

545

SOCIETY OF BUSINESS COMMUNICATORS

LUNCHEON MEETING, SYDNEY

THURSDAY 19 APRIL 1984

COMMUNICATING BUSINESS

April 1984

SOCIETY OF BUSINESS COMMUNICATORS

LUNCHEON MEETING, SYDNEY

THURSDAY 19 APRIL 1984

COMMUNICATING BUSINESS

The Hon Justice MD Kirby CMG *

Chairman of the Australian Law Reform Commission

THE CHANGING ROLE OF CORPORATE GOVERNMENT

The essential clue to understanding the changing role of corporate government is the realisation of the heightened importance of the principle of accountability. Indeed, accountability is a central concept of life today in both the public and private sectors in Australia. In the public sector, we have moved far beyond vague notions of ministerial accountability. Now, we have a very active regime of laws and practices designed to render truly accountable the public servant responsible for administrative action. The panoply of guardians is extensive indeed. In the Federal sphere it includes:

- . The Ombudsman
- . The Freedom of Information Act
- . The Administrative Decisions (Judicial Review) Act
- . The creation of the Administrative Appeals Tribunals
- . Foreshadowed legislation on privacy protection
- . The Human Rights Commission

All of these organs provide greater accountability in the public sector.

In the private sector, the corporation has proved one of the most brilliant inventions of the capitalist system. To a very large extent our economy depends upon the corporation and its success. Major companies own or control very considerable resources. They employ the majority of our working population. It is therefore natural that the community, responding to this great power, imposes duties and obligations on corporations and their officers. Lately these duties and obligations have increased. Much of the discussion about the rules to govern corporations has arisen from a feeling that modern management has been inadequately accountable to shareholders, investors, voting owners, employees and the general public.

With the growth of large corporations, including multinational corporations, and the diversification of shareholdings, the capacity of the individual shareholder to render the management of the corporation accountable (and to point the company in directions wished for) has diminished. In reaction to this feeling of loss of power, we have seen lately the growth of corporate government rules to ensure accountability where the control and management of the company has become divorced from its owners and workers. For the most part the moves, which are not confined to Australia, have been directed at public companies. However, large private companies where shareholders assume a passive role in the management of the company, cannot be left entirely out of account.

Nowadays, the performances of company directors in Australia are being scrutinised more closely than ever before. They are called to account for their stewardship more often and more intensively than in the past. The make-up of boards of directors is changing. There has been an increase in the number of truly independent directors. A greater degree of professionalism is now required at the boardroom table. The procedures of boards are changing to ensure a more effective review of the company's activities. This is where communication to the board of directors comes in. Unless there is an adequate flow of data, adequately presented, the directors will not be able to play an effective function in the government of a large, complex modern corporation.

It is only 20 years ago that the London Times published an advertisement for a 'titled person required to add distinction to the board of directors of a wine company'. I am sure that titles are not a disadvantage today. But they are now scarcely a prerequisite for the legal and practical duties of the modern company director. From being an often passive spectator 20 years ago, the director nowadays has a much more active participation in the government of the company. The change has been gradual. But it has been fundamental. And it is now widely acknowledged. It began in earnest in the 1960s. In 1970 Professor Myles Mace of the Harvard Business School was able to say:

There were really no major problems in being a director in the good old days. Meeting were pleasant, with no controversy. Board members were interesting people ... and it was good to get together once a month and have a luncheon and chat. No homework was required, nor was it expected. Anyone who did homework was regarded as a maverick. Meeting were short ... Nobody worried about responsibilities to stockholders or the possibility of law suits ...

This traditional passive role of the company director seemed entrenched. It usually suited the management executives who, at that time, did not tend to encourage intervention by outside directors. Changing legal requirements, the growth of multinational corporations, the spread of developments beginning in North America under the stimulus of law suits, and technological change have all produced a demand for more accountable company directors in Australia. Lingering self-satisfaction was destroyed by a turbulent environment of take-overs and a series of major corporate crashes in the 1970s. The failure of companies could be attributed primarily to bad management. But the question began to be asked : what were the directors doing? What was their use if they were not directing, in some ways and to some extent, the affairs of the company? This question required fresh attention to the symbiotic relationship between the expert manager and the amateur director. The English, whose enterprise really launched the corporation, developing it from the earlier Crown monopolies, were most adept in this interaction between expert and amateur. We see it in so many aspects of life in an English-speaking society. The expert bureaucrat and the amateur Minister. The expert judge and the amateur jury. The expert Minister and the amateur parliamentary assembly. In the corporation, the relationship between expert and amateur had got out of joint. That is why in the past decade or so, we have been seeing a re-establishment of a more vigorous interaction. It is reflected in our laws. It requires that the director must now be much more knowledgeable as to the company's financial and business activities and be much more active, inquisitive and independent.

