

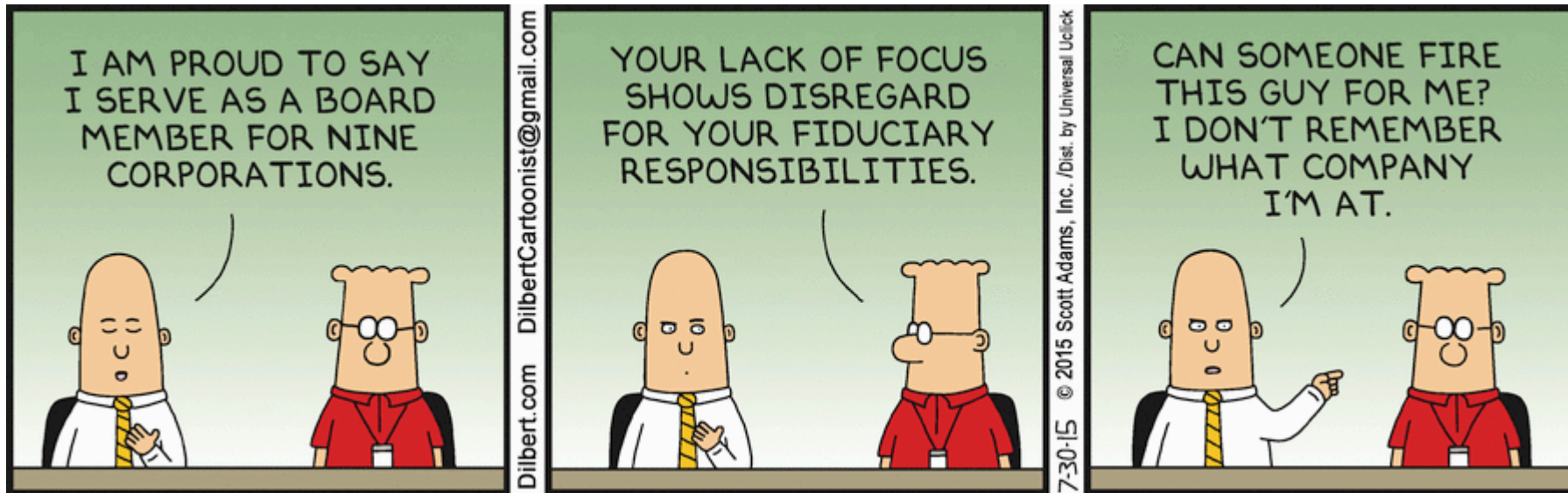
The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. The shapes are primarily triangles and polygons, creating a dynamic, layered effect. The overall composition is clean and modern, with the text centered in the white space.

Call yourself a director

Do you know your legal obligations?

Stuart Waldon, Director
PeopleScape

Every great presentation starts with a Dilbert cartoon!



Agenda

- ▶ Current landscape
- ▶ Duties of directors and officers
- ▶ De-facto and shadow directors
- ▶ Rights of directors
- ▶ Liability of directors and officers
- ▶ Risk management
- ▶ Case studies
- ▶ AICD - Not For Profit Study

Current landscape

- ▶ The conditions under which directors and officers operate appear to be tougher now than they have ever been in the past - and not getting better
 - ▶ Over 600 laws at both Federal and State level
 - ▶ Employment law
 - ▶ OH&S and environmental law
 - ▶ Superannuation Guarantee Act
 - ▶ Discrimination Act
 - ▶ Do not call register
 - ▶ Additional laws for certain industries & sectors (e.g. food safety)
 - ▶ No up to date list of these laws
 - ▶ Societal pressure and expectations
 - ▶ Fundraising - strong competition & regulation
 - ▶ Social Media

The duties of directors

- ▶ Directors have a number of common law and statutory duties:
 - ▶ Duty to act in good faith in the best interests of the company
 - ▶ Duty to act with care and diligence
 - ▶ Duty to avoid a conflict in the position of a director and/or any interest that a director may have
 - ▶ Range of duties that prohibit the misuse of information obtained by directors
 - ▶ Duty of directors to ensure the accounts and financial records of the company are properly managed and signed off
 - ▶ Duty of directors to ensure there is appropriate continuous disclosure by directors to the public
- ▶ There is a “reasonable judgement” test - however it is yet to be tested!

