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Proposal 1:-

Section 181 and s184(1) (the duties of good faith and proper purpose) should be extended beyond directors and other officers of a corporation to any other person who takes part, or is concerned, in the management of that corporation

For the purpose of Proposal 1 (and Proposals 2 and 3), should 'management' of a corporation be defined? If so, should the definition be along the lines of policy which involve decision making related to the business affairs of a corporation to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs?"

Response to Proposal 1:-

Yes. The definition of Management should be extended to anyone exercising power of direction, and/or authority over any other person, within the corporation or being directed by the corporation on its behalf. This means that supervisors would no longer have a defence of being instructed to do any thing, if they knew or should reasonably have known that the thing being requested was incompetent, or illegal, or improperly authorized. This needs to be defined into Corporations Law.

Together with properly defined Whistleblower protection for all acts conducted in employment, illegal or grossly incompetent acts could no longer be made secret or covered up and many potential failures would be uncovered before they occurred.

In the Amcor price fixing case for instance, price fixing would have incurred severe penalties on anyone aware of this activity (but not necessarily involved) not coming forward, but they would also have certain protection from vilification and retribution.

All company owners, Board members, Directors, employees, contractors and service providers would have the same obligations to tell the truth and severe penalties if they do not expose incompetent or illegal acts. In return they would receive appropriate and extensive whistleblower protection from vilification and employment retribution.

This would bring Corporations Law into line with for instance Industrial Safety legislation and with certain Misleading and Deceptive Conduct aspects of Trade Practices where misleading statements (untruths) are severely dealt with.

Proposal 2:-

Subsection 180(1) (the duty of care and diligence) should be extended beyond directors and other officers of a corporation to any other person who takes part, or is concerned, in the management of that corporation.

Response to Proposal 2:-

Yes. The response to proposal 1 is equally appropriate to proposal 2.

Proposal 3:-

As a corollary of Proposal 2, s 180(2) (the business judgment rule) should be extended beyond directors and other officers of a corporation to any other person who takes part, or is concerned, in the management of that corporation

Response to Proposal 2:-

Yes. The responses to proposals 1 and 2 are equally appropriate to proposal 3.

Proposal 4:-

Section 182 and s 184(2) (improper use of corporate position should be extended beyond directors, other officers and employees of a corporation, to any other person who performs functions, or otherwise acts, for or on behalf of that corporation.

Response to Proposal 4:-

Yes. The responses to proposals 1, 2 and 3 are equally appropriate to proposal 4.

Proposal 5:-

Section 183 and s 184(3) (improper use of corporate information} should be extended beyond past and present directors, other officers and employees of a corporation, to any other person who performs, or has performed, functions, or otherwise acts or has acted, for or on behalf of that corporation.

Response to Proposal 5:-

Yes. The responses to proposals 1, 2, 3 and 4 are equally appropriate to proposal 5.

Proposal 6:-

Subsection 1309(1) (knowingly providing false or misleading information) should be extended beyond officers and employees of a corporation to any other person who performs functions, or otherwise acts, for or on behalf of that corporation.

Response to Proposal 6:-

Yes. The responses to proposals 1, 2, 3, 4 and 5 are equally appropriate to proposal 6.

Proposal 7:-

Subsection 1307(1) (misconduct concerning corporate books) should be extended beyond past and present officers, employees and shareholders of a company to any other person who performs, or has performed, functions, or otherwise acts or has acted, for or on behalf of that company

Should the categories of persons subject to s 1309(2) (ensuing the veracity of information) be extended in the same manner as proposed for s1309(1), namely to any other person who performs functions, or otherwise acts, for or on behalf of that corporation.

Response to Proposal 7:-

Yes. The responses to proposals 1, 2, 3, 4, 5 and 6 are equally appropriate to proposal 7. The 'Corporate books' definition apply to all records of the company not just financial records.

General Dishonesty proposal:-

Should there be a general provision prohibiting individuals from acting dishonestly in connection with the performance or satisfaction of any obligation imposed on a company by any statutes If so, should the provision apply to:-

- 1. obligations under the Corporations Act only, ar*
- 2. obligations under any Commonwealth, State or Territory statutes applicable to corporations*
- 3. obligations under any overseas written laws as well as Australian laws'*

Response to General Dishonesty Proposal:-

Yes for 1 and 2 above but not to 3. The law within Australia should not seek to impose additional conditions applying in overseas jurisdictions.

Related Corporations Proposal:-

Should there be a provision to the effect that where any person who: is a director, officer or employee of a corporation, or takes part, or is concerned, in the management of that corporation, or

performs functions, or otherwise acts, for or on behalf of that corporation makes, or participates in making, a decision that is implemented in whole or part by a related corporation, that person, in addition to the duties he or she owes to the first corporation, will also owe the related corporation the duty of care and diligence (a 180(1) and good faith (a 181) in relation to that decision. If this proposal is adapted, that person should have the business judgment rule defence in s 180(2). Also, where the related corporation is a wholly-owned subsidiary, that person should have the benefit of s 187.

Response to related corporation Proposal:-

Yes in all cases.

Other behaviour question:-

Are there any forms of behaviour of individuals below board level (not otherwise dealt with in this paper) that should be prohibited, or differently regulated, under the Corporations Act.

Response to the other behaviour question:-

Yes. If we are to prevent incompetent and illegal acts within companies, it is essential that the people involved or who are on the periphery who know what is going on (potentially all employees and other service providers), are able and encouraged to tell what they know honestly, easily, quickly and without fear of recrimination. This requires whistleblower protection legislation that prohibits the naming of the people and also prohibits retribution of any kind.

It is my contention that there is a consistent and systemic failure of Governance and Management processes within many businesses and more particularly within Government Owned Corporations and in Government Departments that are the central cause of not earlier uncovering and responding to these business and administrative failures.

In all of the corporate failures in recent times many more people knew what was going on but were too afraid to act. In the FAI/HH case a company had to fail before these acts were followed through, even though many other people inside both organisations knew what was going on.

The tendency to avoid bad news, vilify whistleblowers and to generally avoid facing issues that may reflect on their own performance is endemic in private and Government businesses.

Not only whistleblowers, but the people associated with them are often victimized and isolated. A climate of fear is thus created whereby other employees are discouraged from voicing their concerns about incompetent or illegal acts. This feudal and hierarchical approach to accountability pervades many areas of private sector and government company responsibilities.

It is therefore imperative that we also enact appropriate protection for whistleblowers (such as legislation to protect careers, income and reputation and also to remove Parliamentary privilege for naming whistleblowers or their associates), together with appropriate regulations that necessitate an independent investigation once a formal submission is made. Without such protection we cannot really expect employees to help us uncover incompetent or illegal actions. Queensland politicians have made an art form out of naming whistleblowers that discourages whistleblowing in the future.

The CLERP 9 provisions for whistleblower protection are too narrow and only focus on direct financial impacts. In most of the HIH failings, many more people knew what was going on and would have been prepared to speak out sooner, probably soon enough to prevent the failure, if they had had protection from retribution. Not having broad ranging protection for all employees to enable them to speak out about grossly incompetent or illegal acts is now long overdue.

Unless we instill a broad ranging corporate and administrative culture of transparency and open management within companies and especially Government ones, supported by legislation, and include Government departments and their agencies and insist on a consistent framework of ethical practices that include trust, honesty, integrity and accountability, we will perpetrate the very failures that have led to this discussion paper.