The legal position was always that directors had fiduciary duties. In the performance of their functions, directors stood in a relationship of trust to the company. But until lately a high standard of care and skill was not demanded on the part of directors. In 1925 Justice Romer said in words that are frequently repeated:

A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.¹

This limited duty led one commentator to say:

The effect of that rule is simply this. If you appoint the village idiot as a director on your board and as a result he makes a series of stupendous mistakes, he is to be held accountable according to the standards of local village idiots and not according to the standards of reasonably competent directors.²

The formulation of the duties of non-executive directors is nowadays much more rigorous. Their most sensitive function is in dealing with the chief executives. Such people tend to get to the top job by being forceful, opinionated and competent in their work. How is there to be established an arrangement between this chief executive, with the primary obligation of management, and the director, with the duty to the company as a whole? It cannot be established if there is an inadequate flow of information to the board or an inadequate understanding amongst the directors concerning the business of the company. It cannot be achieved if there is inadequate attention in the board to the company's affairs. Obtaining the adequate flow of information to the board is an essential function of business communicators. Management must use people skilled in business communications to ensure the provision of adequate, easily understood and critical information for the board of directors. The board itself must ensure that it is kept fully informed. It must scrutinise the information being received in order to ensure that it is not simply receiving the 'party line'. It must test the information from time to time to ensure that it is adequate. Directors can only do these things if they insist upon a high standard of reporting to the board. They must closely examine and where necessary request further information on every important matter requiring decision by the board. They must question material furnished to the board where they have the slightest doubt as to the validity and accuracy of the information. They must sometimes seek relevant information from outside sources. A strong non-executive chairman can be a real advantage to interaction between the professional and the amateur, to which I have referred. He can establish committees, including an audit committee, to provide detailed checks on the adequacy, precision and accuracy of vital information concerning the corporation.

No director nowadays can properly discharge his functions if he does not have or shortly acquire a good grasp and understanding of the business of the company. This necessitates a working understanding of the trade or industry in which the business operates. Even more importantly, it requires a full understanding of the financial structure and operations of the company. Without having this essential data base, the director is a mere passenger in the vehicle driven by the management. If that lack of understanding persists, the director will not only deprive the corporation of the advantage of positive participation. He will most likely impair the good working relationship by reason of his ignorance or misunderstanding of corporate matters.

Whilst harmony and co-operation on a board of directors is an important consideration, the prudent director who is unconvinced of the wisdom of a particular course will always do well to insist that his dissent to the course of action is recorded. Of

course, this should not be done lightly. It should not, perhaps, be done over trivial issues. But where an important difference of principle arises, where it is felt that inadequate information is being given to the board, it is the duty of a director to assert his position and insist that the record reflects it.

There are various ways in which the flow of information to the board of directors can be improved. One of the most interesting is the move towards so-called worker participation. We have not seen very much of this in Australia. However, in the Federal Republic of Germany and to a lesser extent in The Netherlands and France, statutory provisions have been made for companies to have employee representatives on their supervisory boards. In Australia this development has been confined largely to the public sector and even there it has been desultory.

In this country, the source of information to the board, the shareholders, the workers and the community at large has been the responsibility, ultimately, of the board. But in practice it is often the obligation of business communicators, employed by the corporation. It has to be acknowledged that business communicators have not always succeeded. Corporate material, especially financial material, is often perplexing, complicated and sometimes even intimidating to the non-expert reader.³

Recently, I was reading an important essay by Mr Russell Craig, Lecturer in the Department of Commerce at the University of Newcastle. I want to conclude my remarks by putting before you some of Mr Craig's ideas. I do so because I feel they deserve attention. The motto of the University of Newcastle is 'I Look Ahead' — and that is precisely what Mr Craig has been doing.

Electronic Corporate Records

One of the most remarkable phenomena of our time is the development of informatics — the microchip, computers linked by telecommunications. These developments have wrought a revolution in the distribution of information. This revolution will profoundly affect the activities of the business communications in the years ahead. Not since Gutenberg has there been such a remarkable development in information technology. Just as the printing press released knowledge from the captivity of the few educated nobles and monks who could read and write, so the new information technology today will profoundly affect the way our society is governed. Print remains the main medium of communication today. But in the future, communication by electronic means — through word processors, interactive computers and video material will be the standard medium for the exchange of information. This truism will affect business communication. Indeed

its impact is already being felt. Print remains the main formal medium being used for conveying financial and other corporate information in Australia. However, an increasing number of companies are beginning to experiment with videos in the hope that they can make corporate information, including financial information, more interesting and comprehensible to the various audiences to which the data is addressed — including the board of directors, branches of management, the shareholders and the employees.

Last year I was myself appointed to a board of directors — the Executive of the CSIRO. At the meeting of the Executive in Canberra last week, we were presented with an excellent video film showing the Chairman (Dr Paul Wild) outlining features of the future concerns of the Organisation. The Executive had previously seen most of this data, supplemented by graphics; at a previous Executive meeting. However, now the documentary had been made for distribution throughout the Organisation and beyond. In a scattered body such as the CSIRO, with many diverse centres in different parts of the continent, the need for a better means of communication to the executive, managers and the workforce had to be developed.

