



**AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**

**SUBMISSION TO**

**CORPORATIONS AND MARKETS ADVISORY  
COMMITTEE**

**INQUIRY INTO CORPORATE DUTIES BELOW BOARD  
LEVEL**

## **Introduction and Executive Summary**

The Australian Securities and Investments Commission welcomes the review by CAMAC into Corporate Duties Below Board Level. ASIC considers it important that the provisions imposing duties on those who are ultimately responsible for the acts of a corporation should reflect the realities of modern commercial life.

ASIC strongly supports the adoption of a functional approach to determining which people should owe duties to the corporation. Those who take responsibility (and reap the rewards) for making decisions or taking actions on behalf of a corporation that will have significant effects upon it should owe duties to the corporation regardless of their title or employment status.

It is also important that there should not be significant opportunities for executives to avoid such responsibility through the design and use of corporate group structures.

ASIC also supports the introduction of a general prohibition on individuals acting dishonestly in connection with the performance or satisfaction of any obligation imposed on a company by any statute.

## **Proposals and Questions in the CAMAC discussion paper**

***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.***

*ASIC agrees with this proposal, but believes that it should not be implemented by amendment to the definition of "officer" because this will have consequences for many unrelated provisions in the Corporations Act.*

The increasing complexity of managerial structures of corporations has led to situations where the managerial acts of people who do not fall within the current definition of "officer" in section 9 of the Corporations Act might still have a significant impact on a corporation and its stakeholders.

Sub paragraph (b)(i) of the current definition of "officer of a corporation" which refers to a person *"who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of a corporation"* is very specific and, particularly when applied in the criminal context, might enable a person to escape responsibility on the basis, for instance, that they do not make decisions that affect a *substantial* part of the business of a corporation.

Subparagraph (b)(ii) of the definition, which refers to a person *"who has the capacity to affect significantly the corporation's financial standing"* might extend the category of people, but is arguably limited to those who have a direct power in relation to decisions that may affect the corporation's finances.

The proposed formulation would encompass those "concerned in" management giving it a broader scope, which is potentially significant. This formulation does not appear in the present definition of "officer of a corporation". As noted in the discussion paper, this wording has previously appeared in the Corporations Act in the definition of "executive officer" which was repealed in 2004. In *Commissioner for Corporate Affairs (Vic) v Bracht*<sup>1</sup>, the following meaning was given to the words "concerned in":

---

<sup>1</sup> (1989) 14 ACLR 728

*Advice given to management, participation in its decision-making processes, and execution of its decisions going beyond the mere carrying out of directions as an employee would suffice.*

The Court also said that involvement had to be *"more than passing, and certainly not of a kind where merely clerical or administrative acts are performed"*.

The HII report says that "middle management" in HII played a role in the undesirable practices which occurred in that corporation. It is also ASIC's experience that middle management can sometimes be actively involved in matters which result in material damage to the corporation. This might happen even when they have no formal capacity to make financial or policy decisions, but might have made a significant contribution to the decision making process. In ASIC's view, those who accept the responsibility (and presumably the rewards) of management positions which have a potential to affect the well-being of a corporation should be subject to general duties in relation to that corporation.

Another group of people who might be caught by the proposed formulation are consultants and contractors who act more like employees and who are closely concerned in, but not actually making, significant decisions which affect the corporation. These people might not be caught by subparagraph (b)(ii) of the current definition because they are unlikely to be the formal decision makers in the corporation. Such people can be distinguished from external advisers who simply provide advice and remain at arm's length. Purely external advisers should not be caught by the provisions.

In ASIC's view, it should be made clear that a single instance of taking part or being concerned in management is sufficient to attract the duty. ASIC sees no reason why a person should escape responsibility for his or her conduct simply because it was their first foray into management or their involvement in management is irregular.

ASIC believes that the proposal should not be implemented by amending the current definition of "officer" because this would affect many provisions other than those concerned with the duties of officers. Instead, the proposal could be implemented by amending the introductory words of the relevant provisions or by the inclusion of a new definition of a term such as "a person concerned in management".

***Question (Discussion Paper page 24): 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 "activities which involve policy and 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"?***

*ASIC considers that, if Proposals 1, 2 and 3 were accepted, it would be helpful for the term "management" to be defined as suggested.*

Like proposal 1, the proposed definition might make it more difficult for people who have been involved in critical decisions to escape responsibility due to technical reasons.

