Directors’ Duties

A Guide to the Pacific

Pacific Legal Network

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Contents

Foreword

“Transparency”, “governance” and “regionalism” are perhaps the three most commonly used buzz-words across the Pacific (excluding that old chestnut: “stakeholders”).

Despite the commonality of use, these three words are most definitely the three key drivers in our decision to put together this Guide. This is because the past decade has seen multiple jurisdictions across the Pacific update, amend and/or completely overhaul their companies law. These changes have increased the obligations imposed on company directors – without exception.

Foreign investors and donor bodies look for transparency in accounting practices and they crave good governance. That, coupled with the rapid growth of “multi-(Pacific)-nationals” (where one person often sits on subsidiary boards across multiple jurisdictions) leads us to the timely delivery of this Guide. All directors, whether executive or non-executive (and irrespective of whether they are directors of listed, unlisted, parent or subsidiary companies) have additional duties and obligations imposed on them by statute and by general law.

No two Pacific jurisdictions have the same statute or general law; that has remained the same even with English, Australian and New Zealand legislative models each influencing recent legislation that has now been adopted. We anticipate that this Guide will help all existing and future company directors in the Pacific understand their key areas of risk and exposure, as well as understanding how that risk and exposure can be mitigated via the adoption of certain codes of conduct or via company indemnities and/or appropriate insurance.

We understand that this Guide is the first of its kind. Pacific Legal Network brings together local law firms from across the Pacific to provide a coordinated legal and business advisory service. Like our network, this Guide is a homegrown product; it is being delivered in an eco-friendly electronic format in, and beyond, the Pacific to investors and “stakeholders” interested to know and understand the latest developments in a culturally diverse and geographically expansive and challenging part of the globe.

This guide is provided as part of Pacific Legal Network’s continuous efforts to encourage the positive development of law in the Pacific alongside the enhanced provision of legal services by “home grown” lawyers across the Pacific.

You will appreciate that this is a work in progress. More jurisdictions will be added in due course; it is not exhaustive and it is not legal advice – and in case you did not recognise it, that was our disclaimer!

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Overview

This Guide provides directors and senior executives operating across the Pacific with "need to know" information on their legal obligations. General counsel and inhouse lawyers charged with the difficult responsibility of providing legal guidance to their "client" in this area will also find this guide invaluable.

Understanding the duties in each of the Pacific markets you operate in is crucial given the emerging trend toward intra-Pacific business.

The themes of this Guide include:

- the key duties that directors owe to the company in core Pacific markets; and
- an overview of some of the procedural matters directors need to know.

While there are some commonalities between the laws of the Pacific markets in this Guide, there are also some nuances so it's important to familiarise yourself with these differences. Also, in an era of increased shareholder activism, it's important to point out that directors of listed companies need to pay particular attention to any additional responsibilities imposed on them by virtue of the law or stock exchange rules.

Importantly, as a director you owe duties to your company and when you breach your duties, your company may have a claim against you (or in some cases shareholders may have a claim by way of a derivative action). You may also be subject to civil and criminal consequences, enforceable by the relevant regulator in your country.

In this guide we talk a lot about your actions; however, it's important to note that inaction (referred to as an omission) can also lead to a breach of your duties, and typically you bear the onus of proof to show you have met your obligations.

Irrespective of whether you are an executive director or non-executive director (or their inhouse lawyer!), this guide is a must read for all directors operating in the Pacific Islands region!

"…while common law, equity and statutory duties owed by directors appear to overlap, their application and interpretation do differ as well as the consequences of their breach."

The basics

Sources of directors duties

Director's duties are generally derived from three main sources: the general law, statute as well as the company's constituent documents. Our guide focusses on those duties which exist under general law and statute in Pacific countries. Many of the duties which appear in statute have been derived from general law origins. While they appear to overlap, their interpretation and application do differ as well as the consequences of their breach. We've broken down some of the elements of the general law and statutory duties in this section.

The general law

The "general law" refers to those common law and equitable decisions of judges which have created principles over time.

It's important to note that while common law, equity and statutory duties owed by directors frequently overlap, their application and interpretation do differ, as well as the consequences of a breach of these respective duties.

For example, an overarching theme derived from equity is the notion of a "fiduciary relationship". Directors have a fiduciary relationship owed to the Company and must be loyal and act in good faith. As part of this fiduciary relationship they must:

- act bona fide and in the interests of the company; and
- avoid conflicts of interest.

This means that a director must not place themselves in a position where a personal interest might conflict with the interests of the company. Notably, a sub-set of duties have evolved from this main duty, including:

- the duty to not unduly profit from their position as a director;
- a duty to act for a proper purpose; and
- a duty to not fetter discretions.

As you will see in this Guide the duty of good faith has also been enshrined in statute, as have statutory obligations relating to the disclosure of personal interests. However, while the content of the duties appears the same, there are differences in relation to who the breach may be enforced against as well as the penalties which apply.

For example, usually statutory law relates to persons in a position of a "director", which is often defined in a formulaic method in the applicable legislation. The notion of a "fiduciary", on the other hand, is a person who is expected to act in the interest of another person. This means that under equitable principles at general law (as opposed to statute) the application of directors' duties may be broader and extend to senior management in a company.

Similarly, breaches under statute give rise to specific penalties which are set out in the law whereas breaches at general law are different and can include damages (at common law) and equitable remedies (including an account of profits, a rescission of a contract and equitable compensation).

In addition to those duties discussed above, the general law also prescribes other directors' duties including a duty of care, diligence and skill. This duty requires directors to exercise care, diligence and skill in exercising their powers. Directors are required to act with such care as is reasonably expected from that director (the objective component), having regard to their knowledge and experience (the subjective component).

This duty may therefore vary from company to company, depending on the size and nature of the business. It may also vary in application to executive directors and non-executive directors as the Court may seek to impose a higher standard if you are an executive director.

Similarly, duties may arise under contract where there is a contract between the director and the company.

In summary, it's important to understand that the duties set out in statute are not the only directors' duties which exist.

> “…it is important for directors to remember what is required of directors, and that there are nuances and outright differences between each country.”

Statutory duties: regional similarity and difference

The legal origins of each of the countries listed in this guide stem from English common law (as opposed to French civil law). The existence of the general law has influenced the development of statutory duties in each jurisdiction and their subsequent interpretation.

As such, there are many similarities between the statutory duties that exist in each jurisdiction. For example, the duty to exercise care, skill and diligence exists in all the jurisdictions discussed in this guide.

In contrast there are also differences, Fiji for example is the only jurisdiction that has enshrined a duty to, in good faith, promote the success of their company.

These similarities do not mean that directors should ignore the subtle differences between each jurisdiction due to their shared use of the general law. Rather, it is important for directors to remember what is required of directors, and that there are nuances between each of the countries.

Who owes duties?

Directors’ duties are primarily owed by people who assume the role of a director in a company. A Director may also include a person who is not validly appointed as a director, if that person acts in the position of a director, or the directors of the company are accustomed to act in accordance with that person’s instructions or wishes.

This means, whether someone is a director is a question of fact. It is only necessary to look at the way a person acts, what decisions they make, and how their decisions and actions affect members of the board of directors and the company.

Who owes duties under what are traditionally termed “directors’ duties” varies from country to country. As such, it is important to be aware that you may be liable not only as a director, but as a corporate officer.

It is therefore crucial that you are aware of the powers, duties, and liabilities that may be attached to your position.

Who do you owe duties to?

Generally, duties are owed to the corporation, meaning shareholders as a whole. This means directors must consider the affect the disposal of their duties will have on members of the company as a group, rather than individual parties.

However, in limited circumstances where a special relationship is found to exist between a director and a shareholder, the director may be directly liable. Courts have found that if there exists a special relationship a director may owe a fiduciary duty directly to a shareholder, individually. A director must be aware of the relationship they have with shareholders and any expectations that may be made due to that relationship.

Regional summary table

Lawyers like words, but in business time is money. So, we've brought you a simplified table setting out the legislative differences and similarities between all the countries. This is high-level stuff and for more details please refer to the relevant section of the guide.

Duty Under Statute	Australia	Fiji	PNG	Vanuatu	Solomon Islands	New Zealand	Kiribati	Cook Islands	Timor-Leste	Tonga
Duty to exercise care, skill and diligence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Duty to avoid conflicts of interest	✓	✓	✓	✓	✓		✓	✓	✓	
Duty to act in good faith and for a proper purpose	✓		✓	✓	✓	✓	✓	✓	✓	✓
Duty to not misuse information/position	✓		✓	✓		✓		✓	✓	✓
Duty to disclose interest in proposed transaction	✓	✓	✓			✓	✓	✓		✓
Duty to act in accordance with the Articles of Association/Company Rules/Constitution		✓	✓	✓	✓	✓	✓	✓	✓	✓
Duty to, in good faith, promote the success of the company		✓							✓	
Duty to exercise independent judgment		✓					✓	✓		
Duty to not accept third party benefits		✓					✓	✓	✓	
Duty to prevent insolvent trading	✓		✓				✓	✓	✓	✓

“The Australian success story is partly due to its resource rich geography and well-established service industry.”

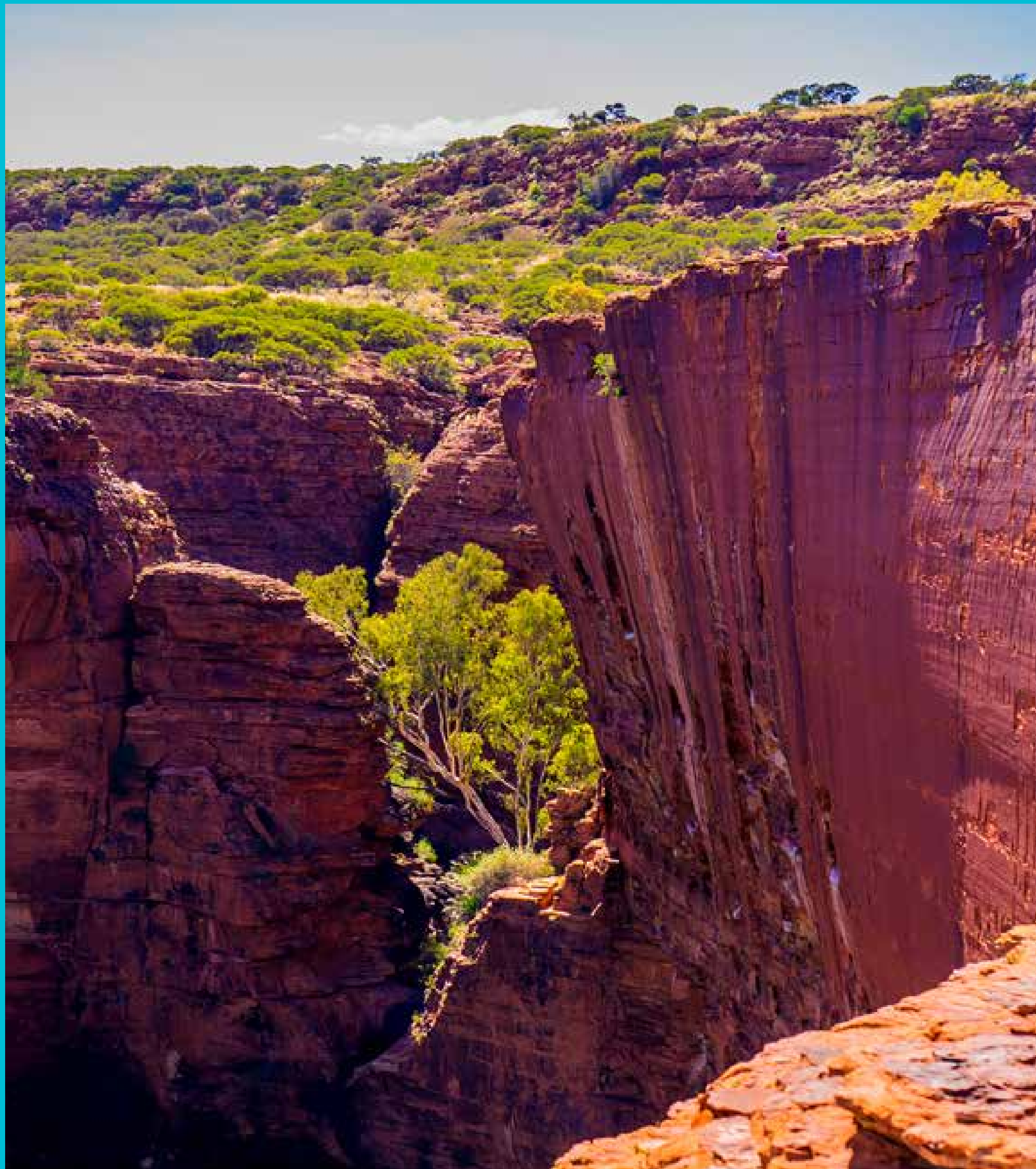
Australia

Overview

Australia continues to break economic records; it is currently experiencing the longest period of undisturbed economic growth in the developed world. The Australian success story is partly due to its resource rich geography and well-established service industry. Australia also greatly benefits from having a well-regulated business and investment framework, making it an attractive market to set up shop.

Companies in Australia are primarily regulated under the *Corporations Act 2001.* The *Corporations Act 2001* sets out the primary duties of directors and establishes a civil authority, the Australian Securities and Investment Commission (**ASIC**), to fulfil administrative as well as regulatory and compliance functions.

Directors and officers are also required to comply with duties not found in the *Corporations Act 2001.* Corporate activity is regulated at both a state and federal level in many areas, including environmental and consumer protection. Australia is also home to one of the world's leading securities exchanges, the Australian Securities Exchange (**ASX**), which imposes additional duties that must be met by directors of these publicly listed companies. Directors must also adhere to those duties found in common law.



Am I a director?

In Australia proprietary (i.e. private) companies must have at least one resident director, while publicly listed companies must have at least three directors, with at least two of them being residents of Australia. Directors must be at least 18 years of age, and not be an undischarged bankrupt or convicted of a serious offence.

The *Corporations Act 2001* defines a director as a person who is appointed to the position of director or the position of an alternate director and is acting in that capacity, regardless of the name given to their position. Importantly, the *Corporations Act 2001* extends this definition to a person who is not validly appointed as a director, if that person acts in the position of a director, or the directors of the company are accustomed to act in accordance with that person's instructions or wishes. However, Officers of a company are also subject to certain duties as set out in the *Corporations Act 2001.*

Am I an officer?

An officer of a company is any of the following:

- a director;
- a secretary;
- a person who makes or participates in decision making that affect a substantial part of the business;
- a person who has the capacity to affect significantly the corporation's financial standing;
- a person with whose instructions the directors are accustomed to act;
- a receiver;
- an administrator;
- a liquidator; or
- a trustee.

Officers owe much of the same duties to companies as directors do (although there are certain duties which are imposed on directors only). It is therefore crucial that you are aware of the powers, duties, and liabilities that may attach to your position. These powers may stem both the *Corporations Act 2001* and the company's constitution.

In the shadows

You do not have to actually hold an official office nor bear any title within the company to attract the role of a 'director.' For instance, where you make decisions which could significantly affect the financial standing of the company, or where other directors customarily follow your directions you too may be deemed to be a director; or rather, a 'shadow director.'

It is therefore important that you carefully consider your actions and decisions, as you could be deemed to be a director in the eyes of the law.

Can I delegate my duties?

Generally, directors have the power to delegate any and all powers to a committee of members, a director, an employee of the company or any other person unless the company constitution restricts this power. The delegate is required to exercise the powers delegated in accordance with any directions of the directors. Any exercise by the delegate of the power delegated to it is as effective as if the director had exercised it.

A director who has delegated his powers will usually be responsible for the exercise of the power by a delegate. However, a director will not be responsible where the director reasonably believed in good faith and after proper enquiry that the delegate was reliable and competent, and reasonably believed the delegate was acting in conformity with the duties imposed on directors.

It is common for a board of directors to delegate some functions to individuals and committees. In fact, directors may even be required to delegate some functions; for example, publicly listed companies must delegate financial auditing to a committee under the ASX rules. However, this does not discharge the entire obligation of directors. Directors have a duty to carefully read, understand and focus on the content of financial reports of the company, consider whether financial statements are consistent with their knowledge of the company's financial position, formulate their own opinion and apply that opinion to the task of reviewing financial statements, be aware of the relevant accounting principles, and make further inquiries if matters revealed in financial statements call for further inquiries.

It is important that directors continue to monitor delegates, to ensure that the delegate continues to exercise its powers in a reliable and competent manner.

Can I rely on the information or advice provided by others?

Directors can rely on information or advice provided by an employee, a professional adviser, another director or committee of directors, so long as the director relied on such information in good faith and after making an independent assessment of the information or advice, having regard to the director's knowledge of the company and the complexity of the structure and operations of the company.

Reliance on the information must have been reasonable – there is a presumption under the *Corporations Act 2001* that the reliance was reasonable. For instance, unreasonable reliance would arise where the director knew or should have known a fact that would contradict reliance (e.g. if the director knew that the professional advisor was providing advice in relation to matters outside that advisers' professional competence).

Directors relying on the advice of a professional or expert should still ensure that they take care and scrutinise any advice received.

What are the key duties I need to know?

Common law duties

Directors must comply with duties to the company which have been imposed by common law, which is essentially case-made law. This general law is expressly preserved by the *Corporations Act 2001*, which provides that the statutory duties are in addition to, and not in derogation of, any rule of law relating to the duty or liability of directors, and does not prevent the commencement of civil proceedings for a breach of duty. Under common law doctrines, directors have a fiduciary relationship to a company and, as a result of this fiduciary relationship, directors owe certain duties to their company for the advancement of that company as a whole.

Statutory duties in the *Corporations Act 2001* prevail over any common law duties, and, for the most part, common law has followed the *Corporations Act 2001.* However, there are some key distinctions that directors must be aware of. Although these differences may seem innocuous, it's important to understand the nuances between statutory and common law duties, as they are able to be invoked either in addition to or instead of the statutory duty, and different remedies will apply.

These common law duties include:

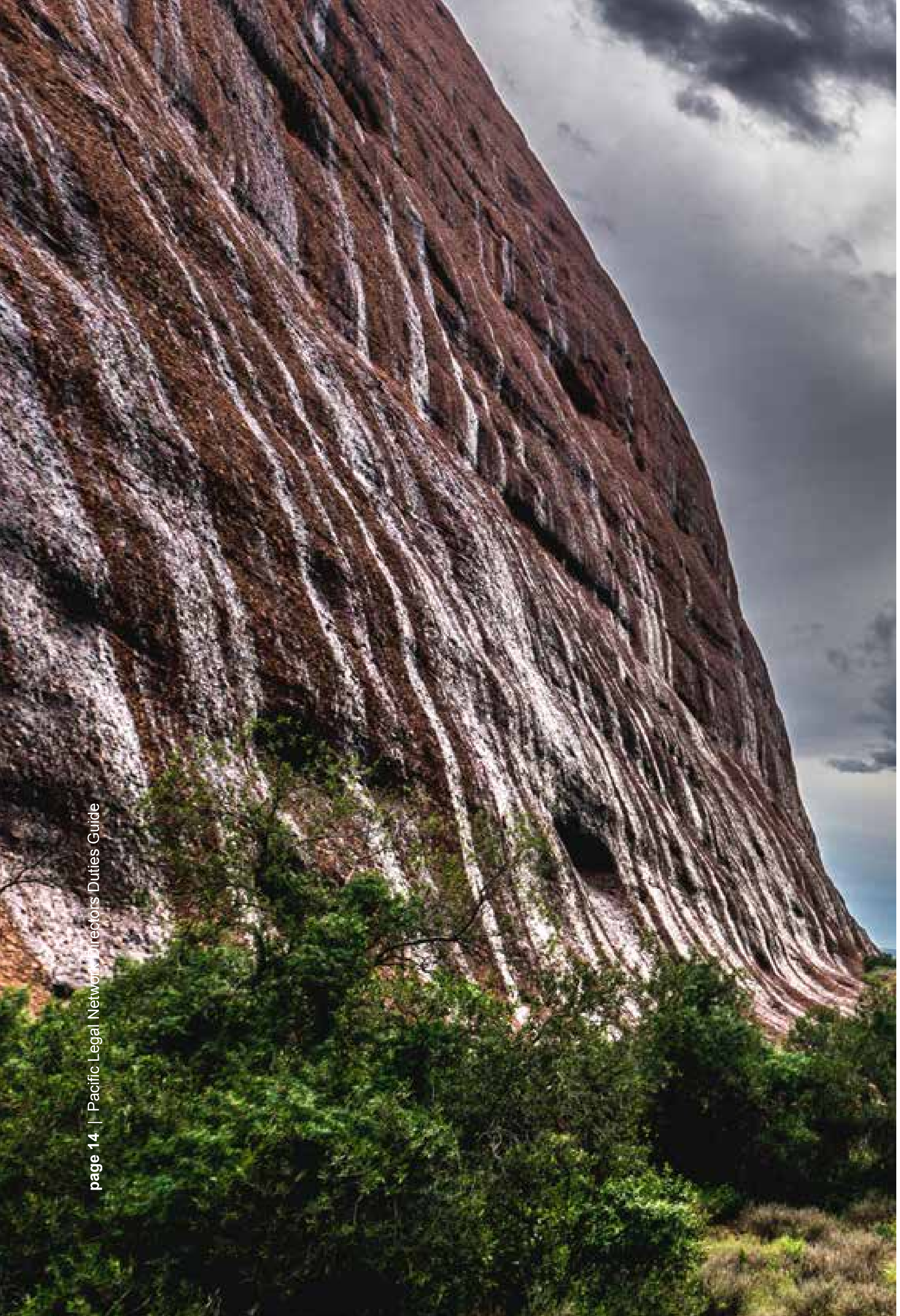
- A duty to act in good faith and for the benefit of the company.
- A duty to avoid situations where there is a conflict between the interest of the director and the interest of the company.
- A duty to exercise powers conferred on a director as a result of his or her office for proper purposes.

Statutory duties

The *Corporations Act 2001* imposes the following duties which directors owe to their company:

- A duty to exercise your powers and duties with care and diligence.
- A duty to act in good faith in the best interests of the corporation.
- A duty to exercise power for a proper purpose.
- A duty to disclose a material personal interest in a matter relating to the company.
- A duty not to improperly use your position or information obtained as a result of your position to gain an advantage for yourself or someone else, or to cause detriment to the corporation.
- A duty to not trade while insolvent.

> "…directors must take reasonable steps to place themselves in a position to monitor the management of the company."



Duty to exercise power with care and diligence

Directors and officers are required to exercise their powers and discharge their duties with a degree of care and diligence that a reasonable person would if they were a director of a company in similar circumstances and occupied a comparable office to the director in question.

Importantly, a director may breach this duty without the company suffering any loss. Where there is no actual damage suffered by the company, failure to exercise reasonable care and diligence will not be shown unless it was reasonably foreseeable at the time that the interests of the company might be harmed by the conduct of the director. The question as to whether there has been a breach of this duty is answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct concerned.

In practice, this means that directors must take reasonable steps to place themselves in a position to monitor the management of the company. This involves being familiar with the fundamentals of the company's business, keeping informed about the activities of the company, regularly attending board meetings and maintaining familiarity with the financial status of the corporation.

Duty to act in good faith and for a proper purpose

There are two components to this duty. A director or other officer of a corporation must exercise their powers and discharge their duties:

- in good faith in the best interests of the corporation as a whole; and
- for a proper purpose.

This two-limb test means that there is a possibility a director may contravene their duties where only one limb is contravened – a director who acted in good faith but for an improper purpose may be in breach of his or her duty to the company.

Limb 1: Acting in good faith

This duty has both an objective and subjective element; the duty to act in good faith requires the director to honestly believe that the exercise of their decision-making power was for the benefit of the company shareholders. In practice, this duty requires a director to: exercise his or her powers in the interests of the company, not misuse or abuse that power, avoid conflicts between his or her personal interests and those of the company, not take advantage of his or her position to make a secret profit, and not misappropriate company assets for him or herself.

