



UNIVERSITY OF CANBERRA, AUSTRALIA

Corporate Governance ARC Project

Developments in the Role of the Chair in the Private and Public Sectors

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**Developments in the Role of the Chair in the Private and
Public Sectors**

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Preface

This paper is part of a major project – *Corporate Governance in the Public Sector: An Evaluation of its Tensions, Gaps and Potential*. The project will provide the first comprehensive theoretical and empirical work on corporate governance in the Commonwealth public sector. It has been designed to enhance communication and participation in governance across government, industry, and the community by improving corporate governance literacy and making information publicly available.

The project is a collaborative venture between three University of Canberra research centres; Macquarie University; and key governmental and industry partners including the Commonwealth Department of Finance and Administration, the Australian National Audit Office, Deloitte Touche Tohmatsu, CPA Australia, and Minter Ellison Lawyers.

This paper is the fourth in a series that will be produced by researchers and industry partners involved in the project. The aim of the series is to identify and explore key emerging public sector governance issues and encourage wider discussion and activity.

The series has been designed for public sector practitioners and corporate governance ‘enthusiasts’ across the public and private sectors. All papers will be broadly distributed and will be available online at: www.canberra.edu.au/corpgov-aps/.

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Corporate Governance in the Public Sector: An Evaluation of its Tensions, Gaps and Potential
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TABLE OF CONTENTS

INTRODUCTION	1
CORPORATE GOVERNANCE IN THE PRIVATE AND PUBLIC SECTORS.....	1
PART I: THE PRIVATE SECTOR.....	2
<i>ASIC v RICH</i> : BACKGROUND.....	2
THE TRADITIONAL ROLE OF THE CHAIR AT COMMON LAW	2
THE CHANGING ROLE OF THE CHAIR AT COMMON LAW	4
THE SIGNIFICANCE OF ‘CONTEMPORARY COMMUNITY EXPECTATIONS’	6
ISSUES SURROUNDING EXECUTIVE CHAIRS	9
THE CHAIR AS ‘CORPORATE FULCRUM’	12
THE ROLE OF THE CHAIR UNDER THE CORPORATIONS ACT.....	12
PART II: THE PUBLIC SECTOR.....	14
THE ROLE OF THE CHAIR IN THE AUSTRALIAN GOVERNMENT CONTEXT.....	14
REMUNERATION	19
OTHER JURISDICTIONS	19
CONCLUSIONS.....	21
BIBLIOGRAPHY.....	23

INTRODUCTION

The Chair of a board of directors might be thought to be central to a sound system of corporate governance; however, until lately, the role of the Chair in corporate governance has largely avoided judicial attention in Australia. In the private sector, the role of the Chair has been subject to increasing scrutiny in recent years with decisions in relation to the Chairs of One.Tel, NRMA, and HIH, and the release of a range of standards and codes of conduct. During the same period, the Commonwealth public sector has seen the release of the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Uhrig Report)¹ conducted by Mr John Uhrig AC, and other reports on public sector governance published in Australia and overseas. The judicial decisions, policy reports and various codes of conduct that have been developed have helped explain the Chair's role in conducting board meetings and in facilitating the flow of information and discussion. The discourse also assists in developing the Chair's role in a range of other areas, such as ensuring the effective operation of the board, communicating with and reporting to relevant stakeholders, reviewing board and organisational performance, and inducting and supporting board members. This paper reviews those developments.

Given the central role played by the Chair in the governance of private and public sector corporations, many commentators have welcomed these developments as timely. Private sector developments acknowledging the Chair's role and responsibilities to include acting as spokesperson for the corporation, acting as interface between the board, management and external stakeholders, and acting as board 'leader' are also considered by commentators to contain valuable lessons for the public sector.

Corporate governance in the private and public sectors

In placing the role of the Chair into its proper context in the governance of a corporation, it is useful to examine definitions of 'corporate governance'. The Uhrig Report defined corporate governance as encompassing the arrangements by which owners, or their representatives, delegate and limit power to enhance the entity's prospects for long-term success.² Complementing the Uhrig Report, the policy document issued by the Commonwealth Department of Finance and Administration (Finance), *Governance Arrangements for Australian Government Bodies* August 2005, notes in its foreword that good governance helps bodies to implement government policies, deliver services well, meet their organisational goals and achieve sustainable outcomes.³ Note also the Australian National Audit Office's useful definition: "*Corporate governance* refers to the processes by which organisations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organisation."⁴

The public sector definition used by the Uhrig Report does not vary significantly from definitions used in the private sector context. In the HIH Royal Commission report, Justice Owen defined corporate governance as "the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations." The rules include legislation, common law and internal company rules. Relationships referred to include those between shareholders and directors, between directors and management, and

¹ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*.

² Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 2.

³ Department of Finance and Administration, *Financial Management Reference Material No. 2*, p. v.

⁴ Australian National Audit Office, *Better Practice Guide: Public Sector Governance*, p. 6.

between the company and regulators and other external stakeholders. The systems may be formal or informal, and include performance standards and reporting and accountability mechanisms.⁵ One possible lesson from the decision of *Australian Securities and Investments Commission v Rich and Others (ASIC v Rich)*⁶ is that, in defining the governance of a particular corporation, consideration should be given to codes of conduct and the structure of the board and the company as a whole.

PART I: THE PRIVATE SECTOR

ASIC v Rich: Background

This 2003 decision involved One.Tel, a listed company that was placed into liquidation in 2001. ASIC (the Australian Securities and Investment Commission) commenced actions against One.Tel's three executive directors and the non-executive Chair, Mr John Greaves, for breaches of their statutory duty of care and diligence.⁷ Mr Greaves was a chartered accountant with substantial commercial experience and had additional responsibilities as the Chair of the company's Finance and Audit Committee. Mr Greaves applied for an order to strike out the action on the ground that the law did not recognise the duties that he was alleged to have been subject to. Justice Austin denied Mr Greaves' application and held that the case against Mr Greaves disclosed a reasonable cause of action.⁸ The ramifications of his Honour's holding will be discussed more fully later in this paper, but it is enough to note at this stage that ASIC's claim related not to the duties of company Chairs generally, but specifically to the duties of a Chair who was also Chair of the audit committee, having regard to the circumstances of the company and qualifications of the individual involved.⁹ However, care needs to be applied when considering the decision given that the case was an interlocutory proceeding, and one where Justice Austin accepted that ASIC's suggestion of expanded duties of Chairs was "reasonably arguable". There has been no finding to date that Mr Greaves owed such duties or breached them. Accordingly, the law is open to further developments in this area.

The traditional role of the Chair at common law

The role of the Chair at common law has traditionally been limited to presiding at meetings and exercising control as needed to enable the meeting to proceed in an orderly, lawful fashion. The classic Australian statement of this duty was made in 1966 by Justice Street (as he then was) in *Colorado Constructions* and has been often quoted since:

It is an indispensable part of any meeting that a Chairman should be appointed and should occupy the Chair. In the absence of some person [...] exercising procedural control over a meeting, the meeting is unable to proceed to business...[T]here must be some person expressly or by acquiescence permitted by those present to put motions to the meeting so as to enable the wish or decision of the meeting to be ascertained.¹⁰

⁵ Owen, *The Failure of HIH Insurance*, Volume I, p. 101.

⁶ *ASIC v Rich* (2003) 44 ACSR 341.

⁷ Corporations Act, s 180(1).

⁸ *ASIC v Rich* (2003) 44 ACSR 341 at 361.

⁹ *ASIC v Rich* (2003) 44 ACSR 341 at 342. For further commentary on the case, see: Adams, 'Are all directors created equal?', and Josev, 'Tailoring directors' duties to "contemporary community expectations".'

¹⁰ *Colorado Constructions Pty Ltd v Platus* (1966) 2 NSWLR 598 at 600. Quoted by Justice Young in *Jenashare Pty Ltd v Lemrib Pty Ltd* (1993) 11 ACLC 768 at 771; Justice Young in *Kelly v Wolstenholme* (1991) 4 ACSR 709 at 712; Justice Owen in *Woonda Nominees Pty Ltd v Chng* (2000) 34 ACSR 558 at 567; and

However, Justice Austin's decision in *ASIC v Rich* in 2003 began to affect perceptions of the role of the Chair more generally. Justice Austin noted that, in the past, the common law tended to lay down duties and responsibilities for the Chair in the limited context of procedure at directors' and members' meetings.¹¹ The courts had not produced statements of the Chair's duties or responsibilities outside the limited context of company meetings, subject to some minor exceptions examined later in this paper. Indeed, Australian courts have rarely considered the responsibilities of the Chair as separate to those of other directors, resulting in some commentators viewing the Chair as a mere figurehead with little or no responsibility beyond the orderly conduct of meetings.¹²

Correspondingly, Australian courts have not — to date — provided a precise characterisation of the nature of the power of the Chair. Indeed, Australian courts have not historically dealt with the issue of the nature of the Chair's power to any significant degree at all. Canadian jurisprudence has, however, provided some guidance in that country, albeit not all uniform. Some Canadian courts have indicated that the Chair acts in a judicial capacity¹³ or something akin to a quasi-judicial capacity.¹⁴ Whether the nature of the Chair's power should be characterised as judicial or only quasi-judicial may be, to a large extent, insignificant. It seems to be reasonably clear that the Chair should, in general, be (or at least appear to be) impartial. As the person responsible for ensuring the smooth carriage of the business of the meeting, there is a tangible benefit in a Chair, regardless of his or her own views on the matters before the meeting, seeking to forward the meeting's purposes and not hindering their attainment. A practical view has been taken by the Ontario Court of Appeal, specifically in relation to the Chair of a public company:

[To use the terms 'judicial' or 'quasi-judicial' in describing the duties of the Chair is confusing] because an adjudicator or judge can never have a personal interest in the issue. A chairperson who is more than a nominal shareholder of a public company, on the other hand, always has a personal interest in everything that affects the company, which includes all of the rulings of the chair. If that distinction is not recognised the reflex reaction is to assume that a decision which benefits the chair personally is non-judicial and thus not bona fide. In

referred to by Justice Gray in *Clark v Perkins* [2002] SASC 382 at paragraph 44 and Justice Austin in *ASIC v Rich* (2003) 44 ACSR 341 at 354-355.

