

# Australian court case on directors' duties could have implications for Singapore too

By Ben Chester Cheong

AN ONGOING case in Australia against directors who allegedly failed in their oversight of potential risks could have implications for independent directors in Singapore too. The bottom line is that independent directors cannot simply rely on the assessments of others, but must engage in active scrutiny and questioning of management—or risk being in breach of their duties.

In December 2022, the Australian Securities and Investments Commission (ASIC) announced that it had commenced civil proceedings against the former board and senior management of The Star Entertainment Group. Listed on the Australian Stock Exchange (ASX), Star operates several casinos and resorts in Australia.

ASIC alleged that the directors had breached their duties pursuant to section 180 of the Australian Corporations Act 2001. Under the rule, directors are required to exercise their powers and discharge their duties with the same degree of care and diligence that a “reasonable person” would.

This includes informed decision-making, risk management, accurate record-keeping, and ethical conduct. Directors can face personal liability for the failure to meet

these standards.

Among other things, ASIC alleged that Star's board did not consider the potential money-laundering risks when it approved a partnership with certain individuals with reported criminal links. In addition, when informed about these risks, the board members allegedly failed to take appropriate action and make further inquiries.

ASIC was able to bring an action against Star because of the evidence it managed to gather. This included a report by KPMG that flagged possible non-compliance with anti-money laundering (AML) laws and the directors' failure to enquire further with management despite being aware of these critical risks.

## 'An inquisitorial mind'

ASIC's current case against Star is novel because it concerns non-financial risk management. Prior to this, another landmark case was against Centro Property Group in 2009.

In that case, the non-executive chairman, six other non-executive directors, and the chief financial officer of Centro were alleged to have breached their directors' duties in relation to their approval of Centro's consolidated financial statements for 2007.

These financial statements failed to correctly disclose about A\$1.5 billion in short-term liabilities, which were instead categorised as long-term liabilities. Centro also did not disclose guarantees of short-term liabilities worth about US\$1.75 billion from a related company, which were given after the balance sheet date but before the approval of the financial statements.

The court held that even though directors may rely on the guidance and advice of other board committees, employees and advisors, they need to pay attention and apply an inquisitorial mind to the responsibilities placed upon them.

The court found that each director, when reviewing the financial statements, failed to exercise the degree of care and diligence required by law. As such, they could be held liable for the losses suffered by Centro as a result of this failure.

Independent directors are sometimes appointed upon the recommendation of parties such as the executive directors or the sponsors. The decision to accept such an appointment should not be taken lightly.

Independent directors cannot mindlessly rely on the advice and conclusions of the audit committee, the finance team or other experts. Instead, they must scrutinise all

the relevant reports and ensure that the content of the report confirms their view of the business.

In addition, independent directors should not fetter their decision-making powers just because they feel a sense of gratitude for being appointed to the board. They must apply their own inquisitorial mind to the facts at hand.

Although ASIC's ongoing proceedings against Star are in Australia, they may have implications for the scope of directors' duty of care and diligence in Singapore, as both countries have similar laws and regulations in this area.

Independent directors in Singapore need to be vigilant in carrying out their duties, including monitoring the company's relationships with high-risk customers, implementing adequate AML controls, and disclosing financial information accurately.

Independent directors cannot simply rely on information about their company that is provided by the audit committee or finance team when there is an ongoing investigation related to AML compliance, especially in a competitor. They must also query the management when there is a reason to do so, such as an audit red flag.

The companies most affected by AML laws are typically those that handle large amounts of cash or financial transactions, such as banks, money service businesses, casinos, and other financial institutions.

However, any company that is involved in financial transactions, and thus has the potential to be used for money laundering, is subject to AML regulations.

In recent years, the scope of AML laws has expanded to include a wider range of industries—such as real estate, legal services, and luxury goods—that may also be vulnerable to money laundering and terrorism financing.

ASIC's ongoing proceedings against Star highlights the importance of AML compliance, and independent directors should pay close attention. Directors have a duty to ensure that companies implement adequate controls to prevent illegal activities. A failure to ensure this could result in legal consequences for the company—and for its independent directors.

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