

## Duty of care

### Scope of Duty

- Directors and officers owe a duty to the corporation to exercise due care, skill and diligence.
- This duty may be derived from the common law of negligence, obligations in equity, or s180(1) of the CA.
- The courts have established that the content of the duty is the same regardless of where the obligation arises. That is, whether its under equity, statute or the common law, the elements are essentially the same. The difference between the sources lies in the remedy available, the consequences for breaching the duty, and the enforcement of the duty.
- Equitable and common law duties are enforceable only by the company (or a liquidator acting for the company) or by a statutory derivative action.
- The statutory duties are also enforceable by these party, but are also enforceable by ASIC.
- This duty applies to both directors and officers (but not to employees).

### Section 180(1)

<b>180(1)</b>	1. 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: <ul style="list-style-type: none"><li>a. Were a director or officer of a corporation in the corporation's circumstances; and</li><li>b. Occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.</li></ul>
<b>Note</b> <ul style="list-style-type: none"><li>• First determine whether the person is an officer or director.</li><li>• Despite not being mentioned, skill is still relevant under s180(1)</li><li>• Objective test</li><li>• Responsibilities can be express or implied</li></ul>	

### Low Expectations of Directors

<b>Re Cardiff Savings Bank</b> <ul style="list-style-type: none"><li>• M only attended one board meeting in 38 years and never read the board papers - he had very little to do with the company.</li><li>• M was found not to have breached his DOC<ul style="list-style-type: none"><li>◦ If he had of gone to the meetings and detected that there was something inappropriate going on or that the company was at risk and failed to intervene, then he would have been liable. But the fact that he had such little interaction with company and did not attend the meetings or read the board documents mean that he was not in breach of his DOC.</li><li>◦ He was completely disengaged.</li></ul></li><li>• <b>Note: this position is much less likely to be accepted today.</b></li></ul>
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### Elements of Duty

- The basic elements for establishing liability for breach of this duty consists of an obligation to exercise care, skill and diligence.
- These elements were outlined in *Re City Equitable Fire Insurance*

Care	Skill	Diligence
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<p>The degree of care is that of an ordinary person acting in similar circumstances to the company's circumstances.</p> <p>What would an ordinary person do in the circumstances?</p>	<p>The degree of skill is that which is objectively required by the person's position within the company.</p> <p>A director need not exhibit in the performance of his duties a greater degree of skill than may be reasonably expected from a person of his knowledge and experience.</p> <p>All directors must possess certain basic skills enabling them to at least understand the operation of the company and its financial affairs (that is, they must be able to guide and monitor the company).</p> <p>Other specific skills may be expected depending on the circumstances of appointment.</p> <p><b>Note:</b> The statutory formulation differs from the common law and equitable duties as s180(1) does not include the word 'Skill'. However, the courts have held that the statutory duty incorporates an objective requirement of skill: <i>Daniels v Anderson</i></p>	<p>This refers to the attention given by the person to the company's affairs, such as attending meetings and asking questions when necessary.</p> <p>A director is not bound to give continuous attention to the affairs of the company. His duties are of an intermittent nature. In respect of all duties that may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.</p> <p>Directors cannot be expected to be 'on top' of everything within the company.</p> <p>A director will be expected to exercise a degree of diligence that will enable them to be informed about the company's affairs and financial position.</p> <ul style="list-style-type: none"> <li>• Regular attendance at company meetings</li> <li>• Reading documents/reports</li> <li>• Ensuring questions are asked when appropriate.</li> </ul>
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#### Important Note

- The responsibilities of directors requires them to take reasonable steps to place themselves in a position to guide and monitor the management of the company.

#### Re City Equitable Fire Insurance Co Ltd

- Facts
  - The City Equitable Fire Insurance Company (CEF) was placed in liquidation after it suffered extensive losses through poor management, including the managing director stealing money from the company.

- Rogue director stole company money.
  - The liquidator took action against the company's directors; however, the company constitution provided that the directors were only liable for wilful neglect or default.
- Issue
  - Did the directors act with wilful neglect or default?
- Decision
  - The directors did not commit wilful neglect or default.
- Significance
  - This decision set the tone for assessing directors' duty of care, skill and diligence (DOCS D) for most of the 20th century. However, it was reconsidered in the more recent AWA litigation.

### **AWA Ltd v Daniels**

- Facts
  - Large losses by AWA on the foreign currency market.
  - The company officer in charge of the foreign exchange currency trading (Kovak), was allowed to operate within the company without any effective supervision.
  - Koval concealed losses made in these transactions by making unauthorised loans to cover the losses, which eventually amounted to nearly \$50million.
  - At all times, AWA had engaged Daniels, an accountant, to audit the company's accounts and internal processes.
  - The audit conducted by Daniels did not result in the lack of internal controls over Koval's activities being immediately reported to AWA's directors.
  - AWA sued Daniels for negligence in failing to report the deficient internal controls over the foreign exchange trading activities.
  - Daniels counter-sued the directors of AWA for contributory negligence.
- Issue
  - Had the directors of AWA acted in breach of their duty of care skill and diligence?
- Decision
  - Court found that the auditors and executive directors were liable in negligence, but the non-executive directors were found not to be negligent.
  - Rogers CJ found that the director of AWA had failed to put in place an effective internal system to enable them to monitor the proper conduct of the audit, which had contributed to the failure to report the irregularities.
  - Rogers CJ recognised that the exact nature of this obligation would change according to the size and complexity of the company. That is, the larger and more complex the company, the broader the level of monitoring that will be required.
  - DOCS D to be objectively assessed.
  - It is the essence of the responsibilities of directors that they take reasonable steps to place themselves in a position to guide and monitor the management of the company.
  - Rogers CJ imposed a lesser standard on non-executive directors.
  - Rogers CJ also said that directors may properly rely on the advice given by the company's internal auditors without breaching their duty. This was particularly important when finding that the non-executive directors were not negligent - because they had relied on the advice of the executive directors.

