SOURCE

Mastering Director's Duties:

A Practical Guide for Effective Governance

Managing Director's Duties

As a director, your leadership shapes the success and sustainability of your company and a big part of that is ensuring the company is compliant and always operating at the highest standards. With increasing obligations to keep track of, we understand it is challenging to stay on top of it all.

This guide is designed to support you in fulfilling your legal and fiduciary responsibilities under Australian Law. It's a practical tool to ensure effective governance and reduce both the company's and your personal risk, based on the key duties and actions required to comply with the Corporations Act 2001 (Cth). While not exhaustive, it serves as a clear and actionable guide to help you stay compliant and lead with confidence.

Why is this guide important?

Directors play a critical role in steering the strategic direction of a company. Beyond protecting the integrity of the business and safeguarding shareholder interests, staying on top of legal obligations can prevent costly errors and bolster your reputation as a responsible leader.

This guide provides steps to follow, promoting transparency, accountability, and ethical decision-making, ensuring your company thrives while maintaining compliance.

Consequences of breaching director's duties:

Failing to meet directors' duties under the Corporations Act can lead to serious consequences, including:

- Imprisonment and/or penalties: Breaches of directors' duties can give rise to both civil and criminal liability. Civil penalty provisions may result in pecuniary penalties. Criminal offences arise where conduct is dishonest or reckless: these carry a maximum penalty of 5,000 penalty units or imprisonment, or both.
- Financial liability: Directors may be required to repay profits, return property, or personally compensate the company for losses particularly in cases of insolvent trading.
- Disqualification and removal: ASIC or the courts may ban directors from managing companies.
- Reputational damage: Breaches can damage a director's professional standing, career prospects, and future board appointments.

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What if the Corporations Act doesn't apply?

Organisations such as incorporated associations, charities, government bodies, and entities established under specific Acts or royal charters are not governed by the Corporations Act 2001 (Cth). However, they are still subject to directors' duties under their own governing legislation or the common law.

For example:

- Charities registered with the Australian Charities and Not-for-Profits Commission (ACNC) must comply with ACNC Governance Standards, which are aligned with Corporations Act duties.
- Directors of statutory corporations and universities may be governed by State Acts or founding legislation.

Regardless of the legal source, the expectations around integrity, diligence, and acting in the organisation's best interests remain largely consistent.

How to use this guide

1. **Familiarise yourself with key duties:**
   - Understand your core obligations and fiduciary duties as a director.
2. **Ensure compliance:**
   - Follow the recommendations to comply with the Corporations Act 2001 (Cth) and other relevant laws.
   - Use this guide as a reference tool during decision-making processes and board meetings. It is a handy print out to have with you at Board meetings.
3. **Implement practical steps:**
   - Apply the practical recommendations provided to uphold high standards of corporate governance.
   - Use the guide to support your actions, document decisions, and seek professional advice when necessary.
   - If you're in doubt, always refer to the relevant Act and ask for support.

Ready to get started?

Below are the key steps and practical actions every director should follow to ensure they're meeting their responsibilities.

