



Précis Paper

Director Duties and Responsibilities

A discussion about the general duties of directors and officers, common situations in which directors can find themselves personally liable, lessons from recent high profile cases and practical steps on how a director may effectively discharge their duties and responsibilities.

Discussion Includes

- Key roles and responsibilities
- Key points within the Constitution
- Australian Resident Director
- Shadow and quasi directors
- Statutory obligations of directors
- Common law duties (fiduciary duties)
- Personal liability of directors
- Key lessons from Royal Commission and recent cases
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- The Shareholders Agreement
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Director Duties and Responsibilities

1. In this edition of BenchTV, Malcolm Campbell (Principal Lawyer, Coleman Grieg Lawyers – Parramatta) and Luke Mitchell (Principal Lawyer, Coleman Grieg Lawyers – Parramatta) discuss the general duties of directors and officers, common situations in which directors can become personally liable, lessons from recent high profile cases and practical steps on how a director may effectively discharge their duties and responsibilities.

Key roles and responsibilities

2. Director duties and responsibilities are primarily governed by the company's Constitution and the *Corporations Act 2001* (Cth). One of the biggest issues for directors is a lack of knowledge about what the Constitution says about they can and cannot do in their role as director and how the internal affairs of the company needs to be run.

Key points within the Constitution

3. The Constitution regulates the affairs of the Constitution and sets out how often meetings are to be held as a minimum, how many people need to attend meetings, what notice needs to be given for meetings and what their express powers under the constitution are.

Australian Resident Director

4. When there is a proprietary limited company, it is necessary for at least one director to be primarily a resident in Australia.
5. With a public company, there must be a minimum of 3 directors, 2 of whom must be primarily based or reside in Australia.
6. The Australian Resident Director rule does not require citizenship of the directors, it simply requires the directors to be 'ordinarily residing in' Australia.

Shadow and quasi directors

7. A shadow director is primarily a person who the Board takes direction from who is not officially appointed as a director. An example of this is in regard to a wholly owned subsidiary where the subsidiary has appointed directors but also takes advice from the holding company.
8. It is a risk area for people involved in senior management of companies as they might think that they are outside of the law in terms of their rights and responsibilities however,

the *Corporations Act 2001* (Cth) extends duties beyond those individuals who are named as directors and can extend to senior management of an organisation.

Statutory obligations of directors

9. Sections 180 – 189 of the *Corporations Act 2001* (Cth) are based upon the fundamental duty of a director which is always to act in the best interests of the company. This includes shareholders, creditors, employees and general stakeholders.
10. There is a rule called the Business Judgment Rule under the *Corporations Act 2001* (Cth) which provides that a director needs to consider whether in their honest and reasonable opinion, what they are proposing to do is in the best interests of the company.

Common law duties (fiduciary duties)

11. Directors must act in the company's best interests including preferring the company's interests over their own. This includes making proper declarations and disclosure where personal interests are or may be in conflict with the company's interests and disqualifying themselves from voting in those circumstances.

Personal liability of directors

12. There are two broad categories in which directors can be personally liable. The first is in regard to insolvency which is where there is the potential for personal liability for certain tax obligations includes unpaid super entitlements to employees and unpaid PAYG installments. The other broad area which can trigger personal liability is in day-to-day operation, which includes contravention of Part 3.1 of the *Fair Work Act 2009* (NSW), the aiding and abetting provisions under consumer law can trigger personal liability being knowingly involved in a contravention and also under environmental legislation.
13. Fundamentally, a director has personal liability to ensure that the company is meeting its regulatory and legal obligations. There are some fairly significant consequences that directors can personally face under the *Corporations Act 2001* (Cth) such as up to a potential maximum fine of over \$1mil for directors for civil penalties and substantial jail terms.

Key lessons from Royal Commission and recent cases

14. High profile decisions such as *ASIC v Healey & Ors* (2011) FCA 717 and *ASIC v Adler* (2002) 41 ACSR 72 have focused on the roles of directors and the operation of businesses. These recent cases show that it is not enough for a director to rubber stamp documents and actions of senior management

15. *ASIC v Adler* (2002) 41 ACSR 72 involved a situation whereby the directors were not across the company's financial accounts and the company's true financial position. This decision shows that a director is expected to have a good grasp of basic accountancy principles, be able to read, understand and critically analyse financial accounts. In many instances, it is not enough to rely on third parties, even where those third parties are professionals
16. *ASIC v Healey & Ors* [2011] FCA 717 introduced the test that requires directors to take reasonable steps, that is to what extent did they reasonably and honestly believe the information that was provided to them was true, correct and accurate and did they ask the right questions.
17. Critical analysis is important in regard to both directors themselves, their skill set, their understanding and knowledge of their role and also critical analysis of the information that they are receiving. A key attribute of a director is having the courage to ask questions and ensuring that they are discharging their obligation and trying to take the reasonable steps to form an honest belief.

Tips for an incoming director

18. Incoming directors need to get themselves up to speed as to where the company is at and understand the industry that it is in, how it is positioned, broadly what its competitors are doing and in terms of the company internally, request recent financial accounts and consider the company's compliance history, its litigation history and the market in which it operates in etc. It is also important for incoming directors to do their due diligence on the company and the composition of the Board.

