

## Aboriginal Participation on Boards Register

The Department of Planning and Community Development would like to thank and acknowledge the Wathaurung people for allowing the use of the word Wayaperri (meaning 'to meet') for the name of this initiative.

### Help Sheet 6

#### Overview of your legal responsibilities

This help sheet is offered not as a definitive guide to your legal responsibilities and liabilities, as these may differ from Board to Board. Rather, it should be seen as a primer to give you a broad indication of some of the ethical and legal duties you should adhere to during your term. The duties set out below are relatively standard, but if you check out the Act, regulations and rules relating to your particular Board you may find that special arrangements apply to you. You must check the particular legislation under which your Board was formed to see what specific laws and penalties you may be subject to or exempt from.

If after this you are still in any doubt about your roles and obligations, you should of course seek legal advice.

#### The Fiduciary Duty

When you join a Board you are accepting a "fiduciary" duty, i.e. a duty to act in good faith for the benefit of, or in the interests of, the Board itself and the organisation or facilities you are overseeing.

This means that you must not allow your personal interests, or those of anyone else, to override the interests of your Board role – even if you have joined the Board as the representative of another organisation or Board.

Some examples of how your fiduciary duties can be fulfilled include:

- Not taking advantage of your position to further your own needs
- Acting honestly and industriously
- Never using information gained through your privileged position to advantage a family member/friend/associate
- Providing adequate information to authorised people or members when requested and not misleading them in any way
- Disclosing any potential conflict of interest
- Acting with care and diligence
- Maintaining confidentiality
- Never knowingly placing the Board or the organisation it is overseeing in a potentially litigious position
- Ensuring all decisions made are to the advantage of your organisation/facility, not individuals or any particular interest groups
- Ensuring you act according to the constitution/rules of the organisation.

The fiduciary duties outlined above are almost entirely the product of case law (arising from court decisions). The following duties are statutory (created from legislation) – however, there is a substantial overlap between the two.

#### The Duty to Act in Good Faith

This duty comes from Section 181 of the *Corporations Act* 1990, which reads: **A director or other officer of a corporation must exercise their power and discharge their duties (a) in good faith in the best interests of the corporation; and (b) for a proper purpose.**

This duty imposes a fixed standard regardless of the capabilities and state of mind of any individual Board member. Therefore, it is entirely possible that even though a member honestly believes they are acting in the best interests of their Board, the law can take the opposite view.



### The Duty to Avoid a Conflict of Interest

A conflict of interest arises when a Board member's duty to act in the interests of the Board of which she is a member is compromised by some other personal or professional interest. Some Boards will be governed by rules that have particular provisions for the handling of conflicts of interest; as with other legal provisions, you should check the Act relating to your Board.

### The Duty Not to Misuse Information or Misuse the Position of Director

The law prohibits Board members (Directors) from using their position to gain an advantage for themselves or another, or to cause detriment to the entity they are governing. A breach of this law may carry civil or criminal penalties. A Board member also must not misuse information gained through their position.

There is significant overlap between these duties, the duty to avoid a conflict of interest (above), and the duty not to abuse a corporate opportunity (below).

### The Duty Not to Abuse a Corporate Opportunity

Being a Board member may involve discussing a range of opportunities including, on occasion, business opportunities. It is therefore possible that Board members may, by virtue of their position, be made aware of several potentially profitable opportunities. This creates a temptation for Board members to take up such opportunities themselves at the expense of the entity they are governing for. The law may view this as abusing a corporate opportunity.

### Duty to Act with Care and Diligence

Board members must exercise their powers and discharge their duties with the care and diligence of a "reasonable person" in their position. In general terms you will meet the duty of care and diligence if you:

- Make a decision to take, or not to take, action in good faith and for a proper purpose;
- Do not have any material personal interest in the matter;
- Inform yourself about the matter to the extent you reasonably believe is appropriate; and,
- Reasonably believe that your judgement is in the Board's best interests. The Board member's belief is taken to be rational unless no reasonable Board member could have held it. It must be noted, however, that in order to rely on this rule, the Board member must actually make a judgement, and not merely do nothing.

In addition, you are expected to:

- Attend meetings regularly (if not always – some Boards will have minimum requirements);
- Act as an entrepreneur – look for opportunities that can advance your Board's cause;
- Make certain that your Board undertakes good financial reporting practices;
- Ask questions and seek more information when you believe it is required;
- Define appropriate Board policies and supervise their implementation;
- Understand your Board's core work; and
- Keep abreast of governance issues.

