The Case for Professional
Project Corporate Governance and Project Controls
Or How to Stop Project Failures

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Front matter

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The Corporate Governance Charter™
Bridging the Theory and Practice of Good Directorship
By

Geoffrey Kiel & Gavin Nicholson

Under an agreement given by Professor Geoffrey Kiel May 2000

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Introduction

Projects regardless of their type, industry and nature have failed for as long as humans have been trying to deliver projects on time. Until the current changes in Corporate Law, failure whilst not exactly tolerated did not cause too much concern at board level in past years. Now failures must be accounted for and the accounts need to show just what impact to either the bottom line or the shareholders funds that such project failure causes. The shareholders of major corporations who fail to deliver a forecasted profit are on the warpath

Basically failures are no longer easy to hide, and the legal profession will wax fat upon the litigation that surely and indeed is already occurring. However it is not the board of directors who are issuing the writs, it is the shareholders, who are now starting to hold the board liable for the failure.

The statutory provision mandating continuous disclosure by listed companies was introduced on 5 September 1994 to support Australian Stock Exchange (ASX) listing rule 3.1. Statutory enforcement of this provision by the Australian Securities and Investments Commission (ASIC) remained dormant for many years with only limited application of the sanctions that followed the introduction of the Corporations Act 2001 (Cth) and further amended legislation in 2004. However, heightened activity by ASIC in 2006 was hoped as evidence that the regulator and the Courts would enforce the full range of penalties and remedies, from criminal proceedings to civil liability. Since then several cases were before the Courts as a result of legal action by the regulator and also by discontented company shareholders.

This paper notes recent enforcement activity and the increasing litigation by shareholders against a listed company for a failure of relevant disclosure may provide an alternative to enforcement of continuous disclosure by ASIC and that the protection afforded to the Board and Directors is to have a proper understanding of Project Governance and Project Controls

Currently (July 2014) there five major multi-million dollar class actions before the courts as a direct result of Boards not having obeyed the Corporate Law of “Continuous Financial Disclosure” The current statutory requirement for disclosure is defined in Section 674 of the Corporations Act 2001 (an extract of this section is shown in Appendix 1). In many cases these companies believe that they have control systems in place or as often the case ignore what the Project Cost Controls systems are telling them (Given that they have Project Control systems in place) and thus imperil the board in being fined for such failures or even worse suffer a jail term

Failure to implement a professional Project Controls system is an additional disaster of good Corporate Governance. It is mostly due to unskilled project managers (due to their lower cost rates) who are managing large scale complex projects, and that they report to the board that their project is performing well to time and budget, because they wish to hide their inadequacies or just to tell the board what they think that the boards want to hear. A definite recipe for disaster that could leaves board members to be in jeopardy of their fiduciary duties.

Looking at Professional Corporate Governance firstly, and then Professional Project Controls

Across many Australian Company boards business, the need for Corporate Governance is being highlighted and indeed many boards have not fully complied with proceeding with Mr. Stan Wallis’s procedures on “Good Corporate Governance”, which were outlined in his “Financial System Enquiry” in 1997!

According to Professor Geoffrey Kiel

Today, many directors are posing the following question:

> *"We know the theory of good governance - the issue is how we can apply many of these concepts to our particular board. In short, we want to link the theory to the practice of good governance."*

Now in order to achieve the practice of good governance it is proposed that boards develop a Corporate Governance Charter, (in fact not too unlike a Project Charter), as Professor Kiel says in developing a charter.

> *The point that is emphasised throughout is that both the content and the process of your Corporate Governance Charter that is important. Compiling such a resource has valuable content outcomes such as:*
>
> - *Setting a system in place for board processes*
> - *Clearly signalling to the business community the emphasis your organisation places on corporate governance*
> - *Providing a useful reference guide for areas of ambiguity; and*
> - *Providing a handy tool when inducting new directors*
>
> *The second major benefit of a Corporate Governance Charter is the process required to compile and draft it. Many of the major problems faced by directors can be avoided or mitigated by anticipating possible problems and holding frank discussions about possible solutions before the pressure of a true crisis arises.*

I believe that in addition to the content that Professor Kiel suggests that a Corporate Charter should contain; that there should be considerable discussion and definition of Project Management. It is all very well ensuring that corporate processes are well defined when the way we do business in the form of a project is in the main completely ignored.

