

**MELBOURNE UNIVERSITY**  
**CORPORATE LAW 2016**  
**BLAW20001**

Notes written by Megan Cheung

*Colour Coded Keys*

Highlighted Blue – Lecture topic for Case Laws

Highlighted Yellow – Main Topics

Highlighted Grey – Detailed subtopics

Red – Subtopics

Orange – Relevant Key words

Blue – Textbook Page number

## Topics Covered

- Companies
  - Corporate Capacity
- Constitution/Rules/Replaceable rules
  - Directors
  - Powers
- Duties: To act to care and diligence
- Duties: Prevent insolvent trading
- Duties: Good faith and Purpose
  - Duties: Conflict of interest
- Consequences of breach of duty
  - Member's Remedies
- Organising Director's Meetings
- Organising Member's Meeting: AGM
  - Reporting and Disclosure
  - Capital Maintenance
  - Class rights
- Voting and Removing Board

Note: Topics are organised according to TOPICS not lecture order

## DIRECTORS

### Standard Chartered Bank V Antico.

(Shadow Director, follow instructions/ insolvent trading 588G)

The court agreed that Pioneer is a shadow director because Giant did whatever Pioneer said. In addition, Pioneer had breach s588G since as a shadow director, they had the duty to prevent the company becoming insolvent.

**Buzzle V Apple** (not Shadow Director)

## MEMBERS MEETINGS

**NRMA v Scandrett** (Members calling meeting for proper purpose)

**NRMA V Parker** (Member calling members, improper purpose)

## CONSTITUTION/RR

**Eley V Positive Govt Security Life** (s140, internal governance rule). Eley was named the solicitor of the company in the constitution however when the company ceased to employ him, he sued. However, he failed because the court held that the contract is deemed a contract only between parties referred in s140.

## CORPORATE CAPACITY

### The Northside V Registrar-General

(Common law, defect in contract, "put on inquiry")

- The court decided the mortgage document was not binding on Northside because the put on inquiry exception applied. The bank officers could see that the loan was being made to companies that were not to Northside (the Sturgess companies). Hence Barclays officers should have investigated and made inquiries to satisfy themselves that Northside's entry into the mortgage was properly authorised and that R Sturgess and G Sturgess had authority to fix and witness the company's common seal.

**Story V Advance Bank Australia Ltd** (put on inquiry)

## DUTY OWED TO

**ASIC v Healey** (Directors duty/roles/ Duty of care – Reliance s189, breach of s344,)

Court requires directors to take "particular responsibility" for the company's financial reports, meaning directors should carefully read and understand the reports.

\*also applies to record keeping – financial report section.

**Deputy Commissioner of Taxation V Clark** (Duty of care - Directors not directly involved/ absences of management) So Mrs Clark was not involved in the business but she was a director so the court decided that she was also liable for the problem of the business since she had a duty of care to be aware of the business's activities.

**Standard Chartered Bank V Antico** (Insolvent trading)

- S588G apply to shadow and de facto directors too.

## Duty - GOOD FAITH - GL

**Greenhalgh V Arderne Cinemas Ltd** (variation of class rights, good faith, members interest)

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Court decided that Mr Greenhalgh's rights were not vary because he had the same voting rights (one vote per share) as he had before the resolution was passed. Directors must look to the company "as a whole" they must act fairly but not identically as between members of different class.

**Kinsela V Russell Kinsela Pty Ltd** (Duty owe to creditors interest, insolvency)

pg261

Even tho, members approved the company granting the lease. During insolvency, the interest of the company were those of its creditors not members of the company.

Court said :breach of s181

(to act in good faith for the business).

\*Company cant remove asset during insolvency to avoid paying creditors.

\*Also refer to ratification.

**Walker V Wimborne** (Corporate group; separate company/entity despite wholly owed.)

1) Each company are a separate entity and directors own duties to that company only. EG)

Wheeler (directors) would gain a financial benefit, who controlled JCLD through their control of Capital Hall Ltd.

