



PRINCIPLE 2

Roles and responsibilities

There is clarity about the roles, responsibilities and relationships of the board

- 2.1 Directors' roles are clear and understood by the board
- 2.2 Directors understand and meet their duties under the law
- 2.3 Directors meet any eligibility requirements relevant to their position
- 2.4 Delegations of the board's authority are recorded and periodically reviewed
- 2.5 The role of the board is clearly delineated from the role of management

To achieve good governance, the roles of the people involved in an organisation and their relationships to one another must be clear and understood. Because directors are at the top of the organisational hierarchy, they must make sure that they understand and meet the responsibilities of their roles.



In this document the term ‘director’ refers to the people who make up an organisation’s board. In some organisations these people may be known as the board members, committee members, trustees, councillors, governors or by another name.

What is a director?

A director is someone who is validly appointed to be director of an organisation. Together, the directors of an organisation form an organisation’s board and collectively have ultimate responsibility for the company. The process for appointing a director will generally be set out under an organisation’s governing documents.

The law also recognises other people who are not formally appointed as directors but who act as directors (de facto directors), or people with whose instructions or wishes directors are accustomed to act (shadow directors). In some circumstances, it is also possible for a director to nominate another person to act in their place (alternate directors), although this will depend on the organisation’s governing documents and any laws that apply to it.

Before accepting a position as a director, it is a good idea to ask:



Do I understand the responsibilities of this role, including my legal duties?



Am I prepared to dedicate the time and energy to perform this role in the way required?



Do I have the skills and experience to discharge the responsibilities of directorship?

Only if the answer to these questions is ‘yes’ should a person accept the responsibilities of directorship.

Sometimes a director of an NFP may also have other roles within the organisation. For example, a director of a sporting club may also be a coach, a player or a parent of a player. It is important for directors to be able to separate these roles and not allow one to improperly influence the other.

Who can be a director?

Generally, directors must be people over the age of 18 and who consent to taking on the responsibilities of the position. Otherwise, there is generally no particular qualification or experience level necessary to become a director under the law.

There may be requirements in an organisation’s governing documents or in the laws that apply to it that set out eligibility requirements for directors. For example, if you are an undischarged bankrupt, you cannot be a director of a company under the Corporations Act.

Directors should know whether they are subject to any eligibility requirements and be satisfied that they continue to meet them. It is a good idea to set out any eligibility requirements for directors in a letter of appointment, and to regularly review whether all directors continue to comply with these requirements.

Directors’ duties

There are two sources of director’s duties: general law and statute.

Under the general law, directors have duties that are based on the relationship they have with the organisation. This is a special relationship based on trust; a relationship akin to being the trustee of someone else’s money, and for this reason directors’ duties are sometimes called ‘fiduciary duties’.

Directors’ duties are usually also set out under statute, though the way this is done will depend on how the organisation is incorporated.

The four main legal duties based on general law and statute are to:

1. Act in good faith and for a proper purpose

This duty has two parts. Firstly, acting in ‘good faith’ means that directors must act honestly, fairly and loyally. It requires that directors act in the best interests of the organisation (rather than in their own personal interests). The requirement to act for a ‘proper purpose’ means that a director’s decisions must further the organisation’s purpose and be made within the board’s legitimate authority.

2. Act with reasonable care, skill and diligence

Directors must take their roles seriously and be diligent in the exercise of their responsibilities. That includes taking the necessary time to prepare for

board meetings, keeping abreast of the organisation's activities and understanding the organisation's financial position (including making sure the organisation can pay its debts when they are due), and attending and participating in board meetings.

3. Not to improperly use information or position

Information provided to directors to support them to fulfil their roles must only be used for the benefit of the organisation. Directors cannot use information provided to them as a director, or their role as a director, to harm the organisation or to gain an improper advantage for themselves or another person or organisation.

4. Disclose and manage conflicts of interest

Conflicts of interest are often unavoidable. They do not represent a problem in and of themselves. However, where a conflict of interests do arise, directors must disclose them, and manage them appropriately. Conflicts of interest are explored in more detail in *Principle 9: Conduct and compliance*.