The Need for a Corporate Governance Charter

Before defining what an organisation needs to do in order to establish a Corporate Charter it is probably best to use (once again) Professor Kiel's definition from his The Corporate Governance Charter ™ **Bridging the Theory and Practice of Good Directorship** book, in which he states that:-

> *Corporate governance itself can be defined as "the relationship among various participants in determining the direction and performance of corporations" or an "umbrella term that includes specific issues arising from interactions among senior management, shareholders, boards of directors, and other corporate stakeholders.*

When looking at that, it is apparent that this definition would also meet some of the criteria for definition of a Project Charter. In mapping these initial criteria with those used in the PMIBOK in describing how a project is defined, it can be observed that governance covers a wide range of business endeavours. So it would seem that there is a deal of synergy between managing the business processes at a board level and managing a project. Sadly the project management processes generally do not manifest themselves at board level. In many cases this consequently means projects, which are failing, are either ignored or at best are given inadequate additional resources, because the directors pay insufficient attention to them. When did you last see a major project as an agenda item on the board papers?

That lack of attention to detail at board level over the years has lead to many failures and the response by governments both Federal and state is to introduce changes to corporate law. Yet interestingly enough the corporate law is silent on projects.

It is becoming increasingly obvious that corporate governance has become a highly focussed topic' as board directors try to come to terms with the progressively more onerous duties placed upon them. Essentially, until a short time ago a board generally operated little more than a 'rubber stamp' on management activities[i], now it has to define the core and/or fundamental role(s) it plays in the modern corporation and society across the spectrum.

There has been a movement away from buyer beware position where shareholders and people who deal with a company are responsible for their own actions and only protected from cases of clear fraud and deceit. Instead, companies and their directors are now held more directly accountable for their actions. This movement is not only discernable in the legal duties (or conformance role) of corporate officers, but in the increased performance expectations of all parties as well. In the United States this has lead to an increase in shareholder litigation for failure.

For example according to Bruce Webster of Pricewaterhouse Coopers, there have been over 120 IT projects lawsuits filed since 1976 in the US. From my reckoning of the various cases over $US10 billion's worth. The basic cause of failure over the years hardly ever changed, miscommunication between the client and the contractor, hazy and ill-defined objectives, the inevitable "scope creep", poor leadership, lack of board commitment and naturally enough poor project management. We have heard it all before, so why do we keep repeating the same mistakes. To paraphrase Winston S. Churchill, "those who ignore history, are condemned to relive it".

The various institutes of Project Management around the world are desperately introducing competency standards and creating standard processes by which they hope to improve the delivery of projects. A shining beacon is the Project Charter and the PMIBOK describing how to do it, yet these attempts to improve the project delivery are either not understood by the board or even welcomed by it and certainly the recent changes to ignore board responsibilities for a Corporate Project Management policy.

Since making these observations in 2000, it would appear that while some progress has been made by many corporates, there is still a large number who have not put Corporate Governance in place. One pleasing achievement has been the development of the Governance Institute of Australia

What is a Corporate Governance Charter?

Once again turning to Professor Kiel for a definition of corporate governance, who says,

> *There is no doubt that there is an increasing burden of duties and obligations being placed on the modern director, leading many in the business community to examine their corporate governance practices. As well as the significant rise in directorial education there is also a noticeable increase in the formal governance responsibilities of company officers.*
>
> *For instance, the Australian Institute of Company Secretaries highlights the growing trend for corporate solicitors to undertake the company secretary role. Similarly, there has also been a significant*

formalisation of the board committee system across the Australian business landscape. For instance, while an Audit committee has long been a feature of corporate life, there are a growing number of alternative committees including Remuneration, Environment, Occupational Health and Safety to name just a few. Clearly, business leaders are seeking ways to ensure their governance practices are effective and efficient

Notice that there is no mention of a Project Management Committee, and yet when a client maybe builds say "a sports stadium" it leaves most of the responsibility, for say commissioning, to the contractor. The project values are in the 100's of million dollars, the ensuing litigation when the project fails costs run into millions, but the client says they do not have the money for proper project governance. Once again the old story of "not enough money to project manage it properly; first time plenty of money to do it a second time" Indeed while boards may introduce "Corporate Governance" this, in many instances, does not filter down to proper governance of projects. If a board introduces corporate governance at a corporate level but fails to introduce it at the project level they are in fact failing the essentials of their own Corporate Governance. Strict guidelines on how, what, when and where a project's finances should be spent should be introduced and then strictly adhered to. This means that the upfront initial plan to execute the project needs to be in sufficient detail that enables form control of scope, time and costs on a project.

