Directors' Liabilities – Navigating the Maze*

John Fast

Abstract

The current debate surrounding directors' duties and liabilities too often focuses on "what happened" in particular instances, instead of addressing "why it happened". This article explores some of the linkages between good governance and board effectiveness. It examines the relationship between boards of directors and their chief executive officers, the structures and content of board meetings and some of the responsibilities that directors owe to their shareholders. It also questions the fundamental assumption that many of the current practices adopted by boards of directors are sufficient to ensure that these directors can avail themselves of the protections afforded to them by the "business judgement rule"

The current turmoil in world equity markets, with its inevitable detritus of company losses and failures has once again turned the spotlight onto directors' duties and liabilities.

A lot of commentary is being devoted to the "obvious and foreseeable" failures and shortcomings in the processes and in the governance of these failed companies. And, as in the past, the air is again heavy with recrimination and finger pointing. The performance of CEOs, senior executives and Chairmen of these companies has attracted scrutiny and criticism and some will either be dismissed or fall on their swords – sometimes leaving with significant payouts. As more information becomes available, regulatory investigations may be initiated, civil or criminal proceedings may ensue and in extreme cases, legislative or regulatory changes effected.

The boom/bust cycle, complete with after effects is not a new phenomenon; the words may be different on each occasion but sadly the music remains very much the same. And whilst amendments to legislation and to governance processes may be introduced imposing stricter requirements on corporations and their Boards in an attempt at playing "catch up" - to plug the gaps identified by the latest spate of corporate failures - such measures may not address some of the more fundamental and structural problems that we face in today's corporate world.

The reporting obligations and standards by which corporations are routinely measured today have increased significantly over recent years. In addition to complying with the regulatory regimes and accounting standards that may be applicable to them, corporations and their Boards are also externally rated by their transparency, by their exposure to external litigation, by the quality and independence of their directors, by their compliance with various corporate governance standards, by their record on corporate social responsibility and most recently by their environmental and "green" credentials. All of the

* A shorter edited version of the article first appeared in the Australian Financial Review

foregoing are important in positioning corporations - how investors will perceive them – and whether or not they will continue to support them in the marketplace.

Investor support, coupled with excellent operational and financial performance by corporations are key ingredients in Total Shareholder Return – probably one of the most important measures by which corporations are judged against their peers and by which their management are rewarded. As a rule, shares in corporations that lead in Total Shareholder Returns will generally trade at a premium to their competitors because they are admired and perceived as being better managed and more socially responsible than their competitors. Today's Boards need to be attuned to the operational and financial performance of their corporations, as well as to the broader social and community agendas that now form part of the corporate landscape.

As the debate surrounding directors' responsibilities is enlivened, it is worthwhile to revisit and redefine the roles of Boards – what they do functionally, how they interact with senior management, how they are populated and what expectations are held of them by shareholders. Critically, we also need a new liability regime that does not dissuade membership of Boards through exposing directors to an ever growing minefield of potential lawsuits and prosecutions – one that takes them out of that defensive fortress mentality, where "good governance" is assumed to be the same as Board effectiveness and where not enough time is spent on probing and really understanding what is happening within their corporations and to providing strong leadership and direction to management.

But we need to address all of these problems at the same time. Merely addressing the issue of liability, without attempting to define expectations of Boards, will not necessarily lead to greater Board effectiveness or better corporate outcomes and may continue to leave corporations and their shareholders short-changed. Indeed, attempting to fashion an appropriate liability regime without first understanding what Boards should be dealing with and how they should operate, is akin to prescribing antibiotics for an undiagnosed malady.

At a high level, Sections 180 and 181 of the Australian Corporations Act impose a series of obligations on directors. Included among these is a duty to exercise their powers and discharge their duties with a degree of care and diligence that a reasonable person, in the same role, would be expected to exercise in the discharge of their duties. The "business judgement rule", which also appears in these provisions, provides an effective "safe harbour" for directors who have conducted themselves according to certain defined standards. The latter encompass notions such as "good faith", "proper purpose" and a rational and reasonably based belief that one is acting in the best interests of the corporation. Much has been written on the subject of these provisions and their meaning. However, at a basic level, compliance with these provisions, and the protections afforded by them, will depend in each instance on the particular circumstances of each corporation - its size and complexity - as well as the conduct of its directors, their respective skill sets, independence and their knowledge of the industry within which the corporation operates.

