

- With those instructions or wishes the directors are accustomed to act (shadow directors)
- S 179(2) Officer includes, as well as directors and secretaries, some other people who manage the corporation or its property (such as receivers and liquidators)

**\*\*Make sure you discuss both the statutory duty and general law duty: Because the remedies are different\*\***

e.g. statutory breach – ASIC can bring an action vs fiduciary duty – full fiduciary remedies

## **b) Directors Duties**

### **1. Duty to exercise Care, Skill & Diligence**

- General Law and s 180(1) (The duty) and s 180(2) (business judgment rule)
- Now the duty is generally accepted to be the same between statute and CL
  - Major cases apply to both

#### **Areas of law for the Duty:**

1. Corporations Act 2001 (Cth)

#### **Section 180 Care & diligence –civil obligation only**

(1) A Director or other officer of a corporation must exercise their powers and discharge their duties with a degree of care and diligence that a reasonably person would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and
- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

2. Contractual Law – sue them for breach of contract
3. Common Law –Tort – Negligence - *Daniels v Anderson*
4. Fiduciary duty? Courts are undecided – do not mention for the purposes of exam.

**\*\*Courts have agreed that this duty is the same under the general law as under s 180, therefore, can use the same cases to discuss both. The difference is only important when it comes to remedies – as general law and statutory remedies will differ\*\***

#### **Has the particular Director discharged their duty of care, skill and diligence?**

<Asses with relevant to the following factors: (for s 180 and general law duty)>

1. Modern Standard of Care
  - *ASIC v Rich* [2009] NSWSC 1229
    - Must meet the (baseline) standard of a reasonable modern director.
      - Mr Graves was far more experienced Director than anyone else on the board, the court (Austin J) looked at the duty owed by him, looked at the standard expected by community standards –no matter what his actual competency is – He should have the objective standard of a 'reasonable modern director'.
    - Further if you have special capacities, and the corporation has taken those into account, you are a director because of this expertise, they relied on you to use that experience – then you must meet that higher standard because of your particular skills.
2. What kind of Responsibilities the Director had?
  - How are responsibilities broken up within the board?

- *ASIC v Rich*
    - Is one director expected to do a certain thing? E.g. relevant chair was subject to a higher standard of care, because he was appointed as one because of his extra skills and capacities, board relied upon that – had to comply with higher standard
      - Endorsed by *ASIC v Vines*; *ASIC v Healy*
- 3. What does Diligence mean? (What would a diligent director would have done?)
  - *ASIC v Rich* –Austin J outlined some requirements for diligence:
    - Minimum standard of diligence requiring every director or officer to become familiar with the fundamentals of the business or businesses of the company
    - Keep informed about the companies activities
    - Monitor generally, the companies affairs
      - Have you kept track of what it was doing, how have you done this?
    - Maintain familiarity with the financial status of the company
      - Do you understand the accounts? DO you know where the company sits financially?
      - Making further enquiries about the accounts if you need to?
    - Have a reasonably informed opinion of the company's financial capacity
      - Are we good for the debts were are currently incurring?
      - Do we have the cash flow to pay our debts when they become due??
        - Directors need to have a very good sense of the company's business and financial status
  - Diligence isn't knowing the answers it means asking the right questions
- 4. What does skill mean? (What would a skilful director would have done?)
  - *Daniels v Anderson (AWA case)*
    - Every director needs to have a base level of financial competence and a base level knowledge of the business
    - Honest but stupid director is no longer a defence – Cannot argue that the director did not know enough about a particular area, should have a baseline knowledge
      - Not a subjective standard – unless there are additional skills – which will raise the standards further
    - A Higher Standard:
      - .Directors with skills will be held to a higher standard of care for decisions within the scope of their expertise – *Gold Ribbon (Accountants) P/L v Sheers*
- 5. The question of delegation/reliance (only if relevant)\*\*very contentious\*\*
  - Section 189
    - Directors can rely on professional or expert advice given to them by employees, professional advisors, other directors, committees of directors etc.
  - Sections 198C
    - Directors can confer on a managing director any of the powers that the directors may exercise
  - Section 198D