¹¹ *ASIC v Rich* (2003) 44 ACSR 341 at 353-354. Examples of the rich jurisprudence in Australia and the UK surrounding the duties of the Chair at company meetings include, in addition to those cases noted in note 10 above: *Re Indian Zoedone Company* (1884) 26 Ch 70; *National Dwellings Society v Sykes* [1894] 3 Ch D 159; *Wishart v Henneberry* (1962) 3 FLR 171; *Flynn v University of Sydney* (1971) 1 NSWLR 857; *John v Rees* (1970) Ch 345; *Re Direct Acceptance Corporation Limited* (1987) 5 ACLC 1037; *Byng v London Life Assn Ltd* [1989] 1 All ER 560; *MTQ Holdings Pty Ltd v RCR Tomlinson Ltd* [2006] WASC 96. These cases all focus on issues such as the authority of the Chair, the power to adjourn meetings, and the existence and/or exercise of the casting vote, rather than the Chair's more general duties at law. For a more general discussion of the role of the Chair in meetings see Lang, *Horsley's Meetings*, Chapter 6 and Magner, *Joske's Law and Procedure at Meetings in Australia*, Chapter 6.

¹² Lumsden, *Australian Corporation Practice Bulletin*, p. 2; Australian Institute of Company Directors, *Chairman of the Board*, p. 86.

¹³ *Johnson v Hall* (1957) 10 DLR 2D 243 per Justice Wilson at 246-7. See also *Bluechel & Smith v Prefabricated Buildings Ltd & Thomas* [1945] 2 DLR 725 (British Columbia Supreme Court) per Justice Macfarlane at 732-733.

¹⁴ *Gray v Yellowknife Goldmines Ltd* [1946] OWN 938 at 942. In matters in which the Chair is interested, it may be placing too high a standard to say that the Chair acts in a quasi-judicial role, "but in the exercise of the discretion vested in him, and in making rulings in the course of his conduct of the meeting, the position at least approximates to that of a person occupying a quasi-judicial position": per Assistant Master Lennox at 942. See also *Re Bomac Batten Ltd and Pozhke* (1983) 1 DLR (4th) 435 per Justice Cromarty at 443.

my view, it is preferable to describe the duty as one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company.¹⁵

This view that the duty of the Chair is to act honestly and fairly towards all individual interests and towards the best interests of the company as a whole is a practical characterisation of the nature of the role. It also has the advantage of upholding the obligation of the Chair, enunciated from time to time in the common law, to act fairly and observe the rules of natural justice in the course of making rulings in matters of meeting procedure.¹⁶

Importantly, the Ontario Court of Appeal's definition of the role of the Chair also has the benefit of expressing the duty in conformity with the expression of the fundamental duty of directors at common law and under the *Corporations Act 2001* (Corporations Act) to act in good faith in the company's best interests.¹⁷ The separate, but related, fundamental duty of directors at common law and under the Corporations Act to act for proper purposes¹⁸ has also found expression in relation to the Chair. In *John v Rees*, Justice Megarry commented: "[the Chair] has wide powers, but he has also the duty of using those powers for proper and not improper purposes."¹⁹ Notably, in that case, his Honour also made some general remarks about the relationship between the Chair and the members of the body, in terms which are also apt to describe the relationship between the directors and the members (and indeed of any fiduciary towards his or her beneficiaries): "Above all, his duty is to act not as a dictator, but as a servant of the members of the body, according to the law."²⁰

The changing role of the Chair at common law

In terms of actual responsibilities, it could be argued that the corporate governance debate in Australia appears to have swung in favour of a pro-active Chair, with responsibilities above and beyond those of the other directors and not merely limited to the chairing of meetings. This part of the paper analyses the role assigned to the Chair in contemporary corporate governance literature in order to ascertain the standard and extent of the Chair's duties.

One of the scant references to the duties of the Chair, other than with respect to procedural duties at meetings, was the following dictum of Chief Justice Rogers (Commercial Division) in *AWA Ltd v Daniels t/a Deloitte Haskins & Sells (Daniels)*:

The Chairman is responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The Chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, for formulating the policy of the board and promoting the position of the company. In discharging his or her

¹⁵ *Blair v Consolidated Enfield Corporation* (1993) 15 OR (3d) 783 per Justice of Appeal Carthy at 799 for the Court of Appeal of Ontario (Chief Justice of Appeal Morden, Justices of Appeal McKinlay and Carthy).

¹⁶ *Re HIH Casualty and General Insurance Limited & Ors* [2006] NSWSC 485 at para 26; *Wasiewicz v Dom Polski Society Ltd* [1999] SAIRComm 1 (11 January 1999) per Deputy President Stevens citing *Wishart v Australian Builders Labourers Federation* (1962) FLR 298 at 300 and *Egan and Davis v Harradine* (1975) 6 ALR 507.

¹⁷ Corporations Act, s 181(1)(a); *Re Smith & Fawcett Ltd* [1942] Ch 304 per Lord Greene at 306.

¹⁸ *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199; *Peters' Delicacy Co Ltd v Heath* (1939) 61 CLR 457; Corporations Act, s 181(1)(b).

¹⁹ (1970) Ch 345 at 377. See his Honour's dicta regarding the law and procedure pertaining to chairing meetings at 377-383 generally.

²⁰ (1970) Ch 345 at 377.

responsibilities the Chairman will co-operate with the managing director if the two positions are separate or otherwise with senior management.²¹

Chief Justice Rogers' statement encompasses both the strategic and communication roles of the Chair. His Honour's quote also highlights the importance of the Chair's role in interacting with the managing director. Clarity in communication between these roles is important in helping to ensure the success of the corporation, a point which this paper will revisit.

It is worth noting that there is some guidance circumscribing the powers of the Chair in the context of a company's business operations. Ford, Austin and Ramsay note that the Chair's ordinary functions do not involve business operations, such as making contracts on the company's behalf, and that there are some judicial views to the effect that the Chair does not ordinarily have any more authority to bind the company than any other director.²²

In *ASIC v Rich*, Justice Austin noted *Dovey v Cory*²³ and *Woolworths v Kelly*,²⁴ two earlier cases in which the duties of the Chair were seen to be more extensive than merely to fulfil a procedural role at meetings. His Honour then cited the above dictum from *Daniels* and held that it was reasonably arguable that it supported the imposition of 'responsibilities' (in the sense that the term is used in paragraph 180(1)(b) of the Corporations Act) on the Chair of a listed public company.²⁵ Subsection 180(1) provides:

180 Care and diligence — civil obligation only

Care and diligence — directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Although commentators have a range of views about *ASIC v Rich*,²⁶ this is widely considered to be one of the most important findings in the case, and it is the subject of this paper.

It is worth noting that in reaching his conclusions about the expanded responsibilities of the Chair in *Daniels*, Chief Justice Rogers relied upon non-legal material to ascertain the work

²¹ (1992) 10 ACLC 929 at 1015.

²² Ford, Austin and Ramsay, *Ford's Principles of Corporations Law*, p. 737, citing *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549; *State Bank of Victoria v Parry* (1990) 2 ACSR 15 at 29.

²³ *Dovey v Cory* (1901) AC 477 per Lord Davey at 493 (duty of Chair to review financial statements and raise significant issues with the directors); *ASIC v Rich* (2003) 44 ACSR 341 at 354.

²⁴ *Woolworths v Kelly* (1991) 4 ACSR 445 per Justice of Appeal Mahoney (duty to ensure that proposals are brought before the directors for their consideration); *ASIC v Rich* (2003) 44 ACSR 341 at 354.

