

# Corporate Governance CPA Australia Style - A Case Study of 'Looters and Shirkers'<sup>1</sup>?

1. Introduction - Part 1
2. Introduction - Part 2
3. What is corporate governance?
4. What happened at CPA Australia?
5. Three examples to illustrate

## 1. Introduction - Part 1

The Agency Problem      - the people who 'own', and the people who 'control'.  
   - not a new problem but CPA certainly illustrates it well.

### 1. The problem of looting

Thomas Jefferson

*"Government exists for the interests of the governed, not the governors"*

### 2. The problem of shirking

Were the board, staff, others 'intimidated' or is that just a convenient excuse?

The law is very aware of the problem

- has evolved and toughened up over last 160 years
- common law and statute law
- directors and officers duties being spelt out more and more

My personal view - We need a CPA case to champion this just as the HIH Royal Commission and the Centro case did.

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<sup>1</sup> p.240 Corporations and Associations. Cases and Materials 10th Edition Robert Baxt, Keith Fletcher, Saul Fridman Lexus Nexis Butterworths Australia 2009

## 2. Introduction - Part 2

Lot to cover, think fast, handouts, broad brush, question time

The myth and the reality of corporate governance with badly 'managed/governed' companies.

### Why is it so hard for members to exercise 'control'?

1843 UK Case Foss v Harbottle - two rules

softened a little with legislation now but still pretty strong influences

1. Corporate personality - who can take action against directors  
usually need liquidation, or change in board
2. Courts like to leave governance to the board  
s.232 now provides some 'oppression' relief

ASIC is generally 'asleep at the wheel' as a regulator

Incumbents usually with power and money are a formidable foe

### What it means practically?

- willing media prepared to enter the fray
- lot of objective truth
- willingness to speak out
- confidence that 'right triumphs over wrong' ultimately
- willingness to do it for nothing
- a bit of money and good legal advice certainly helps

### Our code of ethics obligations

- APES 110 Code of Ethics for Professional Accountants
- are very strong, somewhat unique among the professions
- 'responsibility to act in the public interest' (100.1)
- if we don't like it or are prepared to adhere to it then .....

### Friedrich Nietzsche

*"Anxious yet not disconsolate, we stand to one side for a moment, as contemplative bystanders to whom it has been granted to witness these great struggles and transitions. Oh! It is the magic of these struggles that whoever observes them must also enter the fray!"*

### Alexander Solzhenitsyn

*".....but by rejecting the lie, and by refusing to participate personally in the lie. Everyone must decisively stop cooperating with the lie everywhere he sees it himself... In breaking with the lie, we are performing a moral act, not a political one and not one that can be punished by criminal law - but an act that would immediately have an effect on our way of life."*

### 3. What is corporate governance?

Pretty common term, common usage

4 rough areas - management, strategy, solvency and legalities

Reality is that it is a shibboleth in need of major surgery

CPA Australia demonstrates why.

#### Company - artificial person

*“Companies have proved enormously powerful not just because they improve productivity, but also because they possess most of the legal rights of a human being, without the attendant disadvantages of biology: they are not condemned to die of old age and they can create progeny pretty much at will. This privilege of immortality, not to mention the protection that the artificial corporate form has afforded various venal people down the ages, has often infuriated the rest of society...”<sup>2</sup>*

The chief question - who looks after this artificial person?

The answer to that is what corporate governance is all about

Lots of definitions - Cadbury perhaps best short one, but all just as valid and arguably academic.

Human beings have an inbuilt moral compass.

Artificial persons don't.

That is the red flag, shibboleth aspect of corporate governance.

So who does the looking after, the corporate governing?

The leaders - the board and senior management

Here are three problems

- i. are one step removed - hence the need for the Corporations Act etc
- ii. no adequate checks and balances - lots of motherhood words  
need to learn from constitutional debates such as in USA or Australia  
just think about the new CPA constitutional review - not even considered
- iii. resolving wrongs is very difficult  
regulator is silent and asleep  
legal action is tricky and cost prohibitive  
common sense often relegated behind threats of defamation and 'keep it professional'.

