

I. DIRECTOR DUTIES

Is the person a Director of the Company?

Corporations Act 2001 (SA) s 9

director of a company or other body means:

- (a) a person who:
 - (i) is appointed to the position of a 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:
 - (i) they act in the position of a director; or
 - (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Shadow v De facto Director

Re Mea Corporation Ltd [2006] EWHC 1846 (Ch):

- Because the role of shadow director does not necessarily extend over the whole range of a company's activities, it would be possible for a person to be both a shadow director and de facto director simultaneously.

Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296:

- It may not always be possible to maintain a rigid distinction between a de facto director and a shadow director.

Is the person a de facto director?

Smithton Ltd v Naggar [2014] EWCA Civ 939 [39]:

- Objective test.

Is there an absence of valid appointment?

Re Richborough Furniture Ltd [1996] 1 BCLC 507:

- The absence of valid appointment may arise from some defect in an original appointment or it may supervene by disqualification or by expiration of fixed tenure, a de facto director includes someone who has acted as a director even though not validly appointed, and someone who acts as director even if there has been no purported appointment.

Has the director resigned?

William v Bearing Trader Pty Ltd (2008) 69 ACSR 334:

- A de facto director includes a person who purports to resign as director but continues to act as a director.

Has the person been removed as a Director but is continuing to act as such?

Resources Equites Ltd v Garrett [2009] NSWSC 1385 [301]:

- A person who is removed as a director but who continues to act as a director.

Is the person describing themselves as a consultant?

Mistmorn Pty Ltd (in liq) v Yassen (1996) 21 ACSR 173:

- A person may be a de facto director even where that person describes himself as a consultant, where the person undertakes tasks that would typically be expected of a director.

Is the person a manager?

Forkserve Pty Ltd v Jack and Aussie Forklift Repairs Pty Ltd (2000) 19 ACLC 299:

- A person whose title is Service Manager may be a de facto director where the person signs documents under the title of director and represents himself to third parties as a director.

Factors to consider

Deputy Commissioner of Taxation v Austin (1998) 28 ACSR 565:

- Whether a person acts as a director “will often be a question of degree, and requires consideration of the duties performed by that person in the context of the operations and circumstances of the particular company concerned”.
- Factors considered relevant:
 - The **size of the company**- large companies, more discretion given to employees.
 - The **internal practices or structure of the company** in that certain work given to an individual may be of such a type that it is more appropriate to classify that work as being undertaken by the individual in the capacity as an expert employee or consultant rather than as a director.
 - How the person who it is claimed has **acted as a director was reasonably perceived by outsiders** who deal with the company.

Grimaldi v Chameleon Mining NL (No 2) (2012) 87 ACSR 260:

- Further factors to consider:
 - If a consultant to the company is itself a company and what it does, through the actions of its own directors or officers, is act in the position of a director, then consistently with the policy of s 201B which requires a director to be a natural person, it is a question of fact as to which director or officer in the consultant company is a de facto director of the company [68], [103] and [136]-[140].
 - A person may still be a de facto director even if the company concerned has a properly constituted and functioning board [74] and [132]-[134].
 - Whether the company has held out a person as a director is a relevant consideration [75] and [130]-[131].

Is the person a shadow director?

- As per s 9: A person who is not validly appointed as a director, but the directors of the company are accustomed to act in accordance with the person's instructions or wishes.

Does the board customarily comply with the advice of the person?

Re Lo-Line Electric Motors Ltd (1988) 4 BCC 415, 421:

- The reference is customary compliance by the board rather than an individual director.

Does the advice relate to only some matter of the board?

Australian Securities Commission v AS Nominees Ltd (1995) 18 ACSR 459, 509:

- It is not necessary that there be directions or instructions by the shadow director which embrace all matters involving the board.

Relevant Factors to consider

Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd (2010) 77

ACSR 410 upheld in Buzzle Operation Pty Ltd (in liq) v Apple Computers Australia Pty Ltd (2011) 82 ACSR 703:

- **White J:**
 - In some circumstances, it is possible for the one person to be both a shadow director and a de facto director [233]-[236];
 - It is not necessary that the instructions or wishes of the shadow director be given over the whole areas of corporate activity for which the directors are responsible [241];