



Committee and Members' Duty of Care

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Purpose

This document provides an overview of our legal responsibilities and liabilities in the running and administration of the shed.

The committee should seek legal advice if in any doubt about your roles and obligations.

Duty to act in good faith and with care and diligence

Committee members must exercise their powers and discharge their duties with the care and diligence of a 'reasonable person' in their position.

This means you are expected to do what you'd expect anyone else to do in your place - pay attention, put in the work, read the papers carefully, ask about anything you don't understand, and ask again about anything that seems out of place.

The duty to act in good faith comes from Section 181 of the Corporations Act, which reads:

A director or other officer of a corporation must exercise their power and discharge their duties (a) in good faith in the best interests of the corporation; and (b) for a proper purpose.

This duty imposes a fixed standard regardless of the capabilities and state of mind of any individual board member. It's therefore entirely possible that even though a member honestly believes they are acting in the best interests of their organisation, the law may take the opposite view.

In general, you will meet the duty of care and diligence if you:

- Make a decision to take, or not to take, action in good faith and for a proper purpose; and,
- Do not have any material personal interest in the matter; and,
- Inform yourself about the matter to the extent you reasonably believe is appropriate; and,
- Reasonably believe that your judgement is in the organisation's best interests.

The committee member's belief is taken to be rational unless no reasonable board member could have held it. But to rely on this rule, the member must make a judgement, and not just do nothing.

In addition, you're expected to:

- Attend meetings regularly;
- Act as an entrepreneur - look for opportunities that can advance your organisation's cause;
- Make certain that your committee undertakes good financial reporting practices;
- Ask questions and seek more information when you believe it is required;
- Define appropriate policies and supervise their implementation;
- Understand your committee's core work;
- Keep abreast of governance issues.

As a committee member, you may be able to delegate your powers. This will protect you from a breach of your duty of care and diligence if, after making appropriate inquiries, you believe 'reasonably and in good faith' that the delegate is reliable and competent. You're not expected (or allowed) to micromanage the finances, but you have to be satisfied that the Treasurer is on top of things.

Similarly, you can rely on the professional advice of others if the reliance is in good faith and you have independently assessed the advice. Such reliance is reasonable unless the contrary is proven.

Built into this law is an understanding that committee members with a high level of expertise will attract a higher standard of care than others. This is because a committee member with less expertise can more readily rely on the advice of another.

Duty to act in the best interests of the organisation as a whole

You may be on the committee as a shed member or a third party representative.

It makes no difference. You can, and should, pass on the views of your people to the full committee, but when the time comes to take a decision, you have to act in the interests of the organisation, not those of your supporters or sponsors.

Duty not to misuse information or misuse your position

Linked to the previous point, committee members have to act in the best interests of the organisation, not themselves.

If you hear that the organisation wants to buy a plot of land, you can't dash out and buy it first and then resell it; that's using privileged information for your own ends.

The law prohibits committee members from using their position to gain an advantage for themselves or another, or to cause detriment to the entity they are governing. A breach of this law may carry civil or criminal penalties. A committee member also must not misuse information gained through their position.

There is significant overlap between these duties, the duty to avoid a conflict of interest, and the duty not to abuse a corporate opportunity. Both are detailed below.

Duty not to abuse a corporate opportunity

Being a committee member may involve discussing a range of opportunities, including business opportunities. It is therefore possible that committee members may, by virtue of their position, be made aware of several potentially profitable opportunities.

The example of the land sale cited in the previous section above is one such opportunity.

This type of action shows the temptation that can face some committee members to take up such opportunities themselves at the expense of the entity they are governing for.

The law may view this as abusing a corporate opportunity.

Duty to avoid/ disclose any relevant potential conflict of interest

A conflict of interest arises when a committee member's duty to act in the interests of the committee of which s/he is a member is compromised by some other personal or professional interest - if there's a chance that you (or yours) are going to benefit from a decision made by the committee, the committee needs to know about it.

The definition of what constitutes an interest, unfortunately, differs from state to state. Victoria says 'pecuniary interest', which only covers money, while the NSW law is wider. Worse, the consequences differ,

too: in Victoria all you have to do is report your interest, while in NSW you then have to leave the room and not vote on the matter.