Possible title for this presentation

#### **CPA Corporate Governance - The Myth and The Reality**

##### **The myth**

CPA communications

2nd March email

16th March memo

31st May memo

This is what we are fed and presumed to believe

The Divisional Presidents and Committees have believed it

The Independent Review Panel has basically subscribed to it

<sup>2</sup> p.xv. The Company. A Short History of a Revolutionary Idea. John Micklethwait and Adrain Wooldridge, Random House NY 2003

Members are presumed to believe it  
ASIC have shown no interest to redress it

### **The reality**

The media saw it more clearly than we did

It was a gerrymandered and very flawed system

- refer the handouts on board and board committees
- Nom and Rem committee had too much control
- the board had too much control, and too few checks
- the Rep Council was a rubber stamp
- the members did not even vote for directors
- the AGM is a pointless check - no questions, no rem approval etc
- some directors served well past the normal terms
- constitutional changes were obtuse and very few members voted
- some KMP held long time sway over the organisation - 3 senior mgrs, 4/5 directors
- legitimate questions raised were ignored, kept quiet or threats were made
- legal threats were made if genuine queries arose
- the strategy of the board was a nonsense focussed on a individual not the profession
- the list could go on.

Just read the Independent review Panel Preliminary report to get some idea of the corporate governance failure at CPA

How was it exposed? - media and some journeyman members.

All the people who should have exposed it didn't.

### **Need to remember what CPA Australia is**

A membership body of professional accountants

key role in setting and maintaining accounting and financial reporting standards

heavy responsibility to the market/public and society

A public company but limited by guarantee thus not listed

members are busy

the normal people to oversee and watch it are not there

the reporting safeguards are weak (remuneration, reporting etc)

## 4. What happened at CPA Australia?

2007	<p>Governance review, a changing of the guard, out with the old in with the new          Corporate model v's professional model          Complete board spill          Some key members were involved.          A Malley President with 50% pay increase          Board remuneration: very generous v's voluntary</p>
2008	<p><b>Constitutional changes</b>          (new constitution, directors terms extended on minimal votes, faux rhetoric on board discipline re remuneration, objects changed, members did not vote for directors, representative council etc)</p> <p><b>Strategic changes</b>          (marketing, strategy, CEO focus, books, TV, global reach, financial planning, integrated reporting, minimal disclosure, etc)</p> <p><b>Practical changes</b>          (scandalous remuneration, CPAA Advice fiasco, misleading reporting, just look at the IRP Preliminary Report to get a handle on this etc)</p>
2016	
2017	<p><b>The Fall</b>          Thanks - media &amp; journeymen/women members - not well paid nor eminent          Independent Review Panel - well paid, eminent and yet to prove its worth          New board - still poor corporate governance, respect?          Past leaders - seems they get off scot-free - I call that wrong</p>
2018	<p><b>The Future</b>          Who knows?</p>

### Independent Review Panel Preliminary Report

Confirmed the failure of corporate governance at CPA Australia  
 114 pages showing the failure

#### Missed the obvious

Go back to what corporate governance is all about - it is to look after this artificial person.  
 That is the job of the board and senior management.

With CPA Australia - they did not do a very good job, and in some cases failed YET there are no recommendations to hold them to account for that.

That is Corporate Governance CPA style - board and senior management oversee the organisation for close to 10 years with major deficiencies and failings but none held to account. I call that a professional whitewash and bad corporate governance.

## The Independent review Panel Report is a professional whitewash

Most members understanding of the process

Step 1: Preliminary Report = Draft Report

Step 2: Will amend and make adjustments and additions based on feedback

Step 3: Final Report

The IRP's approach to the process

Step 1: Preliminary Report = Final Report on Findings

Step 2: Only want feedback on recommendations, nothing else

Step 4: Final Report

Well, you think about that a bit and see if you can see the obvious professional whitewash in this.

For proof just refer to their quite specific memo to members for feedback

*"...the primary focus is to further develop the recommendations rather than to reconsider its findings."*

and also the feedback interview guide,

*"Interview Guide*

### **Introduction**

*The Review Panel is undertaking extensive consultation throughout October with members and stakeholders of CPA Australia. The views of the membership are sought to provide input into the review and to obtain feedback on the preliminary recommendations. To achieve this, the Review Panel requests:*

*- discussions focus on feedback on the effectiveness and appropriateness of the recommendations etc"*

See my more detailed response which highlights some of the elephants in the room that the preliminary report ignored and now will forget forever.

It's a very clever but sneaky technique used by the IRP to just not deal with certain issues. I believe its wrong.

## 5. Three examples to illustrate

The question hanging in the air - should the senior managers and directors of CPA Australia be held to account?

I say YES, and to not do so makes a mockery of good corporate governance.

