

Directors and officers responsibilities for the not-for-profit sector

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Introduction

- “For profit entities” can distribute profits to their members and include:
 - public companies limited by shares
 - proprietary companies

- “Not-for-profit entities” are restricted from distributing profits to their members and include:
 - public companies limited by guarantee
 - incorporated associations

What duties apply?

□ For profit

- *Corporations Act 2001 (Cth)*

□ For not-for profit

- *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* - Governance Standard 5, however, note:
 - Some provisions of the Corporations Act, eg criminal offences may still apply
 - Higher duties under common law and equity still apply
 - The Government has announced the abolition of the ACNC and the repeal of the ACNC Act

What duties apply?

- **For both profit and not-for-profit**
 - At common law directors owe a duty to act with care, skill and diligence
 - A director is in a fiduciary relationship with the company – which is a relationship of trust and confidence
 - These duties include a duty to:
 - act in good faith in the best interests of the company;
 - act for proper corporate purposes;
 - give adequate consideration to matters for decision and to keep discretions unfettered; and
 - to avoid conflicts of interest.

What duties apply?

- **For both profit and not-for-profit**
 - Some other laws impose obligations upon directors, including under:
 - *The Competition and Consumer Act 2010 (Commonwealth)*
 - *The Health Insurance Act 1973 (Commonwealth)*
 - Work health and safety laws and workers compensation
 - Customs legislation
 - Environmental legislation and
 - Equal opportunity and anti-discrimination legislation

Who is a director and officer?

- **Directors and officers**
 - The Corporations Act refers to “directors and officers”
- **Directors**
 - A “director” of a corporation is appointed to the position of director or alternate director of the corporation. A person can also be a director of a corporation if they act in the position of the director or is accustomed to act as a director

Who is a director and officer?

□ Officers

■ An “officer” of a corporation includes:

- (a) a director or secretary of the corporation;
- (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation’s financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation).

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Who is a responsible entity?

□ Responsible entity

- The ACNC Act refers to “responsible entity” of a “registered entity”.
- A “responsible entity” of a charity which is registered under the ACNC Act includes:
 - a director of a corporate charity
 - a person who performs the duties of a director; and
 - a committee member of a committee of management of an unincorporated association,regardless of the name of the position or whether or not he or she is validly appointed or duly authorised to act.
- If the registered entity is a trust, the responsible entity includes a director of the corporate trustee.

Governance Standard 5

- Governance Standard 5 requires a “*registered entity*” (registered as a charity under the ACNC Act) to take *reasonable steps* to ensure that its “responsible entities” are subject to, and comply with, the following duties:

Governance Standard 5

- Governance Standard 5:
 - (a) to exercise the director's powers and discharge the director's duties with the degree of care and diligence that a reasonable individual would exercise if they were a director of the company;



Governance Standard 5

- Governance Standard 5:
 - (b) to act in good faith in the company's best interests, and to further the purposes of the registered entity;



Governance Standard 5

- Governance Standard 5:
 - (c) not to misuse the director's position;

Governance Standard 5

- Governance Standard 5:
 - (d) not to misuse information obtained in the performance of the director's duties as a director of the company;



Governance Standard 5

- Governance Standard 5:
 - (e) to disclose perceived or actual material conflicts of interest of the director. A perceived or actual material conflict of interest that must be disclosed includes a related party transaction;

Governance Standard 5

- Governance Standard 5:
 - (f) to ensure that the company's financial affairs are managed in a responsible manner – this includes putting in place arrangements and tailored financial systems and procedures, having regard to the entity's size and circumstances and the complexity of its financial affairs.
 - The systems and procedures include:
 - procedures relating to spending funds, for example, the approval of expenditure or the signing of cheques; and
 - having insurance that is appropriate for the registered entity's requirements.



Governance Standard 5

- Governance Standard 5:
 - (g) not to allow the company to operate while insolvent.



Governance Standard 5

□ Protection 1

- A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:
 - (a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - (b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
 - (c) another responsible entity in relation to matters within their authority or area of responsibility; or
 - (d) an authorised committee of responsible entities that does not include the responsible entity.

Governance Standard 5

- Protection 1
 - (2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

Governance Standard 5

- Protection 2
 - A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:
 - (a) the responsible entity makes the decision in good faith for a proper purpose;
 - (b) the responsible entity does not have a material personal interest in the subject matter of the decision;
 - (c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate;
 - (d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

Governance Standard 5

- Protection 3
 - A responsible entity meets this protection if:
 - (a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
 - (b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Governance Standard 5

- Protection 4
 - This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.



Checklist for corporate charities



- ❑ Bring these duties to the attention of their responsible persons/directors (such as providing to them a copy of Governance Standards);
- ❑ Encourage your responsible persons to attend, prepare and participate at meetings;
- ❑ Adopt governance policies and processes, including to manage conflicts of interest;
- ❑ If it comes to the attention of the company that a responsible person is not undertaking their obligations, take action which is reasonable.

Checklist for responsible entities/persons



- Obtain a copy of the company's Constitution and familiarize yourself with the Constitution, including the objects of the company and ensure that the company operates in a manner which is consistent with those objects;
- Familiarize yourself with your legal and corporate governance duties;
- Spend the time to attend Board meetings and read the Board papers (including financial statements) and do not be afraid to ask questions of management, do not rely solely upon the advice of management and experts;

Checklist for responsible entities/persons



- Disclose all conflicts of interests and excuse yourself from making decisions when you have a conflict of interest with the company;
- Ensure that the company has adopted robust corporate governance arrangements, including a code of conduct, conflict of interest policy and delegation policy, including banking authorities, accounting and audit;
- Ensure that the company keeps adequate records and meets its legal and corporate responsibilities, including in relation to the Corporations Act (as applicable), the ACNC Act, employment law obligations and work, health and safety;

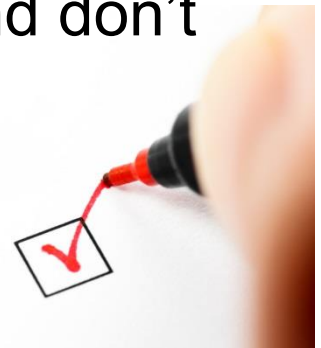
Checklist for responsible entities/persons

- Ensure that the company complies with its reporting obligations to the ACNC;
- Ensure that the company has adequate insurance, including directors and officers insurance;
- Ensure that the assets and funds of the company are accounted for and used appropriately and in accordance with the objects of the company;



Checklist for responsible entities/persons

- Ensure that the company does not make inappropriate distributions, payments or benefits to directors, officers and/or members. Any payments or benefits to directors or members must be considered carefully to ensure that they are appropriate and legally acceptable; and
- Bring your expertise, ideas and enthusiasm to the table, keep an open mind to other people's ideas and don't forget the reason why you joined the charity.



Questions

