

---

# Directors Update

---

## What are your duties and responsibilities?

### Speakers:

Sarah-Jane Christensen MAICD, Thoughtpost Governance  
Paul Geyer GAICD, Australian Institute of Company Directors

# Agenda

---

- Directors duties
  - Snapshot
  - Conflict of interest
- Director development updates
  - Social media
  - Australian Privacy Principles
  - ASX Corporate Governance Council Principles
  - Bribery and Corruption
  - Expansion of Governance Principles
- Housekeeping
  - Constitutions
  - Meetings

---

# Corporate governance

---

- A director holds a position of accountability
- Fiduciary duty defines a director's role and the board's obligation

*A fiduciary duty is the highest standard of care ethically or at law. A fiduciary is expected to be extremely loyal to the person to whom s/he owes the duty s/he must not put her/his personal interests before the duty, and must not profit from her/his position as a fiduciary, unless the principal consents.*

*Fiduciary duty requires one of the highest orders of thinking – beyond thinking and doing for self, thinking and doing for a close group (family, friends and other entities) Jane Walton, AICD research project 2009*

---

## Summary of legal duties

---

- A duty to act in good faith in the best interests of the company
- Duty to act with care and diligence
- Not to make improper use of information
- Not to make improper use of the position
- To avoid conflicts of interest
- To act honestly
- To not trade while insolvent

---

# Summary of legal duties

---

A common law action for negligence may be brought against directors.

The common law requires that a director must:

- become familiar with the company's business
- monitor the company's activities and policies
- maintain familiarity with the company's financial status including by regularly critically reviewing financial statements

*Keith Hanslow, Millens Lawyers*



---

## Directors' duties – conflicts of interest

---

An independent director is a NED who is ... free of any business or other relationship that could materially interfere with the independent exercise of their judgment

### *ASX Corporate Governance Council Principle 2*

- Directors must act fairly and impartially. Avoid bias, discrimination, caprice or self-interest
- Do not use your position as a director to seek an undue advantage for yourself, family members or associates, or to cause detriment to the public entity; ensure that you decline gifts or favours that may cast doubt on your ability to apply independent judgement

Victorian Public Entity Directors' Code of Conduct 2006

---

# Directors' duties – conflicts of interest

---

- Conflict of duty

Where you have a duty to a company or other entity which is incompatible with the duty you owe to the company on whose board you serving

- Representatives - the notion of being a representative is in direct conflict with the fundamentals of governance

- Process

- Maintain a register of interests , exit the room
- As soon as a conflict has been identified it must be disclosed

*“The moment you disclose you are no longer capable of exercising judgment on how it should be resolved – it passes onto those whose interests are at stake”*

*Dr Simon Longstaff, St James Ethics Centre*

---

# Directors' duties – conflicts of interest

---

## Conflict not a dirty word

- Individuals disclose interest
- Boards decide if a conflict AND how to manage it

## Create culture of disclosure – options to manage conflict :

- Leave the room.
- Stay, observe, remain silent, not vote.
- Contribute and then leave.
- Stay, contribute, not vote.
- Stay, contribute, vote.
- Delegate to management or sub-committee.



---

# Directors' Duties

---

## Oversight of payments to directors - Downer EDI v Gillies

- Managing director borrowed against his future accrued bonuses
- Managing director treated as advance payments on bonuses
- CFO treated as borrowing from bonus account
- Second payment overdrew bonus account by \$200k
- Board unaware
- Managing director in breach of duties of care diligence and acted for improper purpose
- Serious misconduct – not entitled to termination payment under employment contract

# Social media

---

- Seafolly v Madden
  - Swimwear company
  - Posted of swimsuit designs on website - implied Seafolly copied designs
  - Seafolly awarded \$25,000
- Facebook
  - Provisions of Advertising Code apply to advertisers Facebook pages – *Advertising Standards Bureau*
- Linfox v Stutsel
  - Employee dismissed for comments posted on Facebook about managers
  - Dismissal found be unfair
  - Company lack of social media policy a consideration

---

# Australian Privacy Principles

---

Applies to:

- Businesses turnover > \$3m – includes private schools

Requirements:

- Appropriate private policy required
- Not use personal information for direct marketing – (some exceptions)
- Take reasonable steps ensure overseas recipients comply with Principles
- Mandatory reporting of serious breaches
- Commissioner powers to investigate
- Max penalty \$1.7m

---

# ASX Corporate Governance Principles

---

## Changes – released March 2014

- Undertake “appropriate checks” before director appointment
- Contracts for directors and senior executives
- Company secretary report to chair
- Criteria for a director to be considered “independent” amended:
  - Service on the board for period that compromise independence.
  - Family ties a factor
  - Material supplier or customer extended to prior 3 years
- Clawback policy on executive remuneration

