



Code of Conduct – Duties and Conflict of Interest
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Duties of Directors

1. The Corporations Act provides that directors must:
 - (a) exercise a degree of care and diligence in the exercise of their powers and the discharge of their duties that a reasonable person would exercise if they:
 - (i) were a director or officer of a corporation in the corporation's circumstances; and
 - (ii) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer (Section 180(1));
 - (b) exercise their powers and discharge their duties:
 - (i) in good faith in the best interests of the corporation;
 - (ii) for a proper purpose (Section 181(1));
 - (c) not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the company (Section 182); and
 - (d) not improperly use information acquired by virtue of their position to gain an advantage for themselves or someone else or cause detriment to the company (Section 183).
2. The Corporations Act includes a criminal offence at section 184, in the following terms:

"A director or other officer of a [company] commits an offence if they:

 - (a) are reckless; or
 - (b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

 - (c) in good faith in the best interests of the [company]; or
 - (d) for a proper purpose."
 3. Under the common law, directors must act in good faith in the interests and for the benefit of the company as a whole. As a general rule, directors owe this duty to shareholders.
 4. The Corporations Act provides that a director of a public company (e.g. GUD) who has a "material personal interest" in a matter that is being considered at a meeting of the board of directors of the company must not, subject to certain exceptions referred to below, vote on the matter and must not be present while the matter is being considered at the meeting (Section 195(1)).
 5. The Constitution of GUD provides that, as long as it is not contrary to the Corporations Law, a director who is in any way interested in any contract may, despite that interest, vote in respect of that contract (Article 39).

Guidelines on How to Deal with Potential Conflicts of Interest

1. *The general principles in this area are:*

(a) *A director may attend a meeting of directors and vote on a matter if:*

- (1) *there is no hindrance to the director's ability to act in good faith in the interests and for the benefit of the company and its shareholders as a whole; and*
- (2) *the director does not have a material personal interest in the matter*

(b) *If a director has an interest in a matter, that interest should be disclosed to the Board.*

2. *At all times, a director must act in good faith in the interests and for the benefit of the company and its shareholders as a whole.*

To do otherwise would amount to a breach of the director's duties. Directors appointed by shareholders to represent those shareholders on the board, must act in the interests of the company of which they are a director and may only act in the interests of their appointors if that course of conduct is also in the interests of the company.

Where the company is part of a group of companies or is a wholly owned subsidiary of another company, a director is taken to act in good faith in the interests of the subsidiary if:

- (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and
- (b) the director acts in good faith in the best interests of the holding company; and the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act (Section 187 CA)

3. *The test of whether a particular act is in good faith in the interests and for the benefit of the company and its shareholders as a whole, is whether an intelligent and honest person in the position of a director of the company concerned, could, in the whole of the circumstances, have reasonably believed that the transaction was for the benefit of the company.*

4. *If a director is interested in a matter, the director should declare that interest even if it does not give rise to a conflict of interest.*

A director is usually considered to be interested in a matter if the director or any person (e.g. a relative or the shareholder company which appointed the director to represent its interests on the board) associated with the director may derive a benefit (financial or otherwise) from the matter.

Every disclosure made at a meeting of directors must be recorded in the minutes of the relevant meeting. Every other disclosure must be made in writing to the secretary and tabled for inspection at the next meeting of directors after it is given. A director's absence from a meeting due to an interest in a matter being discussed should also be noted in the minutes.

There must be full disclosure of the interest, the nature of it and the advantage of the transaction, commercial or otherwise, and such other particulars as will enable the other directors to determine what action should be taken in the interests of the company. Appropriate independent advice may also need to be obtained if there is an issue as to whether there is a conflict of interest.

A “once off” general form of declaration may be made by a director in writing to the secretary, e.g. that the director or a person related to the director:

- (a) is an officer or member of a specified body corporate;
- (b) is a member of a specified firm; or
- (c) holds a specified office or has an interest in specified property

and is to be regarded as interested in any matter in which the company or any related body corporate may, after the date of the notice, be concerned which involves that body corporate, firm, office or property.

5. *It is the “real sensible possibility of conflict” which imposes constraints on a director. A director will not be faced with a real sensible possibility of conflict if there is no hindrance to the ability of the director to act in good faith in the interests of and for the benefit of the company and its shareholders as a whole.*

A director will be faced with a conflict of interest where a loyalty or duty owed to a party other than the company hinders the ability of the director to discharge the duty to act in good faith in the interests and for the benefit of the company and its shareholders as a whole.

6. *A director faced with a real sensible possibility of conflict must declare that conflict of interest and must not vote on the matter or seek to influence the other directors in relation to the matter.*

For example, where a director of company A is engaged in a transaction with company B of which he is also a director, or in which he has a materially relevant interest and *the interests of each company differ in relation to the subject matter of the transaction*, then the director’s duty to each company to act in each company’s interests requires the director to make full disclosure and refrain from voting on the matter. On the other hand, if the interests of company A and company B are such that the transaction is in the interest of each company considering the commercial reality of the transaction and the commercial basis and benefits to the company, the director need not refrain from considering and voting on the matter. However, full disclosure of the director’s interest is required. The disclosure must be made in accordance with the requirements in paragraph 4 above.

7. *Directors can act notwithstanding a conflict of interest if authorised to do so by the company in general meeting after full disclosure of the nature of the proposed transaction and their interests in it and provided such authorisation is not secured by unfair or improper means, such as oppression.*
8. *A director who has a “material personal interest” in a matter that is being considered at a meeting of directors of the company must not vote on the matter and must not be present while the matter is being considered at the meeting (Section 195 CA).*

“Material personal interest” is not defined in the *Corporations Act*. If the director’s personal interest is substantially affected by the outcome of the board’s deliberation, the personal interest is likely to be “material”. A “personal interest” does not have to be a financial, pecuniary or direct interest. However, the interest must be “personal” to the director. Thus, a director will not usually have a material personal interest (c/f a conflict of interest) in a matter simply because the director:

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- (a) is a common director of two companies intending to contract; or
 - (b) has been appointed by an entity associated with a company, with which the director's company intends to contract,

provided that the director's remuneration is not affected by the decision of whether or not to enter into the contract (as that would make it a personal interest which may be material).

The "material personal interest" prohibition does not apply if:

- (a) The board (in the absence of the relevant director(s)) passes a resolution specifying the director, the nature and extent of the director's material personal interest in the matter before the board and states that the directors voting for the resolution are satisfied that the interest should not disqualify the director from considering or voting on the matter (section 195(2) CA);
- (b) The director is entitled to be present and vote under a declaration or order made by ASIC under section 196 CA; or
- (c) The interest does not need to be disclosed under section 191 CA.

Section 191 (1) CA requires a director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.

Section 191(2)(a) CA identifies a number of circumstances in which the director does not need to give notice of an interest under subsection (1), including if the interest:

- (i) arises because the director is a member of the company and is held in common with the other members of the company; or
- (ii) arises in relation to the director's remuneration as a director of the company; or
- (iii) relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members;

In addition, section 191(2)(d) CA states that notice need not be given if the director has given a standing notice of the nature and extent of the interest under section 192 CA and the notice is still effective in relation to the interest.

However, section 193 CA states that sections 191 and 192 have effect in addition to, and not in derogation of, any general law rule about conflicts of interest, or any provision in the company's constitution.

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