

# DUTIES & RESPONSIBILITIES OF CHURCH LEADERSHIP GROUPS

The laws governing directors' duties and responsibilities come from three areas:

- [The common law](#) (judge-made law)
- [Equitable fiduciary duties](#) (to avoid conflicts of interest)
- [Statute law](#), under the Australian Charities and Not-for-profits Commission Act 2012 (the "ACNC Act"); Corporations Act 2001 (Commonwealth) (the "Corporations Act"); Associations Incorporation Reform Act 2012.
- [An entity's constitution](#).

Church leaders should be aware of their obligations under common law. This includes requirements contained in the Safe Churches Resources (Link to BUV website) such as Duty of Care, Redbook and Safe Church requirements.

Church leaders should also be aware of the "**Failure to Protect**" legislation which commenced in Victoria on 1 July 2015. The offence will apply where there is a substantial risk that a child under the age of 16 under the care, supervision or authority of a relevant organisation will become a victim of a sexual offence committed by an adult associated with that organisation. A person in a position of authority in the organisation will commit the offence if they know of the risk of abuse and have the power or responsibility to reduce or remove the risk, but negligently fail to do so.

This guide deals with Church Leaders' duties, obligations, and responsibilities in relation to statutory obligations under the ACNC Act. These duties and responsibilities are similar to duties and responsibilities under the Corporations Act, as well as common law.

In this guide, 'Director' has the same meaning as 'Responsible Entity' in the ACNC Act. All Church Governing members are 'Responsible Entities'.

The primary provisions in the ACNC Act regarding statutory duties for Directors are under Governance standard 5 of the ACNC Regulation 2013.

## **1. Duties of care and diligence**

*To exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity.*

Directors have a duty to be informed of the actual financial affairs of their organisation, including its solvency. This duty is not diminished by delegating responsibility. Directors are unable to hide behind ignorance of the entity's affairs, where that ignorance is of their own making. This means that directors should question information that is put before them to ensure that it is truly representative of the organisation's position and not just accept what may be put to them by employees of the company.

For example, if a director received a balance sheet that did not balance, it would be a breach of his or her duty of care and diligence not to ask for it to be corrected.

Directors are required to make an informed and independent judgement on decisions put to the board of directors, and are required to place themselves in a position to guide the organisation and monitor its management.

## **2. Duty to act bona fide (In good faith) in the interests of the entity as a whole**

*To act in good faith in the registered entity's best interests, and to further the purposes of the registered entity.*

Directors have a duty to act bona fide (in good faith) in the interests of the organisation as a whole. The test as to whether this duty has been complied with is a subjective test of "honesty or good faith".

When acting as a board member you must make decisions that are in the best interest of your charity and to further its charitable purpose.

If you are on the board as a representative or nominee of another organisation, you will generally have to make decisions that are in the best interest of the charity (rather than, for example, the organisation that nominated you).

Directors breach the duty where they fail subjectively (i.e., in their own minds) to give proper consideration to the company's interests. This will occur where, for example, a director assumes the organisation's interests correspond with their own interests, and do not consider its interests as a separate entity.

However, there are qualifications on the above subjective test. It imports an objective standard (i.e., what is reasonable in the eyes of an objective bystander) of whether an intelligent and honest person in the position of a director of the organisation concerned could, in the whole of the relevant circumstances, have reasonably believed that the transactions were for the benefit of the organisation.

Therefore, if a director fails to consider the organisation's interests in his or her own mind, but the transaction is in fact for the benefit of the organisation, there will be no breach of duty.

When considering the "interests of the organisation", a director should have regard to the members as a collective group. However, when the organisation is insolvent (or at risk of becoming insolvent), the interests of creditors prevail.

## **3. Duty not to act for an improper purpose**

*Not to misuse the responsible entity's position.*

Sometimes as a board member you will come across information that could be used for your personal or other interests. Any special knowledge that you gain as a board member must only be used for the benefit of the charity and never to further personal or other interests.

Directors must not use their powers for an improper purpose. This would include obtaining an advantage for themselves, or defeating the voting power of existing members by creating a new majority. A proper purpose could be taking advantage of a genuine commercially favourable opportunity.

Note that in promoting the interests of the organisation, a director may also indirectly promote his or her own interest.

