



## Overview of Directors' Duties and Responsibilities

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## Directors' duties mandated by *Corporations Act 2001 (Cth)*

Duties / responsibilities	Director's liability for breach	Comments
<p><i>Duty of care and diligence and the business judgment rule.</i></p> <p>Directors must exercise duties with the care and diligence that a reasonable person would exercise if they were a director of a corporation in the corporation's circumstances.</p>	<p>Yes, civil.</p>	<p>The business judgment rule is a director's defence to an allegation of breach of this duty. It provides an overriding safe harbour to protect directors from personal liability for breaches of duty owed to the corporation and to shareholders. The rule means that where the director makes honest, informed and rational business judgments on behalf of the corporation, that director should be able to avoid any personal liability arising from that judgment.</p> <p>The fundamental purpose of the business judgment rule is to protect the authority of directors in the exercise of their duties, not to insulate directors from liability.</p>
<p><i>Duty of good faith.</i></p> <p>Directors must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.</p>	<p>Yes, civil.</p>	<p>This duty is consistent with a director's fiduciary duty to act bona fide for the benefit of the corporation, providing for an obligation to act honestly at all times, despite the existence of any other conflicting duties. Directors can be in breach of this duty where their power is exercised for an improper purpose, even if they believe they are acting honestly.</p>

<p><i>Duty not to make improper use of position.</i></p> <p>Directors are prohibited from improperly using their position to gain an advantage for themselves or someone else, or to cause detriment to the corporation.</p>	<p>Yes, civil.</p>	<p>A director breaches this section when engaging in conduct with the intention and purpose of obtaining an advantage or causing a detriment, regardless of whether the benefit or detriment actually occurs in fact.</p>
<p><i>Duty not to make improper use of information.</i></p> <p>Directors are prohibited from using information obtained as a consequence of their role with the corporation to gain an advantage for themselves or another, or to cause detriment to the corporation.</p>	<p>Yes, civil.</p>	<p>As above, a director can breach this section regardless of whether a benefit or advantage occurred.</p>
<p><i>Criminal offences.</i></p> <p>A director commits an offence if they are <u>reckless</u> or <u>intentionally</u> dishonest, and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose.</p>	<p>Yes, criminal, civil.</p>	<p>A director commits a criminal offence if they use their <b>position</b> with <u>intentional dishonesty</u> or <u>recklessly</u> in order to directly or indirectly gain an advantage for themselves, or someone else, or to cause detriment to the corporation.</p> <p>A person who obtains information because they are, or have been, a director of a corporation commits an offence if they use the <b>information</b> with <u>intentional dishonesty</u> or <u>recklessly</u> in order to directly or indirectly gain an advantage for themselves, or someone else, or to cause detriment to the corporation.</p> <p>A director may also commit a criminal offence for failing to prevent the corporation trading while insolvent (i.e. unable to pay its debts as and when they fall due).</p>

<p><i>Duty to disclose personal interests.</i></p> <p>Directors have a duty to make full and frank disclosure of information within their knowledge to enable shareholders to make properly informed judgments on any matter.</p>	<p>Yes, civil.</p>	<p>A director with such a material personal interest in a matter relating to corporation affairs must give the other directors of the corporation notice of that interest.</p> <p>The notice, detailing the nature and extent of the interest and how it relates to the affairs of the corporation, must be given to the other directors as soon as practicable after the director becomes aware of the interest.</p>
<p><i>Duty on directors to prevent insolvent trading by the corporation.</i></p>	<p>Yes, criminal, civil.</p>	<p>A director will be liable under insolvent trading provisions if they incurred a debt when the corporation was insolvent, or if there is/was reasonable grounds to suspect that the corporation was insolvent. This liability occurs irrespective of the fact that the director(s) based their decision-making on what would normally be considered a sound business judgment.</p>

