Caution – solicitor on board!

Solicitors accumulate a wide range of professional skills 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.

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 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, in some cases, to its debtors. However, 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.

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.

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