

Skateboards, Surfboards, and Corporate Boards: Children and Young People and the Corporations Act

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The 2001 net profit of the Coca Cola Amatil company (CCA) was \$171.1M. This is a company that enjoys a high degree of brand loyalty from children and young people, and one which strategically positions its advertising to appeal to a teenage market. We have all seen the advertisements: Images of young people on the beach, in the water, on the snow, leaning against their cars, and always grasping firmly their favourite beverage. The 2001 CCA Annual Report profiles its Board Directors. All of them have substantial and relevant experience, and no doubt act with diligence and integrity. The average age of this Board is 53.

CCA is not unusual in the international corporate board sphere in terms of its board composition – largely former senior executives, mostly male, and on the other side of 50. Experience counts for a lot in commercial operations and is highly prized, but what of the value of youthful vigour, and the inside story on the experience of being a teenager within the very markets that youth-oriented companies seek to exploit? Market research is one thing, however corporate governance is another.

Even if CCA wanted to appoint a savvy 16 year old to its Board, it would not be able to do so in Australia. Section 201B (1) of the *Corporations Act 2001* (CA) is in the following terms:

“Only an individual who is at least 18 may be appointed as a director of a company”

With some exceptions, the upper age limit for appointment as a director

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is 72 years¹, however changes to the Act foreshadowed under CLERP 7 to commence on 1 July 2003 may remove this limit.

There are good reasons to be careful about the quality and capacity of company directors. Directors bear special responsibility on behalf of the shareholders, and there is an increasing regulatory burden. Concepts of fiduciary duty and confidentiality are complex, and the information required to make an informed decision can be both confusing and voluminous. In some cases, personal liability will attach to individual directors for bad decisions. A certain degree of judgement and tact is required to balance the competing demands of shareholders, other stakeholders, employees, other directors, legislators and consumers. None of this however should militate conclusively against the appointment of younger board members.

We live in an age of transition with respect to our views on those who are themselves at an age of transition. We have the example of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* which sets out as one of its fundamental principles:

“Wherever a child or young person is able to form his or her own views on a matter concerning his or her safety, welfare and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances.”²

The Commission for Children and Young People in NSW has, within its enabling Act, the following as one of the principles governing the work of the Commission:

“... (b) the views of children are to be given serious consideration and taken into account”³

In the *Children (Criminal Proceedings) Act 1987*, the principles relating to the exercise of the criminal jurisdiction with respect to children include:

“... (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,”⁴

¹ Section 201C, *Corporations Act*

² Section 9 (b) *Children and Young Persons (Care and Protection) Act 1998 (NSW)*

³ Section 10 (b) *Commission for Children and Young People Act 1998*

⁴ Section 6 (a) *Children (Criminal Proceedings) Act 1987*

These progressive and realistic legislative provisions are underpinned by the classic statement in Article 12 (1) the United Nations Convention on the Rights of the Child:

“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

The principle of child participation is typically ventilated in government and community sectors, however there has been little or no attempt to address the lack of youthful representation within corporate Australia. Boards have been castigated in recent times for their failure to constitute themselves in ways that properly reflect the community. The sense of the good corporate citizen (as well as the more emphatic economic reasoning) has led to some structural re-engineering in boardrooms to dilute the Anglo-Saxon, male, industry captain/political connection/sporting hero typical backgrounds of directors. Boards can be forgiven for not appointing young persons to the table because the CCA prevents them, but there is nothing to suggest that advisory committees must also be devoid of children and young people.

There is a resounding silence from children and young people in corporate Australia. Some of the arguments that are used to prevent real participation are:

- Children should enjoy their youth – they shouldn't be locked up in committees and board rooms;
- It is not fair to place children in such high level commercial situations – they will be humiliated by their ignorance and inexperience;
- We risk placing children in situations where they may face criminal or other sanctions;
- Children and young people simply do not have the maturity or commercial acuity to contribute anything useful to a commercial operation;
- Eighteen years of age is young enough.

