

BOARD BASICS



Warren Tapp

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By

Warren Tapp

Introduction

I saw the need for this little book when I was a guest speaker at a university business school talking about corporate governance, I realized that a lot of those postgraduate students would end up either in roles that were reporting to Boards or perhaps be a member of a Board themselves in the future.

It also became clear to me that they had no knowledge or understanding of how Boards of Directors operate or what they do. Later, I realized there were probably plenty of other people who were not university students, who also don't understand the basics of a Boardroom, and that it might be useful for them to understand this in their current executive role or other career direction. So the aim of this book is not to be a technical guide, but a simple introduction to the role of a Board of Directors in a company, and what it does. I've also added some chapters about how to get onto a Board, which complements my previous book that I published, *"So you want to be a Company Director"*.

I've also included a chapter on what to look out for before you join a Board so that you don't jump into a can of worms before it's too late. I hope that the book is helpful to you, and that you learn something about the basics of a Board of Directors. While the book is primarily based on the Australian corporate environment, a lot of the fundamentals still apply wherever you are in the world. Enjoy the book and feel free to contact me if you have any questions regarding what you've read.

- Warren Tapp

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1. The History of Boards

If we look way back in history, the concept of a Board of Directors started in England as far back as the 1500s when the Dutch East India Company and other such entities were established, and people realized they needed some people to represent the shareholders and look after the company. In most countries today we have a unitary Board, that is only one Board governing the company. However in some countries in Europe they often have two Boards. One is made up management and union representatives and a senior Board of experienced business people.

Australian Corporations Law has historically borrowed heavily from British Company Law. Its legal structure now consists of a single national statute called the Corporations Act 2001. This statute is administered by a single national regulatory authority, the Australian Securities and Investments Commission. Since provisions of the act can frequently be traced back to some pioneer legislation in the United Kingdom, references are frequently made to judgements of courts there. Though other forms are permitted, the main corporate forms in Australia are public and private (in Australia terms, proprietary) companies, both of which predominantly have limited liability. That is the liability of the shareholders is limited to the extent of their share capital, but the liability of the Directors of that company is absolutely unlimited.

Upon Federation in 1901, the Constitution of Australia granted limited powers in relation to corporations to the Australian parliament. Each state had a residual power in relation to anything not within the Commonwealth power. The Corporations Law in Australia has historically closely followed developments in English law. It was mostly the concern of each separate state legislature, and there were significant differences in corporations legislation between the states. After the second world war, it became increasingly clear that legislative differences between the states were creating unnecessary cost for companies that operated beyond one state. So the Commonwealth and the States came up with the formation of a uniform national company's code in 1962.

The problem with that scheme is it did not provide for uniformity in amendments of the legislation and changes of government or policy in each State or in the Commonwealth. A second co-operative scheme was agreed in 1978, and implemented by 1982 to overcome the defects of the first scheme. All laws and amendments would be agreed to by a Ministerial Council, and automatically applied in each jurisdiction. And the second scheme led to the creation of the National Companies and Securities Commission, which was the forerunner to what we have today in the Australian Securities and Investments Commission.

While an improvement on the first scheme, the 1982 scheme still presented significant difficulties mainly due to the National Companies and Securities Commission delegating administrative functions to various state commissions but retaining control of

takeovers and policy. The Commonwealth then sought to take sole responsibility for corporations law in Australia. In 2001, the current arrangement was created, and the states referred their power in respect to corporations entirely to the Commonwealth in the creation of the Corporations Act 2001. Australian companies are incorporated by registration with the Australian Securities and Investments Commission.

An application for registration would state whether the company is to be a proprietary company or public company, and the type of liability of shareholders of the company, which can be one of the following; a) unlimited with share capital, b) limited by shares, c) limited by guarantee or d) no liability, if the company sole objects are mining or mining related topics. The most common form of business entity in Australia is a company limited by shares. Proprietary companies are not allowed to raise capital on public equity markets, and have no more than 50 shareholders. That must include the words proprietary or Pty after their name. Only public listed companies on the Stock Exchange can engage in public fundraising activities although crowdfunding more recently has opened up another avenue of gaining capital for the company.

Companies incorporated outside Australia who wish to carry on business in Australia must either incorporate a wholly-owned or partly-owned subsidiary company in Australia or register a branch office in Australia. Australian companies can be fully foreign-owned, though one director needs to be resident in Australia, and must have an office address in Australia. Proprietary or private companies are often used for private ventures or as subsidiaries of public companies, including foreign companies, and some are shell companies for other business structures such as trusts or partnerships to limit the owner's liabilities. If a foreign company chooses to establish a branch office in Australia, it must be registered as a foreign company under the Corporations Act.

Such a registration does not create a separate legal entity, rather it creates a public record and registration of a foreign company's presence in Australia. Upon registration, the Australian Securities and Investments Commission (ASIC) will issue a certificate of incorporation to the company and an Australian Company Number, which must be quoted at all correspondents and invoices issued by the company. For a branch office of a foreign company it will be issued an Australian Registered Body Number, which is similar to an ABN. If the company has wants to trade, it will also need a tax file number and an Australian business number.

Australian companies must have share capital. The minimum number of shareholders for both a proprietary or private and a public company limited by shares is one. There is no upper limit on the number of shares that can be issued. The manner in which the company deals with that shared capital is strictly regulated by the Corporations Act 2001. By default, shareholders have one vote per share. Corporations listed on the Australian Stock Exchange cannot deviate from one share and one vote rule. Directors must convene a meeting if members with over 5% of voting rights requested in writing stating the resolution they wish to be put. The Corporations Act 2001 also gives the general meeting the power to alter or amend the company constitution by a minimum 75% vote.

Australia has few rules on political donations. Only, if it can be found to be a breach of a director's duty or involve oppression of the minority, can anything be done as a company law issue. A shareholder does not have a right to receive a dividend. Once a final dividend is declared however, it becomes a debt payable by the company to the shareholder from the date stipulated for payment. Corporate governance standards are not just a matter of comply and explain, and have been taken into account by the Australian courts when determining the scope of the director's duties. The ASX (Australian Stock Exchange) Corporate Governance Council's best practice recommendations States that the Chief Executive Officer and the Chair of the Board should be separate people. That is not necessary for a private or family owned company of course.

