

Board Responsibilities, Principles and Practices

Company Limited by Guarantee

WCA is a Company Limited by Guarantee. A company limited by guarantee can be set up when there are a number of stakeholders whose interests have to be accounted for and where a profit motive is not the prime objective of the organisation. 'Limited by guarantee' means that if the company is wound up, and it is in debt, the liability of members is guaranteed to be a nominal amount of \$20. Being a company limited by guarantee also enables WCA to operate throughout Australia.

Corporate Governance

Directors of a company limited by guarantee will be subject to all of the duties and obligations set out in the Corporations Act 2001 and the common law (even where directors are acting in a voluntary capacity.) For more information about being a company director, see the Australian Securities and Investment Commission (ASIC) website.

The obligations imposed by the Corporations Act on directors of companies are more onerous than the obligations imposed on officers of incorporated associations; however, they are more clearly defined. In contrast the equivalent obligations of members of the committee of an incorporated association have not been as well defined through court processes.

General Duties of Directors

Duties often fall into the following categories:

- a duty to act bona fide in the interests of the company as a whole;
- to exercise one's powers as a director for the purpose for which they were conferred and not for any ancillary or improper purpose;
- not to restrict the future exercise of a director's powers; and
- to avoid being placed in a position of a conflict of interest.
- The question to ask is whether a director's actions are a contravention of a directors' duties. This depends upon whether those actions are authorised by:
 - the company's constitution;
 - the company members in general meeting; or

Fiduciary Duties

Directors are also subject to fiduciary duties. The fiduciary duties of company officers are:

- That they must not improperly use their position to:
 - gain an advantage for themselves or someone else
 - cause detriment to the corporation;
- That they must not use information which they obtained because of their position to gain advantage for themselves or cause detriment to the corporation.
- That they must exercise their powers in good faith in the best interests of the corporation and for a proper purpose; and
- That they must notify other officers of a material personal interest if and when a conflict arises. A material personal interest is a matter that relates to the affairs of the company. The notice may be given at any time even if at the time there was no existing conflict.

The standard of care required to be exercised by directors has been clearly set out by the Corporations Act 2001 (Cth). A director of a company is required to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- i. were a director of a corporation in the corporation's circumstances;
- ii. occupied the same office as the director; and
- iii. (had the directors experience powers and duties

This recognises the role played by directors in managing the company's daily affairs.

If a director breaches any of these duties, civil penalties will apply. However, if a director recklessly or intentionally breaches any of these duties then an offence is committed. Similarly, if a person obtains

information and uses it dishonestly with an intent to gain advantage, an offence will be committed.

To Whom Are Duties Owed?

Company officers will be liable to the company for the profit gained from a breach of their fiduciary duties. These duties are created when:

- The directors indicate a willingness to act as a shareholder's agent in negotiations;
- In the case of a family company, family directors who give recommendations or advice regarding shares to family shareholders, will create a fiduciary relationship between themselves and the shareholders because of that advice; or
- A director acts in the joint interests of the shareholders and the company.

A director's fiduciary duties generally stop when he or she ceases to be a director, however, certain statutory duties may well continue even though the person has ceased to be a director. The executive and non-executive directors, the secretary and other company officers have these fiduciary duties.

The Conflict Rule

A director must not let his/her personal interests and company duties conflict. This is a fundamental rule of equity (Phipps -v- Boardman (1967) 2 AC 123).

A director may well ask:

- Does the possibility of conflict have to be more than a real prospect?
- Can a director enter into an arrangement knowing that they may have a real chance of conflicting with the interests of the company?
- Is there a conflict where a director holds shares in another company with which the original company transacts?

Section 191(1) states that a director has a duty to notify other directors where he/she has a material personal interest in a particular conflict. There are exemptions from the general obligation to disclose. A director does not need to disclose his or her interests if the interest:

- arises because of the director's membership of the company and is held in common with the other members;
- arises in relation to the director's remuneration;
- relates to a contract which is subject to the members approval and no obligation will be imposed on the company if the members do not approve it;
- arises merely because the director is a guarantor;
- relates to an insurance contract indemnifying the director;
- relates to a payment under a contract of indemnity which is permitted by the company in favour of the director;
- arises because the director is a director of a related body corporate which proposes to enter into a contract with the company;
- the company is a proprietary company and the other directors are aware of the director's interest and insulation to the affairs of the company; or
- the following conditions are satisfied:
 - the director has given notice to the company and how the interest relates to the affairs of the company;
 - the nature or extent of the interest has not materially increased above that disclosed in the notice; and
 - any new directors appointed after the notice is given are also given notice of the interest at the time of their appointment;
- The director has given a standing notice to the company of the interest.
- In every other case where a director has a personal interest in the transaction, it must be declared at a meeting of directors. A notice given to the board declaring a director's interest must give details of:
 - the nature and extent of the interest; and
 - the relation of the interest to the affairs of the company, and be given at a director's meeting as soon as practicable after the director becomes aware of the interest.

Time Commitments

Committee meetings are held on a fixed day every second month. Committee members commit to giving this diary date the same status as their commercial/work commitments and thus to attend all meetings throughout the year. Overseas travel commitments are an exception. Committee members who have not been willing or able to meet the undeniable time requirements of attending all / most committee meetings and executing their agreed follow-up tasks and responsibilities arising out of their committee membership, have been asked to resign or voluntarily done so. In certain cases, the committee has approved valued but time-poor individuals remaining on the committee in an advisory capacity

Payment / Remuneration

To date, membership of the committee has always been unremunerated. From time to time, funds have been allocated to contractors or individual committee members to manage or execute specific tasks e.g. website specification / implementation; Sydney and Melbourne Wine Show lunches, etc. Even in these instances, we have been fortunate that committee members and others have generally committed and delivered, the time and expertise far in excess of hours billed.

Committee members WCA-related out of pocket expenses eg. Travel, parking, taxis, office expenses, etc have seldom been claimed. Room availability / hire and even interstate flights have generally been secured through the generosity or unofficial “patronage” of individuals or employer companies.

Committee members generally pay standard member rates to attend each WCA event. In recent years, however, the two or three committee member(s) organizing a specific event have occasionally been charged the actual/net event cost rather than the member price.