When determining whether a director acted in good faith, a court will examine whether the director thought their actions were in the best interests of the company. However, the director's claim that he or she acted honestly is assessed by the court objectively considering surrounding circumstances. Courts have also found directors to be in breach of this duty if it objectively considers that a director did not act in a company's best interests, even if the director honestly believed they had acted for the benefit of the company.

Limb 2: What is a proper purpose?

Directors must exercise their powers for the purpose for which they were conferred and not for any improper purpose. Whether power has been exercised for a proper purpose is an objective test which involves two questions:

1) *For what purpose may the power be exercised?*

   The powers of directors should be exercised in a way that benefits the corporation as a whole, and as conferred under the company's constitution.

2) *For what purpose has the power been actually exercised?*

   Where there are mixed purposes for exercising the power, the proper purpose must be the substantial purpose, i.e. if the power would not have been exercised but for an improper purpose, then the power will have been exercised for an improper purpose.

An example helps illustrate this point. A board of directors exercises its power to allot more shares. They do so to create a new shareholder majority in order to defeat the voting power of the existing shareholders. Because manipulating current shareholders' voting rights is the primary purpose for the exercise of this power, it is an improper use of power. Therefore, the board has not exercised its power for a proper purpose.

Avoiding conflict between duty to the company and personal interest

Directors have a duty to avoid a conflict of interest between his or her personal interests and the company's interests. If a director has a material personal interest in a matter that relates to the affairs of the company, he or she must disclose the nature and extent of this interest to the board of directors. A director with a conflict of interest may not be able to vote on the matter or be present at a board meeting where it is discussed. There are different rules for directors of private and public companies.

Authorisation of conflict

The restriction on the interested director's voting rights may vary depending on whether he or she is a director of a public or a proprietary company. A director of a proprietary company may vote on the matter provided they have disclosed their interest to the board. In a public company, the board of directors must pass an ordinary resolution allowing an interested director to be present and vote.

A company's constitution may also expressly provide a procedure for notification and authorisation of a director's conflict of interest.

Improper use of position or information

A director, officer, secretary or employee of a corporation must not improperly use their position, nor can a person who obtains information because they are, or have been, a director or other officer or employee of a corporation improperly use the information, to:

- gain an advantage for themselves or someone else; or
- cause detriment to the corporation.

Whether a director has improperly used their position or information obtained in their position is an objective test, i.e. whether a reasonable person with knowledge of the duties and powers of the position and the circumstances would consider the director's conduct a breach of their duty. A director may not improperly use their position or information obtained through that position even if they have not acted fraudulently or to detriment to the company. A director may breach their duty merely by obtaining a profit that they would not have obtained but for their position in the company, even if the transaction benefitted the company.

Duty not to trade insolvent

A company is solvent if, and only if, it is able to pay all of its debts as and when they become due and payable. Directors have a duty to prevent the company from trading while insolvent. Liability under this duty is limited to directors only; it does not extend to other officers or employees of the company. This duty demonstrates the importance of directors to be aware of the financial status of their company – directors must avoid reckless or irresponsible decisions which may result in an increase in the company's indebtedness.

A director will be in breach of this duty if:

- they are director at the time the company incurs a debt;
- the company is insolvent at that time, or becomes insolvent by incurring that debt;
- at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent; and
- the director fails to prevent the company from incurring the debt, and:
- is aware at that time that there are grounds for suspecting that the company is or would become insolvent; and
- a reasonable person in a similar situation in the company's circumstances would be so aware.

Whether a director has breached this duty depends on the circumstances of the company at the time the debt is incurred. The *Corporations Act 2001* provides some guidance and examples of when a debt is actually incurred in certain transactions.

What are the liabilities should a director fail to comply with their obligations?

Potential civil and or criminal liabilities

Directors who breach their duties may be subject to either civil or criminal penalties, depending on the nature of the breach.

A corporation may bring a civil action against one or all of its directors to recoup any losses (including remuneration) caused by the abrogation of their duties. ASIC may also make a declaration of contravention for breaches of civil penalty provisions against any director. The consequences of a declaration of a contravention of a civil penalty provision means that ASIC can seek a pecuniary penalty order of up to $1,050,000 for an individual, $10,500,000 for a body corporate (these amounts have been increased since our last version of this Guide due to the commencement of the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019). A court, on application by ASIC, may also disqualify directors from managing a corporation, or order a director to pay compensation for damage suffered by the corporation.

ASIC may also bring proceedings for criminal liability against directors for a breach of their duties; however, this tends to only occur in more serious cases where a director or directors have shirked a multitude of their duties causing significant loss. For example, a director or officer commits a criminal offence where they are reckless or intentionally dishonest, and fail to exercise their powers and discharge their duties in good faith and in the best interests of the corporation, or for a proper purpose.

There are also certain remedies open to shareholders of a company where:

- the conduct of the company's affairs; or
- an actual or proposed act or omission by or on behalf of a company; or
- a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

- contrary to the interests of the shareholders as a whole; or
- oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or any other capacity.

Individual shareholders can also bring an action on behalf of a company for a breach of duty by an officer or director where the company is unwilling or unable to do so.

How can I be protected?

Directors and officers often have in place indemnities and insurance which work together to try to mitigate risk and protect from liabilities that may arise as a consequence of their role within the company.

The company's annual report must include details of:

- any indemnity that is given to a current or former officer against a liability which is allowed under the *Corporations Act 2001* (these exceptions are discussed in more detail below), or any relevant agreement under which an officer may be given an indemnity of that kind; and
- any premium that is paid, or agreed to be paid, for insurance against a current or former officer's liability for legal costs.

> "It is common for directors to enter into a deed of indemnity where the directors are indemnified to the full extent permitted by law against all liabilities incurred by the officer as an officer of the company."

Directors' indemnity

It is common for directors to enter into a deed of indemnity where the directors are indemnified to the full extent permitted by law against all liabilities incurred by the officer as an officer of the company.

However, the ***Corporations Act 2001*** imposes certain limits to the indemnities that may be given. For example:

- A company is not permitted to exempt a director (whether directly or through an interposed entity) from liability to the company incurred as an officer of the company.
- A company is also prohibited from indemnifying an officer for liability, other than for legal costs, in certain circumstances; for instance, where a liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith.
- A company must not indemnify a person against legal costs incurred in defending an action for a liability incurred as an officer if the costs are incurred in defending or resisting criminal proceedings in which the person is found guilty.

Directors' insurance

It is also common for directors and officers to require that insurance be put in place before accepting an appointment (known as "D&O insurance"). A company may pay the premium for director's liability insurance which covers liabilities other than those arising from wilful breaches and costs and expenses for defending civil or criminal actions, regardless of the outcome. However, a company is not permitted to pay, either directly or indirectly, for directors' liability insurance which covers liabilities arising out of a wilful breach of duty against the company.

Are there any defences for a breach of duty?

Defence against a breach of duty to exercise care, skill and diligence – the business judgment rule

The business judgment rule can offer some protection from liability for breaches of the duty of care and diligence in relation to honest, informed and rational business judgments. This defence is only available for a breach of the duty to exercise care, skill and diligence. The defence is designed to protect a director who made a decision in relation to the business operations of the company, in good faith and in the belief that it was in the best interest of the company. This defence stems from the reluctance of Australian courts to question the correctness of a bona fide decision of management.

In order to rely on this defence, the director or officer:

- must have made an active decision where the director used his/her judgment;
- must have made the business judgment in good faith and for a proper purpose;
- must not have had a material personal interest in the subject matter of the judgment;
- must have informed themselves to the extent the director reasonably believes to be appropriate make the decision. The focus of the law is not the actual outcome but rather whether the director was well prepared to make the decision; and
- must have had a rational belief that the business judgment was in the interest of the company.

Defences for a breach of a director's duty to prevent insolvent trading

Directors have a statutory defence to their duty to prevent insolvent trading where the director:

- had reasonable grounds to expect and did expect that the company was solvent at the time and that the company would remain solvent even it did incur debts;
- had reasonable grounds to believe and did believe that at the time when the debt was incurred, another person was fulfilling the responsibility for providing the director adequate information about whether the company was solvent, and based on such information, the director expected that the company was solvent;
- did not participate in the management of the company at the time the debt was incurred because the director was ill or had some other good reason; or
- took all reasonable steps to prevent the company from incurring the debt. To determine this, the Court may consider action taken to appoint an administrator, when this action was taken and the result of such action.

> "The defence is designed to protect a director who made a decision in relation to the business operations of the company, in good faith and in the belief that it was in the best interest of the company."

What other procedural matters do I need to understand as a director?

In addition to the key directors' duties, there are a myriad of procedural obligations which you need to know as part of your role as a director. Failure to comply with these responsibilities may result in liability.

What we have listed below are some key requirements, but this list is not exhaustive and you should always seek advice when in doubt.

Appointment of directors

Generally, and subject to the constitution of the company, the shareholders of a company may appoint a person as director by resolution passed in a general meeting. The directors may also appoint a person as director, however the company must confirm this appointment by resolution within 2 months after the appointment is made. There are special rules for the appointment of directors for single director / single shareholder proprietary companies, as well as the appointment of directors of public companies.

The directors of a company may also appoint managing directors and alternate directors, subject to the constitution of the company.

It is important to note that most of the provisions in the *Corporations Act 2001* relating to the appointment of directors are "replaceable rules". This means that the rules relating to the appointment of directors of an Australian company may be either governed by the provisions in the *Corporations Act 2001*, replaced by the constitution of the company, or a combination of the two.

Reporting to ASIC

Directors have a responsibility to lodge annual statements with ASIC and update records to reflect any changes to their company details as they occur, such as appointment or cessation of officeholder or change in the company's registered office and share issue or cancellation, which are to be lodged within 28 days of the change. ASIC also requires certain companies such as public companies and disclosing entities to prepare and lodge financial reports with their office.

Directors are required to pass solvency resolutions within two months of the review date each year and in the case of a negative resolution or where the directors fail to pass such a resolution, the company must lodge a statement in relation to the company's solvency with ASIC.

Meetings

Unless the company constitution provides otherwise, any director may call a meeting of the directors by providing reasonable notice to each director, individually. Two directors must be present at all times during the meeting for a quorum, however the company's constitution may provide for other rules regarding quorum.

A meeting may be held via any technology so long as all the directors consent to the use of the technology.

Again, the provisions in the *Corporations Act 2001* regarding meetings are replaceable rules, and so are subject to the constitution of the company.

Remuneration

Although the replaceable rules allow for the shareholders to set the remuneration of directors at a general meeting, the company constitution may provide a range of other methods for determining a director's remuneration. The remuneration arrangements of directors of listed companies is required to be disclosed under both the *Corporations Act 2001* and the ASX Listing Rules.

What other obligations as a director do I need to understand?

In addition to the key duties and responsibilities under statute and common law, there are a number of other obligations which directors must comply with under various environmental, work health and safety, tax as well as competition and consumer legislation. Depending on the industry you work in, some of these requirements may be particularly important to understand as part of your day-to-day functions.

Duties under environmental law

The Australian federal, state and territory governments, as well as local councils, all have different powers and responsibilities for the regulation and protection of the environment. Directors, and more generally the companies' they represent, are liable to both the federal and state governments for breaches of environmental law.

Under New South Wales law, for instance, directors will be jointly and severally liable for breaches of the company's environmental obligations attracting special executive liability, unless they can demonstrate that they were not in a position of influence in the organisation, or used all due diligence to prevent the contravention by the company.

Depending on the business conducted by a corporation, directors may be required to be aware of unique environmental protection procedures, approvals and regulations such as those applying uniquely to forestry, water, pesticide usage, or irradiated materials, among other things.

Each state and territory also has legislation regarding the role of councils in environmental approvals. Local councils may preclude certain developments and pollutants due to environmental impact and planning regulations. Directors must be aware of local council rules and seek approvals where necessary to avoid penalties.

Work health and safety duties

The *Work Health and Safety Act 2011* is the main piece of legislation governing how company officers (including directors) and workers must interact and behave in order to create a safe working environment. Directors have a duty to exercise due diligence to ensure the business complies with all obligations under the *Work Health and Safety Act 2011*. Directors are subject to more general duties if they are also classed as workers, and therefore may hold liability as an employee at the same time as an officer of the company.

Under the *Work Health and Safety Act 2011*, a person conducting a business has a duty of care and must ensure, within reason, the health and safety of workers while engaged in work. A duty of care will include the provision and maintenance of the work environment, equipment, and the provision of services and monitoring facilities to prevent illness and injury.

The *Work Health and Safety Act 2011* also creates specific responsibilities for businesses and their executives and employees in different workspaces and industries. It is important to take note of any specific duties you may have due to the nature of work you and your workers engage in.

> "The Australian federal, state and territory governments, as well as local councils, all have different powers and responsibilities for the regulation and protection of the environment."

Duties under competition and consumer law

The *Competition and Consumer Act 2010* also imposes certain liabilities on company officers, members and other persons. Directors should be aware of conduct that may constitute cartel conduct, anti-competitive disclosures including of pricing, anti-competitive contracts, boycotts, misuse of market power, resale price maintenance, or breaches of carbon tax pricing reduction obligations.

As an officer you cannot be indemnified for any civil liability, or legal cost incurred in defending or resisting proceedings in which the person is found to have such a liability. As such, you will be personally liable for any conduct as listed above unless you can prove that you have acted honestly and reasonably under the circumstances.

Tax duties

Directors have a duty to ensure that the company meets its taxation obligations. In Australia, directors may be personally liable for certain company debts, including a failure of the company to pay PAYG withholding or the superannuation guarantee charge. The *Tax Administration Act 1953* gives the Australian Tax Office (**ATO**) the power to issue penalties against directors of non-complying companies equal to the unpaid amount of the company's liability.

You must be aware of all taxation and superannuation obligations of the company you are managing, and make all reasonable attempts to minimise liabilities.

Duties and responsibilities of directors of listed companies

Being a director of a company in Australia comes with additional duties and responsibilities. While there are a few securities exchanges in Australia, we have focused on ASX Listing Rules, as Australia's dominant stock exchange.

The *Corporations Act 2001* includes various obligations which are levied at directors of listed companies, and there are different procedural matters which these directors must be aware of. For instance, directors of listed public companies are required to notify their relevant market operator of interests it has such as relevant interests in securities of the company; there are additional items that must be included in the AGM of a listed company; and ASIC is given the power to comment on proposed resolutions of listed companies (to name a few).

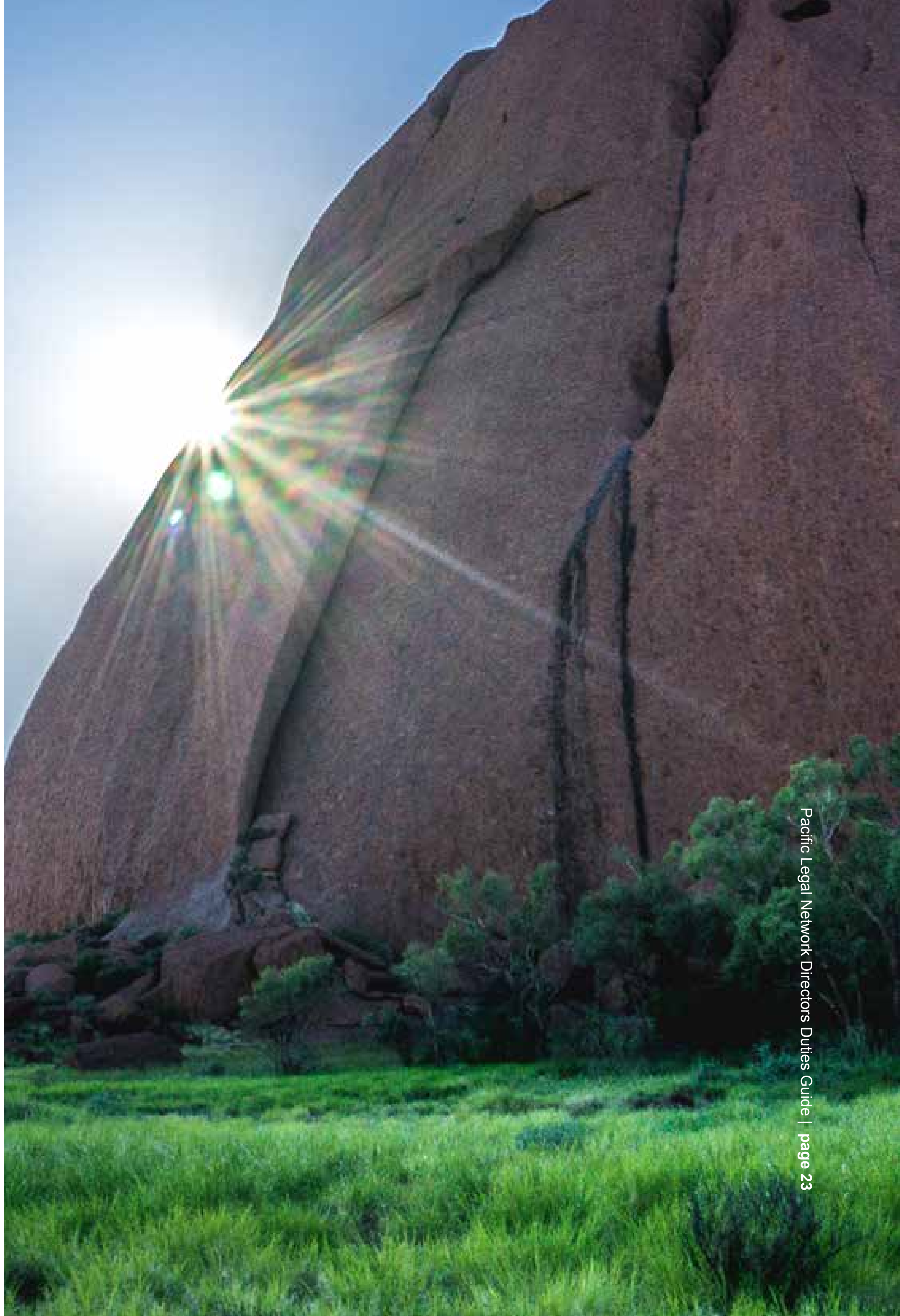
It is an offence under the *Corporations Act 2001* to offer securities where there are any misleading or deceptive statements or omissions in the disclosure document. Any person who suffers loss or damage because of an offer of securities which contains a misleading or deceptive statement can recover the amount of the loss from each director of the body making the offer.

Directors are legally responsible for ensuring the good governance of the company and are expected to adopt proper corporate governance practices. ASX Corporate Governance Council Principles and Recommendations set out recommended practices which, while not mandatory, require the company to give an explanation on why it did not adopt the recommendations.

The ASX Listing Rules also set out periodic and continuous disclosure requirements that all officers of the listed company need to satisfy. These disclosures include what interests they hold in the listed company and any price sensitive information. Failure to comply with these disclosure requirements is an offence under the *Corporations Act 2001* for both the entity and the company officers involved in such contraventions. Directors must also ensure that they observe the insider trading prohibitions set out in the *Corporations Act 2001.*

The ASX Listing Rules sit beside ASX Corporate Governance Principles and Recommendations which reiterate some of the duties of directors such as acting in the best interest of the company at all times, exercising care and diligence, and avoiding conflict of interest.

> "Being a director of a company in Australia comes with additional duties and responsibilities."



“Cook Islanders are of Polynesian descent with a direct connection to the seafarers who first settled the islands.”

Cook Islands

Overview

The Cook Islands, known for its pristine beaches and crystal-clear lagoons, comprises 15 island paradises situated in the South Pacific Ocean. Interestingly, no building can be taller than a coconut tree, the maximum speed limit is 50km per hour, and there are no fast-food chains – now that does sound like paradise!

Cook Islanders are of Polynesian descent with a direct connection to the seafarers who first settled the islands. Historians say that the Maori migrations to Aotearoa (New Zealand) began from Cook Islands largest island, Rarotonga, as early as the 5th century CE.

As a self-governing parliamentary democracy in free association with New Zealand, the Cook Islands' legal system closely reflects other English Common Law jurisdictions. Although it has now, in some cases, followed its own path, the regulation of companies (and their directors) remains like that found in New Zealand, England and elsewhere in the Pacific.

Cook Island companies are regulated by the relatively new *Companies Act 2017* (based on New Zealand's *Companies Act 1993*), which came into force in 2019 and overhauled the primary duties for directors. Hence, directors need to be mindful of some changes. Directors must also be aware of their obligations at common law. The duties of the directors can be found in Part 7 of the Act.

ROKOIKA LAW P.C.

Am I a director?

A company must have at least one director. The *Companies Act 2017*, contains a broad definition of a director, which includes people who are acting in a director's role, even if not formally appointed, such as shadow directors, a controller of director powers, or a delegate of director's powers.

Directors are required to be over 18 years of age. Undischarged bankrupts and persons convicted of certain crimes are not permitted to be directors. At least one director must meet the residency requirements. To satisfy the residency requirements, that director must live in:

- Cook Islands; or
- New Zealand, if that director is also a registered director of a local company registered in New Zealand.

In the shadows

Directors' duties can apply to persons who are not formally appointed as directors. If you direct the company's business, act in the position of director, or if the board is required or accustomed to following your direction you could be considered a director under the *Companies Act 2017.*

Can I delegate my duties?

Subject to a company's constitution, the board may delegate powers under the *Companies Act 2017* to a committee of directors, another director, an employee of the company, or any other person. The following powers may not be delegated:

- approval for the issue of shares;
- determination of the consideration for the issue of shares;
- authorisation of distributions;
- authorisation of financial assistance for the purchase of shares in the company; and
- appointment of a liquidator.

A director who delegates his or her power is responsible for exercising the power by the delegate. A director will not be liable for the actions of the delegatee where the director believed on reasonable grounds that the delegate would exercise the power in conformity with the duties imposed by the *Companies Act 2017* and the company's constitution and where the director monitored the delegate's exercises of power. It is therefore vital that directors monitor delegates continuously.

Can I rely on the information or advice provided by others?

Directors can rely on professional advisers whom the directors reasonably believe are acting in their area of expertise. The advice must be considered in good faith; the directors must also believe that the third party is competent to give the advice, and the directors must make reasonable inquiries of the advice where the circumstances render this necessary.

What are the key duties I need to know?

Statutory duties

The *Companies Act 2017* sets out the following duties:

- A duty to act in good faith and in the best interests of the Company.
- A duty to comply and ensure that the Company complies with the Act and the constitution of the Company.
- A duty to not agree to, allow nor cause the business of the Company to be carried on in a manner likely to create a substantial risk or serious loss to the Company's creditors.
- A duty to not agree to the Company incurring an obligation unless the director believes at that time on reasonable grounds that the Company will be able to perform the obligation when it is required to do so.
- A duty to not exercise any power as a director if he or she is materially interested, whether directly or indirectly, in the exercise of the power.
- A duty to not disclose, use or act upon company information.
- A duty to act with the care, diligence, and skill that a reasonable director would exercise in the same circumstances.

> "The expectations of a director of a small, closely held company are likely to differ from those of a director of a large publicly listed company."

What degree of care, skill and diligence must I exercise?

A director must exercise the care, diligence, and skill that a reasonable director would exercise in the circumstances, taking into account but without limitation:

- the nature of the Company;
- the nature of the decision; and
- the position of the director and the nature of the responsibilities undertaken by him or her.

The test is objective, however, there are subjective considerations. The position of the director is compared with directors in similar circumstances. The expectations of a director of a small, closely held company are likely to differ from those of a director of a large publicly listed company.

It is important to note that you can breach a duty by 'omission', through failing to do something or 'letting' something happen. You must therefore ensure that you have a reasonable knowledge of what is happening within the Company at all times.

What is good faith and in a manner the director believes to be in the best interests of the Company?

The test is subjective (what the director honestly believed to be right), however, the courts generally apply an objective lens in considering a director's actions – that is, how a reasonable director would be expected to act in the circumstances.

Directors must consider the Company as a whole – they must not ignore the interests of minority shareholders and must not act in the interests of only one class of shareholders in the Company.

Subject to the terms of a Company's constitution, a director interested in a transaction may vote on a matter relating to that transaction.