There is some misconception that directors who are not remunerated for their work (sometimes called 'volunteer directors') are subject to lower standards of legal responsibility. This is not the case, and individuals should think carefully before accepting the responsibilities of directorship.

There are several laws that set out the specific duties to which directors are subject. For example, there are directors' duties under the common law, the laws that govern incorporated associations and under the Corporations Act. The ACNC governance standards also refer to directors' duties.

ACNC GOVERNANCE STANDARD 5: DUTIES OF RESPONSIBLE PERSONS

- To act with reasonable care and diligence;
- To act honestly and fairly in the best interests of the charity and for its charitable purposes;
- Not to misuse their position or information they gain as a responsible person;
- To disclose conflicts of interest;
- To ensure that the financial affairs of the charity are managed responsibly; and
- Not to allow the charity to operate while it is insolvent.

Often an organisation's governing document will also set out certain legal duties and require directors to comply with them. The ACNC has published a template constitution for NFP companies limited by guarantee which is a useful resource for organisations.²

It is a good idea in a letter of appointment for all new directors to set out the legal duties and to revisit these regularly as part of ongoing director development so that directors understand and are meeting them. This is discussed in greater detail in *Principle 3: Board composition* and *Principle 4: Board effectiveness*.

There also are other specific legal obligations imposed on directors regarding issues such as work health and safety, tax and the environment.

To whom do directors owe their duties?

Directors' duties reflect the relationship that directors have with the organisation and its members. Directors are entrusted with the responsibility of governing an organisation and so the law expects that they will act in the best interests of the organisation and be accountable for their actions.

Directors owe their duties to the organisation as a whole – meaning that they must act in the best interests of the organisation and its members. It is assumed that the organisation will exist on an ongoing basis (in perpetuity), and as such the interests of future members should also be considered.

In exercising their responsibilities, it is a good idea for directors to consider how their decisions might impact other stakeholders who are not members, such as clients and community members. This may be beneficial to the organisation's strategy and assist with improved decision-making, but it is important to recognise that directors do not have a specific legal duty to act in the interests of these stakeholders (aside from obligations arising from other specific laws, for example regarding environmental protection or WHS).

Some directors are appointed to the board to contribute the perspective of a certain stakeholder group. For example, a federated organisation might appoint directors from its state and territory divisions to its national board. This can provide valuable insight and promote a sense of involvement among stakeholders.

² <https://www.acnc.gov.au/tools/templates/constitution-charitable-company-limited-guarantee>

However, it is important to recognise that even though a director may be appointed because of their relationship to a stakeholder group, they must exercise their duties in the interest of the organisation and apply an independent mind to their responsibilities.

Role of the board

The board is responsible for the overall governance, management and strategic direction of the organisation. As a result, the board has ultimate accountability for its activities and performance. Boards are comprised of an organisation's directors who can only exercise their authority when acting as a collective.

This also means that directors may still be held legally responsible for decisions of the board, even though they may not have supported it individually.



In this document the term 'board' refers to an organisation's governing body (its directors acting as a collective). In some organisations these people may be known as the committee of management, council or by some other name.

The role of the board may vary slightly depending on the nature of the organisation. The boards of smaller or newer organisations, or those without paid staff, may have a more operational focus, whereas the boards of larger and more established organisations may take a more strategic approach to their work. Boards must decide for themselves how best to contribute to their organisation to make a positive impact and to meet their duties under the law.

The role of the board can be broken down into six different dimensions:



Strategy

Establish strategies to guide, monitor and control the organisation's activities.



Resources

Make resources available to achieve the strategy and oversee their use.



Performance

Monitor the organisation's performance.



Compliance

Oversee processes to comply with legal and regulatory requirements.



Risk

Oversee a risk management framework that supports informed decision-making by the organisation.



Accountability

Report progress and align the collective interests of members, stakeholders, board, management and employees.

To assist in defining the role of the board and understanding its legal obligations, many boards choose to develop a board charter to govern the way the board works and fulfils its responsibilities. This is a document that sets out the respective roles, responsibilities and authorities of the board.