Thus it is an imperative to describe how cost controls will be related to all the projects that are being undertaken. Thus formal procedures for the establishment of Project Controls must be included in the Governance charter to ensure the board really gets to know how each project is meeting its financial criteria and completion delivery date

Thus we need to develop a set of performance procedures to overcome the shortcomings and so start with a simple corporate project governance charter. According to the Oxford dictionary a charter is

—n.1 a document granting rights, issued esp. by a sovereign or legislature. b written constitution or description of an organization's functions etc.

According to the Governance Institute of Australia there are a number of useful practitioner documents which make up the Governance Charter and amongst them are:-

- Audit and Compliance Committee Charter
- Audit and Risk Committee Terms of Reference
- Audit and Risk Management Committee Charter
- Audit Committee Charter
- Audit Committee Terms of Reference
- Board and Chairman Evaluation Questionnaire
- Board Charter
- Corporate Governance Policy

From these major documents, it must be assumed that Project Controls would fit into the Audit and Risk and Corporate Governance Policy quite comfortably. It will be interesting to discover if after 17 years since Stan Wallis's reference to creating Corporate Governance Charters

Thus the corporate project governance charter is a formal board policy document that spells out the roles, responsibilities and authorities of the respective board members, company managers in setting the direction, the management and the control of the organisation for each of the individual members and collectively will ensure that all projects that the company undertakes is to a defined methodology and strategic vision.

Typical Board Level Governance Elements

All boards should ensure that they have all the appropriate level of detail for a range of elements which should make up the Board papers or packs in addition to the traditional financial information. The lists of typical elements which should be considered as best practices are as follows:-

- **Governance**: Ensure corporate alignment of strategy, execution and results meets Corporate Law 2001, Section 674
- **Resource Management:** Make sure resource requests and labour processes are supported both top-down and bottom-up and simplified for project and resource managers to communicate their requirements and decisions throughout a project's lifecycle until contract completion.
  Produce graphical analysis of resource and role utilisation in order to assist project teams manage resources in a dynamic environment and allow managers to see where resources are being used across all programmes and projects, as well as their forecasted future use.
  Use of Resource Histograms, S-Curves and Earned Value Performance Management and Dashboard reporting provides the board and directors with a simple and focussed view of actual project process
- **Communication and Collaboration:** Rapidly record, access, and review elements (use of time-lapse photography) to determine the successful consequences of project performance. It is recommended that espousing the 'one single view of the truth' approach enables management to store everything about the project in a single, secure place enabling visibility into any potential issues or delays via workflows and alerts.
- **Reporting and Analytics:** Collect all actual project information on a regular basis (e.g. weekly, fortnightly or monthly) and deliver it in a timely way for the information to be analysed for accurate decision making by using Earned Value Performance Management techniques. The timely production of reports on progress generally enables the Project Management team to implement corrective action if a project is not performing as planned
- **Cost Management:** All costs should be rolled up to a central cost spreadsheet normalised by a robust cost code structure, where project cost information is available for drilldown by work package or for the entire project. Develop S-Curves from baselines and statused on a regular basis
- **Cash Flow Management:** Reliably forecast project final costs by taking into account actuals to date, changes, trends, approved variations and risks throughout the project duration.
- **Funds Management:** Develop a funds management capability that is fully integrated with the cost sheet, ensuring visibility of funding against project budgets, actual spend, and forecasted spend to ensure compliance with Continuous Financial Disclosure requirements
- **Document Management:** Using systems such as Aconex or SharePoint to centralise all the project management documents ensures that all project staff are always working on the most-current versions, for storage of attachments, file control access, e-mail alerts, and version control.
- **Contract Management:** All of the project contracts regardless of type must be managed and kept up-to-date to reflect all changes, variations and original omissions, from basic material procurement to complex construction contracts and so capture all relevant contract details.
- **Liquidated Damages**: Attention must be made to all contractual delivery dates and the potential impact to corporate profits and margins as well as the negative effects of liquidated damages
- **Change Management:** All project transactions leading up to and resulting in a schedule or cost change must be managed using corporate approval workflows.

Changes to original work understandings which have been agreed to and detailed within the original contract must be documented if the changes may lead to a claim for extension of time or variation to costs.

Failure to document such changes and inform the client in a timely manner have often led to the claim to fail, which may well be detrimental to corporate profits and share value.