Transactions involving self-interest

Under the *Companies Act 2017*, a director must not exercise any power as a director if he or she is materially interested, whether directly or indirectly, in exercising the power. The transaction may be able proceed provided that the director discloses his or her interest, and either the constitution of the Company expressly permits the exercise of the power or the exercise of the power is unanimously approved by company shareholders.

Failure to disclose an interest may lead to a transaction being set aside.

Misuse of company information

The *Companies Act 2017* prevents a director from disclosing, using or acting upon company information acquired as a director unless approved by the Company's constitution or unanimously approved by company shareholders. Directors may also be able to disclose, use or act upon company information where it is in the interests of the Company to do so or where they are required to do so by law.

Insolvent Trading

Directors must not allow a company to trade whilst insolvent. A company is insolvent if it cannot pay its debts as and when they become due.

The *Companies Act 2017* contains two primary duties which prevent directors from insolvent trading, namely:

- (**reckless trading**) a duty that directors must not agree, cause or allow the Company to be carried on in a manner which is likely to create a substantial risk of serious loss to the Company's creditors; and
- (**obligations**) a duty that prevents directors from incurring obligations unless they believe on reasonable grounds that the Company will be able to fulfil them.

The courts in other common law jurisdictions have interpreted the duty to avoid reckless trading as requiring directors to undertake a 'sober assessment' of the Company when it enters troubled waters. New Zealand case law has indicated that the duty to avoid reckless trading is aimed at the general conduct of directors when in financial trouble, while the duty or obligations is aimed at particular transactions and a consideration of whether the Company was, reasonably, in a position to meet those obligations, when it entered into that transaction. New Zealand case law is highly persuasive in the Cook Islands; however, the interpretation of these provisions may evolve in future proceedings as Cook Islands courts are not bound by New Zealand precedent.

What are the liabilities should a director fail to comply with their obligations?

Civil liability

The *Companies Act 2017* has a civil and criminal regime for breaches of 'directors' duties. Depending on the severity of the breach of the *Companies Act 2017*, a monetary penalty may be ordered and, generally speaking, the more severe the breach, the higher the penalty amount will be.

Shareholders can bring claims against directors for breaches of duty either themselves, or, where the duty was owed to the Company, a claim can be brought in the name of the Company by shareholders or other directors via a derivative action. A Court order is needed for a derivative action.

The Court will consider the likelihood of success, costs, actions already on foot, and the interests of the Company. The critical question is whether the prudent business person would believe the proceedings will succeed. Derivative actions have achieved the most success in closely held companies.

The Court has wide powers to order relief, including ordering the director to repay the money with interest and compensation payments.

The Court may also disqualify a director (for up to five years) if the director is found liable for breaching their duties.

> "The Court has wide powers to order relief, including ordering the director to repay the money with interest and compensation payments."

Criminal liability

Under the *Companies Act 2017*, directors can be criminally liable for serious breaches of the duty to act in good faith where the director acts in bad faith, believing the conduct is not in the best interests of the Company, and knowing the conduct will cause serious loss to the Company. Penalties can include fines of up to $100,000.00 and prison terms of up to 7 years or both.

Do I have a defence?

The *Companies Act 2017* contains no explicit defences for civil breaches of 'directors' duties and does not contain an explicit business judgment defence. Generally, a director may have a defence for civil liability if they can prove that they complied with the requirements of the *Companies Act 2017.*

It is a defence for a director charged with a criminal breach of their duties if the director proves that they took all reasonable steps to ensure that the requirements of the Act were complied with. Furthermore, it is a defence for a director if they can prove that they took all reasonable and proper steps to ensure that the other directors complied with the requirements of the Act; or in the circumstances, the director could not reasonably be expected to take steps to ensure that the other directors complied with the Act.

How can I be protected?

The *Companies Act 2017* allows a company to provide indemnities and insurance for directors of the Company or a related company in accordance with the company constitution or with the unanimous approval of shareholders. A company may, if permitted by its constitution or with the approval of shareholders, indemnify its directors in respect of liability to third parties, but not in respect of criminal liability or breaches of the duty to act in good faith.

> "Changes in directors or changes to a company details must be notified to the registrar within 20 working 'days' of the change occurring."

What other procedural matters do I need to understand as a director?

Companies Register

The Companies Registrar maintains the Company records either wholly or in part through a digital register. Annual Returns must be filed every year and the directors must ensure that the Companies Office records are kept up to date. Changes in directors or changes to a company details must be notified to the registrar within 20 working 'days' of the change occurring.

Appointment of Directors

Subject to the constitution of the Company, the directors are appointed by ordinary resolution of the shareholders. Subject to the Company's constitution, directors of a company may have the power to appoint alternate directors.

Meetings

Directors have an obligation to call at least one annual shareholders meeting (subject to the *Companies Act 2017* and the Company's constitution). Provisions for holding and governing those meetings must be included in the Company's constitution.

Remuneration of Directors

Subject to the Company's constitution, the *Companies Act 2017* allows the directors to receive remuneration and other benefits with unanimous shareholder approval.

What other obligations as a director do I need to understand?

In addition to the key duties and responsibilities under statute and common law, there are several other obligations which directors must comply with under various environmental, banking and finance, and tax as well as public health. Depending on the industry you work in, some of these requirements may be particularly important to understand as part of your day-to-day functions.

Environmental, Biosecurity and Public Health

A director of a company may be found personally liable under a range of legislative instruments for an offence committed by the Company where the Act that constituted the offence took place with the authority, permission or consent of the director, and the director knew or could have reasonably been expected to have known that the offence was being or would be committed and failed to take all reasonable steps to prevent or stop it.

Such liability arises under, but is not limited to, the:

- *Environment Act 2003* which governs the protection of the environment in the Cook Islands;
- *Marine Resources Act 2005* which provides for the conservation, management, and development of marine resources;
- *Biosecurity Act 2008* which regulates the entry of animal and plant pests and diseases into the Cook Islands; and
- *Public Health Act 2004* which regulates public health in the Cook Islands.

Banking and Finance

The *Financial Transactions Reporting Act 2004* facilitates the prevention, detection, investigation and prosecution of money laundering, financing of terrorism and other serious offences in the Cook Islands. Directors will incur personal liability under this Act if it is proved that the act or omission that constituted the offence took place with the director's knowledge, authority, permission, or consent.

Tax

Directors must ensure that a company meets its tax liabilities. In a liquidation situation where it is established a director has breached a statutory duty, that director may be called upon to return funds to enable the Company to meet its tax liabilities

> "Directors will incur personal liability under this Act if it is proved that the act or omission that constituted the offence took place with the director's knowledge, authority, permission, or consent."

"In 2016, the *Companies Act 2015* came into force in Fiji, overhauling and modernising Fijian company law…"

Fiji

Overview

Fiji is an archipelago of tropical islands which are not only home to some of the whitest beaches and most spectacular coral reefs on the planet, but also to a dynamic business community. Fiji follows the English common law and its legal system is heavily influenced by the laws of Australia and New Zealand. Fiji also has an overlay of statute, common law, and equity which function alongside some codified elements of customary law.

In 2016, the *Companies Act 2015* came into force in Fiji, overhauling and modernising Fijian company law, bringing it more in line with other Pacific jurisdictions. A significant development was the fact that directors' duties were, for the first time, clearly stated in the legislation. The new *Companies Act 2015* borrows heavily from the United Kingdom *Companies Act 2006* codifying and clarifying directors' duties and the powers they may use in executing their obligations.

Fiji is a leader in climate change action and legal advances in the regulation of the impacts of business on climate change. Under the *Climate Change Act 2021*, directors are now required to consider climate change when managing a company. Its important that directors are aware of how climate change impacts their business in light of this climate change law reform.

Haniff Tuitoga
Pacific Legal Network

Am I a director?

The term "director" is used broadly in the *Companies Act 2015*. Certain directors' duties under the *Companies Act 2015* also apply to "officers".

Being a director is not as simple as just having a company title. In order to understand if you are a director you must look at your actions, and the way others treat your directions. A "director" may include:

- a person whose instructions are followed by validly appointed directors;
- a person who exercises powers that would usually be exercised by the board; and
- a person who is an alternate director.

More specifically, directors must be natural persons who are at least 18 years of age. An individual will be disqualified from being a director of a company if they have been disqualified previously or are an undischarged bankrupt.

A company's Articles of Association may further restrict individuals from being a director.

> "It is integral that you continue to oversee functions that have been delegated to others…"

In the shadows

Even though your title does not say "CEO" or "director" you may still be held accountable as though you were a director. Individuals who are not validly appointed as directors will hold the same liabilities as a director if they act in the position of a director, or if the company or board of directors are accustomed to act in accordance with the person's instructions or wishes. This is sometimes referred to as a "shadow director".

Can I delegate my duties?

Generally, a director can delegate their duties to another person, however a company's Articles of Association may exclude the delegation of all or some of the director's powers.

If a director delegates a power, a director shall be responsible for the exercise of the power by the delegate as if the power had been exercised by the director herself or himself.

However, a director will not be liable for the actions of a delegate where the director believed, on reasonable grounds, that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the *Companies Act 2015* and the Articles of Association; and, the director believed on reasonable grounds and in good faith that the delegate was reliable and competent.

It is vital that you continue to oversee functions that have been delegated to others, ensuring they are being exercised competently.

What are the key duties I need to know?

Statutory duties

The following duties apply:

- A duty to act in accordance with the Articles of Association of the company and to exercise powers for the purposes for which they are conferred.
- A duty to act in a way the director considers, in good faith, would be most likely to promote the success of the company.
- A duty to exercise independent judgment.
- A duty to exercise the care, skill and diligence that a reasonable director would exercise when performing their duties.
- A duty to avoid conflicts of interest.
- A duty not to accept benefits from third parties.
- A duty to declare interests in a proposed transaction or arrangement.

While these duties resemble those set out in the United Kingdom's *Companies Act 2006*, differences between these pieces of legislation exist. For example, unlike the statutory position in the United Kingdom which has gone so far as to state in the legislation certain factors to be taken into account in assessing whether a director has discharged his/her duty to promote the success of the company, the Fiji legislation contains no such guidance. Therefore, it will be up to the Fijian courts to define the meaning of these new provisions and it is likely that they will rely on common law principles to do so.

> "…the provisions under the *Companies Act 2015* appear to have codified the commonlawdutyofcare,skillanddiligence…"

What degree of care, skill and diligence must I exercise?

The *Companies Act 2015* requires that you as a director exercise care, skill and diligence when acting in your capacity as director. When performing your functions, the standard to be applied is that of a reasonably diligent person with the general knowledge, skill and experience that would be expected of a person who is a director in the corporation's circumstances.

The provisions under the *Companies Act 2015* appear to have codified the common law duty of care skill and diligence, so that when a director satisfies the "business judgment rule" that director is taken to have met the requirements both under statute and the general the law.

The recent introduction of the *Climate Change Act 2021* has already had an impact of how care, skill and diligence must be exercised. The *Climate Change Act* extends a director's duty to exercise reasonable care, skill and diligence (under the *Companies Act 2015*) by requiring directors consider and evaluate "climate risks and opportunities" to the extent that such risks and opportunities are foreseeable and intersect with the interests of the company (when exercising reasonable care and diligence).

Climate change risks include:

- reducing operating costs by improving efficiency across premises, operations and processes;
- saving on annual energy costs through shifting energy usage towards low emissions energy sources;
- capitalising on shifting consumer and producer preferences by innocating and developing new low-emission products and services
- opportunities in new markets or types of assets; and
- enhancing climate resilience to climate risks thus avoiding future economic costs.

Climate change opportunities include:

- saving on annual energy costs through shifting energy usage towards low emissions energy sources;
- capitalising on shifting consumer and producer preferences by innovating and developing new low-emission products and services;
- opportunities in new markets or types of assets; and
- enhancing climate resilience to climate risks thus avoiding future economic costs.

Although this duty remains untested, we expect that the obligations imposed on directors will be dependent upon the industry in which they operate and arguably the extent to which the company relies upon fossil fuels.

What is the Statutory Business Judgment Rule?

Under the *Companies Act 2015*, a director will be found to have exercised care, skill and diligence where they, in respect of the judgment:

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

The defence only applies to positive business judgments, at the exclusion of omissions or failures in oversight.

As a best practice you should perform all duties to a level that would be expected by a person in a like situation, by continuing to stay informed and giving due consideration before acting.What does promoting the success of the business mean?

The statutory duty to promote the success of the business is unique to Fiji among Pacific nations. The duty does not have an equivalent in Australia or New Zealand, however it does exist in the United Kingdom. The principles espoused from the United Kingdom provide that success is usually defined by having regard to a long-term increase in value. The United Kingdom legislation has also set out factors which a director may take into account in promoting the success of a company including, the long-term consequences of decisions, the interests of the company's employees, and the impact of the company's operations on the community and environment. However, it's also important to note the United Kingdom has allowed company constitutions to define their own form of success.

The Fijian legislation has not given such guidance and so the Fiji courts will interpret this duty in light of emerging principles. This means as a director it is important you give due consideration to the financial position and value of your business. Every decision you take as a director should be with the aim of promoting the business to achieve success.

What is good faith?

The requirement to act in good faith is embodied in the duty to promote the success of the business and the statutory business judgment rule (which are discussed above).

Fijian Courts have not defined good faith since the introduction of the *Companies Act 2015*. Case law prior to the introduction of the *Companies Act 2015* does provide some guidance; being that good faith arises from the fiduciary duty or loyalty owed to the company. As such a director must not profit from their position and must not place themselves in a position of conflict.[20]

Similarly, in respect of the statutory business judgment rule the language adopted in Fiji is the same as is applied in Australia. Australian jurisprudence has stated that good faith will not be established where the director is interested in the matter (i.e. they have a conflict of interest).

Directors are under a duty to exercise independent judgment to decision-making when discharging their duties as a director. While this doesn't prevent you from taking advice from suitably qualified professionals, it does however mean that you must apply an inquiring mind to decisions (i.e. you can't just rely upon what your professional advisor says).

The duty to avoid conflicts of interest

In Fiji, directors are under a statutory obligation to avoid putting themselves in a position where they have, or could have, a direct or indirect conflict of interest with the company.

This duty applies to the exploitation of property, information, or opportunity, and applies regardless of whether the company could take advantage of the property information or opportunity. Subject to certain exceptions a director is prevented from voting on a matter where there is a conflict of interest.

The duty of conflict is not infringed where the situation cannot be regarded as likely giving rise to a conflict of interest or the matter has been authorised by the directors in certain circumstances.

> "…directors are under an obligation to not accept benefits from a third party by reason of that persons position as a director…"

Friends with benefits – a duty to not accept benefits from third parties

Under the *Companies Act 2015*, directors are under an obligation not to accept benefits from a third party by reason of that person's position as a director.

The *Companies Act 2015* does not define "benefit" and there is no threshold which applies so you need to be careful of whether your actions might infringe on this conduct – for example would accepting hospitality or rugby tickets infringe on this duty?

Importantly, conduct will not give rise to a breach where the benefit cannot reasonably be regarded as giving rise to a conflict of interest.

Duty to declare an interest in a proposed transaction or arrangement

Directors are under a statutory obligation to declare their interest which arises, directly or indirectly in a proposed transaction or arrangement with the company.

Annual solvency resolution

Directors are under an obligation to pass an annual solvency resolution stating the company satisfies the solvency test (being that the company is able to pay its debts when they fall due).

What liabilities do directors face should they fail to comply with their obligations?

Liabilities

The *Companies Act 2015* has a civil and criminal regime for breaches of directors' duties. Depending on the severity of the breach of the *Companies Act 2015* a monetary penalty may be applied and, generally speaking, the more severe the breach, the higher the penalty amount will be. In some cases, breaches may create criminal liability. The Crimes Decree 2009 applies to all offences stipulated in the *Companies Act 2015.*

There are other liabilities a Director may face including a disqualification order, preventing them from being a director in future. Directors may also be liable to a suit brought by the Company (and in some special circumstances) by shareholders for breach of their directors' duties.

> "In some cases, breaches may create criminal liability."

What other procedural matters do I need to understand as a director?

Appointment of directors

The *Companies Act 2015* distinguishes between public, private and sole member sole director companies regarding the appointment of directors. Directors are appointed by resolution, however there are certain restrictions imposed on public companies on the manner in which they can pass a resolution for the appointment of two or more directors. Similarly, for a sole member sole director company, the appointment of directors is valid by the director signing the record.

Indemnity

If expressly authorised by its Articles of Association, a company may indemnify a director for acts and omissions in their capacity as director for any costs incurred during any proceeding and liabilities to persons other than the company. A company cannot indemnify a director for any criminal liability arising from their acts and omissions in their capacity as director.

Annual reports

A company is required to prepare an annual report which is to be provided to its members and the registrar of companies for every financial year.

> "Depending on the industry you work in, some of these duties may be particularly important to understand as part of your day-to-day functions."

Meetings

The *Companies Act 2015* does not set out minimum requirements for quorum, or notice for meetings of directors; rather, it is the Articles of Association of the company that will set specific directors' meeting protocols.

Remuneration

Remuneration of directors is to be determined by a meeting of the shareholders, however, in a private company the Articles of Association may allow for other methods of determining directors' remuneration.

A company is required to disclose a director's remuneration if the company is directed to do so by a member with 5% of voting rights that may be cast at general meeting.

What other duties do I have?

In addition to these core duties and responsibilities under statute and common law, there are a number of other obligations directors must comply with under environmental, work health and safety, tax as well as competition and consumer legislation. Depending on the industry you work in, some of these duties may be particularly important to understand as part of your day-to-day functions.

Duties under Consumer Law

Consumer protections originate in the *Commerce Commission Decree 2010.* The Decree sets out offences for misleading and deceptive conduct, unconscionable conduct, false or misleading representations and advertisements, false information and advertisements and bait advertisements. A person who is a director at the time of offences will be held liable for the offence unless it was committed without his/her knowledge or he used all due diligence to prevent the commission of the offence.

Directors who knew of or ought to have known of an infringement and allowed consumer protections to be broken will be prosecuted separately as individuals.

Duties under climate change law

A first amongst Pacific Island nations, Fiji enacted a comprehensive set of climate change laws in the *Climate Change Act 2021*. Under the *Climate Change Act 2021* directors have duties to consider the climate risks and climate change opportunities when making decisions. Further information regarding this new duty is provided in the "Duty to exercise reasonable care, skill and diligence" section above.

Directors of companies that are required to prepare financial statements and directors' reports and of all licensed financial institutions also have a duty to disclose the following in those statements:

- any material financial risks to the company/licensed financial institution arising from climate change risks and climate change opportunities;
- measures adopted by the company/licensed financial institution to reduce its exposure to these material financial risks
- how considerations of climate change risks are integrated into investment policies, risk management policies and investment decision-making processes; and
- the climate change impacts of the activities of the company/licensed financial institution and of the use of goods and services it produces and the extent to which the company/licensed financial institution complies with the long-term temperature goal in Article 2 of the Paris Agreement.

Penalties for breaches of the *Climate Change Act* include fines not exceeding FJD$750,000 or imprisonment for a term not exceeding 10 years, or both.

Duties under environmental law

A director who has directed, authorised or participated in an offence under the *Environment Management Act 2005* is deemed to have also committed the offence and may be personally liable for the same penalty as the corporation regardless of whether the corporation is being prosecuted. Directors are prohibited from directing, authorising or participating in:

- a development activity which is subject to the EIA process but does not have an approved EIA report;
- wilfully or deliberately providing false or misleading information;
- failing to give all reasonable assistance to a person carrying out duties under the *Environment Management Act 2005*; and
- where that director contravenes a condition for the approval of a development activity subject to an EIA report.

Duties under labour law

Under the *Health and Safety at Work Act 1996* employers are responsible for their employees. The Health and Safety at Work Act 1996 provides that where an offence under the legislation is committed by a corporation, liability may be imposed on directors of that corporation.

The legislation creates various offences including:

- a breach of the employer's duty to ensure the health and safety of workers at work;
- intentionally or recklessly interfering with anything provided in the interests of health and safety;
- a failure to establish a health and safety committee when twenty or more employees are employed;
- discrimination against workers who made a reasonable complaint or provided information to a health and safety Inspector; and
- a failure to give notification of accidents.

While the *Health and Safety at Work Act 1996* prescribes that it is a defence that it was not practicable for the employer to comply with the provision that constituted the offence, it is important to note that these provisions cannot be contracted out of.

Tax duties

In circumstances where the company is in financial difficulty and the company entered into an arrangement with the intention or effect of rendering a company unable to pay its tax liability, persons who were directors at the time of the arrangement may be held personally liable. Directors will not be held liable if they did not derive any financial benefit from the arrangement and either the director could not have had knowledge of the arrangement or the director formally recorded his or her dissent and notified the Fiji Revenue and Customs Authority of the arrangement.

Foreign corrupt practices, bribery, money laundering offences

Fiji's *Crimes Decree 2009* and Prevention of *Bribery Promulgation (POBP) 2007* (as amended) legislate against bribery creating various offences in connection with bribing a public official, although these offences do not directly impose liability on directors per se, they apply to all persons, and as such, a director should be mindful of the existence of such laws.

"Kiribati has the largest number of directors' duties codified in their main corporations law, the *Companies Ordinance (1998).*"

Kiribati

Overview

Kiribati (pronounced Kiri-bas) is a group of atolls in Micronesia and the only country in the world that is situated in all four hemispheres. Kiribati follows the English common law having become independent in 1979. The Constitution of Kiribati is the supreme law of Kiribati and grants the Maneaba ni Maungatabu the power to pass statute and the Berentitenti the power to either provide assent or withhold assent to any new statute.

Out of all the countries referenced in this guide, Kiribati has the largest number of directors' duties codified in their main corporations law, the *Companies Ordinance (1998).* In Kiribati other pieces of legislation also place duties, obligations and expectations on directors.

Am I a director?

The term “director” is used broadly in the *Companies Ordinance* to mean any person appointed to direct and administer the business of a company. Certain directors’ duties under the *Companies Ordinance* also apply to “officers”.

Being a director is not as simple as just having a company title. In order to understand if you are a director you must look at your actions, and the way others treat your directions. A “director” may include:

- a person whose instructions are followed by validly appointed directors;
- a person who exercises powers that would usually be exercised by the board; and
- a person who is an alternate director.

An individual will be disqualified from being a director of a company if they have been disqualified previously or are an undischarged bankrupt.

A company’s Articles of Association may further restrict individuals from being a director.

In the shadows

Even though your title does not say “CEO” or “director” you may still be held accountable as though you were a director. Individuals who are not validly appointed as directors will hold the same liabilities as a director if they act in the position of a director, or if the company or board of directors are accustomed to act in accordance with the person’s instructions or wishes. This is sometimes referred to as a “shadow director”.

In Kiribati it is an offence to hold yourself out as a director or for a company to hold you out as a director when not duly appointed.

Can I delegate my duties?

Generally, a director can delegate their duties to another person, however a company’s Articles of Association may exclude the delegation of all or some of the director’s powers.

If a director delegates a power, a director is under an obligation to ensure that there is adequate supervision when delegating their powers so as to prevent an abuse of that power by the delegate.

It is vital that you continue to oversee functions that have been delegated to others, ensuring they are being exercised competently.

What are the key duties I need to know?

Directors' duties are a series of statutory, common law and equitable obligations owed primarily by members of the board of directors to the company that employs them. It is a central part of company law and corporate governance. Directors' duties are similar to the fiduciary duties owed by trustees to beneficiaries, and by agents to principals.

Common law duties

Being a common law country, a number of principles derived from English general law exist in Kiribati including that:

- directors owe duties to the company as a whole, and not to individual shareholders, employees or creditors outside exceptional circumstances;
- a director's core duty is to remain loyal to the company, and avoid conflicts of interest;
- directors are expected to display a high standard of care, skill or diligence; and
- directors are expected to act in good faith to promote the success of the corporation.

> "Being a common law country, a number of principles derived from English general law exist in Kiribati ..."

