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LEGAL ALERT

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Directors Duties - A Must Read for Every Company Director

There has been a discernable trend in Australia and elsewhere towards broadening the scope of liability of directors and officers of corporations into areas which have traditionally been protected by what is commonly known as the "corporate veil" (that is, the liability is that of the **company**, and not of the individual directors and officers).

The duties and obligations (and hence, the liabilities and potential liabilities) of directors and officers are scattered through a variety of State and Federal statutes (and court decisions concerning them), but some of the most important duties are set out in the Corporations Act 2001 (Cth), such as:

- the duty of care and diligence;
- the duty of good faith;
- the duty to properly use information; and
- the duty not to abuse their position;

(the "**Corporations Act Duties**").

It has always been assumed that directors and officers owe their Corporations Act Duties only to the Company - and not to other "interested" parties.

In recent times the trend has been for courts to find that certain people owe a duty of care (and hence have an obligation) to a wider group than had previously been thought to be the case. Given this trend, and the increasingly litigious nature of our society, it was only a matter of time before the extent of the Corporations Act Duties were tested - as recently occurred in the case of *Geoffrey William Vines v ASIC* [2007] NSWCA 75.

In this case (which was decided on appeal last month) ASIC alleged that Mr Vines, the CEO of the GIO Group, breached his duty of care and diligence in relation to his handling of a profit forecast for the year 1998 to 1999. Among other things, the court considered whether this duty was owed to creditors, shareholders and employees of GIO, in addition to



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the company itself. Obviously, if it was, this would open up a whole new field of potential risk and liability for directors and officers of companies.

After careful deliberation, the court held that **at present**, directors and officers do not owe the Corporations Act Duties to third parties such as creditors, shareholders and employees. However, the court expressly acknowledged that **this is an evolving area** of the law, and that it might be that "further development of the law will identify a duty owed to creditors or shareholders or employees".

Given the trend of increasing duty of care (and consequent liability), it is more likely than not that a court, at some time in the future, will decide that company directors and officers do owe a duty of care beyond the company itself - and in our view all company directors and officers should bear this in mind in carrying out their duties.

Companies who do not have an up-to-date Deed of Indemnity, Insurance and Access for their directors and officers should look at putting one in place - so as to provide the maximum protection available at law - and any company director or senior officer who does not already have the benefit of one of these documents should request one from their company.

As with so many things in life, these sorts of documents vary in quality - and not all documents by this name provide the same degree of protection. Also, the nature of these documents has evolved in recent years (along with the law) - so older documents are probably not as effective as some of the newer ones. If you have any doubts about whether an existing Deed of Indemnity, Insurance and Access provides appropriate protection in the particular circumstances, you should have it reviewed by someone who works extensively in this area of law (because many lawyers are not experienced with these documents).

If you would like more information in relation to Deeds of Indemnity, Insurance and Access, or would like appropriate documents reviewed or prepared, please contact [David Heidtman](#), [Elizabeth Lee](#) or [Mark Batistich](#) . We can provide you with a package of documents (including a Fact Sheet, User Guide and Summary of director/officer liabilities - which explains their use and value).

Please feel free to review our Fact Sheet on our website, accessible at [Deeds of Indemnity, Insurance and Access](#).