

Consequence/Penalties

Comparison between Fiduciary Duties and Statutory Duties

Fiduciary Duties

Act in good faith, in the best interest of the company

Act for proper purpose

Avoid conflict of interest/no secret profit

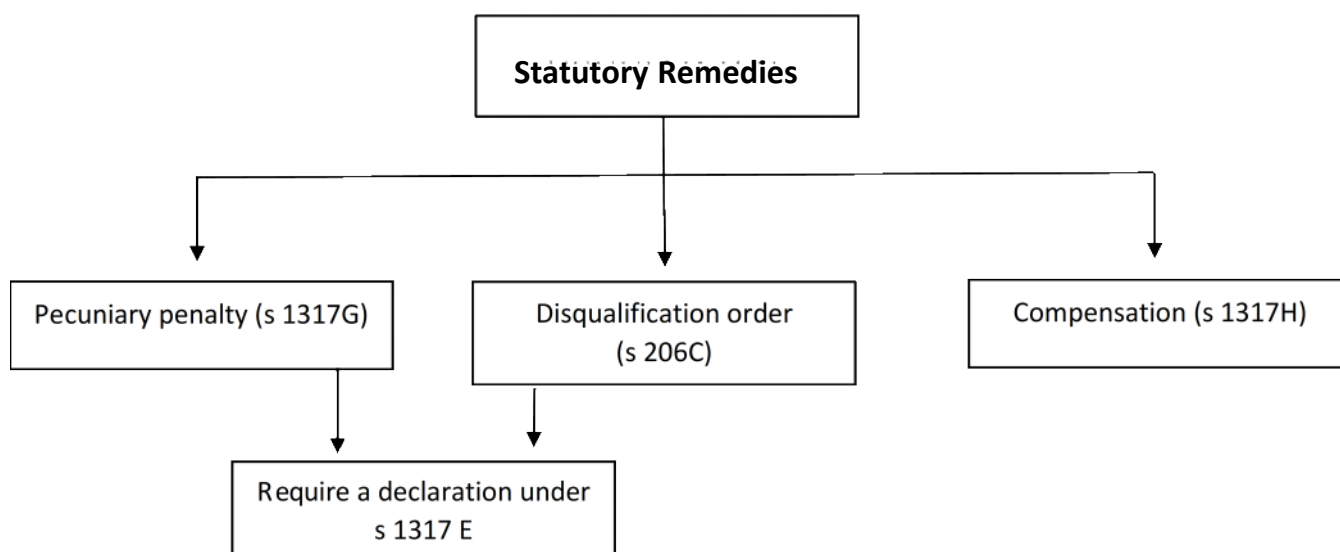
Statutory Equivalent

S 181(1)(a)

S 181(1)(b)

Ss 182, 183 (Requires impropriety)

Duties under ss 181 – 183 is breach → Director/Officer can face following:



CIVIL PENALTY

- ss 180 - 183; CH 2E are civil penalty provisions – if a court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention: section 1317E(1)
 - All of the following are civil penalty provisions:
 - Duty of care and diligence – s 180(1)
 - Duty to act in good faith and for proper purposes – s 181(1)
 - Misuse of position – s 182
 - Misuse of information – s 183
 - Related party transactions – s 209(2)
 - Give benefit to the related pa.
 - Insolvent trading – s 588G(2)
 - Dirc allow the co to conti trading if they knew that co is near or is insolvent.
- ! 181 - 3 May be criminal if there was dishonestly and reckless [184]
- ASIC can then seek a **pecuniary penalty order** (section 1317G), a **disqualification order** (section 206C), or **compensation order** (s 1317H) on behalf of the co.
- No one apart from ASIC/co effected can seek those order. [s 1317J(4)]
 - Co can seek compensation but nor other two orders.
- Standard of care: BOP [s 1317L]

DECLARATION OF CONTRAVENTION [S 1317E]

- The crt has to do this before it make pecuniary penalty or disqualification

PECUNIARY PENALTY ORDER [s 1317G]

- There has to be declaration.
- Upto \$200K - if the contravention:
 - materially prejudices the interests of acquirers or disposers of the relevant financial products; or
 - materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or
 - is serious.

DISQUALIFICATION ORDER [S 206C]

- The crt may disqu that person from managing co for period it think is appropriate if the crt is satisfied that **disqu is justified**.
 - In determining whether the disqualification is justified, the Court may have regard to:
 - the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that [the Court](#) considers appropriate.

- **Automatic disqualification:** director is automatically disqualified from managing a corporation for 5 years, subject to leave of court: s 206G
 - If found guilty.
 - ○ HIH: A fined 250K and disqualified for managing co for 20 years and CEO was 250K and disqualified from management for 10 years.

