

So, you want to be a director?

A guide for aspiring directors and
for those voting for directors

Table of Contents

<i>Definitions</i>	3
<i>What are SGLMG and MGA?</i>	4
Why are there two registered organisations?.....	4
<i>Legal Framework</i>	4
<i>Modern Governance</i>	4
<i>Why do boards exist?</i>	4
<i>Director’s legal duties</i>	5
<i>Suitability of Responsible Persons</i>	5
<i>ACNC Governance Standards</i>	6
<i>Organisational Policies</i>	7
<i>Directors Rights</i>	7
<i>Governing vs Management</i>	7
<i>Expectations</i>	7
<i>Appointment</i>	8
<i>Director identification number</i>	8
<i>Board Committees</i>	8
<i>Developing your skills</i>	8
<i>Candidate Application</i>	8

Definitions

ACNC

Australian Charities and Not-for-profits Commission

ASIC

Australian Securities and Investment Commission

MGA

Mardi Gras Arts Limited

Officer

An officer is defined under the Corporations Act 2011 and means a director, secretary or a person who makes, or participates in, making decisions that affect the whole organisation or has the capacity to significantly affect the organisation's financial standing.

Responsible Persons

SGLMG Directors are Responsible Persons. A Responsible Person is someone who is responsible for governing a charity. Generally, a charity's Responsible Persons are its board or committee members, or trustees.

SGLMG

Sydney Gay & Lesbian Mardi Gras Limited

Stakeholders

SGLMG stakeholders include members, member groups, regulators, Mardi Gras communities and the broader community, government, partners, sponsors, suppliers, funders, auditors, media.

What are SGLMG and MGA?

Public Companies Limited by Guarantee operating under the Corporations Act 2001 (Cth). Both entities are also a registered not-for-profit charity operating under the Australian Charities and Not-for-profits Commission Act 2012 (Cth). They are registered as a public company with the Australian Securities and Investment Commission (ASIC) and registered as a charity with the Australian Charities and Not-for-profits Commission (ACNC). The regulator is the ACNC, a delegation from ASIC.

Why are there two registered organisations?

MGA is the legal employer, carries the revenue and expenses, is the contracted party and holds deductible gift recipient (DGR) status. SGLMG is the operational arm.

Legal Framework

Mardi Gras' legal framework incorporates common and statute law as well as the rules defined in the constitution. Directors have a duty to ensure practices and behaviours comply with these rules. DGR status is decided on by the Australian Tax Office. A charity with DGR status must meet certain rules and directors have a duty to ensure these rules are being met.

Modern Governance

Modern governance is quite different from boards of the past. Corporate governance has been elevated into the spotlight due to corporate failures and Royal Commissions over recent years. As such, expectations and requirements from boards and directors are much more than they once were. Boards have a legal duty and a moral duty to meet these standards and to ensure the sustainability of the organisation. Unexpected events such as COVID19 highlight the responsibilities, diligence and care that boards must exercise to ensure the organisation remains viable. Not-for-profits are often significantly impacted.

Corporate governance is defined as the *framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in the organisation including the mechanisms by which (SGLMG) and those in control are held to account.*

Elements of the corporate governance environment encompass the law, both common law and statute, regulatory bodies, members, other stakeholders, society's expectations, the constitution, policies and code of conduct. Underlying these are the board's values and ethics demonstrated in their relationships and decision-making.

Why do boards exist?

Simply because it is not feasible that all members can come together to make the necessary decisions.

SGLMG and MGA exist, each for a specified purpose. The purpose is legally binding. It is articulated in the constitutions and published on the ACNC website. The purpose also underlies its charity status. Directors are elected by members to act on their behalf in being responsible for the organisation's overall performance and compliance. The board ensures the organisation remains true to its purpose in executing strategy in order to achieve its purpose and does so within the law. The laws under which an organisation operates sets the threshold for expected director behaviour.

The Board of Directors provides oversight. Boards support management to achieve high levels of organisational performance and compliance. The Board is responsible for establishing an

appropriate system of corporate governance with regard to members, other stakeholders, the law, regulators and society.

