

DUTY OF CARE s180

Hypothetical fact pattern:

- More likely to be breach duty of care for failure to keep up with the director's monitoring roles
 - E.g. awareness of financial position
 - It's not about whether someone is a good business person or not

S 180:

(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 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.

General law:

- S 180 mirrors the duty at general law for directors to take reasonable care when performing their duties (Daniels). However, it is not a fiduciary duty (Wheeler).

Step 1 – Is [X] a director or other officer?

- See above notes
 - NB this section does not apply to those 'involved in' a contravention

Step 2 – Minimum Standard Required:

- **BASIC STANDARD: rudimentary understanding of the Company's business** (*Daniels v Anderson*) (i.e. general understanding of the business and financial position business)
 - Continued obligation to keep informed about the activities of the Company.
 - Should maintain familiarity with the financial status of the corporation.
 - General monitoring of corporate affairs by way of regular attendance at board meetings.
- The evolution of the standard:
 - **FOR ALL DIRECTORS: ASIC v MacDonald: Need to consider adequacy of funding, nature and extent of foreseeable risk of harm** (including risk of legal action, harm of reputation and adverse market impact) to be taken into account.
 - *ASIC v Rich*: Standard of competence in reading and understanding financial material.
 - **SPECIALIST DIRECTORS: ASIC v Vines**: Magnitude, and likelihood of occurrence of risk to be taken into account in assessing how a reasonable person would respond to a given risk.
 - *ASIC v Healey*: Directors should be aware of the relevant principles and be able to make inquiries as to compliance with the Australian accounting standards.

Step 3 – Consider the circumstances of the company – will affect the standard required.

- Circumstances:
 - Type of company
 - Company's constitution
 - Size and nature of the Company's business
 - Membership of the board
 - Director's position and responsibilities
 - Director's experience and skills
 - Terms on which the director has been appointed

Step 4 – [X]'s responsibilities within the company per s 180(1)(b):

- The standard of care expected of [X] is further elevated by [X]'s position as [e.g. CEO/CFO].
- Measured objectively
 - *Gamble v Hoffman* suggests the minimum standard will not be lowered due to lack of qualifications/skill
 - Standard of skill required may be increased if director has particular skills - look also at practical responsibilities (*ASIC v Rich*)
- CEO:
 - May have a more detailed duty of care than other directors due to their role in driving significant transactions and promoting decisions for board consideration
 - May have a heightened duty when in a situation of conflict (ie to ensure other directors appreciate potential harm in a transaction)(*Wheeler*)

- CFO: standard of skill expected of a CFO - there are identifiable specialised skills attaching to that office (*ASIC v Vines*)
 - Standard of skill for a CFO is measured objectively against what a reasonably competent CFO would do
- Company secretary:
 - Potential roles include designing and overseeing compliance programs, risk management, investor relations, organising training, negotiating insurance and dealing with regulators.
- A non-executive director may argue that their non-executive status absolves them of liability
 - But post-*Daniels v Anderson*, the non-exec status of a director is not an excuse for a breach of s 180(1): it can produce a lower standard of care than the one which applied to the executive directors, but it will not, in itself, relieve a non-exec director of liability and *MacDonald* – that was about non-execs

Minimum standards expected of directors:

- Directors should take reasonable steps to place themselves in a position to guide and monitor the management of the company (*Daniels v Anderson*)
- If there is a conflict of interest the duty is elevated
- Importance of the transaction
- Riskiness of the transaction
- Embarking on a new/novel activity
- Familiarity with the fundamental business of the corporation (Freidrich; Adler)
- Continuing obligation to keep informed about the company's activities (Adler)
- General monitoring of corporate affairs by way of regular attendance at broad meetings (Adler)
- Familiarity with the financial status of the company and 'sufficient financial literacy' (Adler; Healy)
- Informed and independent judgment about company matters (Freidrich)
- Directors have a responsibility to read, understand and focus upon the contents of financial reports which the law imposes a responsibility upon each director to approve or adopt (Healy)
- Failing to ensure that a company makes loans in accordance with its authorised practices and failing to ensure that the company has a proper system of controls and audit may amount to breaches of s 180(1) (*Cashflow Finance*)

Remember: Per *ASIC v Maxwell* – s180-182 (and 183) do not impose an obligation on directors to conduct the company's affairs in compliance with the *Corporations Act*. Not a backdoor method for imposing civil liability for contraventions of the *Act*.

Defences:

The Defence of Reliance

Section 189: Reliance on information or advice provided by others

If:

- (a) a [director](#) relies on information, or professional or expert advice, given or prepared by:
 - (i) an employee of the corporation whom the [director](#) believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - (ii) a professional adviser or expert in relation to matters that the [director](#) believes on reasonable grounds to be within the person's professional or expert competence; or
 - (iii) another [director](#) or officer in relation to matters within the [director's](#) or officer's authority; or
 - (iv) a committee of [directors](#) on which the [director](#) did not serve in relation to matters within the committee's authority; and
- (b) the reliance was made:
 - (i) in good faith; and

(ii) after making an independent assessment of the information or advice, having regard to the **director's** knowledge of the corporation and the complexity of the structure and operations of the corporation;

X could raise the defence in s189 that X relied on Y to

Step 1 – Who has the director relied on?

- **[X] has relied on [Y] to [insert act], who is a person that can be relied per s [S].**
 - (If reliance on employee/professional advisor): **From the facts, it seems that [X] very likely had reasonable grounds to rely on [Y] because [insert Y's skills/competencies].**
- Per s 189 a director may rely on:
 - A **reliable and competent employee** per s 189(a)(i)
 - Did [X] have reasonable grounds to rely on them?
 - A **professional advisor** where the advice **is the advisor's expert competence** per s 189(a)(ii)
 - Did [X] have reasonable grounds to rely on them?
 - Another director or officer (relating to matters they are responsible for) per s 189(a)(iii)
 - A committee of directors on which the relying director did not serve per s 189(a)(iv)
- Director is not liable for the acts of the delegate if the director reasonably believed: *ASIC v Adler*
 - The delegate will exercise the delegated power properly
 - In good faith that the delegate is reliable and competent
- **Factors relevant to reasonableness for both delegation and reliance:**
 - Whether the power is one that may be properly delegated to others
 - Whether the director knows or should know of facts that would deny reliance on others e.g. knowledge that the delegate/employee/adviser is dishonest or incompetent
 - The relationship between the director and the delegate/employee/adviser
 - The nature and risk of subject matter
 - The inquiries made by the director

Step 2 – Was the reliance in good faith per s 189(b)(i)?

Step 3 – Was the reliance made after the director made an **independent assessment** of the information per s 189(b)(ii)?

- This means that a director cannot abdicate responsibility entirely
 - E.g. if director gets a report from an auditor, director needs to read the report properly and scrutinise the reasoning process and conclusions drawn by the auditors (even if the executive summary of the report indicates positive growth for the company)
- Where the information is particularly important, reliance is less likely to be reasonable (*Healy*)
- If professional advisors are relied upon, they must have sufficient expertise (*Healy*)

Step 4 – If the above 3 steps are met, the director's reliance is presumed to be reasonable per s 189(c)