## **4. Duty not to disclose confidential information**

*Not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity.*

Due to their fiduciary role, directors have a duty not to abuse confidential information that they acquire as a result of their position. Information is considered confidential where the owner reasonably believes that:

- a) if the information were disclosed it would be in some way detrimental to him/her, or advantageous to others
- b) the information is confidential, secret and not in the public domain
- c) in light of the usage or practice of the particular industry or trade, the information would be regarded as worthy of protection.

## **5. Duty to avoid conflicts of interest**

*To disclose perceived or actual material conflicts of interest of the responsible entity.*

Directors are regarded as having what are known as “fiduciary duties” owed to their organisation. This is an important legal relationship, and is a duty of trust and utmost good faith. In this context, directors must put the interests of the organisation ahead of their own.

Directors cannot put themselves into situations where they have (or may have in the future) a personal interest which conflicts (or may conflict in the future) with the interests of the organisation, which they are bound to protect. This will occur where there is a real possibility of conflict.

A conflict of interest may be direct or indirect. Directors have a duty not to have a personal interest in a transaction with the organisation. A director will breach this duty where he or she enters into a contract with the organisation either directly (by personally contracting with the organisation) or indirectly (such as where the director is both a director and member of another organisation which contracts with the first organisation of which he/she is a director).

Directors must not place themselves in a position where they are unable to make decisions in the best interests of the organisation. This would include entering into commercial transactions that could result in situations where they cannot take part in making a decision for the organisation. For example, directors may not enter into transactions where they would have to put the interests of other parties ahead of interests of the organisation.

Directors must avoid situations where personal interests conflict, or may conflict, with those of the organisation. This will occur where the interests of the director is so related to the affairs of the company that it is done in the course of management, and in utilisation of opportunities and special knowledge as director. There needs to be a causal connection between the director’s fiduciary obligations and the opportunity. It is necessary to look at the circumstances in which the opportunity arose; the nature of the opportunity; the nature and extent of the organisation’s operations and the future operations of the organisation. If there is such a connection between the director’s obligations and the opportunity, it is likely that the opportunity has been misused.

It is irrelevant if the organisation could not have exploited the opportunity itself, except where it is actually in the interests of the organisation that the director pursues the benefit.

A perceived or actual material conflict of interest must be disclosed:

- if the responsible entity is a director of the registered entity—to the other directors (if any); or
- if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
- if the registered entity is a company—to the members of the registered entity; or

- in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

## **6. Duty to manage financial affairs**

*To ensure that the registered entity's financial affairs are managed in a responsible manner.*

Charities should have appropriate and tailored financial systems and processes, suitable to the size and circumstances of a charity and the complexity of its financial affairs.

The systems and procedures for a particular registered entity should be developed having regard to the registered entity's size and circumstances and the complexity of its financial affairs.

The systems and procedures may 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.

## **7. Duty to avoid insolvent trading**

*Not to allow the registered entity to operate while insolvent.*

Insolvent has the meaning given by subsection 95A (2) of the Corporations Act 2001

You must ensure that your charity can pay its debts when they are due. This is called being solvent. If your charity is unable to do this then it will be insolvent. As a board member, you must not allow your charity to continue to take on new debts (for example, wages, rent, equipment lease payments) if you know the charity will not be able to pay those bills when they are due.

A person breaches this duty where:

- a) he or she was a director of the organisation at the time when it incurs a debt
- b) the organisation is insolvent at that time or becomes insolvent by incurring that debt
- c) at that time there were reasonable grounds for suspecting that the organisation was insolvent or would become insolvent and either:
  - i. he or she was aware at that time that there were such grounds
  - ii. a reasonable person in a like position in a organisation in the organisation's circumstances would be so aware
- d) he or she failed to prevent the organisation incurring the debt.
- e) The director commits a criminal offence if the failure to prevent the organisation incurring the debt was dishonest. The duty intends to increase a director's responsibility and protect the welfare of stakeholders in the organisation.

## **Protections under governance standard 5 - Reasonable steps taken to ensure compliance with duties**

*If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in the governance standards.*

### **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.

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.

### **Protection 2**

Protection 2 relates to the duties of care and diligence and is also referred to as the "business judgement rule".

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.

### **Protection 3**

Protection 3 relates to the duty to avoid insolvent trading.

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.

### **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.