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?

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

- A person may be a de factor 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.
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 my 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];