

Environmental Defenders Office (SA) Inc.

INFORMATION GUIDE

Corporations and the Environment

(current as at June 2011)

Acknowledgment: Publication of this Guide was made possible with funding from the Law Foundation of South Australia

Contents

Part A. A basic introduction to corporations [\[link\]](#)

1. What is a corporation? [\[link\]](#)

2. How is a corporation governed? [\[link\]](#)

Directors [\[link\]](#)

Shareholders [\[link\]](#)

3. What are the duties of directors and officers of corporations? [\[link\]](#)

4. What penalties apply if these duties are breached? [\[link\]](#)

5. If a director or officer breaches their duties, who can take legal action?

6. Are there any time limits on bringing proceedings? [\[link\]](#)

Part B: How shareholders can influence a corporation's agenda [\[link\]](#)

1. Putting resolutions to shareholders [\[link\]](#)

2. Calling meetings [\[link\]](#)

Part C: Can directors and managers be made personally liable for environmental offences? [\[link\]](#)

Part D: What can be done if a corporation engages in misleading and deceptive conduct? [\[link\]](#)

Trade Practices Act, section 52 [\[link\]](#)

Trade Practices Act, Section 53 [\[link\]](#)

Part E: Environmental reporting by Corporations [\[link\]](#)

1. Disclosures by directors in the company's annual report [\[link\]](#)
2. Disclosures by superannuation and certain other managed investment funds [\[link\]](#)
3. Duties to disclose in a prospectus [\[link\]](#)
4. Voluntary disclosures [\[link\]](#)

CONTACT POINTS: [\[link\]](#)

Acknowledgment: This guide is based on materials prepared by the Environmental Defenders Office LTD (NSW) whose permission is gratefully acknowledged.

Part A. A basic introduction to corporations [\[Back to Contents\]](#)

1. What is a corporation? [\[Back to Contents\]](#)

A corporation (also known as a "company") is a type of organisation. It comes into existence when it is registered by the Australian Securities and Investments Commission ("**ASIC**") (s119). Once registered, the law recognises the company as a distinct legal entity, separate from those who own it (i.e. the shareholders) and run it (i.e. the directors).

2. How is a corporation governed? [\[Back to Contents\]](#)

A company is controlled by its directors and shareholders.

Directors

The directors (often referred to as "the board of directors") are responsible for the day-to-day management of the corporation. The board comprises "executive" and "non-executive" directors. The former are employed to manage the company on a full time or part time basis (such as the Managing Director). The latter attend board meetings, but do not "execute" the decisions of the board.

The directors can delegate their powers to the Managing Director or to any other officer of the company (s198A, 198C and 198D). However, in many circumstances, the board remains responsible for the delegate's actions (s190).

Shareholders

Although the directors run the company, ultimate control vests in the owners (known as the "shareholders" or "members"). Shareholders can appoint and dismiss directors (i.e. control the company's management) and make decisions which bind the company.

Shareholders are not usually involved in the day-to-day affairs of the corporation and, in many cases, meet only once a year at the annual general meeting. Nevertheless, they retain the power to control the company.

If you are lobbying a company to improve its environmental performance, you could write to both the company directors as well as the company shareholders. Both these

bodies have the ability to direct how the company operates.

Company details, such the names of directors and shareholders, the company's principal place of business and other corporate information, can be obtained by purchasing a "company extract" from ASIC. Free on-line searches of basic company information are available at <http://www.asic.gov.au>.

3. **What are the duties of directors and officers of corporations?**

[\[Back to Contents\]](#)

Because directors have substantial power over their company, the law requires them to comply with a number of duties.

Under the Corporations Act 2001 (the "**Act**"), directors must:

- act in good faith in the best interests of the corporation (s181);
- only act for a proper purpose (s181);
- not improperly use their position to gain an advantage for themselves or someone else or to cause detriment to the corporation (s182);
- not improperly use the information gained by their position to obtain an advantage for themselves or someone else or to cause detriment to the company (s183);
- disclose when a director has a material personal interest in a matter that relates to the affairs of the company (s191); and
- exercise the same degree of care and diligence that a reasonable person in their position would exercise (s180).

Note: this last duty will be satisfied in the making of a decision, where the person:

- makes the decision in good faith for a proper purpose; and
- does not have a material personal interest in the subject matter of the decision; and
- informs themselves about the subject matter of the decision to the extent they reasonably believe to be appropriate; and
- rationally believes that the decision is in the best interests of the corporation.