Most committees will be governed by rules that have particular provisions for the handling of conflicts of interest so you should check if such rules exist for your group and then follow them to the letter.

Duty to maintain confidentiality

As mentioned above, you're not allowed to use confidential information for your own benefit, and you're not allowed to pass it on to anybody else.

The next question, of course, is what's confidential? Minutes? Decisions? Names? Ask the President or Secretary (who should be able to point you to a written policy on the issue, or at least a minute of the board).

Don't just assume you have to shut up about everything, either; in the interests of transparency, your committee should be willing to release all information about your organisation that doesn't have personal or financial consequences.

Duty to observe the constitution

You're bound by what's in your organisation's constitution, and its bylaws, and its policies, and the standing orders.

All of these should be written down, and you should get a copy. You're not legally bound by traditions, conventions, or understandings, though you probably shouldn't trample all over these until you've learned why they're there.

Duty not to trade while insolvent

One of the more notable duties, trading while insolvent is one of the few things that does have the potential to cause you real trouble - as an organisation, as a committee and as an individual.

The insolvent trading provisions are some of the most important in the current company law. These provisions compel committee members not to allow the organisation to trade while insolvent (unable to pay debts as and when they fall due) and not to allow the organisation to become insolvent.

You will breach this duty if you fail to prevent your organisation from incurring a debt when a reasonable committee member would have been aware that there were reasonable grounds for suspecting the organisation's debts could not be paid as and when they fell due. Even if the organisation was solvent at the time of incurring the debt, an offence is committed if the organisation becomes insolvent by incurring the debt in question.

In other words, if the organisation is in a death spiral, you have to close down while there's still enough money in hand to pay everybody what they're owed.

Penalties for insolvent trading are particularly severe. Civil penalties of up to \$200,000 or disqualification from directorship may be imposed. They also apply to community sector organisations, though in practice the penalties may not be as severe.

In very serious cases, committee members may be criminally liable, which can mean a prison sentence. For this reason, it's vital that legal and financial advice is sought at the slightest hint of danger.

Not knowing is no excuse. As a committee member you have a duty to understand the financials.

Duty to avoid negligence, fraud and other wrongs

A committee member must not engage in any activities which amount to fraud, negligence, and default, breach of trust or breach of duty.

Where such conduct leads to the organisation suffering loss or damage, the member may have to transfer an amount of property to the organisation equivalent to the loss or damage their actions have caused.

Other relevant laws

In addition to the duties outlined above, there are a range of generally applied laws that committee members should keep in mind as they carry out their role. Committee members are, after all, responsible for ensuring that their organisation is entirely legally compliant.

The following list is by no means exhaustive, but it's a good starting point to indicate some of the areas of law committee members have to satisfactorily understand.

- **Occupational Health and Safety** {designed to ensure that workers are safe and secure in their place of work}
- **Environmental Law** {a vast branch of law that is generally concerned with pollution control, environmental and occupational health, ecologically sustainable development and resource management}
- **Negligence** {governing cases where the duty of care is breached, causing a foreseeable kind of material damage to another}
- **Trade Practices Act** {a powerful and important Act, which includes a section prohibiting misleading and deceptive conduct}
- **Anti-Discrimination** {all organisations and individuals are obliged to meet this legislation, which has a range of provisions that may differ from state to state}
- **Contracts Law** {could apply to a property lease, a computer rental agreement, an agreement to supply services, etc.}
- **Privacy Laws** {designed to govern the way personal information about individuals is collected, stored, used and disclosed}
- **Food Safety Laws** {including requirements for the handling, storage, transport and display of foods}
- **Defamation** {designed to protect the reputation of individuals and organisations by allowing the right to sue for damages}
- **Fundraising** {laws vary from state to state but most states now require formal approval and licensing prior to fundraising activities being initiated}.

The Mount Eliza Men's Shed has a duty of care to provide a safe workplace, and ensure, so far as is reasonably practicable, that workers, volunteers and guests, and other people are not exposed to health and safety risks.

IMPORTANT NOTE

Please note that it is not just the Committee of management that has a duty of care, this extends to the members of the community group, to ensure that all workers, volunteers and guests are not exposed to health and safety risks. If you see something that is not right, or not being done correctly, don't ignore it, and say it's not my problem, point it out and have it fixed.