



Duties of directors and other officers

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) sets out the duties required of directors and other officers. These duties are consistent with the duties under common law and in the *Corporations Act 2001*.



Did you know you can see a corporation's rule book on the ORIC website?

Use 'Search for a corporation' (this searches the public register), put in the corporation's name or ICN and look under 'documents'.

The common law (that's the law developed by judges) imposes special duties on directors and other officers of a corporation, such as a **duty of loyalty** and a **duty of care**. The CATSI Act also imposes duties on directors and other officers. Some of these duties overlap.

Directors and other officers owe these duties to the whole corporation—this means to all its members—and also to stakeholders (such as funding bodies and creditors).

Directors and other officers

The directors make up the governing body of the corporation. They are usually appointed by the members—the corporation's rule book will say how (always check the rule book).

Once appointed the directors have full authority over the corporation and are ultimately responsible for its management. This is why the **directors' duties** exist. They are legal duties that keep the directors loyal and accountable to the corporation—in other words, answerable to the corporation's members—and also to stakeholders.

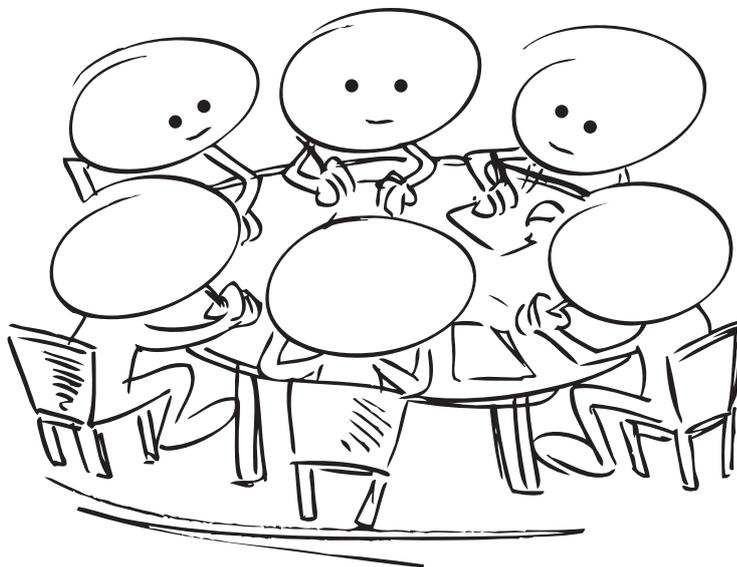
The CATSI Act also extends the scope of some directors' duties to the corporation's other officers and employees.

NOTE: Not every corporation has a CEO—some prefer the title of 'general manager' or 'executive manager'. In every case however, whoever fills this role follows instructions given to them by the board of directors.

Other officers of a corporation are CEOs/general managers, secretaries (in large corporations), chief financial officers (CFOs), special administrators and liquidators—in short, the other people who are involved in making decisions that affect the business of the corporation.

The CEO/general manager is usually the most senior employee and is appointed by the board of directors to look after—or 'manage'—the practical day-to-day business of the corporation, including its property and financial administration.

The duties apply individually—that is to say, each director, officer or employee to whom they apply is personally responsible (and therefore accountable) for meeting them.





LEGAL DUTIES

DUTY OF care and diligence

(CATSI Act: section 265-1)

Directors and other officers must exercise their powers and carry out their duties with reasonable care and diligence.

This means they take their responsibilities seriously.

Directors who act carefully and diligently are interested in what's happening at their corporation and are well prepared to make decisions. For example, they are across their corporation's affairs and:

- follow their corporation's rule book
- never miss a directors' meeting and always arrive on time
- read all the pre-meeting background papers
- know their corporation's financial position
- are not afraid to ask a lot of questions—especially if some of the matters presented to them are complicated or unclear.

For other officers of the corporation, acting with care and diligence, could mean, for example, preparing accurate and timely reports for the directors so that they are well informed and in a confident position to make decisions in the best interests of the corporation.