But the foregoing will not assist Boards in determining what they should be concerned with, nor how directors should go about discharging their obligations. For the former, we need to look elsewhere. There are a number of different models and guidelines which attempt to define the "high level" areas in which directors should be involved. Not surprisingly, there is considerable overlap between them and between different jurisdictions. In Australia, it is generally accepted that Boards have principal responsibility for the appointment and removal of CEOs, for approving the strategy, plans and budgets of corporations, for approving expenditure above designated limits and the remuneration of senior executives, and for a range of documents that a corporation is required to produce, either on a regular basis (e.g. the Annual Review and Accounts) or on an ad hoc basis (e.g. Takeover or Scheme of Arrangement documentation). Although not yet universally the case, recent legislative change has seen Boards focus their attention on some new and non-traditional areas. For example, the exposure of directors in some States in Australia to personal criminal prosecution and liability (including possible jail sentences), in cases involving breaches by corporations of Occupational Health and Safety legislation, has seen Boards adopt a much more "hands on" approach in an area that, until not that long ago, was viewed by many of these same Boards as being an operational issue. These kinds of responsive developments, which are to be welcomed, are nevertheless just that – a reaction to changed circumstances. They do not necessarily reflect leadership by Boards per se; rather, they represent a defensive reaction to a new body of regulatory requirements that have far reaching potential consequences for Boards and for their directors.

Many of today's corporations expend a good deal of energy in the areas of governance and in projecting themselves as being leaders in that area. Good corporate governance, so we are encouraged to believe, is a proxy for a well run corporation. This argument assumes that if all the processes are in place and working well, the corporation is in good shape. Indeed, good corporate governance and winning governance awards have for some become almost independent goals in their own right. Different organisations now routinely measure corporate governance and publish "league tables" ranking corporations according to how well they measure up to the standards of governance prescribed by those organisations. Corporate governance awards are held up as trophies - to be displayed to the world at large, presumably as evidence that corporations that are leaders in corporate governance are better than (and by inference, to be preferred over) those corporations that do not rate as highly. And to some extent, there is considerable merit in this view – high standards of corporate governance are achieved through a high quality and disciplined approach to a range of activities. Much of what is encompassed within corporate governance is process driven; however, a good deal of it does not address the question of what is happening within the corporation. One need only think of Enron to demonstrate the point. Not that long ago, this was the most admired corporation in the USA. It was externally perceived as satisfying all relevant corporate governance criteria. It had a large and diverse Board – populated by individuals who were touted publicly as being very experienced and successful business people, in their own right. Enron "ticked all the boxes" on its Board committee structure – to the world at large, it must have seemed like a very well run and disciplined organisation. Yet it proved to be one of the most spectacular collapses of recent US corporate history – largely because its Board failed to discharge the role that it was really there to perform.

A recent study entitled "The Promise and Peril of Corporate Governance Indices" undertaken by Professors Sanjai Bhagat (University of Colorado), Brian Bolton (University of New Hampshire) and Roberta Romano (Yale Law School) (European Corporate Governance Institute Working Paper 89 – October 2007) draws a number of important cautionary conclusions concerning the use of corporate governance metrics. First, there is no one "best" corporate governance index – there is no one benchmark or set of best practices that is universally appropriate for all, or even most corporations. Secondly, compliance with some of the corporate governance metrics can result in a considerable cost to corporations – one that cannot always be justified in terms of its value to these corporations and their shareholders. Third and importantly, they issue a "health warning" to potential shareholders and other investors – "that there is no consistent relation between governance indices and measures of corporate performance". Accordingly, the study recommends that corporate governance indices be looked on as one of a multitude of pieces of information but not as predictors of future business or stock market performance by those participating corporations.

