

Guide for Company Directors

Roles and Responsibilities



Introduction

Broadly speaking, if you are a director or secretary of a small company, you must follow the requirements set out in the Corporations Act 2001 (Corporations Act). Unfortunately the Corporations Act is well over 1,000 pages long and written so that only a lawyer can make sense of it.

M Group has put together this guide to assist people who have become a private company director and now want to know what is legally required of them. We pride ourselves on providing sensible asset protection advice, but unless our clients are educated themselves in how to deal with their entities, the best structures and advice are of no use.

DIRECTORS DUTIES

As a director, you must:

- be honest and careful in your dealings at all times
- know what your company is doing
- take extra care if your company is operating a business because you may be handling other people's money
- make sure that your company can pay its debts on time
- see that your company keeps proper financial records
- act in the company's best interests, even if this may not be in your own interests, even though you may have set up the company just for personal or taxation reasons, and
- use any information you get through your position properly and in the best interests of the company. Using that information to gain, directly or indirectly, an advantage for yourself or for any other person, or to harm the company may be a crime or may expose you to other claims. This information need not be confidential; if you use it the wrong way and dishonestly, it may still be a crime.

If you have personal interests that might conflict with your duty as a director, you must generally disclose these at a directors' meeting. This rule does not apply if you are the only director of a proprietary company.

SPECIFIC DUTIES

You and any other directors will control the company's business. Your company's constitution (if any) or rules may set out the directors' powers and functions.

You must be fully up-to-date on what your company is doing:

- Find out and assess for yourself how any proposed action will affect your company's business performance, especially if it involves a lot of the company's money.
- Get outside professional advice when you need more details to make an informed decision.
- Question managers and staff about how the business is going.
- Take an active part in directors' meetings.

Only be a company director or a company secretary if you are willing, able and have enough time to put in the effort.

Avoid any company where someone offers to make you a director or secretary on the promise that 'you won't have to do anything' and 'just sign here'. You could be exposing yourself to many legal liabilities.

CAN YOU RAISE MONEY VIA A PUBLIC SHARE ISSUE?

Proprietary companies are generally not allowed to raise money from the public by selling shares. Avoid anything to do with illegal fundraising.

WHO CAN AND CAN'T BE A DIRECTOR OR COMPANY SECRETARY:

You must not act as a director or secretary (or manage a company) without court consent if you:

- are an undischarged bankrupt
- are subject to a personal insolvency agreement or an arrangement under Part X of the Bankruptcy Act 1966 (Bankruptcy Act) that has not been fully complied with
- are subject to a composition under Part X of the Bankruptcy Act and final payment has not been made, or
- have been convicted of various offences such as fraud or offences under company law, such as a breach of your duties as a director or insolvent trading. If you have been convicted of one of these offences you must not manage a company within five years of your conviction. If imprisoned for one of these offences, you must not manage a company within five years after your release from prison.

If you become bankrupt, enter into a personal insolvency agreement or are convicted of a relevant offence at a time when you're a director or secretary then you automatically lose that office. The company must then notify ASIC that you're no longer a director or secretary of the company.

ASIC can also ban you from being a company director in certain situations.

If you're not allowed to be a company director or secretary, you're not allowed to manage a company. It is a serious offence to set up dummy directors while you really manage the company. Directors must also be 18 yrs or older.

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WHAT IF I DO ACT DISHONESTLY?

Every year, the courts send dishonest and reckless company officers to prison, and impose heavy fines and award damages.

As the company watchdog, ASIC investigates corporate crime. You can report dishonest company directors to ASIC. They may take a number of steps against directors who fail in their duties.

COMPANY RECORDS

As a director, the law makes you personally responsible for keeping proper company records.

You must see that the company keeps up- to-date financial records that:

- correctly record and explain its transactions (including any transactions as a trustee), and
- explain the company's financial position and performance.

All companies must have financial records so that:

- true and fair financial statements of the company can be prepared if needed
- financial statements can be conveniently and properly audited if necessary, and
- the company can obey the tax laws.

If your company is a 'small proprietary company' or a small company limited by guarantee (as defined in the Corporations Act), it will generally not have to prepare formal financial reports under that Act each year and lodge them with ASIC. However, you must still keep financial records, and may need financial reports for managing and monitoring your company's financial position and performance for tax purposes or for raising finance.

In most cases, large proprietary and public companies, even not-for-profit public companies, will have to prepare financial reports, have them audited and lodge them with ASIC.

Some public companies limited by guarantee are exempt from these financial reporting obligations and others have reduced auditing and reporting obligations. These are generally only used in non-profit ventures as distributions of profits to members is not allowed.

COMPANY FINANCIALS AND RECORDS:

As a director you must ensure your company keeps all relevant transactional records (receipts, invoices, contracts, statements, wage and superannuation records, asset registers and tax records), whilst also providing the following regular financial statements to enable the Company performance to be monitored:

- Statement of Comprehensive Income: a statement showing the company's revenue and expenses and the profit or loss that results from these items
- Statement of Financial Position: a statement showing the things of value the company owns and the debts the company owes, and
- Statement of Cash Flows: a statement summarising cash inflows and outflows.

