

Directors' Duties:

General Law Fiduciary Duties:

1. Duty to act in good faith in the interest of the company

Directors have: Both fiduciary duty (case law) and statutory duty [s 181(1)(a)] to act in good faith in the best interest of the company.

"Good faith":

- Directors genuinely believe that they are acting in the best interests of the company.
- Parke vs Daily News: Does a director act in a way which a reasonable director considered to be in the best interest of the company?
- Easy to satisfy (having god faith). What is hard? "For the benefit of the company".

"For the benefit / best interest of the company":

Starting point: Directors' duty = company.

a. Members' Interests

Generally, interests of the co. is same as collective interests of the members/shareholders. (Park v Daily News 1962 Eng). Both present and future shareholders. (Darvall v North Sydney; Brick & Tile Co Ltd 1988)

b. Employees' Interests

A director breaches his duties if he disregards his shareholders' interests, not employees.

Case: Park vs Daily News

Paying compensation to employees after the discontinuing of a business is not fostering any employee/employer relationship and hence, not an act for the interest of the company.

Case: Patrick Amendments 2000

Requires directors to consider the interests of the employees in certain situation. Introduced to protect employees by preventing directors to strip company assets and make the company insolvent and hence, prevent the employees from enforcing their entitlement.

c. Corporate Group Interests

Corporate group meaning: a collection of parent and subsidiary **corporations** that function as a single economic entity through a common source of control.

Directors of a member co. in a corporate group must consider the interests of their company rather than the interests of the group as a whole. Why? The rationale behind is that each company has their own creditors

- Case: Walker v Wimborne

Each company is a separate and legal entity and it is the duty of the director to look after the interests of its own company.

- Case: [Equitycorp Finance Ltd v Bank of NZ](#)

In some circumstance, companies may be so intimately tied (welfare depend on each other) à bests interests may be of whole group.

Apply the **objective test**, ([Charterbridge Corp v Lloyds Bank](#)) which is: “ whether an intelligent and honest man in the position of the director could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the co.?” . If yes, no breach.

Directors of wholly-owned corporations:s.187:(introduced in 1999)

- Director of a wholly-owned subsidiary will be taken to act in good faith in the best interest IF:
 - Constitution allows the director to act in the best interest of the holding co
 - and director did act in the best interest of the holding co
 - Subsidiary must be solvent
- Gives recognition to commercial reality of corporation groups.

2. Duty to **act** (exercise power) for **proper purposes**

- Similar to duty to act for the benefit of the companies, except that the directors here usually act in the interests of themselves, rather than employees or creditors.
- Usually, broad management powers are given to directors here in the RR or Constitution.
- In deciding if this duty is breached or not, the court asks 2 questions:
 - Objective purpose for which a power was granted;
 - Purpose actually motivated the exercise of power.

a. Common situations for breach

Common power to abuse is the power to issue shares.

- Proper: to raise capital
- Improper: To maintain power of the current director; To defeat a takeover bid

Case: [Howard Smith Ltd vs Ampol Petroleum Ltd](#) (to defeat a takeover bid)

The primary purpose was to reduce A & B's shareholding so HS can succeed in the takeover bid.

Case: [Whitehouse vs Carlton](#) (creating/destroying a majority of voting powers)

Family dispute- husband and wife separated- shares issued to son so that wife will not have voting power. Share issues invalid/revoked as the purpose of the share issued is not of a proper purpose.

b. Other Purposes:

The duty to exercise power for proper purposes apply to all exercises of directors' duties, not just share issue.

- Case: [Darvall North Sydney Brick and Tile Co Ltd](#)

Darvall is shareholder of NSBT and made a takeover offer.

c. **Mixed Purposes:**

Directors may be motivated by both proper and improper purposes to issue shares.

Hence, apply the '**but for**' test:

(Darvall, Whitehouse) determine: "But for the alleged improper purpose, would the directors have performed the act impugned?" Similar to causation test of the tort of negligence.

Statutory Duty:

s. 181 = duty to act in good faith in the best interest of the company and for proper purpose.

- Same as fiduciary duties/ common law
- Civil penalty provision : s 1317E: pecuniary penalty; disqualify; compensation
- If "reckless or intentionally dishonest": criminal liability s 184(1): harsher punishment