

## TOPIC 8: DIRECTORS' DUTIES (Part 2D.1)

D\_\_\_\_ has exercised their power to (act e.g. enter into K; pass res)\_\_\_\_\_.

P\_\_\_\_ may argue this is a breach of directors' duty, whether in regards to common law or statute. Note, the duties under the Act do not abrogate the common law (s 185).

**Duty to act in GOOD FAITH in the BEST INTERESTS of the company**

→ codified/equivalent under statute → **BUT if Q asks for FIDUCIARY ONLY, still apply good faith/PPs!**

*STATE: the statutory duties contained in s 181 (good faith and proper purpose) are virtually identical to the general law, with the only difference existing in the remedies available if a breach is made out.*

**1. Does it apply?** → S 181 applies to directors and officers of the company.

*Director? (s 9)*

- De jure directors = someone validly appointed
- Includes **de facto directors** (ie someone who manages day-to-day operations); and
- Person who is not validly appointed
- Shadow directors = person whose instructions are customarily followed by directors of the company
  - Includes companies (*Standard Charter Bank*)

*Officer? (s 9)*

- (a) a director or secretary of the corporation; or
- (b) a person:
  - (i) who makes decisions, or participates in making decisions that affect the whole/substantial part of the business entity;
  - (ii) a person who has the capacity to significantly affect the entity's financial standing.
  - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act
    - But not people acting as professionals or through business relationships.
- (c) a receiver and manager of the property of the corporation
- (d) administrator
- (e) administrator of a deed of company arrangement
- (f) liquidator
- (g) trustees
- of an entity that is neither an individual nor a corporation, officer can be a partner in the partnership

### **2. The duty / test**

"D\_\_\_\_ must exercise their powers and discharge their duties in good faith in the best interest of (company)\_\_\_\_\_ (s 181(1)(a); *Re Smith*). While good faith involves subjective honesty (*Fawcett*), the court will look objectively at the surrounding circumstances to assist in deciding whether the director/officer sought to benefit the company (Bell Group). So the test for good faith/bona fide is subjective, with an objective overlay (Owen J in *Bell Group*)."

P\_\_\_\_ will argue that no reasonable director acting on proper considerations would have made the decision (*ASIC v Adler* per Santow J) in those circumstances (Owen J in *Bell*).

- Threshold is very high. Was the belief ludicrous?
- Courts are reluctant to interfere with the management of corporations