

**FIJI LAW SOCIETY CONFERENCE
1-3 AUGUST 2003**

**DIRECTORS' DUTIES AND CORPORATE GOVERNANCE -
A BEST PRACTICE GUIDE FOR FIJI DIRECTORS**

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**DIRECTORS' DUTIES AND CORPORATE GOVERNANCE –
A BEST PRACTICE GUIDE FOR FIJI DIRECTORS**

The paper is in three parts and provides best practice guidelines for directors in relation to their legal responsibilities and further suggests corporate governance procedures which are in line with international standards.

The paper is not intended to act as legal advice and does not purport to state the law as in Fiji, but is intended to provide Fiji company directors with a model of corporate governance that goes beyond what the law requires but is ethically and morally considered best practice.

It is not expected that the recommendations will apply to all companies in the same way. It is recognised that larger companies operate differently to smaller companies. However, the basic duties of directors are generally the same regardless of the size of the entity.

PART I

Purpose of the Companies Act 1985

The underlying purpose of company legislation is to:

- affirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk and the taking of business risks;
- encourage efficient and responsible management by allowing directors a wide discretion in matters of business judgment while at the same time providing protection for shareholders and creditors against the abuse of management power;
- define the relationships between companies and their directors, shareholders and creditors;
- provide basic and adaptable requirements for the incorporation, organisation and operation of companies; and
- provide procedures for realising and determining the assets of insolvent companies.

Corporate Governance

The board of directors is the body through which a company acts to achieve its objective and goals. In order to achieve this, the directors are responsible for:

- maximising benefits on the shareholders' investment and protecting the company's assets;
- ensuring compliance with the company's articles of association as well as the common law, the Companies Act 1985 and other relevant legislation; and
- implementing the resolutions passed by directors and shareholders.

Appointment of Directors

Companies operating in the current competitive environment require boards with highly qualified and focused directors. Therefore the selection of directors should be a carefully planned process. A directorship is no longer a figurehead position in a company, rather it is an active and dynamic role.

Directors should be selected on the skills and experience that they can bring to the board. The skills and experience of the board as a whole should be in as many fields as possible. A board which is comprised of persons from a mix of backgrounds and professions is best equipped to handle the diverse demands of running a corporation today. With their different experiences each director brings a unique value to the board which would not be present if all directors were of the same training, opinion or mindset.

Include a Balance of Executive and Non-executive Directors

The UK's Hampel Report states that the role of the board is to lead and control the company and that this cannot be effectively achieved without a balanced board. Therefore, the board should include a balance of executive and non-executive directors so that no individual or small group of individuals can dominate the decision-making of the board.

The New Zealand Institute of Directors recognises in its Code of Proper Practice that the mix of executive and independent directors will vary from company to company. However, to promote independence there should ideally be at least one non-executive director on every board. In the case of companies listed on a stock exchange and other large companies, the majority of directors should be independent.

Where CEO and Chairman are the Same Person

The Cadbury Report in England states that the chairman of the board is responsible for the balance of membership on the board. Should the chairman and the CEO be the same person, there should be a very strong contingent of independent directors on the board, with a recognised senior member amongst them. Such division should establish responsibilities at the head of the company and ensure a balance of power so that no one individual has unfettered powers of decision.

A Board Needs Independent Directors

The role of the director is to provide experience and objectivity on issues which come before the board. Independent directors therefore protect the integrity of the board by ensuring that the board does not merely rubber-stamp the proposals of the CEO. The Hampel Report states that the primary reason for appointing independent directors is to aid the development of effective company strategy.

A director who is independent in the above sense might be:

- a director who is not an executive director; or
- a former executive director who is no longer employed on a full time basis but nevertheless is capable of giving valuable input to the board from his or her past experience.

Diversity of Experience

While independent directors are recognised as being important, directors should not be selected only on the criteria of independence. The board must ensure that the directors can bring the necessary skills to the board. The Hampel Report states:

Most non-executive directors are executives or former executives of other companies. This experience qualifies them both in constructive policy making and in the monitoring role. Non-executive directors from other backgrounds are often appointed for their technical knowledge, their knowledge of overseas markets or their political contacts... We do not favour diversity for its own sake, to give a politically correct appearance to the list of board members or to represent stakeholders. But we believe, given the diversity of business and size of listed companies, that there are people from other fields who can make a real contribution on the board.

