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Guide to Directors Duties and Liability

What you need to know as a director

Duties & Liability

Directors actions and decisions can have a significant impact on the shareholders and stakeholders of the company. Accordingly, directors must comply with certain requirements when exercising their role and making decisions for and on behalf of their company.

Once appointed, a director owes a fiduciary duty to their company and must ensure that they act appropriately in their capacity. Failure to do so may lead to civil and criminal penalties and liabilities for both the company and the director(s) personally.

Directors Duties

Duty to act honestly

When exercising their functions, directors must make decisions which they honestly believe are in the best interests of the company. When making decisions, directors need to consider all circumstances and material facts and exercise reasonable, independent judgment.

Breaching this duty may give rise to:

- A Court declaration that the duty has been contravened;
- pecuniary penalties of up to \$200,000;
- disqualification of the director(s) from acting as directors;
- criminal penalties (where the breach involves fraud).

Duty not to fetter discretion

Directors must not use their position or power for improper purposes - their powers must be exercised for the purpose for which they were conferred and in a manner which promotes the interests of the shareholders as a whole.

A breach of this duty may result in:

- the transaction which stemmed from the improper use of power being voidable at the company's option;
- the guilty director(s) being jointly and severally liable for any loss suffered by the company as a result of the breach;
- criminal penalties where the breach was reckless or was

It is important for directors to be aware of their duties and the consequences of any failure to comply with them.



Duty to avoid conflicts of interest

All directors are bound to avoid any conflict between their personal interests and those of the company. Accordingly, directors must be vigilant to ensure they do not place themselves in a position where there is a real possibility of a conflict between their personal interests and the interests of the company.

If a potential conflict arises, directors must give notice to the other directors of that potential conflict. After having received notice, the company may grant permission for the director to proceed notwithstanding the existence of the conflict.

Consequences for breach include:

- the director being fined or imprisoned (for serious breaches);
- removal of voting rights on matters related to the conflict.

Duty not to use position for personal profit

Directors are prohibited from using company property, information, corporate opportunities or their positions in the company for personal profit. This duty extends to both present and former directors.

For a breach to occur, it is not necessary that the company have suffered any detriment.

A breach of this duty may give rise to

- A Court declaration that the duty has been contravened;
- pecuniary penalties of up to \$200,000;
- disqualification of the director(s);
- criminal penalties (where the breach involves dishonesty or recklessness).

Duty to act with due care and diligence

Directors are required to exercise reasonable skill and care when performing their directorial duties.

The degree of skill and care required is that which the reasonable person would exercise in the circumstances.

- A Court declaration that the duty has been contravened;
- pecuniary penalties of up to \$200,000;
- disqualification of the director(s).

Duty to avoid insolvent trading

A director must prevent a company from incurring debts in circumstances where the company is insolvent or the debt will render the company insolvent.

Breach of this duty will arise where the director had, or ought to have had, an awareness or suspicion that the company would not be able to meet its debts when they fall due.

Consequences for breach include:

- A Court declaration that the duty has been contravened;
- pecuniary penalties of up to \$200,000;
- disqualification of the director(s);
- the director(s) being personally liable for the debt created;
- criminal penalties (where the breach involves dishonesty).

Vicarious Liability

Directors may also attract personal liability for the acts of the company where:

- the company has breached certain provisions of the *Competition and Consumer Act 2010* (Cth);
- the company has failed to comply with the requirements of the applicable state occupational health and safety legislation;
- the company commits taxation offences, unless the director was not in an way knowingly involved;
- the company fails to make superannuation payments to its employees.

Strategies to minimise risk and exposure to liability

There are a number of steps that directors can take to minimise their risk relating to contraventions of their directorial duties. Directors should:

- ensure that their company maintains clear, up to date policies and procedures for its directors and the exercise of their roles and decision-making functions;
- seek legal advice regarding the impact relevant legislation has to the activities of the company and the decisions made by its directors;
- obtain Directors' and Officers' Liability Insurance;
- seek to obtain contractual indemnities or guarantees from the company for any loss suffered by the director arising from the exercise of their functions as director.

How can Brennan Law Partners assist?

We can provide assistance and advice with respect to:

- Advice regarding directorial duties and liabilities
- Commercial agreements and indemnities
- Civil and commercial disputes

If you have any questions regarding any information in this BLP Guide, we welcome you to contact us at any time.



