

## **Directors' Duties and Responsibilities**

Kinetica Pte Ltd  
6 Temasek Boulevard  
29th Floor  
Suntec Tower Four  
Singapore 038986

[info@kinetica.com.sg](mailto:info@kinetica.com.sg)  
[www.kinetica.com.sg](http://www.kinetica.com.sg)

Tel (65) 6220 1911  
Fax (65) 6224 4118



## A. COMMON LAW DUTIES

Directors are mainly responsible for the overall management of the company. In exercising their powers, they must act honestly with diligence and with reasonable skill.

### 1. Act in the Best Interests of the Company

(a) A director must act in what he honestly considers to be the company's interests, and not in the interests of some other person or body. In discharging the duties of his position, a director must:

- (i) act honestly and with the utmost good faith for the benefit of the company (he should not take into account either his personal interests (other than as shareholder of the company) or ties to family, friends or other outside interests); and
- (ii) use reasonable diligence in his attention to the business of the company and to exercise discretion and care.

The aforesaid constitutes the director's main and overriding duty. This means that everything that a director does in his capacity of a director must be done to promote or advance the interests of his company. The director has the duty to ensure that whatever transactions that are authorized by the board or the individual directors must be commercially justifiable from the company's point of view. "Commercially justifiable" does not mean that profits must be maximized. Directors are allowed to take a wider view of what the company's interests are. A transaction that seems on the face of it to be a bad one may be commercially justifiable if it leads to other intangible benefits for the company. For example, a specific provision under the Companies Act states that in exercising their powers, directors may have regard to the interests of employees. This statutory provision makes it legitimate for directors to direct their thinking, for example, to the way a take-over may affect employees.

(b) Where the company is part of a group of companies, a director must not treat the different companies in the same group as if they were part of one entity. Each company, in law, is a separate entity. When a director compromises the interest of his company for the benefit of another company in the group, he is in breach of his duties to the former. Common directors may consider the interests of the group but should be careful to ensure that transactions between companies that they control are commercially sensible from the point of view of both parties.

### 2. No Conflict of Duty

(a) A director must not place himself in a position where his duty to the company and his personal interests may conflict. This arises out of the principle that a director is regarded as a fiduciary of the company. Hence, a director must not enter into a transaction in which he has a personal interest nor profit from a transaction in which he is concerned on behalf of the company unless he has disclosed such matter to the company and obtained the approval of the company. If the director obtains a benefit in his capacity of director in circumstances where there could be a conflict of interest, he is accountable to the company for that benefit. A director also may not:

- (i) use the property or money of the company to make a profit for himself;
- (ii) use information acquired by virtue of his position to make a profit for himself;



- (iii) make use of his position to obtain a profit for himself;
- (iv) retain a profit by reason and in the course of his fiduciary relationship with the company; or
- (v) obtain for himself any property or business advantage that properly belongs to his company or for which it has been negotiating.

(b) Disclosure

A director may not enter into a transaction with the company without disclosing the fact that he is a party to the transaction and any profits that he will or is likely to obtain from the transaction. In line with this general rule, any provision of emoluments to directors must be approved by the shareholders of the company in a resolution that is not related to other matters. Further, where a director enters into substantial property transactions with his company, such transactions must be approved by the shareholders. The Companies Act makes disclosure of certain conflicts of interest mandatory. These are:

- (i) the nature of a director's interest (whether direct or indirect, and including an interest of a member of the director's family) in any contract or proposed contract with the company;
- (ii) the nature, character and extent of any conflict that might arise by virtue of a director holding any office; and
- (iii) the nature, character and extent of any conflict that might arise by virtue of a director owning any property.

Disclosure in these cases must be made to the board of directors. However, in view of a director's fiduciary duty to the company, full disclosure should also be made to the shareholders.

(c) Cross-Directorship

A person may not be a director of two competing companies. However, if the potential conflict is disclosed to the company and approved, the holding of cross-directorships is not per se a breach of fiduciary duty. Where a person is a director of more than one company, he cannot subordinate the interests of one to the other; at the very least he should disclose the conflict.

**3. Proper Purposes**

A director must employ the powers and assets that he is entrusted with for proper purposes, and not for any collateral purpose. A director may be acting honestly in what he considers to be the company's interest and yet still be in breach of his fiduciary duty if he misapplies the company's assets or if he uses the powers he is delegated for the wrong purpose.

**B. STATUTORY DUTIES**

Generally, the aim of the statutory obligations that follow are imposed on directors to ensure that there is adequate disclosure of information to shareholders and creditors so that they



can make an informed appraisal of their risks in dealing with and/or investing in the company. The statutory duties include those set out below.

