

Sydney Pen Club

Advantage Partnership Lawyers

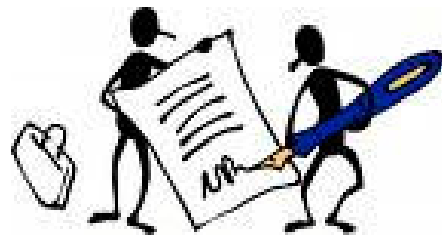
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This Month:



How to avoid being sued

Director's Liability



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Directors Duties and Liability

The power of management of a company is usually invested in the board of directors and under s 201A of the Corporations Law a proprietary company is required to appoint at least one director and a public company to appoint at least three directors. By virtue of their position in the company, directors owe it certain duties and possess a wide range of liabilities.

The court is concerned primarily with the duty of the directors to properly perform their function in relation to the company. The duties of Directors have been established at common law and recently adopted and extended in the Corporations Law.

Common law duties:

It has been established under the common law that directors owe a duty to the company itself, which includes shareholders as a group and to the interests of creditors. However, directors do not owe a duty to the general public, nor to the company's employees, or to the company as a group.

Directors have a fiduciary duty

As a fiduciary, a director is expected to act, not in their own self-interest, but having regards to another's interests. There are a number of fiduciary duties imposed on directors, which fall into two broad categories:

- loyalty and good faith; and
- skill, care and diligence.

Fiduciary duties that arise under loyalty and good faith:

- duty to act bona fide in the interests of the company
- duty to exercise powers for proper purpose
- duty to exercise powers in good faith in the best interests of the corporation and for a proper purpose
- duty to retain discretions
- duty to avoid conflicts of interest
- duties not to make improper use of information or position for advantage or cause detriment

Fiduciary duties that arise under skill, care and diligence:

- duty to exercise the degree of care and diligence that a reasonable person would if they were a director or officer in the corporation's circumstances and occupied the office at that level
- duty to make judgments in good faith for a proper purpose without material interest, in which they are reasonably informed and rationally believe it to be in the best interests of the company

Relief for breach of duty

The law can be flexible in the operation of enforcing duties, such that, if a duty is owed to a person or group, then the person or group should be able to relieve a person from that duty. However, this is not a general rule and can only be applied in certain situations.

Relief can be provided for by:

- the company;
- the company's constitution or contract; or
- the courts

Remedies for breach at common law

Five identifiable remedies exist at common law for a breach of duty, which are:

- equitable compensation or common law damages;
- an account of profits;
- property retrieval;
- rescission of contract; and
- dismissal of director if there is a breach of service contract

Remedies for breach under the Corporations Law

Criminal sanctions can apply under the Corporations Law if the breach of a duty occurs with recklessness or dishonest intent. In addition to this, civil penalties also exist, in the same style of offences under the Trade Practices Act 1974 (Cth).



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