



Crown directors dealt a winning hand as ASIC backs off Chris Kintis & Robert Anstee

Key takeaways

- Crown directors avoid ASIC prosecution partly because they were entitled to rely on "what they were being told by senior management".
- Directors may properly discharge their duties and defend against claims of breach by reasonably relying on information or advice from company employees, other officers or professional advisers.
- However, directors should be aware of the limits of reliance for the purposes of discharging their duties as officers of the company.
- Directors should independently assess information or advice before relying on it, prefer information or advice from persons they believe are competent in the matter, and clearly identify the information or advice relied on.

Background

ASIC Chairman Joe Longo [recently defended ASIC's decision not to prosecute ex-Crown directors](#), saying that the directors were reasonably entitled to "rely on what they were being told by senior management".

The decision is surprising, coming off damning findings of profound governance shortcomings at Crown Resorts, a major public listed company. Findings of money laundering, authorizations of illegal operations in overseas markets, and wide-ranging corporate failures are issues fundamental to the casino business.

ASIC's statement presents an opportunity to explore the concept of reliance as it applies to directors. In times of difficulty, directors expect to be able to rely on information and advice supplied by others to facilitate the proper discharge of their duties to the company.

While reliance on others' information or advice can assist directors to discharge their duties and defend against alleged breaches, there are limitations. Directors must be aware of the circumstances in which they're entitled to rely on information or advice in discharging their duties, what kind of information or advice can be relied on, and their obligations in respect of such information or advice.

When can directors rely on information or advice?

The *Corporations Act 2001* (Cth) sets out the circumstances needed for reasonable reliance.

First, directors can only rely on information or advice from specified persons within and outside the company including:

- company employees the director believes are competent in the matter;
- professional advisers or experts who have competence or expertise in the matter;
- other directors or officers on matters relating to the person's authority; or
- a committee of directors on which the director has not served.

Second, reliance is presumed to be reasonable if the director:

- relied on the information or advice in good faith; and
- did so after independently assessing the information or advice.

Good faith

A director must rely on the information or advice in good faith. For example, a director would not be relying on advice in good faith if they provided incomplete information to the adviser in a way that was calculated to procure the advice they want.

In order to establish the requisite element of reliance in good faith, directors must show evidence that they in fact relied on the information or advice. Reliance may be refuted if there is evidence the director did not genuinely consider the advice, was recklessly indifferent to the content of the advice, or merely paid "lip service" to the advice in making a decision.

Independent assessment

Directors must also independently consider, or bring their own mind to bear on, the information or advice. They must not simply adopt others' views, even if given by a professional adviser. The nature of the information or advice, or special knowledge possessed by the director, may require the director to scrutinise the information or advice more carefully.

Other circumstances

Other circumstances may affect whether reliance is reasonable. For instance, reliance is generally reasonable if advice comes from a company officer or employee who has responsibility over the matter, a high level of knowledge about the matter, and who may be described as the "best person to judge" within the company.

What kind of advice can be relied on?

Directors can only rely on certain kinds of advice in discharging their duties to the company.

- The advice must be directly relevant to the matter being decided on by the director rather than to surrounding issues.
- Directors must be able to identify the specific advice relied on and should not assert reliance on general advice not specifically related to the decision.
- The content of the advice should be clear and detailed.
- The director should also identify the instructions or assumptions on which the advice is based.

Conclusion

While we don't know all the circumstances, ASIC's decision not to pursue ex-Crown directors on grounds they reasonably relied on senior management, given the nature of the allegations made, is an unusual one.

Although reliance on others' information or advice can assist directors with discharging their duties and defending against claims of breach, directors should be aware of the limits of such reliance. These limits include the circumstances in which directors can rely on others' information or advice, what kind of advice can be relied on, and the director's obligations in respect of the information or advice.

If you have any concerns in relation to directors' obligations and duties, be sure to contact Chris Kintis who is experienced in corporations law and director's duties.