Unfortunately, the deeply held and justifiable concerns by directors about their potential personal liability has led to some serious and undesirable consequences. At the core of the problem lies the mistaken belief that if they follow a series of rigorous governance processes and define and limit the scope of their activities, directors will then be able to avail themselves of the safe harbour protection afforded by the "business judgement rule". For some of the reasons referred to below, that belief may prove to be misconceived.

Perhaps it is worth restating a truism – directors are elected by shareholders. It is Boards that have vested in them the management, corporate powers and affairs of corporations. Shareholders entrust Boards with those powers in the belief that they will be discharged conscientiously and properly. In exercising those powers, directors are not mere agents for the shareholders – they are expected to act independently and to apply their best judgement and experience to the Boards they serve and to the businesses of those corporations. With the exception of executive directors, shareholders do not elect senior management, nor do they oversee the management of corporations. It is in the nature of the contract between shareholders and their corporations that those functions and powers reside with the Boards. Typically, Boards will retain some of the powers and responsibilities vested in them and delegate others. The exact "mix" will depend on a number of factors – some powers and responsibilities will be retained because of regulatory requirements, some will be derived from legal precedent and conventions and some will be assumed in response to external pressures and interest groups.

Recent years have seen the development and adoption of Board governance documents by a number of major corporations. These represent an attempt to capture in one place the various processes with which Boards are involved and to try and set out in a more formal manner the way in which they will conduct themselves. In short, they are a blueprint for how these Boards will be run. A Board governance document may seek to formally list those powers and responsibilities that the Board will retain for itself and, critically, may delegate to the CEO all authority and powers other than those reserved by the Board for itself. Some further guidelines may also be included around how the CEO is to go about discharging his or her functions and responsibilities.

On most views, Board governance documents would seem perfectly sensible and desirable. They should result in greater clarity and transparency around Boards, their roles, responsibilities and processes. At the same time, some alarm bells should be sounding for directors, about the mind set and false sense of security that they can create. Put simply, many Board governance documents are only about process, not substance. They do not describe how directors should perform their obligations – they do not define nor are they a substitute for due care and diligence. Importantly, they do not provide exculpation where the latter has not been exercised. The real danger for directors revolves around the formalisation of the delegation of directors' powers and responsibilities – effectively the transference of those very powers and responsibilities that shareholders have vested in Boards to their CEOs. This transference has not been formally blessed by shareholders, the legislature or, indeed the courts. And, whilst it has not been formally tested, there would appear to be little doubt that all the Board governance documents in the world will not be of any use in providing a safe harbour to directors, if they are deemed not to have done enough in the discharge of their duties. It is simply not sufficient for directors to say, in their defence against a negligence or breach of duty claim, that they complied with their obligations as set out in the Board governance document, and that otherwise they relied on the CEO to take all other decisions and actions in the conduct of the corporation's business. No-one could seriously believe that adopting that position could (or should) afford directors a defence.

In the absence of the legislature, the courts or shareholders agreeing to provide some form of protection to Boards, those directors who have delegated their powers and responsibilities to others, are potentially liable for the consequences of the acts of those individuals. There is a wide gulf that exists between delegation and abrogation. Unfortunately, the distinction between these two concepts is often not well understood by directors and the pressures on corporations to populate their Boards with independent non-executive directors in order to comply with regulatory and governance requirements can be unhelpful, inasmuch as it seems to place undue emphasis on the need for "disassociation" by non-executive directors from the day to day affairs of the corporations on whose Boards they may serve. This is one of the paradoxes of today's governance requirements; the focus on the need for greater independence on the part of non-executive directors can come at a very high price – not just for corporations and their shareholders, but for the directors themselves who by mistaking "independence" with being less involved in the affairs of their corporations, may unwittingly be exposing themselves to greater liability than might otherwise have been the case.

