

# DIRECTORS DUTIES - DUTIES OF CARE, SKILL AND DILIGENCE

## Has there been a breach of Statutory and Common Law Duty of Care and Diligence

### S 180

(1) A director or other officer must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- a) Were a director or officer of a corporation in the corporation's circumstances
- b) Occupied the office held by, and had same responsibilities within the corp as the director or officer.

- **Consider:** type of co, size, nature, constitution provisions, division of work. CBA v Friedrich.
- **Consider:** Circumstances and office held by director and responsibilities Daniels v Anderson
  - Both subjective test (circumstances) and objective (reasonable person) in this test.
  - But no regard to personal circumstances (standard of education, experience) Citrofresh.
  - Responsibilities not confined to tasks expressly delegated to director ASIC v Rich
    - 'Apply standard of care that reflects contemporary community expectations'.
- **TEST for duty of care:** Vrisakis v ASC
  - **What are the duties of this particular director**
  - **Where those duties undertaken with reasonable care and diligence?**
    - If not what should have director done to balance foreseeable risk of harm against potential benefits?
- All directors must possess certain basic non-reducible skills: Enabling them to understand operation of company and financial affairs and position.
  - Specific skills may be expected based on position.
- AWA v Daniels
  - The duty requires directors to take reasonable steps to place themselves in position to guide and monitor the company.
    - General understanding of bus and effect of changing economy.
  - Limitation on BOD of **large** companies
- Daniels v Anderson
  - No lower standard for non-executive directors
  - Failure to inquire not sufficient (particularly for delegation), must inform himself about affairs of company.
- **Meetings**
  - Attendance disclosed in directors report.
  - Diligence requirement: Meet as often as necessary to carry out functions properly.
  - Failure to hold meetings is breach of s 180 Sheahan (as liquidator of SA service stations) v Verco [2002] SASC 69.
  - Must put themselves in position to guide and monitor the company.
  - Unfair to hold liable when cant attend meetings Re Cardiff Savings Bank.

### Defences

- S 189 Defence - Delegation:
  - Board can delegate unless constitution provides otherwise s 198D RR
  - D responsible for exercise of power by delegate s 190, unless:
    - D had reasonable grounds delegate would conform with directors duties.
    - Believe on reasonable grounds and in good faith delegate reliable and competent in relation to power. s 189

- S 190(2): Director avoids responsibility if director believed on reasonable grounds that the delegate would exercise power in conformity with duties imposed on directors in good faith, after making proper inquiry.
    - If Met the director not liable for acts of delegate if delegate acts fraudulently, negligently or outside the scope of power.
  - S 180(2) – Business Judgement Rule:
 

*A director or other officer of a co is taken to meet requirements of the duty of care (both stat and CL) if they make a business judgement and they*

    - a) *Make the judgement in good faith for a proper purpose*
    - b) *Do not have a material personal interest in the subject matter of the judgement*
    - c) *Inform themselves about the subject matter of the judgement to the extent they reasonably believe to be appropriate; and*
    - d) *Rationally believe that the judgement is in the best interests of the co.*
  - (1)(a)
    - S 180(3) defines business judgement to mean any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.
    - If director acts with subjective honesty in way that objectively regarded as in best interests of co, director will have satisfied this element ASIC v Rich.
  - (1)(b)
    - Material interest = relationship of real substance with capacity to influence vote of director upon decision to be made McGellin; Grand Enterprises.
    - Not entitled to rely on BJR if have material interest ASIC v Rich
  - (1)(c)
    - Reasonableness assessed by 5 factors ASIC v Rich
      1. Importance of the judgement to be made
      2. Time available for obtaining info
      3. Costs related to obtaining info
      4. Director or officers confidence in those exploring the matter
      5. State of co business at time & nature of competing demands on boards attn.
      6. Whether or not material info is reasonably available to the director.
  - Onus of proof on directors/officers ASIC v Rich
  - Discern between decisions made with faith and due care and those which satisfy degree of care but result in a loss for the company from commercial risk.
  - Courts will not review merits of business decisions made by directors in good faith and with due care Harlow Nominees Pty Ltd v Woodside; Howard Smith Ltd v Ampol.
  - **No BJ where director lacked interest in the co affairs.** Gold Ribbon Accountants Pty Ltd v Sheets [2006].
  - **Receivers can rely on BJR**, falls within officer definition Deangrove v Buckby (2006)
  - Must be a decisions consciously made on a matter relevant to the co's **ordinary business operations** ASIC v Fortescue
- Material personal interest s 191
  - Good faith and proper purpose 181
  - **Rational belief**
    - D believed his or her judgement was in best interests of co and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief ASIC v Rich.

Sheahan (as liquidator of SA service stations) v Verco [2002] SASC 69.

- Set up servos using money loans from banks. Said results terrific but computer not working so cant show financial reports. But position was in fact shit. Failed to guide and monitor co, breaching s 180.

Vrisakis v ASC (1993) 11 ACSR 162

- V solicitor asked to help rescue bank as non-exec director.
- Duties of a non-executive director appointed to take a critical role in an attempted rescue of rothwells were significantly more extensive and the **standard of care significantly higher** than that expected from a non exec director in the ordinary course.

AWA Ltd v Daniels (1992) 7 ACSR 759

- FX dealer to purchase foreign currency as hedge. Only disclosed his successful contracts and hid others. Audits didn't pick up. Auditors filed cross claim that AWA negligent. Said limits on the ability of boards to engage in supervision of large companies, but if appointed that is enough to discharge their duties.

ASIC v Rich (2009) 75 ACSR 1

- S 180 breach by 3 directors Adler, Williams, Fodera.
- Breach of 180 by Adler as loans materially prejudiced interests of HIHC and HIH and a reasonably careful and diligent director would not have procured them. W failed to put in place proper safeguards around investment, failed to consult investment committee breached s 180 and 182.

Forrest v ASIC; Fortescue Metals Group Ltd v ASIC [2012] HCA 39

- Announcement by F entered binding agreement to finance mine and railway.
- Misleading and deceptive breaches of s 1041H, disclosure obligations s 674, s 79 for involvement of Forrest, and breached s 180.
- Audience was not naïve, took it with pinch of salt.
- No deliberate intention to mislead so not misleading and deceptive.
- **If breaching legal obligations for misleading and deceptive conduct to the market, you will also have breached s 180.**

ASIC v Cassimatis (2013) 302 ALR 671

- **C contravened duties of care and diligence as directors of Stomer under 180** by permitting storm to provide financial advice to 46 storm customers.

ASIC v Citrofresh Intl

- Misleading and deceptive statement. Invisible condom to save AIDS problem but was just disinfectant.
- No reasonable MD and CEO of a publicly listed co would have authorised the release of these statements to the stock exchange.
- Failed to exercise

ASIC v Healy

- Failure to disclose 1.5 bil liabilities, classified them as non current. Financial statements were only looked at by one director.
- Directors failed to take reasonable steps required of them and acted in the performance of their duties as directors without exercising the degree of care and diligence law requires.

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| <ul style="list-style-type: none"><li>• Director should keep informed about activities of the corp.</li><li>• Should monitor the corporate affairs and policies.</li></ul> |
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**Consequence for breach of 180 duty of care**

- S 1317E: s 180 is a civil penalty provision. May be ordered pecuniary penalty of up to \$200k s 1317G, compensation to the co for damage suffered s 1317H, or be disqualified from mgmt under s 206C.
- Under common law Co can sue director or officer for damages in their breach of common law standard causes losses.