²⁵ *ASIC v Rich* (2003) 44 ACSR 341 at 355. The implications of relying upon Chief Justice Rogers' decision in *Daniels*, a decision overturned on appeal to the Court of Appeal — but not with respect to the dictum cited above — have been commented upon by Professor Michael Adams, among others, including Justice Austin himself: Adams, 'Are all directors created equal?', p. 207; *ASIC v Rich* (2003) 44 ACSR 341 at 354.

²⁶ For example, the Australian Institute of Company Directors "disagrees that any major redefinition of the role of a chairman is necessary or warranted": Australian Institute of Company Directors, *Chairman of the Board*, p. 88. See also: Australian Institute of Company Directors, *Policy Position Paper — 2006-01*, p.1.

done by Chairs in practice.²⁷ Chief Justice Rogers' approach presaged Justice Austin's practical approach in *ASIC v Rich* in using this type of evidence rather than opting for "the only other alternative, namely to rely on unassisted armchair reflection."²⁸

The significance of 'contemporary community expectations'

Justice Austin referred to 'contemporary community expectations' of which the Chair must be aware. The sources of these expectations include the law (both statute-based and common law). However, his Honour also referred to a range of corporate governance literature cited by ASIC in support of its argument that the Chair is "responsible to a greater extent than any other director for ensuring that the board is familiar with the financial circumstances, position and performance of the company, and ensuring the performance of the board of its supervisory duties."²⁹

The role of the Chair set out in contemporary corporate governance literature is one of a proactive Chair with responsibilities above and beyond those of the other directors and broader than merely chairing meetings. Indeed, commentators Richard Leblanc and James Gillies have put the view that "[t]here is no more significant factor in determining effective board governance than the leadership qualities of the chair."³⁰ In listing the sources of contemporary community expectations about the role, Justice Austin cited extracts from reports submitted by ASIC which purport to set out a range of responsibilities of the Chair.³¹ The responsibilities listed are those regularly found in corporate governance best practice guides and codes of conduct internationally. They include:

- acting as spokesperson for the board and the company
- ensuring that the directors have sufficient information in order to discharge their duties
- ensuring that shareholders are well-informed about the financial state of the company
- ensuring that board policies are put into effect
- establishing appropriate membership of the board and making changes to board membership as appropriate.³²

The judicial approach of *ASIC v Rich* is to recognise the material which has identified the work generally or typically done by Chairs in practice. A potential challenge arising from Justice Austin's decision is that this literature appears to have showed signs of substantial development in recent times. Since the decision was delivered, Standards Australia has published an Australian Standard on good corporate governance.³³ The standard lists the normal responsibilities of the Chair as including:³⁴

- ensuring the board provides leadership and vision to the entity
- making certain that the board has the necessary information to undertake effective decision-making and actions
- developing an ongoing relationship with, and mentoring, the chief executive officer

²⁷ *ASIC v Rich* (2003) 44 ACSR 341 at 355.

²⁸ *ASIC v Rich* (2003) 44 ACSR 341 at 359.

²⁹ *ASIC v Rich* (2003) 44 ACSR 341 at 356.

³⁰ Leblanc and Gillies, *Inside the Boardroom*, p. 201.

³¹ *ASIC v Rich* (2003) 44 ACSR 341 at 357-358.

³² *ASIC v Rich* (2003) 44 ACSR 341 at 357-358. Nonetheless, it seems that many of these principles have been recognised for over half a century, for example, refer Read, *The Company Director*, pp. 114-115 (in relation to the Chair's role in acting as spokesperson for the company).

³³ Standards Australia, *AS 8000-2003 Australian Standard: Good Governance Principles*.

³⁴ Standards Australia, *AS 8000-2003 Australian Standard: Good Governance Principles*, p. 23.

- commencing the annual process of board and director evaluation
- selecting and nominating directors (as part of the nomination committee, if appropriate)
- guiding the ongoing effectiveness and development of the board and individual directors.

The importance of the Chair as the link between the board and the chief executive is crucial. The Australian Institute of Company Directors (AICD) has commented that a good working relationship between the Chair and chief executive is important for the success of the board, and, in turn, for corporate performance and shareholder returns.³⁵ In *Corporate Governance and Chairmanship: A Personal View*,³⁶ Sir Adrian Cadbury's important work on the role of the Chair, Sir Adrian provides guidance on the governance of listed companies and bodies corporate more generally, and notes the special responsibilities of the Chair regarding the appointment and monitoring of the performance of the chief executive in particular. He points out that the Chair has a special role in ensuring that every step is taken to make the best appointment in the first place and that thereafter, the board led by the Chair formally reviews the performance of the chief executive.³⁷

Of course, imposing responsibility upon company Chairs with respect to monitoring the progress and performance of the chief executive is also consistent with Australian case law. The decision of the Supreme Court of Victoria in relation to the National Safety Council Victorian Division, illustrated the problems of the failure of a Chair (and a board) to properly monitor the activities of the chief executive.³⁸

More than a decade ago, community expectations about the responsibilities of the Chair in the UK were expressed in the report of the Committee on the Financial Aspects of Corporate Governance chaired by Sir Adrian Cadbury (Cadbury Committee).³⁹ Consistent with the points later made by Justice Austin in 2003, the Cadbury Committee expressed a clear expectation that the Chair is responsible to a greater extent than any other director for the proper functioning and composition of the board, and is responsible for general oversight of its activities:

The chairman's role in securing good corporate governance is crucial. Chairmen are primarily responsible for the working of the board, for its balance of membership subject to board and shareholders' approval, for ensuring that all relevant issues are on the agenda, and for ensuring that all directors, executive and non-executive alike, are enabled and encouraged to play their full part in its activities. Chairmen should be able to stand sufficiently back from the day-to-day running of the business to ensure their boards are in full control of the company's affairs and alert to their obligations to their shareholders.⁴⁰

The Cadbury Committee also highlighted the responsibility of the Chair to ensure that adequate information is distributed to non-executive directors:

It is for chairmen to make certain that their non-executive directors receive timely, relevant information tailored to their needs, that they are properly briefed on the issues arising at board

³⁵ Australian Institute of Company Directors, *Chairman of the Board*, p. 33.

³⁶ Cadbury, *Corporate Governance and Chairmanship*.

³⁷ Cadbury, *Corporate Governance and Chairmanship*, p. 39.

³⁸ *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115.

³⁹ Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance*.

⁴⁰ Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance*, London, p. 4.7.

meetings, and that they make an effective contribution as board members in practice.⁴¹

The 2003 UK review of the role and effectiveness of non-executive directors conducted by Derek Higgs⁴² (Higgs Review) is an additional source of contemporary community expectations. Justice Austin explicitly recognised that the Higgs Review, although released too late to be incorporated in ASIC's submissions, bolstered the evidence proffered by it.⁴³ The Higgs Review suggested that, in addition to the traditional responsibility of the Chair for the procedural aspects of board meetings, the Chair is responsible for:

- providing leadership to the board and ensuring its effective functioning
- providing leadership to the company
- disseminating accurate, timely and clear information to directors
- communicating with shareholders and with the chief executive
- evaluating the performance of the board, and individual directors (at least annually)
- ensuring the appropriate induction, training and ongoing developmental needs of the directors are met
- ensuring that board decisions are effectively implemented.⁴⁴

In the HIH Royal Commission Report, Justice Owen noted that the Chair also has a duty to take the lead in ensuring that all circumstances that might involve or give rise to conflicts of interest are fully disclosed and ventilated so that the whole board is apprised of the relevant circumstances.⁴⁵ One commentator has argued that the Chair should be responsible for taking the lead in securing full disclosure by all directors and cannot simply assume that there is no conflict of interest in the absence of disclosure.⁴⁶

Amongst a list of the responsibilities of the Chair compiled in 2003, Kiel and Nicholson include “assessing and implementing a balanced board membership”, “guaranteeing that there is adequate monitoring, pursuit and performance of the goals of the organisation” and “making certain that the board has the necessary information to ensure effective decision-making”.⁴⁷ One commentator has referred to the Chair's role in fostering the development of effective strategies by the board.⁴⁸ The duty of the Chair to ensure that other directors have received sufficient information to ensure effective decision-making has also been discussed by other commentators.⁴⁹ It was also highlighted by Justice Austin in *ASIC v Rich* and will be discussed later in this paper.

The UK Combined Code of 2000 devotes attention to induction, development and performance evaluation, assigning responsibility to the Chair for ensuring that new directors

⁴¹ Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance*, p. 4.8.

⁴² Higgs, *Review of the Role and Effectiveness of Non-executive Directors*.

⁴³ *ASIC v Rich* (2003) 44 ACSR 341 at 358.

⁴⁴ Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, pp. 99-100.

⁴⁵ Owen, *The Failure of HIH Insurance*, Volume I, p. 114.

⁴⁶ Lipton, ‘The demise of HIH’, p. 274. See also Australian Institute of Company Directors, *Chairman of the Board*, p. 20. For further discussion of the Chair's duty with respect to conflicts of interest, see *Ampol Petroleum Ltd v R W Miller (Holdings) Ltd* [1972] 2 NSWLR 850 at 884 where Chief Justice Street of the NSW Supreme Court noted that the Chair should exercise the greatest of care before taking the extreme step of debarring a director from participating in discussion or from voting at a directors' meeting.

