

CORPORATIONS LAW

Directors duties

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Guiding notes:

Difference with due care / good faith:

Former: some level of incompetence or laziness; the latter: also looking at some level of disloyalty.

An action may breach both no conflict and no profit. But can have breach only of one. [not always necessary to cover both]

Proprietary company – Pty Ltd

Public – Ltd

SET OUT PROPER PURPOSE IN ALL THE DUTIES, BUT ONLY LOOK AT GOOD FAITH

If advising ASIC – ensure that only statutory duties are mentioned; not concerned about equitable duties.

Ss 180-183 are civil penalty provisions (s 1317E)

Sections

Pt 2D.1: Duties and Powers – includes s 180-184, 189-190:

Duties of care and diligence, good faith, use of position, use of information, reliance and delegation

Also includes disclosure

Part 2F.1 – oppressive conduct [ss 232-235]

Part 2F.1A – Proceedings on behalf of company [ss 236-242]

Part 5.3A > VA and DOCA [ss 435A – 451D]

Part 5.4 – Winding up in insolvency [ss 459A – 459T]

Part 5.4A – Winding up on other grounds [ss 461-464]

Part 5.4B – Winding up in insolvency or by Court [465A – 489E]

Part 5.5 – Voluntary winding up

Part 5.7B – **Recovering property or compensation** [588C – 588Z]

Insolvent trading prevention (**div 3**); Voidable transactions Div 2

Part 9.4B – civil consequences (remedies) for civil penalty provisions [ss 1317DA – 1317S]

Part 9.5 – Power of the Courts [ss 1318-1327]

Part 9.6 [1332]

Duties that are the same at general law or under the statute:

s 180 (duty of care) & s 181 (Duty of good faith & best interests)

Purely general law duties –

fiduciary duties of: No conflict & No profit rule

Purely statutory duties:

ss 182 (Improper use of position), 183 (improper use of information), 588G (duty not to trade while insolvent)

The regulator brings criminal proceedings (ASIC).

No criminal breach of s 180, but possible re ss 181, 182, 183, 588G

s 191 is also a criminal duty

Be more resolute in your conclusions.

VT:

Unfair preference [6 months]

Uncommercial transaction [2 years]

Obstruct creditor interest [10 years]

Unfair Loan [no clawback]

Director related transaction [4 years]

Directors' Duties

[Directors' duties are owed to the company as a separate legal entity]

Director/Office?

Is _ a director?

A director of a company is a person who is either appointed to the position of a director or is appointed to the position of an alternate director and is acting in that capacity, regardless of the name given to their position. (s 9)

A director is not a person who merely provides advice to the directors in the 'proper performance' of their 'professional' functions, or provides advice within a 'business relationship' with the directors or company.

_ may not validly constitute a director as _ merely provides advice to the directors in the 'proper performance' of their 'professional' functions, or provides advice within a 'business relationship' with the directors or company.

Executive directors: Full-time employees of a company, with management and administrative duties designated by the board.

Non-executive directors: Not involved in day-to-day management, and are not employed by the company.

Independent (non-executive) directors: No affiliation with company management, or other business or personal relationship. Holds no previous employment, significant shareholding, close family ties, or lengthy service with the company. (s 9)

The type of director is a question of fact, determined by the executive powers conferred. (*AIG v Jacques*)

Shadow and de facto directors also validly constitute directors.

De facto director?

A de facto director is a person who, while not formally appointed as a director, nevertheless acts as one. (*s 9; Austin*)

*unless a contrary intention appears (*s 9*)

De facto director/officer is someone who has the capacity to 'affect significantly', (company's) financial standing in his or her management of the affairs of the corporation. (*Buzzle*)

Does not refer to a person who has the capacity as a third party to affect a corporation's financial standing, with no involvement in the management of the corporation's affairs

Analogous to the facts in *Austin*, where while the director resigned from his position, but was held as a de facto director as he continued to play an active role in the company, including negotiating agreements with creditors and the ATO, which were responsibilities typically expected of a director.

Relevant facts to consider in determining a *de facto* directorship: (*Austin*)

- The person **must be exercising top-level management functions.** (*Austin*)
- Size of the company:
Employees in larger companies will be delegated more responsibility without acting in the position of a director. This varies according to the internal practices of a company.
- How the person is reasonably perceived by outsiders dealing with the company
The given title does not preclude a finding that the person is a de facto director. (*s 9; Yasseen* [a 'consultant' was found to be a de facto director who undertook tasks typically expected of a director]) .

While s 201B requires directors to be 'individuals', a consultant company cannot be used as a screen to preclude an individual from constituting a de facto director. (*Grimaldi*)

If a consultant company acts as a director through the action of its directors or officers, it will be a question of fact as to *which* director or officer within the consultant company will be held to be the de facto director. (*Grimaldi*)

Shadow Director?