The final objection is true enough however you would be hard pressed to find board members under the age of 20. Young people themselves will tell you however that the difference between ages of 16 years and 18 years are of the order of magnitude as between mid life and later life in adults. There are a number of counter arguments to the other propositions, but perhaps the most persuasive is that legislation and practice already recognises that children and young people can and do participate in some of the most stressful and demanding decision-making known to the human condition. In family law, criminal law, school disciplinary process and care proceedings children and young people are invited and

sometimes encouraged, admittedly to varying degrees, to participate in extremely challenging process. In those situations where they express a wish to be involved, they are not found wanting. Indeed, their very participation can be a crucial component of the ultimate determination. For example, the child who expresses a wish to reside with a particular parent, the child who enters a plea of “not guilty” despite the counsel of his or her legal representative, and the young person who rejects the “summary judgment” of their headmaster and commences proceedings in the Human Rights and Equal Opportunity Commission. All of these situations call for a capacity for balanced decision-making, an ability to receive and consider professional advice, and in circumstances that are more intense than 99 percent of the bulk of most board agendas.

Modern corporate governance theory now highlights the position of the “stakeholder” – generally a wider class than the “shareholder” – and this group has seen its importance grow along with the emphasis on “triple bottom line” accounting. The ethical and social dimensions of corporations are receiving closer scrutiny as turnover for large companies explode beyond the resources of many sovereign nations, commercial operations existing at a global level, and boards making decisions which can affect regional stability and national prosperity. The collapse of Enron in the US, HIH in Australia, and the dismal performance of a string of financial services companies in recent times, has demonstrated the catastrophic impact of gross negligence in the boardroom and sloppy oversight by the regulator. Part of the ethical dimension is that stakeholders, particularly in relation to large publicly listed companies, should now play a more important role in the governance of those companies. Stakeholders will include residents located close to the relevant workplaces, local communities relying on the employment that the company creates, and the consumers who sustain the company’s profits.

A large stakeholder group for many companies will be children and young people, and they are poorly represented, if not entirely disenfranchised, in the operations of most corporations. Consider toy companies, sporting companies, telecommunication companies⁵, confectionery companies, beverage companies⁶, fast food companies, electronic game companies, amusement companies, booksellers, recorded music distributors, and clothing companies. Perhaps even the tobacco companies. All of these sectors exact huge profits from the youth market, and it’s not just the teenagers with the disposable income. Research shows

⁵ Market research by Telstra in 2001 found that 45% of young people between the ages of 14 and 24 own mobile phones, with the figure expected to increase to 55% by 2003.

⁶ Coca-Cola paid £103 million to market its products in association with the first Harry Potter film, and was considered a coup in the battle to secure the lead in sales to the worldwide youth market.

that children as young as two⁷ significantly influence the spending patterns of their parents.

Sharon Beder cites American research in her paper "A Community View, Caring for Children in the Media Age":

"From age 2: Accompanying Parents and Requesting. Children begin to ask for things that they see and make connections between television advertising and store contents. They pay more attention to those ads and the list of things they want increases.

At the same time, the youngster is learning how to get parents to respond to his or her wishes and wants. This may take the form of a grunt, whine, scream, or gesture--indeed some tears may be necessary--but eventually almost all children are able on a regular basis to persuade Mom or Dad to buy something for them.

From age 3: Accompanying Parents and Selecting with Permission. Children are able to come down from the shopping trolley and make their own choices. They are able to recognise brands and locate goods in the store.

At this point the child has completed many connections, from advertisements to wants, to stores, to displays, to packages, to retrieval of want-satisfying products. For many parents this is a pleasing experience. Ditto for the marketers, for it signals the beginning of the child's understanding of the want-satisfaction process in a market-driven society."⁸

By the time a child becomes a teenager in industrialised nations, they are sophisticated and knowledgeable consumers, skilled in navigating and understanding modern capitalist frameworks. They are also the target of concerted marketing campaigns by a myriad of high value and high volume corporations, and the message from the marketers is that young people are no pushover.

It may well be that board representation is not the ideal way to canvass the views, and represent the interests of children and young people in all commercial situations. There are other models. Youth advisory councils have served local government bodies for decades in some areas, and the NSW Youth Advisory Council reports directly to the Premier.

