



PANORAMIC RESOURCES LIMITED

ACN 095 792 288

A GUIDE ON THE DUTIES AND RESPONSIBILITIES OF DIRECTORS

1 The scope of the duties and functions of directors

Directors have many duties, functions and responsibilities, the main duties being:

- a duty to act in good faith in the best interests of the company;
- a duty to act with care and diligence;
- a duty to avoid conflict in the position of a director and/or any interest that a director may have; and
- a range of duties which prohibit the misuse of information obtained by directors.

There are a series of other duties and functions more procedural in nature contained in the Corporations Law which will not be included in this guide but with which directors should become familiar, for example, concerning the accounts of the company and issues of shares.

1.1 To whom is a director's duty owed?

1.1.1 Fiduciary duty

Directors owe a fiduciary duty to the Company. "Fiduciary duty" has been defined by the High Court of Australia as the duty to act with fidelity and trust to one another. That is, a director must act honestly, in good faith, and to the best of his or her ability in the interests of the company. A director must not allow conflicting interests or personal advantage to override the interests of the company.

The company must always come first.

1.2 What constitutes the Company?

1.2.1 Shareholders

The prime duty is to the shareholders. Traditionally, the courts have treated the company as being the shareholders although sometimes the primary duty has been extended to future shareholders, trade creditors and lenders to the company. Employees are generally not regarded as part of the company for this purpose.

No duty is owed to a particular shareholder or a particular group of shareholders but to shareholders as a group or as a whole.

1.2.2 Creditors

The common law has developed such that directors should also take into account the interests of the company's creditors, especially if a company is in financial difficulty. Although recent changes in the law have made it possible to make certain decisions such as a return of capital without seeking creditors approval first, directors may be personally liable to creditors if it is later found that the company was not solvent when the return of capital, say, occurred.

1.3 Group companies

Directors do not owe a duty to group companies. The duty of directors to act on behalf of a company, means to act on behalf of that specific company. If a director

serves on the board of more than one company in a group of companies, then difficult conflicts of interest can arise putting the director in an irreconcilable position.

This position can be at odds with ordinary commercial practice in which the overall group of companies is regarded as a single commercial entity. Recently, some courts have responded to this commercial issue by acknowledging that in some circumstances it is appropriate to look at a group of companies in evaluating what the directors were trying to achieve. Nevertheless, until there is a clear legal position decided by the courts, it is safer for directors not to give special emphasis to the interests of the group.

An exception to this legal position is contained in section 187 of the Corporations Law which allows directors of wholly owned subsidiaries to act in the interests of the group as a whole in special circumstances. A director must still act in good faith and the subsidiary cannot be insolvent.

1.4 Individual shareholders

The general rule is that directors do not owe duties to individual shareholders. There have been exceptions made to that proposition in special circumstances.

1.5 Alternate directors

Alternate directors face a difficult situation. Case law suggests that alternate directors are allowed to pay particular attention to the interests of the company/person who has appointed them to the board. Legislation is yet to clarify this issue.

1.6 Employees

Directors owe no fiduciary duty to employees.

1.7 Test

A test which directors may use to judge their actions at times of difficulty and conflict is to ask themselves this:

“Taking account of all the circumstances, is what I propose to do in my honest belief in the best interests of all the shareholders of the particular company of which I am a director?”

If the answer to the question is “yes”, then the director can feel confident that he/she is complying with his/her duties under the law.

2 Duties to act honestly and to avoid conflict of interest

Under section 181 of the Corporations Law, directors must act in good faith in the best interests of the company. The previous statutory duty to act honestly has been replaced by section 181.

2.1 The law

Section 181 of the Corporations Laws states:

“A director or other officer of a corporation must exercise their power and discharge their duties in good faith in the best interest of the corporation and for a proper use.”

This new section codifies the common law. A breach of the statutory duty has civil and criminal consequences. Criminal penalties apply where fraud is present in the breach. The common law extends the duty to include a requirement of skill.

There have been many cases that show that a director may act honestly but the courts find that nevertheless this does not measure up to the standard that is expected of a person who owes a fiduciary duty to the company.

2.2 Fraud

While there has been a change in the legislation to remove the legislative duty of honesty, there can still be criminal sanctions brought against directors who act dishonestly or recklessly. Fraud or other elements may result in criminal sanctions being sought as well as civil penalties.

