

Directors' Duties and Personal Liability: A concise guide for current and prospective directors

Being a company director involves legal accountability as well as strategic oversight. This guide outlines core legal duties under the Corporations Act 2001 (Cth) (Corporations Act), related common law principles, and similar obligations under the Associations Incorporation Act 2015 (WA) (Associations Act). While governance structures differ, the concepts, principles and standards of conduct are in many ways aligned.

Key Legal Duties

Though not an exhaustive list, key legal duties under the Corporations Act include the following:

- Section 180 – Duty to exercise reasonable care and diligence. This includes staying informed, monitoring financial health, and questioning assumptions. The business judgment rule (s 180(2)) protects directors from liability where decisions are made in good faith, with no material personal interest, and on a rational and informed basis.
- Section 181 – Duty to act in good faith and for a proper purpose.
- Sections 182 and 183 – Prohibitions on misuse of position or information to gain an advantage or cause detriment. These duties continue after a person ceases to be a director.
- Section 191 – Obligation to disclose material personal interests. Depending on the company's constitution or governance rules, a director may be excluded from decision-making in these matters.

The Associations Act imposes duties similar to the above, on management committee members:

- Sections 44–47 require care, diligence, good faith, proper purpose, and prohibit improper use of position or information.
- Section 42 deals with disclosing personal interests.

Directors also have duties relating to:

- Solvency – Under section 588G of the Corporations Act, directors must prevent the company from incurring debts if it is insolvent or would become insolvent. The Associations Act lacks an express insolvent trading provision, but committee members have a general duty of care, which includes ensuring the association can meet its debts. Trading while insolvent may lead to personal liability under common law.
- Fiduciary duties (common law) – Directors and committee members must act loyally, avoid conflicts of interest, and not profit from their role without informed consent. These duties apply even where no statutory breach arises.

Additional obligations may be imposed by a company's constitution, shareholder agreements, internal policies, or industry-specific regulation.

Liability for Breach

Breach of directors' duties can result in civil or criminal liability. Depending on the breach, action can potentially be taken by the regulators (ASIC or Consumer Protection WA) or by parties affected by the breach – such as shareholders or other directors. Statutory penalties may include fines, compensation orders, disqualification, or imprisonment.

Breaches of duty will most commonly meet the civil standard. For example:

- Under Part 9.4B of the Corporations Act, breaches of sections 180–183 may result in civil penalties, even if the breach is unintentional.
- The Associations Act contains various sections which impose statutory penalties, such as section 42 (failure to disclose interests), section 46 (improper use of position), section 47 (improper use of information), or section 66 (failure to keep financial records) – all of which are offences with monetary penalties.

The threshold for criminal offences is higher. Section 184 of the Corporations Act, for example, imposes criminal liability on directors who dishonestly or recklessly fail to act in good faith, or to make proper use of position and information. Penalties include substantial fines and up to 15 years' imprisonment.

Enforcement Powers

- ASIC (for companies) may issue infringement notices, accept enforceable undertakings, seek civil penalties (including disqualification and compensation), and refer matters for prosecution. It also has administrative powers, such as banning orders.
- Consumer Protection WA (for associations) may investigate, issue directions, suspend or cancel incorporation, and initiate prosecutions. While its enforcement is generally less active than ASIC's, similar penalties, including fines and disqualification, can be imposed for breaches.

Delegation and Oversight

While directors may delegate tasks, and rely on the advice of others, they remain responsible for overall governance.

Directors must attend meetings, critically review materials, and respond to risks. Courts have held that passive attendance or unquestioning reliance on others may constitute a breach. In *ASIC v Rich* [2009] NSWSC 1229, the court emphasised that directors must engage with financial and management matters and cannot abdicate responsibility to others.

Section 189 of the Corporations Act (or section 49 of the Associations Act) allows reliance on advice, provided it is received in good faith, from a competent source, and independently assessed. Blind reliance is not a defence.

The business judgment rule (Corporations Act s 180(2) or Associations Act s 44(2)) offers protection for informed decisions, made in good faith for a proper purpose, made by directors where they do not have a material personal interest in the subject matter, and they rationally believe that the judgment is in the best interests of the organisation. The rule does not offer protection, however, for inaction or neglect.

Conclusion

Being a director or committee member means accepting legal responsibilities and a duty to act in the organisation's best interests. Duties are personal – you cannot delegate accountability. The law expects you to actively engage, ask questions, and make informed decisions.

In addition to being aware of, understanding, and carefully following your legal duties, general good governance will also help protect directors and board members from liability. Maintaining proper records, seeking advice when needed, and documenting key decisions are all essential safeguards in the event that conduct is later scrutinised. Tools such as directors' and officers' (D&O) insurance can help mitigate risk, but are no substitute for legal compliance or proper governance.

Disclaimer: This document is general in nature and does not constitute legal advice. Specific guidance should be obtained based on your role and organisational context.

Meet our Team

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