[an inappropriate deference by the board to a person essentially controlling decision-making, while the Board still retains independency in decision-making]

Shadow directors are not appointed to the board, but persons or companies in accordance with whose wishes or instructions the directors are accustomed to act. (*s 9; Buzzle*) This is established by actual accordance rather than just an imposition of will. (*Buzzle*)

*unless a contrary intention appears (*s 9*)

- (company) may constitute a shadow director, even though it cannot be formally appointed under *s 201B*. (*Antico; Buzzle*)
- _ may be both a shadow and *de facto* director. (*Buzzle*)
- As a creditor, _ may still constitute a shadow director (*Buzzle*)

_ is not a shadow director merely because the other directors act on advice given' in _'s 'proper performance of functions' relating to _'s 'professional capacity' or 'business relationship with the directors or the company'. (*Re Akron: s9*)

[A management consulting company was held not to constitute a shadow director of Akron, as the director it provided did not overbear the other directors in Akron, who did not act in accordance with his wishes]

_ as a shadow director is established by a "causal connection' between the shadow director giving instruction and directors' compliance, and it **cannot be an act that directors would do irrespective of the instruction.** (*Buzzle*) This is evidenced by the 'habitual compliance over a period of time' (*Ultraframe*) of a 'governing' majority of directors in (company). (*Buzzle*)

Instructions from a shadow director do not need to solely cover areas of corporate activity under directors' responsibilities. (*Buzzle*)

A shadow director is not liable in liquidation for debts incurred prior to the time that they could be considered a shadow director, or when the board could be said to be accustomed to act in accordance with their instructions. (*Buzzle*).

Analogous to *Buzzle*, where Justice White held that the major creditor company was not a shadow director, despite its strong influence over *Buzzle*, given a document's highlighting *Buzzle*'s acknowledgement of no involvement by the creditor in any of its corporate decision-making, that it only put increasing pressure on the directors to protect its own interests, and constituted arms-length commercial negotiations

Is _ an officer of _?

As a _, _ may constitute an officer of (company)

- a person
 - who makes, or participates in making, executive decisions substantially affecting any of the corporation's business (*s 9; Citigroup; Shafron*)
 - who has the capacity to affect significantly the corporation's financial standing, or (*s 9; Citigroup*)
 - in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (*s 9*)
[excludes advice given by the person in the proper performance of his profession capacity or business relationship with the directors or the corporation]
- A receiver of the property of the corporation (*s 9*)
- An administrator, liquidator, or trustee of the corporation (*s 9*)

Analogous to *Citigroup*, where a share trader with a daily limit of \$10 million was not found to be an officer, but merely an employee, given a lack of involvement in policy making that affected the whole or a substantial part of the business. (no proof that the daily limit was significant enough)

- The fact that _ has different roles is irrelevant, as directors' duties apply to all of _'s decisions once classified as an officer, and the inquiry is not confined to the role _ played in an alleged breach. (*Shafron; Morley*)
[Whether _ has any executive function tied to high-level decision-making]
- That another person has undertaken the final act does not sever _'s participation and role in decision-making, who constitutes a contributor who 'merely assists' _'s engagement in decision-making (*Shafron*)
that the decision-making is subject to control by another or subject to ratification or reversal does not preclude _'s participation in decision-making (*Shafron*)
- _'s participation in decision-making over _ does not make _ an officer as the decisions did not have 'significance for the corporation's business'. (*Shafron*)

Shafron – had extensive legal qualifications and experiences, and regularly attended board meetings – regulatory compliance and advice giving were at the core of his functions: therefore required to bring these to bear in performing his role.

SHAFRON'S extensive legal qualifications made his responsibilities 'wider than administrative' and extended to the provision of necessary advice.

also 'played a large and active part in formulating the proposal that he and other chose to put to the board as one that should be approved'

A company secretary constitutes an "officer" by participating in significant decisions of the company. (*Shafron*)

Duty of Good Faith? (Not a fiduciary but equitable duty: not common law)

As director/officer of __, __ must exercise __ powers and discharge __ duties in good faith and in the best interests of the company, (*s 181(1)(a); Maxwell*) and exercise his powers for a proper purpose (*s 181(1)(b)*)

*This is a civil penalty provision; overlap between ss 181, 182, 183

Wholly-owned subsidiaries?

A director of a wholly-owned subsidiary acts in good faith in the best interests of the subsidiary if

- The subsidiary's constitution expressly authorises the **director** to act in the holding company's best interests; (*s 187(a)*) and
- the director acts in good faith and the holding company's best interest; (*s 187(b)*) and
- the subsidiary was not insolvent when the director acts and does not become insolvent because of the director's act. (*s 187(c)*)

Best Interests?

__ may challenge __ as a breach of __'s duty to in the company's best interests.

Here, the company's best interests are that of the members' as a collective, (*Greenhalgh; Kinsela*) and of both present and future members, even if not in their short-term interests. (*Darwall*)

Where members disagree on the interests, the company's best interests become **what is fair between the different shareholder classes** (*Mills*)

Analogous to *Mills* where the duty to act bona fide in the company's interests was not breached when the directors passed a resolution allocating the entirety of the company's reserve account to ordinary shareholders through bonus shares, which increased the managing director's voting power while excluding preference shareholders from any benefits.

- Analogous to *Bell*, where directors breached their duty of good faith by giving securities to the creditor bank, which presented a large financial risk to creditors, despite that knowledge of the companies' insolvency.
- Analogous to *Smith*, where the director's denial of a share transfer under a power granted by the company constitution to acquire them for himself 'at an undervalue', was still held as for a 'collateral purpose' against the company's best interests. In the present case, __'s (action) may be similarly held to have 'cut down' (shareholder's) right to 'freely transfer shares'. (*Smith*)