2.3 Duty to avoid conflict of duty and interest

Directors must not allow a conflict of interest to compromise their position. Sections 191-195 of the Corporations Law impose an obligation on directors not to allow a conflict of interest to arise. Under these provisions, directors are required to notify the board as soon as possible of any material personal interest in a matter that relates to the affairs of the company.

The Corporations Law (section 195) prohibits a director of a public company from being present or voting at a board meeting while it is considering a matter in which he or she has a “material personal interest” unless:

- the non-interested directors pass a resolution permitting the director to be present and vote; or
- ASIC makes a specific order or declaration on the issue.

The obligations under the section extend beyond board meetings, to meetings of committees of the board. This appears to be so even if the committee has no power to make a decision affecting the company. Thus committees of an advisory nature would be included.

Section 195 does not define the term “material”. At the least, it means that the interest must be real, not theoretical, remote or contingent. The word “material” seems to require an assessment of the relationship between the advantage that the director personally expects, and the contract being considered. If the director’s interest in the matter would be substantially affected by the outcome of the board’s deliberation, it clearly must be disclosed.

The interest must also be “personal”, indicating that a director who is merely an officer with a party to a transaction being considered by the board, with no other direct financial interest, would not usually be prevented from participating in the board’s consideration of the transaction.

Section 195 does not require that the interest be financial or pecuniary. Nor does it speak of “direct or indirect” interest. Where a relative of the director, or a company in which the director or his or her relatives are interested, stands to benefit from the contract being considered by the board, it will be necessary to determine whether an identifiable “material personal interest” of the director is at stake. This would appear to be so if the indirect advantage to the director, pecuniary or otherwise is sufficiently substantial.

There are some exceptions contained in section 191(2) including where a director is also a shareholder and therefore has an interest in common with other shareholders, where shareholders have approved a contract or if the issue arises merely because the director is guarantor of a particular loan to be made by the company.

Additionally, Panoramic’s Constitution (November 2008) regulates situations where a director enters into a transaction, directly or indirectly, to which Panoramic is a party. Article 10.13 (Director’s Interests) (f), (g) and (h) of the Constitution provide:

Subject to complying with the Corporations Act regarding disclosure of and voting on matters involving material personal interests, a Director may:

- (f) participate in, vote on and be counted in a quorum for any meeting, resolution or decision of the Directors and may be present at any meeting where any matter is being considered by the Directors;*
- (g) sign or participate in the execution of a document by or on behalf of the Company;*
- (h) do any of the above despite the fiduciary relationship of the Director’s office:*
 - (1) without any liability to account to the Company for any direct or indirect benefit accruing to the Director; and*
 - (2) without affecting the validity of any contract or arrangement.*

A common cause of potential conflict is where two companies with common ownership have an interlocking relationship in the same fields of business.

2.4 Duty not to misuse the position of director

Section 182 of the Corporations Law prohibits the improper use of the position of a director or officer of a company to gain an advantage for themselves or someone else or to cause detriment to the company. A breach of this provision carries a maximum

civil penalty of \$200,000 and/or disqualification. If fraud or dishonesty accompanies the behaviour, then criminal penalties may also apply. Section 183 of the Corporations Law imposes a similar prohibition on the misuse of information that comes to a director.

A High Court interpretation of the expression “improper use” is as follows:

“Impropriety does not depend on an alleged offender’s consciousness of impropriety. Impropriety consists of a breach of the standards of conduct that would be expected of a person in the position by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.”

2.5 Duty not to misappropriate property or information

A director must not apply company property for the personal benefit of the director or for the benefit of any other person without the authority of the company. This general law principle is reflected in ASX Listing Rules requiring the approval of a general meeting to:

- fees payable to directors;
- employee incentive schemes benefiting directors; and
- termination benefits.

The equitable principles which prevent a director from misappropriating property of the company are supplemented by Part 2.E of the Corporations Law, which prohibits a public company or its wholly owned entity from giving a financial benefit to a related party of the public company.

Related party issues are dealt with in section 4.

2.6 Duty not to abuse a corporate opportunity

A director is not allowed to take advantage of a business opportunity at the expense of the company. A breach of this duty would result in shareholders being able to sue the director and force him/her to pay back any profits that were made from the particular investment opportunity or contract. A director should fully disclose the course of action he/she proposes to take to general meeting of the company and seek its approval. The director should not vote on the matter.