The ASX guidelines also say there should be a majority of independent Directors, and the Chair should also be independent. They also say the company should have a remuneration committee which would be Chaired by an independent director and have at least three members and a majority independent. It should also have an audit committee which will have at least three members with a majority independent, and also be Chaired by an independent director, not including the Chairman. The way to recognize what type of company it is by the words following the company name. Pty and then Ltd indicates it is a proprietary or private company only. If it is Ltd, it indicates it's a public company. However, you do not know whether it is a public listed company on the stock exchange or simply a public company that is unlisted.

The term Ltd also is used after the name of a company that is limited by guarantee, which mainly operates in the not-for-profit sector. Every company will have a Constitution. This could be a standard template that you can download from the ASIC website. And if it's not changed from the template, it can be adopted by the shareholders of the company. However, the shareholders may also amend by majority rule any amendments to the constitution to suit the purposes of that particular company. The constitution is simply a contract between the Directors and the shareholders as to how the company will operate. The laws in Australia are very strong in allowing for removal of Directors by a simple majority vote in an ordinary resolution.

For public companies, there must be a meeting with two months' notice, with the director that you are seeking to remove having a right to be heard. For private companies which do not offer shares to the public and have under 50 shareholders, this rule can be replaced with a different rule when they offer a simpler procedure. Removal from office as a director does not affect a director's claim for possible breach of contract. Directors of Australian companies must be a natural person and be at least 18 years of age. They do not have to be Australian citizens however. No particular qualifications or experiences are prescribed, but other legislation may impose restrictions and qualification requirements on some companies.

An undischarged bankrupt cannot be a director but may be an employee of the company, and ASIC maintains a list of persons who've been banned from acting as a director. A person may be appointed as a nominee director by a shareholder, and that person is expected to act in the interest of the person that appointed them. That can be a problem for

some people as the law says a Director owes their duty to the company which they have been appointed. A private or proprietary company must have at least one director, who may also be the company secretary and sole shareholder. A private company does not have to have a company secretary necessarily. At least one director must be resident in Australia. A public company must have at least three Directors, of which at least two must be resident in Australia, and it must have at least one company secretary, who must also be a resident in Australia.

In the event of a vacancy on the Board, a replaceable rule allows the Board of Directors to appoint other Directors. However, they must be confirmed at the next general meeting of shareholders. Directors' remuneration for a public listed company is determined by the Board itself. So the Directors pay themselves the amount they decide from a shareholder approved maximum pool, with shareholders having a non-binding say on remuneration. If at two consecutive general meetings of shareholders the result is that over 25% of them vote against the director's and executives remuneration, all of those Directors have to stand for election again within 90 days. A director who receives remuneration or other benefit from a company is treated for accounting and tax purposes as an employee of the company.

If a company in Australia attempts to make a takeover of another company, it should be noted that takeovers are regulated directly by very technical rules in the Corporations Act 2001. Corporate transactions and any restructuring may also be subject to anti-monopoly, foreign investment, employment protection and special industry protection legislation as well. The takeovers panel that is operated by ASIC, oversees any such takeovers in Australia. While the history of Boards is a long one going back hundreds of years, today in Australia and similar countries, the structure and operation of Boards is in a mature stage with well-defined legislation and regulations and practices.

2. Legal Structures

We have already outlined the different legal structures that have Boards of Directors. To summarize again, a private or proprietary limited company can have just one director and one shareholder. A public unlisted company needs to have a minimum of 15 shareholders and at least two Directors. A public listed company on the Australian Stock Exchange must have at least three Directors, two of them resident in Australia. I've mentioned the company limited by guarantee previously, and I want to clarify this further. This not for profit company will have a Board of Directors and the guarantee indicates that instead of shareholders, they have members, and the liability of each member is guaranteed only to the extent of a nominal amount (often only \$1 or \$2).

If the company was to become insolvent, the members are protected to the extent of that small amount, but the director's liability is unlimited. These type of companies are mainly used for not-for-profit organizations as any profits they make cannot be distributed to the members but must be retained within the company as part of working capital. In saying that the liability of Directors on a Board is unlimited, indicates how serious the law takes the role of the director in participating in Board decisions for the company and its shareholder's benefit. The Corporations Act 2001 has extensive sections regarding director's duties.

Australian Directors are subject to similar duties found in other jurisdictions, particularly the duty of loyalty and the duty of care. All Directors have a duty to act in the best interest of the company. This is primarily identified as being for the benefit of shareholders. And surveys suggest that Australian Directors, more than in other countries, view their primary obligation as being to create shareholder value. However, in recent times, a trend has emerged that says Directors also have obligations to other stakeholders apart from the shareholders. These may include suppliers, employees, the wider community and others.

As a result, many Boards in Australia are adopting policies in relation to Corporate Social Responsibility, which indicates that the Board is aware of its obligations to other stakeholders while retaining its primary responsibility or duty to the company itself and its owners who are the shareholders. Directors have the duty to strictly avoid conflicts of interest. When Directors have any interest in a transaction, they must give full disclosure, and avoid participating in that decision. So Directors involved, for example, on the Board of two different companies with conflicting interest, must not only declare they have an interest, but also give full disclosure on the potential harm to the other company.

When a director wishes to take an opportunity in which the corporation may possibly have an interest, the director must gain the fully informed consent of the whole Board. The law also says that you must not act in a way that gains any personal interest for you, nor must you disclose any information or gain any benefit that comes from your confidential role as a director of the company. You are required to act honestly and in good faith at all times. The other part of the law indicates you must act with a duty of care. That is, you cannot afford to be negligent in your role resulting in damage to the company or the shareholders' interests.