Delegation

Boards of directors may delegate some of their functions to board sub-committees. Examples of these sub-committees are remuneration, nomination and audit committees. All of these sub-committees require individuals with different sets of skills and knowledge. Furthermore, professional directors may bring important business relationships if the director's previous experience is aligned with the business of the company. Thus, before appointing a new director, the board must strategically evaluate its requirements and skill needs.

Accepting a Directorship

Any director who is considering assuming a position on a board of directors should seriously evaluate the following areas:

- the company's activities;
- the current board of directors and how they operate; and
- what the duties and responsibilities of the directors will involve once they are on the board.

Independent directors must take special care in evaluating these areas. Both the board and the potential director should undertake careful thought and research prior to the appointment.

Procedure for Appointment

The Hampel Report suggests that the procedure for the appointment of new directors should be formalised and transparent. To a certain extent the legislation in New Zealand has formalised the procedure for the appointment of directors. We have set out below the main points of the legislation regarding the appointment of directors in New Zealand, which are applicable to Fiji.

Definition of Director

New Zealand companies legislation (which in many parts constitutes a restatement of established common law principles) defines a director as "a person occupying the position of director of the company by whatever name called". This definition includes a person who:

- is required or is accustomed to instructing the board on what to do;
- exercises powers normally reserved for the board of directors; or
- exercises powers or duties delegated by or with the consent of the board.

A broader definition deems the following to be directors:

- shareholders who take an active role in running the business or in the decision-making process;
- company executives; or
- employees to whom the board has delegated duties or powers.

Minimum Number

A Fiji company must have at least two directors.

Qualification of Directors

There is no legal requirement that the director be a shareholder of the company, nor are directors required to hold any particular qualification. However, the articles of association of the company may contain qualifications of directors which must be met.

Disqualification

The following cannot be appointed or act as directors:

- a person who is under the age of 18 years;
- a person who is an undischarged bankrupt; or
- a person who is not a natural person.

Consent to Act as a Director

A person must not be appointed a director unless he or she has consented to be a director and has certified that he or she is not disqualified from being appointed or holding office as a director of a company.

First Directors and Subsequent Appointments

A person named as a director in an application for registration of the company holds office as a director from the date of registration. All subsequent directors of the company must, unless the articles of association of the company otherwise provides, be appointed by ordinary resolution.

Subsequent appointments of directors require a separate resolution for each director at a general meeting. The only exception to this arises where the company first resolves at the general meeting, without a single dissenting vote, to appoint two or more directors by a single resolution.

Every nomination for the office of director of a listed company must be forwarded by the company to all persons entitled to attend the annual meeting. This notice must be included together with, or as part of, the notice of meeting. An election cannot take place until such notice has been given.

Validity of Acts

Any defects in appointment or qualification that are discovered subsequent to appointment will not invalidate the past acts of that director.

Retirement and Re-election of Directors

Any person who is appointed by the directors (eg. a casual director appointed due to the retirement of a director) must retire from office at the next annual general meeting of the company, but is eligible for re-election at that meeting.

At least one-third of the directors of listed companies must retire from office each year at the annual general meeting. These directors are eligible for re-election at that meeting. Those to retire are those who have been the longest in office. The managing director may be exempted from rotation by the company's articles of association.

The view of the Cadbury and Hampel committees found that all directors should be required to submit themselves for re-election at regular intervals and at least every three years.

The King Report in South Africa recommends:

The term served by a non-executive director should be determined by the board and it should be the duty of the chair to ensure that any non-executive director who is not contributing to the decisions of the board, should not be re-elected and, if necessary, should be requested to resign and if they refuse, to remove them from the board.

RESIGNATION OR REMOVAL OF A DIRECTOR

Resignation

A director may resign at any time. The process requires that the director of the company deliver in writing notice of his or her resignation to the address for service of the company.