**West Ventures Pty Ltd V Resources Equities Ltd** (improper purpose; win voting; stay in control)

Pg 269

The court held that the shares had been issued for an improper purpose, which was to ensure that the shares would be available to be voted in favour of the securing the incumbency of the current board of directors at the extraordinary general meeting. The court noted: directors argued that the shares were for proper purpose to raise capital but the cheque which was payment for the shares were not deposited.

**ASIC V Australian Investors forum Pty Ltd**

(Improper purpose; existing controllers obtaining power)

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The court decided that the additional shares in Australian Investors Forum Pty Ltd was for an improper purpose, which was to preserve the control of the company in the hands of its existing controllers. It was discovered that the shares issued were for \$0.0001 per share fully paid. Hence it was a very small amount.

## Duty - CONFLICT OF INTEREST- DISCLOSING PERSONAL INTEREST - GL

**Aberdeen Railway Co** (Indirect general law conflict – act in the interest of the company)

pg 278

- The court held that the director had a personal interest (to sell the equipment to Aberdeen at highest price) However this breach his duty of the company (to obtain the equipment at lowest price) so there was a conflict of interest.

**Furs Ltd** (Taking corporate information or opportunity)

pg 297.

- The court held, that Tomkies had breached his duty placing himself in a position where his personal interest (obtaining the \$5000) conflicted with his duty to act in the interest of Furs Ltd (obtaining lowest price possible for the business)

Will be revealed for purchased edition

## Corporate Capacity

\*(good starting point s124)

**s124 (Corporate capacity)** - A company is a legal (artificial) person, Companies have the capacity to do most things that a natural person can do, and some additional things including;

- issuing shares
- granting a circulating security interest
- anything that it is authorized to do by any other law.

\*refer to s125 for restrictions

**s125 (limit power)** – constitution may limit power or objects, but acts outside those limitations are not invalid as against third parties.

## Company Contracting

- Directly – based on boards decisions
- Indirectly – through an agent

### Contracting Directly

**s123 (common seal)** – ~~traditionally using its common seal however no longer used.~~

Three ways

**1) s127(2) ( with seal)** – execute the document with seal and witnessed by;

- Two directors OR
- a director and a company secretary

OR

- if it is a proprietary company that has a sole director who is also the sole

company secretary – that director.

**2) s127(1) (without seal)** – execute the document without seal having the document signed by

- Two directors
- a director and a company secretary

OR

- if it is a proprietary company that has a sole director who is also the sole

company secretary – that director.

**3)** use procedure set out in constitution

### Contracting Indirectly

**s126 (indirectly)**

the company is known as a principal and the person making the contract on behalf of the company is the agent.

The principle must give the agent “authority” to act on behalf of the company(principle) then the contract that is made with the third party is legally binding to the principle.

### Types of Authority

1) Actual authority

→ Express Actual

→ Implied Actual

\*Actual authority can be verbally or writing

2) Apparent Authority

## SAMPLE ANSWER

“Name” was not given express authority to enter into the contract with “company name”, neither did “Name” have implied express authority because an express restriction limits implied actual authority and “Name” was aware that she could not “reason”. Under s129(3), “company name” can assume that “name” has apparent Authority because she is being held out as a (chief articliture)which shows authority in position to make decision on behalf of the company. Relevate Case; Freeman lockman and crabtree. The holding out was given by someone with actual authority (the board gave it to sally) and “company name” relied on this representation. Hence from “company name” perspective there is no evidence that “name” could not enter into the contract. [ talk about assumptions ] then [ Under s128(4) – from the facts, there is not enough information whether “company name” actually knew or suspected the assumptions was incorrect. As a result, the contract is binding.

## ACTUAL AUTHORITY

### Express Actual Authority

-Can arise from a provision in the ACT or company’s constitution s198A (power to management)

OR

- When someone who has actual authority delegates some of their own authority to someone else.

### Implied Actual Authority

1) Can arise by implication eg) appointing someone to a certain position.

