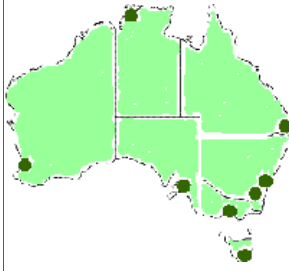




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## Committee members' responsibilities

Roles and Responsibilities of Directors

### Introduction

Most boards or councils of historical associations, as incorporated entities, comprise non-executive directors. Directors have a duty to act in the best interests of the association as a whole and in turn the best interests of all members of the association.

### Role of the President, Treasurer and other Board members (directors)

**As President** of an association you are in effect the chief managing non-executive director of the association. You will be the formal delegate of the board responsible for day-to day management and supervising the work of staff members. You are the major conduit between management and the board. As managing director, you usually have authority from the board to commit the association to numerous transactions. Great care must be taken to ensure that the board is both properly informed of major issues and has been given the opportunity to consider and approve all major transactions.

**As Treasurer or finance director**, you are responsible for financial matters. Although this may be your primary responsibility, it is not your only responsibility. If your particular talents are recognised in your title, this will only add to your responsibilities and not reduce them. You are expected to have the skills of a reasonably competent finance director, but you will not be relieved of responsibility for other areas of the association's affairs. Do not become narrow in your outlook, and familiarise yourself with the association's activities beyond your speciality.

**As a director** your contribution is valued as an independent mind, and you may also have specific skills and expertise that you bring to the board. While you may not have the same familiarity with the association's day-to-day operations as the president, your responsibilities are onerous enough. At the very least, you must:

- be familiar with the operations of the association
- review matters put before you
- contribute in a meaningful way to the board.
- You are also expected to:
  - question management
  - obtain an explanation for things that do not look right
  - bring your external experience to issues of policy considered by the board.

Although you may rely on information provided by others, you will be judged according to the reasonableness of your reliance and the systems you and other members of the board put in place to receive relevant information about the association.

### Everyday duties

#### *The basic rules*

Certain duties apply to a director in every aspect of a association's business and to every transaction in which the association is involved. These are the 'everyday duties'. The law regards directors as owing a fiduciary duty to their association. This means that a director has special obligations to the association because he or she occupies a position of trust.

At the most basic level, the duties of directors can be summarised as a duty to manage and conduct the business of a corporation in the best interests of the association. This general duty can be divided into two broad categories:

- a duty to act in good faith, and
  - a duty to act with reasonable care and diligence.
- Good faith and honesty

The duty to act in good faith includes obligations relating to the purpose and honesty of a director's conduct and separate duties relating to conflicts of interest. Although part of the duty to act in good faith, conflicts of interest are considered separately.

Directors are almost without exception given broad discretions to manage an association's business under the constitution of the association. The duty of good faith must apply to all discretions and decisions of the board, and can be summarised simply. A director must act in good faith for the benefit or in the best interests of the association as a whole and for a proper purpose. The reference to good faith can be equated to honesty.

To whom is the duty owed?

Principally, directors must consider the interests of the members of the association. This may involve considering whether the short term or long term interests of members should be paramount.

In circumstances of insolvency or near insolvency, the duty to act in the best interests of members is overridden by a duty to act in the best interest of creditors.

Further legislation has recently been introduced which also imposes duties in relation to employee entitlements. Although directors are not required to consider the interests of any other person or body, it will usually be appropriate for them to do so. An association's relationship with its employees, customers, regulators and others may be a justifiable concern, if the best interests of the corporation are to be advanced. Nevertheless, directors must be cautious in giving any advantage to those other persons at the expense of the association, because this would not usually be considered to be for the benefit of the association.

Directors must exercise their powers and discretions consistently with the purpose for which the power or discretion is conferred. Where it is not possible to determine a purpose for which a power is conferred, directors remain under an overriding duty to act in the best interests of the association. Where the conferral of a power contains an expressed purpose or a purpose can be implied, directors must additionally abide by that purpose.

### **Care and diligence**

The standard of care and diligence expected of directors has been the subject of considerable attention in recent years. As a minimum, all directors are obliged to:

take reasonable steps to place themselves in a position to monitor management of the association; and

obtain a general understanding of the business and affairs of the association and the effect which changing circumstances may have on the business of the association.

Directors are also under a continuing obligation to keep themselves informed about the activities of the association to enable themselves to participate in the overall management of corporate affairs. This does not require a detailed inspection of an association's day-to-day activities, but does require general monitoring of corporate affairs and policies and regular review of an association's financial statements, together with the duty to make further inquiry in relation to matters arising from the review.

A director is required to attend board meetings whenever he or she is reasonably able to do so. Further, a director must be attentive at board meetings and cannot excuse liability on the basis that he or she paid no attention to proceedings.

Directors are entitled to delegate to others the preparation of books and accounts and the day-to-day affairs of the corporation. Directors are, however, expected to take diligent and intelligent interest in the information available to the director or which the director would be expected to demand from the employees and agents of the association. The Corporations Law now provides that a director will not be responsible for the actions of a delegate if the director believed on reasonable grounds:

at all times that the delegate would exercise the power delegated in accordance with the duties imposed on directors and in accordance with the Corporations Law; and

in good faith, 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.