These duties extend to company secretaries, senior management, and others that control the company (such as, potentially, a holding company or a majority shareholder) (s9, definition of "officer").

4. **What penalties apply if these duties are breached?** [\[Back to Contents\]](#)

Two different regimes exist for punishing breaches of these duties.

The first is called the "civil regime". It requires the court to determine on the balance of probabilities whether or not the breach occurred (s1332). If the court decides that it did, then the court can:

- a. fine the director or officer up to \$200,000 for each breach (s1317G);
- b. order that person to pay compensation for any damage suffered as a result of the breach (s1317H); and
- c. make other orders.

Under the "criminal regime", the court must be satisfied beyond a reasonable doubt that the breach occurred and that the person committed the breach dishonestly or recklessly (s184). If the offence is proved, the court can impose a prison term (as well as other penalties).

5. If a director or officer breaches their duties, who can take legal action?

[\[Back to Contents\]](#)

If a director or officer breaches their duties, the following persons can take action:

- ASIC may seek a fine (s1317J);
- ASIC or the company that employed the director or officer may seek compensation (s1317J); and
- if a director or officer has breached, is breaching, or proposes to breach, the Act, then **any person whose "interests" are affected** can ask the court to stop that breach (s1324(1)). If the case is proved, the court can also order the director or officer to pay damages (s1324(1),(10)).

In some situations, a company's board of directors may not wish to take legal action against a particular director or officer, even though that person breached the law. In these circumstances, a shareholder can bring the action (in the company's name) if the court permits this to occur (s236).

The court must give permission if satisfied that:

- it is probable the company will not bring the proceedings itself;
- the shareholder is acting in good faith;
- it is in the best interests of the company that permission be granted;
- there is a serious question to be tried; and
- certain procedural matters are satisfied s237 (2) CA

6. Are there any time limits on bringing proceedings? [\[Back to Contents\]](#)

Proceedings for a civil penalty must be commenced within 6 years of the alleged breach (s1317K).

Criminal proceedings must be commenced within 5 years of the alleged breach, unless the minister consents to a later date (s1316).

Part B: How shareholders can influence a corporation's agenda

[\[Back to Contents\]](#)

1. Putting resolutions to shareholders [\[Back to Contents\]](#)

Corporations are required to hold meetings at which shareholders can vote "for" or "against" resolutions that affect the company's business.

These resolutions are usually prepared by directors. However, the law permits shareholders to propose resolutions too.

The general procedure for doing this is as follows:

- 100 members who are entitled to vote at the meeting, or members with at least 5% of the votes that may be cast, must give the company notice that they would like to put a resolution to a general meeting of members (S249N).
- The notice must be in writing, set out the wording of the proposed resolution and be signed by the members proposing it.
- The resolution must not exceed 1000 words and must not be defamatory (s249O).

- The members can also provide the company with a written statement in support of the proposed resolution. This statement must not exceed 1000 words and must not be defamatory (s249P).
- If these requirements are complied with, the company must circulate notice of the proposed resolution (and any supporting statement) to all shareholders (s249O).
- The proposed resolution must be addressed at the next general meeting that occurs more than 2 months after the notice is given.
- Minutes of the meeting must be available for inspection by members within one month of the date of the meeting.

Note: the cost of circulating material under paragraph 5 to all members must be borne by the company – but only if these documents are given to the company in time to be sent to members with the notice of the general meeting at which they will be considered. If they are not provided to the company in time, the costs (which can be considerable) may need to be paid by the members moving the resolution.

For this reason, it is important to check what date the company proposes to send notice of the relevant general meeting to members. Members should lodge their notice of proposed resolution and supporting statement with the company well in advance of that date.

Proposing such resolutions can allow small groups of shareholders to bring important issues to the attention of all shareholders. It forces the company to address these issues at a formal meeting of members. It may also reveal significant shareholder support for the proposed resolution.

2. Calling meetings [\[Back to Contents\]](#)

Under the Act, a group of shareholders can require the directors to call a general meeting of members. The procedure is broadly as follows:

100 members who are entitled to vote at the meeting, or members with 5% of the votes able to be cast at the meeting, may request the directors to call the meeting.

The request must be in writing, must state any resolution to be proposed at the meeting, be signed by the members making the request, and be given to the company.

