

## Sitting on a 'voluntary' Board – membership may be voluntary, but legal duties are not

When you join the Board of an organisation – even in a voluntary or unpaid capacity – you become subject to legal duties and obligations under the *Corporations Act 2001* (Cth) or *Associations Incorporations Act 2015* (WA) (or other local equivalent), the general law and the organisation's constitution or rules.

### The main duties

The *Corporations Act* and *Associations Incorporation Act* impose duties which overlap the general law to varying degrees. The legislation has effect 'in addition to, and not in derogation of' any other legal duties and does not prevent the commencement of civil proceedings (see *Corporations Act* section 185; *Associations Incorporation Act* section 48). Thus, the 'fiduciary' relationship of fidelity, trust and loyalty that exists between corporate entities and their officers under the general law, is preserved.

The key duties of Board members are as follows. Note that this is not an exhaustive list.



#### Duty of care and due diligence

*Corporations Act s 180; Associations Incorporation Act s 44*

A Board member must act with the degree of care and diligence that a reasonable person might be expected to show in the role. Powers must be exercised, and obligations discharged, with this level of reasonable care and diligence.



#### Duty of good faith and proper purpose

*Corporations Act s 181; Associations Incorporation Act s 44*

A Board member must act with the degree of care and diligence that a reasonable person might be expected to show in the role. Powers must be exercised, and obligations discharged, with this level of reasonable care and diligence.

Good faith and proper purpose requires Board members to have a subjective honest belief that they are acting in the best interests of the organisation. There is also has an objective component: Could a reasonable person in the Board member's position have believed the actions to be in the organisation's interests?

Board members must also:

- avoid conflicts of interest, and reveal and manage conflicts if they arise (whether those conflicts exist between personal interests and the organisation's interests, or between duties to the organisation and duties to third parties); and
- give adequate consideration to matters for decision, and keep discretions unfettered.



## Use of position

*Corporations Act s 182; Associations Incorporation Act s 46*

This is a duty not to make improper use of one's position to gain personal advantage (or an advantage to someone else), or to cause detriment to the organisation. There are some common elements shared with the obligations of fidelity, trust and loyalty mentioned already.



## Use of information: No improper use of information

*Corporations Act s 183; Associations Incorporation Act s 47*

Similar to the previous duty, use of information may be 'improper' where a person does so to gain an advantage for themselves or someone else, or to cause detriment to the organisation.

Amongst other things the duty protects against disclosure of confidential information.

With all of the above in mind, it might be said that responsibility for good governance is something inherent in a Board member's obligations. As observed by the Supreme Court of Western Australia in one high profile corporate failure:

*'... the Australian directors [in this case] failed to put into practice the notion of stewardship that is at the heart of corporate governance and which underpins the fiduciary concept to which directors are subject'.*

(Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008) 39 WAR 1, 528, 665 Owen J)

## Consequences of a breach of duty

Each of the main statutory duties outlined above carries with them the prospect of penalties in the event a breach. These may include fines or disqualification as a Board member; or in some cases, imprisonment. Under the Corporations Act section 184, contraventions of the obligations of good faith, use of position, and use of information, can give rise to criminal liability where there has been a reckless, dishonest or intentional element.

In addition to any regulatory response, a Board member who fails to comply with their duties may face proceedings brought against them by:

- the organisation;
- other Board members;
- an employee;
- third parties (possibly creditors, competitors, or parties suffering loss on account of negligence).

Legal consequences aside, the most serious consequences in a practical sense can often be of a reputational or commercial nature. Where Board members breach their duties, an organisation could likely expect heightened regulatory scrutiny, and lost business opportunities.



## Charities – take note

The Australian Charities and Not-for-profits Commission (“ACNC”) is the national regulator of Australia’s charities (which number somewhere between 50,000 – 60,000).

In order for a charity to be registered with the **ACNC** it must comply with the ACNC Governance Standards. Amongst other things, the Standards require that a charity must take reasonable steps to make sure that its directors are subject to, and comply with the following duties:

- to act with reasonable care and diligence
- to act honestly and fairly in the best interests of the charitable CLG and for its charitable purposes
- not to misuse their position or information they gain as a director
- to disclose and manage conflicts of interest, and
- to ensure that the financial affairs of the charitable CLG are managed responsibly.

Charities need to comply with the Governance Standards to be, and remain, registered with the ACNC. So, charities whose Board members fail in their duties can lose their charitable registration – a significant consequence that could mean the end for a charity.

## Protection from liability

### Business judgment rule

In deciding whether a Board member has breached any of their duties, courts are reluctant to substitute their own judgment for the business judgments made by Boards.

The statutory business judgment rule provides that where a Board member (or other officer) makes a business judgment, they will be taken to have met their care and diligence requirements (including make the judgment in good faith 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; and
- rationally believe that the judgment is in the best interests of the organisation.

(Corporations Act s 180(2); Associations Incorporation Act s 44(2))

### Other ways in which a Board member can protect themselves from liability

Board members should be able to confidently go about their roles, if some or all of the following are in place or available:

- access to professional advice or information from experts;
- office bearers insurance with cover to protect against breaches of duty (with the policy premium paid by the organisation);
- a deed of access and indemnity, under which the organisation to the full extent permitted by law: indemnifies the Board member against liabilities and costs incurred by them acting properly in their capacity as a Board member; allows access to documents; and gives the benefit of an office bearers’ insurance policy, and access to the policy documents, during and after the member’s tenure on the Board; and
- clear mechanisms by which, if a problem comes to the attention of a Board member, a meeting of the Board can be swiftly called to discuss the issue.

## Governance and Boards contact

If you seek assistance or guidance concerning governance and Board requirements, David McMullen would be pleased to hear from you.



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