COMPENSATION ORDER [S 1317H]

1. Contravention + damages cause by that contravention
 2. In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.
 - ▶ ○ **Compensation covers both loss to company and profits by wrongdoer**
 - ! ○ **There are no case law that has included profit in awarding comp order.**
- **Who can apply:** ASIC or Co.
 - Civil penalty order does not have to be made to get compensation order (ss 1317H, 1317HA, 1317J)
 - Can seek this w/out obtaining declaration assuming they has breach s180-3
 - ★ • Causation: But for the test is used.
 - Order is aim to compensate the co for loss suffered due to the director's breach.

CONSEQUENCE OF CONTRAVENTION OF CIVIL - RELIEF BY CRT

- Relief for contravention of **Civil penalty provisions** (ABOVE): s 1317S
 - Intro after s 1318.
- Relief for proceedings for negligence, breach of duty under the GL: s 1318
 - It is wider than the 1317S.
 - Covers GL and state duties.
- Only relief from civil liability or civil penalty (including s 588G)
- ▶ • **Director may get relief under this before the proceedings are issued against that director.**
- Crt has discretion and may grant partial relief.
- ★ • Crt will take into account if:
 - a. the person has acted honestly; and
 - Acting in good faith/bona fide
 - **Honestly** - has been Narrow interpretation
 - » ▪ **W/out intent to gain benefit [ASIC v McDonald]**
 - b. the person ought fairly to be excused, having regard to all the circumstances of the case.
 - Remorse shown by the wrongdoer
 - Seriousness of breach
- ▶ • **Crt may take into consideration whether the director acted reasonably.**
 - ★ ○ Reasonable person in the same position acted in the same way.
- ▶ • **Extends to all officers and employees**
- Grant relief: they can do that by wholly or partly.
- Effect of granting: Not remove the breach or contravention, but the D is excused by the crt
 - AWA: s1318 - can apply for tort, negligent, breach of duty.

CRIMINAL PENALTY

- Dirc/officer/e/ee - may be criminal liable.
- Intention is required.
- ▶ • **Beyond reasonable ground - Standard of care.**
- It is not upto ASIC to commence criminal proceedings.
- ! • **Does not apply to s 180.**
- Ch 2E - director were dishonest [s 209(3)]
 - Anyone who was involved in the contravention [s 209(2)]
- S 181: only if the director/other officer are reckless or intentionally dishonest and failed to act:
 - In good faith in the best interest of the company; or
 - For the proper purpose: s 180(4).
- **Failure to act for proper purposes**, where reckless or intentionally dishonest: s 184(1)
- Ss 182 - 3 - Breach of duties has to be dishonest or reckless [s 184]
 - **Use of position**--directors, other officers and employees
 - (2) A **director**, other officer or employee of a corporation commits an offence if they use their position dishonestly:
 - (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
 - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.
 - **Use of information**--directors, other officers and employees
 - (3) A person who obtains information because they are, or have been, a **director** or other officer or employee of a corporation commits an offence if they use the information dishonestly:
 - (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
 - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.
 - Dishonestly in s 184(2) - objective test - dishonesty according to standard of ordinary person [SAF v R]
- **Penalty** [Sch 3]:
 - 2000 penalty units (\$360K) or imprisonment for 5 years, or both

ASSESSORIES

- Liability may, depending on the provisions, extend to persons “concerned in” a contravention:
- ★ • Section 79: Involvement in Contraventions
 - A person is involved in a contravention if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced, whether by threats or promises or otherwise, the contravention; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
 - has conspired with others to effect the contravention.
- e.g. ss 181(2), 182(2), 183(2), 209(2) & (3)
- NOTE: Principle of accessory liability is based on *Barnes v Addy* (1874) as discussed in *Bell Group Ltd v Westpac Bank* (2008); *Westpac Bank v Bell Group* (2012).
 - ★ ○ *Barnes v Addy* Two limbs:
 - i. Knowing recite.
 - ii. Knowing assistance
 - Similar to involvement definition, but talks about that that ass knowingly receiving that the property that is off breach of duty or assisting the dirc to breach their duty
 - Bell Group:
 - Bank was liable under the first limb couz that they accepted the property knowing that the property was due to directors breach of duty
 - Bank was also liable under second limb couz they knowingly assistance in breaching of dirc FD
 - They knew of the frdukent purpose of the directors
- ▶ • It can apply to the outsiders, and apply to TP who are involved in the breach for the purpose of the def under s 79.
- ▶ • The TP doesn't have to know that it was breach, but they should have knowledge of the facts of that makes up the breach [*ASIC v Summervil*]