

CHAPTER 9

QUALIFICATIONS OF COMPANY DIRECTORS

9.1 The Companies Code and, similarly, the Corporations Act, says little about what qualifies a person to be a director of a company. Directors must be natural persons.¹ Some directors (at least two in the case of public companies and one in the case of a proprietary company) must 'ordinarily reside within Australia'.² The articles of a company may require a director to hold a specified share qualification and failure to attain this can lead to disqualification.³ No person aged 72 or over can be appointed as a director of a public company or a subsidiary of a public company without a resolution of the company.⁴ A company may specifically provide for a lower age limit in its memorandum or articles.⁵ In all companies, the minimum age of directors is 18.⁶ The NCSC can exempt companies limited by guarantee from the provisions relating to the age of directors.⁷ Certain persons are prohibited from being directors without leave of the court⁸ and the court may make orders that certain persons not manage corporations.⁹

9.2 Neither the Companies Code nor the Corporations Act imposes minimum standards of education, training or competence on directors.

9.3 In 1976, a private member's bill, the Corporations and

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1. Section 219(2) (Corporations Act, s221(2)).
 2. Section 219(3) (Corporations Act, s221(3)).
 3. Sections 221, 222 (Corporations Act, ss223, 224).
 4. Section 226(1), (6), (7) (Corporations Act, s228(1), (6), (7)).
 5. Section 226(11) (Corporations Act, s228(12)).
 6. Section 226(12) (Corporations Act, s228(13)).
 7. Section 226(9) (Corporations Act, s228(10)).
 8. Section 227 (Corporations Act, s229) - insolvents under administration, certain convicted persons.
 9. Section 227A (Corporations Act, s230).

Securities Industry Bill, was introduced.¹⁰ It would have allowed positive qualification requirements to be imposed on company directors. It provided that regulations could be made prescribing 'the qualifications and experience to be possessed by directors of corporations'.¹¹ The Bill did not proceed.

9.4 Traditionally, English law has not required company directors to have special qualifications. The view has been that it is up to the shareholders to choose. For example, in Re Brazilian Rubber Plantations & Estates Ltd,¹² of four directors, one was 'absolutely ignorant of business' who only consented to act because he was told 'the office would give him a little pleasant employment without his incurring any responsibility'. The second, a partner in a reputable firm of bankers, 'was seventy-five years of age and very deaf'. The third 'was a rubber broker and was told that all he would have to do would be to give an opinion as to the value of rubber when it arrived in England'. The fourth was a businessman who said he was 'induced to join' by seeing the names of the other directors whom he considered 'good men'.¹³

9.5 The directors were found not liable for losses incurred in ruinous speculation in rubber plantations. The judge said:

[A director] is ... not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance.¹⁴

9.6 Most submissions to the Committee which addressed this

10. Introduced by Mr Lionel Bowen MP (as he then was), on 19 August 1976, House of Representatives, Hansard, 19 August 1976, p 375.

11. Clause 284(1)(g).

12. [1911] 1 Ch 425.

13. *Ibid* at 427.

14. *Ibid* at 437 per Neville J.

issue supported this position. The NCSC submitted that it was appropriate that there were no prescribed qualifications:

The background and experience of directors varies according to the needs of particular companies.¹⁵

9.7 Mayne Nickless Limited submitted that it would be 'counter-productive' for the law to impose minimum qualifications of an 'academic or practical type' for directors; to do so 'would disqualify a large number of present and potential directors'.¹⁶ Mayne Nickless said that it was

the proper function of the shareholders or directors of a company to assess the qualifications and ability of those whom they may invite to join, or elect to, the board ...¹⁷

9.8 Mayne Nickless said that the standards required by the law were 'the only practicable measure of regulatory control'.¹⁸

9.9 The contrary view was taken by the Institute of Chartered Accountants. Mr Middleton, National President of the Institute, said 'there needs to be more specific clarification of who should hold office as directors'.¹⁹ The Institute submitted that

a pre-requisite to appointment as a company director should be experience in a successful business.²⁰

15. *Submission from NCSC, p 1 (Evidence, p 560).*

16. *Supplementary submission from Mayne Nickless Ltd, p 1 (Evidence, p 409).*

17. *Supplementary submission from Mayne Nickless Ltd, p 1 (Evidence, p 409).*

18. *Supplementary submission from Mayne Nickless Ltd, p 1 (Evidence, p 409).*

19. *Evidence, p 53 (Mr Middleton).*

20. *Submission from Institute of Chartered Accountants in Australia, p 3 (Evidence, p 35).*

