



B Corporation legal requirement: Guide for directors

Australia

About this document

This document is designed to help directors understand the interplay between directors' duties in Australia and the requirement to embed a purpose clause and stakeholder clause into a company constitution. It is intended to be for anyone who needs to explain to a director what the legal requirement means for your business. It may form part of your own briefing paper, or be provided to anyone else in your business. For more detailed information on the requirement, including how to amend a typical company constitution, please refer to the how-to guide.

Please note this document outlines broad guidance and should not be considered specific legal advice. We're grateful for the assistance of Kristy Dixon at Marque Lawyers for helping prepare this guide for B Lab Australia and New Zealand.



Table of Contents

1

What is the B Corp legal requirement and why?

2

What does the B Corp legal requirement mean for my director duties?

3

Does the board need to change anything about its decision-making processes?

4

Does adoption of these provisions create greater exposure to liability for me as a director?

5

Should I seek legal advice before proceeding?

1. What is the B Corp legal requirement and why?

As outlined in the [“how to” guide](#), the Australian B Corp legal requirement seeks to demonstrate that B Corp certified companies commit to considering the impact of their decisions on stakeholders including employees, customers, suppliers, shareholders, community and the environment, and to seeking to balance the pursuit of profit with an overall positive impact on society and the environment.

Community expectations as to the accountability of corporations in respect of non-financial risk, being their impact on the broader range of stakeholders, has shifted in recent times. Corporations are being judged by a higher standard of being good corporate citizens, and their reputation (and consequently their financial position) can be impacted when they fall short. In this context, B Corps are leading the way by embedding their intention to hold themselves to that higher standard within their governing documents, confirming their profit with purpose motive as part of the understanding between each B Corp company and its shareholders and directors as to how the company conducts its business. In this way, the B Corp legal requirement simply seeks to align your company’s constituent documents with your company’s already publicly stated purpose and decision-making practices.

2. What does the B Corp legal requirement mean for my director duties?

Your duties as a director of an Australian company are governed by a complex combination of general law and statutory rules. They include obligations on directors to exercise their powers and discharge their duties:

- a. with the degree of care and diligence that a reasonable person would exercise; and
- b. in good faith and in the bests interest of the corporation and for a proper purpose.

Central to these duties is consideration of what is the purpose of the company, informing what can be considered as in its best interests.

In the absence of any stated purpose in your company's constitution, in general terms, the default position is that a commercial company's purpose is to carry on its business operations to advance the interests of the shareholders. And although there is some debate as to exactly what this means, it is generally accepted that in current times it requires the company's board and management to apply a medium to long-term view (ie including consideration of non-financial risks that may have a longer term impact) as to what is in the interests of the company.

For example, that it may be considered in the company's interests to pay its staff well to ensure they stick around for the medium to long term, even though paying them less would yield a greater shareholder profit in the very short term. Similarly, matters that go to reputation (such as using questionable tactics to drive greater customer sales) might appear to be the better option in the short term but arguably will harm the business in the longer term (for example, by leading to a boycott or loss of market share due to the reputational damage).

2. What does the B Corp legal requirement mean for my director duties? (continued)

These examples show that it is already possible, and in fact necessary, for directors to consider the interests of stakeholders other than shareholders (such as employees, customers, the public at large or the environment) when weighing up what is in the best interests of the company as a whole, provided that the directors' decisions do not push beyond using the company's resources for the benefit of other stakeholders where there is no prospect of commercial advantage to the company.

Adopting the B Corp legal requirement is a signal (in the statutory contract between the company, its directors and its shareholders) as to the way that the company, as a certified B Corp, will conduct its business. It does not change the applicable director duties, but instead clarifies that a positive impact on society and the environment is part of the company's purpose, informing what will be in the best interests of the company.

The provisions do, though, impose on directors that they must always consider the interests of the broader range of listed stakeholders in determining what is in the best interests of the company as a whole. However it is still up to the directors to determine the relevant weighting to accord the various interests that need to be balanced, in pursuit of the overall purpose.

This is arguably no different to the existing position without adopting the list of stakeholder interests – it is already well-established at law that it is prudent for directors to consider the impact of a proposed decision on the interests of all relevant stakeholders, given an adverse impact on any stakeholder interest is likely to prejudice the general interests of the company as a whole over time. And if the purpose of the company is to also seek to achieve an overall positive impact on society and the environment, then it is also appropriate for a decision's impact on this basis to be added to the list of stakeholder considerations, along with the other more typical stakeholders.

3. Does the board need to change anything about its decision-making processes?

As a B Corp, this purpose and the stakeholder considerations are undoubtedly a part of your process already. However, the practical effect of entrenching them is to make them a more conscious part of your corporate governance and decision making and a statement that you will adhere to that higher level of accountability. Note too that this should apply not only at the board level, but also to any management decisions delegated by the company's board to other employees.

Further examples of best practice corporate governance procedures that can assist with ensuring compliance with the B Corp provisions are included in the ["how to" guide](#) in section 5. In general terms though, if the board is comfortable that the provisions required to be adopted to meet the B Corp legal requirement are appropriate for how the company does business, the provisions should not change the process or outcome of your decision-making.

If you have a specific purpose that you also adhere to on top of the more general social benefit purpose prescribed by the B Corp legal requirement, you may want to consider adding this to your constitution as well – we suggest you talk to your lawyer about this.

4. Does adoption of these provisions create greater exposure to liability for me as a director?

The extent to which the adoption of the B Corp legal provisions in your company constitution changes the risk profile of your company and its directors will depend on a variety of factors, including the nature of the company's business, its existing corporate governance practices and public statements about its purpose, and the make-up of its shareholder base. If you have any concerns, it would therefore be prudent to seek specific legal advice.

In general terms however, provided the directors make decisions for the company with genuine intention to best meet the interests of the company and its stated purpose, and factoring in any impacts on the range of stakeholders, there should be no greater exposure to liability. In fact, given that the statement of purpose and stakeholder considerations reflect the way a purpose-led business would be approaching decision-making already, we suggest this change will have the effect of bringing your constituent document into alignment with your processes and therefore actually providing better support and legal protection to the company and its board for doing so.

5. Should I seek specific legal advice before proceeding?

If you have any concerns as to whether the provisions reflect your company's purpose and decision-making or if your company's particular circumstances involve greater risk of stakeholder action (for example, for a listed company or a company operating within a highly regulated industry), before adopting the provisions, it would be prudent to seek specific advice as to the risks in your company's particular circumstances and as to additional measures you might wish to consider adopting to minimise such risks.