Breach of this duty may result in a civil penalty but not criminal liability.

DUTY OF good faith

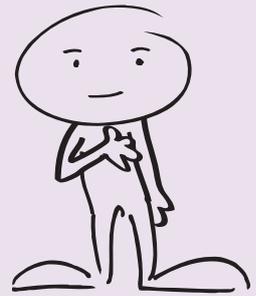
(CATSI Act: section 265-5)

Directors and other officers must exercise their powers and carry out their duties in good faith in the best interests of the corporation.

This means they must be honest and loyal in their dealings with each other and with the corporation.

For example, directors and other officers who act in good faith never make a decision for their own personal advantage. Their one and only concern is to act in the best interests of the corporation as a whole.

A breach of this duty may lead to a civil penalty or criminal liability, if the breach is reckless or intentionally dishonest.



DUTY TO NOT improperly use position or information

(CATSI Act: sections 265-10 and 265-15)

Directors, other officers and employees must not misuse their position, or use information obtained as a result of their position, to gain a benefit for themselves, someone else or to cause harm to the corporation.

For example, they must never pass on personal details about members to other people nor give out information that might allow someone competing for a corporation contract an unfair advantage.

A breach of this duty may lead to a civil penalty or criminal liability, if the breach is reckless or intentionally dishonest.

DUTY TO

disclose material personal interests

(CATSI Act: section 268-1)

Directors must tell each other their personal interests in matters relating to the affairs of the corporation.

This is so directors can avoid making decisions about the corporation which could personally benefit them or their family. 'Material personal interest' is better known as a 'conflict of interest'.

If not handled correctly, conflicts of interest may prevent directors from acting only in the best interests of the corporation.

It is very important to remember that *at all times* the corporation's interests come first.

To manage a conflict of interest, a director must declare 'the conflict' to the other directors. This disclosure can take the form of a 'standing notice' or a notice to a specific directors' meeting (where the issue causing the conflict of interest may be up for discussion).

Disclosing a conflict of interest does not automatically mean a director can't be part of a directors' meeting. It may just mean that for a certain part of the meeting (while the matter is discussed) that director steps out. This allows the other directors to talk freely and to make their decision in a neutral environment. Alternatively, the director may be invited to stay if they have 'the fully informed consent of the other directors to be present and vote' — see section 268-20(4) in the CATSI Act.

A breach of this duty may result in a criminal penalty.

There is nothing wrong with having a conflict of interest so long as you, as a director, disclose all of the information about the conflict of interest to the other directors and abide by their decision how it is managed.

DUTY TO

NOT trade while insolvent

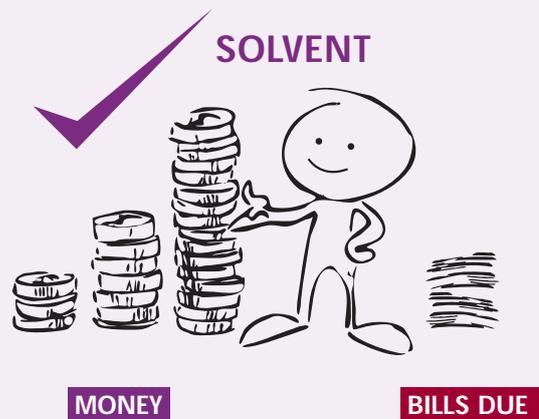
(CATSI Act: section 531-1)

Directors must not allow their corporation to trade when it does not have enough money to pay its bills when they are due.

To be 'insolvent' is to be unable to pay your debts when they fall due. If any one of the directors authorises a transaction, or makes a decision, which causes their corporation to become insolvent, they will have breached their duty to not trade while insolvent.

