



SECTION 12

GOVERNANCE and RESPONSIBILITIES OF EXECUTIVES

Whether you are a committee member, director or office bearer of an incorporated or non-incorporated club or association, you have certain responsibilities and owe certain duties to the club, association and its members.

As such each position needs a clearly defined job description that outlines both the role and responsibilities.

What are your legal responsibilities as a director of a Board or a Society committee?

Committee members are required to act competently, honestly, in good faith and in what they consider to be the best interest of the organisation.

If they fail to do so, they may be liable to compensate members of the organisation
or
third parties who suffer loss as a result of that failure.

Common law duties apply to Directors, officers and administrators of incorporated associations. These are usually the elected board/committee members and officers (such as a president or secretary).

It does not matter if you are a volunteer or a professional. A professional administrator whether employed or just contracted to provide services also has these responsibilities.



Competency

You must act competently. Directors should exercise care, skill and diligence in making decisions.

Under common law:

- The duty of care, skill and diligence is a subjective duty. Breaching this care of duty is deemed reckless in exercising your office.
- You need not exhibit a greater degree of skill than may be reasonably be expected from a person of your knowledge and experience, You, therefore, are not liable for mere errors of judgement.
- Need not give continuous attention to the affairs of your organisation, and
- Need not attend every committee meeting; only when you are reasonably able to do so.
- Are justified in the absence of suspicion, to trust the administrators and other committee members of the organisation.

Under Corporations Law – Section 232(4):

- An officer of a corporation must exercise a degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.
- In considering the degree of care and diligence that you ought to exercise, a court would take into account matters such as your relevant knowledge, background and experience, and the size and financial condition of your organisation, at the relevant time.
- All that is required is that you exhibit the degree of skill that may reasonably be expected from a person of your knowledge or experience. You need not exhibit the skill of a "reasonable director".

Honesty

You must act honestly. Under common law you must act in good faith in the interest of the organisation. This equates with acting honestly.

Under corporations Law – 232(2) – an officer of a corporation shall at all times act honestly in the exercise of his or her powers, and the discharge of the duties of his or her office".



“Act honestly” means that you act “bona fide” and “in the interest of the company”

Improper Purposes

You must not act with improper purpose. Under common law you must not use your powers for improper purposes. An example of use of power for an improper purpose is where directors or officers use company or association resources to ensure their own re-election to the board, rather than nominees of shareholders or members.

Corporation law – section 232(2) – outlines the concept of honesty and not acting for improper purposes. This therefore incorporates that general law doctrine.

Conflicts of Interest

You must declare conflicts of interest. This overlaps with the duties to act honestly and for proper purposes.

At common law you must not place yourself in a position where there is a conflict actual or potential between your personal interests and the duty you owe to your organisation.

Where there is a conflict of interest disclosure is the appropriate action to take. The disclosure must be full and frank and made to the organisation (either the board or a general meeting).

Taking Advantage of Opportunity

The general rule is that you must not use your position to make a profit. If you do, then you must account to the organisation for the profit made. Section 232(5) and (6) of the Corporations Law provides for similar rules.

Directors or officers must not take of opportunity where a company or association is unable. You have an obligation not to profit personally from your position as a committee member, and not to allow a conflict to arise between your duty as a committee member and your own self-interest.

Contracts

The general rule is that contracts made by you with your organisation are avoidable at the option of your organisation.

This includes contracts in officers duties which you have an indirect interest. The fairness of the contract is irrelevant / this is applied as a strict rule.

The contract may be validated by ratification at a general meeting, provided there is full



disclosure. Alternatively, a director may give general notice once and for all under section 231 (5) Conflict of external duties with directors or officer's duties

Unfortunately, there is no clear general answer. What is appropriate will depend upon the facts of the situation.

Section 231 (6) of the Corporations Law requires that where a person holds an office or property which creates duties in conflict with his or her duties as director, they must declare the interest at the next meeting of directors after they become aware of the conflict.

Examples of this are the position of a nominee director who must act both in the interests of the company and also the interests of those whom he or she represents. For example, if you are a club president and also on your State body's committee.

Nominee Directors

The law is not settled when dealing with conflicts between the director's duty to the organisation and the interest of the member nominating that director.

A related issue is the fact that nominee directors are often in receipt of information in their capacity as a director, which in the best commercial interest of their nominator should be disclosed to their nominator, which may be subject to the duty of confidentiality owed as a director.

Nominee directors owe their duties to the organisation to which they are appointed and can only act according to duties owed to their nominators if this does not cause detriment to that organisation.

Trading When Insolvent

It is an offence under the Corporations Law for directors of companies to permit the company to incur a debt that will cause insolvency or increase existing insolvency when there are reasonable grounds for suspecting that this may occur.

An objective test is relevant in that is a director is not aware of the grounds for suspecting; a reasonable person test is applied to a like person in the company's circumstances.

Similar offences occur at State level and should be investigated with state authorities.

"Bona Fide": some intention is required to show that you did not act in good faith. You will breach the duty to act bona fide in the interests of your organisation if you: are aware that you are not acting in the interest of the organisation and ignore that awareness.

"In the interests of the company": A court will usually not examine the commercial wisdom of a decision made by you on your committee or board.

The traditional view is that "the interests of the company" are the interests of the members



of the company considered as a body. The interests of a company include the interest of current creditors if the company is near insolvency. The clearer it is that it is the creditors' money that is at risk, the lower the risk to which the committee or board may expose it.

The nature of the company or association must be taken into account when determining the risk. A sporting association would attract a low financial risk, given its usual activities. If you are acting in your own interests or in the interests of a third party without considering the interests of your organisation you are not acting in the interest of your organisation

Terms of Office of Committees

The Board may appoint standing Board Committees either due to constitutional requirements or to undertake specific tasks. The Board shall issue a list of specific task and responsibilities to Board Committee.

Board committee shall hold office until the expiration of office of that Board or within a time frame directed by the Board.

The Board may appoint Standing Committees either due to constitutional requirements or to undertake specific tasks

- Standing Board Committees shall report at least annually or as required to the Board.
- Standing Committees may be given specific tasks or required to comply with the organisations Strategic Development Plan.
- Standing Board Committees or any Member of such committee may be removed by the Board at its discretion.
- A committee shall not delegate its powers and must only act within the specified powers delegated to it by the Board in accordance with the association's rules.
- In addition to the membership of the Standing Board Committees previously provided for, the President shall be an ex-officio but non-voting member of all such Committees.
- A quorum for a Standing Board Committee shall be fifty percent (50%) of the Voting Members of the Committee.

In addition the Board may appoint an Ad Hoc Committee to carry out specific duties, which may be varied at the discretion of the Board.

The Board at its discretion may remove Standing Board Committees or any Member of such committee. The Board may fill any casual vacancy on any Committee.

The Terms of Reference

The Board shall issue as directed in the constitution specific term of reference for all



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committees.