

# Co-operative directors

## A guide to duties and responsibilities

### Managing the co-operative

A co-operative's management structure is based on the same principles as those for a company. Generally, the board of directors is responsible for managing the affairs of a co-operative. However, legislation and the co-operative's own rules require the board to defer certain important decisions to members at a general meeting. These include changes to the rules, acquiring or selling certain co-operative assets, changing the co-operative's structure or winding up.

The board's level of involvement in the day-to-day affairs of a co-operative will vary.

Smaller co-operatives are likely to have directors with a direct involvement in day-to-day business, sometimes as employed managers.

Large co-operatives are more likely to have a board supervising overall policy and management.

### Director duties

The board structure delivers efficiency and expertise in decision-making especially for larger co-operatives. The board utilises principles of majority rule to control the interests of members. However, the interests of all members are protected by enforceable legal duties imposed upon directors ensuring they act appropriately in managing the co-operative.

Director duties secure the loyalty of directors to the co-operative. These duties arise from three sources:

1. 'General law' - this is the law developed by courts over the years and obligations that stem from this law are fiduciary duties. A fiduciary is a term for a person who has control of the affairs of another.

2. Legislation - other director duties are set out in the governing statute, the Co-operatives National Law. This legislation is based largely upon the law governing companies. These duties are referred to as statutory duties.
3. Co-operative rules - the co-operative's own rules will contain specific director duties relevant to each co-operative. These are part of the contract between members, and are referred to as contractual duties.

### Personal responsibilities of directors

Director duties, whether fiduciary, statutory or contractual, are imposed upon directors as individuals. Therefore each director is personally responsible for their decisions and actions as a director. As these duties stem from different sources of law, enforcing them has different consequences.

Fiduciary duties are owed to the co-operative. Therefore, if a director breaches a duty, the co-operative (or sometimes members on behalf of the co-operative) has the right to sue and enforce that duty by seeking compensation or injunctions against individual director(s).

Statutory duties are enforceable by the Registrar and penalties for breaching them can range from compensation orders, to fines and, in some cases, terms of imprisonment. Statutory duties apply usually to 'officers' of a co-operative which will include directors as well as persons engaged in the management of the co-operative and, in some cases, employees.

Contractual duties that arise under the rules are duties owed to the co-operative or its members. Directors breaching these duties may be subject to legal action from the co-operative or its members.

There are five major categories of director duties:

### 1. The duty to act in good faith (honestly) in the interests of the co-operative

The director must take into account the best interests of the co-operative and act in those interests rather than for any other motive.

### 2. The duty to act with reasonable care

Directors must act with reasonable care and diligence in all aspects of their activities for the co-operative. While delegating duties is permitted in circumstances, directors are not automatically freed from responsibility for the consequences of delegated tasks. For example, delegated financial decisions to unqualified or inexperienced persons could leave directors responsible for unsound decisions or acts. Courts have identified the following as minimum standards of care, skill and diligence expected of directors:

- A director must acquire a basic understanding of the business of the co-operative and must be familiar with the fundamentals of the co-operative's business.
- Directors are under a continuing obligation to keep informed about the activities of the co-operative.
- Detailed inspection of day-to-day activities is not required, however, general monitoring of the co-operative's business affairs such as regular attendance at board meetings is necessary.
- Directors should be familiar with the financial status of the co-operative by a regularly reviewing the financial statements. This duty is vital to maintain the statutory duty to prevent insolvent trading.

### 3. The duty to act for a proper purpose

Directors must act honestly in the interests of the co-operative. Directors are given powers and discretions to make decisions. If that power is abused or used for an improper purpose, then the director will have breached their duty. For example, a decision to schedule a general meeting at an inconvenient time or place in order to limit member participation may amount to an improper use of a director's power.

### 4. The duty to retain discretions

There is a duty to ensure that directors do not abdicate responsibility for decision making by simply fitting in with other persons or the majority. A director has a variety of

discretions or powers to make decisions and the co-operative is entitled to have the benefit of each director's personal effort in making that decision. This duty is closely related to the duty to act with reasonable care especially in delegating.

### 5. The duty to avoid conflicts of interest

Directors must not place themselves in a position where there is an actual or substantial possibility of a conflict between personal interests and their duty to act in the interests of the co-operative. There may be circumstances where a co-operative may allow a director to proceed with a transaction or activity, however, proper disclosure and express permission must be obtained.

## Statutory duties

The *Co-operatives National Law* imposes statutory duties on officers (including directors) of co-operatives which mirror the fiduciary duties. A breach of a statutory duty will expose directors to a range of civil and criminal penalties.

A co-operative's secretary has an expressed responsibility to ensure that the co-operative complies with statutory obligations. Go to the *Role of a co-operative secretary* web page for more information on the secretary's responsibilities.

## Insolvent trading

The most important statutory duty, in addition to the above duties, is to prevent the co-operative from trading whilst it is insolvent. This duty places directors at risk of being personally responsible for the debts of the co-operative that were entered into whilst insolvent. The elements of this duty are set out in the *Corporations Act 2001 (Cwth)* and are applied by the *Co-operatives National Law*.

Briefly, the duty requires that a director must ensure that the co-operative does not incur a debt in circumstances where:

- the co-operative is insolvent at the time
- the co-operative becomes insolvent by incurring the debt
- there are reasonable grounds for suspecting that the co-operative is insolvent or would become insolvent.

Defences available to directors under this duty will be based upon what constitutes reasonable grounds and other matters.

## Business responsibilities of directors

Broadly, directors are required to make decisions and formulate plans or policy for their co-operative. The range of decisions to be made for any co-operative will vary depending on the co-operative's size and its undertakings. Generally, the activities of directors include, but are not limited to:

- development of basic guidelines for the control of the business activities of the co-operative
- appointment, supervision and removal of employees including the determination of their pay and description of their responsibilities
- calling of special meetings whenever necessary or upon the request of members as provided in the rules
- approval of general business arrangements such as entering into contracts with distributors or suppliers
- settlement of arrangements for handling funds and the designation of the people who may sign cheques
- borrowing of funds for any legal or approved purpose
- ensuring that an adequate bookkeeping system is maintained, that regular financial reports and audits are done and that a complete record of board meetings is kept in accordance with accounting standards
- ensuring that the organisation establishes and maintains systems of internal control, and supervision and safe custody of appropriate documents
- using adequate checks to make certain that employed staff and voluntary officers, the manager, secretary and treasurer are conforming to the policies adopted by the board of directors
- exercising prudent decision-making regarding the level of debt entered into
- attending and participating in general meetings (including the annual general meeting) of the co-operative

- reviewing operating results in order to determine whether policies should be continued, changed or dropped
- taking active and energetic steps to keep members fully informed of the organisation's activities and problems. However, care must be taken to ensure that individual members' private and confidential business is not disclosed.

## Responsibilities of the manager

An employed manager, who may or may not be a director, would generally be responsible for:

- serving the co-operative (either directly or with assistance) by carrying out the policies determined by the board of directors
- knowing the organisation's objectives and complying with all policies designed to achieve them
- selecting, training, supervising and developing personnel
- operating the organisation on a sound business basis by giving attention to the development of an effective business structure and utilising operating and financial budgets
- developing and maintaining an adequate accounting and record system
- initiating sound purchasing and marketing practices
- studying, planning and conducting research on problems of interest to the organisation
- identifying and using external sources of assistance on problems affecting the organisation
- achieving technical proficiency with respect to the products handled and the physical facilities operated.

## Further information

For further information please contact:

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[www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)  
Fair Trading enquiries 13 32 20  
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Language assistance 13 14 50

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