The Corporations Act 2001 does include a business judgment rule which says the Directors who acted honestly and in good faith with the utmost care in making a business decision which unfortunately resulted in losses or detriment to the company and its shareholders will not be liable. Directors will not be held liable if they have at least taken steps to inform themselves about the subject matter of that judgment to the extent that they reasonably believe to be appropriate. It means you cannot ignore warning signs or reports that will damage the company and you cannot delegate those responsibilities to management or other people. One of the prime responsibilities of a Board of Directors is to avoid insolvency, that is, the situation when the company is unable to pay its debts that are owed when they fall due. What is worse is allowing the company to trade while it's insolvent and knowing it is. If a director is or should be reasonably be aware that a company would become insolvent and does nothing about it, the director is liable to pay compensation.

Apart from the Corporations Act, there are a number of other pieces of legislation which should be considered by a Board of Directors depending on what type of industry it is in. These include the following although it is not an exclusive list:

- Employment law
- Taxation law
- Superannuation law
- Environmental law
- Intellectual property law
- Trade practices law
- Regulations for that industry

So you can see that a Board of Directors needs to have access to good legal advice in order to ensure the company is complying with a wide range of legislation that impacts on that company. For this reason, quite often a company will have an in-house lawyer providing advice to the Board or perhaps the company secretary has legal qualifications that can also provide this advice. If not, the Board would use outside legal advisors to assist them in ensuring this compliance.

Before we finish on legal matters, I wanted to mention one other legal structure that is outside the Corporations Act. Each state in Australia has its own legislation allowing people to establish what is called an Incorporated Association. For example, in Queensland, the Incorporated Associations Act 1991 regulates the establishment and operation of these bodies. These entities do not have a Board of Directors but rather a management committee. The association must have a minimum of seven members and a minimum of three people on the management committee, which includes the Chairman [or president] and secretary and treasurer. These all operate on a not-for-profit basis in the sense that any profits made by the entity cannot be paid out to the members, but must be retained within the association for the benefit of the entity and its members. Each State has agencies that monitor and control Incorporated Associations and these may be called the Consumer Affairs Office or perhaps the Office of Fair Trading. There appears to be a lesser level of liability for members of the management committee of an Incorporated Association, but there are financial penalties depending on what breaches of the particular Act that have occurred.

I would suggest if you are a member of a management committee of such an entity that you should still adhere to the same principles as if you were a director of a company, subject to the rules in the Corporations Act regarding director's duties, even though that might not apply to you.

Finally, I would mention Unincorporated Associations. This is simply a gathering of people with a common interest, but they have not created a corporate entity or separate body in the same way as an Incorporated Association. Such a gathering of people have no ability to form contracts as one body nor can they open bank accounts except in the name of one of the members. There is also no protection for the members and should the Unincorporated Association run into legal problems, all of the members will be subject to the liability that may result. This is the reason a lot of people with a common interest form Incorporated Associations as the entity itself which allows them to form contracts, borrow money and open bank accounts with a high degree of protection for the members of the association itself.

Finally, if you were invited to join a Board of Directors, you must sign a form of consent to agree to do so and you'll be entered onto the register of Directors for that company with ASIC. Your liability commences from the time your registration is recorded. If you wish to resign from a Board of Directors, you should give that resignation in writing to the Chairman and perhaps the company secretary and ask them to forward that to ASIC to remove you from the register as a director of that company. I've always found it best to contact ASIC afterwards to check if your name has been removed, otherwise, your liability may continue even after you've left.

Today's companies have amendments to their constitution that will allow Directors to access information up to seven years after they leave the Board should they have to defend themselves in a matter that occurred while they were on the Board. Previous to this, Directors normally would sign a Deed of Access from the company before joining, which allows them that same right to access information should legal action be taken against them during the seven years following their departure from the Board. It is important to ensure that you are protected in this way even after you have left a Board of Directors. Most companies pay for Directors and Officers liability insurance for the Board and senior management to cover legal expenses in the wake of any claims against them. I suggest each Director should carefully read such a policy to see what it covers and what exclusions it may have so they know what amount of protection they each have.

3. Role of a Director

There are different types of Directors. You might, for example, be a non-executive director, which means you are simply a Board member with no executive or operational responsibility within the company. You might also be an independent director, which means you have no previous or current connection to the company in any way, as a shareholder or former employee. If you are an executive director, it means that you not only sit on the Board but you work day to day in the company itself. For example, a Managing Director is a member of the Board, but he or she is probably also the Chief Executive of the company.

A nominee director is someone appointed by one of the major shareholders to represent their interests on the Board and that person has the problem of ensuring they look after the interest of the shareholder that appointed them, but also act in the interest of the company as a whole and all of its shareholders. One may occasionally hear about “shadow” Directors. These are people that are not legally members of the Board but exert great influence on the Board from behind the scenes and can be seen by the courts to, in fact, have been a director without having legally or formally done so. The role of the Chairman of the Board is simply to Chair the meetings when the Board convenes. A Chair has no additional powers beyond that of any other director on the Board. They tend to be paid more than the other Directors as their workload is generally bigger. This is because they're often having the regular meetings with the Chief Executive or other staff or representing the Board and the company at functions from time to time. They're also responsible for working with the company secretary to plan the agenda for the forthcoming Board meeting as well as approve the minutes of the previous Board meeting. The Chair is also expected to be a mentor to the other Directors in monitoring their professional development and behavior.

The Board will quite often have committees. Some of these might include the following:

- Remunerations committee.
- Audit committee
- Finance committee
- Risk committee
- Governance committee
- Strategy committee

I've often seen Boards with committees that I regard as operational such as human resources, marketing and so on. These are not required in my opinion as the Board is getting too involved in operational matters. A Board definitely should have a remuneration committee which also includes the role of nominations for future Directors or senior executives and their remuneration. It should have an audit committee to deal with the internal and external auditors for the company and along with this, a risk committee which reviews the risks the company deals with them and how to minimize them. A Board can create any committee it wishes permanently or on a short term basis as required. Generally, the majority of the committee will be Board members themselves and one of the Board members will Chair that committee. However, it's quite appropriate to invite other people who are not members of the Board to sit on those committees if they bring skills or

expertise in a particular area to strengthen the effectiveness of that committee. It should be noted the committees must not be allowed to make decisions on behalf of the Board, but only recommendations to the Board. The purpose of committees is to spend more time on particular issues that the whole Board does not have to deal with in detail. This allows the Board simply to make decisions based on the detailed recommendations of the committee on particular issues.

