

## 5 The evolving role of the board in corporate control systems and compliance programs

The Turnbull Committee report emphasises that the board of directors is ultimately responsible for the company's internal control systems. The Committee states that the board 'should set appropriate policies on internal control and seek regular assurance that will enable it to satisfy itself that the system is functioning effectively. The board must further ensure that the system of internal control is effective in managing risks in the manner which it has approved'. To aid directors in fulfilling this role, the Appendix to the Turnbull Committee report sets out a range of specific risk/control-related questions, that directors may wish to ask management.

The Turnbull Committee's approach accords with the 1999 OECD Principles of Corporate Governance, which state that a key function of the board of directors is 'ensuring the integrity of the corporation's accounting and financial reporting systems...and that appropriate systems of control are in place, in particular, systems for monitoring risk, financial control, and compliance with the law'. This reflects the growing 'proceduralisation' of corporate law, which is also evident in the new statutory business judgment rule.

Nonetheless, the Turnbull Committee and OECD Principles of

Corporate Governance seem to require a considerably higher level of board oversight than has previously been required at general law. For example, in the high profile AWA litigation,<sup>3</sup> Rogers CJ considered that directors are entitled to rely on management to establish proper internal controls and that the board should not expect to be informed of the details concerning management of the corporation. By contrast, the Turnbull Committee considered that it is the role of management to implement board policies on risk and control, and that it is the board's responsibility to assure itself of the effectiveness of the internal control system.

The Criminal Code regime for corporate criminal liability will inevitably place more pressure on directors to adopt an oversight role akin to that envisaged by the Turnbull Committee. Although it is possible in Australia for directors to shift risk by delegating their powers and responsibilities to others, the circumstances where delegation will afford protection from liability are circumscribed under provisions introduced in the Corporate Law Economic Reform Program Act 1999. Neither delegation (nor reliance on a third party's information or advice) will protect a director who simply passes the buck or who relies blindly on a third party's information or advice. Also, directors who fail to adequately monitor the business of the corporation would not receive the protection of the business judgment rule.

## 6 Conclusion

There is a growing tension in contemporary corporate law. In the area of directors' duties, it is still accepted that the main goal of directors is to make money for their shareholders. Corporate ethics and corporate citizenship are peripheral in this context. On the other hand, corporate ethics are becoming more directly relevant in the area of corporate criminal liability, where there is increasing pressure for them to be integrated in corporate operations, to preclude the argument that a corporation's culture contributed to the commission of a crime. Under the Criminal Code, the quality of a corporation's 'culture' is now a matter of legal, not merely anthropological, significance.

There is also a tension in the role of directors. There is a strong feeling in the business community that it is unrealistic to expect directors of large modern corporations to be involved in anything beyond matters of broad policy. However, a counter trend is emerging, which views directors as ultimately responsible for a company's 'culture' and for its system of internal control. It is this trend, which is forging a new relationship between corporate ethics and risk management.

1. *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.
2. See DeMott, 'Organizational Incentives to Care About the Law' (1997) 60 *Law & Contemporary Problems* 39, 45.
3. *AWA Ltd v Daniels* (1992) 7 ACSR 759 (Rogers CJ); *Daniels v AWA Ltd* (1995) 16 ACSR 607 (Court of Appeal).



## Clarification — When can you use an ABN instead of an ACN?

As a number of our readers of our October 2000 edition have noted, early on in the above article an ABRN was inadvertently defined as an Australian Registered Business Number, rather than an Australian Registered Body Number. References

to businesses in the remainder of the article are clearly references to such registrable Australian bodies, foreign companies and Australian Registered Schemes, rather than just registered businesses. The author apologises for the oversight.

Some readers have also queried

the proposition that ABNs may not be used instead of ARBNs and ARSNs, in the same way as ACNs. The author has reconfirmed with the Registration section of the ATO that it is not the practice of the ATO to automatically issue an ABN that incorporates an ARBN or ARSN. However, it is possible for registrable Australian bodies, foreign companies and Australian Registered Schemes to request the ATO to issue an ABN that incorporates their ARBN and ARSN.