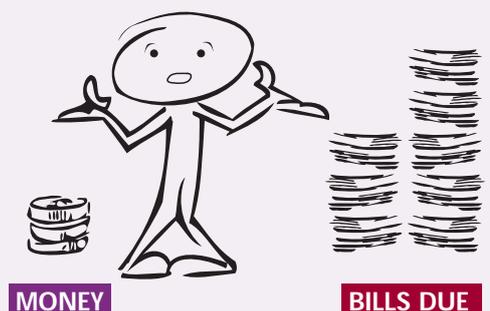
Directors should always know their corporation's financial position. Only then can they be sure that their corporation is not trading while insolvent.

A breach of this duty may result in a civil penalty and, if dishonest, a criminal penalty.



X insolvent

STOP TRADING IMMEDIATELY and call ORIC



Consequences of breach

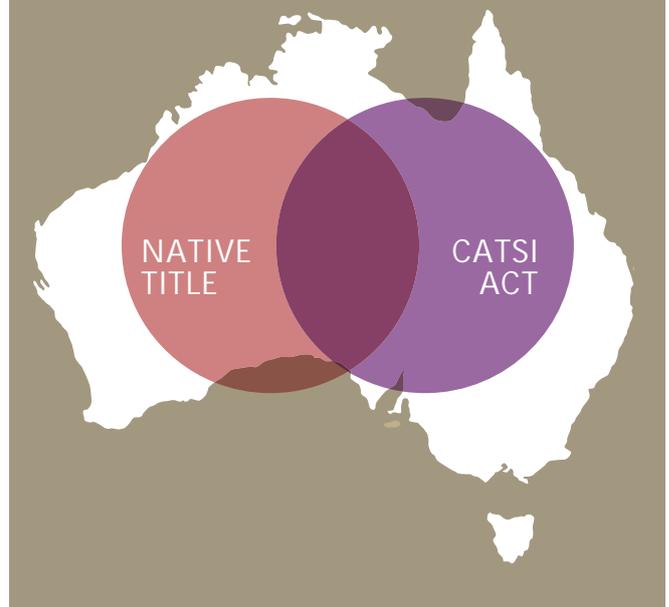
When a duty is breached the consequences will depend on the nature of the duty and the seriousness of the breach. For example:

- **Action by the corporation**—the corporation can take its own action to remove or dismiss the person involved in the breach. The corporation can also take its own civil action to restrain the person involved in the breach and recover compensation for any loss.
- **Civil penalty proceedings by the Registrar**—if a person breaches a civil penalty provision—for example, if a director fails to exercise reasonable care and diligence in carrying out their duties—the Registrar may apply to a court for a ‘declaration of contravention’. The court’s declaration provides conclusive evidence of the breach. If the contravention is serious a court may then order that person to pay a penalty of up to \$200,000 for each contravention to the Commonwealth. A court may also order payment of compensation to the corporation for the damage it has suffered as a result of the contravention and/or disqualify that person from managing a corporation.
- **Disqualification**—in addition to disqualification by a court for a breach of a civil penalty provision, in some circumstances a person is automatically disqualified from managing a corporation, including if they:
 - have been convicted of certain serious criminal offences (including fraud)
 - are bankrupt.The Registrar maintains a register of disqualified officers at oric.gov.au.
- **Criminal prosecution**—a breach of certain duties may attract criminal prosecution and heavy penalties. If a person is found guilty by a court of breaching a duty to the criminal standard and where a criminal penalty applies, the person may be fined and/or sentenced to imprisonment.

Modifications for native title obligations

Corporations that are formed to hold or manage native title are prescribed bodies corporate (PBCs). After their claim is registered they become known as registered native title bodies corporate (RNTBCs).

The CATSI Act makes sure that directors, officers and employees of these corporations are not put in a position where their duties under native title legislation conflict with their duties under the CATSI Act. For example, if you (as a director of an RNTBC) act in good faith and believe that what you are doing is necessary to comply with native title legislation you will not be in breach of duties that apply under the CATSI Act or their equivalent in common law.



NOTE: This fact sheet is not a substitute for legal advice. It is intended as a quick overview of the topic. For more detail see the CATSI Act or consult a lawyer.



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