Subject to the articles of association of the company, a director of the company may be removed from office by ordinary resolution passed at a meeting called for that purpose or for purposes that included the removal of the director. The notice of the meeting must state that the purpose or a purpose of the meeting is the removal of the director.

Even after a director leaves office, he or she remains liable for acts and omissions and decisions made while that person was a director.

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PART II

[Part II looks at directors' duties and provides a summary of the legal standard best practice directors should follow]

GENERAL DUTIES

Directors' Duties

Directors have been viewed as trustees, agents, managers and caretakers of their companies. Whatever the director's precise role, he or she occupies a position of trust in the company. A director's duties may best be explained by the following legal standard from the Model Business Corporations Act in the USA:

A director shall perform his or her duties as a director, including his duties as a member of any committee of the board upon which he or she may serve, in good faith, in a manner he or she reasonably believes to be in the best interest of the company, and with such cases as an ordinarily prudent person in a like position would use under similar circumstances.

(sec 35, Model Business Corporations Act)

The duties of directors include both duties owed to the company and duties owed to shareholders.

The principal duties are to:

- act in good faith and in the best interests of the company;
- exercise their powers for a proper purpose;
- comply with the Act and the articles of association of the company;
- avoid reckless trading by carrying out the business of the company in a manner that does not create a substantial risk of serious loss to the company's creditors;
- not agree to the company incurring obligations where there are no reasonable grounds to believe that the company will be able to perform the obligation when required to do so;
- refrain from disclosing or making use of information obtained in his or her capacity as a director other than for the purposes of the company; and
- exercise reasonable care, diligence and skill.

A director also owes certain specific duties such as an obligation to:

- take reasonable steps to ensure that the share register is properly kept;
- disclose all material interests in transactions or proposed transactions of the company; and
- disclose to the board a relevant interest in any shares issued by the company.

The two key legal obligations are the fiduciary duty of good faith and the duty of care and skill. The duty of good faith relates to the integrity of the director's decisions and acts, whereas the duty of care and skill relates to the standard required of a director's performance.

Duty of Good Faith

A director of a company, when exercising powers or performing duties must act in good faith and in what the director believes to be the best interests of the company.

Conflict of Interest

A director must not place himself or herself in a position where personal interests conflict with the interests of the company. The New Zealand Institute of Directors suggests that a director who has a continuing conflict of interest of a material nature should consider resignation as a director of the company.

Personal Profits

A director may not accept a personal commission, gift or profit which arises in connection with his or her position as director. A director must ensure that any benefit gained through company activities goes to the company and not to himself or herself.

Required Disclosure of Interests in Transactions

A director is required to disclose to the board any interest in a transaction or proposed transaction with the company from which the director or his or her parent, spouse, or child will or may derive a material financial benefit.

The director must disclose the nature and extent of the interest and, if quantifiable, the monetary value.

The company should establish an interests register in which only such disclosures are recorded. The contents of the interests register should be disclosed in the annual report to shareholders.

Confidentiality

All matters concerning the company which are not known to the general public are confidential. Directors must not use confidential information for their personal advantage.

The rules regarding confidential or insider information also apply after the director has either left or been removed as a director of the company.

The Institute of Directors states that the office of director carries with it both legal and moral responsibilities. The legal responsibilities are addressed in legislation and common law, whereas best practice extends to include moral responsibilities. These responsibilities apply to both executive and independent directors. The Institute of Directors suggest:

(directors) should comply with the spirit as well as the letter of the law and remember that in addition to purely legal requirements there is a standard of ethical and moral behaviour against which their actions can be judged.

The inclusion of a standard of ethical and moral behaviour implies that the board has a responsibility for relations with all stakeholders of the organisation. However, there is a difference between responsibility and accountability. According to the Hampel Report:

the directors are responsible for relations with stakeholders; but they are accountable to shareholders.

Directors should be aware that they have responsibilities in a number of other areas. Many of these have been codified in legislation, for example, the reporting and accounting requirements.

Duty of Care and Skill

The standard is that a director, when exercising powers or performing duties as a director, must exercise the care, diligence and skill that a reasonable director with the same skills and qualifications would exercise in the same circumstances. For example, a director who was also an engineer would be measured against the decisions that would be made by a reasonable director who was an engineer. If a director has special knowledge, he or she will be held to a higher standard in light of that knowledge.