Statutory duties

The following duties apply:

- A duty to avoid conflicts of interests.
- A duty to use their powers in accordance with the law.
- A duty to act in good faith and discharge duties with care, skill and diligence.
- A duty to promptly transfer all property the director holds on behalf of the company.
- A duty to not use any assets of the company for any illegal or improper purpose.
- A duty to attend all meetings.
- A duty to ensure the company, and its officers and employees comply with the *Ordinance* relevant service standards and to ensure the welfare and safety of the company's employees.
- A duty to supervise when delegating powers.
- A duty to avoid liability.
- A duty to properly manage subsidiary companies.

Avoiding a conflict of interests

Under the *Ordinance* a director must not place himself/herself in a position where his duty to the company conflicts with his/her personal interest. In particular, unless the Company consents by way of ordinary resolution, a director must not:

- use confidential information obtained during his/her time as a director for his/her own benefit;
- be interested, directly or indirectly (otherwise than merely as a shareholder or debenture holder in a public company holding not more than 1 per cent of the share or loan capital of such company), in any business which competes with that of the Company; or
- be personally interested, directly or indirectly, in any contract or other transaction entered into by the company

Where a director is personally interested in any contract or other transaction entered into by the Company, that director must disclose his/her personal interests in a proposed contract entered into or to be entered with the company, including the nature and the extent of his/her interests to the other directors as soon as he/she was aware of the proposed contract.

A director must also disclose to the company any conflict of interests arising from his/her personal interests or duties to another person (where he/she is a director or employee of the company's competitor).

Duty to use powers in accordance with the law

Directors are required to comply with the *Companies Ordinance* and the rules and limitations set out in the Articles of Association of the company.

Duty to act in good faith and discharge duties with care, skill and diligence

There are two components to this duty. A director must:

- observe the utmost good faith when acting on behalf of the company; and
- discharge their duties with care, skill and diligence.

The first component requires that directors act honestly and use reasonable diligence when acting on behalf of the company or exercising their powers. The duty to act in good faith arises from the fiduciary duty or loyalty owed to the company.

The second component requires that you as a director exercise care, skill and diligence when acting in your capacity as director. When performing your functions, the standard to be applied is that of a reasonably diligent person with the general knowledge, skill and experience that would be expected of a person who is a director in the corporation's circumstances.

In practice, this means that directors must take reasonable steps to place themselves in a position to monitor the management of the company. This involves being familiar with the fundamentals of the company's business, keeping informed about the activities of the company, regularly attending board meetings and maintaining familiarity with the financial status of the corporation.

Promptly transferring all property the director holds on behalf of the company

Directors may be in a position where they hold cash or assets on behalf of a company, for example taking cash payments on behalf of a company for a transaction. A director must transfer to the company all cash or assets obtained on its behalf as soon as possible. However, a director may be authorised to keep the cash or assets on behalf of the company for later use by the company.

Duty to not use assets for an illegal or improper purpose

Directors must not use any of the company's assets for an illegal or improper purpose or do anything which may jeopardize the company's assets. Meaning, when directors are in a position where they are holding assets on behalf a company they are required to use the assets for the benefit of the company, and should not damage or lose the assets.

Role call – duty to attend all meetings

Directors are required to attend all meetings. Directors may only miss a meeting when prevented from attending due to illness or other reasonable excuse.

Duty to comply with relevant service standards and ensuring the welfare and safety of employees

Directors must ensure that the company, its officers, agents and employees comply with the provisions of the *Companies Ordinance* and are also complying with all statutory and customary standards of quality and service owed to customers and others with whom the Company has dealings.

Directors are also responsible for the safety and welfare of their officers, agents and employees. They must make sure that all necessary legal requirements of health and safety are met.

Duty to supervise when delegating powers

Directors are under an obligation to ensure that there is adequate supervision when delegating their powers so as to prevent an abuse of that power by the delegate.

Duty to avoid liability parties

Each director is under an obligation to ensure that no liability is incurred by the company unless there is a reasonable expectation that in the ordinary course of business the company will be able to fully discharge such liability.

Duty to properly manage subsidiary companies

If the company is a member of a group of companies, the directors of a parent company are expected to oversee he directors of a subsidiary. Directors of the parent company must ensure directors of the subsidiary manage the subsidiary to the utmost of their ability without any loss or disadvantage to the company.

> "The first component requires that directors act honestly and use reasonable diligence when acting on behalf of the company or exercising their powers."

What liabilities do directors face?

Liabilities

The *Companies Ordinance* has civil penalties for breaches of directors' duties. A director may be liable to compensate the company for any damage it suffers as a result of a breach of directors' duties and may also be liable for any profit they derive from said breach.

In some cases, breaches may carry criminal liability. Directors may be held criminal liable under the *Penal Code 67* for theft, fraud, forgery and corruption.

There are other liabilities a director may face including a disqualification order, preventing them from being a director in future. In some special circumstances directors may be liable to a suit brought by shareholders for breach of their directors' duties.

What other procedural matters do I need to understand as a director?

Appointment of directors

Every company must have at least 2 directors. Directors are appointed by resolution. In the case of foreign companies, at least one of the appointed directors must be a resident director.

Indemnity

A company may indemnify a director for acts and omissions in their capacity as director for any costs incurred during any proceeding and liabilities to persons other than the company. A company cannot indemnify a director for any criminal liability arising from their acts and omissions in their capacity as director.

Annual returns

A company is required to prepare an annual return which is to be provided to its members and the registrar of companies for every financial year. Private companies may alternatively provide a certificate of solvency to its members.

Meetings

Quorum for a meeting of the board of directors is set at 2 and the directors must be provided with at least 3 days notice, although the Articles of Association of the company can set different rules for proceedings of the board.

Remuneration

Remuneration of directors must be set out in the Articles of Association. When a director is appointed to a board of a company and the board of that company's subsidiary, the director may only be remunerated by the parent company.

What other duties do I have?

In addition to these core duties and responsibilities under statute and common law, there are a number of other obligations directors must comply with under environmental, work health and safety, tax as well as competition and consumer legislation. Depending on the industry you work in, some of these duties may be particularly important to understand as part of your day-to-day functions.

Duties under consumer law

There are various consumer protections guaranteed under statute in the *Consumer Protection Act 2012.* The *Consumer Protection Act 2012* sets out offences for misleading and deceptive conduct, false or misleading representations and advertisements, and false information and advertisements. A person who is a director at the time of offences will be held liable for an offence unless it was committed without his/her knowledge or he/she used all due diligence to prevent the commission of the offence.

Duties under environmental law

A director who has directed, authorised or participated in an offence under the *Environment Act 1999* is deemed to have also committed the offence and may be personally liable for any penalty. Directors are prohibited from directing, authorising or participating in:

- commencing or carrying out an environmentally-significant activity without an environment licence;
- knowingly or recklessly providing false or misleading information; and
- discharging pollutants that makes an environment, such as waterways, unclean, noxious, poisonous, detrimental to the health of people, animals, plants or property, or unreasonably interferes with the health or comfort of a person.

Duties under labour law

Under the *Employment and Industrial Relations Code 2015* directors, secretaries and executive officers are liable for any offence committed by a company with their consent or involvement, or where the offence is attributable to their wilful neglect.

Directors when they are parties to a collective bargaining process have a duty to act in good faith while negotiating. This duty may extend to employers, employees, officeholders and trade unions.

The legislation creates various offences including, but not limited to:

- misleading, preventing or frustrating a labour inspector;
- preventing or interfering with the freedom of employees and employers to join socio-economic groups such as unions; and
- failing to comply with healthy standards for working hours.

Additionally, the *Occupational Health and Safety Act 2015* requires that employers ensure their workplaces are safe and free from hazards. The obligations under the *Occupational Health and Safety Act 2015* will apply to directors who are employers.

Tax duties

Directors may be personally liable for tax payable, if an arrangement has been entered into with the intention or effect of rendering a company unable to satisfy a current or future tax liability under a tax law, and the director derived a financial or other benefit from the arrangement and the direct had knowledge or would reasonably be expected to have known about the arrangement.

New Zealand or Aotearoa (the land of the long white cloud) has a pristine environment and a thriving economy, with tourism and agriculture at its heart.

New Zealand

Overview

New Zealand or Aotearoa (the land of the long white cloud) has a pristine environment and a thriving economy, with tourism and agriculture at its heart. In polls it is often rated as an easy place to do business and foreign investment is encouraged.

New Zealand's legal system, like that of a number of Commonwealth countries, followed that of England. Although it has now, in some cases, followed its own path, the regulation of companies (and their directors) remains similar to that found in England and Australia.

New Zealand companies are governed primarily by the provisions of the *Companies Act 1993,* which sets out the main duties of directors. There are duties contained in other pieces of legislation such as that governing resource management, health and safety and tax. Directors must also be mindful of their duties at common law. Additionally, a company may have a constitution that must be complied with.

Am I a director?

A company must have at least one formally appointed director. The *Companies Act 1993* contains a broad definition of director, which includes people who are acting in a directors' role, even if not formally appointed.

Directors must be at least 18 years of age. Undischarged bankrupts and persons convicted of certain crimes are not permitted to be directors. At least one director must meet the residency requirement. In order to satisfy the residency requirement, that director must live in:

- New Zealand, and must have been physically present in New Zealand for a total of more than 183 days in a 12 month period; or
- Australia, and must be a director of a company incorporated in Australia.

In the shadows

Directors' duties can apply to persons who are not formally appointed as directors. If you direct the company's business, act in the position of director, or if the board is required or accustomed to follow your direction you could be considered a director for the purposes of the *Companies Act 1993.*

> "…the failure of directors to make reasonable inquiries of professional a device meant many were prosecuted…"

Can I delegate my duties?

Subject to the company's constitution the board may delegate powers under the *Companies Act 1993* to a committee of directors, another director or an employee of the company. Schedule 2 to the *Companies Act 1993* sets out the powers that cannot be delegated.

The board that delegates the power is responsible for the exercise of the power by the delegate. The board will not however be responsible where the board believed on reasonable grounds that the delegate would exercise the power in conformity with the duties imposed by the *Companies Act 1993* and the Company's constitution, and where the board has monitored the delegate's exercises of the power. It is therefore important that directors monitor delegates continuously.

Can I rely on the information or advice provided by others?

Directors are able to rely on professional advisers who the directors reasonably believe are acting in their area of expertise. The advice must be considered in good faith, and the directors must make reasonable inquiries of the advice where the circumstances render this necessary. Importantly, the failure of directors to make reasonable inquiries of professional advice meant many were prosecuted following the collapse of the finance company sector in New Zealand in the mid-2000s, and were found not to have complied with their duties as a director.

What are the key duties I need to know?

Statutory duties

The *Companies Act 1993* sets out the following duties:

- A duty to act in god faith and in the best interests of the company.
- A duty to exercise powers for a proper purpose.
- A duty to comply with legislation and the company's constitutional documents.
- A duty to avoid reckless trading.
- A duty to act with the care, diligence and skill that a reasonable director would exhibit.
- A duty to disclose any conflicts of interest and declare any interest in a proposed transaction.

What degree of care, skill and diligence must I exercise?

A director must exercise the care, diligence and skill that a reasonable director would exercise in the circumstances, taking into account:

- The nature of the company.
- The nature of the decision.
- The position of the director and the nature of the responsibilities undertaken by him or her.

The test is objective, however these are subjective considerations. The position of the director is compared with directors in similar circumstances. The expectations of a director of a small closely held company are likely to differ from those of a director of a large publicly listed company.

It is important to note that you can breach a duty by failing to do something or 'letting' something happen. You must therefore ensure that you have a reasonable knowledge of what is happening within the Company at all times.

What is good faith and in a manner the director believes to be in the best interests of the company?

The test is subjective (what the director honestly believed to be right) however the courts generally also consider an objective test – that is, how a reasonable director would be expected to act in the circumstances.

Directors must consider the company as a whole – they must not ignore the interests of minority shareholders and must not act in the interests of only one class of shareholder in the company.

Subject to the terms of a company's constitution, a director who is interested in a transaction may vote on a matter relating to that transaction.

Transactions involving self-interest

Under the *Companies Act 1993* a director must disclose any interest in a transaction. The *Companies Act 1993* sets out the circumstances in which a director may be interested and includes a transaction where a director is a party to the transaction, or may receive a material financial benefit either personally or via a material financial interest in another party. The transaction may be able to proceed providing the required consents are obtained (typically of all shareholders).

Failure to disclose an interest may lead to a transaction being set aside.

Misuse of company information

The *Companies Act 1993* prevents directors from disclosing or using information acquired as a director, without the company's consent. The law also prevents directors from using information for their own personal gain. This functions alongside, but is separate from, the rule regarding transactions involving self-interest.

Insolvent trading

Directors have a duty to prevent a company from trading whilst insolvent. A company is insolvent if it is not able to pay its debts as they become due.

The *Companies Act 1993* contains two main duties which prevent directors from insolvent trading, namely:

- (**reckless trading**) a duty that directors must not agree or allow the company to continue trading in a manner which is likely to cause substantial loss to creditors; and
- (**obligations**) a duty that prevents directors from incurring obligations unless they believe on reasonable grounds that the company will be able to fulfill them.

The Courts have interpreted the duty to avoid reckless trading as requiring directors to undertake a 'sober assessment' of the company when it enters troubled waters. Whereas, the duty to avoid reckless trading is aimed at the general conduct of directors when in financial trouble, the duty as to these obligations is aimed at particular transactions, and a consideration of whether the company was, reasonably, in a position to meet those obligations, when entered into.

What are the liabilities should a director fail to comply with their obligations?

Civil liability

Shareholders can bring claims against directors for breaches of duty either themselves, or, where the duty was to the Company, a claim can be brought in the name of the Company via a derivative action. A Court order is needed for a derivative action.

The Court will consider the likelihood of success, costs, actions already on foot, and the interests of the company. The key question is whether the prudent business person would believe the proceedings will succeed. Derivative actions have achieved the most success in closely held companies.

The Court has wide powers to order relief, including ordering the director to repay money with interest, and compensation payments.

Criminal liability

Under the *Companies Act 1993*, directors can be criminally liable for serious breaches of the duty to act in good faith where the director acts in bad faith believing the conduct is not in the best interests of the company, and knowing the conduct will cause serious loss to the company. There are some exceptions to this, however where an offence has been committed, penalties can include fines of up to $200,000.00 and prison terms of up to 5 years.

Do I have a defence?

The *Companies Act 1993* contains no explicit defences against reckless trading, however a director may have a defence against a claim for reckless trading if he or she can show that they have acted reasonably and relied on professional advice, or the duties had been reasonably delegated. Professional advice must be considered in good faith, and inquiries must be made where a need for enquiry is indicated by the circumstances.

Unlike other jurisdictions, the *Companies Act 1993* does not contain an explicit business judgment defence. Whether a course of action is a legitimate business risk for a director to take has been left to the Courts to interpret.

> "A company may, if permitted by its constitution, indemnify its directors in respect of liability to third parties, but not in respect of criminal liability…"

What other procedural matters do I need to understand as a director?

Companies register

The Companies Registrar maintains the online company records. Annual Returns must be filed every year and the directors must ensure that the Companies Office records are kept up to date. Changes in directors, or changes to a company director's details must by notified to the registrar within 20 working days of the change occurring.

Appointment of directors

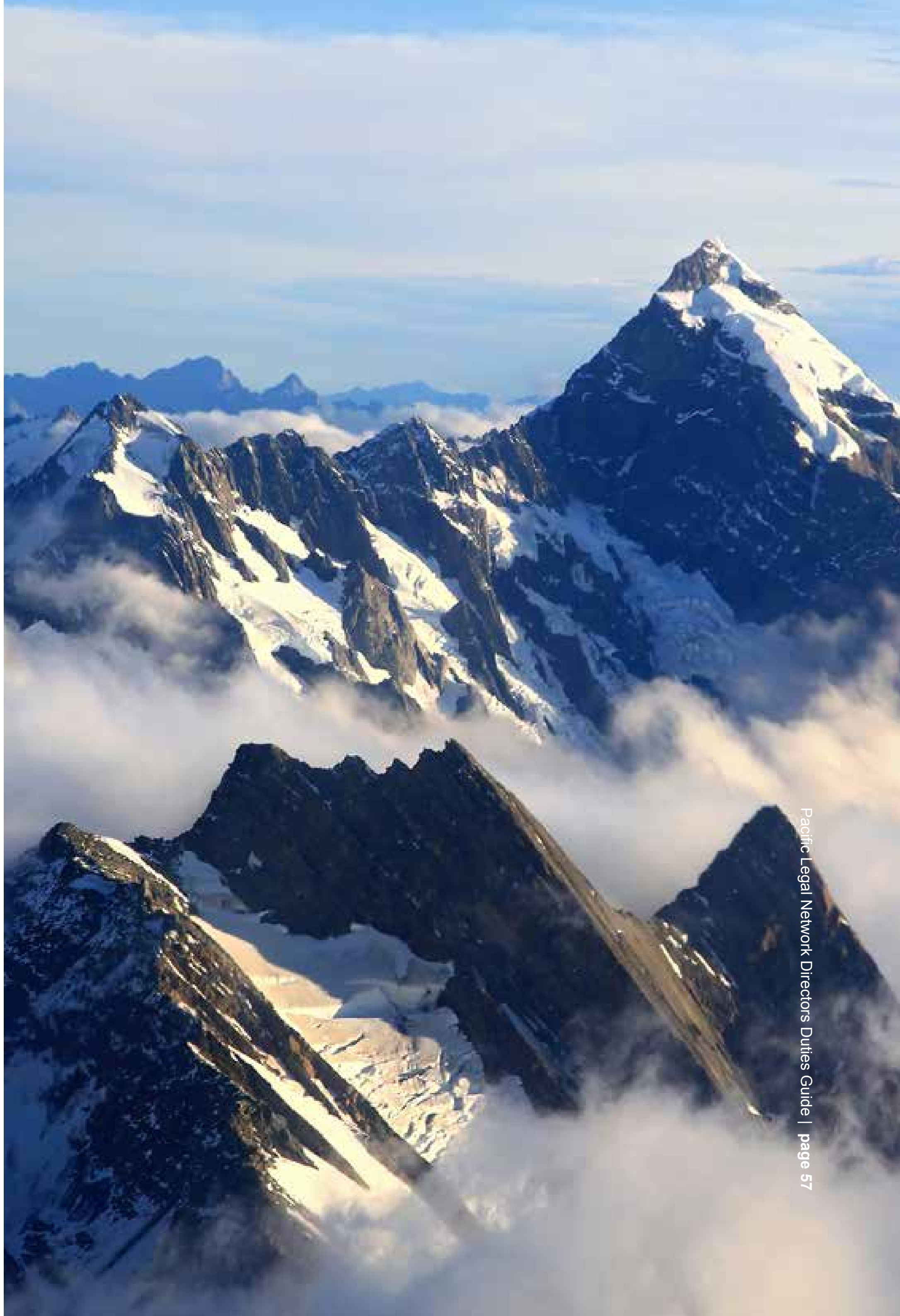
Subject to the constitution of the company, generally directors are appointed by ordinary resolution of the shareholders. Directors of a company may have the power to appoint alternate directors.

Meetings

Directors have an obligation to call at least one annual shareholders meeting (subject to the *Companies Act 1993* and the company's constitution if there is one). The *Companies Act 1993* (subject to the Company's constitution) sets out the procedures for calling meetings a nd the procedures at the meetings.

Remuneration of directors

Subject to the terms of a company's constitution, the *Companies Act 1993* allows the board of a company to authorise director's remuneration. The board must authorise that the payment of remuneration is fair to the company, and provide grounds for that belief. If these requirements are not met, the director may be personally liable to the company for the payment.



What other obligations as a director do I need to understand?

In addition to the key duties and responsibilities under statute and common law, there are a number of other obligations which directors must comply with under various environmental, work health and safety, tax as well as competition and consumer legislation. Depending on the industry you work in, some of these requirements may be particularly important to understand as part of your day-to-day functions.

Environmental

The *Resource Management Act 1991* governs the protection of the environment in New Zealand. A director of a company may be found guilty of an offence committed by an employee or agent where the act that constituted the offence took place with the authority, permission or consent of the director, and the director knew, or could reasonably be expected to have known that the offence was to be committed and failed to take all reasonable steps to prevent or stop it.

Health and safety

Under the *Health and Safety at Work Act 2015*, directors have a duty to exercise due diligence to ensure that the company complies with its health and safety duties and obligations. These duties cannot be delegated.

Directors will be personally liable if they breach their due diligence duty. The maximum penalties are set out in the *Health and Safety at Work Act 2015* and are currently imprisonment for up to 5 years, and/or a fine of up to $600,000.00. Directors cannot use insurance to pay fines. Directors therefore must maintain sufficient knowledge of health and safety matters to ensure that their obligations are met.

Tax

Directors have an obligation to ensure that a company meets its tax liabilities. In a liquidation situation where it is established a director has breached a statutory duty, that director may be called upon to return funds to enable the company to meet its tax liabilities.

Consumer and competition

Directors may become personally liable under the *Fair Trading Act 1986* and the *Commerce Act 1986*, respectively New Zealand's key pieces of consumer and competition law. Generally, actions are often taken against the company, however, directors can be pursued where the company has gone insolvent. Typically, directors must be directly involved in the contravention to be held liable.

> "A director of a company may be found guilty of an offence committed by an employee…"

"PNG maintains a system of legal pluralism whereby customary law is also recognised."

Papua New Guinea

Overview

Papua New Guinea (**PNG**) is a vibrant and diverse country with the largest population and economy of the Pacific Island nations.

PNG has a common law based legal system, which is derived from English law. PNG law recognises a hierarchy of laws consisting of its supreme law, the Constitution, Organic Laws, Acts of Parliament, Emergency Regulations, provincial laws, laws made under or adopted by the Constitution and the underlying law.

PNG maintains a system of legal pluralism whereby customary law is also recognised. Customary law and general law adopted at the time of independence form the basis of PNG's underlying law.

PNG has developed its company law principles in accordance with the principles of modern corporate law. The *Companies Act 1997* is the principal legislation that governs and regulates companies in PNG. It deals with a range of provisions including, incorporation, debt and equity raising, shareholders, and financial accounts, amongst other matters.

The *Companies Act 1997* has similarities with the New Zealand *Companies Act 1993* however, recent amendments to the *Companies Act 1997* has adopted concepts from Australian corporate law (for example, the 'business judgment' rule in 2014) forming part of the fabric of PNG corporate law.

The law governing companies and directors' duties is set out in the *Companies Act 1997.*

Kidu Lawyers
PNG Pacific Legal Network

Am I a director?

The *Companies Act 1997* defines "directors" broadly, with the definition including:

- a person occupying the position of director of the company; or
- a person whose instructions are followed by validly appointed directors; or
- a person who exercises powers that would usually be exercised by the board; or
- a person who is a delegate of the board of directors.

Directors aren't the only people that may owe a duty to the company. Officers owe much of the same duties to companies as directors do (although there are certain duties which are imposed on directors only). It is therefore important that you are aware of the powers, duties, and liabilities that may attach to your position.

As a minimum, to be eligible for a directorship you must be 18 years old, be of sound mind, and must not be an undischarged bankrupt. A company constitution can stipulate further qualifications for being a director.

> "Even though you may not officially hold the office of a director, you may still be deemed a director…"

In the shadows

Even though you may not officially hold the office of a director, you may still be deemed a director under the *Companies Act 1997.*

A "shadow" or "de facto" director is a person who:

- in accordance with whose instructions to the board is required or is accustomed to act; or
- is entitled to exercise or control the exercise of board powers; or
- has been directly delegated board powers.

You should consider whether your actions and involvement with your company could result in you being deemed as a director.

Can I delegate my duties?

A board or a director may delegate their duties; however, the delegate must understand that when the board or a director delegates its duties, in full or in part, the person who agreed to accept those duties may be found to be acting as a director.

A board or a director may be excluded from liability for duties and powers they delegate, but only if the board or director believes on reasonable grounds (at all times) that the delegate will exercise the power in conformity with the delegated duties and the board or director has monitored the delegate by all reasonable methods.

It is important that you delegate your duties to someone who you know is competent to carry them out. You must also ensure you continue to monitor the delegate throughout the course of their work.

What are the key duties I need to know?