## Directors' duties at common law

Duties / responsibilities	Director's liability for breach	Comments
<p><i>Duty to act bona fide (in good faith) in the interests of the corporation as a whole.</i></p>	<p>Yes, civil.</p>	<p>Directors have a duty to act bona fide (in good faith) in the interests of the corporation as a whole. The test as to whether this duty has been complied with is a subjective test of 'honesty or good faith'.</p> <p>Directors breach the duty where they fail subjectively to give proper consideration to the corporation's interests. This will occur where, for example, a director assumes the corporation's interests correspond with their own interests, and do not consider the corporation's interests as a separate entity.</p>
<p><i>Duty not to act for an improper purpose.</i></p>	<p>Yes, civil.</p>	<p>Directors must not use their powers for an improper purpose, including obtaining a personal commercial advantage, or a benefit or advantage for another.</p>
<p><i>Duties of care and diligence.</i></p>	<p>Yes, civil.</p>	<p>Directors have a duty to be informed of the actual financial affairs of their corporation, including its solvency. This duty is not diminished by delegating responsibility to anyone, including a chief financial officer. Directors are unable to hide behind ignorance of the corporation's affairs, where that ignorance is of their own making. This means that directors should question information that is put before them to ensure that it is truly representative of the corporation's position and not just accept what may be put to them by employees of the corporation.</p> <p>For example, if a director received a balance sheet that did not balance, it would be a breach of his/her duty of care and diligence not to ask for it to be corrected. Directors are required to make an informed and independent judgment on decisions put to the board of directors, and are required to place themselves in a position to guide the corporation and monitor its management.</p>

<p><i>Duty to retain discretion.</i></p>	<p>Yes, civil.</p>	<p>Directors must not place themselves in a position where they are unable to make decisions in the best interests of the corporation. This would include entering into commercial transactions that could result in situations where the director cannot take part in making a decision for the corporation.</p>
<p><i>Duty to avoid conflicts of interest.</i></p>	<p>Yes, civil.</p>	<p>Directors cannot put themselves in situations where they have (or may have in the future) a personal interest that conflicts (or may conflict in the future) with the interests of the corporation, which they are bound to protect.</p>
<p><i>Duty not to disclose confidential information.</i></p>	<p>Yes, civil.</p>	<p>Key instances where information is considered confidential:</p> <ul style="list-style-type: none"> <li>• if the information were disclosed it would be in some way detrimental to the corporation, or advantageous to others; or</li> <li>• the information is confidential, secret and not in the public domain; or</li> <li>• in light of the usage or practice of the particular industry or trade, the information would be regarded as worthy of protection.</li> </ul>

## Directors' duties outlined in *Work Health and Safety Act 2011 (Cth)*

Duties / responsibilities	Director's liability for breach	Comments
<i>Duty of care in the management of risks.</i>	Yes, see table below.	<p>Directors have a non-delegable duty to ensure health and safety is maintained. This includes eliminating risks to health and safety, so far as is reasonably practicable, or, where the risks cannot be eliminated, minimising such risks to health and safety, so far as reasonably practicable.</p> <p>If the corporation has more than one director, the duty remains non-delegable, both/all directors retain identical duties to manage risks to health and safety of workers. A person is a 'worker' if the person carries out work in any capacity for the corporation, and includes employees, contractors, subcontractors and volunteers.</p>
<i>Primary duty of care owed to employees.</i>	Yes, see table below.	<p>This non-delegable duty extends to directors ensuring the provision of a work environment without health and safety risks. For example, this can be accomplished through:</p> <ul style="list-style-type: none"> <li>• providing adequate facilities for the welfare of workers at work;</li> <li>• providing adequate information, relevant training, instruction, or supervision necessary to protect all persons from potential risks; and</li> <li>• monitoring the health of employees in preventing illness and injury.</li> </ul>
<i>Duty of persons conducting business or undertakings involving management or control of workplaces.</i>	Yes, see table below.	Directors of workplaces must ensure that the workplace, means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person.

<p><i>Duty of persons conducting businesses or undertakings involving management or control of fixtures, fittings, or plant at workplaces.</i></p>	<p>Yes, see table below.</p>	<p>Directors with control of fixtures, fittings, and/or plant at a workplace must ensure that such fixtures, fittings, and/or plant are without risks to the health and safety of any person.</p>
<p><i>Duty to notify of notifiable incidents.</i></p>	<p>Yes, criminal (statutory penalty; individual: \$10,000, body corporate: \$50,000).</p>	<p>A notifiable incident involves either the death of a person(s), a serious injury or illness of a person(s), or a dangerous incident. Directors conducting business or undertakings must ensure that the regulator representing Comcare (mandated for in <i>Safety, Rehabilitation, and Compensation Act 1988</i> (Cth), s 68) is notified immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred. This must be given by the fastest possible means, by telephone or in writing (e.g. facsimile, email).</p>
<p><i>Duty to preserve incident sites.</i></p>	<p>Yes, criminal (statutory penalty; individual: \$10,000, body corporate: \$50,000).</p>	<p>Directors with management or control of workplaces where a notifiable incident has occurred must ensure so far as is reasonably practicable that the site where the incident occurred is not disturbed until an inspector arrives at the site or any earlier time that an inspector directs. Inspectors are appointed by the Comcare regulators, and are thus external to the corporation.</p> <p>This regulation does not preclude any action to assist injured person(s), remove deceased person(s), remove or minimise the risk of further notifiable incidents; action(s) associated with police investigation(s); or an action which an inspector/regulator has given permission.</p>
<p><i>Duty to consult with other duty holders.</i></p>	<p>Yes, criminal (statutory penalty; individual: \$20,000, body corporate: \$100,000).</p>	<p>If more than one person has a duty in relation to the same matter under the <i>Work Health and Safety Act 2011</i>, each person must consult, co-operate, and co-ordinate activities with all other persons who share the same duty.</p>
<p><i>Duty to consult workers.</i></p>	<p>Yes, criminal (statutory penalty; individual: \$20,000, body corporate: \$100,000).</p>	<p>Directors must consult with workers who, in their line of work are, or are likely to be, directly affected by a matter relating to work health or safety.</p>

