**The holy grail of director independence is failing Australian companies**

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The failings of Crown Resort governance have occurred largely because its board was compelled to employ a majority of part-time directors.

Crown’s board as constituted, was manifestly unable to address systemic issues within the company. It may be claimed those problems were due to management shortcomings, to inadequacies of the directors concerned, to vulnerabilities in the system and processes of governance, to poor culture within the company or to the ongoing influence, however exercised, of the controlling shareholder. But it is also clear that the board could not devote sufficient time to identify and resolve the problems.

The Corporations Act requires that directors exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise and are taken to meet that requirement if, inter alia, they *inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate*.

The directors of Crown did not have the time to “drill down” into the operations of the company and get to grips with the subject matter of judgments they were making. Arguably, those directors were therefore in breach of the Corporations Act, an invidious and ironic situation for them given the company sought to comply with ASX governance principles.

At least one independent Crown director could not recall his membership of a committee. He was unaware of highly significant conduit type transactions through subsidiary companies, money laundering or Crown operations in China. He maintained that he was able to devote only one to two days a month to his role, which included membership of board committees.

One independent director maintained that the “first and last role of all board members is corporate governance” and asserted that the primary function served by the Corporate Governance and Audit Committee was to “go through the corporate governance statement, which is a substantial part of the annual report.” The emphasis was on the trappings of corporate governance. He had little, if any, time to check and ensure the company was complying.

The business landscape in a company like Crown is complex and demanding. Its board had to deal with regulatory and legal changes, ever increasing demands for transparency, corporate governance compliance, political, economic and cybersecurity risks, market volatil­ity, rapid technological change and intense media scrutiny.

At least some Crown directors failed to perceive the challenges of meeting its licence conditions, the complexities and extent of the company’s operations and the nature of the company’s dealings with its various patrons, because they lacked knowledge of company developments and activities. They lacked that knowledge because they were not sufficiently involved. They could not bring their combined experience to bear because of time constraints and the burdens of regulation and compliance.

Independent directors are supposed to bring independent judgement and objectivity to the board which is thus better equipped to appoint and oversight management. If you are not independent, you are deemed to be incapable of exercising objectivity.

Independence has become the holy grail for determining board composition and effectiveness. It is emphasised at the expense of the more important qualifications of experience, competency, integrity, and the time needed to become involved in and understand company operations.

And while the hearing revealed a pattern of prior and ongoing relationships that jeopardised director independence, it is likely that situation is common to many of Australia’s larger companies. The pool of genuinely independent directors in Australia is small, particularly of directors of the calibre required by companies in the ASX 200. Many of the directors in this pool are friends or are at least known to each other. And while some directors may meet the criteria for independence, within a short period on a board such as Crown Resorts, directors are unlikely to be independent of each other and their independence inevitably diminishes as their tenure lengthens.

The three areas of Crown Resorts operations under examination by the Commission (junkets, money laundering, China arrests) revealed that significant failings occurred in each. It is likely that if the hearing were to examine other areas of Crown’s operations, failures of the same nature would become apparent. It is also possible, that if other large listed companies were subject to the same level of scrutiny, they too would manifest deficiencies attributable to a lack of director understanding and involvement.

Directors blame management for failing to escalate matters that need board attention, management claim they keep directors sufficiently informed but protect their patch for any number of good reasons. Two teams struggled to manage Crown, neither willingly accepted responsibility for the deficiencies.

Research by the University of NSW found that over a period of a decade to 2012, shareholders lost up to $50 billion in value in the ASX 200 companies by virtue of the policy of having independent directors. The performance of the ASX 200 index over the past fifteen years, notwithstanding the impact of the GFC and Covid-19, also points to the inability of large ASX companies to foster growth and value.

Companies in the ASX 200 should seriously consider revisiting the composition of their boards. The ASX Governance recommendations “leaves a listed entity with the flexibility to adopt alternative governance practices, if its board considers those to be more suitable to its particular circumstances, subject to the requirement for the board to explain its reasons for adopting those alternative practices instead of the Council’s recommendations.”

One model that may be considered more suitable is a board with a majority of executive directors. Most of the companies in the ASX 200 group have a management committee that would readily form the nucleus of a board. The addition to this team of a non-executive chairman and one non-executive director, both with complementary skill sets would provide a reasonable injection of objectivity and a voice for constructively challenging management.

This model would have compliance with corporate governance processes and systems, currently tying up the board time of companies like Crown, overseen by the company secretarial function. Important legal, regulatory and compliance issues only would come before the board.

This model would have boards emphasise compliance with the law and the plethora of regulations, rules, principles, and recommendations from a perspective of first instilling and then reinforcing an ethical business culture, starting with its own leadership.

This model would have board committees, at least to oversee audit, risk and senior appointments and utilise external expertise as required. If Crown’s failings are the standard, companies would also strengthen their secretarial and internal audit functions.

While it may be claimed that such a board is not subject to oversight, it should also be realised that never before have companies and their management come under more scrutiny by the media and by stock exchanges, regulators, auditors, analysts, proxy advisers, unions, class action lawyers, whistle blowers, special interest groups, institutional shareholders, small shareholders and the public.

One attraction for all stakeholders in this model is that one team runs the company, one team only is unequivocally accountable. Another benefit is that most members of this board are the executives responsible for driving the day to day operations of the company. They *are* sufficiently knowledgeable of its operations to make informed judgments and they are best able to contribute to the formulation of policy and setting company strategy. Their very involvement assists in locking the whole organisation into a focus on its core role.

Some shareholders still consider financial performance and adding long-term shareholder value to be a priority for boards. The company and those shareholders would benefit enormously by having one team that is both setting the direction and making it happen.

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[**Our Crown Resorts board**](https://www.investogain.com.au/shares/company-directors/)

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