Statutory duties

The *Companies Act 1997* and the underlying law (common law) provide for the following directors duties:

- A duty to act in good faith and in what the director believes is in the best interests of the company.
- A duty to comply with the *Companies Act 1997* and the company's constitution.
- A duty to exercise the care, diligence, and skill that a reasonable director would exercise when performing their duties.
- A duty to exercise powers for proper purposes.
- A duty to avoid transactions in which the directors have an interest.
- A duty to use information for a proper purpose.
- A duty not to make improper use of his or her position.
- A duty to prevent the company from engaging in insolvent trading.
- A duty to disclose a relevant interest in shares of the company.
- A duty to ensure proper accounting records are kept.
- A duty to supervise the share register.

What is good faith?

Case law in PNG provides some guidance as to what constitutes "acting in good faith." In assessing whether a director has acted in good faith, the PNG courts have stated that:

- directors must turn their minds to the interests of the company by attending necessary meetings and considering company documents. Ignorance is no defence, meaning that directors must act competently in fulfilling their obligations;
- directors must not actively use their office to obtain undue benefit, or to give their individual interest priority over that of the business; where there is a substantial conflict of interest, this may make it impossible for the director to fulfil his or her duty to act in good faith.

The *Companies Act 1997* has set out examples of where a director would be taken to have acted in bad faith, including where the director:

- persistently failed to comply with the *Companies Act 1997;*
- is found guilty of fraud in relation to the company; or
- acted in a reckless or incompetent manner.

Comply with the *Companies Act 1997* and the company's constitution

Directors must comply with the provisions of the *Companies Act 1997* and the company's constitution (if it has one). Failure to do so, or knowingly allowing the company to do so is a breach. This is a general and broad duty so to ensure compliance with the *Companies Act 1997* and company's constitution, directors should carefully consider both, and where necessary seek advice on the provisions regarding their duties.

What degree of care, diligence and skill do I need to exercise?

In discharging this duty, you must exercise the degree of care, diligence and skill that a “reasonable director” in the “same circumstances” would have exercised.

What constitutes being a “reasonable director” is an objective standard. This standard considers what a reasonably competent director would do in the particular position and with the same responsibilities as the director.

The standard of skill may be higher if directors have been appointed to fulfil a particular task; importantly, a director may be liable if they do not have the required skills for the task. To determine the “circumstances” of the director, relevant considerations may include the size and nature of company, whether the company is listed, the composition of the board and the state of the company’s financial affairs.

Exercising powers for proper purposes

Directors must not use their powers for improper purposes. The exercise of a power for a purpose other than the reason the power was conferred will be invalid even if the motives of the directors are bona fide.

The test for determining whether a director’s power was exercised for a proper purpose is an objective one.

Irrespective of whether the improper purpose is the main reason, or merely one of a number of reasons for making a decision, the decision will be invalid if, but for the improper purpose, the decision would not have been made.

Transactions involving self-interest

Under the *Companies Act 1997*, directors are under an obligation to disclose whether they have an interest in a transaction or a proposed transaction.

Directors may be deemed interested, where they will or may derive, “a material financial benefit”, from the transaction or proposed transaction.

This responsibility extends to circumstances including where:

- the director’s parent, child or spouse may derive a material financial benefit from a transaction; or
- an officer or trustee to one of the other parties who will receive a material interest from the transaction is a director.

While a failure of the director to disclose the interest does not alter the validity of the contract, a director may be found to have committed an offence. Under certain circumstances the company may have the power to set aside the contract.

Other requirements involving self-interest

Directors are also prohibited from disclosing information privy to them due to their position, nor use the information in any share dealing with the company or a related company to their benefit. Directors must also disclose their relevant interests in any share dealings.

Duty not to abuse corporate opportunities

Directors must not use their position or any information which comes to their knowledge in the course of acting as director to pursue opportunities for personal gain.

The director will still be in breach of this duty irrespective of whether or not the company could have utilized the opportunity itself.

Duty to prevent company engaging in insolvent trading

Whilst not referred to as a duty, the *Companies Act 1997* imposes an obligation on directors to prevent insolvent trading. In order to establish a breach, a claimant must show the company has incurred a debt at a time when the company was unable to satisfy the solvency test or that by incurring the debt the company thereby became unable to satisfy the solvency test. A breach could result in the director being personally liable for any damage or loss.

Duty to ensure proper accounts kept

The board, and by extension each director, of a company shall cause accounting records to be kept that:

- correctly record and explain the transactions of the company;
- will at any time enable the financial position of the company to be determined with reasonable accuracy;
- enable the directors to ensure the financial statements of the company comply with generally accepted accounting practice; and
- enable the financial statements of the company to be readily and properly audited.

If a company that is in liquidation and is unable to pay all its debts has failed to keep proper accounts and the Court considers the failure:

- has contributed to the company's inability to pay all its debts; or
- has resulted in substantial uncertainty as to the assets and liabilities of the company; or
- has substantially impeded the orderly liquidation or for any other proper reason,

the Court may declare any director, and former director, personally liable, without limitation of liability.

Duty to supervise the share register

Each director must take reasonable steps to ensure the share register is properly kept and share transfers are promptly entered on it in accordance with the *Companies Act 1997* and constitution.

What liabilities do directors face if they fail to comply with their obligations?

Potential civil and or criminal liabilities

All prospective or existing directors need to clearly understand that their actions as a director (or as a board) may attract civil or criminal liabilities. The *Companies Act 1997* creates both civil and criminal penalties for breaches. A director may be liable depending on the category of offence the act or omission falls under.

Penalties vary dependent on the nature of the breach. Penalties can include financial liabilities, imprisonment and/or disqualification.

How can I be protected?

Directors can rely on two broad defences in connection with breaches of directors' duties under the *Companies Act 1997*, namely:

1. Proving that all reasonable and proper steps were taken to ensure that requirements were complied with, either by themselves, or with other members of the board, and the company.

   Under this defence, directors will not be held liable for any breach where the circumstances meant the director could not reasonably have been expected to take steps to ensure that either the company, or the other directors complied with the requirements.

2. The business judgment rule.

   The business judgment rule protects a director from liability where they make a decision in relation to the operation of the business, and:

- the business judgment was made in good faith for a proper purpose;
- the director had no material personal interest in the decision;
- the director reasonably believed they were appropriately informed about the decision; and
- the director rationally believed the decision was in the best interests of the company.

It is important to remember that the business judgment rule will only protect a director from any liability arising from the duty of care, skill and diligence.

What other procedural matters do I need to understand as a director?

In addition to the key directors' duties, there are a myriad of procedural obligations which directors need to know as part of their role as a director. Failure to comply with these responsibilities can lead to a director incurring liability.

We have set out below some key procedural matters which directors should understand. This list is not exhaustive, and directors should always take advice when in doubt.

Appointment of directors

Natural persons may be appointed as directors upon the registration of a company. A director will take office from date of registration until they resign, are removed, or retire.

Under the *Companies Act 1997*, all subsequent directors shall be elected individually by ordinary resolution of a meeting of the shareholders, although this rule may be displaced under the company's constitution.

Indemnity

A director may be indemnified by the company, only if expressly authorised by its constitution, for any costs incurred by him or her, and any liability to another person for an act or omission in capacity as director. A company cannot indemnify a director against criminal liabilities. There is no prohibition in directors taking out insurance to provide some form of financial protection against some of the risks associated with a directorship.

Annual reports

At the conclusion of five months after every accounting period, the board must compile an annual report and send it to all shareholders. Every annual report must be in writing, describe all information that the board believes is material for the shareholders in understanding the company's state of affairs, including financial reports, any changes in policy, list the entries in the interests register for that accounting period, list employees and former employees who were remunerated above K100,000.00 per annum, state all donations, and state the names of the persons holding office.

Reporting to the registrar

Directors may be liable for the board's collective responsibilities. The board has the responsibility to submit certain required documents to the Registrar within a particular time frame. For instance, directors must submit changes to the constitution to the Registrar within a month of the change. When a resolution is passed, a copy of the resolution must be sent to shareholders who did not sign the resolution.

Record keeping

Directors are also liable for the board's record keeping responsibilities. The board must keep a written record or a record that is easily convertible to written form. It must also maintain the share register and hold accounting records for the last 10 accounting periods. These records must be made available to the auditor.

Meetings

A meeting of the board requires two days' notice and requires a majority of directors gathered in one place, or connected via other agreed methods of communication, although the company's constitution may specify a longer notice period for directors meetings.

Remuneration

At a meeting of the board, subject to the company constitution, directors may vote on the method and amount of remuneration.

What other obligations as a director do I need to understand?

In addition to the key duties and responsibilities under statute and general law, there are a number of other obligations that directors must comply with under other PNG laws. These obligations extend to responsibilities under environmental, work health and safety, tax as well as competition and consumer legislation.

Depending on the industry you work in, some of these duties may be particularly important to understand as part of your day-to-day functions.

Duties under environmental law

Under the *Environment Act 2000* directors and other company officers are required to ensure that their company complies with environmental standards and requirements. Directors who aid or abet contravention of these requirements will be liable.

Directors must ensure that their company apply and receive relevant environmental approvals from the Conservation and Environment Protection Authority for all business activities that have an environmental impact.

"In addition to the key duties and responsibilities under statute and general law, there are a number of other obligations that directors must comply with."

Work health and safety duties

Under the *Industrial Safety, Health and Welfare Act 1961* directors may be liable as employers. Directors as employers must provide adequate sanitary facilities and disclose to the Department of Labour and Industrial Relations any injury that occurs through the course of employment.

It is also the responsibility of employers to ensure that employees comply with safety requirements, including wearing personal protection equipment or correctly using machinery.

The Department of Labour also empowers Industrial Safety Officers to issue compliance orders and question employers regarding any work health and safety matters. Companies and employers who do not comply with the directions of Industrial Safety Officers will be liable to fines.

There is an extensive set of industry specific workplace health and safety requirements contained within legislation, regulation and orders. Employers must be aware which requirements apply to their business and ensure employees comply.

What are the key duties I need to know?

Statutory duties

Directors' duties in the *Companies Act 2012* and the International *Companies Act 1992* closely follow those set out in other common law jurisdictions, including the following fundamental duties:

- A duty to act in good faith and in a manner the director reasonably believes to be in the interests of the company.
- A duty to exercise the care, diligence, and skill that a reasonable person would exercise in the same circumstances.

The *Companies Act 2012* also creates additional duties, including:

- A duty to act in compliance with the *Companies Act 2012* and the company's rules, and ensure the company is also in compliance.
- A duty to not exercise power where the director has an interest in the transaction.
- A duty to not improperly disclose or use information obtained through their position as director.

> "In short, in addition to acting in good faith, honestly and with a proper motive, directors must satisfy a two limb test."

What is the duty of good faith?

The duty of good faith requires that directors act honestly and with a proper motive. As for the director's belief, the Courts have deemed it to be a subjective belief as they are reluctant to intervene and second guess a director's commercial decision. The wording in the *Companies Act* and the *International Companies Act 1992* clearly necessitates a 'reasonable belief'.

In Australia, the duty of care, skill and diligence is met if four criteria set out in the *Corporations Act 2001* are fulfilled. One of these is the requirement for the director to have a rational belief that the decision is for the benefit of the company. According to the Act and applied at common law, a belief is assumed rational unless it is so unreasonable that no reasonable person in the director's particular position would hold it. The nature of the company, the nature of the director's position and functions and the nature of the decision must be considered.

The similar wording for a rational belief in Australia and for a reasonable belief in Vanuatu may render Australian law persuasive. However, the key difference in Australian courts defined the word rational to mean both 'reasonable' and 'based on, derived from, reason or reasoning'. Thus, the Australian standard is arguably higher.

In short, in addition to acting in good faith, honestly and with a proper motive, directors must satisfy a two limb test. Firstly, directors must meet a subjective requirement that they actually believed the decision to be in the interest of the company. Secondly, directors must meet an objective requirement: the belief is deemed reasonable unless no reasonable person in the director's position would hold it.

Duties under competition and consumer law

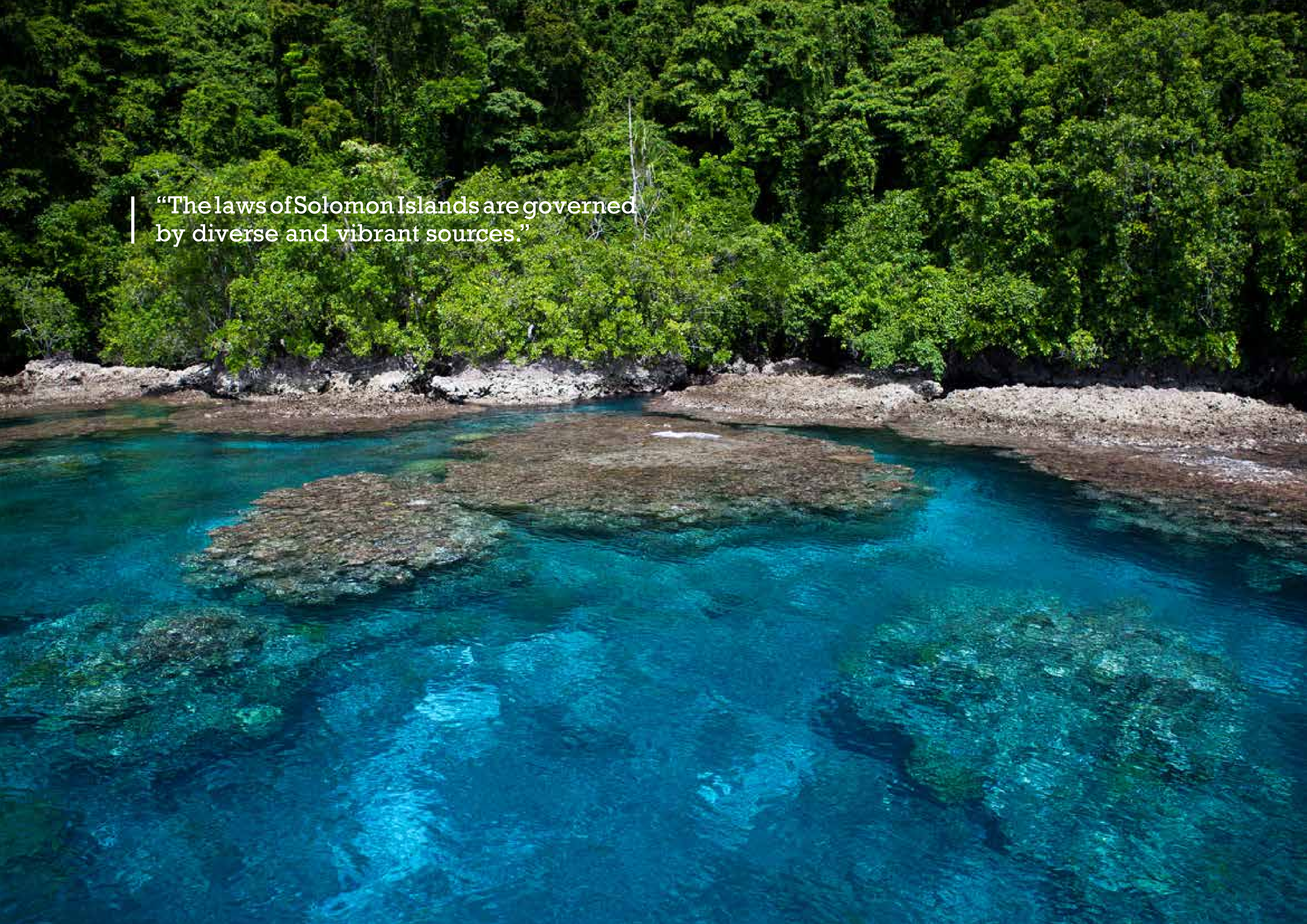
Consumer protections are set out in the *Independent Consumer and Competition Commission Act 2002*. Directors will be held personally liable unless the offence was committed without their knowledge or they used all due diligence to prevent the commission of the offence. A corporation may be convicted of offences relating to, (among other things):

- practices substantially lessening competition, price fixing, taking advantage of market power and resale price maintenance; and
- supplying unsafe goods, not providing information required by the Competition and Consumer Commission standards.

A board cannot indemnify any members of the board for any pecuniary penalties set out in the *Independent Consumer and Competition Commission Act 2002.*

Tax duties

The main laws affecting the taxation are the *Income Tax Act 1959* and *Goods and Services Tax Act 2003.* Under these statutes, directors are responsible for ensuring companies fulfil their tax obligations. All actions taken by the directors will be taken as being performed by the company itself, as such where the company has not complied with the tax rules the public officer and directors may be jointly liable alongside the company.



"The laws of Solomon Islands are governed by diverse and vibrant sources."

Solomon Islands

Overview

The laws of Solomon Islands are governed by diverse and vibrant sources. The constitution, being the supreme law, enshrines the use of statute, common law and customary laws.

Historically, the Solomon Islands have followed English common law as well as common law from various surrounding jurisdictions such as Australia and New Zealand which remain highly persuasive. Directors' duties are contained within the Solomon Islands' *Companies Act 2009* and substantively follow the common law approach to directors' duties. Directors' duties may also arise in the company rules or under an agreement between directors and the company.

Primo Afeau
Legal Services
Pacific Legal Network

Am I a director?

In the Solomon Islands, a director is someone who occupies the position of director regardless of the name given to the position. A director manages or directly supervises the management of business and affairs of the company.

A person who is not a director in an official capacity may still be deemed to be a director for liability purposes, if a director is:

- a person whose instructions are followed by validly appointed directors;
- a person who exercises powers that would usually be exercised by the board; and
- a person who is a delegate of the board of directors.

You may be a director provided you are not “disqualified”. Individuals are disqualified if they are less than 18 years of age, are an undischarged bankrupt, or have been prohibited from being a director by the Court. A company may specify additional qualifications for directors in its company rules.

In the shadows

A person who is not a director in an official capacity may still be deemed to be a director for liability purposes. This means you may be liable as a director if a director or the board is accustomed or required to act in accordance with your directions or instructions. This type of director is usually known as a “shadow director.” Shadow directors do not need to be validly appointed, however will be vested with the powers of a director and any subsequent obligations and liabilities.

A person who exercises powers that the *Companies Act 2009* defines as “directors’ powers”, apart from the rules of the company, may be liable to the same extent as directors in connection with these powers.

Can I delegate my duties?

A director may delegate certain powers under the *Companies Act 2009.* If a director delegates his/her powers to another person, that person, on accepting the delegation, may be liable in connection with the exercise of those delegated powers, just as the director would be.

> “A person who is not a director in an official capacity may still be deemed to be a director for liability purposes.”

What are the key duties I need to know?

Statutory duties

The *Companies Act 2009* provides the following duties:

- A duty to act in good faith in a manner the director believes is in the interests of the company.
- A duty to act in a manner that complies with the *Companies Act 2009* and the company's rules.
- A duty to avoid transactions involving self-interest.
- A duty to use company information for a proper purpose.

There are a number of other provisions which also apply to directors under the *Companies Act 2009.*

Like other common law jurisdictions, the Solomon Islands have recognised other duties.

Directors also owe a fiduciary duty to the shareholders of a company that, if there is a conflict of interest directors must make frank and full disclosure; it is not enough for a director to reveal the existence of an interest.

A director's fiduciary duty also includes a duty to not improperly profit from their position as a director.

> "The director is given wide discretion to avoid the Court substituting its opinion for that of the directors'."

What is good faith?

Since the introduction of the Companies Act 2009, there have been no cases relating to 'good faith'. However, given that the wording is similar to the New Zealand *Companies Act 1993*, New Zealand case law may be persuasive.

To test whether a director has fulfilled the duty to act in good faith in a manner the director believes is in the interest of the company involves a subjective assessment that the director's belief was without malice or dishonesty.

The director is given wide discretion to avoid the Court substituting its opinion for that of the director. In assessing whether the director has acted in good faith, the interests of the company are to be considered as a whole.

Currently no Solomon Islands' case law qualifying directors' belief in the interest of the company exists. Other common law countries, like Australia, require the belief to be rational. There is a minimal objective test: a belief is deemed rational unless it is so unreasonable that no reasonable person in their position would hold it.

What degree of care, diligence and skill do I need to exercise?

To determine whether directors have met the required standard of care, diligence and skill, the *Companies Act 2009* provides guidance. The statute requires, without limitation, that the nature of the company, the nature of the decision and the specific director's position and responsibilities should be taken into account.

Transactions involving self-interest

Under the *Companies Act 2009*, directors must not exercise power if they are directly or indirectly materially interested in the transaction. However, there are exceptions to this rule and a director may exercise such power if:

- the *Companies Act 2009* authorises it; or
- the director has reasonable grounds for believing that the company will satisfy the solvency test after the exercise of the power, and:
  - the shareholders have unanimously approved the exercise of power; or
  - the company rules authorised the director to exercise power.

There is an additional requirement for an exercise of power authorised by the company rules. The rules require that the director disclose the nature and extent of the interest in writing to a director who is not interested or to all shareholders.

As an example, the model company rules in the *Companies Act 2009* require directors to disclose the nature and extent of their interest within 10 days of becoming aware of that interest.

> "…directors must not exercise power if they are directly or indirectly materially interested in the transaction."

Making use of information

Directors must not improperly disclose or make use of information gained in their capacity as director. There are exceptions to this duty and directors may disclose or make use of information if:

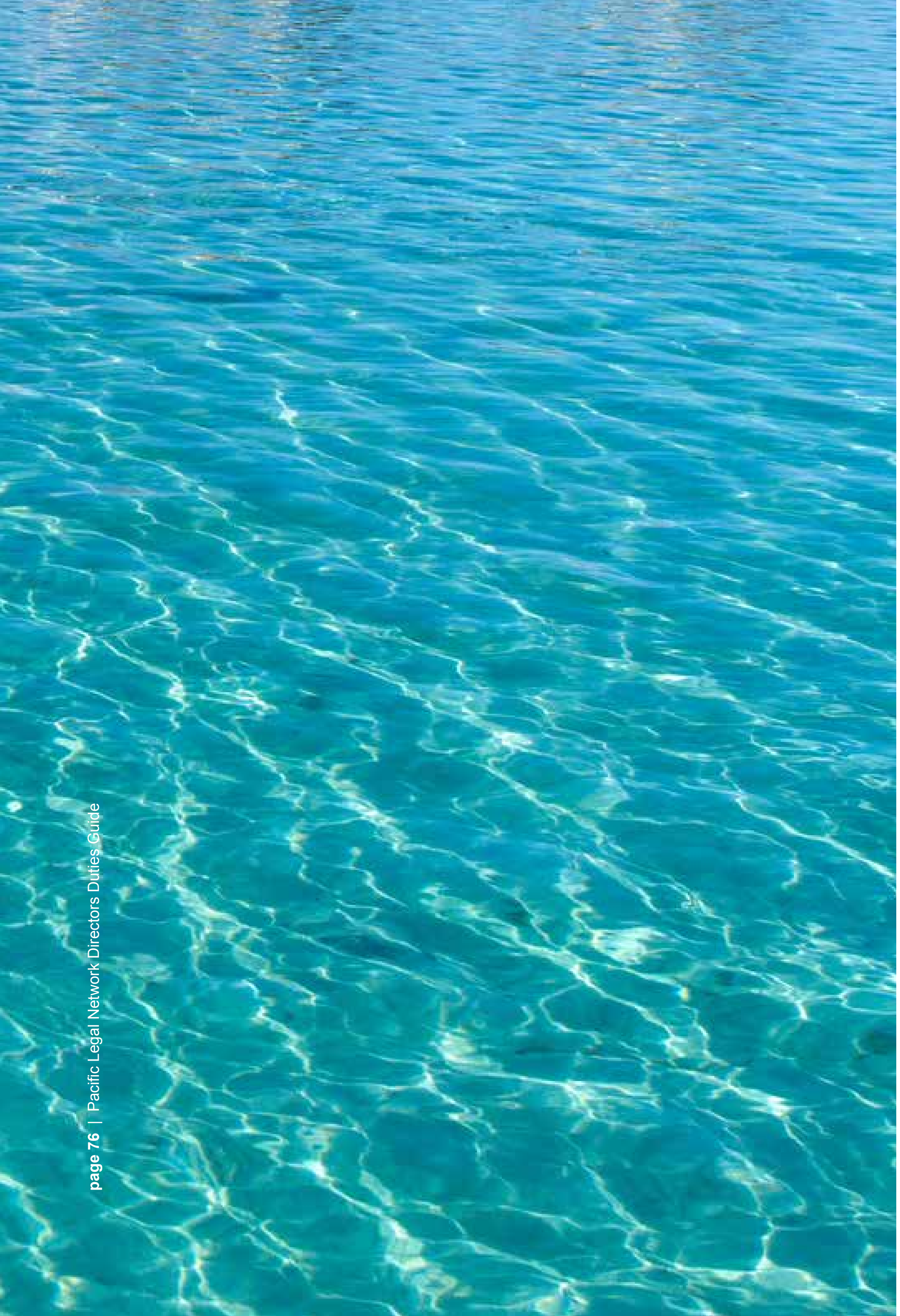
- it is in the interest of the company;
- it is required by law; or
- the director has reasonable grounds for believing that the company will satisfy the solvency test after the exercise this power, and:
  - the shareholders have unanimously approved the exercise of this power; or
  - the company rules authorised the director to exercise this power.