Obligation of Attention to the Affairs of the Company

We recommend that, at a minimum, a director should:

attend all meetings;

review available information to make informed decisions about actions to be taken;

review board documentation and other distributed material; and

monitor those activities delegated to him or her and report back to the board promptly.

These recommendations reflect the director's responsibility to oversee, rather than operate, the business.

Guidelines from the New Zealand Institute of Directors' Code of Proper Practice

In addition to legislation, the Institute of Directors' Code of Proper Practice provides guidelines in respect of directors' responsibilities. These guidelines apply equally to executive and independent directors:

- directors should ensure that they have the time to carry out properly their duties and responsibilities to the company;
- directors should be informed about the financial, social and political operations within the company;
- directors must be satisfied that they are in a position to make informed decisions and that all relevant information is being supplied to them in the decision-making process;
- directors must present to shareholders a balanced and understandable assessment of the company's performance and position. Often this will involve providing information additional to the minimum required by law;
- directors should be aware of all statutory and regulatory requirements affecting the company and, where applicable, the requirements of bodies such as the South Pacific Stock Exchange;
- directors must exercise the care and skill which can reasonably be expected of a person of their expertise;
- directors should not engage in short term trading in the company's shares or securities.

A person should consider whether he or she can meet these duties and responsibilities before accepting a directorship.

STATUTORY AND OTHER OBLIGATIONS OF THE DIRECTOR

Shares

A director has duties and faces liability concerning the issuing of shares, dealing in shares and any reduction of share capital.

Issue of Shares – General

The board of a company may issue shares at any time, to any person, and in any number it thinks fit subject to obtaining any necessary shareholder approvals.

If shares cannot be issued due to any limitation or restriction in the company's articles of association, the board may only issue the shares in accordance with the articles of association.

Generally, existing shareholders are given pre-emptive rights to participate in new issues of shares in proportion to their existing holdings, subject to any variation of this requirement in the articles of association.

Issue of Shares to Directors

Due to the special knowledge of the company available to them, directors are best placed to assess the true value of shares in a company. This information puts directors in an advantageous position when dealing in the shares of the company. Therefore legislation regulates share dealing to limit any resulting unfairness.

Directors are not permitted to participate in the issue of shares unless the scheme for such participation and the precise levels of entitlement for each person have been previously approved by an ordinary resolution of the shareholders of the company. There are some limited exceptions in relation to executive directors.

Dealing in Shares

The *CMDA Act 1996* ("the Act") regulates insider trading of securities in publicly listed companies. "Insider trading" is the buying or selling of shares in a company by a person who has the benefit of information not publicly available. Section 59 of the Act prohibits share dealing by any person who holds inside information.

Any director of a company issuing equity securities must submit to the board details of his or her holdings in such securities. Subsequently, details of any changes in holdings must be submitted to the board including:

- the number and class of shares in which the relevant interest has been acquired or disposed of;
- the nature of the relevant interest;
- the consideration paid or received; and
- the date of the acquisition or disposition.

The director should also record the same particulars disclosed to the board in the Interests Register.

The Institute of Directors' Code of Proper Practice effectively summarises the key policies which companies should put in place:

Directors of public issuers should ensure that their company has in place an approved procedure for the buying and selling of shares or securities in the company by directors or their relatives or associates. Directors should not engage in short term trading in the company's shares or securities. Directors should notify the board in advance of any intended transaction by them or their relatives or associates involving shares or securities in the company.

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PART III

Interests of a Director in Contracts

A director is regarded as having an interest in a contract, where, for example, the director is party to, or will or may derive a material financial benefit from the transaction, or has a material financial interest in another party to the transaction. Such interests include being a director, officer or trustee of another party, or the parent, child or spouse of another party who will or may derive a material financial benefit from the transaction.

A director is required to disclose to the board any material interest in a transaction or proposed transaction with the company. Details should be entered in the interests register operated by the company. Specifically, the director should disclose the following information:

if the monetary value is capable of being quantified, the nature and monetary value of the director's interest; or

if the monetary value cannot be quantified, the nature and extent of that interest.