The directors must call the meeting within 21 days after the request is given to the company. The meeting must be held no later than two months after the request is given to the company (s249D).

The Act does not appear to expressly state who is to pay for the costs of this meeting.

As with member resolutions (see section 1 of Part B, above), the calling of a general meeting allows for a particular issue to be raised before all shareholders. It also forces the company to formally address the issue. However, the right of members to request a meeting must be exercised in good faith, and for a proper purpose. It cannot be used to harass a company or its directors.

It is usually preferable for members to put resolutions to a scheduled meeting of members rather than to call a special meeting for that purpose. This is because it is expensive to call a meeting of members and, if the power to call a meeting is abused, people may seek to remove it from the law.

Part C: Can directors and managers be made personally liable for environmental offences? [\[Back to Contents\]](#)

A number of environmental laws make directors and managers personally liable for their company's breach of environmental laws.

For example, under the Environment Protection Act 1993 (SA) (s129):

(1) Where a body corporate commits an offence against this Act, a person who is an officer of the body corporate is-

(a) subject to the general defence* under this Part, guilty of an offence; and

(b) subject to subsection (2), liable to the same penalty as may be imposed for the principal offence when committed by a natural person.

(2) Where an officer of a body corporate is convicted of an offence under subsection

(1), the officer is not liable to be punished by imprisonment for the offence.

(3) Where a body corporate commits an offence of contravening a provision of this Act, an officer of the body corporate who knowingly promoted or acquiesced in the contravention is also guilty of an offence against that provision.

(4) An officer of a body corporate may be prosecuted and convicted of an offence pursuant to subsection (1) or (3) whether or not there has been a finding by a court that the body corporate committed the contravention.

* Section 124 provides a defence (1) if it can be proven that the defendant took all reasonable and practicable measures to prevent the commission of the offence(s), and (2) if the offence was justified by the need to protect life, the environment or property in a situation of emergency and the defendant took all reasonable and practical measures to prevent or deal with such an emergency.

The position is similar for offences committed under:

- the SA National Parks and Wildlife Act 1972 - which prohibits the destruction of Aboriginal relics or the causing of harm to certain flora and fauna, without a licence or an exemption;
- the Cth Environment Protection and Biodiversity Conservation Act 1999 - which prohibits actions that will have a significant impact on matters of national environmental significance, without an approval or an exemption; and
- a number of other environmental laws.

Further information about these statutes can be found in other EDO Fact Sheets.

Part D: What can be done if a corporation engages in misleading and deceptive conduct? [\[Back to Contents\]](#)

The Trade Practices Act 1974 ("TPA") and certain other laws aim to stop corporations from engaging in misleading and deceptive conduct.

Examples of such conduct in an environmental context could be:

- misleading statements in either a director's report, prospectus, Product Disclosure Statement, or voluntary environmental report (see Part E below); or
- misleading advertising about the green credentials of a product ("greenwash").

Trade Practices Act, section 52 [\[Back to Contents\]](#)

Section 52 of the TPA states that:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

To establish a breach of this section, there is no need to prove that the corporation **intended** to mislead. Nor is it necessary to show that anyone was actually misled. The only question is whether, in all the circumstances, the conduct was misleading or deceptive, or likely to mislead or deceive.

It is worth noting that silence, or failing to give the whole picture, can also be misleading.

Any person can take legal action to stop breaches of the TPA. If a corporation is in breach of section 52, the court can:

- make a declaration that a breach has been committed (s163A TPA);
- grant an injunction against the company to stop the misleading or deceptive conduct (s80(1) TPA);
- order the corporation to pay damages to the applicant – where the latter has suffered loss as a result of the misleading conduct (s82 TPA); and
- require corrective advertising (s80 per *Janssen Pharmaceutical Pty Limited v Pfizer Pty Ltd* (1985) 6 IPR 27).

Trade Practices Act, Section 53 [\[Back to Contents\]](#)

Section 53 of the Trade Practices Act 1974 prohibits companies from making false or misleading representations about a product or service.

Section 53 could potentially have application where false or misleading representations are made about the environmental credentials of a product. For example, if a company represents that a wood product does not contain any rainforest timber or that imported clothing has not been manufactured using oppressive labour practices, and these representations are false, then the conduct could potentially breach s53.

As with s52, there is no need to demonstrate that the corporation intentionally made a false representation. It is enough to show that the representation was wrong.

The remedies discussed with respect to s52 are all available for a breach of s53.

