# DUTIES AND RESPONSIBILITIES OF DIRECTORS AND OFFICERS

21ST EDITION

Professor Robert Baxt
AO FAICD*Life*

The Australian Institute of Company Directors is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 36,000 includes directors and senior leaders from business, government and the not-for-profit sectors.



Published in February 2016 by:
The Australian Institute of Company Directors
Level 30, 20 Bond Street
Sydney NSW 2000
T: 61 2 8248 6600
F: 61 2 8248 6633
E: publications@companydirectors.com.au
W: www.companydirectors.com.au

First edition published in June 1982.

Design by Kirk Palmer Design
Printed by Ligare Pty Ltd

National Library of Australia Cataloguing-in-Publication Data
Baxt, R. (Robert), 1938–
Duties and Responsibilities of Directors and Officers
21st Edition
ISBN 9781876604271
1. Corporate governance – Australia
2. Business law – Australia

# Contents

## Appendix 1 Cases referred to in this book 313

# Key terms

| | |
|---|---|
| ACCC | Australian Competition and Consumer Commission (the regulator responsible for administering the *Competition and Consumer Act 2010* (Cth)* |
| Act | *Corporations Act 2001* |
| ACLC | Australian Company Law Cases |
| ACSR | Australian Corporations and Securities Reports |
| AICD | Australian Institute of Company Directors |
| AJ | Associate Justice |
| APRA | Australian Prudential Regulation Authority |
| ASC | Australian Securities Commission (the former regulator for the Corporations Law in Australia) |
| ASIC | Australian Securities and Investments Commission (now the major regulator not only for the Corporations Law, but also for aspects of the insurance and superannuation industry. The responsible minister is the Minister for Financial Services) |
| ASX | Australian Securities Exchange |
| BJR | business judgment rule |
| CAMAC | Corporations and Markets Advisory Committee. See also CASAC |
| CASAC | Companies and Securities Advisory Committee. From March 2002, CAMAC |
| CCA | *Competition and Consumer Act 2010* |
| CL | Corporations Law |
| CLERP | Corporate Law Economic Reform Program |
| CLERP 9 | *Corporate Law Economic Reform Program Act 2004* |
| CJ | Chief Justice |
| COAG | Council of Australian Governments |
| FSR Act | *Financial Services Reform Act 2001* |
| J | Justice |
| JA | Appeal Justice of a State Supreme Court |
| ITAA | *Income Tax Assessment Act 1936* |
| Minco | Ministerial Council for Corporations |
| *obiter dictum* | An opinion by a judge in deciding a case, upon a matter not essential to the decision, and therefore not binding. |
| P | President |
| Privy Council | A United Kingdom court of appeal to which cases from countries in the Commonwealth could be referred. Australia no longer has that access, unlike New Zealand, but the decisions of the Privy Council are relevant to Australia as they form part of the common law. |
| RBA | Reserve Bank of Australia |
| TPA | *Trade Practices Act 1974* |

* All statutes referred to in this book are Commonwealth statutes unless otherwise noted. The traditional abbreviation 'Cth', meaning Commonwealth statute, will not be used.

# Foreword

It is now almost 40 years since I attended my first conference of lawyers. It was a conference convened by a then much younger Bob Baxt.

I remember distinctly, even though it is now so many years ago, listening to Bob's presentations and marvelling at how he was able to use the latest cases to illustrate where the law was going and why it was going there. At the same time he was also able to make what were very esoteric parts of the law amazingly entertaining, and at all times he dared – as many sadly don't – to give his personal view of whether the direction of the judges and the legislatures were right or wrong.

Reading the 21st edition of *Duties and Responsibilities of Directors and Officers* written by Bob brought all of these thoughts back to me.

This book masterfully takes the reader through the most up-to-date cases and legislative enactments in the way he did almost 40 years ago (the case law at that time obviously being much more limited than it is today). This is done in an entertaining and forthright manner, with areas of some debate being clearly articulated and Bob's wonderfully balanced views clearly enunciated.