9.10 The Institute referred to the standard of competence, honesty and fair dealing required of directors. It compared what was required of those seeking appointment as company auditors and liquidators with what was required of directors and said:

Auditors and liquidators are said to come 'after the event' so surely the eligibility of a person for appointment as a company director should be similarly controlled.²¹

9.11 Mr Middleton said that, in terms of specifying mandatory qualifications of directors, no distinction should be made between public and proprietary companies because

they are both dealing with the public purse ... In one sense, the smaller company is very much dealing with the creditors.²²

9.12 Mr Middleton estimated that the amount lost by creditors as a result of the failure of proprietary companies would

exceed the amount that is lost in a large company failure when shareholders at the other end are losing considerable amounts.²³

Horses for courses

9.13 It is appropriate that the companies legislation not require directors to hold specific academic or technical qualifications. The kind and level of knowledge, skill and experience needed of directors varies according to the companies involved.²⁴

21. *Submission from Institute of Chartered Accountants in Australia, p 3 (Evidence, p 35); see also Evidence, p 54 (Mr Middleton).*

22. *Evidence, p 55.*

23. *Evidence, p 55.*

24. *See, eg, Evidence, pp 11 (Mr Richardson), 54-5 (Mr Middleton).*

9.14 Requiring formal qualifications of skill and education is undesirable. Mayne Nickless pointed out that many of today's highly successful company directors would be excluded from directorship if there were such requirements.²⁵ In addition, certain groups in the community would be discriminated against in an unwarranted fashion. For example, many women who successfully run businesses today²⁶ do not have formal qualifications. Companies operating successfully in the rural sector have directors who do not have formal qualifications but who have a wealth of knowledge and experience.²⁷

9.15 Mr Loton, Managing Director of BHP, conceded it might be possible, although difficult, to draw up guidelines regarding the qualifications of company directors.²⁸ He told the Committee that not all directors of BHP had tertiary qualifications²⁹ and said the criterion was 'the best person ... available'.³⁰

9.16 The Committee considers that the test of a good director is the competence, industry and honesty with which he or she carries out his or her tasks. If directors are competent, industrious and honest it matters little what formal qualifications they hold.

Education and training of directors

9.17 The role of education and training was emphasised throughout the course of the Committee's inquiry.³¹ The Company

25. See supplementary submission from Mayne Nickless Limited, p 1 (Evidence, p 409).

26. See Evidence, p 56 (Senator Powell, Mr Middleton), referring to information from the Victorian Small Business Development Corporation.

27. Evidence, pp 16 (Mr Richardson), 56 (Senator Powell, Mr Middleton).

28. Evidence, p 632.

29. Evidence, pp 632-3.

30. Evidence, p 633.

31. Eg, Evidence, pp 109 (Mr Peters), 344, 364 (Professor Baxt).

Directors' Association told the Committee it had run a 'company directors' course' for 12 years. The Association said that recently there had been a

dramatically increasing awareness in the business community of directors and of their increasing responsibility.³²

9.18 This was reflected in a significant increase in enrolments in the course over the past three years. These increases were expected to continue in the future.³³

9.19 There should be more courses available for directors and directors should attend them. The Committee recommends that 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.**

9.20 The Committee recommends that the **Company Directors' Association of Australia and the Institute of Directors in Australia encourage company directors to participate in the available courses and programs.**

32. *Evidence, p 108 (Mr Peters).*

33. *Evidence, p 108 (Mr Peters).*

Statement of skills

9.21 It was suggested to the Committee that there should be a proper matching of the responsibility and the environment in which [directors] are holding that position as a director, and their capabilities.³⁴

9.22 One way of establishing such a matching process would be for directors to state publicly the particular skills and expertise they bring to the position of director. The statement of skills could be included in the annual report of the company. The shareholders, creditors and public at large would then be entitled to rely on that person to use those skills in the operation of the company.³⁵ Companies could set out their requirements and, in balance, see them met by the overall composition of the board.

9.23 This kind of matching process would be more appropriate in the case of public companies than proprietary companies. Proprietary companies are usually small enterprises, often family businesses, centred on those who are involved in the business, whose skills and expertise form the basis of the corporate business.

9.24 The Committee recommends that 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. Further, the Committee recommends that 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.

34. Evidence, p 53 (Mr Middleton).

35. See Evidence, pp 11-12, 16 (Mr Richardson). Also see Evidence, p 54 (Mr Middleton), where the matching scheme was approved, although qualifications were still considered of primary importance.