2.7 Duty not to make improper use of information

Directors must not make improper use of information acquired by virtue of their position either to gain directly or indirectly an advantage for the director or a person linked to them or to cause detriment to the company (section 183(1) of the Corporations Law).

3 Duty to act with care and diligence

3.1 Duty of care

A statutory duty of care is contained in section 180(1) of the Corporations Law which provides that a director of a corporation must exercise his/her powers and discharge his/her duties with the degree of care and diligence that a reasonable persons would exercise if they:

- were a director or officer of a company in the company's circumstances; and
- occupied the office held by, and had the same responsibilities within the company as, the director or officer.

This is a relatively new section of the Corporations Law having been introduced in March 2000. The introduction of this section was in some ways a response to the common law which has developed a much higher standard of duty of care than that which previously existed in legislation. Although the courts have been a bit uneven in their approach to these issues more recently they have taken a tougher line where directors are guilty of careless behaviour and "dummy directors" are held to task for the liabilities of the company. From the AWA Case (1992) there developed the principle that directors must take positive steps to ensure that they are in a position to satisfy themselves that the company is being operated properly; they must be familiar with the business of the company including the financial performance and "health" of the company.

3.1.1 Responsibilities of executive and non-executive directors

Until recently there has been little distinction made in treating the duties, functions and responsibilities of different types of directors. However, the courts have tended to recognise that directors cannot be responsible for all aspects of the company and have tended to limit the liabilities of directors where something has gone wrong.

As the community has become more anxious about the performance of companies and the fact that some high profile companies have failed, the courts have started to impose a higher standard and expectation on directors. This led to a plea by directors that both the Corporations Law and the common law should recognise a distinction between executive directors, ie those that have management responsibilities, and non-executive directors, ie those who are regarded as independent directors.

In AWA Ltd v Deloitte (1992), Rogers CJ held that it was not possible for directors to have a hands on approach to all affairs of the company. He ruled that the board's function was four-fold, to:

- set the goals for the company;
- appoint the company's chief executive;
- oversee the plans for the managers for the acquisition and organization of financial and human resources towards attainment of the company's goals; and
- review at reasonable intervals the company's progress towards attaining its goals.

Further, Rogers CJ held that non-executive directors could not be expected to pay continuous attention to the day-to-day affairs of the company and could be excused

from liability, while the chairman/chief executive officer must act with appropriate care and diligence on all matters affecting the company.

Executive directors are generally employees of the company and have a responsibility to report to the board on day-to-day matters relating to the company's business. The fact that executive directors are involved in the day-to-day management of the business implies that it is more difficult for executive directors to rely on the information and opinions of employees and advisors. Non-executive directors, on the other hand, are entitled in certain circumstances to rely on the information presented by executive directors and others.

Nevertheless, non-executive directors will still be judged according to the reasonableness of their reliance on such information and the systems put in place to collect relevant information. Executive directors bear considerable responsibility for bringing all relevant matters to the attention of the board and ensuring that the control systems put in place by the board are implemented and work in practice.

3.1.2 Common law negligence

In addition to potential liability for breaches of the statutory duty of care, directors can also be liable for common law negligence. The courts have held that the concept of negligence can adapt to a case where the acts or omissions of a director are negligent. A director's fiduciary obligations do not preclude the common law duty of care.

3.2 Business judgement rule

Section 180(2) of the Corporations Law contains a statutory business judgement rule. Unfortunately, many commentators believe that the legislators opted for a provision which is too narrowly constructed as it only applies to the duty to act with care and diligence under the Corporations Law or at common law and not to other duties and in particular, not to the duty relating to insolvency.

It requires the establishment of a number of steps before it can be applied. The section operates such that a director of a company who makes a business judgement will satisfy the obligations of the duty to act with care and diligence and the equivalent common law duties if they do the following:

- make a judgement in good faith for the proper purpose; and
- do not have a material personal interest in the subject matter of the judgement; and
- inform themselves about the subject matter of the judgement to the extent they reasonably believe to be appropriate; and
- rationally believe that the judgement is in the best interests of the company.