This kind of venture is not confined to the public sector. According to Mr Craig's research, a number of organisations in the private sector are now using video for financial communication. Generally speaking they are large publicly listed companies employing in excess of 2 500 people and, like CSIRO, operating from many locations. They represent a wide cross section of the Australian industry. They include:

- . in the mining sector, CRA, Comalco, MIM
- . in petroleum, Shell and Mobil
- . in manufacturing, Union Carbide, ACI, Consolidated Fertilisers and APM
- . in retailing, the Myer Corporation
- . amongst financial institutions, Westpac, Prudential Assurance, the AMP Society and the National Australia Bank
- . in property and construction, Lend Lease
- . and amongst many smaller companies, enthusiasts such as Dick Smith Electronics and staff co-operatives such as Fletcher Jones & Staff.

Interestingly enough, Australia's largest industrial organisation of employees, the Amalgamated Metals Foundry and Shipwrights' Union, has also used video to present the union's annual results to members.⁴

The video programs being produced include annual report programs, programs outlining the 'state of the company', financial education programs and personality programs designed to introduce key corporate personnel.

The advantages of using video to present corporate data include:

- . the compelling nature of video in a world grown used to the oral and visual presentation of information;
- . the provocative nature of good presentations which can engender and encourage feedback in a way that the printed page can rarely do;
- . the greater control that can be had over the consistency of the presentation of data, so that oral presentation in numerous locations, with inevitable variations, are replaced by a single, more carefully planned and better produced presentation;
- . the capacity which video presents to allow the use of graphics, illustrative visual film clips and other material that is not possible on the printed page;
- . the potential for linking audiences, say of sub managers, shareholders or employees, in simultaneous teleconferences;
- . the personal intimacy that can be established by a video presentation, that is just not possible with a printed report, however imaginatively produced.

On the other hand, as Mr Craig points out, there are a number of disadvantages. They include:

- . the cost of production and of basic necessary equipment;
- . the limitation of the audience reached to those who have this equipment;
- . the tendency of oral and visual material to over-simplify and sometimes trivialise complex matters in favour of attractive presentation;
- . the varying capacity of some managers and directors in the special art of performing on the electronic media. A person may be decisive as a manager and yet not have the appearance, flair, experience or skill in 'projecting' by video or sound tapes. This lastmentioned problem is likely to be diminished in time with the increasing tendency to teach video skills and school and the improved facilities for instruction and interviewing now more readily available in Australia.

One issue for law reform which is raised by the inevitable moves towards video presentation of corporate financial and other information is the question of whether the duty to 'lay before' the annual general meeting profit and loss statements, the balance sheet, the directors' report, auditor's report and directors' statement can be met by presentation of material on video instead of in printed documents. Mr Craig comments:

At present there appears to be no legal or professional impediment to such reports being presented by means of a video program. But, although it seems

technically and theoretically possible for video to be used in this way, whether or not it will be feasible and sensible to do so is another matter. The costs of producing and disseminating such a 'video annual report' are likely to prove a deterrent, at least in the short run. However, it seems likely that the concept of 'video annual reports' will attract increasing attention over time as they become more cost-competitive (on a per-unit basis) with printed annual reports.⁵

Although the presentation of some data, such as figures, of financial statements, in a stable, permanent form will be necessary for the foreseeable future, I by no means exclude the possibility that other parts of the annual obligation of directors to reports to shareholders (and employees and the community) should be done by electronic means. It is likely to have greater impact, to be more comprehensible and to provide in a more versatile, brief and vivid way, the essential information.

The use of videos and sound tapes to communicate essential information to directors, sub managers and to employees throughout the corporation, on a regular basis, is now an established feature of the largest public sector enterprises such as Telecom. As I have said, it is now being introduced into another large enterprise with scattered facilities, namely the CSIRO. The private sector should follow suit. The law should, where necessary, be adapted to permit and facilitate the use of electronic distribution of essential data. Such reformed laws will have to provide for the permanent or at least long-term storage of some such data and define such data as may be presented in this way and the data that must be presented either additionally or in the alternative, in printed form.

The challenge of informatics affects the law in many ways. Two projects of the Law Reform Commission illustrate this statement. Our inquiry into the law of privacy illustrates the way in which new laws are needed to protect the individual in respect of computerised data.⁶ Our inquiry into the laws of evidence illustrate the adaptations that will be necessary to facilitate the admission of computer and computer-generated evidence in courts of law. The informatics revolution will also affect companies and the flow of information within companies and from companies to shareholders and the community. Business communicators, like lawyers, must be alert to the implications of informatics. These implications will keep business communicators and lawyers busy. They will require them to be quicker on their feet in years to come.

FOONOTES

- * The views stated are personal views only. The Law Reform Commission does not have a reference on the subject of company law reporting. The author expresses his indebtedness to the paper by Mr EW Thomas QC, 'Corporate Governance', presented to the Institute of Chartered Secretaries and Administrators in New Zealand, 23 July 1983, mimeo and by R Craig, 'The Use of Video in Financial Communication', Commerce Working Paper, University of Newcastle, 1984.
1. Romer J in Re City Equitable Fire Insurance Co Limited [1925] Ch 407.
 2. CJ Fernyhough, 'Welcome to the Board — the Responsibilities and Duties of a Director', 1978.
 3. Craig, 1.
 4. Craig, 3.
 5. id, 18.
 6. Australian Law Reform Commission, Privacy (ALRC 22), 1983.