

KEEP ON THE RIGHT SIDE OF THE LAW

MICHAEL GRAY

Whether you like it or not, the legal process hangs over your head like the proverbial Sword of Damocles as soon as you become a director. (In the ancient Sicilian story, Damocles was a courtier who coveted King Dionysius' vaulted position, but soon realised that the role came with a gleaming sword suspended over the throne by a single horsehair.)

A director has access to professional advisers such as lawyers, accountants and other consultants for any issue that may threaten that horsehair, and coverage for such professional costs should be clearly set out in the terms and reference of every board.

Nevertheless, you need to be fully aware of what you can do to mitigate your risks of getting into trouble.

FIDUCIARY DUTY AND REASONABLE CARE

A board member's fiduciary responsibilities hinge on acting honestly and in the interest of the company and its shareholders. This includes not subjecting the company to unnecessary risks such as illegal transactions which could benefit the company, but may result in criminal liability.

If a transaction does not appear, at first instance, to benefit the company, the directors should document the reasons why it should proceed.

A company's day-to-day management is not the non-executive director's lot. Nevertheless, he is expected to be a vigilant guardian. You cannot escape responsibility by claiming ignorance, or by relying solely on board members and executive directors with professional qualifications. Neither can you get away by not attending meetings or not signing resolutions.

Indeed, the standard for accountability may be raised for any director who possesses special knowledge or experience, such as an accounting or legal background.

Under the Singapore Exchange regulations, all directors are responsible for internal controls. Similarly, a board member is expected to understand what the financial statements mean, even if he has no accounting knowledge. The now infamous Centro case in Australia and its judgement on director accountability for the accounts clearly define the legal parameters for director responsibility in this area.

The Accounting and Corporate Regulatory Authority (ACRA) in Singapore is working to ensure directors are more accountable for the quality of financial reporting. Kenneth Yap, chief executive officer (CEO) of ACRA said: "We feel that it is time to focus on

directors, since they have the ultimate liability in ensuring that financial statements accord with accounting standards.”

This means that directors who are found wanting in this area may find themselves subject to fines or further liabilities under Section 201 of the Companies Act.

Having said this, you are afforded some limited comfort from professional advice. Section 157C of the Companies Act allows directors to rely on reports, statements and advice from employees, professional advisers and experts, and from other directors, all on the basis that these parties are indeed competent and the matters are within their designated authority or competence.

However, a director must act in good faith, make proper enquiry, and have no knowledge that reliance is unwarranted. The point here is that even if you rely on third parties, you must have taken all reasonable steps to ensure that what you receive is proper.

AVOIDING CONFLICTS OF INTEREST

Significantly, you must avoid conflicts of interest, and under no circumstances should your director’s position enable the improper use of information to buy or sell shares. If you are a director and have, or wish to buy, shares in your company, lock them up after you have bought them and do not trade them until you leave the board, if you can help it.

Be fully aware of the blackout periods for transacting in shares. Even if the company is not in a blackout period, you may be unable to buy or sell due to your director’s position that may provide you with material insider information.

Many directors are frequently asked by family members for investment tips on the companies where they serve as directors. Do

not fall into this trap. If your relatives buy the shares based on your advice when the information is not generally available, this might be considered insider trading.

And relatives are not the only connections that can get you into trouble. Careless talk or disclosure to a secretary, your staff or a friend, can also implicate you if the information is price sensitive. If you have any doubt about any conflict of interest at all, avoid the transaction. If you are unsure of a potential conflict area, discuss it with the chairman of the board or seek professional advice.

COMPLIANCE

As a director, you are responsible for ensuring that you and the company you represent comply with all the regulatory requirements. While you can seek professional advice, you must, at all times, be aware of all the legal requirements behind your appointment.

This typically requires keeping current with events, company law and regulations relating to directors and board practice. One way to do this, of course, is to attend the latest courses and updates provided by professional organisations such as the Singapore Institute of Directors. ■