

[5.3] Duty to avoid conflicts of interest

1. Starting point	“[Directors] also have an equitable duty to avoid duty of conflicts”				
2. Who can be sued?	<table border="1" data-bbox="359 273 1422 389"> <tr> <td data-bbox="359 273 564 389">③ Conflict of Interest, Duty</td> <td data-bbox="571 273 762 389">No</td> <td data-bbox="769 273 938 389">Yes (Loss or Gain irrelevant)</td> <td data-bbox="944 273 1422 389">No – But see 191–195</td> </tr> </table> <p>Basically anybody can be sued: director, secretary, officer, employee</p> <p>Rule is same b/w sole directors and other directors: <i>Aberdeen Railway v Blaikie Bros</i></p>	③ Conflict of Interest, Duty	No	Yes (Loss or Gain irrelevant)	No – But see 191–195
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3. Duty	<p>“Directors have a fiduciary duty to avoid a conflict of interest”: <i>Aberdeen Railway v Blaikie Bros</i></p> <ul style="list-style-type: none"> ➤ ANY conflict engages the rule. Does not depend on extent. Doesn’t matter if transaction is fair. No inquiry into subject matter: <i>Transvaal Land Co</i> <p><u>Do they have a material personal interest?</u></p> <ul style="list-style-type: none"> ➤ Test = Is it <i>substantially likely</i>, under all the circumstances, the interest would have assumed <i>actual significance</i> in the deliberations? <ul style="list-style-type: none"> ○ Reasonable person test ○ “It is the substance of the interest, its nature and capacity to have an impact upon the ability of the director to discharge his or her fiduciary duty which will be important”: <i>McGellin v Mount King Mining NL</i> ➤ Must be self-evidently both personal and material <ul style="list-style-type: none"> ○ Includes pecuniary interests ○ Includes contracts, offices, property ○ Includes close personal relationships (e.g. family) ○ Director of another company ○ Shareholder of another company <p><u>Often a causal question</u></p> <ul style="list-style-type: none"> ➤ E.g. “The contract was obtained by [XX] in the course of a transaction which he was carrying out on behalf of [the company] in his office as [Managing Director]” <p><u>Irrelevant</u></p> <ul style="list-style-type: none"> ➤ Fairness, subject matter, rationality: <i>Aberdeen Railway v Blaikie Bros</i> ➤ Fraud, bona fide, honesty: <i>Regal Hastings v Gulliver</i> ➤ Fact that company could not have gotten that benefit anyway: <i>Furs v Tomkies</i> ➤ You only used the information after you quit the company: <i>IDC v Cooley</i> 				

<p>4. Defences</p>	<p>➤ N/A when director also possesses confidential information relevant to the matter: <i>PBS v Wheeler</i></p> <p><u>If proprietary company</u></p> <p>Except for Pty companies with sole director: s 191(5)</p> <p>Per s 194 – RR</p> <ul style="list-style-type: none"> ➤ IF director w/ interest has (a) disclosed per s 191; or (b) doesn't need to disclose per s 191 ➤ THEN they may: (c) vote on matters related to that interest; (d) transactions related to that interest may proceed; (e) D may retain benefits under that transaction; and (f) the company cannot avoid that transaction merely because of the interest. <ul style="list-style-type: none"> ○ (e) and (f) only apply if disclosure was given <i>before</i> contract was entered into <p><u>If public company: s 195 – mandatory, crime</u></p> <ul style="list-style-type: none"> ➤ Directors with material personal interest in a matter considered at a directors' meeting cannot: (a) be present at that meeting; or (b) vote on the matter: (1) ➤ UNLESS <ul style="list-style-type: none"> ○ Other directors have passed a resolution that: (a) identifies the director, the nature and extent of their interest in the matter and its relation to the affairs of the company; and (b) directors are satisfied this should not disqualify D from voting.: (2); OR ○ Allowed by ASIC via declaration/order as per s 196 ➤ Contravention <ul style="list-style-type: none"> ○ Does not invalidate validity of resolution: (5) <p><u>Disclosure per s 191</u></p> <ul style="list-style-type: none"> ➤ Contravention <ul style="list-style-type: none"> ○ = CRIME. Strict liability: (1A) ○ Does not invalidate resolution: (4) ➤ Does director need to give notice? See (2) <ul style="list-style-type: none"> ○ Includes <u>standing notice</u> per (2)(d). ○ See also s 192 for standing notice: <ul style="list-style-type: none"> ▪ Power to give standing notice: (1). Content: (2). Nature and extent recorded in minutes: (4). Takes effect as soon as it's given; ceases to have effect when new director joins, but has effect again if you also give new director standing notice: (5). Ceases to have effect if nature of interest materially increases: (6). Contravention does not affect validity: (7). ➤ Contents of notice? See s 191(3) <ul style="list-style-type: none"> ○ Must state WHAT his opinion/intention is, not merely that he HAS one: <i>Imperial Mercantile Credits v Coleman</i>
<p>5. Remedies</p>	<p><u>Equity only</u></p> <ul style="list-style-type: none"> ➤ Rescission, provided it is possible to restore parties to their original position ➤ Account of profits if you don't want to void the actual contract <p><u>Crimes</u></p> <ol style="list-style-type: none"> 1. Sec 191 (disclosure) and 2. Sec 195 (voting/attending w/o disclosure)
<p>6. Practical advice</p>	<p>Can you contract out smth to reduce that fiduciary duty?</p>