According to James Beck of Executive Governance - directors in order to fulfil their fiduciary duties should have appropriate answers to the following questions about their board packs. If they don't, they need to make sure changes are made immediately:-

- Can the data be trusted?
- Does it cover the critical issues?
- Is it sufficiently up-to-date?
- Is it presented in such a way that it can be digested quickly?
- Is the information purely historic or does it assess future risks?
- Is only summarised information or data?

More often than not corporate executives forget that the directors may not always have the same depth of knowledge on any particular project or corporate function as themselves.

The view that is now becoming more prevalent is that directors should become aware of the advantages of Project Controls and take the time to learn these advantages, and in fact it should become a new course given by the Australian Institute of Company Directors and the Governance Institute of Australia

Professional Project Controls

Definition of Project Controls :According to **Pat Weaver**

Managing Director, Mosaic Project Services Pty Ltd – expertise in Project Time Management and PMI credential training says:-

Project controls are the data gathering, management and analytical processes used to predict, understand and constructively influence the time and cost outcomes of a project or program…..

Visit http://mosaicprojects.wordpress.com/2013/11/21/project-controls-a-definition-2/

Having defined Project Controls as a management action; which can then either be pre-planned to achieve the desired result or taken as a corrective measure prompted by the monitoring process will be implemented within the Corporate Project Management strategy under the influence of the Governance Charter. Project controls is specifically concerned with project metrics, such as scope time, cost, quantities, and resources; in addition project revenues and cash flow will be an important element of the project metrics under project control. The processes and practices are put in place to ensure the controls are actually executed and data collected and managed. The board then must understand what effect the project reports are indicating and what is occurring to the corporate finances

Thus, an effective Project Controls process can be applied in a collaboration of its various sub-disciplines which have been defined in the PMIBOK, such as:

1) Planning, Scheduling & Project Reporting

- Scope management;

- Project deliverables:
- Work breakdown / Cost breakdown structures;
- Schedule management;
- Status measurement / reporting;
- Status Analysis & Calculation;
- Schedule forecasting;
- Corrective action;

2) Earned Value Analysis & Management
- Baseline Scheduling
- S-Curves

3) Cost Engineering & Estimating
- Estimating;
- Cost management;
- Cost control;
- Cost forecasting

4) Change Management & Controls
- Change order control;
- Trend Analysis;

5) Risk and Delay Claims
- Risk Assessment & management;
- Delay Claims Quantification
- Forensic Schedule Analysis

Project Controls encompasses the total project people, processes and tools used to plan, manage and control cost and schedule issues and mitigate any risk events that may impact a project. Project control is equivalent to the project management process stripped of its facilitating sub-processes for safety, quality, organizational, behavioural, and communications management. Project control is considered the quantitative resource control subset of the project management process.

The Value of Project Controls:

A successful project performance depends on appropriate planning. There are 21 processes that relate to planning out of the 39 processes specified for project management within the PMIBOK Guide. The execution of a project is based on an effective and coherent project plan and can only be achieved through an effective schedule control methodology.

The development of a suitable Project Control system is an important part of the project management effort. Furthermore, it is well known that ineffective planning and monitoring plays a major role as the cause of project failures and profit downgrades. Indeed it can be said that it is leading to increased shareholder activism, who are being funded by Litigation Fund Managers

In spite of the fact that there has been continuous change and upgrade in the project management field, evidence shows that the current traditional approach continues to show a lack of utilisation of Project

Controls and there has been a plethora of learned articles published indicating the importance of control in the achievement of project objectives.

Empirical evidence has proved over time and again that Project performance can be improved when dedicated Project Controls systems are a major part of Project Governance that has been put in place. Critical Success factors are based on good Project Governance and Project Control practices, which result in good cost and schedule outcomes.

" To put Project Controls into perspective, it is known that a major project failing could wipe out put a corporate's entire annual profits" Just ask the shareholders of Newcrest Gold Mine

Impact of Failure to Implement Proper Project Controls

The impact of failing to ensure that the board has proper information to keep the market informed is that the prospect of a class action by the shareholders is quite likely if profit results are not what were expected as a result of major project failure, in order to get financial compensation.