The book covers everything that a director or someone wanting to understand what directors do needs to be aware of.

The basics, such as the structure of a company and indeed what a company is, are clearly set out. However, the more advanced questions, such as do directors owe a duty to society, are also dealt with.

The publication in my opinion suits not only the first-time reader of matters such as this, but also those who have been around for years and who need updates and indeed welcome the thoughts of a clever and well-experienced mind such as Bob Baxt's.

This publication is a must for all who are involved in governing, both for profit and also not-for-profit entities.

In my opinion it should sit near or on each of our desks and be the first port of call, not just during a storm but indeed before one occurs.

Having read this 21st edition I continue to be in awe, as I was 40 years ago,

of how Bob can be so complete in his understanding of the issues involved and yet so entertaining and forthright in his views.

**David Gonski** AC
7 January 2016

# Preface

It is with much pleasure that I agreed to undertake the writing of the 21st edition of this text. It is my understanding that this has now become a standard reference work for members of the Institute. I also understand that it is widely used by many lawyers, business persons and persons involved in various areas of the Australian business community.

The Australian Institute of Company Directors undertakes a number of important tasks; one of the tasks that I have been heavily involved with over the years has been the education of persons who wish to become directors of companies (whether large or small companies, whether their shares are listed on the stock exchange or they are small family corporations) to recognise the legal environment in which they operate and the need to ensure that their companies and their conduct associated with their companies comply with the laws as developed by the Government of Australia. In addition to the laws that are enacted in Australia, there is now a growing emphasis being placed on companies complying with a culture of governance that is administered by an organisation under the auspices of the Australian Securities Exchange. The Institute is a member of this organisation, which has now published three versions of its rules of governance which have an important influence on the way companies should behave and do behave in the context of the Australian regulatory environment. However, it is vital that directors and officers of companies understand that whilst this culture of corporate governance is very important it is not necessarily, and in most instances, is not the law. The rules of corporate governance may well be vital to the way in which companies educate their directors and their staff to behave in order to ensure that as many companies and individuals as possible should behave with that particular culture in mind.

Despite the fact that there have been many financial collapses, and various reports have been issued from bodies such as the Senate Economics References Committee, as well as from many media commentators, relating to significant losses being suffered by companies both large and small in Australia, the main proposition that directors and officers should be aware of is that the law of Australia

is as delivered by the Commonwealth Government and the State and Territory Governments in relevant areas.

The continued demand for increased penalties to be included in the relevant corporations legislation, being made by the current Chairman of the Australian Securities and Investments Commission, Greg Medcraft, and the insistent calls in the Australian Senate in particular, for the establishment of royal commissions to examine the fact that millions of dollars have been lost by large and very prestigious financial institutions (which fortunately and responsibly, in my view, have been resisted by the Federal Government) does not change the fact that the law, and the way in which it has to be complied with by company directors and officers, is the law of the Australian Parliament and the Australian courts, not the wishes of organisations that may be created by different sections of the community.

The Australian Securities and Investments Commission has a major responsibility in administering an ever-increasing range of legislative provisions contained mainly in the Act and related legislation. There is likely to be a significant increase in the laws of the land as a result of the Commonwealth Government's decision to implement the great majority of the recommendations of the Murray Report into the Australian Financial System. We have yet to see what these recommendations will look like when translated into law but they are likely to place even greater onus on the work of the regulator, and also likely to contain an increased range of potential penalties for breaches of the law that may occur.

Fortunately, Australia is blessed with a range of courts (the Federal Court of Australia and the Supreme Courts of the States and Territories) which have performed the important tasks of assessing and ruling on various disputes that arise as a result of the operations of companies. Our regulators have also provided a comprehensive and sustainable set of guidelines to assist company directors and their advisers in meeting the challenges which their organisations have to meet in this regulatory regime. It is important to note that these guidelines and the rules of corporate governance from the ASX Corporate Governance Council do not have the backing of the law, although they are generally regarded as sensible and rules that should be complied with by directors and officers. (Some of the ASX Listing Rules do have the backing of the Act by virtue of specific provisions in the Act.)