## **1. Accounting records**

A director has to ensure that the requirement to keep proper accounting records is complied with. Section 199 of the Act requires the company to keep such accounting records which sufficiently explain the transactions and financial positions of the company. The accounting records must be kept at such places as the directors think fit, and if such place is outside Singapore, then the statements and returns must be sent and kept at a place in Singapore where they may be inspected by the directors.

Failure by a director to take reasonable steps to ensure compliance with the requirement (Section 199(6)) renders him guilty of an offence. If convicted, he may be imprisoned for a term not exceeding 3 months or to a fine not exceeding S\$2,000.00. Further, a default penalty may also be imposed.

## **2. Annual accounts**

Section 201 of the Act requires the directors to produce to the shareholders a profit and loss account and a balance sheet at least once every calendar year. The company's profit and loss account and balance sheet must be laid before the company at its Annual General Meeting within the first 18 months after incorporation and thereafter at intervals no greater than 15 months from the preceding accounts. The accounts and balance sheet must be made up to a date not more than 6 months before the date of the meeting. The profit and loss account and balance sheet must be audited before being presented to the Annual General Meeting.

Please note however that a private company may, by a unanimous resolution of members, dispense with the holding of Annual General Meetings. Consequently, and so long as the dispensation from holding Annual General Meetings is still in force, the directors need not comply with the requirement to lay the company's accounts before the company at its Annual General Meeting.

Please note further that (a) dormant companies, and (b) exempt private limited companies with a turnover of less than \$5 million, are exempted from preparing or filing audited accounts. However the statutory requirement to maintain accounting records still exists.

The profit and loss account and balance sheet must, pursuant to Section 201(1A) of the Act, comply with the requirements of the Accounting Standards and give a true and fair view of the profit and loss of the company for the period covered by the accounts.

This section of the Act also extends to holding companies and requires consolidated accounts to be presented.

If any director fails to comply or take all reasonable steps to ensure compliance of Section 201 or has by his own wilful act caused any default by the company, he shall be guilty of an offence under the Act and shall be liable on conviction to a fine not exceeding S\$10,000.00 or to imprisonment for a term not exceeding 2 years.



### **3. Directors' Reports**

The directors are required to attach a report to the members together with the accounts (Section 201(5)). This report is to be made in accordance with a directors' resolution and must be signed by at least two directors of the company.

If a director fails to comply with the foregoing, he may be subject to the same penalty as stated in (2) above.

### **4. Shares**

Notwithstanding anything in the company's Memorandum or Articles of Association, the directors shall not, without prior approval of the company in general meeting, exercise any power of the company to issue the unissued shares of the company (Section 161).

Any director who knowingly issues shares without the prior approval by the company in general meeting may be liable to compensate the company and the persons to whom the shares were issued for any loss damages or costs which the company or that person may have sustained or incurred.

### **5. Dividends**

The provisions regulating the declaration of dividends are to be found in a company's Articles of Association. It is the function of the directors to recommend the payment of the dividend and the function of the shareholders in general meeting to declare the dividend.

The directors usually have the power, unfettered by the shareholders, to declare payment of interim dividends.

It is the responsibility of the directors to ensure that their dividends are not paid out of capital but only from the profits of the company. If the directors fail in this duty, they incur personal liability to the creditors (Section 403(2) of the Act). Further, they may also, if convicted, be imprisoned for one year or be subject to a fine of S\$5,000.00.

### **6. Meetings**

The Act provides for holding of meetings, such as:

- (a) holding of statutory meetings (for public companies only) - Section 174 of the Act; and
- (b) holding of annual general meetings - Section 175 of the Act.

Failure to comply with these requirements renders the company and every officer in default guilty of an offence. Upon conviction, the company and every officer shall be liable to a fine not exceeding S\$5,000.00 and also to a default penalty.

Another section relevant to the calling of meetings is Section 176 of the Act which gives the shareholders representing 10% of the company's paid-up capital the right to requisition an Extraordinary General Meeting.

When this requisition is properly presented to the company, the directors are bound to call a meeting to be held as soon as practicable (not more than two (2) months from the receipt of



the requisition). However, if the directors do not proceed to convene the meeting within 21 days of receipt of the requisition, the requisitionists representing at least half of the voting strength of all the requisitionists may convene a meeting.

**7. Appointment of Secretary**

Section 171 of the Act requires every company to have a secretary and according to subsection (3), the secretary (or secretaries) shall be appointed by the directors of the company. The office of secretary shall not be left vacant for more than **6 months** at any one time.

**8. Appointment of Auditors**

The directors of the company shall, within **3 months** after incorporation of the company, appoint such a person or persons to be the auditor or auditors of the company who will hold office until the conclusion of the company's first Annual General Meeting (Section 205(1)).

The company shall at each Annual General Meeting appoint such a person or persons to be the auditor or auditors of the company who will hold office until the conclusion of the company's next Annual General Meeting (Section 205(2) of the Act).

