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# Powers

## Powers of directors

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### Section 198A (RR)

(1) The business of a company is to be managed by or under the direction of the directors.

See s 198E - powers of directors who are the single director/shareholder of pty

(2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting. For example, the directors may issue shares, borrow money and issue debentures.

- On the board – look after audits

## Appointment and removal of directors

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- Must be at least 18, and not disqualified: s 201B
- Grounds for disqualification: Part 2D.6 CA
- Minimum numbers of directors: s 201A
  - Pty Ltd companies – Must have at least one director (s 201A(1))
  - Ltd companies – Must have at least 3 directors, at least 2 must ordinarily reside in Aust (s 201A(2))
- Directors may be elected by members: See eg s 201G
  - S201G (RR): A company may appoint a person as a director by resolution passed in general meeting
- Directors of public companies – May be removed by members: s 203D; but not by other directors: s 203E
- Directors may appoint Alternate directors: s 201K (RR)

## Remuneration – Listed companies

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- Listed companies – must disclose their arrangements for remuneration of key management personnel in annual reports: s 300A
- Annual General Meetings (AGMs) of members of listed companies – Voting on advisory resolution of remuneration of key management personnel: s 250R
- If more than 25% of votes were against the adoption of the remuneration report – at next AGM board may face a “spill” resolution: s 249L

# Q1: Is X a director/officer?

The first question that must be decided with regard to any liability on the part of X is whether he could be considered as a director or officer of the corporation, which could imply a fiduciary or statutory duty upon him.

## Statutory definitions

### s9 – Director means:

(a) a person who:

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

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

- (iii) **they act in the position of a director (de facto director); or**
- (iv) **the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes (shadow directors).**

Subparagraph (b)(ii) **does not apply merely because the directors act on advice** given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

### s9 – Officer means:

- b) a **director or secretary** of the corporation, or
- c) a **person**:
  - (i) who **makes, or participates in making, decisions that affect the whole, or a substantial part, of the business** of the entity;
  - (ii) who has the **capacity to affect significantly the entity's financial standing, or**
  - (iii) **whose instructions the board is accustomed to act** (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); **or**
- d) a person: a receiver, or **receiver and manager**, of the property of the corporation; or
- e) an **administrator** of the corporation; or
- f) an administrator of a deed of company arrangement executed by the corporation; or
- g) a **liquidator** of the corporation; or
- h) a **trustee** or other person administering a compromise or arrangement made between the corporation and someone else.

**If the question does not expressly say that X is a director**