Minutes should be kept of all Board meetings, recording who was there and what decisions were made. It should include the times the meeting started and finished as well as any times that Directors left the room or returned. These minutes should be kept by the company on file and they should be issued, in my view, within 48 hours of the Board meeting while Directors can remember what happened at the meeting. Normally the Chairman will approve the draft and circulate it to all of the Board to agree to within a day or two. At the following Board meeting, one of the items of business is to approve the minutes of the last Board meeting.

So the sequential process is that the Chairman and Chief Executive meet to discuss the agenda for the next Board meeting. Some of the items will be permanent standing issues while others may be particular issues that need to be dealt with soon. Once the draft agenda is finalized, the company secretary will issue that to all of the Directors usually a week or so before the Board meeting to allow time for them to read it. A Board "pack" includes the agenda, as well as all of the reports and documents the Board should read prior to the meeting. This may include a report from the Chief Executive on the previous month's operations and it will obviously include full financial reports. They should include a profit and loss statement, a balance sheet, a cash flow statement, and in my view, a cash flow forecast. The papers may also include other departmental operational reports and documents with specific proposals requiring Board approval. It may be useful to mark some Board papers for decision and others for information only to be read by the Directors later.

So what you do as a director is attend the Board meetings [all of which have been put in your diary for the 12 months ahead], and then read the Board papers before attending the meeting. You are welcome to ring the Chief Executive or others if you have any questions or need clarification on anything you read. At the Board meeting, the Chair will declare the meeting open and deal with the agenda item by item. As each subject is brought to the Board's attention, you should be invited to provide your own comments on the topic or better still, ask any questions if you wish to challenge any points of view. Collectively, the Board will form a view on a decision and once the Chair is satisfied the Board has reached a majority view they will propose the motion and the Board will then vote on it either by show of hands or by general acceptance. This is then recorded in the minutes as a decision of the Board and any Director can ask that any vote by them to the contrary is recorded. The Chair will then conclude the meeting and advise the date of the next Board meeting and that the minutes of this meeting will be issued for approval for correction in the next few days.

What happens, however, if the company requires the Board to make a decision urgently in between Board meetings? The law allows for a circulating resolution [generally called a "flying minute"]. In this case, the company secretary will issue a paper to all Directors usually by email with a particular motion seeking a yes or no answer. Once the

company secretary has collected all of the votes back electronically, that decision is either approved or not approved for immediate implementation or action. However, it is important that on the next month's agenda, the Board does ratify that decision so that it's recorded in the minutes as having been done. Once the minutes are approved at the following Board meeting, the Chairman will sign them and that becomes the official record of that Board meeting and cannot be changed. Quite often, courts will use the minutes of Board meetings as evidence to help them determine the decision of the Board and what action they took in making that decision.

In your role as a director on a Board, I would say it is not just attending Board meetings. I keep saying monthly Board meetings, which is the common practice, but it may be in your case, the Board only meets every two or three months and in fact by law, the minimum requirement is one meeting a year only to approve the annual audited accounts and elect new Directors. Apart from Board meetings, you should also be involved in the company to the extent that you need to without being involved in operations. There's an old saying "nose in and hands out". I tend to use the phrase about Directors need to stay out of the kitchen, in other words, you don't get involved in operations matter how much you think you're trying to help. The way you can be more involved and active in your role as a director is to attend company functions, visit operational sites of the company wherever they are, meet the staff and do other reading on the industry the company operates in to broaden your knowledge and understanding. In fact, when you join the Board of Directors, you should be given an induction by the Chair [this doesn't always happen]. This allows you to gain from the Chair an understanding of the issues in the past of the Board and how it operates, but then go on to meet the senior executives of the company and be given access to any information about the company that will help deepen your understanding of its operations. [You have the legal right to ask for any information about the company].

In my experience, you would probably sit through your first Board meeting fairly quietly, listen to the others, vote if you have to, but absorb the whole culture of the Board before you become more active. However, the sooner you can start to contribute, the better, by asking questions or offering opinions or ideas, then the more value you'll be as a member of that Board.

I've often seen Boards of Directors where some people talk too much and others don't say anything. A good Chair will encourage the quiet people to express their view so that the whole Board has the value of a number of people contributing their opinion before a decision is made.

So, what is corporate governance? Many books define it as "the systems and procedures used in the governing of a corporation." That may not provide much help to you, but it is the process where the Board of Directors govern the company in the interest of the shareholders and other stakeholders. It is not the management of the company, as that is left to the executives employed by the company to implement Board decisions.

Generally, the role of the Board and your role as a director on that Board is to help the company achieve profits in order to pay dividends to shareholders in a commercial setting. Of course, if you're on a company limited by guarantee, those profits must be retained by the company to be used in furthering the objectives of the company itself. If

you're appointed to a government Board by a Commonwealth minister or State minister, the company will be owned by that shareholding minister and the government, and it may have its own set of rules about how the Board operates.

It could be that the statutory authority or government company is there to provide a service to the community rather than make a profit, and you need to understand what the aims of the company are if you're appointed to one of those Boards. Generally, in the case of family companies, the majority of the Board will be members of the family, and the aim of the company will be to make more profits for distribution to family members. You may be a non-family member on the Board in order to bring a fresh view to the strategic growth and standards of corporate governance in that company.

4. Functions of a Board

If you Google “Tricker Model”, you will see an interesting matrix about what a Board should do. Here it talks about internal accountability as well as external accountability, whereas the other part of the matrix talks about monitoring, and the other half talks about performance. What the model says is you need to monitor the internal workings of the company such as financial reports while providing accountability to external regulators such as audited tax returns and so on.

The monitoring role of a Board means keeping an eye on everything within the company through the reports you receive to see if there are any trends or issues emerging.