The extent of directors' liability will critically depend on a number of factors, including on how well they have discharged their obligations and powers and whether or not the "business judgement rule" is applicable to their actions. Even then, it may be argued that the protections afforded by Section 180 of the Corporations Act, which provide a defence to what are in effect quasi–criminal offences that carry civil penalties under that Act, may not provide directors with a complete defence in civil proceedings involving allegations of negligence or breach of duty by directors, and may not protect them from suit in other jurisdictions, such as the USA. For Australian corporations that operate in countries outside Australia, the business judgement rule, whilst relevant and potentially helpful, will nevertheless not be determinative of directors' liabilities.

Little wonder then that some directors are beginning to feel unease and are questioning the relevance of their roles on the Boards that they serve. There seems to be a perception among some that unless you are the Chairman or Chairman "in waiting", merely serving as a non-executive director is not a particularly rewarding role. The feeling expressed by these directors is that there is limited scope for them to exert any real influence over the strategy or direction of the corporations they serve, whilst the quality of their interactions with other Board members, not to mention with the management and employees of those corporations is at best sporadic and superficial. When weighed against the potential for liability and loss of personal reputation that could arise from their involvement as directors, it is not surprising that they view their involvement as posing a disproportionate risk to them, relative to the potential rewards associated with those roles.

So what can shareholders reasonably expect of directors? This is a difficult question and one that involves both subjective and objective considerations. It also needs to be considered in the context of one very important caveat – non-executive directors are not full time employees of corporations. By the very nature of their roles they are not, and cannot unlike employees of corporations, be expected to devote their full time and attention to the affairs of the corporations that they oversee. So how they spend their time and the areas of focus for their attention must be considered against the backdrop of recognising that theirs is a more limited and time constrained role. In turn, this makes it all the more important that their energies and focus be directed towards those areas that are of greatest importance to their corporations.

One of the important responsibilities of Boards is the culture of their corporations. Since the latter are not fixed for all time and change in response to shifts in the social, regulatory and business environment, Boards have a primary role in setting and maintaining the ethical standards and rules of behaviour that govern the internal and external interactions between corporations and their stakeholders. These "rules of engagement" are sometimes formalised in the "Charters" and "Guides to Business Conduct" of corporations. But merely having them in these kinds of documents, without a strong commitment to their implementation and maintenance will not suffice. Boards have to set the right tone and lead by example to ensure that the values encapsulated by them are understood and consistently applied throughout their corporations. For without involvement by the Boards, the way in which these values will be translated and applied by senior management will ultimately depend on the values and integrity of CEOs.

As previously mentioned, Boards are responsible for the appointment of CEOs, to whom they delegate a significant portion of the powers and responsibilities vested in them by shareholders. One of the measures of the effectiveness of Boards is the way in which their respective CEOs perform during their tenure and the legacy that they leave behind. In recent years, the longevity of CEOs has declined; a term of five years is now generally regarded as the norm. Many CEOs today are recruited externally, from different organisations and sometimes different industries. Irrespective, new CEOs can come from different cultural backgrounds and sometimes may have little or no comprehension or appreciation of the history and culture of the corporations whose leadership they may assume. These differences are not necessarily bad, nor do they automatically lead to undesirable consequences. Indeed, depending on the state of health of the corporation to which they may be appointed, a change in focus, culture and attitude can re-energise some corporations and at times, be “life saving”. `

The trend for CEOs to stay for shorter terms carries with it a number of risks for Boards. First, it is not always immediately apparent what the long term effect of a change in CEO can have on the DNA of a corporation. The legacy of CEOs is often felt long after they have left but Boards remain responsible for that legacy – good or bad. There are times when it is easy to identify corporations in need of radical reform – those beset by a history of poor decision making and consistent under achievement in key metrics will be obvious candidates for change. However, there may be many other corporations that are not afflicted by any of the foregoing and by most measures are perceived externally as extremely successful, well governanced and well positioned for the future. Yet, a new CEO, wanting to put his or her individual “stamp” on the corporation may nevertheless subject it to serious and radical structural and cultural change, for no apparent reason or clearly identifiable benefit. This focus on “fixing things that aren’t broken” may come at considerable economic, human and cultural costs to the corporation. Some of these costs will be more immediately obvious - a loss of corporate memory and history, a decline in operational and financial outcomes, loss of talent, disillusionment and unsettling in existing employees, becoming an “employer of lesser choice” through external perceptions about how individuals are treated and valued by the corporation etc. Other costs may be more subtle; for example, employees of corporations undergoing constant churn and upheaval have been known to “take their eye of the ball”, with a corresponding increase in workplace accidents, poorer overall performance, higher staff turnover and a loss of enthusiasm for their workplace, as they continue to struggle with significant changes in their work environment and worry about whether they will be made redundant.