The High Court of Australia has indicated in a leading judgment, which has yet to be fully tested, that directors owe their duties to the company – the shareholders – and not to other stakeholders. That particular guiding principle can be varied, and has been varied in very special cases by specific provisions in the legislation. For example, the environment is seen as a very significant and important stakeholder interest, and the Act contains a specific instruction to directors of companies to outline what their companies have done or are doing in the context of the environment protection regime.

In this 21st edition, I have included a separate chapter on the influence and impact of the corporate governance movement, and the so-called rules of risk relating to risk management and related matters. I also discuss the impact that the various state organisations such as the Independent Commission Against Corruption (ICAC) in New South Wales and similar bodies in other states have had. The courts have tended to differentiate between the duties that are owed by directors and the context of the operation of these laws to the rules of corporate law (one such decision is discussed in the body of this text).

One of the most significant developments since the last edition of this book appeared has been the extraordinary growth in class action litigation. This has usually been supported by smaller groups of shareholders or investors, usually supported by litigation funders, and has led to a considerable increase in the amount of litigation the directors of companies have to face in a variety of scenarios. The courts have so far rejected propositions that minority shareholders should have a direct say in the running of company meetings and matters to be discussed at those meetings where such power has not been given to them. The courts will not remove the responsibility for managing the companies from the board of directors unless the constitution of the company directly requires it to do so. But there will be further challenges in this area and it will be interesting to see to what extent ASIC will intervene in these matters, if at all.

In this edition I deal with many of these issues, I hope in a helpful and useful way, and provide what I trust will be some useful guidance to directors and others in seeking specific professional advice if problems arise that need further examination. Whilst the pace of legislative development has been very slow in 2015, it is likely to be significantly increased in 2016 and beyond and new issues will come to the

fore which may need to be addressed in the context of the background set out in this book.

I wish to express my thanks in producing this edition to a number of people. I start with three young colleagues at Herbert Smith Freehills. Katie Bull, David Douglas and Neil Jourbert, all of whom worked with me as paralegals during 2015, will have either commenced or will commence formal legal 'apprenticeships' in the Melbourne and Brisbane offices in 2016. I wish them well and I also thank them for their considerable assistance in producing this edition.

Alicia Mayer Beverley, who had worked for a number of years with the Institute, and who was a fundamental part of the production of the 20th edition, has also played a significant part in producing this edition. She commenced a new full-time position before this latest edition was completed, but her valuable assistance up to that stage has proven extremely important. Javier Dopico, who is now the Education Specialist at the Institute, took over Alicia's role and has been extremely helpful in helping me to finalise the book. I am also very indebted to Lorna Frick, an independent secretarial operator, who has done the bulk of the typesetting for the book, as was the case with the 20th edition.

**Robert Baxt** AO FAICD*Life*
Emeritus Partner Herbert Smith Freehills
Professorial Fellow University of Melbourne

# Chapter One

# Introduction

This book deals with the *Corporations Act 2001* (the Act) and related general law and other statutes that impact the duties and responsibilities of company directors. The relevant law is essentially Commonwealth law; however, because of constitutional difficulties faced by the Commonwealth Government, the Act is necessarily a combination of Commonwealth, state and territory legislation, with the states and territories referring certain legislative powers to the Commonwealth. This referral must be refreshed every five years.

The other sources of law I discuss in this book are the common law (also referred to as the general law), and other related legislation. This book refers to the relevant organisation as either a corporation or a company.

Until 2010, the Australian Securities Exchange (ASX), formerly the Australian Stock Exchange, played a major role in regulating the operation of rules in this area of the law. As a result of significant changes to the Act in 2010, this responsibility has shifted to the Australian Securities and Investments Commission (ASIC), which is now the regulator. Nevertheless, the ASX continues to play a significant role in the listing of securities on its exchange. While a new operator, Chi-X, has been registered and is allowed to compete in the market, the ASX remains the sole regulator responsible for the listing of securities of companies.

