

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

COMPANY DIRECTORS' DUTIES

Report by

Senate Standing Committee

on

Legal and Constitutional Affairs

November 1989

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TERMS OF REFERENCE

The social and fiduciary duties and responsibilities of company directors.

(Journals of the Senate, No 79, 26 May 1988, pp 763-4)

RECOMMENDATIONS

- 1 An objective duty of care for directors be provided in the companies legislation. (para 3.28)
- 2 A 'business judgment rule' be introduced into Australian company law. It should include an obligation on directors to inform themselves of matters relevant to the administration of the company. They should be required to exercise an active discretion in the relevant matter or, alternatively, to show a reasonable degree of care in the circumstances. (para 3.35)
- 3 Directors be required to attend board meetings unless there is a reasonable excuse for non-attendance. (para 3.39)
- 4 The companies legislation be amended to provide for, and specifically limit, the extent to which company officers may rely on others. (para 3.53)
- 5 The companies legislation be amended to set out requirements which must be met for exoneration of directors from what would otherwise be breaches of their fiduciary duties. (para 4.65)
- 6 The companies legislation be amended to permit all creditors to share equally in sums recovered from directors. (para 5.47)
- 7 Criminal liability under companies legislation not apply in the absence of criminality. (para 5.57)

- 8 The companies legislation be amended to make it clear that the interests of a company's employees may be taken into account by directors in administering the company. (para 6.24)
- 9 Matters such as the interests of consumers, or environmental protection, be dealt with not in companies legislation but in legislation aimed specifically at those matters. (para 6.56)
- 10 The NCSC and the ASC proceed immediately to consult as necessary, in particular with shareholders' groups and others involved in the securities industry, in order to develop a proposal to eliminate the unfair practices relating to small shareholders in renounceable rights issues. (para 7.48)

11

- (i) The establishment of an audit committee be made a requirement for public listing of a company;
- (ii) the chairperson and a majority, or all, of the members of the audit committee be non-executive directors;
- (iii) the audit committee be required to meet regularly and report to the board;
- (iv) the audit committee have direct access to the company's auditors (internal and external) and senior managers, and the ability to consult independent experts where necessary; and
- (v) as a high but lesser priority, similar requirements be introduced for larger non-listed companies. (para 8.15)

12 Audit committees have the following functions:

- (i) reviewing financial information to ensure its accuracy and timeliness and the inclusion of all appropriate disclosures;
- (ii) ensuring the existence and effective operation of accounting and financial controls;
- (iii) overseeing the audit of the company, including nominating the auditors, approving the scope of the audit and examining the results;
- (iv) providing a link between the auditors and the board; and
- (v) any other functions allocated to it by the company, provided that the extra functions do not compromise its ability to perform the tasks set out in paragraphs (i)-(iv) above. (para 8.16)

13 Smaller unlisted companies be encouraged to set up audit committees, or, in the absence of an audit committee, have auditors present at board meetings which approve financial statements prior to their distribution to shareholders. (para 8.17)

14 The Company Directors' Association of Australia and the Institute of Directors in Australia:

- (i) make an assessment of the courses and programs dealing with the duties and responsibilities of company directors;

- (ii) following this assessment, compile an index which sets out information such as the courses available and the cost, duration and location of the courses;
 - (iii) update the index at regular intervals; and
 - (iv) distribute the index freely amongst company directors.
(para 9.19)
- 15 The Company Directors' Association of Australia and the Institute of Directors in Australia encourage company directors to participate in the available courses and programs. (para 9.20)
- 16 The board of a public company state in the company's annual report the particular skills and expertise that each director brings to the company. (para 9.24)
- 17 A public company include in its annual report a statement of the particular skills and expertise that it considers desirable to be represented on its board. (para 9.24)
- 18 Company directors' professional associations, such as the Company Directors' Association of Australia and the Institute of Directors in Australia, take steps to develop and promote a code of ethics for company directors. (para 10.11)
- 19 The NCSC, the ASC and the Corporations and Securities Panel receive the funding necessary for them to be as active, effective and vigilant as possible. (10.39)

20 The law be amended to make a director personally liable for complicity where he or she intentionally or recklessly assists in or encourages an act which constitutes an offence by a company. (para 12.31)

21

- (i) The appropriate mix of individual and corporate liability for corporate misconduct be referred to a body such as the Australian Law Reform Commission for detailed investigation and report;
- (ii) the matter be investigated and researched in close consultation with all persons and community groups who are willing and able to contribute; and
- (iii) the aim of such a review be to develop a theoretical basis to guide the future drafting of legislation and prosecution guidelines. (para 12.46)

22 Section 229(2) of the Companies Code, or its equivalent, be amended so that criminal liability under that section only applies where conduct is genuinely criminal in nature. (para 13.12)

23 Civil penalties be provided in the companies legislation for breaches by directors where no criminality is involved, and, in appropriate circumstances, people suffering loss as a result of a breach be enabled to bring a claim for damages in the proceedings taken to recover the penalty. (para 13.15)

- 24 A system of on-the-spot fines for minor offences, such as the Victorian PERIN system, be introduced into the administration of company law. (para 13.20)

ABBREVIATIONS

ASC	Australian Securities Commission
AULSA	Australian Universities Law Schools Association
Companies Code	The <u>Companies Act 1981</u> as it applies in all jurisdictions
Evidence	Transcript of proceedings of the Committee's public hearings
NCSC	The National Companies and Securities Commission
The Committee	The Senate Standing Committee on Legal and Constitutional Affairs