Delegation of the board's authority

The board has ultimate responsibility for and control over the way an organisation is run, except in some matters which may require the involvement of members (such as changing the organisation's governing documents). However, boards can choose to delegate part of their authority to others, such as an organisation's staff and volunteers.

An organisations' governing documents (particularly its constitution) and any other laws that apply to it may limit the ability of the board to delegate its authority.

There are some parts of the board's authority that are considered good practice to be reserved for the board or which the board may be required to retain under the law, for example:

- Appointing, overseeing and evaluating the performance of the CEO;
- Approving the budget and strategy; and
- Reviewing and approving financial reports.

It is important that any delegation of the board's authority is clearly defined and recorded appropriately and regularly reviewed. One of the ways this can be done is through establishing delegation policies that set out which of the board's authorities are being delegated and the circumstances under which they can be exercised.



The board may delegate some of its authority, but it cannot delegate its responsibility. The board is still ultimately accountable for any of its powers that are exercised by others on its behalf.

Board committees

Many boards establish committees to assist with their work. Committees can also be a helpful way to build and access expertise as committee members do not necessarily have to be directors. Some committees may operate for a defined period (for example, to oversee the appointment of a new CEO) and are referred to as ‘ad hoc committees.’ Others may operate on an ongoing basis (for example, a fundraising committee) and are referred to as ‘standing committees’.

For example, many boards will establish an audit committee to assist the board on an ongoing basis with oversight of financial reporting and the appointment of the auditor.



Although the board may delegate some of its responsibility or authority to a committee, the board is still accountable for the operation of its committees and for the use of any delegated authority by those committees.

One way this can be done is through establishing a committee’s ‘terms of reference’ which include:

- What the committee’s purpose is;
- What its powers are (if any);
- Who its members will be;
- Who its chair will be;
- How often it will meet;
- How it will report to the board; and
- How often it will be reviewed.

The role of the chair

In the boardroom, the chair is *primus inter pares* – first among equals. Their role is to manage the business of the board both inside and outside of the boardroom. The chair does not hold greater authority than any other director but will generally have additional responsibilities.



In this document the term ‘chair’ refers to the person who leads and manages the business of the board. In some organisations this person may be known as the president, convenor or by some other name.

In the boardroom, the chair has a number of responsibilities such as facilitating discussion, ensuring that agenda items are dealt with in sufficient detail and that decisions are made appropriately.

The chair also has a number of responsibilities outside the boardroom including overseeing an appropriate flow of information to the board and maintaining a close link between the board and management. The role of the chair is often characterised as managing the business of the board because the chair is generally responsible for board’s operations, including setting its agenda and approving board papers. It is important that there is a strong, collegiate relationship between the chair and the CEO.

The role of the chair is generally not set out in law. However, an organisation’s governing documents may set out requirements such as how the chair is appointed and what their responsibilities are.

The role of the company secretary

Many boards appoint a company secretary (in some NFPs this person could be called the ‘public officer’) to facilitate corporate governance processes and support the operation of the board. The company secretary generally has responsibility for coordinating board minutes and papers, and monitoring compliance of the board and its committees with the law, the organisation’s governing documents and its internal policies. For companies, the Corporations Act specifically requires that the board appoint the secretary (s204D).

It is common for the company secretary to also have other roles within the organisation such as being general counsel. In smaller NFPs, the company secretary is often one of the directors.

The company secretary often has other obligations outside the boardroom. For example, the company secretary may take on responsibility for liaising with regulators on behalf of the board and complete timely and proper completion of any returns, such as the obligation of charities to notify the ACNC when a director is added or removed from the board. The organisation’s governing document or the laws that apply to them may also set out specific responsibilities for the company secretary.

It is common for the company secretary to report both to the CEO and to the board. Directors should be able to communicate directly with the company secretary without having to go through the CEO. Often the decision to appoint and remove a company secretary will be left to the board.



An organisation's governing documents and any laws that apply to it may set out requirements about who can be appointed as company secretary and the way this must be done.