Directors

- ▶ Directors can either be formally appointed, or deemed to be a director with the full responsibilities and liabilities attached:
 - ▶ De-facto directors
 - ▶ Shadow directors
 - ▶ Nominee directors
 - ▶ Alternate directors

Directors v Officers

- ▶ A director is an officer
- ▶ Officers are defined under the Act
 - ▶ A person who makes or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - ▶ Has the capacity to affect significantly the corporation's financial standing; or
 - ▶ In accordance with whose instructions or wishes the directors of the corporation are accustomed to act
- ▶ Generally, all of the major duties of directors apply to officers

Rights of directors

- ▶ Usually spelt out in the Articles of Association or Constitution:
 - ▶ Obligation and right to attend board meetings and participate in the management of the company
 - ▶ Right to receive all internal information about the company's affairs
 - ▶ Right of indemnity from their colleagues for obligations under the legislation and common law
 - ▶ May have the courts authorise a person to inspect the financial records of the company
 - ▶ Right to retain or obtain documents

Liabilities of directors and officers

- ▶ The key areas of potential personal liability for you as a director are:
 - ▶ debts incurred when the company becomes insolvent
 - ▶ company losses caused by a breach of directors' duties
 - ▶ if you act as a guarantor or provide security over personal assets
 - ▶ debts incurred by the company acting as trustee
 - ▶ illegal phoenix activity
 - ▶ other regulatory action that might be taken against you

If you fail to perform your duties as a director, you may:

- ▶ be guilty of a criminal offence with a penalty of up to a maximum of \$200,000, or imprisonment for up to five years, or both
- ▶ have contravened a civil penalty provision (and the court may order you to pay to the Commonwealth up to \$200,000)
- ▶ be personally liable to compensate the company or others for any loss or damage they suffer
- ▶ be prohibited from managing a company

Risk management for directors

Known Knowns

Known Unknowns

Unknown Unknowns

“Taking into account all of the circumstances, is what I propose to do in my honest belief in the best interests of all the shareholders of the company of which I am a director?”

How to mitigate risk

PREPARE

- ▶ Pre-appointment due-diligence
- ▶ May chose not to take up the appointment

PROCEED

- ▶ Terms of appointment
- ▶ Protections - Deeds of access and indemnity
- ▶ Insurances (e.g. D&O insurances, Public liability insurances etc)

POST-APPOINTMENT

- ▶ Governance
- ▶ Codes of conduct
- ▶ Policies
- ▶ Review & enforcement

“Inquiry reveals explosive evidence of RSL’s charity fundraising failures”

Sydney Morning Herald - 5 September 2017

- ▶ RSL’s accounting systems had extensive irregularities
- ▶ The organisation did not act on concerns about large scale claims for work expenses from its long-serving former president
- ▶ Withdrawal of more than \$200,000 in cash on corporate credit cards
- ▶ \$2.5m in “consulting fees” paid to directors of its nursing home charity
- ▶ RSL LifeCare directors voted on resolutions relating to their own fees
- ▶ State law forbids directors of charities from receiving any form of remuneration without the express permission of the Fair Trading Minister
- ▶ RSL LifeCare maintains the payments were legitimate reimbursement for work performed in addition to directors’ duties
- ▶ Entire NSW RSL State Council stood down and all fundraising suspended

Kids Company - UK Charity

- ▶ Collapsed in 2015 - 1 month after receiving a £3m government grant
- ▶ All former directors have been named in proceedings
- ▶ All directors were volunteers, including the chair who was a former BBC chief
- ▶ All could be barred from holding other directorships
- ▶ CEO was not formally a director - but alleged to be a de-facto director
- ▶ A damning report by MPs found the trustees of the company ***“held in sway of an unaccountable and dominant CEO, were ultimately responsible for the collapse of the organisation”***

2017 AICD NFP governance

- ▶ Governance never more important than now:
 - ▶ Unprecedented change
 - ▶ Evolving regulatory environment
 - ▶ New funding models
 - ▶ Increasingly complex operating environment
- ▶ Key issues:
 - ▶ Building foundations for long-term success
 - ▶ Organisational culture
 - ▶ Risk and reputational management
 - ▶ Financial challenges

Thank you!

Stuart Waldon

Director, PeopleScape

E: swaldon@peoplescape.com.au

T: 0498 092 157