⁴⁷ Kiel and Nicholson, *Boards that Work*, p. 126.

⁴⁸ Garratt, *The Fish Rots from the Head — The Crisis in Our Boardrooms*, pp. 189-190.

⁴⁹ Australian Council of Super Investors Inc, *Corporate Governance Guidelines*, p. 9; Barker, *Building Effective Boards*, p. 3; Standards Australia, *AS 8000-2003 Australian Standard: Good Governance Principles*, p. 23.

participate in a full, formal and tailored induction programme and ensuring that the development needs of the directors, and of the board as a whole, are identified and met.⁵⁰ Sir Adrian also noted in 2003 that the Chair has a significant role in the selection of new directors and review of the performance of individual directors and of the board as a whole.⁵¹ Sir Adrian points out that this may be shown in the receipt of feedback by the Chair from each director in relation to his or her own performance, for example in relation to decision-making, the flow of information and the conduct of debate, as individual directors may feel that this has a significant impact on their own contribution.⁵²

Sir Adrian assigns responsibility to the Chair for ensuring that the board has the role of reviewing and endorsing (or not endorsing) the company's strategy, and ensuring that the strategy is understood within the company and externally, as well as ensuring that the strategy is regularly reviewed.⁵³ The AICD places the Chair's strategy-setting role within a broader annual review framework which includes review of strategy, goals, budget and executive performance.⁵⁴ It may be difficult to legislate to assign responsibility to the Chair for strategy-setting because strategy may not be easily amenable to quantification and, as Sir Adrian notes, the degree to which these responsibilities will be discharged by the Chair personally will vary widely between Chairs and companies.⁵⁵ Despite this, Sir Adrian argues that responsibility for ensuring that the company is appropriately represented in public rests firmly with the Chair, irrespective of the size of the company and of the way in which the Chair delegates his or her duties in this regard.⁵⁶ The Chair's role as the company's main representative to the outside world has also been noted by other commentators.⁵⁷

In the HIH Royal Commission Report, Justice Owen discussed corporate governance and the lessons from the HIH collapse at length. In so doing, his Honour had occasion to comment on the role and responsibilities of the Chair, and remarked that the role of the Chair:

brings with it 'additional rights and additional opportunities' which may affect the content of the role and warrant the imposition of higher standards and duties in order to ensure board effectiveness and prevent the exploitation of those additional opportunities.⁵⁸

Issues surrounding executive Chairs

The Cadbury Committee recommended that the Chair's position should be occupied by a non-executive director in order to prevent too great a concentration of power or 'unfettered powers of decision', recommending that where the Chair is also the chief executive, there should be a group of independent directors on the board with an appointed leader.⁵⁹ In

⁵⁰ Committee on Corporate Governance, *The Combined Code*; see Institute of Chartered Secretaries & Administrators, *ICSA Guidance Note 041001*, p. 4.

⁵¹ Cadbury, *Corporate Governance and Chairmanship*, pp. 47 and 50.

⁵² Cadbury, *Corporate Governance and Chairmanship*, p. 47. On board appraisal, see also Australian Institute of Company Directors, *Chairman of the Board*, pp. 63-67.

⁵³ Cadbury, *Corporate Governance and Chairmanship*, p. 132.

⁵⁴ Australian Institute of Company Directors, *Chairman of the Board*, p. 43.

⁵⁵ Cadbury, *Corporate Governance and Chairmanship*, p. 135.

⁵⁶ Cadbury, *Corporate Governance and Chairmanship*, pp. 135-136.

⁵⁷ Ford, Austin and Ramsay, *Ford's Principles of Corporations Law*, pp. 253-254 and 737.

⁵⁸ Owen, *The Failure of HIH Insurance*, Volume I, p. 108.

⁵⁹ Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance*, p. 4.9. Notably, this suggestion was echoed by the ASX Council which recommended that where the Chair is not an independent director, the appointment of a lead independent director should be considered: ASX Council, *Principles of Good Corporate Governance and Best Practice Recommendations*, p. 21.

Daniels, Chief Justice Rogers highlighted difficulties that could arise where the chief executive also occupied the office of Chair. His Honour noted that, unless abundant caution is exercised, information about problems of the company which should be laid before the board will tend not to be revealed.⁶⁰

There has for some time been a position amongst a number of corporate law commentators that combining the roles of Chair and chief executive within the one person in public companies is undesirable.⁶¹ A number of rationales have traditionally been offered for this position. Professor Meredith Edwards and Robyn Clough have noted that one justification for the separation of roles of Chair and chief executive is based on the understanding that managerial interests may, to an extent, dominate at the expense of ownership interests.⁶² Edwards and Clough also note a more positive reason for the separation of roles, namely the importance of the Chair's role as a confidant or mentor to the chief executive.⁶³ The Organisation for Economic Co-operation and Development (OECD), has noted that, in countries with single tier board systems, "the objectivity of the board and its independence from management may be strengthened by the separation of the role of chief executive and chairman, or, if these roles are combined, by designating a lead non-executive director to convene or chair sessions of the outside directors."⁶⁴

This view was reinforced by the Hampel Report on corporate governance which recommended that any decision to combine the roles should be publicly explained.⁶⁵ Although there are contrary opinions, particularly in the United States,⁶⁶ the view that the Chair should not be the chief executive and should in fact be a non-executive director is a view held by a number of commentators in the corporate governance debate in Australia (and the UK, Canada and NZ⁶⁷). It is usually cited as a method of helping to ensure an appropriate balance of power, increasing accountability, and increasing the capacity for more independent decision making by the board.⁶⁸ This view was endorsed in the Higgs Review, which recommended that the UK Combined Code should be amended to provide that the

⁶⁰ *AWA Ltd v Daniels t/a Deloitte Haskins & Sells (Daniels)* (1992) 10 ACLC 929 at 1015.

⁶¹ Tomasic and Bottomley, 'The Fiduciary Duties of Directors in Corporate Australia'.

⁶² Edwards and Clough, *Corporate Governance and Performance*, p. 8.

⁶³ Edwards and Clough, *Corporate Governance and Performance*, p. 8.

⁶⁴ Organisation for Economic Co-operation and Development, *OECD Principles of Corporate Governance*, p. 63.

⁶⁵ Stapledon, 'The Hampel Report on Corporate Governance', p. 410.

⁶⁶ Leblanc and Gillies, *Inside the Boardroom*, p. 215; Haigh 'Bad company', p. 83. Nonetheless, it should be noted that a range of positions has been advocated on this issue in the US. The Conference Board Commission (a 12 member commission formed in June 2002 to issue best practice remuneration, corporate governance, accounting and audit recommendations) recommended that corporations give careful consideration to separating the offices of Chair and CEO, with the Chair as an independent director: The Conference Board, *Commission on Public Trust and Private Enterprise*, pp. 19 and 29.

⁶⁷ Leblanc and Gillies, *Inside the Boardroom*, p. 215. The New Zealand Stock Exchange has recommended that a person should not simultaneously hold the positions of CEO and Chair: NZX, *NZX Listing Rules, Appendix 16 — Corporate Governance Best Practice Code*, p. 2. Gideon Haigh has noted that the role of the Chair can be affected by the place of origin of the company, and expresses what may be viewed as a somewhat sceptical view, that all the models are 'flawed': Haigh, 'Bad company', pp. 83-84. For a succinct discussion of the main different board structures used around the world, refer: Garratt, *The Fish Rots from the Head — The Crisis in Our Boardrooms*, pp. 38-43.

⁶⁸ See, for example: Organisation for Economic Co-operation and Development, *OECD Principles of Corporate Governance*, pp. 63-64; Stapledon, 'The Hampel Report on Corporate Governance', p. 410; Kiel and Nicholson, *Boards that Work*, p. 125.

roles of Chair and chief executive should be separated.⁶⁹ The importance of the role of the Chair may be evinced by the recommendations of the Higgs Review that:

- the division of responsibilities between the Chair and the chief executive should be set out in writing and agreed by the board
- the chief executive should not become Chair of the same company
- at the time of appointment, the Chair should meet a test of independence in order to engender trust with executive and non-executive directors on the board and ensure objective debate.⁷⁰

More recently, in the Report of the Royal Commission into the failure of HIH Insurance, Justice Owen indicated his general support for a separation of the roles of Chair and chief executive as a check on power, but noted the need for flexibility “if a persuasive case can be articulated and communicated to the shareholders”.⁷¹ Accordingly, it remains a lively area of debate, and Justice Owen’s dictum that it is necessary to examine the circumstances of a particular Chair or company in each case before laying down an inflexible rule should be borne in mind.