---

## ASX CGC Proposals - Finance and Risk

---

- Boards receive CEO and CFO declaration on financial records before approves financial statements
- Boards have risk committees OR disclose how manage risk
- Board annual review risk management framework
- Entities have internal audit functions OR explain alternate processes
- Disclose economic, environmental and social sustainability risks

---

## ASX CGC Proposals - Diversity

---

- Improvements among top 200, (now 15.6%, and 22% in top 20) or "Glacial progress" (only 16% of new appointments this year are women)
- ASX CGC proposals
  - can report “Gender Equality Indicators” under the Workplace Gender Equality Act 2012
  - disclose definition of “senior executive”
  - measurable objectives re-defined to include appropriate and meaningful benchmarks that are measured and monitored
- 47 of Top 200 boards, still have no women
- Workplace Gender Equality Act
  - employers > 100 employees
  - report annually on gender indicators

---

# Bribery and Corruption

---

- Tough new laws in the UK and elsewhere
  - UK and US laws often apply to non UK and non US companies
- Australia
  - Criminal Code (Cwth) – bribery of foreign official carries 10 years, fines up to \$1.7m for individuals, \$17m for companies
  - Facilitation payments - still allowed in Australia
    - requires record keeping
    - defence likely to be abolished
  - more Australian companies operating internationally
  - AFP has signalled more enforcement
  - Can result in breach directors duties – *ASIC v Lindberg (AWB)*

## **More Governance - Sporting organisations**

Sports Governance Principles issued by Australian Sports Commission

- Applies to national sporting organisations receiving more than \$5m in funding - 12 months to implement
- Must be company limited by guarantee
- Seek target 40% female board representation by 2015
- CEO not be appointed after leaving role
- Publish annual reports consistent with Corporations Act



---

# Switkowski Report – messages for all boards

---

- Rec 8) Bad news must be passed up the line quickly.
  - Sometimes, organizations seem to have holding depots where issues await a fix while being shielded from upper management and the board. This is poor practice.
  - .. ask the question 'what's keeping you up at night?' and follow up and monitor action on concerns. Boards should not resile from detailed interrogation of operations, even when times are good.
- Rec 9) Policies and Procedures should be reviewed and updated as required.
  - All policies, codes of conduct etc ..require annual endorsement by the board.
- Rec 11) The board agenda should .. cover issues around player welfare and treatments...
  - The board could consider occasional attendance of players, perhaps from the Leadership Group, at its meetings.

---

## Governance – NFPs & charities

---

- Those registered with ATO automatically move across to ACNC
- Can opt out of registration but may lose tax concessions
- Must supply AIS to ACNC – detail depends on size:
  - Small entities < \$250k annual revenue
  - Medium entities \$250k - \$1m annual revenue
  - Large entities > \$1m annual revenue
- Must comply with governance standards
- ACNC determines if charitable status applies

---

# NFP - Governance Standards

---

1. Purpose and NFP character
  - Demonstrate purpose and character as NFP
  - Make information about purpose public
  - Comply with purpose
2. Accountability to members
  - Take steps to provide members opportunity to raise concerns
3. Compliance with Australian laws
  - Must not engage in conduct that creates an indictable offence or attracts civil penalty
4. Suitability of responsible entities
  - Ensure not disqualified from managing a corporation or disqualified by the Commissioner
5. Duties of responsible entities

---

## Update - Superannuation and Tax

---

- Personal liability for company's unpaid SGC
- Administration or liquidation won't discharge director liability for unpaid PAYG tax or SGC liabilities
- Directors being found liable for company not remitting PAYG amounts withheld

---

# Constitutions

---

## Fixing corporate errors - Weinstock v Beck

- Director of private company acted as such for 30 years, but not validly in office because rotation provisions in constitution not followed
- High Court restored earlier order remedying the breach
- Validation provision of Corporations Act to be given a full or wide reading,
- expensive, and uncertain, remedy -so check the fine print

---

# Meetings - Minutes

---

- Read pro forma / draft minutes !
  - "the Board notes that it received the following papers.. Each director confirms that he/she has read the above materials and has made due enquiry of the relevant author if required."
  - For whose benefit exactly?
- Emerging best practice
  - Minutes that are not too short, not too long
  - Note important matters discussed
  - Circulated to board within 7-10 days
  - Consider a log of outstanding items, and an anniversary review of decisions taken the previous year
  - Note comings and goings, or adjourn every hour or so

---

## Quote of the day..

---

### HIH Royal Commission

*“By and large the people who were involved were not inherently bad or in some way set upon being part of a corporate disaster. HIH is a reminder, if one is needed, that a drastic fall from corporate grace can occur if those in charge lose their way”*

Mr Justice Owen

---

# Question & Answer Session

---





---

# Thank you for your attendance

---

For further information on membership or Company Directors support services please contact **Theresa Jackson**  
Email: [tjackson@companydirectors.com.au](mailto:tjackson@companydirectors.com.au)  
Phone: 03 9245 4200