Duty	Short summary of duty	Practical recommendations
Duty to act in good faith (Corporations Act 2001, s181(1)(a))	Always make decisions you genuinely believe are in the best interest of the company.	1. **Be goal oriented** - Regularly review the company's goals and ensure your decisions align with these goals. 2. **Think long term** - Where there is a range of options, adopt the option you consider will best further the interests of the company. 3. **Consider creditors' interests** during financial difficulties, not just those of shareholders. 4. Consider the interests of minorities and avoid acting solely in the interests of one section of the company. 5. Think about **each Group entity** - In a corporate group, every company operates as a separate legal entity and should be regarded as having its own interests, even if it is a wholly owned subsidiary. *Note: If the company's constitution allows, directors of a wholly owned subsidiary can act in the interests of the holding company (Corporations Act, s187).*
Duty to act for a proper purpose (Corporations Act, s181(1)(b))	Use your powers as a director only for the purposes for which they were given.	1. **Scope** - Ensure that any action taken is within the scope of your authority as a director. 2. Consider **alignment** - Evaluate whether the action aligns with the company's constitution and objectives. 3. **Objectivity** - Refrain from using your position to further personal interests or for purposes outside the company's objectives. *Note: If the company's constitution provides for specific purposes, directors must ensure their actions are in line with these stated purposes.*
Compliance with the Constitution (Corporations Act, s140(1))	Know the company's constitution and ensure it is followed in decision-making and governance.	1. **North star** - Regularly review the company's constitution and ensure compliance. 2. Ensure **alignment** - Ensure board decisions align with the powers, procedures, and restrictions set out in the constitution. 3. Review at **critical junctures** - Review the constitution when major transactions, restructures, or governance changes take place. 4. When in doubt, **get advice** - Seek legal advice when uncertain about legal or constitutional requirements. *Note: Your constitution is the set of rules of how your company legally operates, and keeping it up to date with latest legislations can yield significant benefits.*
Duty of care and diligence (Corporations Act, s180)	Perform your role with the same care and diligence a reasonable director would. Directors may be protected under the Business Judgement rule if they: (a) Make a decision in good faith and for a proper purpose; (b) Do not have a material personal interest; (c) Inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) Rationally believe the decision is in the best interests of the company.	1. **Stay abreast** - Stay informed about the company's activities and performance. 2. **Be active** - Regularly attend board meetings and actively participate in discussions. 3. Review and understand financial statements and reports. 4. **When in doubt, get advice** - Seek expert advice when necessary and ensure adequate information is available before making decisions. 5. **Conduct research and analysis** before making decisions and ensure decisions are based on a thorough understanding of the facts and potential impacts 6. **Be assertive** - Challenge proposals and provide alternative viewpoints when required. 7. **Be strategic** - Consider emerging risks and opportunities such as climate, AI and cyber. *Note: To use the Business Judgement Rule as a defence, ensure documentation and meeting minutes support the four conditions of the rule.*

Duty	Short summary of duty	Practical recommendations
Duty to prevent insolvent trading (Corporations Act 2001, s588G)	Do not allow the company to incur debts unless you reasonably believe it can pay its debts as and when due.	1. **Financial health** – Regularly review financial statements to assess the company's financial health. 2. **Risk tolerance** – Avoid taking on excessive debt or engaging in high-risk ventures without thorough analysis. 3. **Cash is king** – Ensure the company has adequate cash flow to meet its obligations. *Note: If you have any insolvency concerns consider the Safe Harbour provisions (s588GA)*
Solvency Test (Corporations Act 2001)	Confirm (and be satisfied on reasonable grounds that) the company is solvent or not materially prejudiced before conducting a market transaction or approving financial results.	1. Conduct solvency and **net assets tests** where applicable. 2. **Can we pay our debts?** Ensure that after the transaction, the company will be able to pay its debts as they become due. 3. **Keep an audit trail** – Document the tests performed and the basis for the conclusions, including in written resolutions where appropriate. *Note: This section particularly applies to events such as dividend declarations, solvency declarations for financial reports or transactions involving the company's shares.*
Reliance on information or advice (Corporations Act, s189)	Directors can, in exercising their powers and duties, rely on reports and advice from professional advisers, experts, employees, and other directors or committees.	To rely on such advice, directors must adhere to certain standards: 1. **Employee advice:** Believe on reasonable grounds that the employee is reliable and competent. 2. **Professional adviser or expert:** Believe on reasonable grounds that the matter falls within the adviser's or expert's competence. 3. D**irector or Committee:** Believe on reasonable grounds that the matter falls within the designated authority of the director or committee. 4. **Good faith and proper inquiry:** Act in good faith and make proper inquiry where indicated by circumstances, ensuring no unwarranted reliance. *Note: For a committee of directors, the protection under s189 applies only if the director did not serve on that committee.*
Duty to avoid conflicts and disclose interests (Corporations Act, s191)	Inform the board if you have a personal interest in a company transaction.	1. **Ensure disclosure** – Disclose any personal interest in a transaction or proposed transaction. 2. For **directors of a public company:** you must not be present while the matter is being considered at the board meeting, nor vote on the matter (s195(1)), unless directors without a material personal interest pass a resolution identifying the interest and stating they are satisfied it should not disqualify you (s195(2)), or you are permitted to do so by a declaration or order made by ASIC under s196 (s195(3)). 3. For **directors of a proprietary company:** provided disclosure is made under s191 (or the interest does not need to be disclosed), you may vote on matters relating to the interest, the transaction may proceed, and you may retain benefits under the transaction (s194 — replaceable rule). Check whether the company's constitution modifies this rule. 4. **Record disclosure** – Ensure the disclosure is recorded in the minutes of the meeting.
Duty to avoid improper use of position and information (Corporations Act, s182 and s183)	Don't use your role or company information for personal gain or to harm the company.	1. **Confidentiality** – Maintain the confidentiality of company information. 2. **Abuse of position** – Avoid using your position to secure personal advantages. 3. **Handle with care** – Refrain from disclosing sensitive information to unauthorised parties. 4. **Don't share with mates** – Avoid sharing sensitive information, even informally (e.g. with friends, family, or former colleagues).

