

Directors and officers

- S9 “director”
 - (a) a person who:
 - (i) is appointed to the position of a director
 - (ii) appointed to position of an alternate director and is acting in that capacity
 - alternate director sits on behalf of real director when they cannot be available for meetings.
 - (b) unless the contrary intention appears, a person not validly appointed will be regarded as one if:
 - (i) they act in the position of a director
 - (ii) directors of company are accustomed to act in accordance with person’s instructions or wishes.
 - Exceptions exist, see notes.
 - S9 “officer”
 - (a) director or secretary
 - (b) a person:
 - makes, participates in making, decisions that affect the whole, or substantial part of business
 - has capacity to significantly affect corporations financial standing
 - in accordance with whose instructions directors of corporation are accustomed to act.
 - (c) receiver, or receiver and manager of property of the corporation
 - (d) administrator
 - (e) administrator of deed of company arrangement
 - (f) liquidator
 - (g) trustee or other person administering compromise, arrangement between corporation and someone else
- non-executive directors are not employed by the company
 - executives not on BOD are officers
 - corporate secretary – compliance officer; ensure right procedures are followed
 - Independent director – non-executive, no financial stakes
 - Chair of Board: responsible for making sure BODs hold its meetings in a proper fashion, usually spokesperson

Restrictions

- 201B CA
 - 18 years +
 - ‘individual’ has been taken to mean a human being/person.
- Undischarged bankrupt, must complete bankruptcy process first. S 206B
- Certain criminal convictions. S 206B
 - E.g. involve dishonesty + jail term > 3 months
 - Breaches of CA criminal convictions

- Disqualification
 - o Cannot be director or manager of any kind
 - o Usually due to breach of civil penalty provision in CA
 - o No need to give up shares, can be SH
 - o *ASIC v Adler*
 - No distinction between public/private corporations.
- No requirement for professional qualifications
 - o But duties towards corporations, may involve complex financing.

'De-facto' and 'shadow' directors

- S 9(b)(i) – de-facto director, someone not appointed, but acts as director
 - Usually due to some procedural irregularity
 - Or someone not elected, but allowed to behave like one
- S 9(b)(ii) – shadow director, if directors accustomed to act in accordance with person's instruction/wishes.
 - E.g. patriarch of a family company.
- Liable if something goes wrong
- *Grimaldi v Chameleon Mining*
 - De-facto director
 - Seemed as if though grimaldi had some power to make decisions, didn't go through BOD
 - Negotiated on behalf of company
 - Did not act in best interest of company
- *Standard Chartered Bank v Antico*
 - A company can be treated as a director of another company
 - If a company tells a board of directors of another company what to do, then it may be treated as a director.

Shadow directors and officers

- *Buzzle operations v Apple Computer*
 - While apple gave them suggestions, BOD's of B made own independent decisions
 - Cannot say that every lender or creditor, when they put conditions is an officer of a company.
 - Not enough to effect financial standing, must also be involved in management of company

Appointing directors

- S 201G: appointment done by shareholders elections at annual meetings of company
 - SH can also call special meetings to elect directors if they're unhappy with the board
 - Is a replaceable rule
- One vote per shareholder, but can change constitution to set up different voting system

Removing Directors

- Proprietary companies s 203C
 - By ordinary resolution of shareholders (>50%)
 - Replaceable à can make it harder to remove directors
 - Constitution may have different rules e.g. 75% or 90% etc.
- Public companies s203D
 - By ordinary resolution
 - Non-replaceable
 - Regardless of constitution or any agreements
 - Notice of intention to move resolution must be given at least 2 months before meeting
 - Director must be informed as soon as practicable
- S 203F removing executive directors
 - Usually in constitution if you are removed from BODs, you will lose your employment of company
 - Should ensure that employment contracts are drafted so that no breach of contract occurs if an executive director is removed

Corporate Governance

- Soft law, companies have a choice if they want to follow them
 - But have to use 'if not, why not?' approach i.e. explain in annual reports
- Eight principles
 - Laying solid foundations for management – certain recommendations on how to structure board and promote ethical and responsible decisions.
 - E.g. majority BODs should be independent
 - Recommendation 2.1; to be an independent director
 - 1. You must not be a substantial shareholder of the co.
 - 2. You must not be an employee or executive of the co in the past three years.
 - 3. You must not be a material, professional advisor or consultant to the co à including in the past three years.
 - This would include people like lawyers, accountants, auditor, etc.
 - 4. You must not be a material supplier or customer of the co à i.e. you must not be buying large amounts of goods from the co or selling large amounts of goods to the co.
 - 5. You must not be in a material contractual relationship with the co.
 - Any other kind of contract you have with the co which is significant = material.

Director and executive remuneration

- Regulations to ensure executives in large corporations are not paying themselves too much, cheating SH, and risking company's profitability
- Distinction between director and executive remuneration in who has right to decide amounts paid.

Directors

- S202 CA: SH have power to approve amount given
 - Usually directors fix amount themselves, they require SH approval (shareholder resolution or annual meeting)
 - Small companies not much of a problem because of limited SH
 - But in large listed public companies, large separation between SH and management.

Executives

- S 198A – remuneration approved by directors
 - Directors usually decide on CEO's remuneration
 - Public listed companies have a board remuneration committees under governance guidelines with a majority of independent directors.

Problems

- Disparity between what executives get and ordinary workers get
- Skewed incentive plans
 - Payment supposed to be based on performance.
 - Share options
 - Bonuses based on share price
 - Manipulation of inside information

Attempted solutions

- S300 A disclosure requirements
 - The company, in its annual reports must have a remuneration report detailing how much executives make including bonuses.
 - This lead to remuneration increasing as companies made comparisons with each other.
- S 250R non binding shareholder votes
 - After remuneration report presented at annual

meeting, SH can vote to say whether they accept.

- It is non-binding, company does not have to follow the decision
- S 250 U-Y 'two strikes' rule
 - 25 % threshold
 - need to make changes, if 25% reject the report