

CAMAC Discussion Paper
Corporate Duties below Board Level

Submission from the Accounting Bodies

Proposal 1

Section 180(1) and s 184(1) (the duties of good faith and proper purpose) (Corporations Act ('CA')) 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.

The HIH report commented on the significant role played by middle management and considered they were unprepared to accept responsibility for their decision making. The Accounting Bodies acknowledge that many decisions within companies are made by senior managers in positions of considerable authority within the company and, in many instances, significant decisions are made by these officers without reference to the Board.

It is necessary however, to look to the definition of 'officer' within the CA. 'Officer' is defined in the CA in relation to a corporate entity, as a person who makes, or participates in making, decisions that affect the whole, or a substantial part of the business of the entity; or who has the capacity to affect significantly the entity's financial standing.

Given that definition, the Accounting Bodies consider that it is sufficient to rely on the current definition as to the people participating in a company's decision making process as they consider that the term 'officer' includes those within middle management who participate in the decision making processes. We do not support re-inclusion of a definition of 'executive officer' as the word 'executive' has connotations that place the title above the word 'officer'.

The Accounting Bodies are firmly of the view that any attempt to broaden the definition should be principles-based rather than function-based to avoid circumvention of the spirit of the legislation through job titles and job descriptions. The definition of 'employee' in Accounting Standard AASB 1028 'Employee Benefits' may provide a useful starting point:

'Employee means a natural person (including a director) appointed or engaged under a contract for services who is subject to the direction of an employer in respect of the manner of execution of those services, whether on a full-time, part-time, permanent, casual or temporary basis.'

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.

The Accounting Bodies recognise there are two issues in this proposal.

- 1) The first is the issue of executive decisions being taken by people who were directors and executives of say, subsidiary companies but not the company itself.
- 2) The second issue arises in respect of the use of consultants who are not directors or executives, but nevertheless participate in management of the corporation concerned.

The suggestion that the duty in s180 (1) be extended to a wider class of people to include:

- (i) directors, officers and employee;
- (ii) others who take part or are concerned in the management of the corporation; and/or
- (iii) those who perform functions or otherwise act for or on behalf of a corporation,

has some merit. The Accounting Bodies generally agree that the obligations under subsection 180(1) CA should be extended to a broader group, but not beyond the employer/employee relationship. This would be relevant to those who are directors and officers (within the CA definition) of the subsidiary company as they also have the duty, not only to the company that they direct, but to its parent.

Whilst consultants and others outside the company, who are engaged under their own set of obligations, may provide advice or make recommendations, ultimately it is the directors, officers and employees of the company that must make and implement the decisions. The Accounting Bodies therefore do not support extension of the s 180(1) duty to those who perform functions or otherwise act for or on behalf of a corporation.

The Accounting Bodies would support the use of the word 'participate' in respect of a person's role within a company's management rather than the term 'is concerned with', on the basis that it is more active and would require more diligence to be exercised.

Proposal 3

As a corollary of Proposal 2, s180(2) (the business judgement 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.

Directors and officers must exercise a requisite degree of care and diligence at all times when making business judgements or carrying out business functions. The CA's test of 'sound business judgement' currently requires directors and officers to demonstrate the same degree of care and diligence that would be required of an ordinary reasonable person holding a similar position in the same circumstance.

The Accounting Bodies agree that the 'business judgement rule' should be extended to all those who participate in the management of a corporation. This includes both making business judgements and carrying out other business functions. The participation in management should therefore enable the decision makers to be distinguished from those who simply carry out a function. This however, would not extend to consultants.

The Accounting Bodies consider the standards of an ‘ordinary reasonable person’ are not the appropriate standards. The ‘reasonable person’ benchmark is universally acceptable. To also use the word ‘ordinary’ tends to convey a lack of sophistication that would not be expected in an officer holding a participatory role in management of a corporation

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.

Although it is acknowledged by the Accounting Bodies that this proposal would see the introduction of a functional test that may avoid the need to determine whether a particular person who satisfies the functional test is director or officer, etc of the corporation we reiterate that the Accounting Bodies are of the opinion that the extension of the sections should not go beyond the employer/employee relationship except for those who hold ‘officer’ positions within the company and do not fall within this definition. The only reservation held by the Accounting Bodies in not supporting an extension would be where there was improper use of their position due to fraud or negligence. If those conditions existed, the extension would be supported.

Proposal 5

Section 183 and s184(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.

The Accounting Bodies acknowledge that this proposal is wide ranging and applies to all past and present directors, officers and employees of a corporation, where they have had exposure to corporate information. Nevertheless, given that many matters do not come to light for a long time after the improper use may occur, we are of the opinion that responsibility should remain with those who were participating in the decision making at the time of the alleged improper use providing it is within the statute of limitations period. The proposed extension is therefore not supported by the Accounting Bodies.

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.

For the same reasons outlined in Proposal 2, the Accounting Bodies do not support this proposition, as ultimately it is the directors, officers and employees of the company that must make and implement the decisions

Question 2

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

Please see the Accounting Bodies' response to proposals 5 and 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.

Please see the Accounting Bodies' response to the two previous proposals.

Question 3

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?

The Accounting Bodies consider that general legal principles apply and there is no requirement to reiterate the requirement to act within the law – particularly in relation to the responsibilities that lie with officers under the CA.

Question 4

Is there any need to define the term 'employee' for the purposes of ss 182-184 or ss 1307 and 1309 if Proposals 4-7 are implemented?

The Accounting Bodies have suggested that the definition of 'employee' as set out in AASB 1028 'Employee Benefits' may be appropriate.

Question 5

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 the first corporation, will also owe the related corporation the duties of care and diligence (s 180(1)) and good faith (s 181) in relation to that decision? If this proposal is adopted, that person should have the business judgement 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.

If there are one-off decisions or situations where a group of executives made commercial decisions for a corporate group, but did not at the time consider which of the subsidiaries would be used to implement the decision this is a high level decision where the same responsibilities that lie with the initial Board would flow through to the company ultimately affected by the decision.

Question 6

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?

The Accounting Bodies are of the opinion that the current provisions of the CA are available to the regulators and rather than change the laws, the current CA provisions should be used more robustly. In parallel, companies themselves should reinforce their corporate governance processes to ensure there is clear direction within companies.