Part E: Environmental reporting by Corporations [\[Back to Contents\]](#)

There are only limited requirements for environmental reporting by corporations under our law.

1. Disclosures by directors in the company's annual report

[\[Back to Contents\]](#)

Under the Corporations Act 2001, public companies, and proprietary companies that exceed certain thresholds (called "large proprietary companies"), are required to produce an Annual Report.

The Annual Report is required to include a "Directors Report" that must:

"if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory – give details of the entity's performance in relation to environmental regulation" (s299(1)(f)).

If you believe that a company has not made a disclosure to this effect in its annual Director's Report, it is best to contact ASIC with details.

Copies of Directors' Reports can be obtained from the company itself, from ASIC (by paying a fee) or, occasionally, off the internet.

2. Disclosures by superannuation and certain other managed investment funds [\[Back to Contents\]](#)

Often people who choose to invest in super and certain other managed funds are unable to take ethical, social and environmental considerations into account, as investment decisions are made by fund managers.

However, under section 1013D of the Corporations Act 2001, which came into operation on 11 March 2002, relevant entities (such as super funds) must give their existing and prospective clients a Product Disclosure Statement ("PDS") setting out certain information about the investment product being sold.

This statement is required to disclose: "the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment".

Under the Corporations Regulations 2001, the PDS must outline:

what labour standards, and environmental, social or ethical considerations are taken into account; and

the extent to which these considerations are taken into account (clause 7.9.14C of the Corporations Regulations 2001).

Importantly, if a fund does **not** take any of these matters into account – the PDS must

contain a statement to this effect (CI 7.9.14C(a)).

One of the purposes of this requirement is to enable consumers to differentiate between competing funds on the basis of their ethical investment credentials.

3. Duties to disclose in a prospectus [\[Back to Contents\]](#)

When a company issues shares in itself to the public, or 'floats', it is usually required to prepare a public disclosure document called a prospectus.

This document is required to contain "all information [about the company] that investors and their professional advisors would reasonably require to make an informed assessment" of the prospects of the company (s710 CA).

In particular, the prospectus must include details of any material risks associated with investing in the company. In many cases, a company's poor environmental record will be a matter of material concern to potential investors, and should be disclosed. In other cases, the possibility of new legislation, such as laws limiting greenhouse gas emissions or imposing a charge on such emissions, may be a material risk and may need to be disclosed.

If you are aware that a corporation proposes to float, and you believe it should make disclosures relevant to its environmental performance or prospects in the prospectus, then you could write to the company to suggest this.

Any person can make a complaint to ASIC, if it believes a prospectus to be misleading or to omit material information.

In its role as the government's corporate watchdog, ASIC has the power to issue a 'stop order' or to take other action. A stop order prevents offers, issues, sales or transfers of the shares in question, while the order is in force (s739).

A person who suffers loss as a result of misstatements or omissions in a prospectus may be entitled to recover the loss from directors of the company making the offer or, in certain circumstances, from other persons involved in preparing the prospectus (s729).

4. Voluntary disclosures [\[Back to Contents\]](#)

There are a number of voluntary programs in Australia for environmental reporting.

One such example is the reporting of greenhouse gas emissions under the Australian Greenhouse Office ("AGO") "Greenhouse Challenge" program. A component of these reports is publicly available on the AGO's website (www.greenhouse.gov.au).

CONTACT POINTS: [\[Back to Contents\]](#)

1. For complaints and information about company misconduct and company law: [\[Back to Contents\]](#)

Contact ASIC

www.asic.gov.au - in the section entitled 'Contacting us', there is a complaints form which can be used to report misconduct by companies, either via the internet or in

hardcopy;

infoline@asic.gov.au - for enquiries as to the areas within ASIC's jurisdiction

1300 300 630 - the telephone help line. Trained operators may be able to assist you with enquiries.

2. For complaints and information about misleading and deceptive conduct: [\[Back to Contents\]](#)

Contact ACCC

www.accc.gov.au - in the section entitled 'contact details', there is an online email complaints and enquiries form;

1300 302 502 - the telephone information line will answer your query where possible or refer you to another contact point.

Contact the SA Office of Consumer and Business Affairs

www.ocba.sa.gov.au - in the section labelled 'consumer advice' there are means by which complaints or enquiries can be lodged online;

(8204 9777 or 131 882 for country callers excluding mobiles) - help line for general inquiries.