Related to this issue is the question of the chairing of and composition of audit committees. In the HIH Royal Commission report, Justice Owen noted that it has been generally accepted practice for some time that the Chair of the company should not also chair the audit committee.⁷² This has been a recommendation of regulators and corporate governance advocates for some time.⁷³

Another source of contemporary community expectations is the *Principles of Good Corporate Governance and Best Practice Recommendations* relating to the governance of listed public companies released by the ASX Corporate Governance Council (ASX Council) shortly after *ASIC v Rich* was delivered.⁷⁴

Relevantly, in its recommendations on the structure of the board, the ASX Council adopted a similar position to the Higgs Review, namely, that better practice is that the roles of Chair and chief executive should be separate, and that the chief executive should not become Chair of the same company.⁷⁵ The ASX Council also recommended, as better practice, that the Chair should be an independent director,⁷⁶ a view that is consistent with the positions of a number of other regulators⁷⁷ and umbrella industry groups.⁷⁸ In 2005, the Australian Council

⁶⁹ Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, p. 23; Committee on Corporate Governance, *The Combined Code*, p. A.2.1.

⁷⁰ Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, p. 24.

⁷¹ Owen, *The Failure of HIH Insurance*, Volume I, p. 109. More recently, in an address to the Australian Council of Superannuation Investors, Justice Owen has argued that there may be good reason for combining the two roles and that companies should not be damned for combining the roles: Gluyas, ‘Shareholder apathy the enemy: Owen’.

⁷² Owen, *The Failure of HIH Insurance*, Volume III, p. 278.

⁷³ Recommendation 4.3: ASX Council, *Principles of Good Corporate Governance and Best Practice Recommendations*, p. 30; Australian Council of Super Investors Inc, *Corporate Governance Guidelines*, p. 10.

⁷⁴ Corporate Business Law Report, ‘One.Tel decision creates storm of interest’, p. 6.

⁷⁵ Recommendation 2.3: ASX Council, *Principles of Good Corporate Governance and Best Practice Recommendations*, p. 21.

⁷⁶ Recommendation 2.2: ASX Council, *Principles of Good Corporate Governance and Best Practice Recommendations*, p. 21.

⁷⁷ Australian Prudential Regulation Authority, *Prudential Standard APS 510: Governance*, p. 5; NZX, *NZX Listing Rules, Appendix 16 — Corporate Governance Best Practice Code*, p. 2.

⁷⁸ For example, Investment and Financial Services Association Limited, *Corporate Governance*, p. 20.

of Super Investors Inc (ACSI) issued guidance in its *Corporate Governance Guidelines: A Guide for Superannuation Trustees to Monitor Listed Australian Companies* advocating the separation of the roles of Chair and chief executive and recommending that the Chair should be appointed from among the independent non-executive directors. ACSI cautioned that combining the two roles has the potential to create a concentration of power and diminution in the degree of accountability that would ordinarily result from a separation of the two roles.⁷⁹ In its recent Prudential Standard APS 510 on the governance of regulated institutions,⁸⁰ the Australian Prudential Regulation Authority (APRA) has also reflected this view, requiring that the Chair of a governing board must be an independent director, and cannot have been the CEO at any time during the previous three years.⁸¹ However, this view has been criticised by hands-on executive Chairs who have been intimately involved in the development of companies and feel a strong sense of ownership about them.⁸² Accordingly, it is perhaps a factor that should be considered in the context of the individual circumstances of each corporation.

The Chair as ‘corporate fulcrum’

Justice Austin indicated that, although it is largely both exhortatory and voluntary and must always be used with caution, the literature on corporate governance is relevant in determining the responsibilities of the Chair of a listed public company. His Honour also noted that although it may seem to be unduly harsh to retrospectively rely on evidence of this kind to determine a standard of conduct not previously set out in the common law or statute, “the court’s role, in determining the liability of a defendant for his conduct as company chairman, is to articulate and apply a standard of care that reflects contemporary community expectations.”⁸³ In ascertaining and applying the relevant standard of care, Justice Austin noted that community expectations of directors have risen significantly over the last century with a parallel growth of literature related to corporate governance.⁸⁴

Accordingly, it is timely that the increased significance of the role of the Chair — a position that has been described as the ‘corporate fulcrum’⁸⁵ — should now be recognised more formally.

The role of the Chair under the Corporations Act

Some commentators (the AICD, for example) have argued that the principles-based general duties of directors and officers set out in Part 2D.1 of the Corporations Act, as interpreted through case law, specify the legal duties and responsibilities of the Chair in sufficient detail.⁸⁶ In addition to these general duties of directors and officers which apply to the Chair

⁷⁹ Australian Council of Super Investors Inc, *Corporate Governance Guidelines*, p. 10.

⁸⁰ ‘Regulated institution’, in this context, refers to an authorised deposit-taking institution or a authorised non-operating holding company under the *Banking Act 1959* (Cth); Australian Prudential Regulation Authority, *Prudential Standard APS 510: Governance*, p. 3.

⁸¹ Australian Prudential Regulation Authority, *Prudential Standard APS 510: Governance*, p. 5.

⁸² Standen, ‘The ASX Corporate Governance Council’s Principles of Good Corporate Governance and Best Practice Recommendations’, p. 223.

⁸³ *ASIC v Rich* (2003) 44 ACSR 341 at 358.

⁸⁴ *ASIC v Rich* (2003) 44 ACSR 341 at 358-359.

⁸⁵ Josev, ‘Tailoring directors’ duties to “contemporary community expectations”’, p. 554, citing J. Keeves, ‘Directors’ Duties — *ASIC v Rich* — Landmark or Beacon?’, p. 181.

⁸⁶ Australian Institute of Company Directors, *Chairman of the Board*, pp. 86-88.

in circumstances where (as is the usual case) he or she is also a director,⁸⁷ the Corporations Act contains a limited number of other provisions regulating the duties of the Chair.⁸⁸

Sections 248E and 248G, both replaceable rules, authorise the directors to elect a Chair for board meetings, and provide for a casting vote for the Chair, respectively. Section 249U is the equivalent replaceable rule providing for the election of the Chair at members' meetings.

Section 250S provides that the Chair of an annual general meeting must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about, or make comments on, the management of the company. Section 250T imposes an equivalent duty on the Chair with respect to asking questions of the company auditor relevant to the conduct of the audit and the preparation and content of the auditor's report.⁸⁹ Breach of either of these sections gives rise to an offence of strict liability by the Chair.⁹⁰ Section 250SA, inserted as part of the CLERP 9 amendments⁹¹ provides that at the annual general meeting of a listed company, the Chair must allow a reasonable opportunity for the members as a whole to ask questions about, or make comments on, the remuneration report (notably, section 250SA does not specify a sanction for breach of the provision).

Division 6 of Part 2G.2 of the Corporations Act contains detailed regulation of the appointment of proxies and corporate representatives for members' meetings. Paragraph 250A(4)(c) provides that if a proxy form specifies the way the proxy is to vote on a particular resolution, if the proxy is the Chair, he or she must vote on a poll and must vote the way specified. Breach of the provision is a criminal offence of strict liability.⁹²

Part 2G.3 of the Corporations Act regulates minutes of meetings and members' access to minutes. Subsection 251A(2) provides that a company must ensure that minutes (of a meeting of the company, or of its directors) must be signed within a reasonable time after the meeting by either the Chair of the meeting, or the Chair of the next meeting.⁹³ Breach of the provision is a criminal offence of strict liability, which potentially carries with it a term of imprisonment.⁹⁴

In relation to the non-procedural duties of the Chair, there is a dearth of Australian law and no coherent exposition of this aspect of the role of the Chair. This may be one of the reasons that has led courts and commentators alike to look to sources other than the Corporations Act and the company law reports for guidance on the duties of the Chair.

⁸⁷ There is no rule of law restricting appointment of the Chair to a director or member; the question of who is eligible depends on the company's constitution: Read, *The Company Director*, p. 30.

⁸⁸ A feature also shared by the UK Companies Act: Cadbury, *Corporate Governance and Chairmanship*, p. 35.

⁸⁹ The effect of section 249V (auditor's right to be heard at general meetings) should also be noted here.

Although unlike sections 250S and 250T, the Chair is not explicitly fixed with liability for breach of section 249V, it is likely that the responsibility for failing to afford the auditor with the right to be heard at general meetings would lie with the Chair as the person with responsibility for procedure at the meeting.

⁹⁰ Corporations Act, subsections 250S(2) and 250T(2).

⁹¹ *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*.

⁹² Corporations Act, subsections 250A(5) and (5A). The penalty for breach of the provision is 5 penalty units: Schedule 3, Item 66. Section 250A has attracted judicial attention in recent years with ASIC's pursuit of Mr Nicholas Whitlam for alleged breach of paragraph 250A(4)(c) and of his duties as Chair and director of NRMA, refer *ASIC v Whitlam* (2002) 42 ACSR 407 and, on appeal, *Whitlam v ASIC* [2003] NSWCA 183.

⁹³ This appears to be a longstanding principle: Read, *The Company Director*, pp. 138-139.

⁹⁴ Corporations Act, subsection 251A(5A). The penalty for breach of the provision is 10 penalty units or imprisonment for 3 months, or both: Schedule 3, Item 71.