If it is considered that the words "concerned in", as they appear in Proposals 1, 2 and 3 and as they are likely to be construed by a court, might be too uncertain, then consideration could be given to providing guidance as to what is meant by these words.

**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.**

*ASIC agrees with this proposal.*

See ASIC's response to Proposal 1.

**Proposal 3. As a corollary of Proposal 2, s180(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.**

*ASIC agrees that the group of persons to which the defence in s180(2) applies should be identical to the group to which s180(1) applies.*

ASIC can see no reason why this defence should not be afforded to all those to whom s180(1) applies.

**Proposal 4. Section 182 and 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.**

*ASIC agrees with this proposal.*

Modern corporations use a range of mechanisms to retain the services of appropriate personnel. Increasingly, this has included the retention of contractors and consultants as well as employees. ASIC agrees that a functional approach should be adopted which looks at the substance of the role occupied by a person in relation to the corporation, rather than the legal formalities of the role. Where a person accepts the responsibilities and rewards of a role that is functionally similar to that of an officer or employee and abuses his or her position, that person should not be shielded by the technicalities of his or her retainer.

**Proposal 5. Section 183 and 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.**

*ASIC agrees with this proposal.*

See ASIC's response to Proposal 4.

**Proposal 6. Section 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.**

*ASIC agrees with this proposal.*

There is no reason why a person retained as a contractor or consultant to the company (but who might not be considered an "employee") should be able to escape responsibility for such misconduct due to the technical aspects of their contractual arrangements. Having said that, such responsibility should not apply to the normal external adviser who merely gives advice in the ordinary course. ASIC believes that some extra element of connection to the corporation would be required in order to attract the extra responsibility.

For this reason, the application of this proposal to external professional advisers could be clarified.

***Proposal 7. Section 1307(1) (misconduct concerning corporate books) should be extended beyond past and present officers, employees and shareholders of a company to any person who performs, or has performed, functions, or otherwise acts or has acted for or on behalf of that company.***

*ASIC agrees with this proposal.*

ASIC's views on this proposal are similar to those for Proposal 6. Misconduct in relation to corporate books can result in the loss or falsification of vital evidence and records which might be required by ASIC or by the external administrator of a company.

***Question (Discussion Paper page 29): Should the categories of persons subject to section 1309(2) (ensuring 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?***

*ASIC considers that the categories of persons subject to s1309(2) should be so extended.*

Once again, ASIC sees no reason why a person retained as a contractor or consultant to the company (but who might not be considered an "employee") should be able to escape responsibility for such misconduct due to the technical aspects of their contractual arrangements.

***Question (Discussion Paper page 32): 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 statute? If so, should the provision apply to:***

- ***Obligations under the Corporations Act only, or***
- ***Obligations under any Commonwealth, State or Territory statutes applicable to corporations***
- ***Obligations under any overseas written laws as well as Australian laws?***

*ASIC believes that there should be a provision which prohibits individuals from acting dishonestly in connection with the performance or satisfaction of a company's statutory obligations.*

ASIC considers that a general dishonesty provision would assist in providing an enforcement response in situations where there has been a significant instance of dishonesty, but where there is a "gap" in the current Commonwealth prohibitions. Some such gaps are identified in the HHH report.

Currently, where ASIC identifies misconduct, which is not prohibited by Commonwealth laws, charges may be laid in accordance with general offence provisions under State law such as general fraud offences. The use of State charges, sometimes in combination with Commonwealth charges, in prosecutions arising out of ASIC investigations, can lead to procedural complications and will inevitably mean that there is some variation in the enforcement responses available to ASIC from State to State. In ASIC's view, this is undesirable in a national regulatory regime.

The test for "dishonesty" in the context of the provision should be clearly specified so that there is no confusion as to what the appropriate standard should be.

The Discussion Paper has raised a number of reservations about this suggestion. The first such reservation concerns the possible availability of more than one charge and the perceived risks of persons being vulnerable to double jeopardy. In ASIC's view, this reservation is misconceived. It is already often the case that a particular instance of misconduct might potentially be prohibited by a number of sections. Prosecutorial authorities routinely have to consider which of a number of possible charges is most appropriate. The Commonwealth Director of Public Prosecutions has published his approach to these decisions in the Prosecution Policy of the Commonwealth. There is a number of systemic safeguards against double jeopardy and the legal principles in relation to this are clear.