The powers vested in the ASX under ss.793A–793E and 1101B of the Act are now largely powers exercised by ASIC; they provide that ASIC is responsible for

the legal operation of the 'Listing Rules', which are overseen to a certain extent by the ASX, as well as the market rules, which are applied to both the ASX and Chi-X's operations.

The ASX's previous role of overseeing certain practices regarded as irregular or that raised problems (for example, market information and the activities of certain brokers) has now been vested in ASIC. Where appropriate, these are discussed in the body of this work.

Other regulators that also oversee the operations of companies, their directors and officers, are the Australian Prudential Regulation Authority (APRA), the Reserve Bank of Australia (RBA) and, in the context of competition law issues, the Australian Competition and Consumer Commission (ACCC).

Since the global financial crisis, the relevant background to the regulation of companies and their directors and officers is best described as 'turbulent'. Many challenges have arisen for companies and their directors and officers. In line with overseas influences and developments, and despite the robustness of the Australian economy, many corporate collapses occurred in those years, some of which were high-profile companies. As a result of increased agitation, both in the media and elsewhere, a plethora of further legislation and regulation governing the affairs of companies and their directors and officers, has been introduced.

A significant number of reports have been prepared by various bodies, including the Australian Senate, the most significant in many respects being the 2014 Senate Economics References Committee Report into the operations of ASIC, *Performance of the Australian Securities and Investments Commission* (2014), and the Murray Report into the Australian Financial System. These reports are discussed in some detail in the body of this work.

Executive remuneration legislation is another important area of new regulation for company directors, and is covered in Chapter 9. I also discuss several high-profile cases, including the James Hardie cases (arising out of the reorganisation of the James Hardie group of companies (2009, 2010, 2011, 2012)), the decisions in *ASIC v. Healey (No 1) and (No 2)* (2011), and other cases in which the regulator has chosen to pursue areas in the disclosure regime (the *Fortescue* case (*Forrest v. Australian Securities and Investments Commission*

(2012)), which ASIC lost). In recent years, however, the number of cases dealing specifically with critical issues relating to directors' duties has been less frequent.

The chairman of ASIC, Greg Medcraft, has recently raised several critical issues; for instance, he believes the penalties available to the courts to hand down in cases in which there are breaches of the law are too low. David Murray, the head of the recent Murray Inquiry into the Australian Financial System supports this view. In the report presented on 7 December 2014 to the government, several significant changes have been suggested to the way in which corporate regulation should take place. These will be discussed as appropriate in this book. Other concerns relate to the apparent absence of a 'culture of compliance', which was referred to more recently by Greg Medcraft in submissions to the Senate Estimates Committee. I will briefly discuss this issue as well.

## 1 The legal and regulatory framework

### 1.1 A brief historical background

This work, written primarily for directors and officers of companies, is intended to provide an overview of the major legal responsibilities and duties imposed upon directors and officers in carrying out their roles. Some of these duties and responsibilities are derived from the national statute in operation: the Act. This overriding Commonwealth legislation became increasingly important because of the *Wakim* litigation (*Re Wakim; Ex parte McNally* (1999)). In that case, the High Court of Australia held that the national Corporations Law (CL) scheme, in force at the time, was unconstitutional. By a 6:1 majority, it was found the states did not have the power to confer certain jurisdiction on the Federal Court, as the various state *Jurisdiction of Courts (Cross-Vesting) Acts* and various versions of the Act purported to do. To overcome this difficulty, the states and the territories agreed to confer certain powers on the Commonwealth, resulting in the enactment of the Act in 2001. The financial and other difficulties mentioned earlier led to greater cooperation between the states and territories with the Commonwealth Government through the establishment of the Council of Australian Governments (COAG). While the previous Labor Government wished to see the states and territories

transfer more of this area of regulation to the Commonwealth, the current Liberal-National Government seems inclined to reverse this particular course of action.

