

Director Duties

Duty of Care (S180)

S180: Director or other officer (under **S9**, includes shadow and de-facto) must exercise their powers and discharge duties with the degree of care and diligence.

1. **Reasonable person test**, what would a reasonable person do in the position of the directors.
2. **Minimum standards of care, skill, diligence expected** as per *Daniels case*
 - Basic understanding of the company's business
 - Keep informed about company's activities
 - Monitor the company's financial position (read financial statement)
 - Attend board meetings regularly

Standard of skill expected -> depends on position but must have basic understanding on financial status, higher position means more skill expected as per *ASIC v Vines*.

Defense for Directors

S198D: Delegation defence

- **S190(1):** If directors delegate power, director is responsible for the exercise of power by the delegate. Even if the delegate is negligent, directors might still be liable
- **S190(2):** Directors wouldn't be liable under sub1 if director believe on reasonable grounds, in good faith and after making proper enquiries that the delegate was reliable and competent.

S189: Reliance defence as per *ASIC v Healey*

- If directors relied on advice or information provided by someone not qualified, breach DOC.
- **S189(b):** If reliance is made in good faith, after making independent assessment of the advice, not breach (info must be given by someone who is competent ex: accountant, other directors)

S180(2): Business Judgment Rule as per *ASIC v Rich* (must satisfy all 4 then BJR can be use)

- (a) Make judgment in good faith for a proper purpose
- (b) Do not have material personal interest
- (c) Inform themselves and reasonably believe judgement to be appropriate
- (d) Believe that judgment is in the best interest of the company

Example: directors invest in a mining company, but lose money, it is beyond the control of directors that price goes down, so can use BJR defence.

Consequences

- **Civil penalties:**
 - **S1317G:** Pecuniary(money) penalty up to \$200,000
 - **S206C:** Disqualifying the person from managing companies for a specified period of time
 - **S1317H:** Pay compensation to the company for any loss or damage it has incurred because of the breach (can also be for general law)
 - **There is no criminal penalty**
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Duty to prevent Insolvent trading (S588G)

S588G: Directors (under **S9**, includes shadow and de-facto) have a duty to prevent their company incurring debts when the company is insolvent or would become insolvent. A company is insolvent if it is unable to pay all its debt as and when they due for payment under **S95A**. (must satisfy all 3 to breach)

1. A person is a director at the time when debt is incurred.
2. Company is insolvent at the time or becomes insolvent by incurring that debt.
3. There are reasonable grounds for suspecting insolvency at the time debt was incurred.

Defences for Directors

- **S588H(2)**, had reasonable grounds to expect and did expect that the company was solvent and would remain solvent even if it incur the debt as per *Metropolitan Fire Systems Pty Ltd v Miller*
- **S588H(3)**, had reasonable grounds to believe and did believe that a reliable person was responsible for providing the director information and the person was fulfilling that responsibility, and expected based on the information that the company was solvent and remain solvent even if they incurred the debt.
- **S588H(4)**, absence from management due to illness and other good reason(accident) as per *Deputy Commissioner of Taxation v Clark*
- **S588H(5)**, took all reasonable steps to prevent incurring the debt.

Consequences

- **Civil penalties:**
 - **S1317G:** Pecuniary(money) penalty up to \$200,000
 - **S206C:** Disqualifying the person from managing companies for a specified period of time
 - **S1317H:** Pay compensation to the company for any loss or damage it has incurred because of the breach (can also be for general law)
 - **Criminal: S588G(3)** (If director is reckless or intentionally dishonest)
 - Fine up to 2,000 penalty units, or
 - Prison for 5 years, or
 - Both
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Duty to act in good faith in the best interest of the company (S181)

S181: Directors or other officer (under **S9**, includes shadow and de-facto) must exercise their powers and discharge their duties in good faith in the best interest of the company and for a proper purpose.

S181(1)a: Must act good faith (honest) and best interest of the company.

Who is the best interest?

- Members: interest of a solvent company are those of its members as per *Greenhalgh v Arderne Cinemas*
- Creditors: when company is insolvent/nearing insolvency, interest are those of its creditors as per *Kinsella case, Walker v Wimborne*

Test: Whether an intelligent honest person in the position of the director could have reasonably believed the decision would benefit the company? As per *Equitycorp Finance v BNZ*

S181(1)b: Proper purpose

We use the 2-step test as per *Howard Smith Ltd v Ampol Petroleum*

1. Question of Law: for what purpose was the power conferred? Ex: raise capital, issue shares
2. Question of Fact: for what purpose was the power exercised? It is the true intention of directors.
Ex: to make a majority member a minority, to gain control of the company, afraid to lose their jobs as directors, etc.

If actual purpose is not within the lawful purpose -> breach proper purpose

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