The Board must ensure SGLMG develops a strategy to meet its objectives in light of the current context of the political, regulatory, economic, social, technological and competitive environments. The essential functions of a board are recognised as strategic direction, resources, performance, compliance, risk and accountability (Australian Institute of Company Directors). An **effective** board has diversity in its composition, diversity in the mix of skills and experience, ethnicity, backgrounds and most importantly diversity in thought and perspectives.

Director's legal duties

The legal relationship between SGLMG/MGA and a director is a '**fiduciary relationship**', that is, the duty to act with fidelity and trust. This means that a director acts in the interest of the whole organisation and not in the interests of self or a third party.

A critical element of a director's duty is that the organisation comes first. This is an obligation to act honestly, in good faith and act in the best of the director's ability for SGLMG/MGA's interests.

Directors duties are imposed by the *Corporations Act 2001*(Cth), *ACNC Act 2012*(Cth) and also federal and state laws such as Contract law, Intellectual property, Work, Health and Safety law, Anti-discrimination law, Environment law, Competition law, Taxation and superannuation, Privacy and data.

Directors have a duty under common law, under the Corporations Act and for registered charities, under ACNC Act, to act in the best interests of the NFP organisation that they serve. Directors should not seek to benefit from the NFP organisation and should not be influenced by their wider interests when making decisions affecting the organisation. Directors have obligations not to improperly use their position, or information available to them in their position as a director to gain an advantage for themselves or someone else or to cause detriment to the NFP organisation. Directors are obliged to disclose conflicts of interest. Directors also should not use their relationship with other directors to lobby for their projects.

Directors could be liable if Mardi Gras was in breach of any law. Actions can be brought against directors up to seven years after they finish their term for consequences of decisions made when they were a director.

Suitability of Responsible Persons

Directors under the ACNC Act are **Responsible Persons**. An individual may only be appointed as a Responsible Person if they are:

- not disqualified from managing a corporation, within the meaning of the Corporations Act 2001 (Cth) and
- have not been disqualified by the Australian Charities and Not-for-profits Commissioner at any time during the previous year from being a responsible person of a registered charity.

You may be disqualified from managing a corporation if you have been convicted of any of the following:

- a serious ('indictable') offence that involves making or participating in making, a decision that affects the whole or a substantial part of the business of a corporation (including an Aboriginal and Torres Strait Islander corporation)

- a serious ('indictable') offence for actions that could significantly affect a corporation's (including an Aboriginal and Torres Strait Islander corporation's) finances
- an offence that is a contravention of the Corporations Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) that is punishable by imprisonment for more than 12 months
- an offence involving dishonesty that is punishable by imprisonment for at least three months, or
- a serious offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

These include offences against the law of a foreign country.

ACNC Governance Standards

As registered charities, SGLMG and MGA must comply with the ACNC Governance Standards. Non-compliance could result in loss of charitable status, damaged reputation and loss of funding making it unviable. Directors are responsible for ensuring that SGLMG complies with these standards. Directors are 'Responsible Persons'.

Standard 1: Purposes and not-for-profit nature

Charities must be not-for-profit and work towards their charitable purpose. They must be able to demonstrate this and provide information about their purposes to the public.

Standard 2: Accountability to members

Charities that have members must take reasonable steps to be accountable to their members and provide them with adequate opportunity to raise concerns about how the charity is governed.

Standard 3: Compliance with Australian laws

Charities must not commit a serious offence (such as fraud) under any Australian law or breach a law that may result in a penalty of 60 penalty units (equivalent to \$12,600 as at December 2918) or more.

Standard 4: Suitability of Responsible Persons

Charities must take reasonable steps to:

- Be satisfied that its Responsible Persons are not disqualified from managing a corporation under the *Corporations Act 2001 (Cth)* or disqualified from being a Responsible Person of a registered charity by the ACNC Commissioner, and
- Remove any Responsible Person who does not meet these requirements.

Standard 5: Duties of Responsible Persons

Charities must take reasonable steps to make sure that Responsible Persons are subject to, understand and carry out the seven duties set out in this Standard.

1. Act with reasonable care and diligence
2. Act honestly in the best interests of the charity and its purposes
3. Not misuse the position of responsible person
4. Not to misuse information obtains in performing duties
5. Disclose any actual or perceived conflict of interest
6. Ensure that the charity's financial affairs are managed responsibly
7. Not allow a charity to operate while insolvent

These are explained in more detail on the ACNC website.

