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LEGAL BRIEF

The legal importance of

Directors who are also responsible officers need to ensure their organisation allows them to fulfil their duties

THE CONCEPT OF THE RESPONSIBLE officer has intrigued me for some time. What is the role of a responsible officer? What are they responsible for?

To whom are they responsible: the organisation, its shareholders, clients or ASIC? Do you need to be responsible to be a responsible officer? And if so, how responsible?

As with many aspects of the Corporations Act that have changed following Financial Services Reform (FSR), how it applies and the implications for business practices will be determined only with the benefit of ASIC investigations, court trials claiming failed responsibility and judgments that attribute blame and orders for compensation. So do not expect an answer to the responsibility questions for at least five years.

In the meantime, we can look at recent judgments involving Jodee Rich, John Greaves and fellow directors of One.Tel, as well as John Elliott and fellow directors of Water Wheel, for the possible directions the courts will follow when finally called upon to adjudicate the who, what and how of the responsible officer. These judgments are particularly relevant for any responsible officer who is

also a director of the organisation. If this is you, I would seriously consider giving up the role of director and/or responsible officer unless your organisation gives you real powers that allow you to not only identify potential issues but also, if needed, bring about sweeping changes ... of a responsible nature.

Responsible officers who are not directors can rest easy that the One.Tel and Water Wheel cases should not affect them. However, the law is dynamic, and where the courts feel that blame and compensation is warranted, they will often try to find a way of achieving the punishment required for those who are responsible.

The One.Tel director cases involved the question as to whether a director who held other roles in the company was required to achieve a higher standard of care in carrying out his duties, when compared to other directors. John Greaves sought to have ASIC allegations of a breach of Section 180(1)(b) of the Corporations Act summarily dismissed. He claimed that, as a non-executive director, he should be treated the same as the other non-executive directors, whom it appears ASIC had not pursued at that time. ASIC argued that Greaves's additional roles as non-executive chairman and also as chairman of the finance and audit committee vested in him additional responsibilities, and his standard of care as a director was higher than that of his fellow non-executive directors.

Section 180(1) of the Corporations Act provides that a director or other officer of a corporation must exercise their powers and discharge their duties with a degree of care and diligence that a reasonable person would exercise if they were a director or officer of the corporation in the corporation's circumstances and occupied the office held by, and had the same responsibility within the corporation as, the director or officer.

There are some important points to note from the section. Responsibility and the degree of it are important and apply not just to directors, but also to officers.

In the One.Tel director cases, in reaching its conclusion that there was "a reasonable arguable case with a view that Mr Greaves had [additional] responsibilities ...", the court considered the legislative history of the statu-



PHOTO: ERIN JONASSON

John Elliott: Submitted that he was required to meet the standard of reasonable competency and diligence

simply being responsible

tory duty of care of directors as well as recent literature on the role of corporate governance. It seems that the courts are willing to give a broader interpretation to understanding and applying the standard of care applicable to the director's responsibilities within the corporation.

For all responsible officer/directors, the point is that, whether you are an executive or non-executive director of maybe even just an officer, the position occupied by you and the responsibility provided to you includes that of being a responsible officer. This must be a consumer-protection role. After all, the whole of the FSR approach to licensing has been to introduce greater consumer protection into financial services.

If you are a director of your organisation, it must follow from the recent law that your director duties under Section 180 of the Corporations Act will be higher than that of your fellow directors, because you are the responsible officer. If you are not a director, it will be interesting if someone runs the argument that results in you, the non-director responsible officer, being held personally accountable.

Before exploring this issue further, it is worthwhile examining the approach of the courts in the Water Wheel Group cases.

Section 588G of the Corporations Act imposes personal liability on a director where the company incurs a debt at the time it is insolvent and at that time there are reasonable grounds for suspecting that the company was insolvent, or would become insolvent. This was the claim made against John Elliott of the Water Wheel Group.

The court accepted Elliott's submission that the standard to be met by him was that of the reasonably competent and diligent non-executive director. The court supported the idea that the responsibility and liability of a director needs to be measured in the context of the role they hold.

However, in the same case, the court accepted ASIC's submissions that the reasonable person would have ensured that management provided financial information on a regular basis, so that a reasonable director could be aware to the solvency of the organisation.

What does this suggest for directors who are also responsible officers? Not only will it probably be expected that you have a higher responsibility than your fellow directors, particularly if you are a director, but it is expected that, as a reasonable person, you would have in place systems that ensure your role as a responsible officer is undertaken seriously by you.

There is a wide gap of opinion on this point. While some responsible officers go too far (although there are not too many of them), most do not go far enough, at least in my view. And when I am pushing my view, I do so from my former boring role as an

accountant auditor in a former life. I also draw some comfort for my view from section 9 of the Corporations Act, which defines a responsible officer to be "in relation to a body corporate that applies for a licence ... an officer of a body who would perform duties in connection with the holding of the licence".

This may not sound like much, but the "in connection with" phrase tells us to take a wide approach to interpretation. This is what ASIC did when, during the FSR transition, it expressed the view that a responsible officer "is someone on whom a licensee depends for its organisation or competency ... who is directly responsible for significant day-to-day business decisions about the on-going provision of financial services by the licensee".

I do not know what your opinion of those statements may be, but in my view they suggest that a responsible officer holds a very responsible position, one that goes to the very heart of being the holder of an Australian Financial Services licence.

What would I do if I were asked to be a responsible officer? Say no, before considering the role, until I could be made satisfied that:

- ▶ The systems of non-compliance review result in reports to me on a regular basis.
- ▶ I have the ability to at least suspend any person who is reasonably identified as having possibly breached financial services policies and guidelines.
- ▶ I enjoy a right of immunity from an action against me by the organisation if I am of the view that I must notify ASIC of any concerns that I have of organisational competency and of the day-to-day business of providing financial services.
- ▶ A whistleblowing culture, as opposed to a "don't-dob-in-your-mates" culture, is promoted within the organisation.
- ▶ I enjoy specific information access under an Access and Indemnity Deed to enable me to enjoy a competent defence, whether or not I am still with the organisation.
- ▶ I am able to have the compliance team checked for competency. After all, who does check the checker?

What these tips may mean for you in your organisation will be entirely dependent on its size and the extent of your day-to-day or hour-to-hour involvement.

Before you throw the whole lot in and resign as a director and responsible officer, remember the comments above should be considered only as your last line of defence.

We must not forget that the most effective activity you can undertake as a responsible officer/director is to do your job responsibly. If you responsibly carry out your duties, there will be no further requirement for you to be responsible, and there will be no additional liability for which you may become responsible. **Asset**