However, irrespective of who assumes the mantle of CEO, the relationship between the Board and the CEO is critical. The delegation of so much of the Board's powers and responsibilities to the CEO creates an imperative for directors to be very aware, involved and engaged with the CEO and with senior management. Regrettably, in many instances this does not occur – at least not in a way that would likely protect directors from civil liability as well as from statutory liability under the Corporations Act. This, notwithstanding the large and growing body of governance related activities that impose robust compliance requirements on corporations and their directors. So why isn't all of this enough?

There are a number of reasons that can be suggested. The first relates to the personal attributes of the CEOs themselves and their perspective on Boards and their functions. These can vary enormously, ranging from those CEOs who work seamlessly and co-operatively with their Boards and value the experience and input that directors can contribute to those who, for reasons of hubris or otherwise view Boards as an interfering waste of their time, a distraction and imposition on the time of management and otherwise are contemptuous of independent directors whom they disparage as knowing less about the corporations' businesses and affairs than they do.

The attitude of a CEO to his Board may have a significant impact on the level and quality of the information flow between management and the directors. In this regard, having a CEO who is inclusive of and close to his Board will be extremely important in providing a level of assurance to directors that they are being comprehensively and accurately informed about the health of the corporation and about matters that are of significant importance to the corporation and its stakeholders. A recurring theme in some of the most recent Australian high profile corporate problems and failures has been the assertion, after the event, that some of the Boards were not properly informed about the state of their corporations' financial health, gearing, security, liquidity etc. If those assertions are ultimately proved, then it will raise some very interesting questions about how these corporations were managed, the timing and quality of the information made available to their Boards and the nature of the relationship between those Boards and their CEOs. It may also lead to a consideration of whether the independent directors could or should have conducted themselves differently, whether they had adequate controls in place to ensure that they were obtaining relevant and timely information from management and whether directors acted with sufficient care and responsibility, in terms of the powers and responsibilities that had been vested in them by the shareholders.

The second area where directors may be exposed to potential liability relates to the frequency and duration of Board meetings and the content of Board agendas. Whilst practices may differ as between corporations, recent years have seen a trend of some corporations moving to less frequent Board meetings. In Australia, somewhere between six and nine meetings per annum seems to be the norm. The pressures to reduce meeting frequency may come from a number of different directions. First, many CEOs themselves will push for fewer meetings for reasons including, that each meeting represents a substantial commitment of preparation and attendance time that interferes with the running of the corporation, or simply because they do not like to have to interact with directors, whose views and opinions they neither seek, nor respect. Secondly, for corporations whose Boards include foreign non-executive directors, a need to travel frequently may act as a disincentive for those foreign directors to join or remain on the Boards of those corporations. Thirdly, with the raft of process related business items that now form part of the corporate governance landscape, a considerable portion of what transpires at Board meetings is perceived by some directors as being more about form than about substance and therefore deemed boring and uninteresting to them.