Organisational Policies

In addition to the law, directors must comply with the internal policies of the organisation. These include the Board Charter, Board Code of Conduct, Conflict of Interest, Related Party Transactions, Communication and Media and all other relevant policies. They are also responsible for setting and monitoring policy.

Directors Rights

- Directors may rely on information and professional expert advice where they have sought this advice in good faith. Directors must also make an independent assessment of the information they have received.
- Directors have a right to receive information on the company's affairs in a timely manner to assist them in their oversight.
- Directors are covered by Director's and officer's insurance. This generally does not cover circumstances where a director has breached their duty of care and diligence.

Governing vs Management

Management runs the organisation; the board ensures it is being run well and in the right direction. Directors generally operate on a longer-term timeframe and at a strategic level.

An effective board has diversity of thought as well as diversity of skills, knowledge and perspectives. A board should ensure it has all the necessary skills across the directors to deliver on the vision including strategy and risk, finance, legal understanding, membership, sector knowledge, marketing, stakeholder management, public relations, fundraising or other relevant knowledge for its context. All directors are expected to have an adequate level of financial literacy and the ability to read and interpret financial statements.

Directors act *only* as a group. Individual directors have no inherent executive power. They make joint decisions for which they are all individually and collectively liable. One measure of a good director is their contribution to the collective. It is expected that directors debate contentious issues and put alternative viewpoints on the table. Good debate leads to better informed decisions as diverse issues and viewpoints are considered and discussed. Even if directors are representing a small member group, each director has the responsibility to consider the merits of a decision and act in the best interest of SGLMG as a whole and its future. Directors are not there to act in the interest of a particular group. Acting so could be a breach of a director's legal duty. Once the board comes to a decision, each director is expected to support that decision.

Expectations

Board Directors have an obligation to the organisation and members. It is a selfless role and not one for personal agendas. Being a board director can be very rewarding, but it is time consuming and requires dedicated time above and beyond meetings. Having time capacity is a necessary component.

Devoted time is required outside of the meetings for preparation to fulfil the **duty of due care and diligence**. Directors are expected to have read the board pack, undertake their own independent research on matters, understand the financials and bring to the meetings questions they have regarding any items to inform decisions. Each director has an obligation to focus on every agenda item, not just those they are interested in. Their assessments, understanding and decisions should focus on strategic implications and consider the impact on the future of Mardi Gras. Adequate meeting preparation can easily take up to a day.

Directors also have an ongoing obligation for professional development to upskill themselves, recognise their own gaps and commit to improving their knowledge and capacity to be an effective Director.

Meetings are scheduled bi-monthly from 6.00pm – 9.00pm. Occasionally, additional meetings are called if a matter arises that needs to be addressed before the next meeting.

Directors are also expected to be involved in other activities to support management such as planning, sub-committee meetings, working groups, attendance at events.

Appointment

Directors will receive a letter of appointment and be provided with an induction program. To accept a director position, individuals must sign a Consent to Act and declaration. This is a legal requirement and implies that you understand and accept your legal obligations.

A director's duty is to represent the interests of the whole organisation. They are bound by board policy and strategic plans, regulations and the democratic process of decision making.

Director identification number

From November 2021, directors must apply for a unique director ID to verify their identity. Applications are made on the Australian Business Registry Services (www.abrs.gov.au).

Board Committees

Committees can be created by delegation from the board. Committees report up to the board. Being on a committee is a great steppingstone to being a director. Committees and working groups help the board with aspects of their role and duties. The work should not conflict with the CEO's delegated responsibilities. They can be useful for areas of board business that require specialist skills or a substantial time commitment. They often do the homework for the board and provide recommendations to the board. Decision-making responsibilities rest with the board of directors. Committees are governed by a Charter which defines their role, timespan, functions and responsibilities. Where committees or working parties are established to meet a specific objective, they are generally disbanded once the objective is met or the objective is no longer relevant.

Developing your skills

There are numerous organisations who run short courses specifically for directors. Some include:

- Justice Connect
- ProBono Australia
- Governance Institute of Australia
- Women on Boards
- Australian Company of Institute Directors

Candidate Application

To be advised.