



Duties of directors and other officers

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) sets out the duties required of directors and other officers, such as senior staff like CEOs. These duties are consistent with those of the Corporations Act.

What are the duties of directors and other officers?

For directors and other senior officers of a corporation, special duties towards the corporation—especially a duty of loyalty and a duty of care—are imposed by the general law (the non-statutory law developed by judges). The duties are owed to the corporation as a whole which includes all its members and creditors.

As well as these general law duties, the CATSI Act imposes specific statutory duties on directors and other senior officers. Some of these overlap with the general law duties and are based on similar ones in the Corporations Act:

► Duty of care and diligence

This duty requires directors and other officers to exercise their powers and discharge their duties with reasonable care and diligence. It means directors must take their responsibilities seriously.

Directors who are acting carefully and diligently will be well prepared, making sure they are properly informed about their corporation's affairs. For example, this might include reading papers before a meeting, attending meetings, asking questions and seeking more information if they do not understand the information being presented to them.

The duty is subject to the business judgment rule. This means that a court will not normally intervene if a business decision is within the director's power and made honestly. Breach of this duty may result in a civil penalty. More information about penalties is below.

► Duty of good faith

This duty requires directors and other officers to act honestly in the best interests of the corporation. It means that directors will be honest and loyal in their dealings with other directors and with the corporation.

For example, directors who are acting in good faith will not make a decision for their own personal self-interest but in the best interests of the corporation as a whole. A breach of this duty may lead to civil liability or criminal liability if the breach is reckless or intentionally dishonest.

► Duty of disclosure of conflicts of interest

This duty requires a director to disclose to the other directors any conflict of interest that they may have in a matter which relates to the corporation's affairs.

For example, a director must not allow conflicting interests or personal advantage to take priority over the interests of the corporation. The corporation must always come first.

It means that a director must avoid making a decision about the corporation's affairs which *might* be affected, even if not *actually* affected, in some important way by another business or personal interest of the director or even a relative of the director. So a director needs to avoid not only actual conflicts of interest but the perception of a conflict, or potential conflict, of interest.

To manage conflicts of interest, a director is required to disclose any interest. The disclosure can take the form of a standing notice or notice to a meeting where the interest may be raised. Disclosing an interest does not mean that a director cannot participate in the meeting, but may mean that they cannot be involved in a decision about that particular matter. Failing to disclose a conflict of interest may be a criminal offence.

There is nothing wrong with having a conflict of interest, so long as directors disclose these interests.

► *Duty not to improperly use position or information*

This duty requires directors and other officers to act properly in their position. This means that directors must not improperly use their position, or use information obtained as a director, for any purpose other than the business of the corporation.

For example, directors cannot use their position or information obtained in their role as a director for their own personal advantage or to the detriment of the corporation. To do so may incur civil liability or criminal liability if the breach is reckless or dishonest.

► *Duty to not trade while insolvent*

This duty means that directors must not allow their corporation to trade when the corporation is insolvent or if there are reasonable grounds to suspect insolvency.

Insolvency means not being able to pay debts when they become due and payable. If a director authorises a transaction or makes a decision which makes a corporation insolvent, and is aware or should have been aware that this would happen, then the duty is breached. The duty applies to each director individually and together as a group. Directors should always know and understand the corporation's financial position to make sure they know it's not insolvent.

Who do the duties apply to?

The duties:

- care and diligence
- good faith
- not to improperly use position or information

apply not only to the directors but also to the officers of a corporation.

The duties:

- disclosing conflicts of interest
- not trading while insolvent

apply to the directors.

The directors are the people who make up the governing body of a corporation. Under the old *Aboriginal Councils and Associations Act 1976* directors were referred to as the governing committee.

Directors are appointed by members of a corporation to govern the corporation. They therefore have authority over the corporation and are ultimately accountable for it. This is why the duties exist, to ensure that directors are accountable to the corporation and its members.

Directors' duties apply individually to each director, so each individual must ensure the corporation complies with the law.

The scope of directors' duties has been extended so that the CATSI Act includes officers. This brings Aboriginal and Torres Strait Islander corporations in line with the *Corporations Act 2001*.

Chief executive officers (CEOs) and other officers (for example secretaries in large corporations) of the corporation must therefore also comply with the duties of directors. The CEO is usually the most senior officer in the corporation and is appointed by the directors to take overall day-to-day control. The title is not always 'Chief Executive Officer' but may also be general manager or executive director.

The functions of the directors

The CATSI Act contains a replaceable rule which says that the business of an Aboriginal and Torres Strait Islander corporation is to be managed by or under the direction of the directors. Usually the directors do not manage the day-to-day operations of a corporation—that is the role of the CEO.

This replaceable rule also states that the directors may exercise all the powers of the corporation, except any powers that the CATSI Act or the corporation's rule book requires a general meeting of members to exercise.