The performance part of the company talks about setting policies and also reviewing strategy for the future. In other words the Board provides Oversight and Insight. In fact, the four functions of a Board are primarily these:

1. Strategy
2. Monitoring
3. Risk management
4. Finance

If a Board effectively deals with those four functions, it's probably doing a pretty good job. In my experience, however, strategy often gets overlooked and neglected. If you put strategy as the first item on the agenda after the official opening proceedings, it allows the Board to spend more time on looking at its future rather than simply spending most of the Board meeting looking at the past, such as last month's results.

Quite often a Board will have a separate strategy day once a year, where senior executives and the Board will meet together to plan the next three or four years, and make changes to what it's doing in order to achieve its objectives. It may also be decided to have a separate risk management day, where it focuses on all of the risks that are captured in your risk framework, and steps taken to reduce those risks that may damage the company.

It's quite common for the Chief Executive to sit through the whole Board meeting in order to answer any questions and comment on any of the written reports. It is probably good practice to invite the Chief Financial Officer also to attend the Board meeting for that part of the meeting that includes the financial reports themselves. This is again to answer any questions and provide any comment about the financial health of the company.

The Board may occasionally decide to invite other members of the staff to attend who have a particular skill or area of specialty that the Board would like to know more about. It is also not uncommon for a Board to invite an outside person to attend a Board meeting as a guest speaker on a particular topic that the Board would like to also know more about. In all of this, the Chair is the key person in controlling the time so that the Board meeting is completed in a reasonable duration without dragging on too long.

The Board, for example, may receive reports from its various committees with recommendations where it'll make decisions based on what it's received. The Board also

should spend time planning its own activities in the following ways: agree on a Board calendar for the next 12 months, so that everyone knows what date and time the Board meetings are, and also the committee meetings throughout the year. (Most committees only meet two or three times a year.)

The calendar may also include a strategy day, or risk management day, or any other activity the Board decides it needs to meet for. The other part of the Board's role is to monitor its own performance. It often surprises me how often Boards do a performance review on the Chief Executive, but not on themselves. Whether you do it internally between your peers as a Board or invite an external consultant to do a review of the Board is up to you. Either way, it's important for the Chair to manage the process so that the Board is aware of any shortcomings or inefficiencies in how it operates and take steps to correct them.

I also suggest the Board puts aside in its budget some funds for professional development of all Board members throughout the year. Generally, the Chair will manage this process and recommend courses or other reading to individual Directors based on their needs to improve their ability to contribute to the total Board.

Of course, if the Board is a publicly listed company on the Australian Stock Exchange, it will have an annual general meeting where all shareholders are invited to attend. In recent times, we have seen an increase in shareholder activism if they're not happy about the way the company is operating in their interests. However, the shareholders have limited rights in that they can only approve the appointment of Directors at an annual general meeting or the reelection of them, and vote on the remuneration arrangements as indicated earlier. (This is a nonbinding vote on the Board.)

So in summary, your role as a director on a Board is a serious one and you should take it seriously. While a non-executive director has a part time role, in fact your liability exists for 365 days a year. Always make the effort to ask questions, seek more information, and read all of the Board papers, as well as participate fully in all Board decisions.

It is likely the Board will also enjoy some social time together such as a meal or drinks after Board meetings or at other times of the year. This is good, as it builds team spirit in the Board and you get to know your fellow Directors better. The problem is sometimes some individuals exhibit behavior that is not conducive to a team effort and the Chair is responsible for dealing with this. I'll talk more about this in the next chapter.

5. Board Problems

As I mentioned in the previous chapter, there will be times when an individual director can cause problems for the whole Board. This may be for a number of reasons. One, they get too involved in operations and start trying to give instructions to staff. Two, they disrupt Board meetings because they either, a) dominate the meeting and talk too much and not allow others to have their say, or b) don't say anything at all and sit through the Board meeting silently and contribute nothing. Again, it is the Chair's role to have an individual private conversation with that person to advise them that such behavior is not acceptable and provide advice on how they can change.

A Board cannot remove a director on their own, as it is entirely up to the shareholders or members. If you're appointed to a government Board or some other commercial Board, you may not know all of the Directors till you get there, and then find they're individuals who are difficult to work with. It's important you retain your own independent thinking to form your own decisions in voting on Board decisions, but at the same time contribute to a collegiate atmosphere, so that the team can work smoothly in providing the highest standards of corporate governance.

It may be that the Chief Executive is the problem and refuses to cooperate with the Board, and this is easily fixed. The Board has the authority in its constitution to remove or terminate a Chief Executive at any time and appoint a new one in their place. In the case of family companies, the founder is often the major shareholder, and tends to have dominance over the Board and can often remove or appoint Directors on their own in the case of a private company.

In the case of government Boards, only the minister can appoint or remove Directors, and any bad behavior is one for the Board to have to deal with. The best course of action here is for the Chair to meet with the shareholding minister and advise them that one individual director is causing major disruptions, which allows the minister to then make a decision on their removal.

Other Board problems occur when a major crisis happens that affects the company. This may be the fatality of an employee on a work site, or it may be a sudden global economic downturn, or other health impact such as the pandemic. This may require that the Board acts urgently in dealing with these as they occur. It is not uncommon for a Board to have a telephone or video hook up on a weekend or night time to discuss the crisis and decide what action needs to be taken to protect the company. Any decisions made, however, must result in a flying minute, which is then recorded in the meetings of the next Board meeting after ratification. The crisis may involve Directors being required to travel urgently to another location to see the issues for themselves and make decisions quickly.

For this reason, it's important that a Board has two important documents in place. The first is a business recovery plan, which allows the company to rebuild after the crisis has occurred. And the second is a disaster action plan, which allows the Board to quickly implement protocols should a crisis occur. This indicates who is responsible between the Board and the executive in taking actions to resolve the disaster or crisis.

Obviously, workplace health and safety is important for any company, and should a fatality occur on a work site, the Board needs to be able to respond quickly in dealing with it. In recent times, the Commonwealth and States have introduced industrial manslaughter legislation, which effectively means the Directors will be held liable for the death of an employee unless it can be proved that they had appropriate systems in place to avoid such events occurring.