Prohibition against insolvent trading

A director must call a meeting of directors within 10 working days to consider appointing a liquidator if the director believes that the company is unable to pay its debts as they fall due in the normal course of business, or the director is aware of matters that would put any reasonable person on inquiry as to whether the company is unable to pay its debts.

A director will be liable to any creditor to whom the company incurs an obligation after the time that the director failed to call a meeting of directors if at the time of that failure, the company was unable to pay its debt and the company is later placed in liquidation.

Liability to creditors is joint and several, which means that a board may be liable to a creditor for the actions of one of the members or the board.



What liabilities do directors face if they fail to comply with their obligations?

Liabilities

A director may be liable for acts or omissions contravening the *Companies Act 2009* committed both as an individual director or committed as a collective board for which every director is personally liable. A director may incur a civil or a criminal penalty corresponding to the relevant act or omission.

A director may be criminally liable for up to seven years' imprisonment for offences, such as:

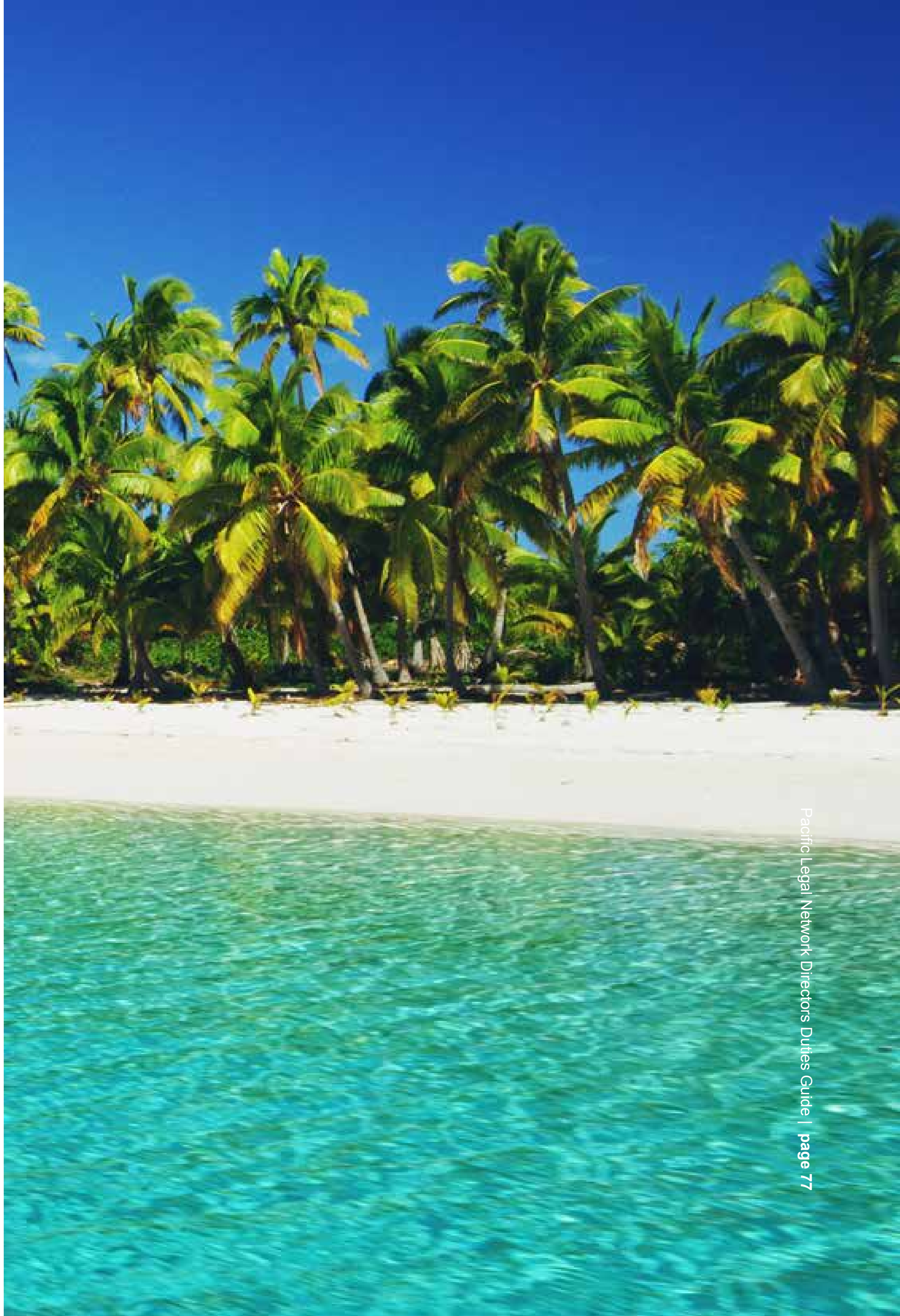
- destroying or falsifying records or is a party to destroying or falsifying records with the intent to defraud or deceive a person;
- receiving any property of the body corporate and, altering or omitting to make a full record with intent to defraud; or
- circulating or publishing a written statement that the director knows to be false with intent to defraud.

> "A director may incur a civil or criminal penalty corresponding to the relevant act or omission."

Do I have defence?

There are several available defences if a director is charged with breaching a directors' duty including:

- the director took all reasonable and proper steps to ensure that all requirements were complied with;
- the director took all reasonable and proper steps to ensure that other directors complied with all requirements; or
- in the circumstances, the director could not reasonably have been expected to take steps to ensure other directors complied with the requirements.



What other procedural matters do I need to understand as a director?

In addition to directors' duties generally, it is important for directors to be aware of procedural requirements as they may be personally liable for failing to comply with them. The headings below list the main areas where a director needs to take care but this list is not exhaustive and directors should always take advice when in doubt.

Appointment of directors

A person may be named as a director in a company's application for registration, whereby the director will hold office as director from the date of registration. Subsequently, directors may be appointed by ordinary resolution unless the company's rules state otherwise.

Indemnity

A company cannot indemnify a director in respect of any liability arising out of a breach of a director's duty unless such indemnity is expressly provided in the company rules or with the unanimous approval of the shareholders. Under no circumstances can the company indemnify a director for criminal liability.

Annual reports

The directors must prepare an annual report on the affairs of the company during the accounting period. The annual report must be in writing. It must include financial statements for the accounting period. It must also include the names of directors as at the end of the accounting period and the names of those who have ceased holding office as directors during the accounting period.

Reporting to the registrar

Every director may be individually liable for failing to comply with the board's collective reporting duties to the Registrar. For instance, the board has a duty to notify the Registrar within 10 days of the issue of shares.

Record keeping

Likewise, if the board does not adhere to its record keeping obligations, every director may be personally liable. As an example, the board has an obligation to correctly record and explain the transactions of the company to ensure that at all times the financial position of the company can be determined. If the board breaches this duty, every director may be liable.

Meetings

The company's rules must include provisions for holding directors' meetings and the procedure of those meetings.

Remuneration

The company's rules define the remuneration of directors. Directors' remuneration may also be defined by unanimous shareholder approval.

> "The directors must prepare an annual report on the affairs of the company during the accounting period."

What other duties do I have?

The *Companies Act 2009* outlines directors' duties. However, directors may also be liable under legislation. Depending on the industry within which your company operates, you may need to be attentive to one or more of the following areas of the law.

Duties under environmental law

Under the *Environment Act 1998*, where a company is guilty of an offence, directors who authorised, or participated, or contributed to the offence by neglect or omission may be personally liable. A corporation may be liable for:

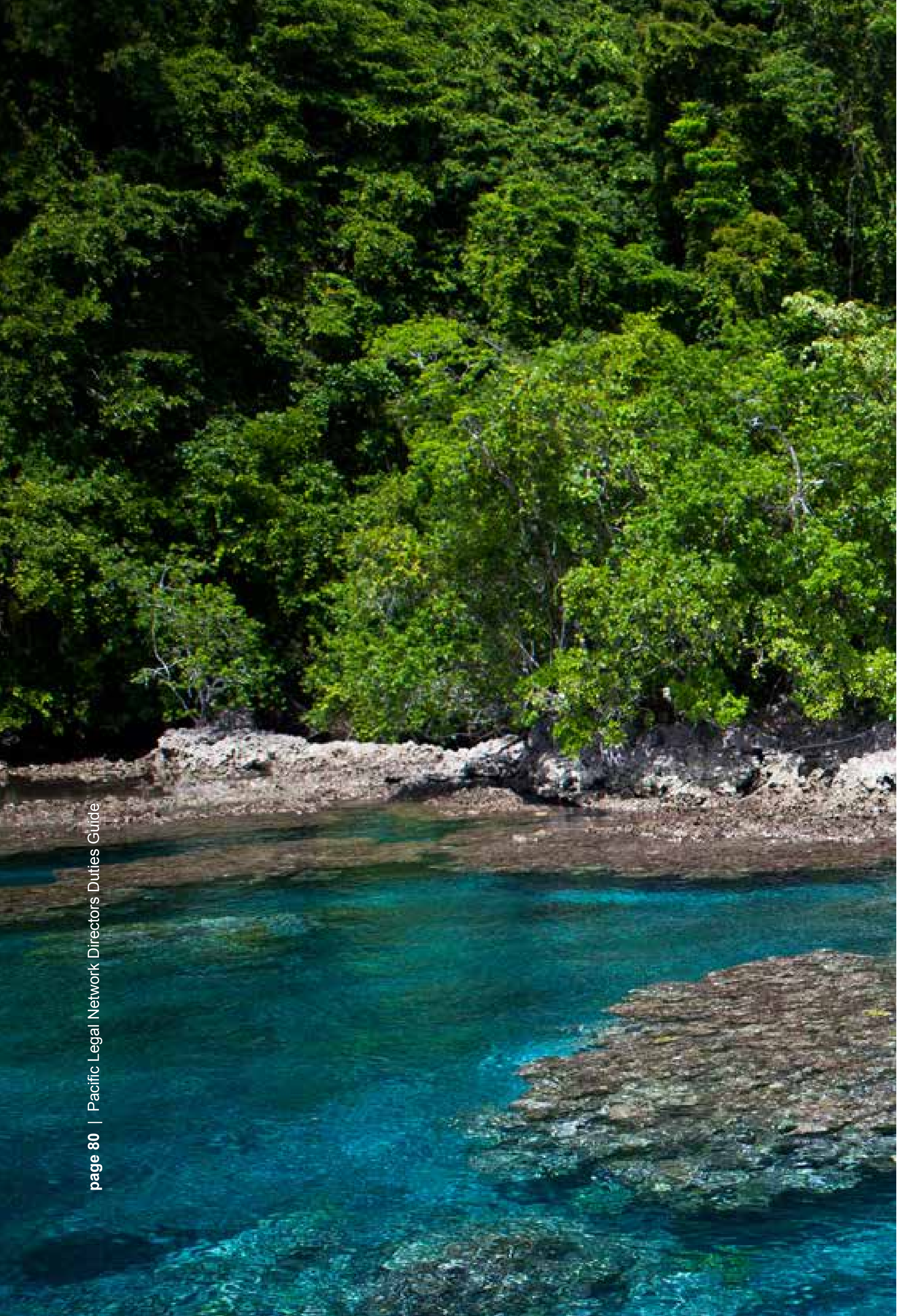
- carrying on prescribed development without approval by the Minister;
- filing a misleading environmental impact statement or public environmental report;
- emitting noise, dour or electromagnetic radiation which unreasonably interferes with the health, welfare, convenience, comfort or amenity of any persons;
- allowing waste to be placed in a position that could gain access to the environment and is likely to result in pollution; or
- breaching conditions of environmental licences.

Work health and safety duties

Directors are not specifically targeted as potentially liable for an offence under the *Safety at Work Act 1982 (Cap 74).* However, they may be made personally liable if they are a "person in control". A person in control is defined widely as someone in control of a workplace or plant, but also of an activity. The *Safety at Work Act 1982 (Cap 74)* further specifies that duties are not imposed on a person in control if the requirement is beyond his or her control. In other words, if a person in control of a plant is directed or limited by a director, then a director would be liable.

A person in control has a duty to ensure that the workplace is safe and without risk to health. In addition to liability for breach of this general duty, a person in control may be liable for offences including failing to protect persons from harmful dust and fumes and failing to comply with requirements where dangerous machinery, electrical installations and heavy lifting is involved.

> "A person in control has a duty to ensure hat the workplace is safe and without risk to health."



Duties under Competition and Consumer Law

Consumer laws are set out in the *Consumer Protection Act 1995 (cap, 63).* Where a corporation is guilty of an offence, every person who was a director at the time of the offence may be personally liable. It is a defence that the offence was committed without the director's knowledge and that the director exercised the diligence that he ought to have exercised to prevent the commission of the offence.

The director may be liable for the corporation's offences including selling goods below an approved standard, misleading or deceptive conduct, false representations, price discrimination and monopolisation.

Tax duties

Directors are liable for offences committed by the corporation under the *Sales Tax Act 1996 (cap, 125)* and the *Income Tax Act 1965*. A corporation may be guilty of offences under the *Sales Tax Act 1996* include knowingly making a false representation for the purpose of obtaining reductions or exemptions of sales tax and defaulting in filing or remitting a return. Under the *Income Tax Act 1965*, a corporation may be liable for failing to make tax deductions or for incorrect or fraudulent returns, among other offences.

"TheKingdomofTongaisaPolynesianarchipelago that is comprised of 176 different islands."

Photography by Kathryn Hindle

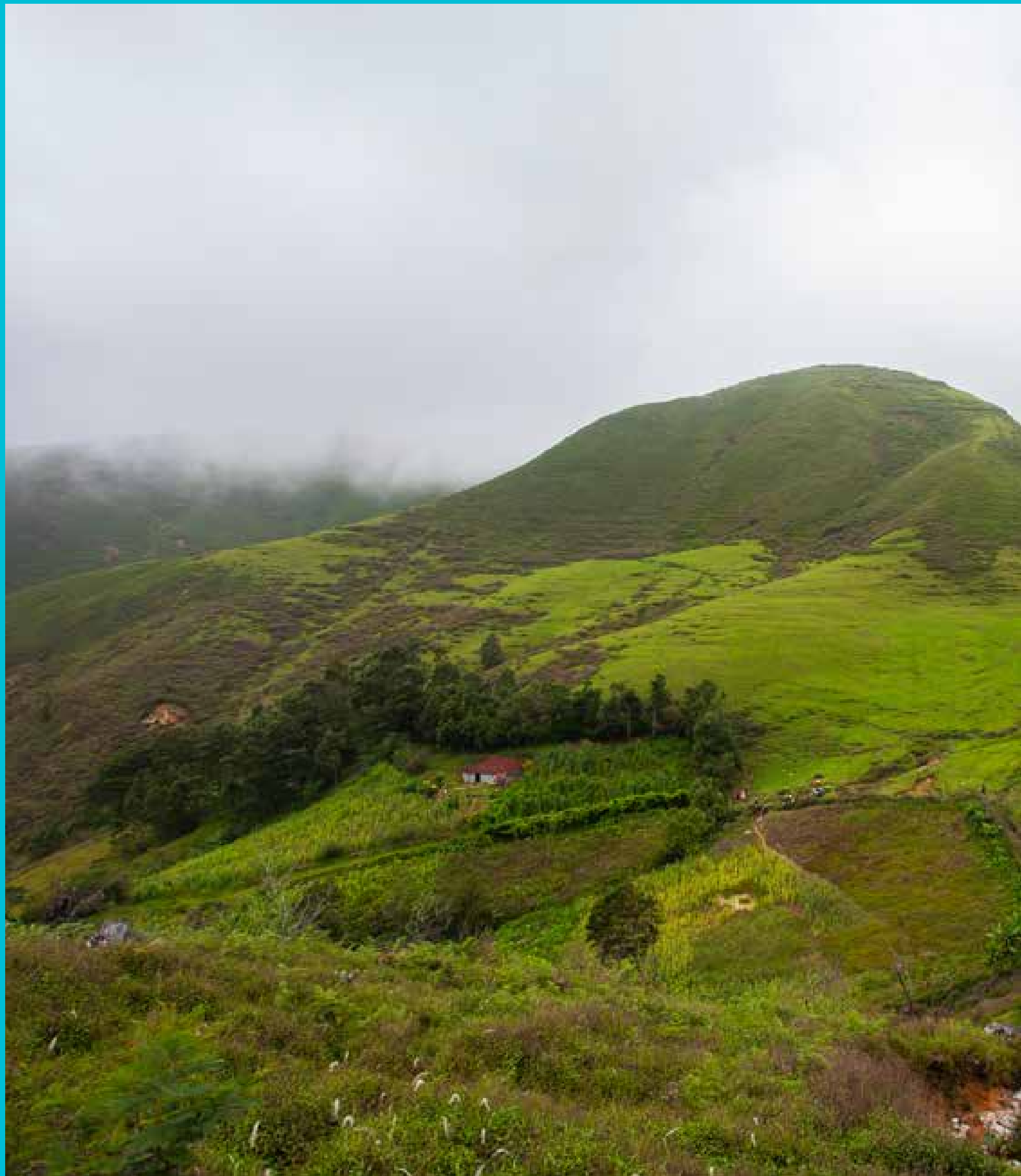
Timor-Leste

Overview

Timor-Leste's economic growth has been largely sustained by revenues from the Petroleum Fund. However, in pursuit of long-term sustainability, economic diversification has emerged as a strategic priority. This shift aims to broaden national revenue sources through taxation and the active participation of the private sector, which plays a critical role in the country's sustainable economic development.

More than two decades after the restoration of independence, Timor-Leste has increasingly prioritized investment and diversification as key pillars of its economic policy. As such, both national and international investors are encouraged to contribute to the country's economic progress.

The country's legal system is rooted in civil law, drawing primarily from Portuguese legislation, doctrine, and jurisprudence as subsidiary sources. To support investment and business activity, a legal framework was established through parliamentary legislation, which defines a specific regime governing the organization, functioning, and registration of companies in Timor-Leste.



Am I a director?

A Director is the individual entrusted with managing the internal affairs of a company, overseeing its business operations and social responsibilities, and acting as the company's legal representative in all matters permitted by the applicable Company Law and the company's Articles of Association (hereinafter "**AoA**").

Pursuant to Company Law No. 10/2017, of 17 May (hereinafter, the "**Company Law**"), the term director may refer to a sole director or to a member of a board of directors. The terms director and administrator are used interchangeably and refer to the same role. In all cases, directors must be natural persons with full legal capacity.

Timor-Leste recognizes two main types of commercial companies:

Limited liability companies (Quota-based – "**Lda**") – involving participation in quotas and quota-holders; and Joint-Stock Companies (Share-based – "S.A") – involving participation in shares and shareholders.

In a Limited Liability Company (hereinafter "Lda"), management may be entrusted to one or more directors, up to a statutory maximum of thirty. These directors may be quota-holders or external individuals and are appointed in accordance with the company's Articles of Association and the applicable provisions of company law. Their core responsibilities include overseeing the daily management of the company, representing it legally, and ensuring compliance with regulatory obligations.

In a Joint-Stock Company (hereinafter "**S.A.**"), the board of directors must consist of an odd number of members, with a minimum of three, who may or may not be shareholders. However, the Articles of Association may exceptionally allow for the appointment of a sole director, provided the company's share capital does not exceed USD 200,000. The Articles may also establish the position of an executive director tasked with handling day-to-day operations. Directors are expressly prohibited from engaging, whether in their own name or on behalf of third parties, in business activities that compete with or are similar to those of the company.

> The terms director and administrator are used interchangeably and refer to the same role. In all cases, directors must be natural persons with full legal capacity.

Am I an officer?

Under Timorese Company Law, an officer of a company is described as follows:

- A director/administrator
- A legal representative
- A corporate secretary
- A shareholder/quota-holder
- An auditor

Each of the officers has assigned and designated duties as per described in the Company Law.

In the shadows

Directors appointed as legal representatives must reside in Timor-Leste, in accordance with legal requirements. However, not all directors are required to reside in the country, and the role of legal representative may be assigned to someone who is not a director.

Can I delegate my duties?

The company law allows the nomination of managers (for Lda's) and CEO's (for S.A's) to perform some line of business that is part of its purpose or appoint attorneys to perform certain acts or categories of acts. However, in Lda companies, it is established in the company law that "Directors shall not be represented in the performance of their duties".

At first glance, there may seem to be a contradiction between the Timorese company law rule that states "Directors may not be represented in the exercise of their duties", and the common practice in commercial companies of appointing managers (in limited liability companies) or CEOs/executive directors (in joint-stock companies) to carry out day-to-day management functions. However, this contradiction is merely apparent. This rule is intended to prevent directors from informally delegating or assigning their official duties to third parties who have not been formally appointed or recognized under the law or company's Articles of Association.

The purpose is to protect the company by ensuring that only individuals who have been formally and legally appointed to the role of director are authorized to act on behalf of the company and are subject to the legal duties and liabilities that come with that position. So, we can conclude that managers or CEOs are not exceptions to this rule, as they are not considered "representatives" in the prohibited sense. Managers (in "Lda" companies) or executive directors/CEOs (in S.A. companies) are corporate officers or governing bodies who have been properly appointed in accordance with the law and the Articles of Association; registered and formally accepted; and given authority through resolutions or specific delegation. Therefore, they are not informal substitutes, but rather duly empowered individuals within the legal structure of the company.

So, while a director cannot simply "appoint someone else to act for them," it is perfectly lawful for duties to be delegated internally to a CEO or executive director, so long as the proper procedures are followed.

Avoiding conflict while holding several officer positions in the company

A director may not simultaneously hold the position of corporate secretary within the same company. Likewise, a director is prohibited from concurrently serving as the company's auditor.

What are the key duties I need to know?

All directors shall be natural persons with full legal capacity and shall be responsible for managing and representing companies. Acts performed by directors on behalf of the company, within the scope of their legal powers, are binding on the company in relation to third parties. To that effect, directors shall sign documents on behalf of the company, expressly indicating their representative capacity.

Directors must always act in the best interest of the company and are required to exercise the diligence of a prudent and careful manager in the performance of their duties.

While the company's Articles of Association may define specific responsibilities for directors, the Company Law sets forth a number of residual obligations that directors owe to the company, as follows:

Duty of care

Directors must demonstrate availability, technical competence, and a sound understanding of the company's business appropriate to their role. In fulfilling their functions, they are required to act with the diligence of a prudent and orderly manager.

Duty of loyalty

Directors must act in the best interest of the company, taking into account the long-term interests of shareholders. This duty extends to the consideration of other stakeholders relevant to the sustainability of the company, including employees, clients, and creditors.

Prohibition of competition

Unless expressly authorised by a resolution of the general meeting, directors are prohibited from engaging—whether as employees or in a self-employed capacity—in any business activity that falls within the scope of the company's corporate purpose.

Liability towards the company

Directors are liable to the company for damages resulting from acts or omissions that breach legal or statutory obligations, unless they can demonstrate that they acted without fault.

