

DON'T IGNORE THE RISKS Directors' and Officers' Liabilities

CURT SCHATZ



Most individuals have a direct involvement with a company, whether as a director, other officer or employee. Yet most individuals in that position are

unaware of not only the duties attached to those positions but also the gravity of any breaches of those duties. **Breaches can not only result in monetary penalties but also criminal consequences! So – what do you need to know?**

We have previously reported on the statutory duties owed by directors and officers under the Corporations Act (whether for a large public company or a small shelf company). The duties are to:

- 1 act with care, skill and diligence and to prevent insolvent trading
- 2 act bona fide in the interests of the company and for a proper purpose
- 3 not improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to the company
- 4 retain his or her discretion
- 5 avoid conflicts of interest.

In the last few years, Australia has experienced some high profile corporate collapses (HIH, One.Tel) and cases where courts have been asked to adjudicate on breaches of these duties. For example, we reported late last year on the GIO case where officers were found to have breached their duties.

Directors and officers need to be aware of the possible consequences in breaching such duties, to then appreciate the importance of those duties. ASIC (the body responsible for prosecuting breaches) has increased its involvement through its program of proactively approaching corporations (including small shelf companies)

to ensure the company has proper governance systems in place.

Breaches of the duties specified above attract civil penalties. If a court deems that a director or officer has breached its duty such that there is a material prejudice to the interests of the company or its members, or a material prejudice to the company's ability to pay its creditors, or the breach is serious, the court can order a pecuniary penalty of up to \$200,000.

Where the company has suffered damages as a result of the breach, the individual involved may be ordered to pay compensation to the company. Compensation may include repaying

the company and its directors and, if uncomfortable, diverting their business elsewhere.

However, quite often even the above is not always a sufficient deterrent. Section 184 of the Act goes further. It provides that, if a director or other officer fails to act in good faith and for a proper purpose, and does so recklessly or with dishonesty, then that breach will attract criminal consequences. Similarly, a director, officer or employee who uses their position or information dishonestly or recklessly with the intention to gain an advantage for themselves or to cause detriment, will also attract criminal consequences. The maximum penalty



profit made by the person as a result of the contravention. Exemplary damages have also been awarded where the court deemed that the conduct was wrongful and reprehensible, and considered something more than compensation was required.

Orders can be sought where an individual will be disqualified from managing a corporation (which will also have the effect of preventing a person acting as a shadow director). This can have a serious effect on corporate structures. ASIC is also quick to publish in the media details of adverse findings. This often sees customers querying

that can be imposed is a fine of up to \$200,000 and/or five years' imprisonment (section 1311; schedule 3).

The fact that we generally only hear names like Williams, Adler and Rivkin associated with large corporations does not mean ASIC only looks at high profile companies. Mullins Lawyers has assisted liquidators in investigating private companies where the directors have faced charges at the instigation of ASIC. Directors, officers and employees need to be conscientious in their decision-making or can expect to face serious consequences.

Anti-Money Laundering and Counter-Terrorism Financing Act – Where are we now?

AMANDA CAMPBELL



The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (CWLTH) ("**the Act**") represents a bit of a headache for many venues. However, for those who are still taking the "ostrich head in the sand"

approach, the headache is set to get bigger.

The AUSTRAC "grace period" gives venues which have only recently become aware of their obligations a chance to catch up without penalty. Venues that are taking active steps to become fully compliant with their obligations will not be prosecuted – serious compliance measures such as audits and fines will not commence – until after December this year. That said, there are some very serious penalties which may be imposed for non compliance – penalties which may financially cripple a club or hotel:

(which have now passed) it is **not** too late to ask us for help. Your risk increases as time passes.

To comply with the Act and avoid prosecution by AUSTRAC, you must do all the following as soon as possible. If you accept (or have already accepted) our fixed fee offer of \$950 plus GST and outlays, we will do this for you:

- 1 Review the legislation to determine whether you are a reporting entity under the Act.
- 2 Prepare and lodge the first compliance report (which was due 31 March 2008).
- 3 Assess your business operations and gambling activity by reference to the criteria in the Act and carry out a self-assessed risk assessment to identify your obligations under the Act. There are no hard and fast rules regarding how to self assess – assessment is made by judgement



CURT SCHATZ
EDITORIAL

It seems to me that we are currently experiencing an almost unprecedented passage of time where change is confronting us every day. What are these changes?

We have gone through a process of discussion between the various stakeholders and the Government on the proposed amendments to the *Liquor Act*.

We understand that those legislative amendments to the Act should be legislated some time in early 2009.

We haven't seen the regulations yet – and we look forward to seeing those.

We had a rather unanticipated and surprise announcement by the Treasurer on 15 April 2008 regarding a moratorium on gaming machines for Queensland. This announcement specifically related to hotels and clubs.

In respect to hotels, it essentially creates an artificial cap on the number of gaming machines until April 2010, but otherwise allows the reallocation scheme to continue.

My personal view is that this will reduce supply, and demand will continue to exist through the fact that Queensland is a demographically growing State.

The prices for the operating authorities should therefore increase. Time will tell.

In respect to clubs, the QOGR will accept applications for gaming machines for greenfield/new club sites and also increases for clubs in terms of gaming machine numbers. We await further information from the QOGR and/or the government as to the scheme under which these approved machines will find their way into clubs. One suggestion is that it will be a reallocation scheme similar to hotels, but not the same.

The article written about anti-money laundering and counter-terrorism financing demonstrates another compulsory imposition by the government in an endeavour to crack down on money laundering through the gaming operations of pubs, clubs and others.

This, once again, requires compliance by the licensees with the compulsory requirements and to change in their method of doing business. It does require proper documentation to be in place and its implementation within each venue to be subject to scrutiny.

It is against this backdrop that we at Mullins continue to strive to provide, through our dedicated team of specialists, commercial solutions, technically excellent legal advice and the support that our loyal customer and referrer base are used to.

Until next time, and to quote Steve Aylward of the QHA, "*Keep the taps flowing*".

...there are some very serious penalties which may be imposed for non compliance – penalties which may financially cripple a club or hotel...

- 1 up to \$11 million fine for non compliant corporations
- 2 up to \$2.2 million fine for non compliant individuals
- 3 up to 10 years' jail time
- 4 potential liability under federal terrorism legislation if non compliance involves more proactive 'assistance' to money launderers or terrorism groups.

Our specialist team of eight lawyers works exclusively in the area of hospitality law – providing advice and assistance regarding all aspects of liquor, gaming and transactional issues to clubs, hotels, taverns, detached bottleshops, motels and larger accommodation venues, nightclubs, restaurants, caravan parks and special use developments. These new laws impact on the advice that must be given in many of these areas.

If your venue operates gaming machines, TAB or other betting facilities, you have obligations under the Act and MUST become AML/CTF compliant. While it is too late to meet some of the AUSTRAC deadlines

and reference to the guiding criteria in the Act.

- 4 Draft and prepare a "compliance program" for the venue, which addresses all compliance and reporting obligations under the Act, for your risk level, and meets AUSTRAC requirements. The compliance program must cover areas such as methods of reporting, monitoring gaming activity and payouts, verifying customer identities, staff training programs, staff screening and due diligence, suspicious activity programs, appointing a compliance officer, carrying out independent reviews or audits, and threshold transaction reporting.

If we prepare your compliance program, you will receive step-by-step instructions with your program to help you manage the implementation phase.

If you would like our help or would like to know more, please email us or give us a call.



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