PART II: THE PUBLIC SECTOR

The role of the Chair in the Australian Government context

A range of different types of boards exists at the Commonwealth level in the public sector. Over 90 of these are boards governing Commonwealth authorities or Commonwealth companies under the CAC Act. A Commonwealth authority is a body corporate, incorporated for a public purpose, by an Act or subordinate legislation, that is able to hold money on its own account, whereas a Commonwealth company is a Corporations Act company in which the Commonwealth has a controlling interest.⁹⁵ Some significant bodies under the CAC Act include the Australian Broadcasting Corporation (ABC) and the Australian National University (ANU), as well as all of the government business enterprises (GBEs), such as Australia Post and Medibank Private Ltd.

However, some statutory corporations that are also governed by boards are only subject to certain CAC Act provisions, for example the NEPC Service Corporation and the National Transport Commission. Other statutory corporations that are governed by boards are not subject to the CAC Act at all, for example the Albury-Wodonga Development Corporation.

Another class of statutory corporations at the Commonwealth level is not able to hold money or property on their own account.⁹⁶ These are often commissions, and are typically encompassed in a Department of State or a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act), and are involved in regulation or some other form of statutory decision-making.⁹⁷

There are also Corporations Act companies which involve government participation but are not regulated by the CAC Act because the Commonwealth does not hold a ‘controlling interest’.⁹⁸ Such companies may exist where the Commonwealth is a non-controlling member. In other cases, the Commonwealth’s involvement may be under the company’s constitution and may not relate to its rights as a member, but be limited to the right to appoint or remove a director. Examples include Beyond Blue Limited, the Australia and New Zealand School of Government Limited, and a range of cooperative research centres (or CRCs). All of these bodies are described in the *List of Australian Government Bodies and Governance Relationships as at 31 December 2004*, which includes bodies where the governance relationship takes account of factors such as appointing directors.⁹⁹

The CAC Act, together with the *Commonwealth Authorities and Companies Regulations 1997* and the *Commonwealth Authorities and Companies (Report of Operations) Orders 2005* comprises the core public sector umbrella legislation regulating Commonwealth authorities and Commonwealth companies. A number of the provisions of the CAC Act

⁹⁵ The terms ‘Commonwealth authority’ and ‘Commonwealth company’ are defined in sections 7 and 34 of the CAC Act, respectively. As at 1 March 2007, there were 71 Commonwealth authorities and 28 Commonwealth companies.

⁹⁶ Department of Finance and Administration, *Financial Management Reference Material No. 2*, p. 22.

⁹⁷ Examples of the prescribed agencies under the FMA Act which constitute bodies corporate are the Australian Competition and Consumer Commission (ACCC) and the Australian Communications and Media Authority (ACMA). The Chair of the authority is also the Chief Executive for the purposes of the FMA Act in many of these bodies: Department of Finance and Administration, *Financial Management Reference Material No. 2*, pp. 21-22. These bodies are not the subject of this paper.

⁹⁸ Refer CAC Act, section 34.

⁹⁹ Department of Finance and Administration, *Financial Management Reference Material No. 1*.

legislative framework governing authorities, including, in particular, the conduct of officers provisions, are modelled on equivalents in the Corporations Act.¹⁰⁰ Subsection 22(1) of the CAC Act, for example, is closely modelled on its Corporations Act-equivalent, subsection 180(1). The CAC Act provision states:

22 Care and diligence — civil obligation only

Care and diligence — officers

- (1) An officer of a Commonwealth authority must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if he or she:
 - (a) were an officer of a Commonwealth authority in the Commonwealth authority's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the Commonwealth authority as, the officer.

Note: This subsection is a civil penalty provision (see Schedule 2).

This provision is of particular relevance since the decision of *ASIC v Rich*, which concerned the interpretation of its Corporations Act-equivalent, subsection 180(1).¹⁰¹

For Commonwealth authorities, the CAC Act complements the particular enabling legislation of the authority, for example the *Australian Postal Corporation Act 1989*, the *Australian Sports Commission Act 1989* and the *Australian War Memorial Act 1980*, which deal with a range of additional governance issues. The CAC Act does not refer specifically to the role of the Chair of the board.¹⁰² The enabling legislation of a Commonwealth authority commonly refers to the Chair (and Deputy Chair),¹⁰³ and provides for the ability of the Chair to convene and preside over meetings of the board,¹⁰⁴ but will not generally set out specific responsibilities. Tasks such as providing leadership to the board and the authority, communicating with stakeholders and the chief executive, evaluating the performance of the board and individual directors, and ensuring the appropriate induction, training and ongoing developmental needs of the directors, are generally implicit.¹⁰⁵ Moreover, guidance regarding

¹⁰⁰ Explanatory Memorandum, *Commonwealth Authorities and Companies Bill 1996* at 1. It should also be noted that for Commonwealth companies, the CAC Act contains reporting and accountability requirements which apply in addition to the Corporations Act: CAC Act, sections 35 to 44.

¹⁰¹ The main difference between subsection 22(1) of the CAC Act and subsection 180(1) of the Corporations Act is the reference to 'a director or other officer' in the latter. The CAC Act defines an 'officer' of a Commonwealth authority to include persons who would be considered directors of a company under the *Corporations Act*: compare Corporations Act, section 9, definition of 'director', and CAC Act, section 5, definition of 'officer'.

¹⁰² Several Commonwealth authorities, by virtue of their enabling legislation, are governed by a sole person at the apex rather than a multi-member board or council, such as the Australian Government Solicitor, Comcare and the Director of National Parks.

¹⁰³ Refer *Acts Interpretation Act 1901*, section 18B, which also encompasses other formal nomenclature, such as Chairperson, Chairman and Chairwoman.

¹⁰⁴ For example: *Australian Postal Corporation Act 1989*, sections 65, 66 and 81; *Australian Sports Commission Act 1989*, section 21; and *Australian War Memorial Act 1980*, section 17.

¹⁰⁵ There are, of course, exceptions to this. For example, section 124 of the *Australian Securities and Investments Commission Act 2001* (which provides for disclosure by members of ASIC to the Chair of a direct or indirect pecuniary interest in a matter before ASIC, and where the Chair has a relevant interest, disclosure to the persons concerned in the matter), and section 84 of the *Primary Industries and Energy Research and Development Act 1989* (which provides that the Executive Director of a Research and Development Corporation must give written notice to the Chair of all direct or indirect pecuniary interests that the Executive Director has or acquires in any business or in any body corporate carrying on any business). The CAC Act now contains a

the role of the Chair in the public sector comes from a range of sources in addition to legislation, including policy, guidelines and reports. A number of the contemporary community expectations applying to the private sector in Australia are also contained in the public sector context, including through corporate governance guidance, such as, for GBEs, the *Governance Arrangements for Commonwealth Government Business Enterprises* of June 1997.

A range of commentators have recognised the central role of the Chair in the governance of public sector corporations. Some have noted that it is important to define the Chair's governance role to protect against confusion about the responsibilities of the Chair, the board, the chief executive and senior management, including the importance of a leadership role for the Chair, particularly in liaising between the board and key stakeholders.¹⁰⁶ This encompasses the traditional duty of ensuring the proper functioning of the board and its meetings, but also monitoring the implementation of decisions. It also covers maintaining a close relationship with the chief executive and representing the authority to outside stakeholders.

One addition to the list of duties of the Chair that has been noted is of 'monitoring and improving the quality of the board.'¹⁰⁷ This could include taking an active role in succession-planning for the board, induction of new directors, and reviewing the performance of his or her fellow board members, adding other dimensions to the role and responsibilities of the Chair.¹⁰⁸ The role of the Chair in the private sector in reviewing the performance of the board and its individual members was also commented on by Justice Owen in the HIH Royal Commission report, where his Honour noted that the performance and contribution of board members should be guided by the Chair.¹⁰⁹

The Chair's role in fostering the development of directors is reflected on a practical level by the Uhrig Report's better practice recommendation that the Chair ensure that the directors have opportunities for ongoing professional development.¹¹⁰ Additionally, the *Governance Arrangements for Commonwealth Government Business Enterprises* of June 1997 provide that the Chair of a GBE must head a board nomination and remuneration committee which will, through the board, provide the shareholder ministers with a list of suitable candidates for board membership.¹¹¹

comprehensive regime for disclosure of interests for Commonwealth authorities reflecting that in the Corporations Act for companies (CAC Act, sections 27F-27K, Corporations Act, sections 191-196).

¹⁰⁶ See, for example: Edwards, Nicoll and Seth-Purdie, *Conflicts and Tensions in Commonwealth Public Sector Boards*, p. 21. Also, for example, the WA Government has recognised the Chair's role in ensuring an appropriate mix of board skills: "The Chairman is responsible for the effective working of the board's process, advising the Minister on the balance of its membership": Government of Western Australia, *Corporate Governance Guidelines for Western Australian Public Sector Board Members*, p. 7.

¹⁰⁷ Edwards, Nicoll and Seth-Purdie, *Conflicts and Tensions in Commonwealth Public Sector Boards*, p. 21.

