**Duty to act in good faith in the best interests of the company**

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No meaningful difference between fiduciary and statutory duty

There is a fiduciary duty owed by position of trust, beneficiaries of trust, in equity – 181(1)(a) as well – no meaningful difference – therefore consider them together

- Then look at content of duty

In the end

- If there is a breach
- Look at 2 duties separate
Statutory duty

- Civil offence – s 181(a)

‘(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; ...

- Criminal offence - s 184(1)

‘(1) A director or other officer of a corporation commits an offence if they:

(a) are reckless; or

(b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

(c) in good faith in the best interests of the corporation; or ...

- if does recklessly, intentionally dishonestly – elevated to criminal offence
- look at civil offence first
- if facts allow:
  o ex, directors knew not acting in good faith
    ▪ reckless to that – criminal
    ▪ breach of civil and can be elevated to criminal offence
Fiduciary duty

- Fiduciaries ‘must exercise their discretion bona fide in what they consider — not what a court may consider — to be the interests of the company, and not for any collateral purpose’ (Re Smith and Fawcett Ltd [1942] Ch 304 at 306)
  
  o Bona fide – in good faith
  o In what they consider not court
  
  ▪ Subjective test
  ▪ Whether or not fiduciary, director or officer, whether consider what they're doing is in best interest of company
  ▪ Has to be some limit on subjectiveness
Meaning of good faith (bona fides)

Limit – on subjectiveness

- Firstly ask: Subjective test – whether they were acting in best interest of company

Concept of the amiable lunatic’ –

- “Bona fide (good faith) cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying its money with both hands in a manner perfectly bona fide yet perfectly irrational (Hutton v West Cork Railway Co (1883) LR 23 Ch D 654, per Bowen LJ).
- Has to be limit – can’t follow what director says – can we accept?

What is the limit? – the test:

“...I consider that the standard of behaviour required by s181(1) is not complied with by subjective good faith...certainly if no reasonable director could have reached that conclusion.” (ASIC v Adler (2002), per Santow J).

- No reasonable director reach conclusion
- We asked subjective inquiry – do you director thinks this is in best interest of company – yes – accept evidence until get to a point where no reasonable director would have reached that conclusion
- Lunatic threshold
- Ask subjective inquiry – at some point – no reasonable director reach – stop accepting subjective evidence – put cap – court won’t accept subjective intention after point of ridiculousness – stop believing
  o Objective overlay
  o High threshold on when court will stop accepting

Surrounding circumstances (objectively viewed) could lead one to doubt, discount or not accept a director’s assertion he/she has acted in good faith (Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008) 70 ACSR 1)

- Suing a director
  o You have no acted in good faith in best interest of company
  o Served written claim
  o Put in defence – trial – witness box – 12-18 months down the road – asked question – did you think this was in best interest of company – response: yes – court says: subjective test – he said yes – case closed?
- Bell Group:
  o When director gets to witness box – do you think best interest – if director says yes – court may not believe – have seen all surrounding circumstances – makes it inherently unlikely that that is truthful
  o Don’t believe witness
  o Words coming out of directors mouth – won’t believe – believe in the evidence
Meaning of ‘interests of the company’

Who is ‘the company’?

- Acting in best interest of WHO
- shareholders as a collective group
- both current and future members
- not particular shareholder – as a group – can include diff classes, duty to act fairly between them – not in the interest of 1 shareholder over another

Where there are different classes of shareholders: the duty to act fairly as between members (Mills v Mills (1938) 60 CLR 150)

What do shareholders want – what is their interest in company – act in best financial interest – receiving money by way of dividends – receiving by way of company being profitable – financially doing well – shareholders benefit from this – financial distribution

If increasing capital value – assisting shareholders interest

**What is in the best financial interest of company

Can consider the interests of other people/groups (stakeholders) provided doing so also benefits the company (shareholders as a collective group)

“In my view, it is proper to have regard to the interests of the members of the company, as well as having regard to the interests of the company as a commercial entity. Indeed, it is proper also to have regard to the interests of the creditors of the company. I think it is proper to have regard to the interests of present and future members of the company, on the footing that it would be continued as a going concern.”

Per Hodgson J (at first instance) in Darvall v North Sydney Brick & Tile Co Ltd (1989) 16 NSWLR 220, 239-240

  o creditors – keep company going as growing concern – ultimately company continues to trade, earn money, profit – goes back to shareholders
  o can be in interest of shareholders and company to look after other people
  o not one dimensional – as long as show how it is good for business
  o ultimately good for shareholders

But if shareholders’ interests and interests of other groups conflict, shareholders’ interests are paramount

Per Mahoney JA (NSW Court of Appeal) in Darvall v North Sydney Brick & Tile Co Ltd (1989) 16 NSWLR 260

  o look after everybody but if make decision – then in favour of shareholders – shareholders are who duty is owed to – collectively not individual