## 1.2 An overview

The duties and responsibilities of directors emanate not only from the Act, but also from the common (or general) law: the body of precedent developed as cases have been decided in Australia and in other jurisdictions, especially the United Kingdom (UK). While there is a tendency for Australian cases to be the dominant sources of these common law rules, cases from the UK, and increasingly the United States of America (US), play a part in the interpretation of our law. In addition, the rules of corporate governance now commonly play a part in providing courts with guidance on how directors' duties should be evaluated. In my view, it is a mistake for these rules to be given such a high profile without the important backing of corresponding legislation to ensure they are given legal effect. My concerns are particularly well illustrated by the problems that arose from the decision in the *Bell Group* case (2012), which is discussed in Chapter 11 of this book.

This book discusses the operation of the relevant rules (statutory and common law) as they affect directors, although most of the rules also apply to officers; when there is an important distinction, it is noted.

As well as the rules of company law, there is an ever-increasing range of other rules that affect the obligations of directors and officers of companies. These include responsibilities under the competition and consumer laws, environmental protection law, workplace health and safety law, equal opportunity law, taxation law, privacy principles, and the implementation of rules on climate change.

The *Commonwealth Criminal Code Act 1995* ('the Criminal Code'), which only came into legal effect in 2001, will potentially play a significant role by placing a premium on compliance. As such, risk management and corporate compliance have become central features of the organisation of a company, and of compliance by its directors and officers. In addition to the relevant statutory regimes that are in place, there is a growing body of 'quasi regulation', described broadly under the term corporate social responsibility (CSR or corporate governance), to which I have referred earlier. In my view, the emphasis on CSR or corporate governance in highlighting how directors should behave plays too significant a role in our

community. We need legislative backing for this initiative to be given its proper place 'in the law'.

The Act is the fundamental statute referred to in this work; its duties and responsibilities apply to public and private (proprietary) companies. However, a new form of company, the one-person or one-director, one-shareholder company, introduced by the *First Corporate Law Simplification Act 1995* has, in a sense, provided more flexibility for small businesses with clarification of the law.

As far as company directors are concerned, the most significant changes occurred in the early 2000s through the introduction of the 'statutory business judgment rule' (BJR) in s.180 of the Act. This rule was intended to 'soften' the effect of the harsher readings of the directors' duty of care by the courts. While other rules were introduced into the legislation (namely ss.189 and 198D), as a whole these are considered to be largely ineffective (see a discussion of these provisions in Chapter 5).

At the same time the BJR was introduced, a new statutory derivative action was introduced for shareholders (members), which was intended to overcome rules that previously limited their ability to enforce claims, either against the company (and its directors) or against outsiders. At the time of writing, there is still on-going discussion and debate about how the BJR should be extended to further protect company directors (and officers) in appropriate circumstances (if at all). Most recently, through its report *Business Set-Up, Transfer and Closure* (September 2015), the Productivity Commission has proposed a variation to the BJR to allow directors and others involved in rescuing companies in, or near insolvency, greater flexibility so they can avoid falling foul of the general prohibitions against insolvent trading. The report contains a detailed consideration of the proposal which is discussed in Chapter 7. In the US, the BJR is not a statutory rule but provides a greater, more effective safe harbour to directors than the current legislation in Australia. The Australian Institute of Company Directors (AICD) has considered how the 'Honest and Reasonable Director' defence would modify this rule, which I consider in this book (see Chapter 5).

## 2 Further regulatory reform

In the 19th edition of this book, I discussed the importance of the Wallis Report into the Australian Financial System. A further major inquiry resulted in the Murray Report, which was presented to the Federal Government at the beginning of December 2014. On 10 October 2015, the Federal Government provided its official response to the Murray Report. At this stage, the observations made by the government are very high level but do suggest there will be significant changes to the way ASIC will operate, and to the way the financial markets will be regulated. I will not be discussing the detailed responses of government in this work.

The Wallis Report paid specific attention to the interests of investors, in particular, small investors (of which Australia boasts the highest number), and the way in which they might be adequately protected within the financial services market. In more recent years (indeed, since the publication of the 20th edition), the difficulties facing investors in this context have grown significantly. The 2014 Senate Economics References Committee Report into the performance of ASIC, referred to previously, is a clear illustration of these concerns.