Where a director is a member, or is on the governing body, of an entity with which his or her company is contracting on a regular basis, he or she can avoid repeated disclosure by submitting a general notice to the board and in the Interests Register.

Remuneration and Loans

A company is not bound to pay directors. The board may, however, authorise various forms of remuneration and benefits by the company to its directors, subject to any restrictions contained in the articles of association of the company. Such remuneration or benefits may come in the form of:

- payment for services;
- compensation to a director or former director for loss of office;
- the making of loans to a director;
- the giving of guarantees by the company in respect of a director's debts; or
- entering into a contract to do any of the above.

Being a director of a publicly listed company is a senior position and the level of compensation should reflect this. However, shareholders have a right to know that they are receiving value for money from their directors and as a part of that right should have access to remuneration information regarding directors.

The King Committee in South Africa recommend that:

There should be a separate full and clear disclosure of the total of executive directors' and non-executive directors' earnings broken down into headings such as fees, salary, share options, benefits, bonuses, etc. Directors' remuneration, including that of the non-executive directors, should be the subject of recommendations to the board by a Remuneration Committee with the majority of its members (including the chair) being non-executive directors.

Best Practice – Directors' Remuneration

These requirements are not mandatory in Fiji, but are suggested best practice for public companies. A director who votes in favour of authorising payments, benefits, guarantees, contracts or loans to other directors must sign a certificate stating that the payment, benefit, guarantee, contract or loan is fair to the company and stating the grounds for that opinion.

A director is liable for any unauthorised payments except to the extent that the director proves that the payment was fair to the company at the time that the payment was made or given. These conditions also apply to unauthorised loans made by the company to the directors.

The company's annual report must contain the total remuneration and value of other benefits received during the relevant period for each director, and any entries in the Interests Register.

It is generally recommended that shareholders should be invited specifically to approve all new long term incentive plans which potentially commit shareholders' funds over more than one year, or dilute the equity.

The New Zealand Stock Exchange Listing Rules reinforce this view by not allowing additional remuneration unless it is authorised by ordinary resolution.

Policy behind Packages

The Greenbury committee recommended that an executive director should have a reasonable proportion of his or her remuneration package directly linked to the company's performance, whether by annual bonuses, share option schemes or long-term incentive plans.

They also recommended that non-executive directors should not have the same incentive schemes as executive directors to prevent their independence from being compromised. While the Hampel committee agreed, they did not have the same objection to payment of non-executives in company shares. Payment in company shares is considered to be a useful and legitimate method of aligning the interests of the directors with those of the shareholders.

Accounting Records and Financial Statements

Accounting Records

Every company is required to correctly record and explain all transactions and determine with reasonable accuracy the financial position of the company. These accounting records must include:

- entries of the money spent and the money received each day and the matters to which such money relates;
- records showing the assets and liabilities of the company;
- records of any stocktaking during the year;
- a record of goods bought and sold that identifies the goods, the buyers and sellers, and the relevant invoices; and
- a record of the services provided and the relevant invoices.

These records should be open at all times to inspection by the directors.

The directors are responsible for ensuring that these records are kept. If the board fails to comply with the requirements of this section every director of the company commits an offence and is liable for penalty.

Annual Report

The directors are responsible for the preparation of the annual report to the shareholders at the annual general meeting.

Annual Financial Statements

The directors are responsible for the preparation of the financial statements to be presented to the shareholders at the annual general meeting. These statements must be prepared in accordance with generally accepted accounting practice and give a true and fair view of the affairs of the company.

In the case of holding companies, group annual financial statements are also required.

Additional Communications to Shareholders

It has been recognised internationally that reporting requirements under the law are not always adequate to present a balanced view of the affairs of the company. The New Zealand Institute of Directors' Code of Proper Practice for directors states that it is the duty of the board to present to shareholders a balanced and understandable assessment of the company's performance and position. Such reports will often involve the provision of information additional to the minimum required by law. In addition to the legislative requirements enumerated above, the directors' report should also state:

- that the financial statements are the directors' responsibility;
- whether an effective system of internal control is in place;
- whether the business will continue to be a going concern in the year ahead, and, if not, the reasons are to be disclosed and explained; and
- whether the corporate governance Code of Best Practice developed by the reports in the relevant countries are adhered to and, if not, in what respects there has not been adherence.

