**ASIC v Mitchell (No. 2) [2020] FCA1098**

Notes on Role of Chair

From para 1398 – 1420 (pp 314 - 318) his Honour Beach J provides a detailed discussion of the role of the Chair, with a review of relevant caselaw precedents followed by a distillation of applicable principles. Point include:

* The Chair has no power or authority to manage the company /organisation. His /her primary function is to preside at board meetings and exercise procedural control. Save for that, and the power to exercise a casting vote (if applicable), they have no greater authority than an ordinary director.
* The Chair does have the power and authority to manage board meetings and to that extent may have greater responsibility for the performance of the board as a whole.
* The Chair has the power, authority and responsibility for setting the agenda items for board meetings (a responsibility that can be discharged in consultation with the CEO).
* They have the power, authority and responsibility to ensure that the board has sufficient information, whether in written or oral form, to be able to meaningfully consider and decide on the agenda items before the board. The context of the decision required or consideration necessary by the board at that meeting must be taken into account.
* The chair has the power, authority and responsibility to ensure that sufficient time is allowed for the discussion of complex or contentious matters. This might include meetings outside board meetings so that board members are thoroughly prepared.
* They are there to ensure that the board members work effectively together and to ensure that their skill sets and personalities complement each other. The Chair should endeavour to facilitate the effective contribution of each director.
* The Chair is there to ensure workable and harmonious relations between the executive and non-executive directors, and between the board on the one hand and the executive management on the other hand, particularly the CEO.
* The Chair should facilitate a productive and harmonious relationship with the CEO, particularly where the CEO is not a director.
* The Chair has an important role in dealing with disrupters on the board. The sorts of questions they may need to ask themselves:
  + Do they display very negative behaviour?
  + Are they “net energy drainers” (Ram Charan, Dennis Carey and Michael Useem, Boards That Lead: When to Take Charge, When to Partner, and When to Stay out of the Way (Harvard Business Review Press, 2013) 64-5)?
  + Do they pontificate on issues that are pretentious or irrelevant?
  + Do they require remedial assistance or counselling?
  + Should they be encouraged to depart?
* But productive dissent and competitive tension between conflicting ideas and positions should be welcomed rather than hindered by a Chair who thinks that s/he otherwise knows best.
* The Chair may have greater responsibility for defining and ensuring that the board sets and implements the corporate culture of the organisation and appropriate corporate governance structures (i.e. the framework of rules, relationships, systems and mechanisms under which authority is exercised and controlled within the corporation and under which it is accountable.)
* Other responsibilities of the Chair include assisting to identify new directors, dealing with their induction, and development of each director and ensuring continuing education.
* The Chair is responsible for monitoring the performance of the board, board members and board committees.
* The Chair is there to ensure that there is appropriate communication with members.
* They have a role in representing the board and the organisation to outside parties.

His Honour also discussed the Chair’s role in ensuring appropriate and sufficient information is before the Board to deal with any of the agenda items before it [paras 1166 – 1172. Points include:

* The Chair is not entitled to completely delegate to the CEO the function of determining the amount and quality of information to be put before the board. But they can and should consult with the CEO. If the Chair is satisfied that the CEO has exercised or made the appropriate judgement, they are entitled to rely on that judgement.
* If information is to be presented in oral rather than written form, the Chair must make sure through prodding or the asking of questions at the board meeting that the information is sufficient for the relevant agenda item to be properly considered in terms of the decision required by the board.
* If a person other than the CEO is the more appropriate person to present, then the chairman should ensure that that person is in attendance at the meeting.
* The Chair in conjunction with the CEO should consider the context / nature of each agenda item in determining the information to be put before the Board (eg decision, discussion, noting, for guidance only etc).
* The Chair should ensure that information is in a comprehensible form for the Directors to be able to perform their functions and responsibilities.