## QUICK SUMMARIES (CHEAT SHEETS)

### Directors Duties

Duty	Description	Section/Case
Duty to exercise Care, Skill & Diligence:		
<b>General Law</b>		
Duty to exercise care, skill and diligence (torts - negligence)	Directors owe the company a duty to exercise care, skill and diligence Courts have made clear that the general law duty is the same as the statutory one – can apply cases to both.	<i>Daniels v Anderson</i>
<b>Corporations Act</b>		
Duty to exercise care and diligence	<p>The directors have a statutory duty to exercise reasonable care and diligence (s 180(1)). In order to discharge this duty, at a minimum, all directors must take necessary steps that will enable them to effectively guide and monitor the management of the company (<i>Daniels v Anderson</i>)</p> <p>Directors are expected to: monitor, assess and be aware of the company's financial situation/be familiar with the company's business/make inquiries and keep informed about the company's activities/ be familiar with the company's financial status, regularly review financial statements, and inquire into suspicious matters.</p> <p>If failure to keep accounts: The failure to keep accounts does not meet the standard of care and diligence that a reasonable director would exercise. While this standard varies (<i>ASIC v Rich</i>), generally directors must remain informed about their company's financial position and keep financial records (<i>Daniels v Anderson</i>)</p> <p>The Standard of care may be increased to account for distribution and any special qualifications and/or expertise (<i>ASIC v Rich</i>)</p>	Section 180(1)
Defence: Business Judgment Rule	<p>This only applies to duty of care under s 180(1) and the common law duty of care.</p> <p>A Director, who wishes to use this defence, has to have made a business decision fulfilling the following requirements:</p> <ul style="list-style-type: none"> <li>- It must be made in good faith and for a proper purpose;</li> <li>- The director wishing to rely on this defence cannot have a material personal interest in the decision;</li> </ul>	Section 180(2)

	<ul style="list-style-type: none"> <li>- The director must have informed themselves about the subject matter before making the decision; and</li> <li>- The director must rationally believe that the decision was in the best interests of the company.</li> </ul>	
Reliance on others	<p>Defence: if the director relied on information or professional or expert advice given or prepared by one of the categories of people referred to in s 189(a) (e.g. directors, competent reliable employees)</p> <p>Reliance must be:</p> <ul style="list-style-type: none"> <li>• Made in good faith, after an independent assessment of the information or advice provided; and</li> <li>• Reasonable in the circumstances</li> </ul>	Section 189
Power to delegate powers to others		Section 198C; Section 198D
Directors still responsible for delegate	However, delegation as per above, will not exempt directors from their duty of care, as the directors are responsible for the action of the delegate.	Section 190(1)
Defence – reliance on others	<p>Director can escape this liability if:</p> <ul style="list-style-type: none"> <li>• Reasonably believed that the delegate would exercise his or her powers in conformity with directors duties; and</li> <li>• After making proper enquiries, the director reasonably believed in good faith that the delegate was competent and reliable.</li> </ul>	Section 190(2)

Honesty: Duty to Act in Good Faith for a Proper Purpose		
General Law		
Fiduciary duty:		
Duty to Act in Good faith	<p>Directors have to act in the best interests of the company. Both a subjective and objective test (<i>Westpac Banking Corp v Bell Group Ltd</i>)</p> <ul style="list-style-type: none"> <li>- Subjective: they believe they are not acting in good faith</li> <li>- Objective: reasonable person examining all the evidence from all perspectives would consider that the director was acting in the company's best interest.</li> </ul>	<i>Hutton v West Cork Railway Co</i>
Duty to act for a proper purpose	<p>Directors can only exercise their powers for a proper purpose. This means their conduct should be for the benefit of the company.</p> <p>Look at what the purpose of the power is? What is the purpose the director is exercising it for in this situation? (<i>Howard Smith</i>)</p>	<i>Whitehouse v Carlton; Mills v Mills</i>
Corporations Act		
A director or officer must exercise their powers:		S 181
Limb 1: in good faith in the best interests of the company	A director will have breached this duty if no reasonable director would have considered 'the transaction' to be in the best interests of the company. ( <i>ASIC v Adler</i> )	S 181(1)(a)
Limb 2: For a proper purpose	<p>The director has a duty to exercise their powers for a proper purpose. The purpose motivating the transaction must be aligned with the best interests of the company.</p> <p>This means any power, given to a director by the Corporations Act –<b>must be exercised for a proper purpose.</b></p> <p>If dealing with issuing shares: directors of a company have a power to issue shares (s 198A) However they cannot:</p> <ul style="list-style-type: none"> <li>• Exercise this power for the purpose of destroying or creating a majority voting power (<i>Howard Smith</i>)</li> <li>• Issue shares for the purpose of maintain their position of control of the company (<i>Ngurli v McCann</i>)</li> <li>• Issue shares for the purpose of favouring a group of shareholders over another (<i>Whitehouse v Carlton Hotel</i>)</li> </ul>	S 181(1)(b)