

Lecture 9, 10, 11, 12 – Directors’ Duties

- Directors Duties provisions (s180-184) also apply to Officers — and potentially other employees
 - Must look at status of ‘other employees’, to determine what is expected
 - Managers, etc. still owe fiduciary duty
 - Green & Bestobell Case
- Directors cause direct harm to the company if they don’t comply with Fiduciary Duty
 - Directors have ultimate say
 - Shareholders have full control once appointed by shareholders
 - Only way Shareholders can change is to replace board
- Directors Duties — s185
 - Corporations Act
 - Common Law
 - s185 specifically states relevance of common law
 - i.e. some cases pre-date Corporations Act
 - Statute codifies breaches
- **Remedies** — highlights difference statute makes to breaches
 - Company seeks remedies
 - Damages for loss resulting from breach
 - Seeks compensate/benefit/assist Co. for fiduciary breach suffered
 - Account of Profits
 - Focus on Gain that directors make
 - Rather than direct Co. loss
 - Even if the Co. couldn’t make the \$ itself, it is a punitive measure to deter fiduciary from making gain at the expense of the Co.
 - Rescission
 - Voiding the contract
 - Trying to get out of contract relationships
 - i.e. Promoters’ Duties (involves fiduciaries)
 - Restorative to pre-contract status quo
 - Constructive Trust — *not examinable*
 - Fiduciary benefit from information + resources that results from fiduciary breach
 - Purchases asset — belongs to company
 - Fiduciary holds asset as constructive trust for company
- **Co is Proper Plaintiff**
 - Fiduciary duties owed to Co. — not individual shareholders
 - Company seeks remedies
 - Statute (Corporations Act) + Common Law — combination
 - ASIC
 - Criminal - i.e. s588(G) insolvent trading
 - Company
 - Civil remedy - i.e. damages

- **Duties**

- s1317(E) — CIVIL PENALTY PROVISIONS
 - Attempt by statute to ensure directors comply with duties
 - To ensure Co. doesn't suffer loss
 - i.e. s180-184, s588(G)
 - Lifts the veil — individuals liable
 - **Civil Penalty Provision**, resulting in;
 1. Civil liability
 - Lower standard of proof — balance of probabilities — >50% probability
 2. Criminal liability
 - Beyond reasonable doubt — remedies involve loss of liberty — needs clearly established facts
- Directors' Liability — Insolvent Trading — s588(G)
 - Lifts the veil — individuals responsible for contracts entered into while insolvent
 - **Pecuniary Penalty Order** — 'Civil Fine' to ASIC — up to \$200,000
- Guilty Mind — Mens Rea
 - Co. Criminal trials concerned with intent — beyond reasonable doubt
 - Can subsequently pursue Civil Penalty Provisions after ASIC paves the way through criminal action

- **Common Law** — Co. = proper plaintiff

- Statutory Derivative Action - s236
 - Company's claim = member's claim
 - Right to sue is derived from the fact that the Co. can sue, but has not yet done so
 - Possibly because of lack of funds, etc.
 - But Company liable for funds

- **Duties**

0. Care, Skill, Diligence
 - Entrepreneurial Risk — Calculated
 - Provides directors leeway to make calculated risk to make profit
 - Without Business Judgement Rule, Directors would be scared to act
 - Inaction
 - Speculative Venture — Gamble
 - Foolish/reckless
 - Doesn't consider possibility for failure
 - Determinant — **Reasonable Person Test** — s180(1) - 'Carelessness' v 'Recklessness'?
 - i.e. Driving 5km over the speed limit = trying to do the right thing, but failing to watch speedometer
 - No intent — Careless
 - Driving 120km/h in a 60km/h zone = Motive (Reckless)
 - Intent — Reckless
 - **AWA Case** — Managing Director higher standard of care
 - Low down employee responsible — not supervised by senior management

- Auditor informed senior management, but failed to alert BoD
 - Held Auditor 1/3 liable
 - BoD failed to supervise — Contributory negligence
- **Permanent Building Society v Wheeler 1994** — Minimum standard for All Directors
 - Lack of Education — No excuse
 - All directors held to a minimum standard
 - **Business Judgement Rule** — s180(2)
 - All directors must evaluate the likelihood of failure
 - PROPER PURPOSE
 - In Co's interest?
 - GOOD FAITH
 - Honest?
 - No Material Personal Interest — must rationally believe judgement in Co's best interests
 - Appropriately informed
- **Reliance** — s189
 - On whom? — s189(A)
 - Employee
 - Professional Advisor
 - Director
 - Committee of Directors
 - Criteria — s189(B)
 - Reliance in good faith?
 - Independent assessment?
 - Complexity of risk
 - Breach? — s189(C)
 - Statute?
 - Common Law?
- **ASIC v Healey** — Delegating
 - Directors must read and understand financial statements — s189
 - Must be conversant in financial affairs of Co.
 - Failure to make proper inquiry — s190(2) — defence
 - Responsible for delegate's acts, unless proper inquiry is made
 - Defence failed

1. Loyalty, Good Faith

- Bona Fide in Co's interests
 - GENUINE — **Percival v Wright**
- Powers used for proper purpose?
 - Why did Co. give director these powers?
 - Does their use correspond with this purpose?
- Avoid conflict of Interest
- Retain Discretionary Power
 - 'Mop up' anything left out of the act
 - Account for anything not expressly authorised
 - Can't be delegated to subordinates
 - Rescission