The Audit Committee

A properly constituted Audit Committee can make an effective and valuable contribution to the process by which an organisation is directed and controlled.

The New Zealand Institute of Directors' Code of Proper Practice has made the following recommendations to audit committees on their surveillance of the audit and the preparation of the financial statements:

- the audit committee should review all financial statements to be released by the company and review compliance with internal systems and statutory requirements;
- the audit committee should normally meet at least three times a year;
- the audit committee should be comprised only of independent directors and staff members attending as required by invitation of the committee. When this is not practicable there should be at least a majority of independent directors and the chairman of the committee should be an independent director;
- there should be a clear line of communication between the audit committee and the external auditors. The audit committee should meet with the external auditors at least once a year. For at least part of that yearly meeting no executive directors or staff members should be present;

- there should be a clear line of communication between the chairman of the audit committee and the head of the internal audit function, if any.

The audit committee should also ensure the independence of the external auditors from management.

Procedures governing Meetings of Directors

Notice of Meetings

All directors must receive a notice of meeting within a reasonable period of time before a directors' meeting.

Quorum Requirements

For the meeting to be valid, a quorum of directors must be present. Unless the articles of association requires a greater number, a quorum for a meeting of the board is a simple majority of the directors. No business may be transacted at a meeting of directors if a quorum is not present.

A meeting of the board may be held by a quorum assembling at the time, date and place appointed for the meeting. Alternatively, the method of communication can be through audio, or audio and visual, communication by which all directors participating and constituting a quorum can simultaneously hear each other throughout the meeting.

Minute Book and Attendance Register

The board must keep minutes of all meetings of the board and establish a record of directors' attendance at meetings.

PENALTIES AND LIABILITIES

Statutory Penalties

Both the CMDA Act 1996 and the Companies Act 1985 ("the Acts") sets out certain penalties for the various offences in terms of each of the Acts. This part prescribes the maximum fines and periods of imprisonment for various offences.

Civil And/Or Criminal Liability

Directors face extensive potential civil and/or criminal liability. Both the Companies Act and the CMDA Act stipulate the penalties to be imposed on directors and other persons for the pertinent offences. Fines and imprisonment, respectively, may be imposed.

There are certain defences that the directors may use in response to such charges, for example:

- the board took all reasonable and proper steps to ensure that the requirements of the Act were complied with; or
- the director took all reasonable and proper steps to ensure that the board complied with the requirements of the Act; or
- in the circumstances the director could not reasonably have been expected to take steps to ensure that the board complied with the requirements of the Act.

Prohibition of Indemnity

A company cannot exempt its directors from liability for any act or omission made in their capacity as directors. Nor can a company compensate directors for such claims made. The company can, however, pay for their costs in a successful defence of such a claim.

A director may obtain comprehensive insurance cover for civil liability at the expense of the company.

CONCLUSION

Directors' Duties Are Extensive

The duties of a director are both extensive and varied. They are not merely limited to the statutory and common law obligations stated in this publication. Companies should expect each director to perform specific and distinct duties, depending on the company type, structure and the activities it pursues.

Furthermore, a director's duty to a company may continue even after the director has left the company. Former directors remain liable for decisions made while they sat on the board. Confidentiality obligations will also continue.

Directors must ensure that they understand the nature of the business and ensure that they have adequate information provided to them for decision making. A directorship requires individuals to act professionally and competently and maintain appropriate levels of integrity towards the company and its shareholders. Failure to maintain such standards could lead to removal as well as civil and/or criminal liability for its directors.

Whilst high standards are expected from directors of public companies, we consider that these standards are based on sound principles and are largely of a common sense nature. It should therefore not be too onerous for a board of directors with the right mix of skills amongst its members to meet those standards for the benefit of the company as a whole and ultimately also the integrity of the market place.

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