If default is made in complying with the above, the company and every director of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S\$5,000.00.

Please note however that the company shall be exempt from appointing auditors if it is dormant or is a private exempt company with a turnover of less than \$5 million.

**9. Duty to Disclose**

(a) Interests in transactions

Section 156 of the Act imposes a duty on every director to disclose at a meeting of the directors of the company his interest, whether direct or indirect, in a transaction or proposed transaction with the company. A director's failure to disclose his interest in a transaction to the company's Board of Directors constitutes a breach of his duty.

Further, section 156(4) of the Act requires a director to give general notice to the directors of the company stating that he is an officer or member of a specified corporation or that he is a member of a specified firm and that he is to be regarded as interested in any transaction which may, after the date of notice, be made with that corporation or firm. Such a declaration is valid if:

- (i) the notice states the nature and extent of the interest of the director in the corporation of firm;
- (ii) his interest in that corporation or firm is not different in nature or greater in extent than the nature and extent so specified in his notice at the time any transaction is so made; and
- (iii) the notice is given at a meeting of the directors or the director takes reasonable steps to ensure that it is brought up and read at the next Board meeting after it is given.



The Company Secretary (by Section 156(7) of the Act) shall record every such declaration in the minutes of the meeting at which it is given.

Any director of a company who fails to comply with any of the provisions of this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S\$5,000.00 to imprisonment for a term not exceeding 1 year.

(b) Holdings in the Company

The company is required to keep a Register of Directors' Holdings (Section 164). To ensure that the said Register is correct and properly maintained as up-to-date as possible, each director must provide information on the following:

- (i) shares in the company (or related corporation) in which he has an interest and the nature;
- (ii) debentures or participatory interests of the company in which he holds an interest and the nature and extent of that interest;
- (iii) rights or options of the director (alone or jointly with another) in respect of the acquisition or disposal of shares in the company or a related organisation; and
- (iv) contracts to which the director is a party or under which he is entitled to a benefit giving the right to call for or make delivery of shares debentures or participatory interests of the company.

In each of the above cases, the obligation covers not only the shares debentures or participatory interests of the company itself but also those of any related corporation.

Further, the extent and particulars of the interest held by the director in shares debentures or participatory interests must be included in the notice given by the director. A director is also required to give particulars in writing of any change in respect of the particulars he has already given. This notice of change of particulars must include the consideration (if any) received as a result of the event giving rise to the change.

If the director is a director of a public company or of a subsidiary of a public company of the date when he attained or will have attained the age of 70 years, notice must also be given. If default is made in complying with the section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S\$15,000.00 or to imprisonment for a term not exceeding 3 years. In the case of a continuing offence, the company and every officer shall be subject to a further fine of S\$1,000.00 for every day during which the offence continues after conviction.

(c) Information for Register of Directors

Each company is required to keep a Register of Directors, Managers, Secretaries and Auditors (Section 173). Every director is obliged (Section 165) to give notice to the company in writing of such events and matters affecting or relating to himself as are necessary for the purposes of compliance with the requirement to keep such register, that is, the Register must contain:

- (i) the present full name or any former name, his usual residential address, his nationality and his business occupation; and



- (ii) particulars of other directorships of public companies or subsidiaries of public companies. However, there is no need to show particulars of directorships held by a director in a related company.

If default is made in complying with the above, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S\$5,000.00 and also to a default penalty.

(d) Office or property likely to create a conflict

A director who holds any office or possesses any property by which, directly or indirectly, duties or interests might be created which are in conflict with his duties and interests as a director is bound to declare at a Board meeting of the company the fact, nature, character and extent of that conflict (Section 156(5)).

Any director who fails to do so shall be liable on conviction to a fine not exceeding S\$5,000.00 or to imprisonment for a term not exceeding 1 year.

(e) Disposal of the Company's undertaking or property

Notwithstanding anything in the company's Memorandum or Articles, the directors shall not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting (Section 160).

**10. Discretion to register transfer of shares**

The company's articles may restrict the right to transfer shares. For example, directors may have the discretion to refuse to register transfers. In such a case, the duty of directors is to exercise their discretion bona fide in what they consider (and not what a Court considers) to be in the interests of the company. So long as directors exercise their discretion bona fide, the Court will not interfere with such exercise of discretion.

Where a company refuses to register a transfer, it must send a notice of the refusal to the transferor and the transferee within one month of the transfer being lodged. The company and every officer who is in default shall be guilty of an offence under the Act and will be liable on conviction to a fine not exceeding S\$1,000.00 and also to a default penalty.

Further, the company must, if it is given the power or discretion by its articles to refuse to register a transfer, within one month after the application sent to the applicant a notice in writing stating the facts which justify the refusal to exercise the discretion.