		<p>This consultation must include:</p> <ul style="list-style-type: none"> <li>• relevant information about the matter;</li> <li>• adequate opportunity for workers to raise issues pertaining to the matter; and</li> <li>• adequate opportunity for workers to contribute to the decision-making process in resolving the matter.</li> </ul> <p>These views are taken into account by the director conducting business or undertaking. Workers are to be advised of the outcome of the consultation.</p>
<p><i>General obligation of person conducting business or undertaking to health and safety representatives.</i></p>	<p>Yes, criminal (statutory penalty; individual: \$10,000, body corporate: \$50,000).</p>	<p>The person conducting a business or undertaking must consult, so far as is reasonably practicable, on work health and safety matters with any health and safety representative for a work group of workers carrying out work for the business or undertaking, or confer with a health and safety representative for a work group, whenever reasonably requested by the representative, for the purpose of ensuring the health and safety of the workers in the work group.</p> <p>They must also allow any health and safety Representative for the work group to have access to information that the director has relating to hazards (including associated risks) at the workplace affecting workers' health and safety.</p> <p>With the consent of a worker who the health and safety Representative represents, directors must allow the health and safety representative to be present at an interview concerning work health and safety. The interview is to be conducted between the worker and an inspector, or the director (or a nominated representative of the person conducting business). Directors must also provide resources, facilities and assistance to a health and safety representative that are reasonably necessary for the representative to exercise their duties under the <i>Work Health and Safety Act 2011</i>. Directors must allow this representative to spend such time as is reasonably necessary to exercise such duties.</p>

*Liabilities for breach of work health and safety duties*

<p>Category 1: A person with a health and safety duty, either recklessly or without reasonable excuse, engages in conduct that exposes another person(s) to a significant risk of death, serious injury, or illness.</p>	<p>Person conducting business: \$600,000, or 5 years' imprisonment, or both. Body corporate: \$3 million.</p>
<p>Category 2: A person with a health and safety duty does not observe that duty, and another person is injured as a direct consequence of such failure to comply with the duty.</p>	<p>Person conducting business: \$300,000. Body corporate: \$1.5 million.</p>
<p>Category 3: A person with a health and safety duty does not observe that duty.</p>	<p>Person conducting business: \$100,000. Body corporate: \$500,000.</p>

## Work Health and Safety Regulation 2011 (NSW)

Duties / responsibilities	Director's liability for breach	Comments
<i>Duty to identify hazards.</i>	Yes, criminal.	A duty holder, in managing risks to health and safety, must identify reasonably foreseeable hazards that could give rise to risks to health and safety.
<i>Managing risks to health and safety.</i>	Yes, criminal.	A duty holder, in managing risks to health and safety, must eliminate risks to health and safety so far as is reasonably practicable. If it is not reasonably practicable to eliminate risks to health and safety, directors must minimise those risks so far as is reasonably practicable.
<i>Hierarchy of control measures.</i>	Yes, criminal.	A duty holder, in minimising risks to health and safety, must implement risk control measures by substituting (wholly or partly) the hazard giving rise to the risk with something that gives rise to a lesser risk, isolating the hazard from any person exposed to it, and/or implementing engineering controls. If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by implementing administrative controls. If a risk still remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by ensuring the provision and use of suitable personal protective equipment.
<i>Maintenance of control measures.</i>	Yes, criminal.	A duty holder who implements a control measure to eliminate or minimise risks to health and safety must ensure that the control measure is, and is maintained so that it remains, effective, including by ensuring that the control measure is and remains fit for purpose; suitable for the nature and duration of the work; and installed, set up, and used correctly.