OR

2) Implied by acquiescence

\*Note: Express restrictions LIMIT implied actual authority

### 1) Positions and Implied Authority(IAA)

\*\*Director, acting alone- no implied actual authority:

#### **Brick and Pipe**

\*\*Chairperson, acting alone- no implied actual authority

Company secretary – administrative matters.

CEO: IAA to do all things that fall within the usual scope of that office: **Hely-**

#### **Hutchinson V Brayhead**

Other executive officers: IAA for things usual to their job

### 2) Acquiescence

pg 505

“Ratifying” past exceeding of authority – If all directors know the actions/plans of one directors and do nothing to stop him. The court say the board has “acquiesced” in that one director’s action

So in the future, that one director has implied actual authority to bind the company in similar transactions.

## APPARENT AUTHORITY – pg 507

\*When no actual authority is given, apparent authority might be valid if these 3 are satisfied.

- A “holding out” (or representation) – Representation to outsider party that the agent has authority to enter on behalf of company, this can be words or conduct.

#### **Freeman & Lockyer**

\*Implied actual authority can be a representation for apparent authority.

AND

- the holding out was given by someone with actual authority: **Crabtree-Vickers**

AND

the outsider (third party) must be “induced”  
(third party reliance)

## ENFORCING DEFECTIVE CONTRACTS

\* Occurs when an agent makes a contract on behalf of the company however;

- has no express actual authority at all OR

- Has express actual authority that is too narrow to be able to Amake this contract.

In this case; the outsider may be assisted by

- common law rules

- Corp ACT (statutory assumption)

to enable them to enforce the contract despite the defect.

\*\*There is need to balance the interest of outsiders dealing with the company and innocent shareholders/creditors.

## COMMON LAW TO ENFORCE CONTRACT

### Indoor management rule

The outsiders may assume/show that a company has given authority, whether implied actual or apparent authority to the agent hence binding the company to the contract.

This rule; the outsider can assume that:

- no procedural defects in appointment of directors

- board meetings properly called and held

- Any board or general meeting approval required under constitution/RR has been obtained.

\*If these CAN be assumed in the circumstances then indoor management rule applied.

### Exception- Can’t use Indoor Management Rule

Indoor Management Rule can’t apply when;

1) “Actual knowledge” exception applies

→ The outsider knows that the agent lacked express actual authority or that the contract was defective in some way. In addition, if the outsider “kept his/her eyes shut” in order not to discover an irregularity then the actual knowledge exception applies

OR

2) “Put on inquiry” exception applies when;

→ The outsider has failed to make inquiries that would usually be made by someone in their position

→ A reasonable person in outsider’s position would have been “put on inquiry” and investigated but the outsider has either not done this.

\*In these case the outsider will not be able to enforce the contract on the basis of apparent authority, implied actual authority or the indoor management rule.

### **Relevant Cases:**

**The Northside V Registrar-General**

**Story V Advance Bank Australia Ltd**

## STATUTORY ASSUMPTIONS TO ENFORCE CONTRACT

**S129(1)** – The statutory indoor management rule

\*Complied with constitution/RR

### Class Rights

"By issuing (preference shares) there is no general law variation because the voting and dividend rights of existing ordinary shareholders are not effected ; *Greenhalgh v Arderne Cinemas Ltd*." However in this case, since the company originally has one class of shares and are now issuing new shares with different rights to the existing shares (voting rights of Preferences shares are different to ordinary shares) there is a deemed variation under s246C(5). Assuming the company's constitution does not set out procedure for varying class rights because as given, the company is governed by replaceable rules. The company must gain special resolution of the company in order to pass the resolution under s246B.

### VARYING/CANCELLING CLASS RIGHTS

**s246B(1)** (Stated in constitution) – When a company's constitution sets out the procedure for varying/cancelling the rights of class of shares, procedure must be compiled with.

**s246B(2)** (Not stated in constitution) – When a company's constitution does not set out procedure for cancelling/varying class rights, The class rights can only be cancelled/varied by passing special resolution of the company and then class of shares that is effected.