Litigation in relation to claims being made against companies and their directors and officers for alleged breaches of the law, including misleading or deceptive conduct, market malpractices and related allegations, has grown significantly. This has been supported by the development of a litigation funding industry, which has enabled many more class actions to be brought. The litigation funding industry grew following the High Court decision in *Campbell's Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006), in which the High Court ruled that public policy did not prevent an organisation or person from providing funding to persons to bring proceedings in the courts in return for a share of the proceeds of litigation.

The old English general law rules about funding litigation were no longer a bar to arrangements known as 'litigation funding'. In effect, the High Court determined that, provided the arrangements put in place between the litigation funder and the relevant party were reviewed by the courts, plaintiffs (and defendants) in litigation could obtain financial support for the pursuit of litigation. In addition, class actions involving cases brought on behalf of a group of shareholders or others, and discussed in various chapters in this book, have relied on such funding.

In the US, the popular use of contingency fees (lawyers acting for the relevant parties take a percentage cut of the damages or award they obtain, but receive no payment if their case is lost) has led to a proliferation of litigation against directors and their companies, especially when companies fail. This type of litigation is becoming more prolific in Australia as litigation funders support shareholders in this area. The operation of litigation funding has been under constant review by the Commonwealth Government and the Standing Committee of Attorneys-General. However, while the government has developed some rules, many questions remain unanswered. In the case *Melbourne City Investments Pty Ltd v. Treasury Wine Estates Ltd* (2014) (*Treasury Estates*), the Victorian Court of Appeal ruled against certain entrepreneurial arrangements that encourage litigation funding in that state. A recent attempt to seek High Court review of this decision has failed.

There are many litigation funders operating in Australia but only one, in my view – IMF Bentham Ltd (IMF) – has established itself in a commercially sound fashion, including listing its shares on the ASX. There are also smaller litigation funders, and these primarily operate from overseas. ASIC, and other parties, have challenged some of their settlements; in fact, courts have actually intervened to reset arrangements reached as a result of litigation being offered.

In *ASIC v. Richards* (2013), ASIC intervened in a class action settlement taken to the Federal Court for approval, which arose out of the collapse of Storm Financial Ltd. The Full Federal Court accepted ASIC's argument that the division of the settlement between the different classes of investors was unfair as a result of inadequate disclosure provided by the parties' solicitors, and ordered the distribution arrangement be set aside.

The Federal Government has generally taken the view that litigation funding is legal and there should be no significant barriers to its operation. A number of companies have been established within the regime governed by the management investment scheme legislation in the Act (Chapter 5) and generally speaking, the courts have found many of these arrangements not legally viable. As indicated earlier, the *Treasury Estates* decision has also challenged some of the more entrepreneurial arrangements that have been introduced.

The introduction of some form of contingency fee arrangements in Australia is growing in support, including through a recent Productivity Commission report,

*Access to Justice Arrangements* (2014). However, at the time of writing, no final decision has been reached in relation to its recommendations. In the eyes of many lawyers and others, attempts to regulate the operation of litigation funders through the provisions of the Act, and in particular the changes brought about by the *Financial Services Reform Act 2001*, have not been entirely successful in dealing with this particular form of operation. Suffice it to say, there are still many entrepreneurial, and quite exciting from a purely theoretical point of view, developments in this area. Furthermore, investors and others have been provided with significant opportunities to seek legal remedies when corporate collapses have occurred.

Many of the reforms described in the previous edition of this book, which came about through the operation of the Corporate Law Economic Reform Program (CLERP), remain present in the current legislation. In more recent years, the law reform agenda was driven to a significant extent by the Corporations and Markets Advisory Committee (CAMAC) which, regrettably, has been dissolved. The Federal Government decided that it needed to abolish this body for cost-saving purposes, in line with its determination to reduce the budget deficit; this move has been heavily criticised by the legal profession and many organisations. Law reform is now effectively carried out through the operations of the Australian Law Reform Commission (ALRC) and by Treasury and its officers. It is expected that legal and other professions will continue to provide assistance, as they did to CAMAC.

