YLP LEGAL
Your Legal Partner

Director's Duties

Client Fact sheet

DISCLAIMER

This Fact sheet provides an outline of Directors' Duties as they exist both at Australian common law and in statute. This fact sheet is **not intended to be a substitute for professional legal advice** and no reliance should be placed on the information as if it were such. Please consult YLP Legal should you have any question regarding your obligations under the following duties.

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Introduction

Directors (and some corporate officers) have a fiduciary relationship with their company and owe various fiduciary duties to it. Fiduciary duties require directors:

1. To act in good faith in the best interest of the company.
2. To exercise their powers for a proper purpose.
3. To retain their discretionary powers.
4. To avoid undisclosed conflicts of interest.

The fiduciary duties are supplemented by various statutory duties under the *Corporations Act 2001 (Cth)* ('Corporations Act'). The statutory duties contained in the *Corporations Act* largely reflect, but do not replace or override the fiduciary duties.

DUTIES ESTABLISHED UNDER THE *CORPORATIONS ACT 2001 (CTH)*

Who owes duties under the Corporations Act?

Duties prescribed by the *Corporations Act* apply to directors and other officers of a corporation. Some duties also apply to employees (ss. 182, 183). A director is any person who has been validly appointed to the position of director (s 9), but also includes de facto directors or shadow directors.

A de facto director is somebody who has not been validly appointed but who acts in the position of a director.

A shadow director is a person on whose instructions other directors of that company are accustomed to acting.

'Officer of a corporation' is defined in s 9 as including persons who hold specific positions within a company, such as a director or secretary. Senior executives may also be officers for the purposes of the *Corporations Act*.

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Who owes duties under the *Corporations Act?*

WHAT? Directors and other officers of a corporation must perform their duties with a reasonable degree of care and diligence.

HOW? The *Corporations Act* recognises that a reasonable degree of care and diligence will vary depending on the company's circumstances and the director's responsibilities within that company. The law imposes a minimum requirement that all directors take reasonable steps to enable them to guide and monitor the management of the company *(Daniels v Anderson).*

The Business Judgement Rule:
Directors do not breach their duty of care and diligence if:

- A decision was made in good faith and for a proper purpose.
- There was no material personal interest involved in the decision.
- The director informed themselves about the decision to an appropriate extent.
- The director believed the decision to be in the best interests of the company.

Duty of Good Faith – s 181 Corporations Act

WHAT? A director or other officer of a corporation must exercise their powers and discharge their duties in good faith and for a proper purpose.

HOW? It is a breach of this duty to engage deliberately in conduct which is not in the interests of the company *(ASIC v Maxwell)*, or to act in a way that no rational director would consider to be in the best interests of company *(ASIC v Adler).*

TO WHOM? Directors must act in the best interests of both present and future shareholders and the commercial entity. To whom a duty of good faith is owed can change if the company becomes insolvent or experiences financial difficulty.

Responsibility for Actions of Delegate – s 190 Corporations Act

A director is authorised to delegate their powers to a committee of directors, another director, an employee or any other person (s 198D). If directors delegate a power, the director remains responsible for the exercise of the power by the delegate as if the power had been exercised by the director themselves.

There are certain circumstances which would give rise to a defense to a breach of this duty.

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Improper Use of Position and Improper Use of Information – s 181-183 Corporations Act

WHAT? Directors have a duty to avoid conflicts of interest.

HOW? Directors, officers, secretaries and employees cannot use their position within a corporation to advantage themselves or another person (s 182). For example, directors cannot make undisclosed personal profits from their position *(Regal (Hastings) Ltd v Gulliver).* Further any information obtained through one's position in a corporation cannot be used improperly. A person improperly uses information if they gain a benefit for themselves, or another person, or cause detriment to the corporation.

TO WHOM? Directors must make full disclosure of any potential conflicts of interest. Depending on the circumstances, there is a duty to disclose conflicts to the shareholders, other directors, or the ASX.

Duty to Prevent Insolvent Trading – s 588G Corporations Act

WHAT? If there are reasonable grounds for suspecting a company is insolvent, a director has a duty to prevent the company from incurring further debts, i.e. insolvent trading.

HOW? A breach of this duty occurs if:

- The company is insolvent at the time a debt is incurred.
- The director had reasonable grounds to suspect insolvency.
- The director failed to prevent the company from incurring that debt.

Consequences of Breach

If a company is placed into liquation a director who is found to have authorised insolvent trading can be personally liable to pay compensation. Further, the Act makes failure to prevent insolvent trading a criminal offence punishable by fine or imprisonment (s 588G(3)).