The role of management

Directors act collectively to provide governance and oversight of an organisation and will typically meet several times per year for a limited period of time. It is not practical for boards to direct the day-to-day operations of an organisation, or to perform themselves the tasks necessary for an organisation to achieve its goals. For this to happen, the board must delegate some of its authority to 'management' (paid or unpaid workers).

For example, the board will generally delegate authority for the CEO to use the organisation's financial resources within the limits set by the budget and in alignment with the strategy. It is important that any delegation of the board's authority to management is recorded and regularly reviewed.



Although the board may delegate some of its responsibilities or powers to management, the board is still ultimately accountable for management and for the use of any delegated authority by management.

The board oversees the strategy while management develops and implements the plans to achieve it. Boards are expected to operate on a more long-term and strategic basis. By comparison, management should be concerned with the more immediate operational needs of the organisation.

“A company in many ways may be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does.”

Lord Justice Denning, *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd*, 1957

In practice, the division of responsibility between the board and management may be less defined. It may be possible in theory to divide responsibilities between the board and management, but it is likely that the line between the two will shift as an organisation's needs and environment changes.

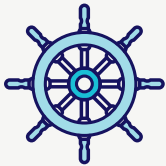
Boards should take an active role in considering where this line is drawn and in reviewing whether the focus of their discussions is appropriate to make sure they, and management, are making the most impactful contribution to the organisation.



QUESTIONS FOR DIRECTORS



DO DIRECTORS UNDERSTAND AND MEET THEIR RESPONSIBILITIES, INCLUDING LEGAL DUTIES?



ARE THE ROLES AND RESPONSIBILITIES OF THE BOARD AND INDIVIDUAL DIRECTORS CLEAR?



ARE ANY DELEGATIONS OF THE BOARD'S AUTHORITY CLEARLY RECORDED AND REGULARLY REVIEWED?



IS THERE AN APPROPRIATE SEPARATION BETWEEN THE ROLE OF THE BOARD AND OF MANAGEMENT?



ARE DIRECTORS SUBJECT TO ANY ELIGIBILITY REQUIREMENTS AND ARE THEY CONTINUING TO MEET THEM?



CASE STUDIES

HelpfulCare

The board of HelpfulCare has established a board charter that broadly sets out the roles and responsibilities of its directors, the eligibility requirements that apply to them, and their duties under the law. The charter is a board-approved policy document and is reviewed annually so that it is relevant and to keep it fresh in the minds of directors.

HelpfulCare also has a board policy handbook that includes a range of governance policies about how the board will operate. The handbook includes policies that explain in detail the roles and responsibilities of directors, the chair, the CEO and the company secretary.

The handbook also includes a policy on how the board will use committees. In line with the policy, the board of HelpfulCare has established three committees, each with its own terms of reference that are approved by the board and reviewed every two years. The HelpfulCare board has an audit committee, a risk committee; and a nominations committee.

The board's delegation policy sets out how the board's powers may be delegated to management or to committees. The policy also requires that any delegation be reviewed after a certain period. Delegations of the board's authority are also recorded in a register so there is clarity for the people involved with the organisation on who has delegation and how it is to be exercised.

The Friendlies

When calling for nominations for directors, the Friendlies provides a copy of a position description for directors which explains what the board and directors do.

When people are appointed as directors, they receive a letter of appointment from the chair which sets out the expectations of their roles. The letter includes matters such as eligibility requirements for directors, minimum attendance at board meetings and their general legal duties. Directors are required to sign and return the letter, which affirms that they understand their responsibilities and meet the relevant eligibility requirements, and they will advise the board if they are no longer eligible.

The Friendlies employ one staff member (their part time coordinator). Their position description is set out in their employment contract, which also explains their responsibilities and their relationship to the board.

The Friendlies do not have any ongoing committees. However, from time to time they establish ad hoc committees for specific projects. In the past they have had committees for coordinating their ten-year anniversary and for reviewing their constitution. When they established the committees and their terms of reference, they also record these details in the board minutes.