



18 June 2007

Review of Sanctions for Breaches of Corporate Law
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir,

Review of Sanctions in Corporate Law

We refer to Treasury's above discussion paper ("the paper") released on 5 March 2007.

We welcome the opportunity to provide feedback on the consultation issues contained in the paper. In particular, the focus of our response is on chapter 3 of the paper and our support for a general defence to be available to directors in relation to most, but not all, duties of directors.

General defence

As with the directors of other corporations, QBE's directors are faced with many challenges and must deal with complex business and regulatory arrangements across various jurisdictions when carrying out their duties as directors. As such, we have a keen interest in ensuring that the outcome of this review achieves the balance referred to in section 3.1 of the paper between discouraging undesirable behaviour but ensuring that business is willing to take sensible commercial risks (see also section 3.4).

To instil confidence in both shareholders and other stakeholders, it is important that directors in all corporations meet their fiduciary duties to the corporation. However, to facilitate an entrepreneurial and appropriately competitive business environment, directors require a defined, but also flexible, framework in which they can carry out their duties without the ever present fear of personal liability for each of their decisions.

With the ever increasing demands placed upon directors today, due to technology, regulation and the overall global nature of business, it is important that the law keeps up with such changes and remains relevant.

For that reason, we believe that the factors listed in section 3.2 of the paper properly form the basis of a general defence through providing a framework by which a director's decisions can be supported, i.e. the decision was:

- made in a bona fide manner;

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- within the scope of the corporation's business;
- reasonably and incidentally to the corporation's business; and
- for the corporation's benefit.

Business Judgement Rule

It is necessary to clarify how the general defence interacts with the existing Business Judgement Rule ("BJR") under section 180 of the Corporations Act ("the Act").

We believe that introducing a general defence while maintaining the BJR in its current form may have the unintended effect of causing further uncertainty for directors as to which will take precedence.

Given that the four elements listed above and those contained in the BJR are primarily focussed on ensuring directors act in an informed and ethical manner and in the best interests of the corporation, we believe both of these concepts should be combined into one general defence. This will provide clarity and minimise both complexity and costs (see section 3.6 of the paper). The elements are strict, meaning they are not easily satisfied. In other words, wrongdoing is discouraged. Nevertheless, they are clear so that a director in an appropriate case can be covered by them.

We also support the recent comments by the Australian Institute of Company Directors¹ that the BJR should be extended further than just its current application to duties under section 180 of the Act. We provide this support on the proviso that directors meet the strict liability requirements of the Act.

A general defence would also properly recognise that:

- a director's duties are not confined to those under section 180 of the Act, but extend to various sections of the Act and associated regulations, as well as at common law and in equity; and
- that the business environment has significantly evolved since the introduction of the BJR, so as to require a broader and more flexible approach to judging if or how a director has met his or her fiduciary duties.

In addition, uncertainty should be reduced by section 181 of the Act using the BJR concept of 'rational belief'. The current objective test aspect of section 181 is dealt with in the bona fide element of the general defence, along with the three other elements (see sections 3.16 to 3.18 of the paper).

Section 588G - Insolvent Trading

Notwithstanding our comments above, we are opposed to either introducing a general defence or extending the BJR to section 588G involving insolvent trading.

¹ See Australian Financial Review article - 8 June 2007 pp 27 - *Views split on director protection*



As seen from recent examples, trading while insolvent can ultimately have a significantly negative impact upon the shareholders, employees and other stakeholders of the corporation.

The focus of directors and their decision making in a corporation which is trading solvently to one that is trading in an insolvent manner is different due to the personal liability that may be incurred by the directors for the corporation's debts in the latter case.

This insolvency situation can easily create a conflict between the director's personal interest and the best interests of the corporation. If the general defence was extended to the provisions of section 588G, it could be argued that this would cover directors who allowed a corporation to trade while insolvent and thereby risk the entitlements of those parties mentioned above. We do not believe this is Treasury's intention nor in the public interest. Further, the specific defences referred to in section 3.13 of the paper are sufficient.

QBE as insurer

QBE is a large provider of directors' and officers' insurance.

A general defence will assist QBE in granting cover and other things being equal enable QBE to maintain if not reduce premiums.

Similarly an exception for section 588G will allow QBE to pursue recovery actions where appropriate against directors who have permitted a company to trade while insolvent. An example is trade credit insurance where after QBE pays its insured's loss, QBE may be able to recover from directors of suppliers to the insured whose companies failed to pay their debts as and when they fall due.

Review of section 189

QBE operates in 43 countries and has around 10,000 employees.

As a large corporation, it can only function effectively if directors, especially non-executive directors, and other company officers can rely on employees, professional advisers and experts.

For consistency with section 190 and for clarity (see sections 3.21 and 3.23 of the paper), section 189(b)(ii) should be amended to use the words originally proposed. These words recognise that not every occasion requires a separate assessment of the information or advice, i.e. it depends on the circumstances. To do otherwise places too high a burden on directors and other company officers. For example, a director may properly trust a long standing employee who over time has demonstrated on numerous instances that a director's reliance on him or her is reasonable (see section 3.26 of the paper).

QBE recognises reliance on information is an issue in the current ASIC proceedings against former James Hardie directors. If the Government decides amending section 189 is not appropriate at this time, then section 189 should be further considered after the conclusion of any appeal or settlement of such proceedings.



We would be pleased to assist you with any further information you may require. If you have any questions, please do not hesitate to contact either Peter Smiles (tel: (02) 9375 4322) or me.

Yours faithfully,

A handwritten signature in blue ink that reads "D Ramsay".

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