# Caution – solicitor on board!
## Serving on a client's board of directors

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## Snapshot

- There are real risks when acting as a director on the board of a client's company.
- Solicitors should be very clear about the role they are playing: whether decision making or advice giving.
- Even if not formally appointed to a board, there is a risk that a solicitor could be a de facto director unless roles are clearly defined.

Solicitors accumulate a wide range of commercial skill and knowledge, as well as a critical mindset, which can be extremely valuable on a corporate board. However, there are potential pitfalls for both the practising solicitor and the company when agreeing to serve on a client's board.

### Solicitors as directors

The first caution for a company appointing a solicitor to the board is that the line between giving legal advice and the role of director can become blurred. While it can be useful for the board to have direct access to a solicitor when discussing issues, where that solicitor is also a director, the company may lose legal professional privilege in the advice it receives.

In *Standard Chartered Bank v Antico* [1993] 36 NSWLR 87 (at [91]-[93]), the defendant company made a claim for legal professional privilege over the minutes of a board meeting in which one of the directors summarised the legal advice he had given the company in his capacity as the company's solicitor. The court decided that, on the facts of this particular case, the director's summary was given in his role as a director with legal knowledge, participating in the making of a commercial decision, rather than giving confidential legal advice. The company was not able to claim privilege over the minutes.

A solicitor director can also run the risk of finding themselves in a conflict of interest. Directors owe a primary duty to the company and, in some cases, to its debtors. However, solicitors owe a paramount duty to the court and may find that duty conflicting with directors' duties.

A conflict may also arise in circumstances where the board is considering the remuneration paid to the solicitor's firm or the engagement of another firm of solicitors, in which case the solicitor should follow the conflict of interest rules in the *Corporations Act 2001* (ss 191–196).

### Insurance

Solicitors who agree to act as directors for their client company should carefully consider insurance coverage. While directors will normally be covered by a company's Directors and Officers ('**D&O**') insurance policy, many policies limit cover to claims arising from acts of the director while acting in their capacity as a director. Similarly, solicitors insured by Lawcover will have professional indemnity coverage under their Lawcover policy, but that policy specifically excludes claims which arise from acting as a director of a body corporate. While the two types of insurance should dovetail neatly, there are risks that the distinction between actions as a director and actions as a solicitor might become blurred, which can lead to problems with insurance coverage. The cross over between the roles of solicitor and director could create problems with both types of insurance.

### De facto directors

Solicitors are often asked by clients to act on the board of a company, particularly a distressed company, for a short period while other arrangements are made. An appointment as a director, even for a limited period, carries all of the duties a director owes a company. Solicitors who agree to accept that responsibility should carefully consider their role as advisor to a company and be extremely clear about the capacity in which they are acting, even after the appointment as director ends.

While a solicitor might be careful to ensure that their tenure as director has officially ended, there are a number of other factors which might lead to the solicitor still being considered a director of the company, and liable to be in breach of directors' duties. How the outside world perceives the former director can be relevant, as can the question of tasks performed by the former director and the way in which appointed directors perceive and act on advice.

The definition of director under s 9 of the *Corporations Act 2001* is much wider than those appointed to the board and notified to ASIC. A person can be a director, regardless of whether they are appointed or not, if they 'act in the position of a director' (a de facto director) or the directors 'are accustomed to act in accordance with the person's instructions or wishes' (a shadow director). There is an exception to the definition of a shadow director if the person is providing advice 'in the proper performance of functions attaching to the person's professional capacity', but the exception does not apply to de facto directors.





The title a person holds is not relevant when the courts decide whether a person is a de facto director, nor is the question of intention.

In *Mistmorn Pty Ltd (In Liquidation) and Hugh Jenner Wily v Michael Yasseen* [1996] FCA 1673, Davies J found the defendant to be a director, despite the fact he had only ever described himself as a consultant. '[I] do not say that he (Mr Yasseen) held himself out to be a director, for, as I have said, I think that he intended not to be a director, but he dealt with the matters one would expect a director to handle' (at [40]).

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The difficult question is that matters 'one would expect a director to handle' are not precisely defined either in the *Corporations Act 2001* or in the case law. Indeed, the courts have shied away from setting out, in any definitive way, a list of actions which would constitute the actions of a director, preferring instead to characterise them as 'top level of management functions' (see *Deputy Commissioner of Taxation v Austin, Leslie Raymond* [1998] FCA 1034) which will vary depending on the company.

It will also be a question of degree (see *Natcomp Technology Australia Pty Limited v Graiche* [2001] NSWCA 120) and the courts are asked to make a value judgment about the proper characterisation of a person's role over time (see *Grimaldi v Chameleon Mining NL* (No 2) [2012] FCAFC 6 at [70]).

### Protecting yourself and your clients

To avoid the blurring of lines between a role as a solicitor and a role as a director, it is prudent to:

- carefully document the role in which certain tasks are done and advice is given. Use law practice letterhead when providing advice and make sure that legal advice is minuted appropriately;
- keep conflicts front of mind in the board room. Declare conflicts early and avoid participating in decisions which might create conflicts; and
- if you are not appointed as a director of a company, and do not intend to be one, make it clear that you are providing advice and avoid participating in decisions of the company. **LSJ**