The law and theory of good governance in modern business however militates against continuing neglect of this huge, unrepresented market. It does so against the continuing revolution towards youth participation in other areas of social practice, and maintains the fiction that young people

⁷ In Australia in 1993, children under 18 had an average \$31.60 to spend each week and influenced more than 70 per cent of their parents' clothes and fast food purchases, according to Sian Powell and Bernard Zuel, 'Marketers' influence over young challenged', Sydney Morning Herald (Sydney), 3 September 1993. Ten years on, the disposable income is obviously much greater.

⁸ Papers from a national conference, edited by John Squires and Tracy Newlands, 'New College Institute for Values Research', Sydney, 1998, pp. 101-111 citing James U. McNeal, Kids as Customers: A Handbook of Marketing to Children, New York: Lexington Books, 1992.

are not interested in commerce or engaging in the administration and direction of companies. In 2002, Business Studies was the most popular non-core subject in that year's Higher School Certificate in NSW, with over 17,000 students sitting for the exam. That's a huge talent pool.

Smart companies will get ahead of the game and look into ways in which they can implement constructive and meaningful dialogue with children and young people. Professional advisers and directors should review company and board structures and schedules to identify opportunities for youth input. UNICEF, the NSW Commission for Children and Young People and the Foundation for Young Australians all have useful resources on how to maximise participation. Their respective websites have links to youth participation resources⁹. These moves will not only articulate best practice in youth participation, but may also prove to be financially profitable. Youth advisory committees, children's task forces, and youth observers are all ways in which an entity might start to tap into the experience, enthusiasm, and insight of young people.

The *Corporations Act* should be reviewed to introduce the kind of flexibility that it demonstrates to the other end of the life cycle. The Act could extend the discretion to a Board to allow a young person (say, at or over the age of 16 years) to sit as a director with the assistance of a mentor or board "shadow" in relation to procedural or legal requirements. One Alaskan authority has published *The Power of an Untapped Resource – Exploring Youth Representation on your Board or Committee*¹⁰. This text also grapples with legal restrictions, and suggests that young people be excluded from certain decisions of a board but argues that the law does not operate to exclude young people from all decisions. In Australia, a board would need to consider what aspects of the agenda required a director's decision, and what aspects could be referred to non-directors. Of course, many decisions in modern corporations are made in committee with the directors exercising the power of review, veto, and final determination on recommendations.

If the Act were to be amended there will be concerns as to director's liability, however, these are not really any different to the liability attaching to all directors. There may be requirements to ensure that comprehensive director's and officer's insurance is in place, and that all young board members receive an appropriate induction and orientation with clear guidance as to where advice, counsel and assistance may be obtained from. Again, these are all best practice recommendations for any new board member. And if some Board members feel a little squeamish about their usual boardroom conduct in front of a younger person then they should reflect on two things. Firstly, they might query whether that conduct is appropriate behaviour in the first place. Secondly, the politics and tenor

⁹ <<http://www.unicef.org>> at 2000, <<http://www.kids.nsw.gov.au>> at 2000, <http://www.ayf.org.au> at 2000.

¹⁰ Association of Alaska School Boards, <<http://www.aasb.org>> at 2000.

of modern teenage relations are robust enough to prepare a young person adequately for the cut and thrust of the boardroom.

With recent commercial dealings in the media and public spotlight, perhaps a little youthful idealism is just what the Board needs. Quite apart from the ethical and philosophical dimension of youth participation, this “untapped resource” might also impact positively on the bottom line as well. Australia has used the law at an early stage (in international terms) to achieve positive social ends in discrimination, gender equity, and universal suffrage. Most would argue that such progressive legislation has provided economic benefits as well. Australia should grab the initiative again, pay its respects to Article 12 of the *Convention on the Rights of the Child*, and amend the *Corporations Act* to invite the possibility of youthful representation. The market can then be left to decide on the utility of such an amendment. My own guess is that the boards of the market leaders will seize on the opportunity to remove young people from the stuffy rooms of market researchers, and put them in the director’s chair where their unique experience can be shared directly with the balance of directors seeking to understand the youth market.