

Shredding the Corporate Veil: Are you a Shadow Director?

People are generally aware of the risk of personal liability as a director. For example, directors can find themselves personally liable for debts to employees, for tax debts and penalties owed to the Australian Tax Office or for breaches of *The Corporations Act 2001* (“the Act”).

However, the Act itself provides little guidance or limitation in defining who is a director. A director may be anyone who acts in a position of a director, or someone who gives instructions or expresses wishes and the directors of the company are accustomed to act in accordance with those instructions or wishes. The result is that a trusted company advisor can, unwittingly, become liable as if they were a formally-appointed director.

Lessons learnt from the James Hardie Industries Limited case tell us that persons such as company secretaries, Chief Financial Officers and in-house legal counsel, whilst not formally appointed, may be considered an officer of a company.

Accordingly advisors can be subject to duties owed under the Act, not simply by virtue of appointment as a director or officer, but because they are a person who makes, or participates in making decisions that affect the business of the company.

Even an “external” advisor or consultant to a company can find themselves participating in decision making of a company. Perhaps ironically, the better service and advice you provide, which can lead to unquestioning implementation of your recommendations by a company, the more likely it is you might find yourself stepping into the shoes of director of that company – whether you intended to or not. Financial advisors, accountants, lawyers and the like can, depending on the particular circumstances, inadvertently find themselves subject to the statutory and common law duties by which a director is bound.

Whether your conduct might be construed as the actions of a shadow director will depend on the circumstances. But simply calling yourself a consultant and delivering excellent service will not in itself inoculate you against the possibility of being found to be shadow director.

If you are uncertain whether you are at risk of becoming “part” of a company, rather than simply advising one, we can provide practical guidance on how to best ensure that carrying out your business of advising a company does not inadvertently place you at risk of personal liability as a shadow director.

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