The previous Labor Government, elected to office in November 2007, placed a high priority on areas of corporate law reform. One particular initiative was to tackle the problem raised by CAMAC in its report *Personal Liability for Corporate Fault* (2006), which established that there are well over 600 statutes (now increased to over 700) that use a reversal of onus of proof or strict liability regime for evaluating company liability. CAMAC described this undermining of the principle that a person is innocent until proven guilty as totally unacceptable. Following that report, and agitation by bodies such as AICD amongst others, COAG was vested with the task of encouraging all states and the Commonwealth Government to initiate programs to review such legislation, and to embark on a reversal of these pieces of legislation. A significant number of states have undertaken such reviews.

However, there are still those that have not delivered the necessary steps to remove this particular legislative initiative, as discussed by COAG in its 2010 report *National Partnership Agreement to Deliver a Seamless National Economy: Performance report for 2009–10*. Currently, the ALRC is conducting an inquiry into the way in which Commonwealth legislation in Australia interferes with freedom of corporations and other persons 'governed' by the Commonwealth Government. It will be interesting to see the result of this report due in late 2015, especially as we celebrate the 800th anniversary of the Magna Carta, which established the important principle that an individual would be treated as innocent until a relevant court ruled against that person.

## 3 More recent regulatory and legislative initiatives

Since the election of the Liberal-National Government in September 2013, the program for corporate law reform has flagged considerably; and with the abolition of CAMAC, reports dealing with rules relating to conduct at annual general meetings, the review of financial management and investments through legislative arrangements within the Act, and crowdfunding, amongst other matters, have all stalled. This is a pity, as much of the work done on these matters is significant, and indeed, New Zealand and other jurisdictions have picked up some of the work undertaken by CAMAC. The Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014, which had its origins with the previous Labor Government, has now been passed. One important reform which will make many directors and their companies much happier has been to replace the so-called 100 member rule (which enabled members of a company to seek a special meeting of the company) and to now require that for a meeting to be called, 5% of the relevant members or shareholders must make the call for the meeting.

Unfortunately, the political parties have not agreed on other earlier proposed changes, including reforms to the dividend law (s.254T of the Act).

In the last few months, reforms to corporate law have largely concentrated on questions relating to deregulation (colloquially, these pieces of legislation are referred to as 'Red Tape Bills'). This legislation, generally referred to as the omnibus repeal bills, contains significant initiatives to reduce over-regulation. It is hoped that further

efforts will be made in this regard; a similar approach has been taken by ASIC.

The government has also in December 2015 introducted into Parliament the Insolvency Law Reform Bill 2015 (updating earlier drafts). What has not been included in the Insolvency Law Reform Bill is a proposal that Australia introduce into its legislative arrangements a US-style 'Chapter XI', which provides a far more sophisticated and entrepreneurial legislative framework. It aims to ensure that companies with much to offer, but which have suffered significant setbacks because of world economic conditions, should be given another chance to operate through a rearrangement, or similar initiatives or devices, without going through the pain and costs of liquidation. Also of importance are the proposals in the September 2015 Productivity Commission Report entitled *Business Set-up, Transfer and Closure*.

Finally, as noted earlier, the government has now issued its initial high level response to the recommendations in the Murray Report. By and large, the government has accepted all of the recommendations (bar some minor ones) in the Murray Report; but we will have to await the formal response and the draft legislation dealing with the very significant new powers to be vested in ASIC and the new regulatory regimes to be introduced, before I am able to provide a more conclusive assessment of the new regime.

## 4 Further developments

While there have been fewer cases in the corporate law area in relation to directors' duties and associated matters in the last 18–24 months than there were in the period preceding the 20th edition of this book, these cases will continue to arise from time to time. They are discussed in the *Baxt Report,* which I author and is published by Thomson Reuters. Many cases are also discussed in my *Directors Counsel* column in AICD's *Company Director* magazine.