### WHEN ARE CLASS RIGHTS VARIED OR CANCELLED – CERTAIN ACTIONS TO TAKE

**s246(C)** (Variation of rights) – Deemed variation of class rights

ACTION	Whose rights are varied	Resolution s246B(2) – not in constitution
Splitting shares into two	All holder of shares in the original class	Special resolution of; - the company - each class existing after the division (each class)
Varying rights of some members only	All holder of shares in the original class	Special resolution of; - the company - member whose rights were varied - member whose rights were not varied
S246C(5) Issuing new share in a company with only one class of shares that have different rights to the existing shares	Holders of existing shares	Special resolution of the company
S246C(6) Issuing new preference shares ranking equally.	Holders of existing preference shares	Special resolution of; - the company - holders of the existing preference shares.

### Members aren't happy with variation

s246D (1) (application to set aside variation) -

Members with at least 10% of the votes in the class may apply to the court to have the variation/cancellation set aside for unfair prejudice.

\*Note: holding 10% up to 25% because if you hold 25% you would have defeated it.

### Voting and removing board

#### APPOINTMENT BY MEMBERS

**s201G** (directors, members, general resolution- proprietary/public )

- [RR] Members elect directors by ordinary resolution.

NOTE: replaceable however very stupid because if you change to gaining 55% of vote instead of 50%(ordinary), what if results were 48% and 52% then no one is elected. Therefore 50% works perfectly. If there is 50% and 50%, the existing broad has the casting vote.

#### APPOINTMENT BY OTHER DIRECTORS (Director-Director)

**s201H** (Appointment by other directors) – [RR] Directors may appoint a person as a director. BUT must gain member's approval/disapproval at next meeting. refer to 201H(2) and 201H (3)

**s201H(2)** (Proprietary company, unlisted public, appointed director)

[RR] if a director appoint a person as a director, this must be confirmed by a meeting within 2 months after announcement how the person ceases to be director.

\*unlisted public s201E also apply

**s201H (3)** (public company, appointed director) –

[RR] if a director appoint a person as a director, the company must confirm the appointment by resolution at the next annual general meeting. If not, the person fails to be director. S201E also apply – when 2 or more elected directors

S201E – (two or more elected directors) separate resolution required for each director unless all members agree.

#### REMOVAL OF DIRECTOR BY MEMBERS

\***s203C** (removal of directors by members/director- private) – [RR] for proprietary companies. Members of a proprietary company may remove a director from office or appoint another person by **ordinary resolution**. As oppose to public companies s203D.

Note restriction RR: "Members can not remove a director from the company without \_\_\_\_\_ consent."

**S203D** (removal of directors by members – public)-

Shareholders can always vote out directors by ordinary resolution despite what is in constitution or what members or directors agree.

**S203D(2)** (notice) – if outsider wants to remove director they must give notice 2month before meeting however meeting may pass resolution even through the meeting is held less than 2 months after notice.

**S203D(3)** (directors to be informed) – Company must give the director a copy of the notice.

**s249J (1)** (notice to members)

**S249H(3)** (removing/appointing director, Public) – short notice is not allows for removing/appointing directors  
21 days notice must be given. S249H(1)

#### REMOVAL OF DIRECTORS BY DIRECTORS

**S203(E)** (removal of directors – public company)

Directors of a public company cant be removed by other directors.  
- Director removing director in private company refer to s203C RR

\*\*NOTE: when talking about removal/appointing must set out procedures/meeting.

## S257B – Buy back Procedures

Procedure	Minimum Holding - listed company buying below ASX price	Employee share scheme - encourage employees to become members		On market - listed company on ASX		Equal access - all members are given the opportunity via document		Selective - only some members
		Within 10/12 Limit	Over 10/12 Limit	Within 10/12 Limit	Over 10/12 Limit	Within 10/12 Limit	Over 10/12 Limit	
Ordinary resolution s257C	----	----	Yes	----	Yes	----	Yes	----
Special/ unanimous resolution s257D	----	----	----	----	----	----	----	Yes

**Table will be revealed for purchased edition**