The level of supervision required is currently unclear. Whether, and what level of ongoing supervision is required will eventually be resolved by the courts. Willfully ignoring the performance of the delegate will not be satisfactory. At this stage, directors should apply a commonsense approach to determining the level of ongoing supervision necessary to meet the requirements. Directors can also rely on the provision of information by, and advice from, officers and employees provided that the directors believe, on reasonable grounds, that that the officer or employee is reliable and competent in relation to the matters concerned. The reliance must also be made in good faith, and after the director has made an independent assessment of the information. The level of assessment required will be determined by reference to the particular circumstances of the director (including the director's knowledge of the association), and the complexity of structure and operations of the association.

Directors are not required to bring particular qualifications to the office, unless they are appointed to a specific role. However, they are expected to be able to understand an association's financial statements, as well as the general business of the association to which they have been appointed.

### **Business judgment rule**

The business judgment rule, added to the Corporations Law in March 2000, does not provide directors with a general defence to all claims arising from a breach of duty. The rule will only apply where a claim is made that the director has breached the duty of care and diligence as described. It does not apply to any other breach of the duties owed by directors. Directors and other officers

are taken to meet the statutory requirements of the duty of care and diligence, and their equivalent duties at common law and equity, in respect of a business judgment if they:

make the judgment in good faith and for a proper purpose

do not have a material personal interest in the subject matter of the judgment

inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate

rationaly believe that the judgment is in the best interests of the corporation. A belief that the judgment is in the best interests of the association is a rational one unless the belief is one that no reasonable person in the director's position would hold.

A few important points to note about the rule are:

the rule only protects business or operational decisions

the rule will not apply where no decision has been made and a claim arises because of a failure by a director to supervise delegates or monitor the business

a director will not be able to rely on the rule where the director has failed to inform himself or herself about the decision being made.

Most boards resolve issues long before it comes to a formal vote. Directors should remember that their vote on an issue is the most important evidence of their views on the issue. A court is unlikely to be impressed by a statement that a director was concerned about a matter but ultimately let himself or herself be persuaded to vote in favour of a resolution without fully examining the matter which was the subject matter of the resolution. This may include obtaining independent legal advice.

### Conflicts of interest

Given the special position a director holds in an association, the courts have developed strict rules with regard to conflicts of interest. Conflicts can generally be divided into the following three categories:

the overriding duty to avoid a conflict of interest

duties not to misuse the association's property, information or business opportunities

duties relating to financial benefits which may be given by an association to its directors.

Directors should give notice of any material personal interests in matters that relate to the affairs of the association. The notice can be a standing one, but must include details of the nature and extent of the interest and the relation of the interest to the affairs of the association.

### Accounts

One of the most fundamental obligations placed on directors is the preparation of accurate financial accounts. Directors must ensure that their association prepares accounts, reports on those accounts and maintains adequate records. This duty is in addition to the fundamental duty that a director must have a basic understanding of financial accounts and implement appropriate reporting systems, to ensure that financial issues affecting the association are brought to the board's attention.

### Execution of documents

Before signing a contract, you must consider whether you are authorised to do so. A director who acts beyond his or her authority may be personally liable to the other party to the contract.

### Summary

In most cases, to state the duties of directors is easy. The application of the duties, though, can be difficult. Furthermore, the range of transactions in which an association may be involved means that the directors must be aware of the areas in which they may apply. The following is a summary of handy hints.

Be knowledgeable

Familiarise yourself with the basic principles of corporate law.

The Australian Institute of Company Directors conducts a Company Directors' Course and publishes a Company Directors' Manual.

Be diligent

Obtain a good understanding of the business of the association and the environment in which it operates.

Read your board papers and attend board meetings.

Be demanding The professionalism of board meetings will be an indicator of the professionalism of the management of the association. If the board fails to meet regularly, it is indicative of a lack of consultation and could spell danger.

Consider whether board papers are prepared thoroughly, and sent to you well in advance of board meetings.

Be assertive 'All agreed?' Do not be pushed into accepting a position that you do not agree with. Be assertive and speak your mind. You have been elected to the board to exercise your own judgment. Disagree if that reflects your opinion.

Be beyond reproach.

Treat conflicts seriously. Wherever possible, any director with any conflict should decline to vote on a resolution, regardless of the seriousness of the conflict. Observe the highest standards.

Procedures are important. Read the association's constitution and ensure that you understand it. If not, ask questions. Obtain a working knowledge of meeting procedures. Be comfortable with the other procedures the board has in place.

### **Financial data**

You may not be a financial director, but that will not excuse ignorance of financial accounts. Personal liability for the debts of the association should force you to have a knowledge at least of the key financial data which indicates the solvency of the association.

You may request reports from the financial director (treasurer) from time to time.

The establishment of an audit committee to report regularly is also a common control function.

### **Indemnities and insurance**

Does the association's constitution contain appropriate indemnities? If not, consider whether you should ask for a deed of indemnity.

Consider the insurance arrangements.

Always seek independent advice on the adequacy of the insurance offered to you.

### **Risk factors**

Watch out for warning signs including:

- getting bad news late
- board decisions not being implemented
- decisions being made without board approval
- inadequate auditing of past mistakes
- inadequate or ineffective control systems.

### **Seek advice**

Directors can take no better precaution against mistakes and breaches of duty than exercising care and obtaining advice from qualified people. A quick phone call can clarify issues and ensure that directors make decisions on a proper basis.

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