Although there may be a degree of merit in some of the foregoing arguments, there is no exact science that will determine the duration and the number of times that Boards should meet in any twelve month period. However, it is for Boards, irrespective of any pressures applied to them by their CEOs, to determine how frequently they may need to meet to discharge their obligations appropriately and with due care and skill. What one can assert with some measure of confidence is that the larger, more complex and more diverse the corporations and their business activities, the more frequently their Boards may need to meet. In the event of a catastrophic business failure, the frequency of Board meetings as well as the degree of energy and areas on which the directors had expended their efforts and focus may all be relevant factors in determining if the directors of that corporation had fulfilled their duty of care and diligence to the business and affairs of that corporation In an environment of ever increasing litigation, it is not difficult to imagine directors being subjected to claims that they failed to discharge their obligations and did not exercise due care and diligence, particularly if a Board had opted for a lesser number of face to face meetings than one might reasonably expect, given the size and complexity of that corporation and its businesses.

The content of Board agendas is also of great importance. It is the case with many corporations in Australia, that their Board agendas are constructed by their CEOs, sometimes with the input of senior management. Whilst these agendas are submitted in draft to their Chairmen, more often than not these draft agendas are generally adopted as submitted, perhaps with some minor changes. Most corporations will also have protocols about Board papers from management; in many instances, these have to be channelled through the CEOs who will often edit and determine the content of what is finally submitted to the Boards or, indeed whether these papers will be submitted at all. Thus Boards may be left to deal with an agenda prepared by CEOs and with papers edited by CEOs.

So, who should own Board agendas - the Boards or the CEOs? Do Boards apply sufficient independent judgement to the content of their meetings? Who would shareholders reasonably expect to be setting their Boards' agendas? More to the point, if the CEOs are effectively determining the structure and content of Board meetings, as well as the content of Board papers that support those agendas, then where is the independent input from directors and how much more difficult does it become for them to assert that they have discharged their obligations with due care and skill? The reason why this question is important is that it is not sufficient for Boards to merely rely on the judgement of their CEOs, if they wish to mitigate the risk of personal liability to them; they need to be independently engaged and focused on the agendas of their Boards – to drive their agendas rather than have someone else do this for them. After all, isn't this one of the reasons that shareholders have elected them – to represent shareholders to the best of their abilities? The requirement for them to exercise this independent judgement and skill should not be subsumed in an agenda over which they have exercised little or no influence – that might steer their focus into particular directions and not others. By focussing on an agenda that may not be their own, directors run the risk of "not knowing what they don't know"; of finding out about problems when it is too late and of being held accountable for failures that might otherwise have been preventable, in whole or in part, if the underlying causes had or could have been known to them in time.

It is a matter for directors to determine the structure and duration of their Board meetings. Each corporation will have its own unique complexities; in the ordinary course of events, it seems logical that the larger and more complex the corporation, the greater the Board commitment. One might reasonably expect that Board meetings will at a minimum deal with the matters that Boards and their sub-committees have reserved unto themselves, as well as with certain governance and regulatory issues, with business arising from Board sub-committees and with correspondence and other housekeeping matters. However, this may not suffice. Boards are ultimately responsible for the health of the corporations that they lead. As previously observed, delegation of responsibility to CEOs does not absolve Boards from responsibility for the actions of those individuals and the consequences of those actions. For this and other reasons, one might also reasonably expect to see Boards actively involved with the formulation and review of their corporations' long term strategies, with an evaluation of the quality of their senior management succession plans as well as with the integrity of the evaluation processes that are applied to these assessments, with their risk exposures to serious regulatory prosecution and opportunistic litigation and with the culture and values of their corporations. At least once a year, non-executive directors should meet separately in "closed session" with each member of the senior management to gain an understanding and perspective on what that executive is seeing in terms of emerging trends, on what is "keeping that executive awake at night", on what is being done about the latter and on what the executive sees as working and what is not working within the corporation...and why. Often these perspectives will not otherwise become known to Boards – it is not uncommon for some CEOs to demand "cabinet solidarity" from their subordinates and to pressure them to present a united front at Board meetings, even when significant differences of views exist among the ranks. The process of keeping Boards informed through agendas formulated by CEOs, that are in turn supported by papers also edited by CEOs can steer Boards in some directions and away from others, potentially leaving directors in the dark about important issues and therefore vulnerable to an accusation that they have not discharged their obligations, by delegating too much and not retaining sufficient control over the fortunes of their corporations.