The Corporations Law further provides that the belief of a director that the judgement is in the best interests of the company will be regarded as a rational one unless that belief is one that no reasonable person on the director's position would possibly hold. The definition of "business judgement" is also more narrow than some would have hoped. It is defined to mean "a decision to take or not to take action in respect of a matter relevant to the business operations of the company" and consequently only relates to business aspects of the operation of a company.

3.3 Delegation

Three other amendments of significance have made clearer the position of directors in the context of their duty to act with care and diligence. Section 198D makes it clear that directors will be able to delegate their responsibilities in specific situations. When delegation does take place there are corresponding duties on directors for the actions of the delegate (section 190). Furthermore, section 189 provides that directors and officers will be able to rely on information or advice provided by others in certain circumstances.

The Corporations Law provides that a director will not be responsible for the actions of a delegate if the director believed on reasonable grounds:

- at all times that the delegate would exercise the power delegated in accordance with the duties imposed on directors and in accordance with the Corporations Law; and
- in good faith, after making proper enquiry if the circumstances indicated the need for enquiry, that the delegate was reliable and competent in relation to the power delegated.

In general, it will be more difficult for persons to establish that the directors are in breach of their duty if they follow procedures and engage in due diligence type of activity to ensure that all necessary safeguards are provided. The law also provides a clear indication that different standards will be imposed on directors depending on the nature of their experience, the corporations that they are directors of and related circumstances.

4 Related party transactions

4.1 The law

The Corporations Law prohibits public companies, and entities controlled by them, from giving financial benefits to related parties except in specified circumstances. A financial benefit is interpreted very broadly and includes benefits given directly or indirectly.

The Corporations Law specifically provides that the economic and commercial substance and effect of what the company has done is to prevail over its legal form, and that any consideration that may be given for the benefit must be disregarded, even if the consideration is adequate.

4.2 Related parties

Related parties of public companies include: an entity which controls the public company and its directors and directors of the public company and their spouses, de-facto spouses, parents or children.

4.3 Exceptions

The Corporations Law does not prevent public companies entering into all transactions with related parties which provide financial benefits to those persons. A range of transactions are specifically excluded from the prohibition.

Financial benefits are permitted if they are approved by a majority of disinterested shareholders. These disinterested shareholders need to be provided with information as to the costs and consequences of the provision of the benefit, at a general meeting held within 15 months before the giving of the benefit.

Financial benefits are also permitted if they are given on arms' length terms, that is, no more favourable than those which would be reasonable in the circumstances of dealing with the related party at arms' length. Other specific exceptions are:

- reasonable remuneration to a person in their capacity as an officer or employee;
- reasonable remuneration to a person in their capacity as an officer;
- reasonable payment and reimbursement of expenses incurred in the performance of their duties as an officer or employee;
- financial benefits to related parties in their capacity as a shareholder which financial benefit is in common with that offered to all other shareholders; and
- benefits to subsidiaries.

4.4 Breach

Breach of the prohibition does not necessarily affect the validity of the transaction. However, each person involved in the contravention commits an offence if their involvement is dishonest.

5 Personal liability

There are many approaches to directors' liabilities under legislation and common law. It is worthwhile noting that a director can become personally liable in the following circumstances:

- for statements in, and omissions from, a prospectus;
- insolvent trading;
- trade practices issues;
- pollution and the use and storage of environmentally hazardous chemicals and dangerous goods;
- breaches of occupational health and safety legislation; and
- breaches of tax legislation.

There are almost as many different statutory defences to directors' statutory liability as there are offences. Directors can seek some protection by adopting appropriate systems which are designed to ensure that:

- matters which can result in personal liability are properly supervised; and
- the risk of contravention of laws imposing personal liability is minimised.

6 Price Sensitive Information

As a director of Panoramic, you may come into possession of price sensitive information about listed entities. There is a prohibition on a person in possession of price sensitive information about a company who knows or ought reasonably to know that the information is “price sensitive” from:

- dealing in securities of that company;
- procuring another person to do so;
- if the securities are quoted, communicating the information to another person in circumstances where it is likely that the other person will deal in the securities or procure someone else to do so.

Price sensitive information is information which is not generally available but if it were, a reasonable person would expect it to have a material effect on the price or value of securities.

The rules for dealing in Panoramic shares by directors are designed to assist preventing breaches of the insider trading provisions of the Corporations Law.

As a director, you should have full knowledge of the Company’s policy in dealing in securities of the Company (which was given to you on your appointment as a director of the Company).