Another concern raised in the Discussion Paper is the possibility that ASIC might be responsible for administering the provision even in circumstances where the underlying statutory obligation was in legislation that ASIC did not administer. In ASIC's view, a general dishonesty provision should appear in the Criminal Code, rather than the Corporations Act. ASIC would thereby have no particular responsibility in relation to breaches occurring beyond its regulatory horizon (ie by persons who were not directors or corporations). In ASIC's view, this is the most appropriate location for a general dishonesty offence provision.

A further matter raised in the Discussion Paper is the perceived need to ensure that the penalty regime recognises that the offence will encompass less serious contraventions as well as more significant ones. There are already examples of general offence provisions, which are likely to encompass a range of behaviour of varying degrees of seriousness. Such general offences often attract fairly high maximum penalties, but in such cases the courts have a discretion to impose a lesser penalty if appropriate. The exercise of this discretion, including the consideration of relevant factors, is a day-to-day task for the judiciary. The Prosecution Policy of the Commonwealth sets out the approach that the CDPP will take in circumstances where misconduct may be covered by both a general offence provision with a high maximum penalty and a specific offence with a lower maximum penalty.

In ASIC's view, the obligations referred to by the provision should be limited to obligations under Commonwealth statutes and, if possible under the Australian Constitution, under State and Territory statutes.

**Question (Discussion Paper page 34): *Is there any need to define the term "employee" for the purposes of ss182-184 or ss1307 and 1309 if Proposals 4-7 are implemented.***

*If the proposals in the Discussion Paper were adopted, ASIC sees no immediate need for a definition of the term "employee" in the context of the duties discussed in the Discussion Paper.*

ASIC prefers the functional approach advocated by the HIH Report and the Discussion Paper than an approach which is based upon the technical categorisation of a person's formal contractual arrangements. If the functional approach is adopted in these provisions, the meaning of the term "employee" is not likely to be of great significance.

**Question (Discussion Paper page 37): *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 duties of care and diligence (s180(1)) and good faith (s181) in relation to that decision? If this proposal is adopted, that person would have the business judgment rule defence in s180(2). Also where the related corporation is a wholly-owned subsidiary, that person should have the benefit of s187.***

***If this proposal is not supported, what, if any, alternative proposal should be adopted to deal with the concern raised in the HIH report.***

*ASIC considers that there should be reform to address the situation where a general commercial decision is made with respect to a corporate group without considering which of the subsidiaries will be used to implement that decision.*

In ASIC's view the law must recognise the reality of the increasing use of intricate corporate group structures and the tendency of executives to make decisions for these groups as a whole, rather than on a company-by-company basis.

Where several executives make a decision in the interests of a corporate group as a whole that, for instance, a particular transaction should occur, but do not address their minds to the question of which corporation in the group should be a party to this transaction, it might be difficult to establish that the executives are officers of the particular company which ultimately takes part in the transaction. This might require the prosecution (or ASIC in civil proceedings) to establish that the executives are officers of a corporation, that they might not even be aware of and certainly may not have consciously considered at the time that the decision was made. Even the proposed broader scope of the directors' duties provisions set out in Proposals 1 and 2 might not encompass this situation.

ASIC is aware of matters where such decisions have had a significant effect on the company that has become the vehicle for their implementation. ASIC believes that those who make such decisions should owe appropriate duties to that company. ASIC would support a proposal that the decision makers should be deemed to owe duties under s180(1) and 181 in those circumstances.

In the context of corporate groups, the current and proposed future scope of the directors' duties provisions will result in situations where a person owes a duty to more than one company. In many such cases, this will not necessarily pose a significant issue because the interests of the group as a whole and the companies in the group will be aligned. In cases where there is a divergence between the interests of the group and the potential interests of individual companies that might be called upon to implement decisions, ASIC considers it appropriate for the executives making the decisions to deal with that misalignment of interests to avoid a conflict.

Again, ASIC sees no reason why the business judgment rule in s180(2) should not apply to the same categories of people who are covered by s180(1).

***Question (Discussion Paper page 38): 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 Act?***

*Currently, ASIC is not aware of any additional forms of behaviour that need to be addressed.*