¹⁰⁸ Guidelines for directors of government boards and committees published by the South Australian Department of the Premier and Cabinet note that Chairs of major statutory authorities (and other statutory bodies) are a potential source for identifying, from directors of their boards, suitable candidates for appointments to other government boards: South Australian Government, *Government Boards and Committees*, p. 8.

¹⁰⁹ Owen, *The Failure of HIH Insurance*, Volume I, p. 118.

¹¹⁰ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 102.

¹¹¹ Department of Finance and Administration, *Governance Arrangements for Commonwealth Government Business Enterprises*, paragraph 3.5.

The separation of the roles of Chair and chief executive is also recognised in elements of Commonwealth public sector corporate governance,¹¹² such as in the *Governance Arrangements for Commonwealth Government Business Enterprises*, which provides that the Chair of a GBE must not also be an executive of the GBE, unless otherwise agreed by the shareholder ministers.¹¹³ The separation of roles of Chair and chief executive has also been expressed in some State and Territory legislation.¹¹⁴

Chapter 6 of the Uhrig Report contains better practice recommendations for the governance of statutory authorities generally, and a number of these specifically relate to the role of the Chair of governing boards. These better practice recommendations are consistent with a number of better practice recommendations relating to Chairs in the private sector, and are also a useful signpost for contemporary community expectations of Chairs of governing boards in the public sector.

The Uhrig Report notes that it is better practice that the Chair does not chair all committees, particularly the audit committee, on the basis that it affords a more balanced distribution of workload amongst the board members, a greater focus on risk management and gives the other directors an opportunity to build additional experience.¹¹⁵ Of course, this does not mean that the Chair does not have a role in serving on, or chairing, committees.¹¹⁶ The benefits of the separation of roles have also been observed by the Australian National Audit Office (ANAO) in the context of audit committees.¹¹⁷

The Uhrig Report highlights the potentially important role of the Chair in relation to appointment, reappointment and removal of directors in the context of ensuring that the responsible Minister is well-supported in his or her decision-making. The report describes better practice arrangements for appointments and notes that when a Minister is considering an appointment, the Chair and the responsible Department should brief the Minister on the particular skills, attributes and experience that would benefit the board in meeting its

¹¹² There are exceptions to this principle in relation to some public sector bodies. This is often due to their regulatory or other statutory role. For example, the roles are combined in the ACCC, the ACMA, and the Reserve Bank of Australia (RBA). For further reading on the RBA, refer: Bell, *Australia's Money Mandarins*.

¹¹³ Department of Finance and Administration, *Governance Arrangements for Commonwealth Government Business Enterprises*, paragraph 3.4. This may also be confirmed by legislative provision; for example, section 83 of the *Australian Postal Corporation Act 1989* provides that the Managing Director of Australia Post may not also be its Chair.

¹¹⁴ For example, *Government Business Enterprises Act 1995* (Tas), subsection 11(6); *Financial Management Act 1996* (ACT), subsection 79(2).

¹¹⁵ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 97.

¹¹⁶ Indeed, subsection 22(3) of the *Australian Sports Commission Act 1989* provides that the Chair of the Australian Sports Commission must serve on any committee of the Commission which includes persons other than members of the Commission.

¹¹⁷ The ANAO's *Better Practice Guide: Public Sector Audit Committees*, issued in February 2005, quotes the general support in the HIH Royal Commission report for a separation of the roles of Chair and chief executive as a check on power, recognising the need for flexibility "if a persuasive case can be articulated and communicated to the shareholders" (Owen, *The Failure of HIH Insurance*, Volume I, p. 109), and notes that an independent Chair can perform the role unencumbered by management responsibilities and provide the chief executive with the opportunity to receive advice and assurance from an independent perspective: ANAO, *Better Practice Guide: Public Sector Audit Committees*, p. 17. Indeed, the Guide recommends that for CAC Act bodies, the Chair of the audit committee should be a non-executive director, and for FMA Act agencies, the audit committee Chair should be an independent person to strengthen the actual and perceived independence of the committee: ANAO, *Better Practice Guide: Public Sector Audit Committees*, p. 18. It should be noted, however, that the views of the ANAO are not necessarily an articulation of policy of the Australian Government.

objects.¹¹⁸ The report indicates that it is expected that the Chair and the responsible Minister should meet at least annually and discuss the performance of the board, where the Chair should be equipped to discuss the outcome of the annual performance evaluation process for the board and, if required, the performance of individual directors.¹¹⁹ This point is also consistent with guidelines for directors of government boards issued by the South Australian Department of the Premier and Cabinet, which recommend that the Minister should, on an annual basis, review the board's performance with the Chair or the board.¹²⁰ Likewise, the guidelines suggest, the Minister should consult with the Chair when a vacancy occurs and consider the overall composition of the board and gaps in experience, ability and knowledge.¹²¹

The Uhrig Report also recommends that prior to making a decision on reappointments, the Minister and the Chair should discuss the performance of the board and of individual directors.¹²² Separately, in cases where the Minister is assessing the performance of the board and seeks further information, the Chair should be the point of contact.¹²³

The Uhrig Report makes a number of points about communication between the Minister and statutory authorities with governing boards. Communications between the Minister and the authority are to be primarily with the Chair, at formal and informal levels,¹²⁴ a point that has also been made by the ANAO in its better practice guidance.¹²⁵ Structured communication between the Minister and the Chair may also be supported in the enabling legislation of the authority.¹²⁶

The Uhrig Report notes that in circumstances where the Minister considers it necessary to communicate with the chief executive, such communications should only occur in conjunction with the Chair, so as not to detract from the board's ability to provide effective management oversight.¹²⁷ Conversely, the Chair should advise the Secretary of the

¹¹⁸ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, pp. 85 and 98.

¹¹⁹ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 102.

¹²⁰ South Australian Government, *Government Boards and Committees*, p. 5. The guidelines also contain (at pp. 23 and 24, respectively) lists of considerations for reviews of board and director performance.

¹²¹ South Australian Government, *Government Boards and Committees*, pp. 7 and 9.

¹²² Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 82. This may also be a requirement under specific enabling legislation; for example, subsection 73(2) of the *Australian Postal Corporation Act 1989* provides that the Minister must consult with the Chair before nominating a person for appointment as a director.

¹²³ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 82.

¹²⁴ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 82.

¹²⁵ Australian National Audit Office, *Better Practice Guide: Public Sector Governance*, Guidance Paper No. 2: Potential Conflicts in the Governance of CAC Bodies p. 3. Refer also: *Hughes Aircraft Systems International v Aircservices Australia* (1997) 146 ALR 1 at 74-75 where Justice Finn commented on the nature of certain communications between the Minister for Industry, Technology and Regional Development and the Chair of the Civil Aviation Authority.

¹²⁶ For example, paragraph 11(2)(b) of the *Australian Sports Commission Act 1989* provides that the Minister must not give a direction to the Commission under subsection 11(1) without first giving the Chair an opportunity to discuss the need for the proposed direction with the Minister. Also, guidance at a State level about the selection of a Chair of a government board indicates that those preparing the selection criteria should consider including the ability of the Chair to "make available the time for board matters and access by the Minister and chief executive": South Australian Government, *Government Boards and Committees*, p. 6.

¹²⁷ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 82. Refer also to Mantziaris' case study of the governance issues arising out of the former Overseas Telecommunications Commission in the late-1980s, where Mantziaris reports that the responsible Minister regularly contacted the managing director directly; the managing director appears to have informed the Chair of these ministerial contacts and invited him to participate. Mantziaris states that the exclusion of the Chair appears to have been

responsible Department of issues to be discussed with the Minister prior to formal meetings, to allow the Department sufficient opportunity to adequately brief the Minister.¹²⁸ Notably, in discussing the issues associated with appointing public servants to the boards of statutory authorities, the Uhrig Report noted that it should not be interpreted as proposing that Departmental representatives should not attend board meetings, provided that the Chair's agreement is obtained beforehand.¹²⁹

Remuneration

A related point that should be noted when considering the heightened responsibilities of public sector Chairs is remuneration. It may be that the heightened responsibilities of Chairs of statutory authorities above those of other directors is recognised by the public sector through the remuneration that is paid to Chairs for the discharge of those responsibilities. For example, the Remuneration Tribunal's current determination for fees and allowances for part-time office-holders shows that the fees and allowances paid to a selection of Chairs of Commonwealth authorities are higher than those paid to the other directors.¹³⁰ The higher level of remuneration for the Chair is also generally reflected in the private sector,¹³¹ which may reflect the Chair's heightened legal duties and responsibilities.

