Rights of directors

Duties of Directors

The rights of company directors centre on enabling a director to effectively perform their duties whilst a director of a particular company, and defending themselves in legal proceedings after ceasing to be a director of that company.

What rights do directors have?

The right to receive documents in the company’s possession

A director has a general right of access to documents in the company’s possession in a timely manner to enable him or her to carry out their director functions. In practice, boards are frequently provided a broad right of access so as to enable the director to do their job properly.

The Centro case (ASIC v Healey (2011) FCA 717) has shown that managing the flow of information for directors is critical – a director needs to ensure the volume of board papers is appropriate, that key matters are highlighted and the information is comprehensible to all directors.

There may be circumstances where external information is not given to directors for a limited period of time – for example, takeover offers.

The right to inspect documents and financial records

At common law, a director is entitled to inspect, and to take copies of, the books and accounts of the company for a proper purpose. The director may exercise that right personally or employ a proper agent to make the examination for him or her.

Section 198F(1) gives currently serving directors (but not their agents) the right to inspect books, other than financial records, at all reasonable times for the purposes of a legal proceeding to which they are party or wish to bring against others or believes may be brought against them.

Section 290 of the Corporations Act 2001 outlines the right of access for a currently serving director to ‘financial records’ (which are defined in a relatively limited way in s 9) at all reasonable times. A director may apply for a court order to allow another person to inspect and make copies of the records on their behalf. The court must be satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

Former directors have the right to inspect books, including financial records, for up to seven years after ceasing to be a director. Again this only applies for the purpose of a legal proceeding.

This period of access may be extended by the company and its directors entering into appropriate deeds of access (often called a deed of access and indemnity). Boulos v Carter; Re Tarbs World TV Australia Pty Ltd (2006) 24 ACLC 46 established that a former director may request access to bring an action on behalf of the company provided they have standing under s 236, are acting in good faith and obtain the leave of the court (s 237) to do so.

The explanatory memorandum to the CLERP Act which introduced s 198F states that information can only be used by the director for the purposes of the company, for example, if an ex-director and the company are in litigation with each other if may be difficult for the ex-director to establish that access to documents are for the purposes of the company.
If a director holds shares in the company, they also have the rights of a shareholder. Shareholders have the right to access the minutes of general meetings of members only (s 251B). Members also may apply to the courts for access to company books under s 247A.

**The right to delegate**

Unless the company’s constitution provides otherwise, the directors of a company may delegate any of their powers to anyone (s 198D). The delegation must be recorded in the company’s minute book.

If the directors delegate a power, s 190 makes the directors responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves. However, a director will not be responsible for things under the delegation if:

- The director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the *Corporations Act 2001* and the company’s constitution (if any); and
- The director believed on reasonable grounds and in good faith, after making proper inquiry if the circumstances indicated the need for inquiry, that the delegate was reliable and competent in relation to the power delegated.

Delegation does not excuse a director of their duty of care and diligence.

**Reliance on information or advice**

In legal proceedings brought claiming whether a director has breached a duty, the director would raise a defence of reasonable reliance on information or professional or expert advice provided by others (s 189), which goes on to provide that the director’s reliance on the information or advice is taken to be reasonable unless the contrary is proved.

Essentially, the director must prove:

(a) the director relied on information, or professional or expert advice, given or prepared by:

(i) an employee of the corporation whom the director believed on reasonable grounds to be reliable and competent in relation to the matters concerned; or

(ii) a professional adviser or expert in relation to matters that the director believed on reasonable grounds to be within the person’s professional or expert competence; or

(iii) another director or officer in relation to matters within the director’s or officer’s authority; or

(iv) a committee of directors on which the director did not serve in relation to matters within the committee’s authority; and

(b) the reliance was made in good faith and after making an independent assessment of the information or advice, having regard to the director’s knowledge of the corporation and the complexity of the structure and operations of the corporation.

However, the courts have been firm that directors cannot substitute reliance upon the advice of management or others for their own attention and examination of an important matter that falls specifically within the board’s responsibilities – matters such financial reporting obligations (Centro case) or statements to the markets (James Hardie cases).

**The right to obtain insurance against liability for breaches of duty in certain circumstances**

This is a complex area. Directors can obtain insurance against liability in certain circumstances but they cannot obtain insurance for certain breaches of the *Corporations Act 2001* (or indeed some other breaches of legislation).

It is important to have appropriate directors and officers insurance (often referred to D&O insurance), not the least because an indemnity will be of little assistance if the company has insufficient funds to meet a claim by a director for indemnity.

**What are some other rights?**

Austin and Ramsay¹ identify other director rights:

- Lawful administration of the affairs of the company
- The right to enforce statutory provisions
- The right to enforce the corporate constitution
- Remuneration (if in a director’s terms of engagement)
- Participation in board decisions
- Indemnity
- The right to remain in office until validly removed

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How should a director gain access to documents?

Before seeking legal action to access documents, it is suggested that a director should make approaches to the chairman, company secretary and/or CEO. In some instances, the company cannot refuse access to the information.

What rights do officers have?

Officers are defined under the Corporations Act 2001 as a director or secretary of the organisation, a person who makes or helps to make decisions that affect the whole or a substantial part of the business or who may significantly affect the company’s financial standing, or receivers, administrators, liquidators and trustees. However, the specific rights of directors referred to above do not always extend to other officers. Therefore, officers would need to have rights provided in a specific agreement such as a deed of access and indemnity, as discussed below.

What are deeds of access and indemnity?

On top of statutory requirements of the Corporations Act 2001 regarding access to information, organisations will normally offer directors deeds of access and indemnity. The deed gives the directors access to company documents and records should a claim ever be made against them relating to their office. Boards should consider including the following limitations:

- The right of access does not apply to any documents over which the entity claims legal professional privilege;
- Whether the right of access should be limited to a particular period after the director has ceased service (for example, seven years);
- An undertaking by the director to keep the contents confidential, except where they must be disclosed in court proceedings or as required by law.

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