Duty	Short summary of duty	Practical recommendations
Record keeping (Corporations Act, s286)	Ensure the company keeps accurate accounting records.	1. **Accounting** - Implement a reliable accounting system, it makes it easy to record and explain transactions, easy to understand financial position and performance, and enables true and fair financial statements to be prepared and audited. 2. **Review often** - Regularly review the company's accounting records to ensure accuracy and fairness. 3. **The 7-year rule** - Ensure financial records are kept for at least seven years, more is always better.
Annual Reports (Corporations Act, Pt 2M.3)	Ensure the company prepares and files annual reports and financial statements, where applicable.	1. **Suitability** – Check if you need to lodge an annual report or an exemption applies. Your company secretary and CFO can guide you. 2. **Seek comfort and advice** that annual reports have been accurately prepared. 3. **File them – use a financial calendar!** Ensure these reports are filed with ASIC within the required timeframe. *Note: The board should review, approve and record the approval of the financial report prior to filing it with ASIC.*
Delegation (Corporations Act, s198D)	If you delegate tasks, ensure the person is capable and monitor their performance.	Choose, Provide and Monitor your delegation: 1. **Choose** delegates who are competent and experienced. 2. **Provide** clear instructions and expectations for the delegated tasks. 3. Regularly **monitor** and review the performance of delegates. *Note on continuing responsibility: If the directors delegate a power under s198D, each director remains responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves (s190(1)). A director will not be responsible under s190(1) if: (a) the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the Act and the company's constitution; and (b) the director believed on reasonable grounds, in good faith, and after making proper inquiry if the circumstances indicated the need for inquiry, that the delegate was reliable and competent in relation to the power delegated (s190(2)).* *Note: Document your basis for selecting the delegate and for your ongoing belief in their reliability and competence.*
Compliance with other Acts (Including WHS, environmental, privacy, tax, employment, and financial services laws)	Ensure the company has measures in place to comply with all applicable laws and regulations.	1. Ensure the company has **clear policies and procedures** addressing key compliance areas such as environmental protection, WHS, anti-bribery, taxation, and modern slavery. 2. **Culture** - Promote and oversee a culture of ethical conduct and legal compliance throughout the organisation. 3. Allocate sufficient **resources and training** to support compliance obligations. 4. **Monitor legislative changes** and update company policies accordingly. *Note: Depending on your company, choose an adequate cadence (we recommend Annual or Bi-Annual) to review your policies and procedures.*

Contact us for tailored support:

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Disclaimer This checklist is provided for informational purposes only and does not constitute legal advice. The laws and Acts referred to in this checklist are not exhaustive. Directors are encouraged to seek professional legal advice specific to their circumstances to ensure compliance with all applicable laws and regulations.

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