



Technical Update

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Directors' duties now law

Before the Companies Act 2006 was implemented there was no one specific statement setting out a director's duties. They were spread amongst common law rules and principles. The Companies Act 2006 has looked to codify the position and they are all now contained within Part 10, Sections 171 to 177. Below is a summary of those duties which the director is required to adhere to in their position as a Director on the Board.

s171

Duty to act within powers

This element of the Act requires the directors to act in accordance with the company's constitution and to exercise powers in line with the terms on which they have been engaged. The company's constitution includes the Articles of Association and Resolutions passed and the powers are to be used for 'proper' purposes.

s172

Duty to promote the success of the company

This duty has been the most highly debated amongst the seven, mainly due to the ambiguity of the requirements i.e. what is success? It replaces the previous common law duty of acting in 'good faith and in the interest of the company'. Instead Directors are required to consider the following six points, amongst others, when undertaking their duties and making decisions:

- The likely consequences of any decision in the long term
- The interests of the company's employees
- The need to foster the company's business relationships with suppliers, customers and others
- The impact of the company's operations on the community and the environment
- The desirability of the company maintaining a reputation for high standards of business conduct
- The need to act fairly as between members of the company

The reason for the clarification is to bring the duties more in line with the Combined Code.



s173

Duty to exercise independent judgment

This duty prevents directors being unduly influenced by third parties and ensures that the decision(s) they make for the company are based on their own independent judgement. They can seek advice and guidance but ultimately the final decision / vote must be theirs.

s174

Duty to exercise reasonable care, skill and diligence

The first element of this is that the director must satisfy an objective test i.e. do they have the relevant skill, expertise and general knowledge to undertake the role – if not then they should not undertake the position as a director. If they do, then the second subjective test comes in which relies on the directors using their knowledge and skill appropriately. If there is a specialism then the director would be expected to use this at a higher level than others.

s175

Duty to avoid conflicts of interest

This covers both a conflict of interest and also a conflict of duties and imposes a positive obligation on the directors in any situation where a conflict 'may' arise. A conflict covers the exploitation of any property, information or opportunity. If a conflict is likely to occur then, for companies incorporated after 1 October 2008, it is now down to a quorum of the independent directors to agree the position. For limited companies incorporated before 1 October 2008 then the independent directors can agree the position as long as the Articles do not impose a restriction. Public entities can only use director approval if the Articles give specific permission.

s176

Duty not to accept benefits from third parties

Directors are unable to accept a benefit where it could be construed as a conflict and only arising through their role as a director of the company. The acceptance of a benefit which is not likely to give rise to a conflict can still be accepted i.e. corporate hospitality.

s177

Duty to declare interest in proposed transaction or arrangement

A director is required to disclose to the Board any transactions where they have a direct or indirect interest. They are required to disclose the 'nature and extent' of the transaction and this information can be given at either a meeting or in written notice to all the directors. The information must be continually updated should circumstances change.

And the consequences?

A breach of one of the above duties could give rise to a criminal or civil liability for the director involved. The Companies Act does not clearly state the specific liability or penalty that may arise but in respect of loss of profits to the business, the director would be expected to put this right. Compensation may also be required as a result of the breach and the impact it has had on the company.

Janice Matthews is Technical Director at Menzies LLP. For further information please email jmatthews@menzies.co.uk.