

14 September 2005



Mr John Kluver
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Dear Mr Kluver,

Submission in relation to "Corporate Duties Below Board Level - Discussion Paper - May 2005" ('Paper')

INTRODUCTION

Promina Group is a leading group of insurance and financial services companies. Promina Group Limited, the ultimate holding company is listed on the ASX and the New Zealand stock exchanges.

The Paper proposes the following amendments to the Corporations Act (2001) ('Act') across three broad categories.

- (a) Extension of sections 180(1), 181 and section 184 (1) beyond directors and officers to 'any other persons who takes part in or is concerned with the management of the corporation' and as a corollary of the proposal in relation to section 180(1), the extension of the business judgement rule to these same persons;
- (b) Extension of sections 182, 183, 184(2), 184(3), 1309(1) and 1307(1) beyond directors, officers and employees to 'any person who performs or has performed functions or otherwise acts or has acted, for or on behalf of that company';
- (c) Introduction of a general dishonesty provision

In accordance with the invitation for public consultation, we set out below our comments on the proposals.

COMMENTS

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.

Response

In our view, we believe there is no demonstrated need to broaden the obligation of the duties of good faith and proper purpose to any other person than those currently defined as 'officer' under section 9 of the Act.

We believe that extending these duties to any other person who "takes part, or is concerned, in the management of that corporation", irrespective of any definition of 'management', significantly broadens the pool of people who may potentially be liable under these sections of the Act. We believe that it is significant that there are other laws available, which impose liability on individuals below board level, such as the Insurance Act 1973. We submit that extending these duties is likely to act as a disincentive for individuals to take up managerial roles within the organisation.

In addition, the breadth of the concept of "any other person who takes part, or is concerned, in the management of the corporation could include and could impact those persons who are involved in management, but:

- have little real control or power in their managerial role to affect the organisation;
- have little or no involvement in policy making or decision making;
- have more administrative managerial roles;
- have no significant control over the outcome/impact of decision; and
- lack any significant discretion.

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 corporations or the conduct of its affairs'?

Response

Based on our response for Proposal 1 there is no need to define management.

However, if management needed to be defined it should be synonymous with the current definition of officer under section 9 in subsections (b)(i) and (ii).

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

In our view, as per our reasons in our response for Proposal 1, we believe there is no demonstrated need to broaden the obligation of the duties of care and diligence to any other person than those currently defined as 'officer' under section 9 of the Act.

Proposal 3

As a corollary of Proposal 2, section 180(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.

Response

Given our response to Proposal 2, there is no need to extend the business judgement rule.

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 act, for or on behalf of that corporation.

Response

We support the extension of section 182 and s 184(2) beyond directors, officers and employees to any other person who performs functions, or otherwise acts for or on behalf of the corporation.

We would argue that it should be extended to persons such as contractors or consultants where they are performing functions of officers and employees (and if applicable, directors).

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

In relation to the extension of section 183 and 184(3) we make the same submission as for Proposal 4.

Proposal 6

Subsection 1309(1) (knowingly providing false and 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

In relation to the extension of section 1309(1) we make the same submission as for Proposal 4.

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.

Response

In relation to the extension of section 1307(1) we make the same submission as for Proposal 4.

Should the categories of persons subject to s1309(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?

Response

In our view, if the person is performing functions which are akin to those functions carried out by the director, officer or employee then there should be no reason that those persons would not be in a position to ensure the veracity of the information which they are providing.

General Dishonesty Provision

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?

Response

In our view there are a number of difficulties associated with the introduction of a general dishonesty provision. One issue is that the conduct may be prohibited or dealt with under other legislation and thus cause a duplication. This may in turn impact the enforcement of the general dishonesty provision.

Another issue is that the conduct may breach "non-criminal" obligations under the legislation and therefore without a general dishonesty provision, these breaches would not otherwise have any criminal sanctions. A general dishonesty provision would not necessarily take into account the differing levels of offence and seriousness.

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.

Response

In our view the definition of employee does not need to be extended given the broad use of 'any other person' in Proposals 4 through 7.

Corporate Groups

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 (s 181) in relation to that decision? If this proposal is adopted, that person should have the business judgement rules 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 this proposal is not supported, what, if any, alternative proposal should be adopted to deal with the concern raised in the HIH Report?

Response

In our view the current definition of officer is broad enough to deal with the situation in corporate groups where a general commercial decision is made for the corporate group, but without consideration of which of the subsidiaries will be used to implement the decision. Any liability is not diminished if the person is not appointed as a director of that subsidiary or if the person is employed by another company in the corporate group.

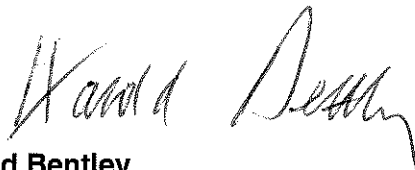
Are there any forms of behaviour of individuals below board level (not otherwise dealt with in this paper) that should be prohibited, or differently regulated under the Corporations Act?

Response

We believe that the current laws are adequate and therefore we do not believe that any other forms of behaviour should be prohibited or differently regulated.

Please do not hesitate to contact me if you have any questions about our comments above.

Yours sincerely,



Harold Bentley
Chief Financial Officer