Other jurisdictions

Generally speaking, umbrella legislation regulating government-owned corporations at the State and Territory levels contains minimal recognition of the role of the Chair.¹³² However, there are elements of specific recognition of the role of the Chair at these levels. For example, in the Australian Capital Territory, the *Financial Management Act 1996* was amended in 2005 to detail specific functions for the Chair of the governing board of Territory authorities, in particular:

- (a) managing the affairs of the governing board
- (b) ensuring, as far as practicable, that there is a good working relationship between the governing board and management of the authority
- (c) ensuring that the responsible Minister is kept informed about the operations of the authority.¹³³

These developments may indicate a state trend toward a greater legislative recognition of the role and duties of Chairs of government-owned corporations. At the Commonwealth level,

caused by the Minister's need for quick and authoritative answers: Mantziaris, 'When the Minister leans on the board: The forced resignation of the managing director of Australia's Overseas Telecommunication Commission', p. 174.

¹²⁸ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 85.

¹²⁹ Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, p. 99.

¹³⁰ Remuneration Tribunal website, downloaded on 12 January 2007:

<http://www.remtribunal.gov.au/determinationsReports/consolidatedCurrent/2006-12%20Determination16.12.06.pdf>.

¹³¹ Ford, Austin and Ramsay, *Ford's Principles of Corporations Law*, p. 737.

¹³² For example, the *Government Owned Corporations Act 1993* (Qld) (which contains provisions relating to the Chair's role in respect of meetings and in ensuring that observations and suggestions of the Auditor-General of Queensland are considered at the ensuing meeting of the body), and the *State Owned Corporations Act 1989* (NSW), the *State Owned Enterprises Act 1992* (Vic) and the *Government Business Enterprises Act 1995* (Tas) (which contain provisions relating to the Chair's role in respect of meetings).

¹³³ *Financial Management Act 1996* (ACT), section 82.

the obligation to keep the responsible Minister informed about the operations of the corporation (and its subsidiaries) is placed upon the board as a whole.¹³⁴

Although guidance produced by the South Australian Government in 2000 states that the Chair “has no greater responsibility as a member of the board than other directors”, it goes on to note that the Chair “usually has great influence over the success of the board and the success of the organisation” and “must be prepared to contribute much more time overseeing the organisation than an ordinary director.”¹³⁵ In terms of relationships with other stakeholders, the guide notes that the Chair “should not identify too closely with management, dominate the board or allow coalitions to form that exclude other directors from the decision-making process”, but encourage the other directors to make real contributions to the organisation and contribute their skills and experience towards the effective operation of the board.¹³⁶ The guide also assigns responsibility to the Chair for translating the government’s objectives in relation to the authority into a strategic plan, and for ensuring that appropriate reporting arrangements are in place to advise the Minister.¹³⁷

A guide produced by the Queensland Government for members of Queensland Government boards sets out a range of responsibilities for the Chairs,¹³⁸ each of which is consistent with the role of the Chair as set out in *ASIC v Rich* and in the Uhrig Report. These include:¹³⁹

- setting the board agenda
- facilitating the flow of information and discussion
- conducting board meetings and other business
- ensuring the effective operation of the board
- communicating with and reporting to the Minister
- reviewing board and organisational performance
- inducting and supporting board members.

On the matter of appointments, the Queensland guide notes that responsibility for selection lies with the Minister and/or Cabinet and that, accordingly, it would not normally be appropriate to tender suggestions or advice unless invited to do so.¹⁴⁰

It should also be noted that Australia is not alone in paying greater attention to the role of the Chair in public sector governance. For example, *Building Effective Boards: Enhancing the Effectiveness of Independent Boards in executive Non-Departmental Public Bodies*,¹⁴¹ the report issued by Lynton Barker of the UK Public Services Productivity Panel in November 2004, contains useful discussion of the role of the Chair in the board of an executive non-Departmental public body in the UK, which has a number of parallels with Australian better practice guidance. In order to enhance strategic management and governance, the Chair should, according to Barker:

- act as board team leader

¹³⁴ CAC Act, paragraph 16(1)(a) (for Commonwealth authorities) and paragraph 41(1)(a) (for wholly-owned Commonwealth companies).

¹³⁵ South Australian Government, *Government Boards and Committees*, p. 19.

¹³⁶ South Australian Government, *Government Boards and Committees*, pp. 19 and 20.

¹³⁷ South Australian Government, *Government Boards and Committees*, p. 19.

¹³⁸ Queensland Government, *Welcome Aboard*, paragraph 3.2. For the purposes of the Guide, ‘board’ includes committees and statutory authorities.

¹³⁹ Queensland Government, *Welcome Aboard*, paragraph 3.2.

¹⁴⁰ Queensland Government, *Welcome Aboard*, paragraph 3.2.

¹⁴¹ Barker, *Building Effective Boards*.

- carry out regular skills, knowledge and aptitude audits
- act as ‘board conductor’
- act as the interface between the board, the executive management, the entity and the responsible department.¹⁴²

CONCLUSIONS

A number of commentators have welcomed Justice Austin’s approach in *ASIC v Rich* in taking into account contemporary community expectations in determining the standard and content of the duties of the Chair and in setting the standard above that of the ordinary director.¹⁴³

Whether non-executive directors with specialist qualifications or experience are subject to a higher standard of care than other directors, in dealing with business or issues within their special expertise, has traditionally been a vexed question in corporate law. Generally speaking, Australian courts have held that a director is required to act reasonably, in the same manner as an ordinary person with the knowledge and experience of the director would act in the circumstances if acting on his or her own behalf.¹⁴⁴

Commentators have emphasised that *ASIC v Rich* reiterates that there is a minimum standard of care and diligence expected of directors and that a lack of skill or expertise cannot be used as a defence for a breach of that standard.¹⁴⁵ However, Justice Austin is considered to have provided fertile ground for reconsidering the corporate law question of equivalency of responsibilities of directors. The implications for the Chair in particular are that the level of “responsibilities” of the Chair for the purposes of paragraph 180(1)(b) of the Corporations Act and paragraph 22(1)(b) of the CAC Act — and the other directors — is likely to be determined by a range of factors. Those factors may include the length of time of the Chair’s association with the body (as director or otherwise), the particular responsibilities formally allocated to the Chair under a statement of role, and any responsibilities informally assumed by the Chair. These factors are not exhaustive, and a court may take other factors into account, such as corporate governance best practice literature, which may also be influential.¹⁴⁶

Commentators suggest that one consequence of the decision in *ASIC v Rich* is that some Chairs may be reconsidering their directorship portfolios if they are concerned about the amount of time required to be dedicated to the corporation.¹⁴⁷ As the Australian Shareholders Association has noted, some Chairs may need to “take crash courses in corporation law,

¹⁴² Barker, *Building Effective Boards*, p. 3.

¹⁴³ For example the Australian Shareholders Association, Professor Bob Baxt and Professor Ian Ramsay, cited in: Corporate Business Law Report, ‘One.Tel decision creates storm of interest’, p. 5; Lumsden, ‘A chairman’s lot is not a happy one’, p. 2.

¹⁴⁴ *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109, *State of South Australia v Marcus Clark* (1996) 19 ACSR 606, *ASIC v Vines* (2003) 48 ACSR 322.

¹⁴⁵ *Statewide Tobacco Services Ltd v Morley* (1990) 2 ACSR 405, *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115.

¹⁴⁶ For recent consideration of a Chair’s duties, see: Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme*, paragraphs 31.274-31.294.

¹⁴⁷ The matter of the number of directorships a director should hold has received separate attention in recent years: ASX Council, *Principles of Good Corporate Governance and Best Practice Recommendations*, p. 23; Investment and Financial Services Association Limited, *Corporate Governance*, p. 19; Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, p. 41.

accounting, governance, and financial management.”¹⁴⁸ This may also suggest that the persons willing to take on the role of Chair of the board, finance, audit or safety committee should pay close attention to their legislative protections,¹⁴⁹ their directors’ and officers’ liability insurance policy, and their directors’ fees.

Before *ASIC v Rich* and the recent corporate governance standards, guidelines and reports, the role of the Chair for private sector Corporations Act companies could have potentially been perceived to have been limited to performing procedural and ceremonial duties. Throughout the common law there have been occasional departures from this enunciation of the Chair’s role, but these have been infrequent. Justice Austin’s decision helps emphasise the commonsense understanding that the Chair has a wider role and set of duties (at least in relation to listed companies) and gives a form of legal recognition to the significant corporate governance literature in the public and private sectors which has been generated over the last decade. In the public sector, *ASIC v Rich*, along with sources of particular responsibilities of the Chair of governing boards in the public sector, such as enabling legislation, and a range of other sources, including policy, guidelines and reports have all contributed to greater clarity of role for Chairs of public sector governing boards. In so doing, *ASIC v Rich* has made a valuable contribution to discussion and policy-making in the private — and public — sector contexts regarding the role of the Chair.

¹⁴⁸ Corporate Business Law Report, ‘One.Tel decision creates storm of interest’, p. 5.

¹⁴⁹ Potential legislative protections include the business judgment rule (Corporations Act subsection 180(2), and the CAC Act equivalent, subsection 22(2)), reliance on information or advice provided by others (Corporations Act, section 189, and the CAC Act equivalent, section 27D) and delegation by directors (Corporations Act, section 190 (and the CAC Act equivalent, section 27E) and section 198D).

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