

Share Capital, Dividends and Membership

Fundraising Power

- **Section 124 CA: Legal capacity and powers of a company – companies can raise capital by:**
 - Issuing and cancelling shares
 - Unless limited by guarantee
 - Granting options over unissued shares
 - Granting a security interest in uncalled capital
 - Issue debentures
 - Grant a 'circulating security interest' (formerly 'floating charge')

Membership

A person is a member of a company through either: **s 231 CA**

- Upon registration of the company (subscription) – **s 231(a)**
- Agreement to become a member after registration and name entered on register of members
- Conversion from limited by guarantee to limited by shares **s231(c)**

Member's Register

- Companies must maintain a register of members **ss 168-9**
 - at registered office or business premises – **CA s 172**
 - But use of information is restricted – **CA s 177**
- The Register must contain: **s 169 CA**
 - Member's name and address
 - Date on which the entry of the member's name is made
 - An index if there are more than 50 members
 - If there is share capital – number, type and class of shares; dates of issue; amounts paid or unpaid
- 2 main functions
 - 1. Prerequisite to membership **s231, Maddocks v DJE Constructions¹**
 - Membership of a company dates from entry in share register
 - 2. In the absence of evidence to the contrary **Sung Li Holdings²**, the register is proof of the matters shown in the register: **s 176 Re Clifton Springs hotel Ltd³**

1 HC held person does not become a member until person's name is entered in share register. Irrelevant that the company had not maintained a register. If register is altered in contravention of constitution, entry in register is void and transferor remains legal owner of the shares.

2 CC provided a transfer of shares was only to be registered if authorised by board. B did not meet to approve transfer, but transferee's name was registered. Held transferee not be recognised as owner until board approval.

Week 6: Directors' Duties

Category	Common law	Statute
Loyalty	No conflict	Material interests must be disclosed ss191-196 ** apply alongside common law**
	No profit	Related party transactions Ch2E
		Duty not to misuse position or information ss.182-183, 184
	Duty not to fetter discretion	
	Duty to act in good faith and best interests of the company	Duty to act in good faith and in the best interests of the company and use powers for a proper purpose ss.181,184
	Duty to use powers for a proper purpose	** apply alongside common law**
Care and diligence	Duty to act with reasonable care, skill and diligence	Duty to act with care and diligence s.180
		Duty to avoid insolvent trading s.588G

** **s79** aiding and abetting in contravention- applies to anyone **

1. Outline Relevant Persons and their role inc 'The Board'
2. Identify Problem Behaviour
3. Duties Breached
S180, s181, s182, s183, s588G, s79, common law
4. Defences
5. Remedy

Directors	Common law duties (fiduciary duties to company) Statutory duties Insolvency provisions s588G only apply to directors
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3 Pask made application for shares and forwarded payment to company. His name was entered in the register but no notice of allotment or acceptance was sent to him and denied receiving any communication from the company other than notice of an extraordinary meeting. Company went into liquidation and liquidator included Pask on a list of contributories as holder of partly paid shares even though there were no minutes recording allotment of shares to him.

Claim: P applied to court to have register rectified by removal of his name and order for the return of allotment

Held: Court refused and held P to be a member because his name was entered in the register.

Officers	Some statutory duties i.e. duties of care No conflict/ no profit doesn't apply
Employees	S182-183 *Continues after person ceases to be a director/ officer/ employee
Others	May apply under s79; aided and abetted in contravention

Directors have a **core, irreducible requirement of directors to be involved in the management of the company** *ASIC v Healey* [2011]⁴

➤ Who owes the duties?

- **Fiduciary duties:** owed by directors to the company, also owed by those in a relationship where there are fiduciary obligations
- **Contractual duties:** those who have contracts with the company- i.e. Employment contract.
- **Tortious duties:** those who are in such proximity to the company that they owe a duty of care
- **Statutory duties:** Directors, officers and sometimes employees

Directors

➤ A director is **s9 CA**

a) A person who

- i. Is appointed to the position of director; or (**De jure**)
- ii. Is appointed to the position of alternate director and is acting in that capacity regardless of the name given to their position; and (**De facto director**)

b) Unless the contrary intention appears, a person who is not validly appointed as a director if:

- i. They act in the position of a director; or
- ii. The directors of the company...are accustomed to act in accordance with the person's instructions or wishes (**Shadow director**)

○ De facto directors

- Person who is not appointed but acts in the position of a director
 - *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565⁵

⁴ Directors adopted financial statements without noticing there was a major 1.2Billion \$ problem with it.

Liability that each director was aware of, was effectively in the wrong column (which indicated it was a non-current liability when it was a current liability).

5 Person resigned as director but continued to negotiate with taxation and creditors on behalf of company. DCofT sought to make him liable for payments which he would've been liable for if he were a director. **HELD:** Austin had practical direction of company – negotiating important things i.e. debt taxation. Held they were a de facto director.