Liability towards shareholders and third parties

Directors are also liable, under general civil liability principles, to shareholders and third parties for damages directly caused to them through acts performed in the exercise of their duties.

> Directors must always act in the best interest of the company and are required to exercise the diligence of a prudent and careful manager in the performance of their duties.

What are the rights and rules concerning remuneration and resignation and removal and dismissal of directors?

1. **Remuneration of Directors**

   Directors are entitled to remuneration as determined by resolution of the shareholders (or quota holders).

   Where a director is removed from office without just cause, he or she is entitled to compensation equivalent to the remuneration that would have been due until the end of the respective term of office.

2. **Resignation of Directors**

   A director may resign from their position by submitting a written notice addressed to the board of directors or the company secretary.

   Should the resignation cause damage to the company, the director may be held liable to compensate for losses arising from the resignation.

3. **Removal of Directors**

   The shareholders may revoke the mandate of a director at any time by resolution.

   If the removal occurs without just cause, the director is entitled to compensation, typically corresponding to the remaining remuneration due under their term.

4. **Dismissal of Directors for Just Cause**

   Dismissal may occur where there are serious or repeated breach of the director’s legal or statutory duties.

   In such cases, the director is not entitled to any compensation, and the dismissal may be immediate and with legal effect upon verification of the breach.

What are the liabilities should a director fail to comply with their obligations?

Directors who fail to comply with their legal or statutory obligations may face various consequences, including:

1. **Civil Liability and Compensation**

   Directors are liable to the company for damages resulting from acts or omissions in breach of their legal or statutory duties. This liability may be avoided only if the director can prove they acted:

   - In good faith.
   - On the basis of substantiated information.
   - Without any conflict of interest; and
   - According to reasonable business judgment.

   Directors are also personally liable to equity holders and third parties for direct damages caused in the performance of their duties, in accordance with general civil liability principles.

2. **Grounds for Dismissal**

   A serious or repeated breach of directors' duties constitutes just cause for dismissal.

   Such breaches include, but are not limited to:

   a) Failure to register, or delay in registering, acts required by law or failure to maintain orderly and up-to-date company books and records;

   b) Carrying out, in a personal or third-party capacity, business activities that compete with the company's business, without prior approval from the equity holders.

3. **Exclusion and Limitation of Liability**

   Directors who did not participate in a management decision or voted against it—and whose dissent was recorded in the minutes—shall not be held liable for the consequences of that decision.

   Absent such record, directors are presumed to have voted in favour. Liability among directors is joint and several unless otherwise established.

4. **Initiation of Liability Proceedings**

   Legal proceedings against directors for breach of duty must be initiated by resolution of the equity holders passed by simple majority, within three months of the resolution date.

   This resolution automatically entails the removal of the directors in question and requires the appointment of special company representatives tasked with bringing the compensation claim on behalf of the company.What other Procedural Matters Do I Need to Understand as a Director?

How can I be protected?

Although the Timor-Leste Company Law (Law No. 10/2017 of 17 May) does not expressly address insurance coverage for directors, there is no legal restriction preventing the company or its directors from seeking appropriate insurance policies. Directors and the company are free to obtain Directors and Officers (D&O) liability insurance or similar coverage to mitigate potential risks arising from the exercise of management functions.

What other procedural matters do I need to understand as a director?

Annual reports for Annual General Meeting

Directors are required to convene at least one annual shareholders' meeting, in accordance with the provisions of the Companies Law and the Company's Articles of Association, for the purpose of approving the financial statements relating to the preceding financial year.

Companies Registry Office

The Companies Registry Office is responsible for maintaining official company records through a public digital register. While the Company Law mandates the filing of Annual Returns, in practice the Registry Office is not yet fully operational to enforce or process such filings.

In the absence of a corporate secretary, directors are responsible for ensuring that company records remain accurate and up to date. Any changes to company particulars—including the appointment or removal of directors, or amendments to registered details—must be reported to the Companies Registry Office within 30 days of the change.

Board of directors meetings

The Company Law sets out a minimum (non-mandatory) requirement for quorum of the BoD, depending on the number of directors held by the company, and does not determine rules for notice for meetings of directors; rather, it is the Articles of Association of the company that will set specific directors' meeting protocols.

Tonga

Overview

The Kingdom of Tonga is a Polynesian archipelago that is comprised of 176 different islands. It is unique in the Pacific as it is a constitutional monarchy and has been for over 1,000 years. A reformed constitution implemented in 2010 considerably reduced the Crown's power, which has now devolved to the Cabinet. However, the monarch continues to retain some royal prerogatives like the right to veto legislation.

Tonga's legal system, like that of a number of Commonwealth countries, follows that of England in many ways. There are many similarities between the company law of Tonga and New Zealand, and thus precedent from common law jurisdictions such as Australia and New Zealand remains highly persuasive.

Tongan companies are governed primarily by the provisions of the *Companies Act* [Cap. 17.03], which sets out the main duties of directors. There are duties contained in other pieces of legislation such as that governing the environment, tax, consumer and competition and banking. Directors must also be mindful of their duties at common law. Additionally, a company may have a constitution that must be complied with.

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Am I a director?

A company must have at least one formally appointed director.

The *Companies Act* [Cap. 17.03] contains a broad definition of director, which includes people who are acting in a directors' role, even if not formally appointed.

Directors must be at least 18 years of age. Undischarged bankrupts, persons convicted of certain crimes and persons who do not comply with the qualifications contained in the constitutional documents of the company are not permitted to be directors. There is no requirement for a company to have a local resident director.

In the shadows

Directors' duties can apply to persons who are not formally appointed as directors. If you direct the company's business, exercise or are entitled to exercise powers that would fall to be exercised by the board, act in the position of director, or if the board is required or accustomed to follow your direction you could be considered a director for the purposes of the *Companies Act* [Cap. 17.03].

> "…the board may delegate one or more of its powers to a committee of directors, another director or an employee of the company."

Can I delegate my duties?

Subject to the company's constitution the board may delegate one or more of its powers under the *Companies Act* [Cap. 17.03] to a committee of directors, another director or an employee of the company or any other person. Schedule 2 to the *Companies Act* [Cap. 17.03] sets out the powers that cannot be delegated.

The board that delegates the power is responsible for the exercise of the power by the delegate. The board will not however be responsible where the board believed on reasonable grounds that the delegate would exercise the power in conformity with the duties imposed by the *Companies Act* [Cap. 17.03] and the Company's constitution, and where the board has monitored the delegate's exercise of the power. It is therefore important that directors continuously monitor delegates.

Can I rely on the information or advice provided by others?

When exercising its powers or performing duties, a director may rely on reports, statements and financial data, and other information prepared or supplied, and on professional or expert advice. The advice must be considered in good faith, the directors must make reasonable inquiries of the advice where the circumstances render this necessary, and the director must have no knowledge that such reliance is unwarranted.

What are the key duties I need to know?

Statutory duties

The *Companies Act* [Cap. 17.03] sets out the following duties:

- A duty to act in good faith and in the best interests of the company.
- A duty to exercise powers for a proper purpose.
- A duty to comply with legislation and the company's constitutional documents.
- A duty to avoid reckless trading.
- A duty to act with reasonable care, diligence and skill.
- A duty to disclose any conflicts of interest and declare any interest in a proposed transaction.

What degree of care, skill and diligence must I exercise?

A director must exercise the care, diligence and skill that a reasonable director would exercise in the circumstances, taking into account:

- The nature of the company.
- The nature of the decision.
- The position of the director and the nature of the responsibilities undertaken by him or her.

The test is objective, however these are subjective considerations. The position of the director is compared with directors in similar circumstances. The expectations of a director of a small closely held company are likely to differ from those of a director of a large publicly listed company.

It is important to note that you can breach a duty by failing to do something or 'letting' something happen. You must therefore ensure that you have a reasonable knowledge of what is happening within the Company at all times.

What is good faith and in a manner the director believes to be in the best interests of the company?

The test is subjective (what the director honestly believed to be right at the time of exercising the power or performing the duty) however the courts generally also consider an objective test – that is, how a reasonable director would be expected to act in the circumstances.

Directors must consider the company as a whole – they must not ignore the interests of minority shareholders and must not act in the interests of only one class of shareholder in the company.

Subject to the terms of a company's constitution, a director who is interested in a transaction may vote on a matter relating to that transaction.

> "The expectations of a director of a small closely held company are likely to differ from those of a director of a large publicly listed company."

Transactions involving self-interest

Under the *Companies Act* [Cap. 17.03] a director must disclose to the board of the company any interest in a transaction or proposed transaction with the company and enter it into the company's interests register. The *Companies Act* [Cap. 17.03] sets out the circumstances in which a director may be interested and includes a transaction where a director is a party to the transaction, or may receive a material financial benefit either personally or via a material financial interest in another party. The validity of the transaction is not affected by a failure by a director to disclose an interest in the transaction being entered into by the company.

A transaction entered into in which a director of the company is interested may be avoided by the company at any time before the expiration of 3 months after the transaction is disclosed to all the shareholders.

Misuse of company information

The *Companies Act* [Cap. 17.03] prevents directors from disclosing or using information acquired in their capacity as a director, except for the purposes of the company or as required by law. A director may disclose or make use of information if the particulars of the disclosure, use or act are entered in the interest register, the director is first authorised to do so by the board, and the disclosure, use or act will not prejudice the company. The law also prevents directors from using information for their own personal gain. This functions alongside, but is separate from, the rule regarding transactions involving self-interest.

Insolvent trading

Directors have a duty to prevent a company from trading whilst insolvent. A company is insolvent if it is not able to pay its debts as they become due.

The *Companies Act* [Cap. 17.03] contains two main duties which prevent directors from insolvent trading, namely:

- (**reckless trading**) a duty that directors must not agree or allow the company to continue trading in a manner which is likely to cause substantial loss to creditors; and
- (**obligations**) a duty that prevents directors from incurring obligations unless they believe on reasonable grounds that the company will be able to fulfill them.

The duty to avoid reckless trading is aimed at the general conduct of directors when in financial trouble, the duty as to these obligations is aimed at particular transactions, and a consideration of whether the company was, reasonably, in a position to meet those obligations, when entered into.


Photography by Kathryn Hindle


Photography by Kathryn Hindle

What liabilities do directors face if they fail to comply with their obligations?

Civil liability

Shareholders can bring claims against directors for breaches of duty either themselves, or where the duty was to the company, a claim can be brought in the name of the company via a derivative action. A court order is needed for a derivative action. The court will consider the likelihood of success, costs, actions already on foot, and the interests of the company. The key question is whether the prudent business person would believe the proceedings will succeed. Derivative actions have achieved the most success in closely held companies.

The court may disqualify a director if the director has been guilty of fraud or of a breach of duty or has acted in a reckless or incompetent manner in the performance of their duties as director.

The Court has wide powers to order relief, including ordering the director to repay money with interest, and compensation payments.

Do I have a defence?

If a director has committed an offence in relation to a duty, the director will have a defence if they can prove that:

- the board took all reasonable and proper steps to ensure that the requirements of the *Companies Act* [Cap. 17.03] were complied with;
- the director took all reasonable and proper steps to ensure that other directors complied with all requirements; or
- in the circumstances, the director could not reasonably have been expected to take steps to ensure other directors complied with the requirements.

The *Companies Act* [Cap. 17.03] provides that it is no defence to plead ignorance of the law. Nor is it a defence that the director relied on incorrect advice, unless the director was entitled to rely on that advice.

What other procedural matters do I need to understand as a director?

Companies register

The Companies Registrar maintains the online company records. Annual returns must be filed every year during the month allocated to the company and in the form prescribed by the *Companies Act* [Cap. 17.03]. In addition to filing the annual return, directors must ensure that the Companies Office records are kept up to date. Changes in directors, or changes to a company director's details must by notified to the registrar within 20 working days of the change occurring.

Annual reports

The board must prepare an annual report on the affairs of the company during the accounting period. The annual report must be sent to every shareholder of the company not less than 20 working days before the annual meeting of shareholders. Section 220 of the *Companies Act* [Cap. 17.03] outlines what an annual report must include.

Indemnity and insurance

Unless expressly authorised by its constitution or with the prior approval of the board, a company cannot indemnify or directly or indirectly effect insurance for a director under the *Companies Act* [Cap. 17.03].

Appointment of directors

A person named as a director in an application for registration holds office as a director from the date of registration. All subsequent directors of a company are appointed by an ordinary resolution of shareholders. This is subject to the constitution of the company. A court may also appoint directors in particular circumstances.

Meetings

Directors have an obligation to call at least one annual shareholders meeting (subject to the *Companies Act* [Cap. 17.03] and the company's constitution if there is one). The *Companies Act* [Cap. 17.03] (subject to the Company's constitution) sets out the procedures for calling meetings and the procedures at the meetings.

Remuneration of directors

Subject to the terms of a company's constitution, the *Companies Act* [Cap. 17.03] allows the board of a company to authorise the payment of director's remuneration. The board must authorise that the payment of remuneration is fair to the company and provide grounds for that belief, and also ensure that after authorising the payment that its particulars are entered in the company's interests register. If these requirements are not met, the director receiving the remuneration payment may be personally liable to the company for the amount of the payment.

Photography by Kathryn Hindle

What other obligations as a director do I need to understand?

In addition to the key duties and responsibilities under statute and common law, there are a number of other obligations which directors must comply with under various environmental, banking, tax as well as competition and consumer legislation. Depending on the industry you work in, some of these requirements may be particularly important to understand as part of your day-to-day functions.

Environmental

The *Environmental Management Act 2010* and the *Environmental Impact Assessment Act 2003* govern the protection and management of the environment in Tonga. Where a company is found guilty of an offence under these Acts, any director of that company at the time of the offence could also be found guilty and held liable.

Banking

Directors of licensed financial institutions may be held liable by a court for any loss or damage sustained by the licensed financial institution, as a result of gross negligence or willful misconduct in performance of their functions and duties as director as per section 26A of the *Financial Institutions Act* [Cap. 16.06]. The same applies to directors of banks under section 32 of the *Banking Act 2020.*

Directors also have a duty of confidentiality under the *Financial Institutions Act* [Cap. 16.06]. They cannot disclose any information in respect of a customer that it has acquired in their capacity as director of a licensed financial institution.

Tax

Directors have an obligation to ensure that a company meets its tax liabilities. In a liquidation situation where it is established a director has breached a statutory duty, that director may be called upon to return funds to enable the company to meet its tax liabilities.

Consumer and competition

Directors may become personally liable under section 32 of the *Consumer Protection Act* [Cap. 17.04]. Where an offence under the Act is committed by a company, any director of that company will be deemed to have committed that offence unless they prove that the offence was committed without their knowledge or involvement and that the director exercised all diligence to prevent the offence being committed.

There are also industry specific competition and consumer law regulations, for example the *Communications Act 2015*, under which directors can similarly be found personally liable for an offence committed by company it is a director of.

> "A director of a company may be held liable for any loss or damage sustained by a licensed financial institution… "

“Tuvalu” means “eight standing together”; it was named for the nation’s eight continuously inhabited islands.

Tuvalu

Tuvalu is one of the smallest and low-lying nations on earth. With the official languages being Tuvaluan and English, it consists of 124 islands, islets and atolls. “Tuvalu” means “eight standing together”; it was named for the nation’s eight continuously inhabited islands.

As this nation’s existence is threatened by rising sea levels due to the effects of climate change, it is important for Directors to stay across their environmental obligations, as well as many others outlined in the following chapter. To combat the climate crisis, Tuvalu has undertaken economic and legal reform, that is set to revolutionise how people and business engage with each other, including through the establishment of digital registries on blockchain. With all this change, it is important for Directors to understand the procedural matters in Tuvalu, and how Tuvalu’s Companies Act defines the term *director*.

Am I a director?

Under Tuvalu's Companies Act, the term *director* is defined broadly to include any person who occupies the position of a director, regardless of the title used. This means that even if someone is not formally appointed, they may still be considered a director if they carry out the functions of one in practice. To be eligible to serve as a director, the individual must be a natural person - not a company or other legal entity - and must give written consent to act in the role. Directors are also generally expected to be of good character and meet any applicable age requirements. For example, under Tuvalu's International Companies Act, a director must be at least 21 years old.

While a director is usually someone formally appointed by the company, Tuvaluan law also recognises *de facto* and *shadow directors*. A *de facto director* is someone who acts in the capacity of a director without formal appointment, while a *shadow director* is a person whose instructions or directions the appointed board members are accustomed to following. Additionally, *company officers*, such as managers or secretaries, are not directors by default but may still be held to similar duties and liabilities if they assume a decision-making role or exercise control over the company's affairs. The Companies Act ensures that anyone who effectively manages or influences a company's operations can be held accountable regardless of their official title.

> "Importantly, even after delegating, directors remain legally responsible for the outcomes."

In the shadows

Under the Companies Act of Tuvalu, a person does not necessarily need to be formally appointed as a director to be treated as one under the law. Individuals who act in the capacity of a director, or whose instructions the actual directors of a company habitually follow, may be considered "shadow directors". This means that even without an official title or board appointment, a person who effectively controls or influences the decisions of the board may be held accountable as if they were a legally appointed director. These individuals can incur the same duties and liabilities, both civil and criminal, as properly appointed directors, particularly if their actions or instructions guide the management or strategic direction of the company.

Can I delegate my duties?

Under Tuvalu's Companies Act, directors are permitted to delegate certain responsibilities to others, such as employees or committees, but this must be done with care. The company's Articles of Association may restrict what powers can be delegated, so directors must first ensure that any delegation aligns with the company's governing documents.

Importantly, even after delegating, directors remain legally responsible for the outcomes. They must actively supervise the delegated tasks, ensure the delegate is competent, and maintain proper oversight systems. Delegation does not remove a director's duty to act in the company's best interests, and failure to properly monitor delegated duties can still result in liability.

What are the key duties I need to know (i.e. duty of care, duty of loyalty, prohibition of competition, liability towards the company, liability towards shareholders and third parties)?

Under the Companies Act of Tuvalu, a company director has several key legal duties, including;

Duty of Care

The Companies Act states that every officer (which includes directors) must exercise “the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.” This means that when making decisions, you must act with a level of competence and attention that a prudent director in similar circumstances would. The Act also says directors must act honestly and in good faith with a view to the best interests of the company. Failure to meet this duty can result in liability under the Act: The Act makes it an offence if a director fails to secure compliance by the company with the requirements of the duty of care or is the cause of a default.

Duty of Loyalty / Good Faith & Best Interests

Directors are required to act honestly and in good faith in the best interests of the company. This is a key fiduciary obligation. You must prioritise the company’s interests over your personal interests, avoid exploiting your position for personal gain, and ensure decisions serve the company’s welfare. For example, the Act provides that no information about the company’s business or affairs may be disclosed by a director except for authorised purposes.

Prohibition of Competition / Conflicts of Interest

Although Tuvalu’s Companies Act does not use the exact phrase “prohibition of competition”, it includes provisions related to directors entering into contracts with the company and dealing with their own interests. The Companies Act provides that a director may enter any contract with the company and that such a contract “shall not be liable to be avoided nor shall a director be liable to account for any profit made thereby by reason of the director holding the office of director”. This indicates that the law allows, under certain conditions, conflicts of interest or dealings by a director, but these must comply with the Act and need proper disclosure and corporate governance. In practice, a director must exercise care and must disclose any interests, ensure transparency, and avoid situations where personal interests conflict with duties to the company.

Liability Towards the Company

Directors are collectively responsible for the management of the business and affairs of the company. If a company commits an offence by failing to comply with the duty of care or other obligations, directors who were responsible or failed to act may be individually liable. The Act provides defence where the director proves that he reasonably believed a competent and reliable person was charged with the duty of seeing compliance and was in position to do so. Thus, your actions (and omissions) as a director can expose the company, and you personally, to legal consequences.

Liability Towards Shareholders and Third Parties

While the statutory duties in Tuvalu focus primarily on the company itself as the duty holder, shareholders and third parties can still be affected by director behaviour. The Act's duty of care and loyalty are owed to the company, but in cases of wrongful acts, misrepresentation, or breach of duty, directors may face liability towards shareholders or third parties under common law or other statutes. For example, if a director fails to prepare and lay before the company proper financial statements or knowingly allows the company to trade while insolvent (though not explicitly stated in the Act, this may be drawn from general company law principles), shareholders or creditors might have recourse. In practice, you must consider that third party liability may arise especially if the company becomes insolvent.

As a company director in Tuvalu, your core obligations include acting with care and skill, prioritising the company's interests, dealing openly and honestly with conflicts of interest, managing the business responsibly, and being aware that your decisions can trigger liability towards the company and potentially shareholders or third parties. Non compliance can lead to offences and personal exposure.

> "Directors are required to act honestly and in good faith in the best interests of the company."

What are the liabilities should a director fail to comply with their obligations?

Civil Liability

As a company director in Tuvalu, you can be held civilly liable if you breach your duties to the company, its shareholders, or other stakeholders. Civil liability typically arises when a director fails to act in the best interests of the company, engages in negligent or dishonest behaviour, or allows the company to undertake actions that result in loss or harm. This can include approving transactions that are not in the company's favour, failing to maintain proper accounting records, or authorising the issue of shares without receiving fair value. Directors are also expected to exercise a reasonable standard of care, diligence, and skill in carrying out their responsibilities. If you act outside of this standard and your actions cause financial harm to the company or others, you may be personally liable to compensate for the loss. Civil claims can be initiated by the company itself, shareholders, or, in some cases, creditors.

Criminal Liability

In addition to civil liability, directors may also face criminal penalties for breaches of their statutory obligations. Certain failures such as not maintaining proper books of account, submitting false or misleading information, or breaching key corporate governance requirements can be treated as criminal offences. These offences may lead to fines or, in more serious cases, imprisonment, particularly where the breach involves recklessness or deliberate misconduct. Directors who are found guilty of knowingly allowing the company to act unlawfully or failing to prevent such actions may also be prosecuted. Criminal liability serves as a more serious consequence, reflecting the public interest in ensuring directors carry out their roles with integrity and within the framework of the law.

Do I Have a Defence as a Company Director?

Yes, as a director, you do have certain defences available if you are accused of breaching your duties. Generally, if you can demonstrate that you acted honestly, in good faith, and with reasonable belief that your decisions were in the best interests of the company, you may avoid liability. It is also a defence to show that you relied on competent professionals or other officers of the company whom you reasonably believed were fulfilling their responsibilities. Courts also consider a director's level of knowledge and experience when evaluating whether their conduct was reasonable. Furthermore, if you are charged with an offence for failing to ensure compliance with a legal obligation, you may be able to defend yourself by proving that you delegated the task to a qualified and reliable person and had no reason to believe they would fail in their duty. However, these defences will not apply in cases involving fraud, deliberate wrongdoing, or wilful neglect.

> "Courts also consider a director's level of knowledge and experience when evaluating whether their conduct was reasonable."

How can I be protected?

Act in good faith, with care and diligence

By meeting your core statutory duty to act honestly and in good faith with a view to the company's best interests, and to exercise the care, diligence and skill a reasonably prudent person would in comparable circumstances you significantly reduce exposure to liability. When you have documented decision making, proper board minutes, risk assessments, and align your actions with the company's memorandum and articles, you are building a strong defence.

Comply with the law, articles and corporate formalities

The Act requires compliance with the Act itself, company regulations and the company's own memoranda and articles.

Ensuring registers are up to date, accounts and annual returns are prepared and laid properly, conflicts are disclosed, and director qualifications remain valid will help protect you from breaching statutory obligations.

Use statutory relief provisions

The Companies Act includes a shareholder or company director relief mechanism. Under the Companies Act you may apply to the court, in proceedings to enforce liability against you, for relief (wholly or partly) if you can show you honestly and reasonably relied on competent information (e.g. audited financial statements or reports) and acted in good faith. Also, the Articles of the company may include a directors' indemnity rule (Second Schedule) that indemnifies you when you are successful or acquitted in legal proceedings.

Avoid conflicts of interest and ensure transparency

Although the Act allows directors to contract with the company under specific conditions, it is safest for you to declare interests, gain member approval where required, and ensure dealings are transparent. These practices help you avoid claims related to breach of loyalty or competing interests.