To achieve the foregoing level of involvement by Boards, their agendas may need to be more flexible, with sufficient time being made available for directors to have broader free ranging conversations on subjects that they consider to be important. So how do non-executive directors determine what should be included on their Board agendas? There is no simple formula. In each case, it will be a matter of judgement for the Boards to determine what they believe is most important and what they should be dealing with at their meetings. As a starting point, directors have presumably conducted due diligence of the corporations they have agreed to serve. This and their ongoing interaction with management, as well as the individual experiences, knowledge, perspectives and expertise that they bring to Boards should provide part of a framework around which Board agendas can begin to be built. Perhaps the time has also arrived for the creation of a new statutory position reporting independently to Boards – that of "Chief Risk Officer", whose role it would be to provide Boards with an ongoing assessment of all of the major risks facing their corporations from time to time.

The Board room also needs to be a forum where open, questioning and robust conversations can and are encouraged to take place. The outcomes of those conversations should not be negotiated and pre-determined outside the Boardroom and ahead of the meetings. It is healthy for directors to be engaged, to inquire, at times to present differing views and to challenge – and sufficient time needs to be available for this to occur It is also important that directors support their management where appropriate and that they be prepared to do so publicly and for the right reasons, regardless of how their support may be viewed externally or impact public perceptions about their individual legacies.

The length of Board meetings should be tailored to their agendas – not the reverse. The content of Board meetings should not be about what can be "fitted" into an available time frame of a two or three day Board meeting; rather, it should be about how much time is required to do justice to the needs of the corporations. The Board agendas of many corporations today are simply too tight, with too much being squeezed into too little time. There is a risk in those circumstances that the casualty can be the loss of quality in the debate and the postponement of conversations around important business, structural or cultural issues that simply miss out on getting onto the agenda.

It may well be that some of the foregoing considerations may necessitate more frequent and/or longer Board meetings for some corporations. If this proves to be the case, then it will be necessary to recognise this by a significantly appropriate increase in directors' remuneration. In some instances, the number of Boards on which individual directors may be able to serve may need to be reconsidered, given the increased time commitment that may be required of them. In each case, the risk/reward equation needs to be properly addressed. It is not about getting more out of directors for the same amount of reward; it is about corporations benefitting to the fullest extent possible from the collective and individual skills and experiences of directors and about recognising those contributions and ensuring that directors are not professionally or financially disadvantaged through a need for them to be more involved with their respective corporations.

Government and regulators also need to take a lead in introducing a statutory scheme that clearly defines what may be expected from directors in terms of appropriate behaviours and levels of involvement by them. Such a scheme could include a menu of non-prescriptive "principles based" model guidelines that might assist directors in formulating a framework that will be relevant to them and to the conduct of their Board meetings and address the nature of their relationships with their CEOs, including the question of delegation of the powers vested in Boards. Critically, such a scheme should clearly provide that if corporations and their directors have complied with standards that are at least consistent with the spirit and intent of the model guidelines, then directors will be afforded a far more extensive and complete "safe harbour" defence to that which currently applies – one that would by legislation exclude the possibility of separate civil litigation being launched against directors who have acted properly, diligently and with due care in the discharge of their obligations and have otherwise conducted themselves consistently with the standards contemplated by the legislature. Such a proposal would not be novel or unique; there already exist instances where the legislature has taken similar steps in other areas of liability, unrelated to corporations.

At the end of the day, it is in the interests of corporations and their shareholders that they have access to the best talent pool available, from which to populate their Boards. Removing some of the ambiguities around directors' roles and reducing the uncertainty that currently exists with respect to directors' potential liabilities may broaden the pool of potential directors, improve the effectiveness of Boards and should lead to more sustained and better outcomes in the long term for corporations and their shareholders.

John Fast is a Lawyer and Company Director. He was formerly Chief Legal Counsel & Head of External Affairs at BHP Billiton and prior to that appointment was the Senior Commercial Partner at Arnold Bloch Leibler.