

Duties and responsibilities of company directors

Today's business environment is increasingly competitive. This increases the workload of the owners and managers of small businesses and presents them with many different challenges. Directors of small companies face these challenges as well as having official duties and legal responsibilities relating to company administration.

What duties do company directors have?

Directors are subject to statutory and common law duties. Some of these key duties include:

1. Duty of care and diligence

Directors have a duty to exercise their powers with a degree of care and diligence of a reasonable person in a like position in a similar company. In this respect, when a director makes a business decision, he or she is taken to have discharged their duty of care and diligence if:

- The decision is made in good faith and for a proper purpose.
- They do not have a significant personal interest in the decision.
- They have informed themselves about the subject matter of the decision.
- They believe that the decision is in the best interests of the company.

2. Improper use of information

A person who obtains information because he or she is, or has been, a director, officer or employee of a company is prohibited from improperly using that information to gain an advantage for themselves or someone else or to cause detriment to the company.

3. Duty to prevent insolvent trading

Directors have a duty to prevent a company incurring a debt while it is insolvent.

4. Duty to act in good faith

A director has a duty to exercise his or her powers and discharge his or her duties in good faith in the best interests of the company.

5. Improper use of position

A director, secretary, officer or employee of a company can not improperly use his or her position to gain an advantage for themselves or someone else, or cause detriment to the company.



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6. Conflict of interest

Directors have a duty to avoid situations in which there is a real possibility of conflict between their personal interests and the company's interests.

7. Negligence

At common law, company directors owe a duty of care at common law and can be held liable for negligence.

What responsibilities do company directors have?

1. Lodgement of documents, forms and notices with the Australian Securities and Investments Commission ("ASIC")

- ASIC must be notified of changes to the structure of a company or its officers, within certain time limits of the changes occurring. If you fail to notify ASIC within the applicable timeframe, you may face fines and penalties. ASIC has standard forms by which to notify it of any changes. These forms can be obtained from ASIC website at www.asic.gov.au; and
- All companies are required to submit annual statements to ASIC. Every company has an annual review date, usually the anniversary of the company's registration date. Soon after the annual review date each year, the company will be issued an annual statement by ASIC and an invoice statement for the company's annual review fee. The statement must be reviewed and the review fee paid by the due date.

2. Company register

Companies are required to maintain a number of books, registers, accounts and records. These records must be kept for 7 years and be available for inspection by any authorised person within certain time limits.

3. Display of company's details

If a company's ABN is not used in its name, the company must set out with its name the expression "Australian Company Number" or "ACN" followed by the company's ACN. Alternatively, if the last 9 digits of the company's ABN are the same as its ACN, then the company can include the expression "Australian Business Number" or "ABN" followed by the company's ABN. Companies must display their name and ACN or ABN on the common seal and every other seal of the company, every public document and every eligible negotiable instrument (eg cheque) issued by the company and all other documents required by ASIC.

4. Privacy responsibilities

The *Privacy Act 1988 (Cwth)* governs how businesses may use people's personal information that they hold or have collected in the course of their business. The Act contains some very strict restrictions on what can and cannot be done with people's personal information and severe penalties if these restrictions are breached. For more information visit www.privacy.gov.au or phone the Privacy Hotline on 1300 363 992.



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5. Intellectual property protection

The protection of your business' intellectual property rights is another area of importance. Your business' intellectual property, for example your company logo or the process that you use to do something within your business that is unique within your industry, may be one of your business' most valuable assets. Information on this can be found at IP Australia at www.ipaustralia.gov.au.

6. Taxation

The Australian Taxation Office ("ATO") will require your company to pay certain business related taxes such as PAYG (Pay As You Go Withholding Tax) and GST (Goods and Services Tax). For more information on your company's taxation liabilities, telephone the ATO hotline on 13 28 61, visit its Internet site at www.ato.gov.au or consult with your taxation advisor.

There are a number of other legal obligations that company directors have. These are discussed in more depth in ASIC's publication called *Your Company and the Law* that is available on ASIC's Internet site at www.asic.gov.au or by calling ASIC's information service on (03)5177 3988.

What are directors' duties if the company is unable to pay its debts?

The *Corporations Act 2001* (Cwth) imposes liability on a director of a company who allows the company to incur a debt at a time when:

- The company is insolvent at the time that the debt was incurred; or
- Where there existed reasonable grounds (and the director is aware of these grounds) for suspecting that the company was, or may become, insolvent as a result of incurring the debt.

This is commonly referred to as "insolvent trading".

If the directors of a company determine that the company cannot pay its debts when they become due for payment (ie the company is insolvent), then there are a series of steps that the company is required to take. These include:

- Appointing an administrator;
- Applying to the Court for the appointment of a provisional liquidator; or
- Applying to the Court to wind up the company and appoint a liquidator.

A company may be insolvent even if it appears to have more assets than liabilities.

If you think that your company is not able to pay its debts when they become due, or is heading that way, it is imperative that you immediately seek the advice of your legal advisor or accountant.



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Am I personally liable for my company's debts?

There are a number of situations in which a company's directors may become personally liable for company debts. These include trading when the company is insolvent and if the company enters into agreements before it is incorporated and:

- Those agreements are not ratified by the company when it becomes incorporated; or
- The company does not become incorporated; and
- If the director has given a director's guarantee against the debt (ie they have legally guaranteed payment, usually in writing).

Again, if your company is having financial difficulties or if you have any concerns about its structure, solvency or long term prospects, you should seek professional advice.

Further information

Your legal advisor and your accountant will help you decide whether a company is the best structure for your business and your personal circumstances. They can also give you specialist advice and assistance relating to operating a company. You can receive general information about companies and *Corporations Act 2001 (Cwlth)* by contacting:

- ASIC by telephone on (03)5177 3988 or visiting their Internet site at www.asic.gov.au; or
- Australian Institute of Company Directors ("AICD") by telephone on (07)3222 5500 or by visiting their internet site (www.companydirectors.com.au). The AICD also provides professional development to company directors including a company directors' course.

The following fact sheets provide further information on these issues:

- Insurance
- Set up as a company
- Tax implications for a company