Get professional advice if you have any doubt about the content or type of financial records to keep. The lists above give examples only, because the financial records you need will vary from company to company.

You may keep some financial records electronically, but you must be able to convert them into hard copy so that you can give them to anyone entitled to inspect them. Make backup copies of electronic records regularly (for example, weekly or daily).

Further to the above, you must ensure that you:

- display the company name, the words 'Australian Company Number' (or 'ACN') or 'Australian Business Number' (or 'ABN') and the relevant number on:
- the common seal (if the company has one)
- every public document of the company
- every negotiable instrument (e.g. cheque, promissory note) of the company, and
- all documents lodged with ASIC.
- your company register is up-to- date, including:
 - registers of office holders and members (shareholders)
 - registers of other interest in the company
 - minutes of general meetings
 - minutes of meetings of directors
 - registers of charges created by the company over company property (s271 of the Corporations Act was removed from registration under the Personal Property Securities Act 2009. You are required to have this register and make entries up until this point in time), and
- financial records that enable an assessment of the company's financial position and performance and are sufficient for financial statements to be prepared (and audited if necessary) for at least seven years after the transactions are completed.
- your Annual Statement forwarded by ASIC is reviewed and correct and the appropriate annual fees are paid;
- pass a solvency resolution at any AGM or as required; and
- advise ASIC of any changes in the company or the officeholders or members, including any change in personnel, address, names or shareholdings.

M Group attempts to do all these things on your behalf provided you let us know of any changes you have or wish to make. We understand the importance of compliance work and can make running your company as simple as possible.

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COMPANY SOLVENCY

You must ensure that your company is able to pay all of its debts as and when they become due for payment. A company is 'insolvent' if it cannot pay all of its debts as they become due and payable.

By law, you must prevent your company from incurring a debt when it is insolvent or about to become so. This means you must consider whether you have reasonable grounds to believe that the company will be able to pay a new debt when it becomes due, as well as pay all the other debts.

You may expose yourself to criminal prosecution, substantial fines or to action by a liquidator, creditors of the company or ASIC to recover amounts lost by creditors due to your actions.

Your personal assets, not just those of your company—may be at risk.

Common signs of financial trouble are:

- low operating profits or cash flow from the main business
- problems paying trade suppliers and other creditors on time
- trade suppliers refusing to extend further credit to the company
- problems with meeting loan repayments on time or difficulty in keeping within overdraft limits, and
- legal action taken, or threatened, by trade suppliers or other creditors over money owed to them.

If your company is in financial difficulty or in danger of being insolvent, seek immediate advice from M Group or an insolvency professional. They will be able to explain your options to you. Your options may include re- structuring your company's affairs, changing your company's activities or appointing a voluntary administrator or liquidator to the company.

Do not assume that you will be able to trade out of the problem. Delay could be damaging to the company and to you personally, and may reduce the options available.

CAN I CLOSE A COMPANY?

Yes, but ending a company is a specialist task and should only be undertaken under certain circumstances, such as where a company:

- is not carrying on business
- has assets of less than \$1000
- has paid all its fees and penalties under the Corporations Act
- has no outstanding liabilities
- is not a party to any legal proceedings, and
- all its members have agreed to the de- registration.

You should not undertake closing a company without the assistance of M Group.

DIRECTOR PENALTY NOTICES

From 30 June 2012, directors are personally liable for unpaid PAYG withholding or SGC amounts. As a director you must avoid incurring director penalty liabilities by ensuring the company is lodging and paying these liabilities on time. Even after you cease to be a director of a company, or if you are a newly-appointed director, a director penalty may still apply.

The director penalty regime applies to:

- unpaid PAYG withholding amounts
- unpaid SGC obligations applicable from and including 30 June 2012 (ie the June 2012 or later quarters).

The overarching objective of the director penalty regime is to ensure that directors cause the company to comply with certain taxation and superannuation obligations. Directors have a legal responsibility to ensure the company meets its PAYG withholding and SGC obligations. These measures were introduced to ensure directors of

companies take appropriate and prompt action with respect to employee entitlements.

If you are a company director and the company has outstanding PAYG withholding and SGC obligations, you will become personally liable for a penalty equal to these amounts.

The directors of a company that fail to meet a PAYG withholding or SGC liability in full by the due date each become personally liable for a penalty equal to the unpaid amount.

SUMMARY:

Despite the amount of information here (which remember is only a very basic summary of the Corporations Act), you are unlikely to get into trouble if you:

- are honest and careful in dealing with the company and on its behalf with others
- understand your legal obligations and make compliance with them part of your business
- keep informed about your company's financial position and performance
- get professional advice or more information when you are in doubt, and
- give the interests of the company, its shareholders and its creditors top priority.

If you require more information, please contact M Group for advice.

Note: This information was adapted from an Australian Securities and Investment Commission information brochure and remains current at as April 2012. This guide is intended only as general advice and should be not constituted as legal advice. You should seek specific advice in relation to any matter arising from your reading of the above. M Group accept no responsibility for any damages arising out of the information contained herein.