

Corporations Notes

Directors Duties

Background

Who are duties owed to → Company

Who can take action → ASIC, company (acting through board), liquidator

Who owes directors duties

Director

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

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

De facto director

- Not formally appointed but act as director
- *Deputy Commissioner of Taxation v Austin*
 - o Resigned as director but continued to play active role in company
 - o Performed responsibilities typically expected of director
 - Size of company → impact on the type of discretion that is appropriate
 - How the person is perceived by outsiders →
 - exercising top-level management functions
- *Mistmorn (in liq) v Yasseen*
 - o 'consultant' but undertook tasks typically expected of a director
 - o look to substance of role not the label
- *Grimaldi v Chameleon Mining NL (No 2)*
 - o Consultant company cannot be used as screen
 - o If a consultant company is found to be a director → question of fact as to which individual in that consultant company that will be held as a director
- Criteria

- Size of company → impact on type of discretion appropriate
- How person is perceived by someone outside the company
- Exercising top level management functions

Shadow director

- Persons in accordance with whose wishes and instructions the directors of the company are accustomed to act
- *Buzzle Operations (in liq) v Apple Computer Australia*
 - Company can be held as shadow director
 - Insufficient that simply imposes conditions on commercial dealings with which directors feel obliged to comply
 - 'causal connection between putative shadow director giving the instruction or expressing wish and the director acting on it'
 - pulling strings behind scenes
- *Re Akron Roads (No 3)*
 - Insufficient that advising and then company acting on that advice

Officer

S 9 'officer' of a corporation means

- (a) a director or secretary of the corporation; or
- (b) a person;
 - (i) who makes, or participates in making, decisions that affect the whole, or substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation; or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or (e) an administrator of a deed of company arrangement executed by the corporation; or (f) a liquidator of the corporation; or (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else

ASIC v Citigroup Global Markets Australia (No 4)

- trader with daily trading limit of \$10 million- in context of company- not large enough under b(ii)
- no involvement in policy making or decisions that affected whole/substantial business – not under b(i)

Shafron v ASIC

- S was general counsel and secretary
- S argued all actions performed as general counsel- this did not fall within definition of officer

- 'the relevant statutory inquiry was what were the responsibilities he had within JHIL, not an inquiry which sought to divide the capacities in which those responsibilities were undertaken'
- (b)(i)- not confined to role in a particular decision, looking at role in company generally
- 'participates'- not just confined to joint decision making, question of fact and degree to determine whether someone 'participated' in duty-
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Interaction of statute and general law

<p>S 185- interaction of sections 180 to 184 with other laws etc</p> <ul style="list-style-type: none"> - s 180-184 <ul style="list-style-type: none"> (a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and (b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a). - This section does not apply to subsections 180(2) and (3) to the extent to which they operate on the duties at common law and in equity that are equivalent to the requirements of subsection 180(1).
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Duty of care, skill and diligence

Looking at careless, negligent, haven't kept eyes on company, not seeing mistakes in financial reports, not inquiring further about reports

Statute – starting point

S 180- care and diligence – directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they
 - o (a) were a director or officer of a corporation in the corporation's circumstances; and
 - o (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
- *Note: This subsection is a civil penalty provision (see section 1317E)*

Common law informs interpretation of the statute

Daniels v Anderson

- Facts
 - o AWA was an electronics company started foreign trading
 - o D audited, found deficiencies in books → told managing director Hooke
 - o H and D → don't mention losses to board
 - o Board sued D for failing to bring info to board
- LAW
 - o Core irreducible standard - reasonable person in same role in same company
 - Look at role → what position, duties, content
 - Look at company → big, small, what business?
 - Pure personal circumstances (e.g. education) not relevant but if director holds themselves out as having particular skill, they are judge in light of that skill
 - o Objective → Requires directors to take reasonable steps to place themselves in position to guide and monitor the company
 - Ensuring knowledge of business
 - Informed about activities
 - Remain familiar with financial accounts
 - Regular attendance at board meetings
 - **NOTE → further standard added in ASIC v Rich → have a reasonably formed view of company's financial capital**
 - o Relying on management?
 - Isn't good enough → have to bring informed and objective mind to matters brought before the board

