

Conflicts of interest for company directors

A company director must not allow personal interests to conflict with duties to the company. The director is liable to account to the company for any profit derived from breach of this duty, even if the company sustains no loss and even if the director has acted honestly.

Potential conflicts

The key areas of potential conflicts of interest are:

- ✦ Contracts with the company;
- ✦ Loans to directors;
- ✦ Insider trading; and
- ✦ Seizing the company's business opportunities.

Use of company information

- ✦ Directors cannot make use of information gained through their position to make a profit for themselves.
- ✦ This duty is extended by The Companies Act which forbids an officer (defined to include director or employee) from making improper use of their position, or of information gained by virtue of their position, to gain an advantage for themselves or any other person, or to harm the company.
- ✦ Therefore, directors are prohibited from using information to make a profit for themselves or for anyone else by dealing in the company's shares where that

information is not generally available to the public.

- ✦ This applies to all companies, whether listed on a stock exchange or not.

When company information cannot be used

- ✦ The Companies Act sets out the circumstances where a director may
 - ✦ make use of, act on, or disclose corporate information,
 - ✦ to whom it may be disclosed, and
 - ✦ for what purposes.
- ✦ A director who has gained information as a result of their position as director or employee of the company must not disclose that information to any person, or make use of or act on the information, except:
 - ✦ For the purposes of the company;
 - ✦ As required by law; or
 - ✦ For the purposes of disclosing their interests.

When company information can be used

A director may make use of, act on, or disclose information if:

- ✦ Details are entered in the interests register;
- ✦ The director was first authorised to do so by the board of directors; and
- ✦ The use of, acting on, or disclosure will not, or will not be likely to, disadvantage the company.

Disadvantaging the company

- ✦ There is conflicting case law as to whether a disclosure, use, or acting on of information is likely to disadvantage the company.
- ✦ The cases deal with what is known as a 'corporate opportunity'.
- ✦ Disadvantage to the company has been found in cases where the company has been unable to make use of the corporate opportunity (through lack of resources or because a third party would not contract with the company), or the company chooses not to make use of the corporate opportunity.
- ✦ Directors have been held liable where third parties have offered corporate opportunities to a director and intimated that they would not deal with the company itself.
- ✦ The courts have held that the director should have tried to secure the benefit of the opportunity for the company where that opportunity was within the company's line of business.
- ✦ Otherwise, the director should have declined the opportunity.

- ✦ Breach of this obligation makes the director liable to account for any profits arising out of the opportunity.

If in doubt, a director should seek the approval of all the shareholders of the company in writing before disclosing, using, or acting on information which may be prejudicial to the company.

Seizing the company's business opportunities

- ✦ Conflicts of interest where a director could profit by taking up a business opportunity that rightfully belonged to the company, must be avoided.
- ✦ This duty is very strict. It is breached even if the company itself cannot take up the opportunity for reasons such as a lack of funds.
- ✦ This means that it is not necessary to show that the company suffered a loss in order to establish a breach of duty.
- ✦ The director is liable to compensate the company for any loss suffered by it. They must also account to the company for any profit.
- ✦ A director can be held liable for breach of this duty in situations where, eg the director resigns as a director of the company to take up the opportunity.

See Us First

- ✦ Talk to us before making any financial decisions.
- ✦ We can assist you in meeting the necessary legal or financial requirements.
- ✦ If you consider that any of the issues contained in this fact sheet may affect you.

Disclaimer

Important: This is not advice. Clients should not act solely on the basis of the material contained in this fact sheet. Items herein are general comments only and do not constitute or convey advice per se. Changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. We believe the contents to be true and accurate as at the date of writing but can give no assurances or warranty regarding the accuracy, currency or applicability of any of the contents. This fact sheet is made available to our clients as a helpful guide for their private information. Therefore it should be regarded as confidential and should not be made available to any person without our prior approval.