According to Adele Ferguson a business journalist for the Fairfax group," it isn't just about getting financial compensation; the rise of class actions has focussed attention on the principles of Corporate Governance and the means of recovering losses that arise when companies ignore those principles"

In fact law firms such as Clayton Utz have made the statement that 2014 is potentially the "year of shareholder activism" As Jeremy Leibler of Arnold Block Leibler has said "Through shareholder activism, we are starting to see a shift from director-centric governance to shareholder-centric governance"

In 2013 there were 230 "public actions" against listed companies; results indicate that eight boards were spilled

Looking at the number of companies which have been the subject of class actions over the past few years, it includes a number of blue chips, which indicates that corporate governance has not played a major role in board decisions at the top level.

Amongst those who have faced class actions, are QANTAS, Fairfax Media, Intrepid Mines ,Brickworks, Leighton Group Holdings, Worley Parsons, Aristocrat, Centro, Commonwealth Bank, NAB, Treasury Wines, as well as those who ASIC has taken to court.

Conclusion

It is fairly obvious that if shareholders want better returns on their capital and want the company to be a success, then they are going to have to demand that the board introduces Project Corporate Governance. The main drawback is that most companies do not have a culture, which allows for the easy implementation of such new ideas. Change in introducing Project Controls is an anathema to most people and as we all get older it gets worse not better. So it rests with the project management profession to ensure that these new tools are implemented as part of their contribution to the success of the project and improved Project Governance

The alternative to implementation is to as they do as they do in America and that is correcting management shortcomings by everybody taking everybody to court which appears to be an emerging trend in Australia

After all do you want a failed Corporate Governance project on your CV? Or worse, face the prospect of being convicted under sub-section 1311 of the Corporations Act 2001?

Appendix 1

CORPORATIONS ACT 2001 - SECT 674

Continuous disclosure--listed disclosing entity bound by a disclosure requirement in market listing rules

Obligation to disclose in accordance with listing rules

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

(2A) A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 2: Section 79 defines ***involved*** .

(2B) A person does not contravene subsection (2A) if the person proves that they:

(a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and

(b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.

(3) For the purposes of the application of subsection (2) to a listed disclosing entity that is an undertaking to which interests in a registered scheme relate, the obligation of the entity to notify the market operator of information is an obligation of the responsible entity.

(4) Nothing in subsection (2) is intended to affect or limit the situations in which action can be taken (otherwise than by way of a prosecution for an offence based on subsection (2)) in respect of a failure to comply with provisions referred to in subsection (1).

Obligation to make provisions of listing rules available

(5) If the listing rules of a listing market in relation to a listed disclosing entity contain provisions of a kind referred to in subsection (1), the market operator must ensure that those provisions are available, on reasonable terms, to:

(a) the entity; or

(b) if the entity is an undertaking to which interests in a registered scheme relate--
the undertaking's responsible entity.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) If the listing rules of a listing market in relation to a listed disclosing entity contain provisions of a kind referred to in subsection (1), the market operator must ensure that those provisions are available, on reasonable terms, to:

(a) the entity; or

(b) if the entity is an undertaking to which interests in a registered scheme relate--
the undertaking's responsible entity.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

APPENDIX 2

Current Shareholder Activism

In the past few years shareholder activism has been growing as more and more companies have not performed as well as expected by the shareholders. Many companies have not complied with Section 674 of CL2001 and have faced with shareholder disapproval, and hence a class action.

This activism has caused the growth of litigation, which has in turn lead to the arrival of litigation Funders, who provide the funds to mount the class action using well known Australian legal entities.

The litigation funders generally earn about 25% of the amount that the court has awarded the action, which leaves the people who are members of the class action with approximately 75%

One of Australia's largest litigation funders has raised approximately $AUD1.5 billion in gross income since it started several years ago as a result of being very successful in class actions and is a very profitable business, unlike some of the companies that are being sued.

This particular funder has mounted 159 cases for prosecution and have only lost 6, which would indicate how unprepared the boards and directors of those winners must have been, and 35 cases were withdrawn which left 104 settlements and 14 cases were won which generated $1.47 billion in revenue

This year 2014 there have been 8 new cases sent for prosecution, included amongst these are treasury Wines, ANZ Bank, Citibank, Westpac as well as the Wivenhoe dam case following the 2011 floods in Queensland.

One disturbing factor, well for directors and boards is that the use of Common Fund claims which looks like succeeding and has been the basis of the bank fees class action. This new method means that the litigation does not have to achieve a number of shareholders or aggrieved people in order to prosecute.

So all in all if a board and directors wish to avoid these problems; they need to be more proactive in disclosure and must have an very good knowledge of how the companied projects are going against budgets and what impact a non performing project will have on the price of the shares. This means a greater understanding of Governance and Project Controls

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