The other Board problem that I have seen over the years is one of complacency. If a Board consists of the same people over many years, they almost unintentionally form a club within themselves where they agree to agree on everything. They form the attitude that if it's not broken, don't fix it. And that if nothing has happened in the past, that it probably won't happen in the future. This of course is the wrong attitude, and a healthy Board has robust discussion and disagreement from time to time in order to realize that they can't continue to operate in the way it's always been done in the past.

Your role as a director is to contribute to that robust discussion by forming an independent view and challenging the status quo if necessary to make the rest of the Board aware of issues they may have fallen asleep at the wheel on.

This brings me to the point about Board renewal. In the case of companies listed on the stock exchange, they are re-elected by the shareholders at each annual general meeting. However, in practice, they tend to stay in the role and are re-elected for some years. Generally, a director after five or six years has either developed the skills to be nominated as the Chair of the Board, or they should consider leaving the Board and allowing a new face at the Board table.

I met one Chairman who had been 28 years in that role and was very proud of it. As I told him, that's probably 20 years too long. Generally, a Chairman should think about finding a replacement for themselves after 10 years or so, but of course the constitution might dictate some of these rules for your company. But the Board should have a discussion about succession planning through its remunerations and nominations committee.

One of the other problems is that the Board may not have the skills it needs to deal with the problems of today. For this reason, I always recommend that a Board undertakes a skills gap analysis to identify what skills they are lacking around the Board table in areas of particular need for their company. These may be some of the following; strategic thinking, human resources, information technology, marketing, finance analysis or legal knowledge-skills relevant to that particular company or industry.

Once a Board has identified the gaps in their skills, they should then seek to find people with those skills to be available for appointment to the Board or election at the next annual general meeting.

6. Boards and Technology

One of the problems is that by the time people have gained enough experience to be appointed to a Board, they have started to get a few grey hairs. The older the average age of a Board, means the less they are able to understand the rapidly changing world of technology and how it impacts on their company. For this reason, you may consider introducing a younger Board member who has up-to-date knowledge of IT and social media.

Recent surveys have found that one of the biggest challenges Boards face is that of “hacking” or cyber attacks where outside parties attempt to infiltrate your IT systems and gain access to such information as, 1) your financial records, 2) your staff records, 3) customer records or other vital information. It is important that the Board understands how good its systems are to protect against such hacking attempts.

It should also be aware of the latest trends in technology that may allow a company to grow at a faster rate by using technology. Perhaps you need to establish an IT committee, that can gain outside expertise to recommend to the Board what it needs to do, even if the Directors don't fully understand it themselves.

I have seen companies close up completely because their competitors have gone past them through the use of the latest technology that the Board of the old company failed to consider or invest in. Other companies have used cutting edge technology to gain a competitive advantage in the marketplace. On that note, social media appears to be the strongest marketing trend for companies today. The traditional avenues of advertising through newspapers and magazines or other media, is not only expensive but fails to reach your target audience or customers. It's important that Directors understand the power of social media and how it can be used for the benefit of the company. All of this, however, needs to be considered in the light of privacy legislation where the Board has the responsibility to ensure the privacy of its staff, its customers and its suppliers.

For this reason, a good Board will be familiar with the Privacy Act 1988 and in particular another piece of legislation introduced in 2018. It is called the Privacy Amendment (Notifiable Data Breaches) Bill. This requires a company to advise the government if a data breach has occurred on any of its records. This may have occurred as a result of human error within the company or an external malicious attack. Companies with a turnover of less than \$3 million a year are not required to comply with the Privacy Act 1988. It's useful for a director to have a look at the privacy policies of other publicly listed companies to see how they address it and how strong your privacy principles are being followed in your company.

On another note, there has been a trend for Boards to use technology to operate more efficiently. These include software systems or portals that allow a director to access all of the required Board records through their computer or laptop in a secure basis. The Corporations Act 2001 has been amended to allow for electronic transfer of such records or information and indeed Board decisions by flying minute. The other issue for Directors who

are not IT savvy is the decision to approve expenditure on large software platforms, networks or hardware, often with large amounts involved. If necessary the Board may need to get independent advice from IT specialists to review any such proposal and monitor the installation project to ensure it will be on time and within budget over and above the management reports they get. It should also be in a language the Board understands without all the technical acronyms and jargon. A good Board will embrace technology and invest in it to grow the company.

7. Before you join a Board

A lot of potential Directors think about joining a Board without reflecting on the possible risks in terms of personal financial liability and reputational damage. They do this without properly investigating the company and the people in it.

I have often heard Directors say to me that if they'd known what they were letting themselves in for, they might have had second thoughts. The trouble is, it's too late by then because your liability starts from the moment you are legally recorded as a director.

For this reason it's important you do very thorough due diligence on a company before accepting any Board invitation, or sign the consent to act as a director. This includes you asking for a lot of company information on a confidential basis as part of your research. Using Google or other means, you can get a lot of information about a company and its past, and you should ask information such as where and when the Board meetings are held or the committees meetings, and have a look at the last two or three Board meeting packs and minutes.

Perhaps have a look at the company's constitution and what its strategic plan looks like. You should ask to meet not only the Chairman, perhaps some of the Directors, before you accept, and indeed the Chief Executive and other senior managers.

Ask yourself if this company is a place that suits your interest and skills for now, and you believe you can be allowed to make a meaningful contribution. Will your particular skills and experience assist in the company furthering its objectives? Ask them if they have a risk management process in place, and if any adverse risk incidents have occurred in the past. You should also ask if the company currently has any legal action either being taken against it, or the company itself has taken legal action against others. Has there been any evidence of this in recent years?

You need to know how independent you'll be allowed to be on the Board, how much you're expected to toe the line rather than form your own view. Understand clearly what's expected of you as a Board member and perhaps committee member, and obviously you may want to ask about the remuneration arrangements, or reimbursement of expenses.

I have seen cases where a potential director has been allowed to sit through a Board meeting before they accept the offer, so they can actually see the Board in action before making that decision. However, this might not always be allowed by that company.

You might ask for a copy of the letter of appointment that's going to be sent to you to see clearly what is stated in terms of all the matters that are important to you.