As a Board member, you may be able to delegate your powers. This will protect you from a breach of your duty of care and diligence if, after making appropriate inquiries, you believe "reasonably and in good faith" that the delegate is reliable and competent. Similarly, you can rely on the professional advice of others (such as an accountant) if the reliance is in good faith, and you have independently assessed the advice. Such reliance is reasonable unless the contrary is proven.

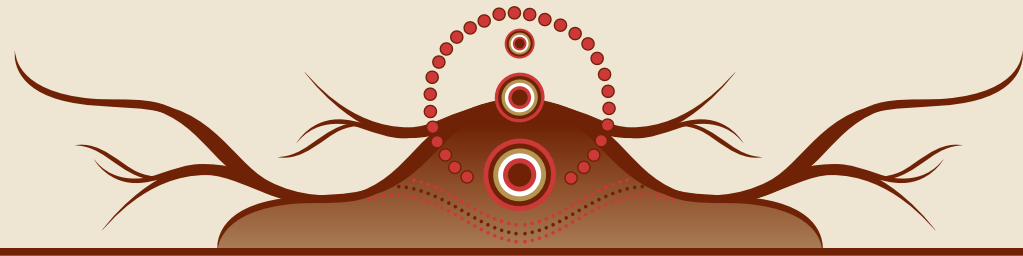
Built into this law is an understanding that Board members with a high level of expertise will attract a higher standard of care than other members. This is because a Board member with less expertise can more readily rely on the advice of another.

### Insolvent Trading

The insolvent trading provisions are some of the most important in the current company law and will almost certainly be of relevance to your Board. These provisions compel Board members not to allow the organisation to trade while insolvent (unable to pay debts) and not to allow the organisation to become insolvent.

You will breach this duty if you dishonestly fail to prevent your organisation from incurring a debt when a reasonable Board member would have been aware that there were reasonable grounds for suspecting the organisation's debts could not be paid as and when they fell due.

Even if the organisation was solvent at the time of incurring the debt, an offence is committed if the organisation becomes insolvent by incurring the debt in question.



Penalties for insolvent trading are particularly severe. Civil penalties of up to \$200,000 or disqualification from directorship may be imposed, although penalties may not be as severe in the community or government sectors. In very serious cases, Board members may be criminally liable, which can mean a prison sentence. For this reason, it is vital that legal and financial advice is sought at the slightest hint of danger.

#### **Duty to Avoid Fraud and Other Wrongs**

A Board member must not engage in any activities which amount to fraud, negligence, and default, breach of trust or breach of duty. Where such conduct leads to the organisation suffering loss or damage, the member may have to transfer an amount of property to the organisation, equivalent to the loss or damage their actions have caused.

#### **Other Relevant Laws**

In addition to the duties outlined above, there are a range of generally applied laws that Board members should keep in mind as they carry out their role. Board members are, after all, responsible for ensuring that their Board is entirely legally compliant. The following list is by no means exhaustive but it is a good starting point to indicate some of the areas of law Board members would be advised to familiarise themselves with.

- Occupational Health and Safety (designed to ensure that workers are safe and secure in their place of work)
- Environmental Law (a vast branch of law that is generally concerned with pollution control, environmental and occupational health, ecologically sustainable development and resource management)
- Negligence (governing cases where the duty of care is breached, causing a foreseeable kind of material damage to another)
- *Trade Practices Act 1974* (a powerful and important Act, which includes a section prohibiting misleading and deceptive conduct)
- Discrimination (all organisations and individuals are obliged to meet this legislation, which has a range of provisions that may differ from state to state)
- Contracts Law (could apply to a property lease, a computer rental agreement, an agreement to supply services, etc.)
- Privacy Laws (designed to govern the way personal information about individuals is collected, stored, used and disclosed)
- Food Safety Laws (including requirements for the handling, storage, transport and display of foods)
- Defamation (designed to protect the reputation of individuals and organisations by allowing the right to sue for damages)
- Fundraising (laws vary from state to state but most states now require formal approval and licensing prior to fundraising activities being initiated)

For more help sheets visit the following website and follow the links to Wayaperri: <http://www.dpcd.vic.gov.au/indigenous/>

Queries should be directed to [wayaperri@dpcd.vic.gov.au](mailto:wayaperri@dpcd.vic.gov.au)