The rule book of a corporation may replace this rule and set out what functions the directors will have. Normally their functions include:

- appointing the CEO
- setting goals, formulating strategy and approving business plans for the corporation
- approving annual budgets and key management decisions (such as decisions on major capital expenditure, business acquisitions, restructuring and refinancing)
- monitoring the management of the corporation and its business results
- setting and reviewing policies for communication with members and approving reports to members
- setting and reviewing budgets.

Number of directors

The CATSI Act sets the maximum number of directors for a corporation as 12. Having a maximum of 12 directors avoids large and unworkable directors' meetings. A corporation may also apply to the Registrar to be exempted from this requirement if it wants to have more directors.

Corporations may be concerned that a maximum of 12 directors will not allow for broad participation and representation in management. They can use management committees and other structures to do this without increasing the number of directors. This leaves a more streamlined process for directors to consider the recommendations of the committees when making decisions.

Modifications for Native Title legislation obligations

Corporations that are formed to hold or manage native title are known as prescribed bodies corporate (PBCs) or registered native title bodies corporate (RNTBCs). The CATSI Act makes sure that directors and employees of these corporations are not put in a position where their duties under Native Title legislation conflict with their duties under the CATSI Act. For more information see the *Native Title* fact sheet.

Better governance

The CATSI Act sets up requirements that ensure a corporation can operate with better and clearer governance. These include:

- *rule book*:
 - the corporation must have a rule book (constitution) written in English, which is publicly available from the Register of Indigenous Corporations maintained by ORIC
 - the rule book must cover the matters that the Act sets out, including a dispute resolution process
 - the rules for internal governance must be workable and consistent.
- *registered native title bodies corporate*: If the corporation aims to become an RNTBC, or is already an RNTBC, the rules must also be consistent with Native Title legislation.
- *anti-nepotism measures*: These prevent corporations from giving financial benefits to directors or related parties (such as a spouse of a director) unless approved by members.
- *strengthening members' capacity to participate in managing the corporation*: This is done by allowing members to request information about directors' payments and requiring members to approve related party transactions. These include transactions involving another business or personal interest of a director or even a relative of a director.
- *bringing members' rights into line with the Corporations Act*: For example, members can apply to a court to inspect a corporation's books or to stop a corporation from acting in a way that is unfair to the members.

The Registrar can act for members in some circumstances, for example, when a corporation is acting unfairly towards members.

Consequences of breach

When the duties of directors and officers are breached, there may be consequences, depending on the type of duty and the nature of the breach. For example:

- *Disqualification*—under the CATSI Act the Registrar can automatically disqualify people from managing a corporation if they have been convicted of fraud or if they are bankrupt. The Act introduces a new power for disqualifying individuals by a court if they have contravened a civil penalty provision of the Act, have repeatedly contravened provisions of the Act, or if they have been involved with two or more corporations that have failed. This is consistent with the Corporations Act.

The Registrar will maintain a register of people who are disqualified from managing corporations. This register will be publicly available.

A person disqualified from managing corporations cannot participate in making decisions that affect a substantial part of the corporation's business. They therefore cannot be a director. A disqualified person also cannot significantly affect the corporation's financial standing; or instruct the directors, knowing or intending that they will follow the person's instructions.

- *Civil penalties*—If a person breaches a civil penalty provision, for example, a director who fails to exercise reasonable care and diligence in carrying out their duties, the Registrar may apply to a court for a declaration of contravention. This provides conclusive evidence of the breach. A court may then order the person to pay a penalty and/or compensate the corporation for damage suffered as a result of the contravention.
- *Criminal penalties*—Breach of certain duties may attract criminal penalties. If a person is found guilty by a court of breaching a duty where a criminal penalty applies, the person may be fined or sentenced to imprisonment.

Further information

website: www.oric.gov.au

freecall: 1800 622 431
(free call except for mobiles)

email: info@oric.gov.au



Reporting reminder

The new *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) has changed the way corporations have to report. Corporations report according to their registered size and income.

All reports must be lodged with ORIC between 1 July and 31 December each year.

For example, 2007–08 reports must be lodged with ORIC before 31 December 2008.

Failure to lodge reports with ORIC is a breach of the CATSI Act.

Directors must approve these reports before they are lodged with ORIC.

If, for some reason, corporations can't meet the reporting requirements under the CATSI Act, they should write to ORIC to apply for an exemption or extension of time.

Size and income of corporation	Reports required
Small with a CGOI of less than \$100 000	1. General report only
Small with a CGOI of \$100 000 or more and less than \$5 million. Medium with a CGOI of less than \$5 million.	1. General report + 2. Audited financial report or financial report based on reports to government funders (if eligible) + 3. Directors' report
Large or any size with a CGOI of \$5 million or more.	1. General report + 2. Audited financial report + 3. Directors' report

What's CGOI?

Consolidated gross operating income = gross income of the corporation and any entities it controls.

Need to know your registered size?

Check the public register at www.oric.gov.au or call ORIC.

Corporations can lodge reports online at <https://online.oric.gov.au>.

Need help with reports?

www.oric.gov.au
info@oric.gov.au
1800 622 431
(free call except from mobiles)