<p><i>Review of control measures.</i></p>	<p>Yes, criminal.</p>	<p>A duty holder must review and, as necessary, revise control measures implemented so as to maintain, so far as is reasonably practicable, a work environment that is without risks to health or safety.</p> <p>The duty holder must review and, as necessary, revise a control measure where the control measure does not control the risk it was implemented to control. The duty holder must do this so far as is reasonably practicable (occurring under circumstances where the results of monitoring show that the control measure does not control the risk, or a notifiable incident occurs materialises because of this risk), before a change at the workplace that is likely to give rise to a new or different risk to health or safety that the measure may not effectively control, or a new relevant hazard or risk is identified.</p>
<p><i>Provision of information, training, and instruction.</i></p>	<p>Yes, criminal.</p>	<p>A person conducting a business or undertaking must ensure that information, training, and instruction provided to a worker is suitable and adequate, having regard to the particular worker/employee and their line of work; the nature of the risks associated with their work at the time the information, training, and instruction is provided; and the control measures implemented.</p>

## Schedule 2: Australian Consumer Law, *Australian Competition and Consumer Act 2010 (Cth)*

Duties / responsibilities	Director's liability for breach	Comments
<i>Duty not to engage in conduct that is unconscionable.</i>	Yes, criminal, civil.	A director must not, in trade or commerce, engage in conduct that is unconscionable. Directors can face significant civil penal prosecution if they are knowingly concerned in the unconscionable conduct of their corporation. Furthermore, directors can be held liable if they have contravened, aided or abetted another person to contravene, or have conspired to contravene, the unconscionable dealing provision.
<i>Duty not to engage in conduct that is misleading or deceptive.</i>	Yes, criminal, civil.	A director must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive. Directors can face significant civil penal prosecution if they are knowingly concerned in the misleading or deceptive conduct that their corporation is conducting. Directors can further be held liable if they have contravened, aided or abetted another person to contravene the provision, or have conspired to engage in conduct that is misleading or deceptive.
<i>Duty not to engage in conduct that is false or misrepresentative in the advertisement of goods or services to be sold to consumers.</i>	Yes, criminal, civil.	A director must not, in trade or commerce, make false or misleading statements in regards to the supply of goods or services provided by their corporation. Directors can face significant civil penal prosecution if they are knowingly concerned in the misrepresentative advertisement of goods or services offered by their corporation. Furthermore, directors can be held liable if they have contravened the provision, aided or abetted another person to contravene it, or have conspired to do so.
<i>Duty not to make misleading statements regarding certain business activities</i>	Yes, criminal, civil.	Directors can face significant civil penal prosecution if they have made misleading statements regarding certain business activities, or statements that are not true and fair representations of their corporation's financial position.

## Disclaimer

The content of this document is a general guide only, is not exhaustive on the topic and must not be relied on as legal advice. The legal duties and obligations listed herein have been summarised and in some instances re-worded into plain English for your convenience. If you, your colleagues or clients have any issue involving the subject matter of this document, or feel because of the nature of your business that any of the duties listed in this document may apply we strongly recommend legal advice relevant to the particular circumstances be obtained.

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- *Taxation Administration Act 1996* (NSW);
- *Taxation Administration Act 1953* (Cth);
- *Crimes (Taxation Offences) Act 1980* (Cth);
- *Protection of the Environment Operations Act 1997* (NSW);
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- *Crimes Act 1914* (Cth);
- *Crimes Act 1900* (NSW);
- *Application of the Crimes (Taxation Offences) Act 1980* (Cth);
- *Personal Liability for Corporate Fault Reform Act 2012* (Cth);
- *Trade Practices Act 1974* (Cth);
- *Income Tax Assessment Act 1936* (Cth);
- *Occupational Health and Safety Act 1983 No 20* (Cth);
- *Racial Discrimination Act 1975* (Cth);
- *Sex Discrimination Act 1984* (Cth);
- *Disability Discrimination Act 1992* (Cth);
- *Human Rights and Equal Opportunity Commission Act 1986* (Cth);
- *Affirmative Action (Equal Opportunity for Women) Act 1990* (Cth);
- *Environmental Offences and Penalties Act 1989* (Cth);
- *Environmental Planning and Assessment Act 1979* (NSW);
- *Coastal Protection Act 1979* (NSW);
- *Ozone Protection Act 1989* (NSW);
- *Dangerous Goods Act 1975* (NSW);
- *Local Government Act 1993* (NSW);
- *Waste Minimisation and Management Act 1995* (NSW); and
- *Trade Marks Act* (Cth).