Ensure the company's governance and procedures are sound

When the company has robust internal controls, audit functions, board oversight, and you rely on reliable advisers and reports, the courts are more likely to view your decisions as informed and prudent. This helps if your conduct is later challenged.

> "When you have documented decision making, proper board minutes, risk assessments, and align your actions with the company's memorandum and articles, you are building a strong defence."

What other procedural matters do I need to understand as a director?

Annual Returns

Under Tuvalu's corporate regulatory framework, companies are required to submit an annual return to the Tuvalu Business Registry within twelve months of the end of their financial year. For example, if a company's financial year concludes on December 31, the annual return must be submitted by the following December 31. This filing is essential for maintaining the company's legal standing and ensuring compliance with local regulations.

The primary document required for this filing is the annual financial report, which provides a comprehensive overview of the company's financial situation. Additionally, companies may need to submit other documents, such as tax returns and compliance certificates, depending on the nature of their business operations. The Tuvalu Revenue Authority mandates the submission of tax returns to ensure compliance with the country's tax laws. It is also crucial for companies to stay informed about any changes in legislation that may affect their reporting obligations.

Failure to comply with the requirement to file the annual return can lead to administrative penalties. Therefore, companies must diligently prepare and submit the necessary documents to fulfill their annual filing and reporting obligations. Maintaining accurate records and adhering to these requirements contributes to the company's transparency and legal standing within Tuvalu.

Appointment of Directors

Every company must have at least two directors. On incorporation, a statement must be lodged giving the names and particulars of the first directors, who must consent in writing to act. When a director resigns or is removed, the company must update the register of directors and notify the Registrar within the relevant period. Under the Companies Act, for example, companies must maintain a "register of directors" and lodge updates within 14 days of change. Directors are typically appointed by shareholders at a general meeting, although the company's articles of association may specify procedures for appointment. Once appointed, the company is required to file a list of directors, including their names and addresses, with the Minister as part of the company registration and ongoing compliance obligations.

Indemnity

Companies in Tuvalu may provide indemnity to their directors for liabilities incurred while acting in their official capacity, as permitted by the Companies Act. However, such indemnities do not cover instances involving fraud, dishonesty, or wilful misconduct, and other criminal offences. It is important that any indemnity arrangements be disclosed to the shareholders and may require approval at a general meeting to ensure transparency and compliance with the law.

Annual Returns

Tuvaluan companies must file annual returns with the Registrar of Companies within 12 months following the end of their financial year. These annual returns typically include the company's financial statements, a current list of directors, and other statutory declarations as required by law. Failure to file the annual return on time can result in penalties and may even lead to deregistration of the company, so timely compliance is crucial.

Meetings

Companies are required to hold an Annual General Meeting (AGM) each year to present financial statements, elect directors, and address other key company matters. Shareholders must be given notice of the meeting according to the company's articles of association, which also set out the quorum necessary to conduct business at the meeting. Proper minutes of the meetings must be recorded and signed by the chairman to maintain an official record of decisions and proceedings.

Remuneration

The remuneration of directors must be approved by shareholders at a general meeting. This remuneration, along with any related benefits, should be disclosed in the company's financial statements to ensure transparency. Additionally, remuneration practices must comply with applicable laws and regulations, including those related to taxation and employment, to avoid legal complications.

> "Failure to file the annual return on time can result in penalties and may even lead to deregistration of the company, so timely compliance is crucial."

What other obligations as a director do I need to understand (i.e. environmental, banking, tax, consumer and competition)?

Environmental Obligations

Under Tuvalu's Environment Protection Act, directors must ensure that their company complies with environmental laws and regulations. One of the key obligations is ensuring that any business activity likely to have a significant environmental impact is subject to an Environmental Impact Assessment (EIA). This process must be completed before the activity begins. Directors also need to ensure compliance with the conditions of any environmental permits or licences, as failure to do so can result in penalties or revocation of the licence. Additionally, companies must adopt the "precautionary principle" meaning that environmental protection should not be delayed due to a lack of complete scientific certainty. Directors must also support the sustainable use of Tuvalu's natural resources, including land, water, and marine ecosystems, and ensure compliance with any international environmental agreements to which Tuvalu is a party. Directors are expected to integrate environmental risk management into their company's strategy and decision-making processes.

Tax Obligations

Directors are responsible for ensuring that their companies comply with all relevant tax obligations under Tuvalu's Income Tax Act and other tax legislation. This includes filing annual tax returns, paying corporate income tax on profits, and ensuring compliance with indirect taxes such as customs duties, consumption tax, and sales tax. While there may not be explicit provisions in the law assigning personal penalties to directors for non-compliance, they may still face reputational damage or legal issues if the company breaches tax obligations. Directors must also ensure that proper financial records are maintained to support tax reporting and compliance. A well-functioning finance and accounting process within the company is crucial, and directors should oversee internal systems to prevent underreporting or overpayment of taxes.

Banking and Financial Services Obligations

Directors have responsibilities when their company operates in or interacts with the financial sector. If the company engages in banking or financial services, it may be subject to licensing and anti-money laundering (AML) rules. Directors must ensure that the company does not engage in unlawful financial practices such as the misuse of funds, insolvency mismanagement, or operating without required approvals. Even if the company is not in the financial services industry, directors must ensure that financial dealings (e.g., loans, deposits, payments) comply with legal and ethical standards. If the company is in a regulated financial sector, directors should be aware of any additional compliance or prudential obligations that may apply and seek legal or regulatory advice as needed.

Consumer and Competition Obligations

While Tuvalu does not currently have a comprehensive consumer protection or competition law, directors still have a general obligation to ensure fair and ethical business practices. The Ministry of Finance and Economic Development encourages fair trading, suggesting that businesses must not exploit consumers or engage in misleading or anti-competitive behaviour. Directors should ensure that their companies provide truthful information about products and services, respect consumer rights, and avoid practices such as price fixing, market manipulation, or abuse of dominant market positions. Even in the absence of a formal competition act, responsible governance means proactively managing risks associated with unfair trade practices and ensuring that the company operates transparently and responsibly in the marketplace.

"Prior to Independence in 1980, Vanuatu was a jointly administered Anglo-Franco condominium."

Vanuatu

Overview

Prior to Independence in 1980, Vanuatu was a jointly administered Anglo-Franco condominium, meaning a dual system of law developed with French institutions and English institutions co-existing. The condominium was often referred to in the international diplomatic arena as the 'pandemonium'.

The French Civil Code and English Common Law both applied (and a joint courthouse established with the French occupying one side of the court and the English the other... imagine that!). Also, residents were obliged to 'opt' as to which system of law was to apply to them and in the absence of the exercise of the 'option' the local authorities would determine that issue themselves! Even more worrying, under one of the original charters for the establishment of the Condominium, any disputes that arose between the French and the English would be arbitrated over by the King of Spain!

Despite all this 'colour' company law (and indeed most commercial law) in Vanuatu has institutionally not strayed far from the English roots with the latest in a series of post-colonial company laws, the *Companies Act 2012,* empowering the historically English Vanuatu Financial Services Commission monitoring company compliance and performing the duties of a company registrar.

Additionally, Vanuatu has an *International Companies Act 1992* thanks to (ultimately) the operation of the offshore finance centre established by the English in the 1970's.

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Am I a director?

Liability and qualifications for directors are significantly different in the *Companies Act 2012* and the *International Companies Act 1992.* In particular, the *Companies Act 2012* applies to shadow directors and delegates, whereas the International *Companies Act 1992* does not consider the roles of shadow directors and delegates and any duties that may apply to these positions.

Under the *Companies Act*

Subject to the company's rules, directors are responsible for managing the business and affairs of the company. A person may be liable as a director, if:

- a person has been appointed as a director;
- a person exercises control of powers that would be exercised by a director;
- they are a person whose instructions a director is required or accustomed to act in accordance with; and
- they are a person to whom a director has directly delegated power.

Requirements for directors differ between the *Companies Act 2012* and the *International Companies Act 1992.* In the case of a company incorporated under the *Companies Act 2012*, at least one director must be a natural person who has attained 18 years of age and who complies with qualifications for directors specified in the rules of the company. In addition, directors must not be disqualified from being a director. That is, they must not be an undischarged bankrupt, disqualified by the Court, or convicted of an offence in connection with the management of a company punishable by imprisonment for more than 2 years during the period of 3 years after the conviction.

In the shadows

A director is sometimes termed a 'shadow director' if he/she is a person whose instructions a director is required or accustomed to act in accordance with. Generally, the shadow director is liable just as an appointed director.

Can I delegate my duties?

When a director delegates power to an agent and the agent consents to the delegation, the agent is liable just as if he/she was a director.

The model rules specify that a director may delegate powers to an employee, to a committee of directors or to a director. The model rules require that directors monitor the exercise of powers by a delegate by reasonable methods.

Under the *International Companies Act 1992*

A director is responsible for the management and direction of the business and affairs of the company, subject to the company constitution. Both directors and their duly appointed agents are liable under the *International Companies Act 1992.*

The *International Companies Act 1992* creates a liability for an alternate director, appointed in writing, to attend board meetings, vote and act in his/her place for a fixed period of time. During the period of appointment, alternate directors are liable for acts or omissions, just as a director would be.

The director of a company incorporated under the *International Companies Act 1992* may be a natural person or a body corporate. There are no additional requirements set out in the *International Companies Act 1992.*

What are the key duties I need to know?

Statutory duties

Directors' duties in the *Companies Act 2012* and the *International Companies Act 1992* closely follow those set out in other common law jurisdictions, including the following fundamental duties:

- A duty to act in good faith and in a manner the director reasonably believes to be in the interests of the company.
- A duty to exercise the care, diligence, and skill that a reasonable person would exercise in the same circumstances.

The *Companies Act 2012* also creates additional duties, including:

- A duty to act in compliance with the *Companies Act 2012* and the company's rules, and ensure the company is also in compliance.
- A duty to not exercise power where the director has an interest in the transaction.
- A duty to not improperly disclose or use information obtained through their position as director.

> "In short, in addition to acting in good faith, honestly and with a proper motive, directors must satisfy a two limb test."

What is the duty of good faith?

The duty of good faith requires that directors act honestly and with a proper motive. As for the director's belief, the Courts have deemed it to be a subjective belief as they are reluctant to intervene and second guess a director's commercial decision. The wording in the *Companies Act* and the *International Companies Act 1992* clearly necessitates a 'reasonable belief'.

In Australia, the duty of care, skill and diligence is met if four criteria set out in the *Corporations Act 2001* are fulfilled. One of these is the requirement for the director to have a rational belief that the decision is for the benefit of the company. According to the Act and applied at common law, a belief is assumed rational unless it is so unreasonable that no reasonable person in the director's particular position would hold it. The nature of the company, the nature of the director's position and functions and the nature of the decision must be considered.

The similar wording for a rational belief in Australia and for a reasonable belief in Vanuatu may render Australian law persuasive. However, the key difference in Australian courts defined the word rational to mean both 'reasonable' and 'based on, derived from, reason or reasoning'. Thus, the Australian standard is arguably higher.

In short, in addition to acting in good faith, honestly and with a proper motive, directors must satisfy a two limb test. Firstly, directors must meet a subjective requirement that they actually believed the decision to be in the interest of the company. Secondly, directors must meet an objective requirement: the belief is deemed reasonable unless no reasonable person in the director's position would hold it.

What degree of care, skill and diligence do I need to exercise?

The duty of care, skill and diligence is defined in relation to a reasonable person but not any reasonable person: a reasonable person in the same circumstances as a director. To determine what the duty of the reasonable person in those circumstances is, the following elements, without limitation, must be taken into account:

- the nature of the company;
- the nature of the decision; and
- the position of the director and the nature of the responsibilities undertaken by that director.

According to relevant New Zealand case law, the standard to be applied is that of a reasonably competent director. The standard is partly objective as the director's particular knowledge or experience is not relevant, and partly subjective given considerations by reference to the nature of the company and the director's position; for example, this draws a distinction between the duty of an executive and non-executive director.

What happens if I'm interested in a transaction?

Under the *Companies Act*

Material interests

A director must not exercise any power as a director in circumstances where the director is directly or indirectly materially interested in the exercise of that power. There are exceptions to this rule, and a director may exercise this power, if:

- the *Companies Act 2012* expressly authorises the director to exercise the relevant power despite the interest; or
- the director has reasonable grounds for believing that the company will satisfy the solvency test, and:
  - the rules expressly authorise the director to exercise this power, following disclosure of the interest; or
  - the shareholders have unanimously approved the exercise of this power.

In circumstances where the exercise of power has been authorised by the rules, the rule itself must require that, before the exercise of the power, the director disclose in writing the nature and extent of the interest to the other directors or to all shareholders.

Disclosing information

A director is prohibited from disclosing or making use of information that has come to them in their capacity as a director of the company. There are exceptions to this rule: a director may disclose this kind of information if it is in the interests of the company or it is required by law. A director may also disclose such information if there are reasonable grounds for believing that the company will satisfy the solvency test after the director has disclosed or made use of the information and it is either authorised by the rules, or it is authorised by unanimous shareholder approval.

Under the *International Companies Act 1992*

There is a conflict of interest where there is a transaction or agreement between the company and:

- one or more directors;
- one or more connected persons;
- a person in which a director or liquidator has a financial interest; or
- a person to whom any director or liquidator is related.

A director is not prohibited to forgo his/her exercise of power because of a conflict of interest. In fact, the Act maintains that an agreement or transaction shall not be void or voidable because of a conflict of interest.

However, for an agreement or transaction to be valid in circumstances where a director has a conflict of interest, the directors must disclose in good faith:

- the material facts of their interests in the transaction or agreement;
- their interests in the agreement or transaction; and
- their relationship to any party to the agreement or transaction.

The other directors who are entitled to vote must be aware of these elements and must approve or ratify by resolution, the exercise of power by the interested director.

If these requirements are not met, the transaction or agreement is not valid.

Insolvency

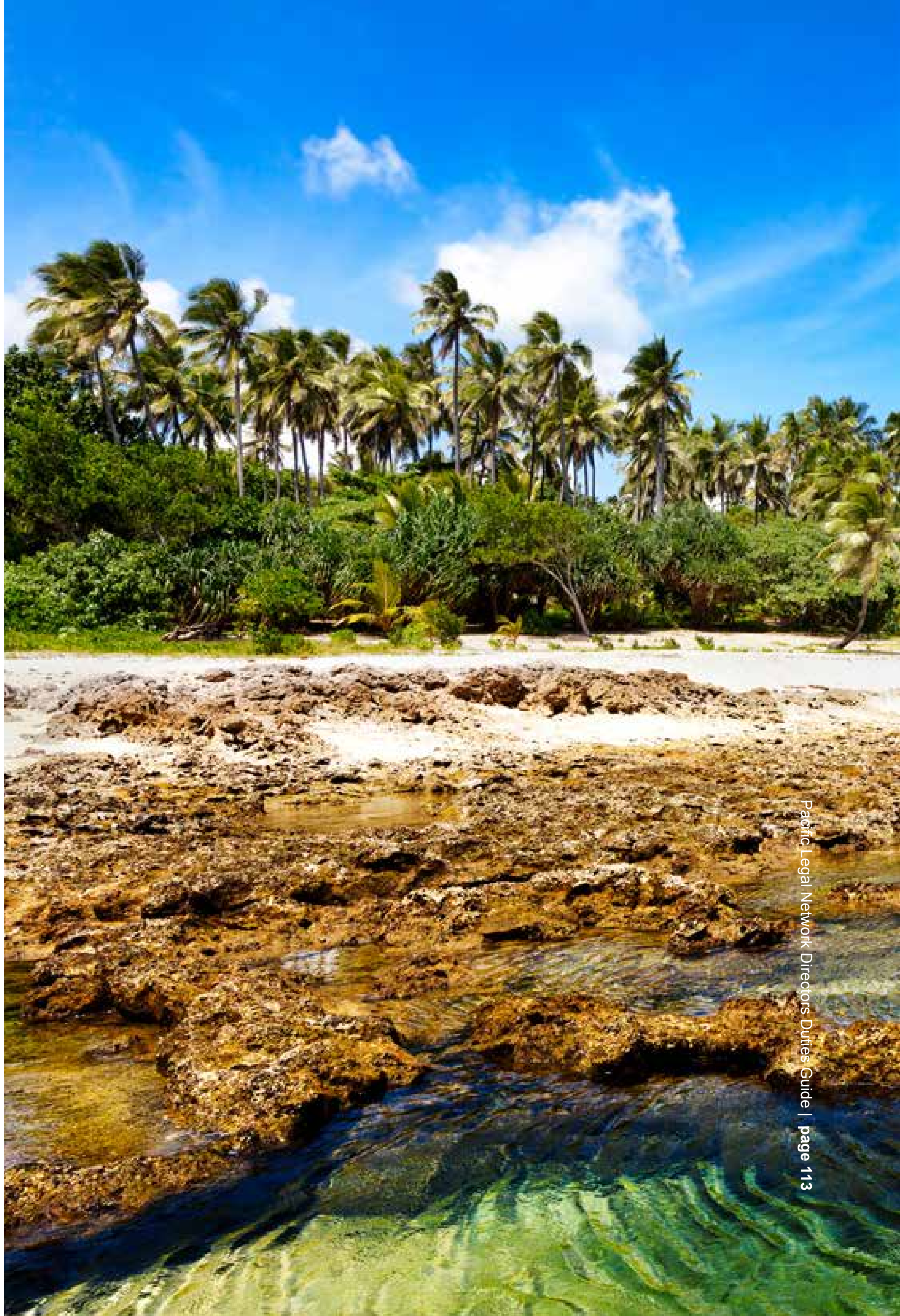
Under the *Companies Act 2012*, if a director believes that, or is aware of matters that question the company's ability to pay its debts, the director must call a meeting of directors within 10 working days to consider whether a liquidator should be appointed. Directors may be liable to creditors if the company was, in fact, unable to pay its debts at the time of the failure to call a meeting and the company is later liquidated.

Each director who did not attend the meeting or vote in favour of appointing a liquidator may be liable to creditors if, at the time of the meeting, there were no reasonable grounds to believe that the company could pay its debts and the outcome of the meeting was to not appoint a liquidator.

Directors are only liable to those creditors to whom the company incurred a debt after the date of the meeting. If more than one director is found liable, the liability is joint and several. This means that a creditor may pursue the action against and collect the penalty from any of the liable directors.

There is a defence for failing to discharge these obligations. A director is not liable if he/she can establish that the creditor knew or ought to have known that there were circumstances that questioned the solvency of the company. It is also a defence that the director shows that the creditor assumed the risk of dealing with the company in such circumstances.

> "A director must not exercise any power… where the director is directly or indirectly materially interested in the exercise of that power."



What liabilities will a director face if they fail to comply with their obligations?

Under the *Companies Act 2012* and the International *Companies Act 1992* a director may be both liable for his/her own breach of duties or collective breaches by the board. Directors may incur civil liabilities with penalties varying according to the breach. They may also be criminally liable for the most serious offences.

Do I have a defence?

There are several available defences under the *Companies Act 2012* if a director is charged with breaching a director's duty. The director must prove that:

- the director took all reasonable and proper steps to ensure that other directors complied with all requirements; or
- in the circumstances, the director could not reasonably have been expected to take steps to ensure other directors complied with the requirements.

What other procedural matters do I need to understand as a director?

There are a number of additional procedural matters that directors may be personally liable for under the *Companies Act 2012* or the *International Companies Act 1992.*

Appointment of directors

Under the *Companies Act 2012* natural persons can be appointed directors upon the registration of the company, or subsequently by ordinary resolution. A director's appointment is only effective when the person has consented in writing.

There are no statutory requirements for the appointment of directors under the *International Companies Act 1992* and the procedure and term of appointment may be defined in the company constitution or by shareholders, and directors may themselves be companies in addition to natural persons.

Indemnity

A company incorporated under the *Companies Act 2012* may indemnify or insure its directors only if it has been approved by the Board according to the rules of the company. Directors may not be indemnified for liability to a person arising out of a breach by that person of a duty to the company in relation to the person's general director duties and duties under insolvency.

In the *International Companies Act 1992* there is an obligation for the company to indemnify its directors unless the company constitution prescribes otherwise, and also, provided that the person acted honestly and in good faith in the best interests of the company. The company shall indemnify all expenses, including legal fees, judgments, fines and amounts paid in settlement and those amounts reasonably incurred in connection with legal, administrative or investigative proceedings.

However, the *International Companies Act 1992* does not completely exclude indemnification for criminal proceedings as the company may still indemnify the director if:

- the director had no reasonable cause to believe that his/her conduct was unlawful;
- the director is or is threatened to be a party to proceedings by reason of his/her position as director; and
- the director was serving as a director for the company or another enterprise at the request of the company.

Annual reports

Under the *Companies Act 2012*, directors must prepare financial statements that comply with defined requirements within 4 months after the balance date of the company. Within 20 working days of completing the financial statements, directors must prepare an annual report on the affairs of the company during the accounting period. The annual report must be in writing, include the financial statements, or auditor's report if required, state the names of directors who hold office and those who have ceased to hold office during the accounting period, any additional information required by law or by the company rules, and be signed by two directors.

There are no requirements in to prepare annual reports under the *International Companies Act 1992.*

Reporting to the registrar

Directors are each liable for failing to comply with reporting requirements under the *Companies Act 2012*. Under the *International Companies Act 1992* there are no reporting requirements apart from obligations generally imposed on an international company under a 2016 amendment to the *International Companies Act 1992* to provide reports to the regulator on change of beneficial ownership in such a company.

Record keeping

Directors are liable for a company's breach of record keeping obligations under the *Companies Act 2012.*

The *International Companies Act 1992* does not define any record keeping obligations.

Meetings

The *Companies Act 2012* requires company rules to include provisions governing board meetings which must be complied with. If the company rules do not state provisions for the holding of meetings of the board of directors the model rules will apply.

The *International Companies Act 1992* leaves open the manner, time and place of director meetings. Meetings may even be conducted outside of Vanuatu. Additionally, directors are deemed present at a meeting if they participate by telephone or other real time electronic means and all directors are able to hear and recognise each other's voice.

Remuneration

Directors' remuneration and other benefits are determined either by the company rules or by unanimous shareholder approval.

The *International Companies Act 1992* does not make rules for directors' remuneration.

> "Directors are not personally liable for the board's collective breach of record keeping obligations..."

What other duties do I have?

Other statutes specific to particular areas may render a director personally liable. Set out below is an overview of certain laws that may cover spheres applicable to your organisation's industry.

Duties under consumer and other laws

There is currently no general competition or consumer law in Vanuatu. A consultation draft was presented by the Asian Development Bank in October 2016.

There are industry specific competition and consumer law regulations. For example, in the *Telecommunications and Radiocommunications Regulation Act 2009*, a person who aids, abets, counsels or is in any way directly or indirectly concerned with the contravention of a provision of the Act is liable. This may include directors who direct the act or omission that contravenes the *Telecommunications and Radiocommunications Regulation Act 2009.*

> "Employers also have a duty to ensure that work hours, overtime remuneration, statutory tea breaks, leave requirements, and health and safety laws are followed."

Labour law

Directors may be liable as employers under the *Employment Act (Cap 160)* and *Health and Safety at Work Act (Cap 195)*. Statutory duties arise due to the existence of an employment contract, meaning directors could be liable to employees where they constitute being the employer under the contract.

Specifically, employers must provide their employees with work in accordance with their contracts unless there is an emergency. Employers also have a duty to ensure that work hours, overtime remuneration, statutory tea breaks, leave requirements, and health and safety laws are followed.

Directors in their capacity as employers must also ensure that they contribute to the Vanuatu National Provident Fund (**VNPF**) on behalf of their employees as per the *Vanuatu National Provident Fund Act (Cap 189).* VNPF contributions are set at 8 per cent for the total remuneration paid to an employee each month. Half of the contributions must be paid by the employee, the other half is to be paid by the employer, which is to be withheld by the employer on the employee's behalf.

Tax duties

Directors' personal liability under the *Valued Added Tax Act 2006* is limited to the situation where the director is responsible for furnishing information or statements under the Act to the Director and they fail to do so within the required period.

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