Territory to:

- obtain any relevant licence or government approval;
- comply with legal requirements;
- if unlawful or serious environmental harm occurs, notify the relevant regulatory authority.

It is a common defence in all the environmental protection laws where a director can show that he or she exercised ‘due diligence’ or ‘took all reasonable steps to ensure the corporation complied with’ those laws. ‘Due diligence’ can usually only be shown if there is some kind of environment management system in place.

It is important to understand that some general non-specific system of environmental management will not satisfy the requirement for due diligence. An environmental management system used by an organisation must first allow for the identification of specific risks and then the mitigation of those risks.

All directors of any organisation which may be susceptible to breaching the environmental protection laws should constantly remind themselves of the following comments by Hemmings J in State Pollution Control Commission v Kelly (1991), who said:

"due diligence...depends on the circumstances of the case, but contemplates a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless also designed to prevent the contravention. Whether the defendant took the precautions that ought to have been taken must always be a question of fact and, in my opinion, must be decided objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such person to say that he did his best given his particular abilities, resources and circumstances."

Workplace Relations

Workplace relations is one of the broad responsibilities of a board in its role overseeing business performance and legal compliance. Generally, a board will not be directly involved in the day to day considerations of work conditions and pay. However, particularly in a small organisation where there is a sole director who is largely managing the organisation, there can be personal liability for failure to comply with workplace relations law.
Workplace relations are largely governed by the Federal Fair Work Act 2009. That Act covers pay and conditions. Fines can be imposed when an organisation contravenes these requirements. Section 550 provides that a person who is involved in a contravention of a provision is taken to have contravened the provision. Directors in small organisations may well be involved in managing working conditions and pay. They must ensure that they do not breach the Fair Work Act 2009 or they may be personally liable under s 550.

**Sexual Harassment**

The Federal Sex Discrimination Act 1984 (and State and Territory equivalents) makes it unlawful to sexually harass an employee and also for an employee to sexually harass a fellow employee. This Act then goes on to provide that a person who ‘causes, instructs, induces, aids or permits’ another person to do an unlawful act shall also be taken also to have done the act.

The legal proceedings brought by Ms Fraser-Kirk against David Jones in 2010 were a warning that laws other than sex discrimination laws may be available against directors in relation to sexual harassment. That case was settled but was interesting because Ms Fraser-Kirk brought the legal action on the basis of representations being made which said to be were misleading or deceptive conduct under the Trade Practices Act (now the Australian Consumer Law 2010). First, Ms Fraser-Kirk referred to written policies and statements made during her job interview that David Jones was committed to providing a safe work place and did not tolerate sexual harassment. She then argued that the sexual harassment she had faced meant that David Jones’ policies and statements were ‘misleading or deceptive’ conduct. She also relied on the old equivalent of s 31 of the Australian Consumer Law, which states:

‘A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:

(a) the availability, nature, terms or conditions of the employment; or

(b) any other matter relating to the employment’

Second, Ms Fraser-Kirk referred to alleged representations by directors of David Jones at a press conference that the incident had been a ‘one off’ and that David Jones had never previously had any reason to question the conduct of the employee alleged to have committed the sexual harassment. It was argued that these representations were misleading or deceptive and that the failure to subsequently correct them had been misleading or deceptive.

As the case was settled, we will never know if these arguments would have been accepted by the court. However, the possibility that these actions exist under the Australian Consumer Law certainly provide encouragement, if any was needed, for directors to ensure that their organisation has appropriate sexual harassment policies and procedures in place.

**Specific Industries or Professions**

There are state and territory laws regulating many professions and industries which make directors liable for breaches by their corporations. These include:

- architecture
- building work
- casinos
- commercial fishing
- electrical work and sales
- explosives
- gaming machines
- liquor sales
- lotteries and art unions
- mining
- pawnbrokers and second hand dealers
- pharmacies
- private health facilities
- real estate agents
- retirement villages
- security
- tow truck
- travel agents
- veterinary practice
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