

**DIRECTOR'S
DUTIES AND
MINIMISING
RISKS OF
PERSONAL
LIABILITY**

**A SIMPLE
GUIDE FOR
BUSY
DIRECTORS**

A publication of aspect legal



We are often asked whether a specific breach of a director's duty will expose the director to personal liability. Below is a simple guide to key director's duties and our tips on how to minimise the risks of your personal liability, as director of the company. This guide is a great refresher for long-serving directors and a handy guide for your senior executives.

YOUR DUTIES AS DIRECTOR

As director, you have the duty to:

1. exercise your powers and duties with care and diligence. This includes:

- i. being financially informed: actively being informed about the ongoing financial position of the company. It is not enough to be aware of the financial position of the company only at the time that you sign off the accounts;
- ii. not trading when the company is insolvent i.e. ensuring that the company is able to pay all its debts when they are due;
- iii. keeping adequate financial records. If an action for insolvent trading is taken against you as director and the company has failed to keep adequate financial records, then it will generally be assumed that the company has been trading while insolvent;

 **Aspect TIP:**

to protect against the risk of insolvent trading, before incurring a new debt, review your existing debts and assess the impact of the proposed new debt on those existing debts as well as on the future cash position of the company

2. take care when handling other people's money;

3. exercise your powers and duties in good faith in the best interests of the company.

This means acting fairly and honestly, and being careful in your dealings;

4. exercise your powers only for the purpose for which they were conferred and not for any ancillary or improper purposes. This includes:

- i. not improperly using your position to gain an advantage for yourself or another person, or to cause detriment to the company;
- ii. not improperly using information obtained through your position as director to gain an advantage for yourself or another person, or to cause detriment to the company;
- iii. not applying company property for your personal benefit or for the benefit of another person without the authority of the company;

5. avoid conflicts of interest with the company. This means that if you have any material personal interest in a matter that relates to the affairs of the company, you must disclose these (usually at a directors' meeting);

- 6. ensure the company files and meets its PAYG and superannuation contribution liabilities on time. You will become personally liable for the liability if it is more than three months old and the debt has not been reported to the ATO.** You will no longer be able to

absolve your personal liability by placing the company into liquidation or into voluntary administration. In addition, **your family members and associates who were either partly responsible for the non-compliance or were treated more favourably than other employees as a result of the non-compliance may also become personally liable.**

Aspect TIP:

review your PAYG and superannuation lodgement histories. Ensure that BAS statements are lodged and any PAYG or superannuation liability is reported to the ATO within 3 months of the lodgement date. If you are a newly appointed director, you have a grace period of 30 days before you also become personally liable for the liabilities

Aspect TIP:

your legal adviser can advise whether a particular interest that you have amounts to a "material personal interest" that requires disclosure

HOW TO MINIMISE PERSONAL LIABILITY RISKS - MORE ASPECT TIPS

- 1. Understand your role as director and familiarise yourself with the company's constitution** (the constitution will set out other rights and obligations of your role).
- 2. Actively take part in the day-to-day running of the company and be informed of what the company is doing.**
- 3. Consider taking out director's insurance** to cover unforeseen circumstances and allegations of negligence or failure of duties.
- 4. Make a habit of good record keeping of decisions and discussions of the directors. If you disagree with the other directors on an issue, ensure that this is recorded and a copy retained by the company and by you. If you suspect that a decision may be in breach of a director's duty, consider seeking shareholder ratification of the decision.**
- 5. Implement good financial processes to ensure all tax returns, PAYG and superannuation contributions are lodged and paid within three months of the due date.**
- 6. Implement a good corporate governance program that enables you to (i) manage the company's compliance with all legislation that applies to the business (including the Corporations Act, tax and occupational health and safety legislation), and (ii) monitor activities, identify breaches, promptly rectify breaches and prevent further breaches.**

If you have any questions about your duties or liabilities as a director, or how to implement effective corporate governance processes, contact us for more information and a confidential discussion.

EMAIL:
enquiry@aspectlegal.com.au

PHONE NUMBER:
02 8006 0830

OFFICE LOCATION:
Top Floor, 6/10 Rodborough Road
Frenchs Forest
NSW 2086