

## Directors Duties

### Road Map

- **Who is a director?**
  - S9
  - Shadow
  - De-facto
- **Duties**
  - Exercise care skill and diligence
  - Good faith and proper purpose
  - Loyalty duty
  - Duty to prevent insolvent trading
- **Remedies**

### Who are directors and other officers

- **Director s9**
  - Person who is appointed **(s9)(a)(i)**
  - Appointed alternate director – acting in that capacity regardless of name of position **(s9)(b)(ii)**
  - Person **who is not validity appointed**
    - Act in position of director **(s9)(b)(i)**
    - Company acts in accordance with their wishes **(s9)(b)(ii)**
      - Can extend to anyone who company listened to e.g. bank giving advice – creditors can argue they were acting as director because company listened to them
- **De-facto director**
  - **S9(b)(i)** – acting in that position
    - **Includes**
      - Person who purports to resign but continues to act as director **(Williams v Bearing Traders)**
      - Person who is removed but continues to act **(Resource Equities v Garrett)**
      - Consultant who undertakes tasks expected of director **(Mistmorn v Yasseen)**
- **Shadow directors**
  - **S9(b)(ii)**
    - **Standard Chartered v Antico (1995) 18 ACSR 1**
      - you can be substantial shareholder and be on the board and this won't make you a shadow director
      - Parent company had 3 directors acting as directors of Pioneer, made significant decisions and accepted, funding arrangements that demonstrated willingness to exercise control over financial affairs
      - Parent company can be a shadow director of a subsidiary
- **Officer**
  - **Definition of officer**
    - Directors or secretaries **(s9)(a)**
    - a person who makes or participates in decisions that affect the whole/substantial part of the business **(s9)(b)(i)**
    - person who can affect companies financial standing **(s9)(b)(ii)**

- person who the company acts in accordance to their wishes (s9)(b)(iii)
- receivers (s9)(c)
- administrators (s9)(d)
- liquidators (s9)(e)

## Duty – exercise care, skill and diligence

### Road map

- Common law duty
- Statutory duty
- Reliance or delegation
- Business judgment rule

### Common law duty

- **Contract**
  - Usually in employment contract that they will act in a way that suits the position they hold
- **Common law**
  - *tort: Daniels v Anderson (1995) 37 NSWLR 438*
    - idea that common law duty of negligence owed by directors to company to avoid being negligence
    - standard has become increasingly objective

### Statutory Duty

- statutory version of the duty is regarded as ‘essentially the same’ (Ford at [8.305]) as the general law duty:
  - *Re HIH Insurance Ltd (in prov liq); ASIC v Adler (2002) 41 ACSR 72;*
  - *Daniels v Anderson (1995) 37 NSWLR 438;*
  - *ASIC v Rich (2009) 75 ACSR 1.*
- **s180**
  - **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 exercise if they:**
    - **(a) were a director or officer of a corp in the corp’s circumstances; and**
    - **(b) occupied the office held by, and had the same responsibilities within the corp as, the director or officer.**
- Director of company – minimal standard of care you are expected to meet regardless if you were smart enough to or not (**ASIC v Rich**)
- **Centro decision**
  - financial competent not enough to say that you did your best or minimum standard – needs to be able to act in that position appropriately
  - If you asked and were told its okay then you were fine but you didn’t ask the question
- **The modern standard of care: ASIC v Rich [2009] NSWSC 1229**
  - Non-executive Chair (Greeves) more experienced in financial matters than any other board member
  - Need to meet minimal objective base line then consider level of his knowledge