



## Statutory Directors Duties – an introduction

The *Corporations Act 2001* (Cth) (**the Act**) has largely codified the common law in respect to the duties that directors have to the companies they manage. The Act includes the following sections that provide guidance to directors in discharging their obligations:

### **Duty to act with care and diligence - s180(1)**

A director or other officer must exercise their duties with a degree of care and diligence that a reasonable person would exercise in their position.<sup>1</sup> The standard of care and diligence required as determined by a court would take into consideration the company's circumstances and the director or officers position within the company.<sup>2</sup> The skill required by an executive director is measured objectively in regard to that directors' special calling. So, in considering whether a director is so negligent as to be in breach of the statutory duty, the conduct is measured in two ways:

- (a) against the (objective) standard of care; and
- (b) against the standard of skill held by the particular director or officer.

### **Duty to exercise powers in good faith – s181(1) (*Conflict of duties*)**

A director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose.

### **Duty not to improperly use position - s182 (*Duty not to profit from position*)**

A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

### **Duty not to use information for personal advantage - s183**

A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

### **Duty to prevent insolvent trading – s588G**

A director of a company commits an offence under section 588G if the company incurs a debt and the company is insolvent at that time, or becomes insolvent by incurring that debt and the director suspected that the company was insolvent or would become insolvent as a result of incurring the debt, and the director's failure to prevent the company incurring the debt was dishonest.

Section 558H provides that it is a defence to liability under section 558G if, at the time the debt was incurred, the director had reasonable grounds to expect, and did expect, that the company was solvent at the time and would remain solvent even if it incurred that debt. The four alternative defences to a breach of s588G are that a director had:

- (a) reasonable grounds to suspect solvency s 588H(2);<sup>3</sup>
- (b) delegated and relied on others s 588H(3);<sup>4</sup>
- (c) been absent from management s 588H(4);<sup>5</sup> and
- (d) taken all reasonable steps to prevent the debt from being incurred s 588H(5),(6).

### **Duty not to fetter discretions**

Directors have certain discretions conferred on them by law and the company's constitution. When exercising such discretions the directors are subject to two duties, namely:

- (a) a duty to retain discretion;<sup>6</sup> and
- (b) duty to give adequate consideration.<sup>7</sup>

Directors must exercise active discretion, they cannot ignore issues or blindly rely on another person. They must give adequate consideration when purporting to exercise a particular discretion.

### **Reliance on information and advice from delegates**

Pursuant to section 189 of the Act, directors can rely on information or advice from delegates:

- (a) provided by an employee whom the director believes on reasonable grounds to be reliable and competent; or
- (b) a professional advisor or expert in relation to matters that the director believes on reasonable grounds to be within their competence; or
- (c) another director or officer in relation to matters within their authority; or
- (d) a committee of directors on which the director did not serve in relation to matters within the committee's authority.

The reliance must be in good faith and the director must have exercised independent judgment in relation to the information or advice by making an independent assessment of it. The independent assessment required is determined by reference to the directors' knowledge of the corporation and its operations.

### **Responsibility for actions of delegates**

Pursuant to section 190(1) of the Act, if directors delegate a power under section 198D, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the director themselves unless the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Act and the company's constitution (if any) and the director believed:

- (a) on reasonable grounds; and
- (b) in good faith; and
- (c) after making proper inquiry - if the circumstances indicated the need for the inquiry,
- (d) that the delegate was reliable and competent in relation to the power delegated.

### **Material personal interest - director's duty to disclose - Section 191**

s191 requires a director who has material personal interest in a matter that relates to the affairs of the company to give the other directors notice of this interest. s191(2) outlines the exceptions to this requirement to provide notice.

The notice must give details of the nature and extent of the interest and the relation of the interest to the affairs of the company<sup>8</sup> and be provided at a directors' meeting as soon as practicable after the director becomes aware of their interest. The details must be recorded in the minutes of the meeting.<sup>9</sup>

Failure to disclose a material personal interest according to s191(4) does not invalidate a resolution by the directors at first instance. It has been held that the threshold for determining whether an interest is material is quite low<sup>10</sup> however this contrasts with *Magellan v Mount King Mining NL*<sup>11</sup> where the Western Australian Supreme Court stated that the nature of the interest "should have the capacity to influence the vote of the particular director upon the decision to be made, bearing in mind that the conflict of interest must be of a real or substantial kind".

Therefore it is considered appropriate to declare even minor conflicts of interest where there is a potential for conflict so as to err on the side of caution.

s192 of the Act provides that a director may give other directors standing notice about an interest. The notice may be given at any time and whether or not the matter relates to the affairs of the Company at the time the notice is given.

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<sup>1</sup> *Corporations Act 2001* (Cth) s180(1).

<sup>2</sup> *ASIC v Vines* (2003) 48 ACSR 322.

<sup>3</sup> *Friedrich & Morely*.

<sup>4</sup> *Capricorn Society Ltd v Linke* (1995) 17 ACSR 101.

<sup>5</sup> *Tourprint International v Bolt* (1999) 17 ACLC 1543 and *Southern Cross Interiors v DCT* (2001) 19 ACLC 1,513.

<sup>6</sup> *Corporations Act 2001* (Cth) s198D.

<sup>7</sup> *Corporations Act 2001* (Cth) s189(b)(ii).

<sup>8</sup> *Corporations Act 2001* (Cth) s191(3).

<sup>9</sup> *Corporations Act 2001* (Cth) s191.

<sup>10</sup> *State of South Australia v Marcus Clark* (1996) 14 ACLC 1,019.

<sup>11</sup> *Magellan v Mount King Mining NL* (unreported, 7 April 1998).