

TERMINATION:

- **Outgoing partners must give notice** to creditors and clients to avoid continuing liability: secs 21 & 40
- **A partnership may be dissolved** with or without a court order: sec 36-39
- **Rights and obligations** of partners **continue** after dissolution **until all business transactions have been completed**: sec 42
- **After dissolution** a partner **might be entitled to a share of profits (or be required to contribute to losses)**: sec 48

STATUTORY FRAMEWORK FOR DISSOLUTION:

S 36 – BY EXPIRATION OR NOTICE

- If the partnership is entered into for a **fixed term** the expiration of that term terminates the partnership
- If it is for a **single venture** termination of that venture or undertaking terminates the partnership
- If it is for **undefined time** **any partner giving notice** to others of his/her intention to dissolve the partnership terminates the partnership
 - The dissolution will **take place as from the date mentioned in the notice**. If no date is mentioned, it takes place from the date when the notice is received.

S 36 - Dissolution by expiration or notice

Subject to any agreement between the partners a partnership is dissolved—

- (a) if entered into for a **fixed term** by the expiration of that term;
- (b) if entered into for a **single adventure** or undertaking by the termination of that adventure or undertaking;
- (c) if entered into for an **undefined time** by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution or if no date is so mentioned as from the date of the communication of the notice.

S 37 – BY DEATH, BANKRUPTCY OR CHARGE:

S 37 - Dissolution by death or bankruptcy or charge

- (1) Subject to any agreement between the partners **every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner**.
- (2) A partnership may at the option of the other partners be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

S 38 – BY ILLEGALITY:

S 38 - Dissolution by illegality of partnership

A partnership is **in every case dissolved** by the happening of **any event which makes it unlawful for the business of the firm to be carried on** or for the members of the firm to carry it on in partnership

S 39 – BY THE COURT:

- Mental illness
- The partner other than the partner suing becomes in any other way permanently incapable of performing his part of the partnership contract;
- A partner has been guilty of such conduct as in the opinion of the court will prejudicially affect the carrying on of the business;
- A partner willfully or persistently commits a breach of the partnership agreement;
- The business of the partnership can only be carried on at a loss;
- In the opinion of the court, it is just and equitable that the partnership should be dissolved.

s 39 - Dissolution by the court

On application by a partner the [court](#) may **decree a dissolution** of the partnership in any of the following cases—

(a) when a partner is found to be **mentally ill**, in which case the application may be made as well on behalf of that partner by his or her guardian or administrator if appointed under the Guardianship and Administration Act 1986 or other person having title to intervene as by any other partner;

(b) when a partner other than the partner suing becomes **in any other way permanently incapable of performing** his part of **the partnership contract**;

(c) when a partner other than the partner suing has been guilty of such **conduct** as in the opinion of the [court](#) regard being had to the nature of the [business](#) is calculated to **prejudicially affect the carrying on of the business**;

(d) when a partner other than the partner suing **wilfully or persistently commits a breach of the partnership agreement** or otherwise so **conducts himself** in matters relating to the partnership [business](#) **that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him**;

(e) when the **business** of the partnership **can only be carried on at a loss**;

(f) whenever **in any case circumstances** have arisen **which in the opinion of the court render it just and equitable that the partnership be dissolved**.

GIVING NOTICE TO AVOID CONTINUING LIABILITY:

S 21 - Liabilities of incoming and outgoing partners

(1) **A person who is admitted as a partner** into an existing firm does not thereby become **liable to the creditors of the firm for anything done before he became a partner**.

(2) **A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations** incurred before his retirement.

(3) **A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm** as newly constituted and the creditors and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

S 40 - Rights of persons dealing with firm against apparent members of firm

(1) **Where a person deals with a firm** after a change in its constitution **he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change**.

(2) **An advertisement in the Government Gazette and in at least one newspaper** circulating in each district in which the firm carries on [business](#) **as to a firm whose principal place of [business](#) is in Victoria shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised**.

Duties of Care and Diligence

THE DUTY

Directors' duties of care (skill) and diligence are:

- the duty to exercise reasonable care (skill) and diligence (treat as overlapping requirements) in the performance and exercise of the powers and functions of directors; and
- the duty to prevent insolvent trading by a company.

Note lax standard in older cases – *Re City Equitable Fire Insurance Co Ltd* [1925].

SOURCES OF THE DUTY

- S 180(1) – care and diligence
- General law: the *AWA case* - care *skill* & diligence
- A director's employment contract (if any)
- Note principles that may provide a defence relating to:
 - (i) delegation – s 198D and s 190
 - (ii) reliance – s 189
 - (iii) statutory business judgment rule: s 180(2)
(compare s 1317S & s 1318 which may provide relief from liability when acting *honestly*: *ASIC v Macdonald (No 11)*[2009] NSWSC 287).

THE STATUTORY DUTY

Section 180(1) requires directors and other officers to exercise their powers and duties with the degree of care and diligence that *a reasonable person* would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and
- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

This is a 'civil obligation only' (refers to s 184, the 'Criminal offences')

It is a civil penalty provision: s 1317E.

THE GENERAL LAW DUTY

- AWA case: *AWA v Daniels* (1992) 7 ACSR 759 (NSWSC); *Daniels v Anderson* (1995) 37 NSWLR 438 (NSWCA)
- Expresses the general law duty in the same terms as the statute
- Did the CA decision create uncertainty in relation to several aspects of the duty?

- Adds in 'skill'
- Is seminal case for the duty as a whole
- AWA mandated the following *minimum* standards of care, skill & diligence expected of all directors (higher standards may be expected of some directors eg. exec directors):
 - (i) to acquire a basic understanding of the business of the co and the fundamentals of the co's business;
 - (ii) to keep informed about the co's activities;
 - (iii) to generally monitor the co's business affairs. Thus a director should attend board meetings regularly; and
 - (iv) to be familiar with the financial status of the co by regularly reviewing the financial statements.

3 OVERLAPPING REQUIREMENTS

CARE:

- Reasonable care: s 180(1)- the degree of care that *a reasonable person* would exercise in the co's circumstances and with the same responsibilities as the director;
- for non-exec directors, there is no objective standard of the reasonably competent director. If non-exec director appointed because of special skills, then the standard of care is judged by what other people possessed with the same knowledge, skill & expertise would have done
- basic duty: guide and monitor management, be familiar with/understand company's activities and financial status

SKILL

- The standard of skill expected is variable. Different standards may apply according to whether the director is an executive or non-executive and whether he/she has special qualifications. But, at a minimum, all directors must have the necessary skill to have a basic understanding of the company's business and its financial position.
- for non-executive directors, there is no objective standard of the reasonably competent director. If non-exec director appointed because of special skills, then the standard of care is judged by what other people possessed with the same knowledge, skill & expertise would have done

DILIGENCE:

- s 180(1) and AWA: a director must exercise the degree of diligence that *a reasonable person* would exercise if they were a director of a company in the company's circumstances and had the same responsibilities as the director
- attend board meetings
- to be familiar with the co's business and financial position
- conduct periodic review of company's financial statements

