

# Hospitality, Registered Clubs & Gaming Alert

## October 2008

## Directors' Duty of Confidentiality: It is Real!

Even though Club Directors are volunteers, they are subject to the Corporations Law and have the same general duties as directors of other public companies. Club Directors should therefore act with caution.

Thomson Playford Cutlers' successfully represented a large metropolitan club in the New South Wales Supreme Court in August 2008, in a case which has highlighted the duties of confidentiality owed by directors of registered clubs to their Club. In that case, a former director of the Club was found to have breached his duties by disclosing the Club's confidential information to the affiliated RSL Sub Branch. The Supreme Court awarded costs against that director.

The case is a timely reminder that even though Club directors are volunteers, they still have the same general duties as directors of other public companies. This can be a potential legal minefield for directors. However, if directors keep up to date with their legal obligations about confidentiality and are diligent in acting in the best interests of their Club and follow some simple, practical steps, directors can minimise their risks.

### Step 1: Knowing the standard

The first step is for a director to be aware of the standards that apply. Directors must always act in good faith for the benefit their Club. This includes keeping confidential information of the Club strictly confidential. The Corporations Act 2001 also imposes a direct obligation on directors not to improperly use information they have obtained while a director to:

- > gain an advantage for themselves or someone else; or
- > cause detriment to the Club.

A director owes these duties to the Club even after ceasing to be a director. There are only limited exceptions to this rule, for example, if a director is required to disclose information by law.

### Step 2: Knowing what is really "confidential"

The second step is for a director to be able to identify what information is "confidential", and in most cases this is clear. If information is publicly available from other sources then it will rarely be confidential, unless presented in such a way (perhaps with other sensitive information) which makes it "confidential".

As another example, if a Board decides to make a public announcement, once that announcement is made the content is not confidential. What might be confidential however, are the discussions of the Board in reaching that decision.

Directors should always consider that even if the information might not seem "confidential" in itself, disclosure might have a negative effect on the Club as a whole. A common issue is: who voted "for or against" a certain decision. Improper disclosure of information like this might easily disrupt the day to day management of the Club and affect the trust and working relationships of Directors.



### Step 3: Knowing who to talk to

The third step is for a director to decide who they can talk to in a particular situation. Mostly, directors can easily identify when information should not be disclosed. A director clearly must not disclose confidential information to a competitor of their Club or to another person who could get an improper benefit, such as someone tendering for a contract with the Club.

On the other hand, it can be more difficult to decide whether to disclose information within the Club community itself. Directors who are elected with the support of a group within the Club's membership can feel an obligation to "represent" that group. The general rule in this situation is that directors must act in the best interests of the Club as a whole, and the Club's interests must

take priority over the interests of any other person or group. Directors cannot allow themselves to be compromised by looking out for, or using their position purely to promote, the interests of any particular group (though it may be appropriate to consider their interests in Board discussions). This means that directors should take particular care when disclosing information to a sub club, sub branch or other organisation.

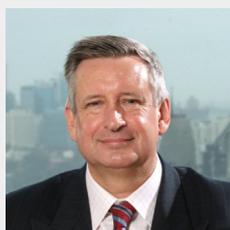
- > The director can raise the issue with the rest of the Board and ask for a resolution on whether the information can be disclosed, and if so, to whom.
- > If the Board is uncertain, the Board can seek legal advice.
- > If the Board will not obtain advice, or a director is still uncertain, that director can obtain independent legal advice.

### Step 4: If in doubt?

If a director is in doubt about whether information can be disclosed, these are preliminary steps to get some clarity:

Directors should also undertake ongoing training and education to keep up to date with changes in the law and make sure they have a clear understanding of their obligations. Dedication to good corporate governance (regarding confidentiality and other director's duties) will give directors confidence in their role in managing their Club, and assist in giving members confidence in their Board.

### For more information on this topic please contact:



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