The Shareholders Agreement

19. For privately held companies, there will often be a shareholders agreement that exists as a collateral contract to the constitution that regulates the affairs of the shareholders and the conduct of the directors, who are representatives of the shareholder. It may also talk about how shares may be disposed of and it is important for a director to ensure that any relevant provisions in the shareholders agreement are followed.
20. It is important to consider whether the company has Directors and Officer Holders Insurance. While this will not protect a director from personal liability for tax and insolvent trading claims, but for workplace laws and consumer laws under which personal liability can be triggered, this type of insurance may alleviate some of that liability.

Directors obtaining information

21. Directors who are struggling to obtain information should keep agitating for it and ask why it is not being provided. This is because as a director, it is difficult to discharge obligations to take reasonable steps and forming an honest opinion and belief if they do not have all the information available to them. It is important that a paper trail of the enquiries made exists to show that the director has discharged their obligation to make the enquiries.
22. In the context of a director requesting information and it being withheld by senior management, then the Board may wish to retain a lawyer to advise the company and the Board as to what information should be provided and potentially, the lawyer may be instructed to approach senior management to furnish that particular information.

Whistle Blowing

23. Whistle blowing is a huge growth area of law and one of the key things as a director is to make sure that the company you are involved in has a Whistle Blowers policy and that everybody understands the protections afforded to whistle blowers.

The provision of personal guarantees

24. Asset protection for an individual can be undone by the giving of a personal guarantee. Most commonly, the guarantee will arise almost exclusively where there is credit being given, whether through a lender or a trade creditor.
25. It is important when it comes to personal guarantees, that the director understands what is being asked as many guarantees are extreme and may grant legal rights to real estate and any personal property owned.

Confidentiality

26. Rogue directors need to understand that there is a statutory obligation and that they cannot misuse information that they are provided in their role as director or allow the use of it to cause detriment to the company *Corporations Act 2011* (Cth).
27. Sensible protections should be put in place such as sharing information in a secure workspace, paper copies that are collected at the end of board meetings, two factor authentication on IT systems around the provision of that material

BIOGRAPHY

Malcolm Campbell

Principal Lawyer, Coleman Grieg Lawyers, Parramatta

Malcolm Campbell is a Principal Lawyer and integral member of Coleman Grieg's Commercial Advice team boasting over 19 years' experience across business, commercial, workplace and estate planning law. Through his successful representation of a diverse and growing list of businesses, associations and organisations, Malcolm has developed a comprehensive understanding of the challenges faced by those operating within today's commercial landscape. His wide-reaching experience allows Malcolm to quickly develop a strong understanding of his client's needs, get to the core issues and put in place well thought out and effective strategies to help them achieve their objectives in a timely, effective and commercially sound manner.

Through his utilisation of a down-to-earth, people centric approach, Malcolm ensures that his clients receive practical 'real world' guidance and solutions, regardless of the matter at hand. With professional qualifications spanning a range of commercially-relevant areas including economics, law and corporate governance. Malcolm's clients regularly benefit from his eclectic knowledgebase. He is also a Fellow of the Governance Institute of Australia (FGIA). Having recently amalgamated his own firm Dooley & Associates Solicitors with Coleman Greig Lawyers. Malcolm possesses an in-depth knowledge of the unique challenges faced by businesses – particularly those located within the Greater Western Sydney region. As both Public Officer and Secretary of the Sydney Hills Business Chamber, Malcolm has a vested interest in delivering strong outcomes for local businesses, both through his role as a commercial lawyer and via his ongoing involvement in the local business community.

Malcolm is an engaging speaker, regularly presenting webinars, seminars and workshops to a wide range of audiences, from not-for-profit organisations and charities through to top tier firms and peak body groups such as LawCover, the College of Law and Legalwise CPD seminars.

For over ten years Malcolm has been an active supporter of the Save Our Sons charity, a role

which has seen him help raise public awareness and much needed funding for research on Duchenne Muscular Dystrophy.

Luke Mitchell

Principal Lawyer, Coleman Grieg Lawyers - Parramatta

Luke Mitchell is a Principal Lawyer within Coleman Grieg's Commercial Advice team having joined the firm as part of our 2019 amalgamation with Dooley & Associates Solicitors. With over 15 years of extensive experience as a Commercial Lawyer, Luke has successfully worked with a diverse range of clients across multiple industries, placing a particular focus on shareholder and share sale agreements, customer engagement, and sponsorship and distribution agreements.

Further to his expertise as a Commercial Advice lawyer, Luke has significant experience across a number of legal areas and has run complex commercial litigation matters in the Federal Court of Australia, NSW Court of Appeal and the Local, District and Supreme Courts of NSW. Luke also has a high level of experience pertaining to Employment Law, both as an advisor and a litigator, roles which have placed him in a unique position of understanding with regard to the many competing factors faced by businesses. Through a combination of his background in commerce and his experience as the director of a small businesses, Luke has developed a genuine understanding of the realities of operating a business. This person experience has given him a clear understanding of his clients' motivations and concerns, and as such he is able to provide focused and individually tailored advice by providing practical, pro-active solutions which allow his clients to get on with running their businesses. Luke has written extensively on the day to day commercial and employment-related challenges face by Australian businesses and has also been responsible for presenting the risk management module in the College of Law's practice management course.

With years of experience working alongside a diverse list of clients throughout the Greater Western Sydney region, Luke brings unique insights and knowledge surrounding the specific challenges faced by businesses located within Australia's third largest economy. A proud support of Save Our Sons Inc, a charity that seeks to find a cure for Duchenne Muscular Dystrophy, Luke has continued to undertake extensive pro bono work on its behalf.

BIBLIOGRAPHY

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