Have a look at the financial affairs of the company to see how solvent it is, and if it is financially healthy. Maybe meet with the Chief Financial Officer to get their view on the finances of the company now and going forward. It is too late once you're appointed to the Board to find out that for some years the company has been slowly going backwards financially, and when crunch time comes, your liability will start.

Finally, ask yourself, "How well will I fit with these people around the Board table? Do I want my name associated with this company? Can I add value to the Board? Will you have the time and energy to fulfil all your duties and responsibilities? Do you have any conflicts of interest? If you were a shareholder, would you put money into this company, and if not, why not?"

If any of this due diligence causes you concern, you do need to think carefully before allowing flattery to overtake reality. While it's nice to be invited to join a Board, you also need to be aware of what you're getting into once you are a member of that Board. Of course, you might say, "Well, if I'm not happy, I'll resign from the Board not long after I start." However, that's not going to do your own reputation much good as people will know that you've had a short term only, and will want to know why.

This chapter was really to focus on one of the important Board basics, that is do your homework before you join a Board.

8. Getting on a Board

As I said in my introduction, the idea for this book came from me talking to post graduate business students at university, and the fact that one day they might be interested in trying to obtain a Board appointment as part of their professional career. You may not be a university student, but you have the same aspirations, so let me give you a few tips that I would give graduates about getting on a Board.

1. Get a career coach or business mentor to advise you.
2. Keep investing a small percentage of your income in your personal and professional development.
3. Develop a lifelong love of learning.
4. Build a career plan with milestones over the years to where and when you want to be.
5. Network constantly in business circles.
6. Work smarter, not harder.
7. Learn to recognize opportunities before they pass you by.
8. Find your purpose in life in terms of your career.

Having said that, here are some resources you can use to find Board opportunities.

If you join the Australian Institute of Company Directors and pay a small extra fee each year, you will receive a weekly email with all the Board vacancies they have listed around Australia. A lot of these are not-for-profit Boards, but that's okay as a starting point, because at least you'll see it will show you've had some Board experience even if it's in a voluntary way.

The Director Institute also provides a list of Board vacancies. Another company I've found is called Board Directions which charges an annual fee and you receive weekly lists of Board vacancies for you to apply for. Don't be surprised however, if you find that all three sources have the same Board vacancies in a lot of cases.

Each State government and the Commonwealth government keeps a register of potential members for its own Boards and you can send your CV for inclusion on these registers at no charge.

Of course, I've said networking's important and it's important to get to meet existing Directors or other people in a position to recognize your ability to contribute to a Board, and there may be opportunities you don't even know about.

Of course, there are a large number of Board recruitment firms operating in Australia, including the major accounting firms and individual firms who specialize in this area. They're usually paid by the client to find a suitable director to fill a Board vacancy, and there's nothing wrong with you sending your CV with a covering letter to all of them indicating your willingness to be considered for any opportunities in the future.

Having said all that, it's important that your professional skills provide some evidence that you can make a worthwhile contribution at Board level. Keep in mind the role

of the Board is to work on the business and not in the business, and so they are looking for strategic thinkers who can analyze risks and finances of a company and look to the future. I often say a Board's role is oversight and foresight. That is not just looking at the past and monitoring it, but thinking outside the box about the future for the company.

I suggest you'll also need to be a good communicator, both in written word and verbally, and able to analyze large amounts of complex information quickly to form an opinion before a decision is made. You need to be an independent thinker, but at the same time a team player who can get on well with your fellow Board members and contribute in a meaningful way while accepting the majority view or decision.

Whether you want to be invited to be appointed to a family company Board, a public listed company, a private company, or a public unlisted company, or a government Board or a not-for-profit organization, you need to be able to demonstrate in your CV that you have the skills and experience to make a useful contribution.

As I often say to people, the hardest part is getting your first Board appointment. Once you have that under your belt, you'll find that the invitation for a second Board appointment will come faster, and then it tends to get even faster as you have more Board experience. Some people will only ever join one Board in their career, to either assist a not-for-profit organization, or because they are asked to, while others make a career out of being a full-time company director. I was fortunate to reach that point where I made my living from being a company director on multiple Boards, while at the same time providing corporate governance advice to Boards of other clients.

You need to be sure you've got the time for each Board though, as this is not a hit and miss role. It also needs to be a company that you think you can add some value to or an interest you have because of where they're aiming to get.

Finally, develop a career plan for yourself and good luck in getting on Boards in the future as the economy in Australia operates more effectively by having organizations governed by skillful and interested Board members.

9. A Good Board

So before we finish this book let me share with you what a good Board looks like and, from that, the opposite indicates a Board that is not so good.

We start with agency theory that states that the Board of Directors are the “agents” of the shareholders or members, the owners. It is the latter who vote to appoint the Board and, via the Constitution, give them wide powers to govern the company in the interests of those they are agents for. In turn the Board will appoint (and disappoint) the Chief Executive with wide powers to operate the company according to the direction of the Board. That includes the power to appoint other management and staff. So you can see the power starts from the owners and flows downwards. Poor governance is when the power flows upwards and the management starts telling a weak Board what is going to happen and that Board simply rubber stamps all such decisions. It is the Board that is accountable to the owners and not management, who in turn are accountable to the Board.

A well governed company will have a good Board who understand this issue and act accordingly. The first thing to consider is what size the Board should be (the Constitution will indicate the minimum and maximum size). In my experience a Board of about 6 or 7 people will provide the range of skills needed although a private or family company may only have 3 or 4 people. There is a lot of talk today about diversity and it seems to focus on gender. While that is important consider other ways to achieve diversity such as age, industry or other skills, ethnicity and geographic location.

A good Board will have a skilled Chair who can lead a group around the Board table towards reaching decisions. They are the first among equals but with no further powers than any other Director. They must establish a good working relationship with the CEO and all outside stakeholders. The Chair also provides leadership in mentoring each Board member and will often be the face of the company to the media or at company or other events. They will know all the rules of governance and ensure they are followed and they set an example of the highest integrity for the Board. A good Chair must be organized and decisive and able to manage their time well. They will often be an ex officio member of all Board committees, meaning they can attend any such meetings if they wish.