N.B. CPA Australia has plenty of money to take legal action if necessary, and we have a new board.

### i. Remuneration of the board and management

Scandalous and over the top are good descriptors

CPA response - 2nd March 2017

*“You also dwell at length on issues pertaining to board and executive remuneration, **the annual cost of which is clearly disclosed** in each year’s annual report in accordance with applicable standards and **subject to scrutiny at each Annual General Meeting**. There simply **are no secrets in relation to the total quantum of cost** associated with the organisation’s board and executive management and CPA Australia’s disclosures follow the same form as other comparable member organisations. Indeed, it was precisely because of a concern that director compensation **be proportionate to the demands on directors and relevant market benchmarks** that the Board recommended changes to article 45 of the constitution in 2012.”*

CPA memo - 31st May 2017 (forced them to disclose)

Still can’t come clean - s.202B statement. Still not right.

CEO’s termination pay - still cannot come clean

Where is the contract?

Who signed it?

Is this a club within a club or is this a public company?

What did the IRP find out and say

*“The separation payment was equivalent to three year’s salary, a term of notice above both market and member expectations. Most CEO contractual employment agreements are one year or less, particularly following the 2009 changes to the Corporations Act (Section 200B(1)) that required shareholder approval for any termination payment that exceeds twelve months’ salary.<sup>88</sup> This requirement does not apply to member-based organisations. The member responses were, without exception, vocal in condemning the scale of this payment. While it complied with the letter of the law, the Review Panel considers it excessive for a member-based organisation. The Review Panel understands that the rationale for the changes to the separation payment was part of a succession planning strategy. The Review Panel was informed that if CPA Australia had refused to pay out the full amount of the separation payment, the organisation would have been in breach of contract. The Board did not disclose the terms of this contractual agreement to the members, and there is minimal documentation of the decision-making process or rationale.*

*Upon his departure in June 2017, the former CEO’s annual contract included:*

*an annual salary as CEO of CPA Australia*

*an annual salary as CEO of CPA Advice*

*annual bonus of up to 30% of base salary*

*long term incentive (LTI) to be payable after a period of five years.”*

### And what didn't the IRP say?

Did they see the contract? Why not? Nothing to say on that.  
Nothing about trying to recoup this scandalous level of remuneration?

### Oh well, perhaps we can wait for the final report?

Sorry to say but there won't be anything in that on this either. They have censored any more fundings for the final report and have censored what sorts of things they will deal with, which is just to refine their initial recommendations.

## ii. CPA Australia Advice

- a. **The business model.** I would suggest the IRP report was very very weak on this. The test is not whether it had a strategic rationale but whether it passes the reasonable person test.
- b. **The risk of losing Professional Indemnity Insurance for Public Practitioners.** Seems tis was a risk they were prepared to take without informing the members.
- c. **The remuneration of Key Management Personnel.** The IRP just avoided the issues here, and just stated the facts as findings. The elephant in the room was not just avoided it was blindsided.

*“Some members have questioned why the CPA Australia directors were provided additional remuneration if they sat on the CPA Advice Board. The Review Panel notes it is not unusual for Directors to be paid additional fees for sitting on Boards of subsidiaries. However, it is unusual for executives to receive additional remuneration unless they are office-holders.*

*CPA Advice Board appointment and remuneration did not follow the same procedure as CPA Australia. Candidates and remuneration were recommended by the former CEO in a meeting in February 2015. The former CEO “outlined the recommended candidates for the appointment to the Board”.<sup>77</sup> The CPA Australia Board, excluding those Directors who were to sit on the CPA Advice Board, then approved the appointment of five existing directors and remuneration of:*

*▣ \$100k per annum for Chair ▣ \$70k per annum for Directors.”*

Ask yourself is this a reasonable decision by the CPA board to approve not only these board increases but also a \$250,000 salary for Alex Malley on top of his already overpaid CEO position at CPA Australia. Just have a look at the Board chart to see which directors approved this.

- d. **The reporting** - the ‘true and fair’ view was consolidated out. The IRP did not comment on this.
- e. **The auditor said it was okay!** The IRP did not comment on this.

## iii. Membership Numbers

Remember growth in membership numbers was the big selling point for this whole decade.

I would suggest it was a bit of a furphy.

It was Sales Talk

It was Misleading

In some case it was plain Wrong

refer my attached analysis plus refer to the IRP Preliminary Report