



## **DUTIES OF COMPANY DIRECTORS**

### **WHAT DUTIES DO COMPANY DIRECTORS HAVE?**

Directors are subject to many statutory and common law duties. The decision to become a company director is not something that should be taken lightly. Some of the key duties include:

#### **1. DUTY OF CARE AND DILIGENCE**

Directors have a duty to exercise their powers with the degree of care and diligence of a reasonable person in a like position in a similar company. 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; and
- 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 from incurring a debt while it is insolvent. The regulatory bodies and courts take this duty very seriously and directors have been jailed for breaches of this duty.

#### **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 cannot improperly use his or her position to gain an advantage for themselves or someone else, or cause detriment to the company.

## **6. CONFLICT OF INTEREST**

Directors have a duty to avoid situations where 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 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](http://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 are to be kept for 7 years and must be available for inspection by any authorised person within certain time limits.

#### **3. 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).

### **WHAT ARE THE 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.

### **AM I PERSONALLY LIABLE FOR MY COMPANY'S DEBTS?**

There are a number of situations where 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.

### **CONCLUSION**

Serious penalties apply for company directors who fail to meet the standards imposed by law makers. The above represents a short summary of those obligations. Please contact the Mackey Wales Law commercial team if you require clarification or further information on anything raised.

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