All the Directors on a good Board will know their legal obligations under the Corporations Act. These include the requirement to act in good faith at all times and in the best interests of the company and the need to act with due diligence and care in making all decisions. This means reading the Board papers when they get them and asking questions before the meeting so they are fully informed. It also means leaving your mobile phone outside the meeting and listening to all of the debate around the table and asking any questions at the meeting and stating your opinion without fear or favour. In the case of a charity or not for profit Board it means ensuring that all the requirements and regulations of the Australian Not for Profit and Charities Commission are also followed as well.

A good Board will have an agenda that covers all of the important matters about the company without getting in to operational matters. This agenda will include such standing items as the financial reports (including a cash flow forecast or projection as distinct from a cash flow statement). It will also include a report from the Chief Executive as well as a report on your Risk Management framework and any incidents since the last meeting. It may also include a Strategy Tracker to review progress on your 3 year Strategic goals and a Compliance checklist to ensure the company is complying with all relevant legislation and regulations. The agenda may also include other items that one of the Directors would like discussed although it is up to the Chair to decide if there is time for that at the meeting. I suggest some Board papers are marked "For decision" while others are only "For information" so that only the first group are actually discussed and decisions made while the last group is simply for reading by the Directors.

A good Board will have Directors and officers Liability insurance in place for both the Board members and the senior Executives of the company. They will all have read it and understand what it covers and. More importantly, what it does not cover in its exclusions. A good Board will also review all the insurances for the company in its Compliance checklist and Risk Management framework. They will also have a Code of Conduct for the Board that sets out the ethical rules in which to operate and the standards expected from all Directors. A good Board will have a thorough induction process for new Directors, under the supervision of the Chair.

A good Board will have a robust set of Committees, each with their own Charter. Each Committee will have an effective Chair and may include outside experts on some Committees. They will know that they only make recommendations to the full Board which will make any final decision. Good Board meetings will have robust debate and even disagreement at times but once a decision is made it is binding on all the Directors. The Chair should encourage all Directors to have a say on each matter but bring the discussion to a decision eventually. A good Board will keep accurate Minutes of all meetings and ratify any Flying Minutes between meetings at the next formal meeting. It is important that all Directors respect the confidentiality of all Board meetings. I have seen cases of Directors leaking information and decisions to outside parties, including the media, and that is not acting in good faith or the best interests of the company.

A good Board will have a budget for ongoing professional development for all Board members as well as the CEO and this is managed by the Chair. it will probably undertake a review of its own performance each year or every second year, either internally or with an outside consultant, as well as the annual performance review of the CEO. A good Board will probably meet in different locations, depending on how wide spread its operations are, and certainly visit company sites to see things first hand. All Directors will be expected to attend such functions and company events and not just the Board or Committee meetings alone.

A good Board will agree on a set of policies which explain the operational rules for the company and these should be well known by all staff. It will also have a policy on Corporate Social Responsibility to show its position regarding such things as the environment, the wider community, philanthropy and work practices in its supply chain. All

such policies will be reviewed each year and made well known to all staff and relevant stakeholders.

A good Board will have a strong succession plan in place to ensure they know when they need to replace the Chair or each Director and they have candidates already identified for such roles. They will have a remuneration policy in place that provides adequate reward for their efforts and that of the CEO but is aligned to the interests of the shareholders or members.

A good Board will be well prepared for the unexpected as per its Risk Management framework. This means having a Disaster Action Plan when a crisis does occur and a Business Recovery Plan after it does happen. Such a crisis may be another pandemic or a cyber attack on its data or a major fire that shuts down the business.

A good Board will have a calendar 12 months forward with dates for Board and Committee meetings as well as days for Strategic Planning or Risk Management on top of regular Board meetings and the AGM for the company. Good Directors will not miss any of these meetings or events, if possible.

Finally a good Board will have a clear understanding that they are the servants of the owners and will actively contribute to the growth and profitability (or mission if it is an NFP) of the company. Each Director will behave in a way that is respectful of the other Board members and management and staff of the company while still sharing their own views for the good of the company. A good Board will function smoothly and effectively at all times and achieve the goals it has set for the company and its owners.

10. Summary

I said at the outset of this book, it's not meant to be a technical guide to everything regarding Boards of Directors. It is simply an attempt to provide some of the basic information about how Boards operate, and hopefully it would have added to your own knowledge in this area.

There's a huge amount of resources available in the way of books, webinars, courses, and other advisors to fill in the details about Boards, and I wish you well on your search for that further information.

Feel free to email me at info@tappadvisory.com.au anytime to see if I can suggest resources that might assist you in your research or answer any questions you have.

Generally, most members of the public only think about Boards of Directors when something goes wrong with a company and we see it in the media. Behind the scenes there are thousands of Boards operating around Australia and in other countries who do good work in ensuring the company satisfies its shareholders and all of its stakeholders as a good corporate citizen. In my experience, being a member of a Board is a very enjoyable role and I've always left the Board feeling that I have made a contribution for the benefit of that company and its owners.

Hopefully now you have a better understanding of some of the legal structures of companies and what the role of a director is and the functions of a Board. I've also touched on some of the problems Boards have to deal with and the use of technology today. I've also tried to give you advice on doing due diligence before you join a Board and some tips on how to get on a Board. Finally I have described what a good Board looks like.

Thanks for reading "Board Basics" and I look forward to sharing further knowledge and information in the future.

Board Basics is designed to give university graduates, or other executives, looking to further their career to Board roles. It is not a technical book, but a simple overview of some of the key information you need to know about how Boards of Directors operate in Australia. A lot of the fundamental issues are relevant to Boards in most other countries as well.



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He founded his own company to provide consulting advice to Boards on corporate governance and other processes, and has been a keynote speaker at conferences in Australia and overseas on this topic. He published a book entitled, "So you Want To Be A Company Director," which is also available on his website store at www.tappadvisory.com.au along with this book on Board Basics and videos on Boards and Governance and general business.

His qualifications include a Master's Degree in Business Administration, and a Master's Degree in Law. He also has a Graduate Diploma in Applied Corporate Governance and completed the Advanced Company Directors course.

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