

All references to sections are sections of the *Corporations Act* unless indicated otherwise.

Reach a conclusion overall - any breach? If so, which one?

#### **Has ... exercised reasonable care & diligence?**

1. The duty to exercise reasonable care and diligence is a general law duty, arising from the tort of negligence and equitable duty of care, and a statutory duty under s180(1). Both forms have the same substance (*ASIC v VINES*).
  - S 180(1) places a duty on directors to use the degree of care and diligence that a reasonable person would use if they were:
    - a director of a corporation in the corporation's circumstances, and
    - occupied same office and had the same responsibilities as the director.
  - To determine if the duty has been breached, it must be considered:
    1. What a "reasonable person" would do in the circumstances;
    2. a subjective consideration of the corporation's circumstances and the directors' office and responsibilities.

#### **2. Corporate circumstance:**

When considering the corporation's circumstances, some factors are relevant (*COMMONWEALTH BANK v FRIEDRICH*): Here, ... is (size, nature, type of corporation) e.g. a large, publicly listed company, with a high turnover, significant yearly profit and many customers. The board ... (composition of the board, distribution of responsibilities btw the board & others) comprises 7 directors, including a MD and chairman.

#### **3. Identify the type of the director + what a reasonable person in the position would do**

... is a MD/non-executive director/chair. ... expected to exercise the degree of care and diligence that a reasonable MD/non-executive director/chair of a large publicly listed corporation would exercise. A reasonable MD/non-executive director/chair of a large publicly listed corporation would be expected to ..., he failed to do so by + irregularity. e.g. exercise his own independent judgment when voting on matters brought before the board; always voting as the MD votes, without considering the merits of the issue. / In light of conflicting advice from the bank and the FD, a reasonable director may have made further enquiries.

#### **4. Minimum standard**

There is a minimum standard of care that all directors would be expected to meet (*DANIELS v ANDERSON; ASIC v ADLER*). ... has failed to meet that standard because + irregularity

#### **5. Relevant case for the type of the director**

Non-executive & executive directors:

- All have a continuing obligation to familiarise themselves with the company's financial position by regular review and understanding of its financial statements (*DANIELS v ANDERSON*)

Non-executive:

- may owe a lower standard of care than the other directors (*DANIELS v ANDERSON*).
- must be proactive and participate in all board decisions, or formally abstain; cannot rely on the other directors to reach a majority decision (*ASIC v HELLCAR*) which ... has not done.

MD/CEO:

- As the co's CEO, ... is under a continuing obligation to supervise mgmt and seek satisfactory explanations regarding ... (e.g. the deficiencies of the FE trading system & procedures.) Failing to make inquiries of ... (the co's senior executives) that would have led to a better appreciation of the risks and dangers of ... (e.g. the foreign exchange dealings) is a breach of directors' duty of care and diligence. (*Daniels v Anderson; ASIC v Adler; ASIC v Hellicar*)