- Significance
  - This case provided a first step towards increasing the standards expected of company directors.
  - Directors must take reasonable steps to place themselves in a position to guide and monitor the company.
  - Directors must have a general understanding of the business and the effect of the changing economy of that business.
  - This case noted the limitations on boards of directors of large companies in their ability to stay 'on top' of everything.

### **Daniels v Anderson**

- Facts
  - On appeal, the decision in *AWA v Daniels* was largely reaffirmed.
  - Agreed that the executive director had acted in breach of his duties and that the non-executive director had not.
  - The responsibilities of director require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company.
- Significance
  - The importance of the *AWA* appeal case cannot be underestimated.
  - The most significant consequence of the decision is the clear principle that directors' duties are assessed objectively and ignorance by directors (either through inexperience or unreasonable delegation of responsibility) of internal problems is no defence.
  - Director is required to inform himself about the affairs of the company.
  - A non-executive directors not be held to a lower standard of care and should not be entitled to rely on information provided to them.
  - There is a positive duty on directors to act collectively to manage the company. Inactivity or a failure to enquire will not be sufficient.

## Delegation and Reliance

### **AWA Ltd v Daniels**

- If a director appoints a person of good reputation and competence, absent real ground for suspecting that the auditor is wrong, the directors have discharged their duties.
- Where directors know or should have known, any fact that would deny reliance on others, then such reliance may lead to the imposition of liability.

### **198D**

1. Unless the company's constitution provides otherwise, the directors of a company may delegate any of their powers to:
  - a. A committee of directors; or
  - b. A director; or
  - c. An employee of the company; or
  - d. Any other person
2. The delegate must exercise the powers delegated in accordance with any directions of the directors.
3. The exercise of the power by the delegate is as effective as if the [directors](#) had exercised it.

190	<ol style="list-style-type: none"> <li>1. If the directors delegate a power under section 198D, a director is responsible for the exercise of the power by the delegates as if the power has been exercised by the directors themselves.</li> <li>2. A director is not responsible under subsection (1) if: <ol style="list-style-type: none"> <li>a. The director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution (if any); and</li> <li>b. The director believed: <ol style="list-style-type: none"> <li>i. on reasonable grounds; and</li> <li>ii. in good faith; and</li> <li>iii. after making proper inquiry if the circumstances indicated the need for inquiry;</li> </ol> </li> </ol> <p>That the delegate was reliable and competent in relation to the power delegated</p> </li> </ol>
189	<p>[Defence for breach of directors' duties If</p> <ol style="list-style-type: none"> <li>a. A director relies on information, or professional or expert advice, given or prepared by: <ol style="list-style-type: none"> <li>i. an employee of the corporation whom the <a href="#">director</a> believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or</li> <li>ii. a professional adviser or expert in relation to matters that the <a href="#">director</a> believes on reasonable grounds to be within the <a href="#">person's</a> professional or expert competence; or</li> <li>iii. another <a href="#">director</a> or <a href="#">officer</a> in relation to matters within the <a href="#">director's</a> or <a href="#">officer's</a> authority; or</li> <li>iv. a committee of <a href="#">directors</a> on which the <a href="#">director</a> did not serve in relation to matters within the committee's authority; and</li> </ol> </li> <li>b. Reliance was made: <ol style="list-style-type: none"> <li>i. In good faith; and</li> <li>ii. After making an independent assessment of the information or advice, having regard to the <a href="#">director's</a> knowledge of the corporation and the complexity of the structure and operations of the corporation; and</li> </ol> </li> <li>c. The reasonableness of the <a href="#">director's</a> reliance on the information or advice arises in proceedings brought to determine whether a <a href="#">director</a> has performed a duty under <a href="#">this Part</a> or an equivalent general law duty;</li> </ol> <p>The <a href="#">director's</a> reliance on the information or advice is taken to be reasonable unless the contrary is proved.</p>

## Important Duty of Care Cases

### Vrisakis v Australian Securities Commission

- Facts
  - V was a corporate lawyer appointed to the board of the Rothwells company to assist with implementing a rescue package (the company was in financial difficulty)
  - V was unable to save the company, which went into insolvency.

- ASC alleged that V had breached his statutory duty of care by failing to implement key elements of the rescue package.
- Issue
  - Did ASC demonstrate that V breached his Statutory DOC?
- Decision
  - The question of whether a director has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.
  - Today, a director is expected to attend ALL meetings unless exceptional circumstances, such as illness or absence from the state prevent him from doing so.
- Test
  - Two part test designed to incorporate both objective and subjective elements into the duty:
    - What are the duties of the particular director?
      - Due to V's particular skills, he had a more extensive duty to manage the financial position of the company.
    - Were those duties undertaken with reasonable care and diligence?
  - Whether a director has exercised a reasonable degree of care and diligence will be determined by balancing the foreseeable risk of harm against the potential benefits.

#### **Note**

- ASIC has succeeded in actions against directors and executives on the basis that a reasonable person in their position would not have allowed the company to engage in conduct that contravened the provisions in the CA, particularly misleading or deceptive conduct (s1041H) and/or continuous disclosure (s674) - see, for example, *ASIC v Citrofresh International Ltd (No 2)*
- In the James Hardie Litigation, the non-executive directors were found to have breached their DOC by approving a misleading ASX release. It was found that these non-executive directors were in breach of s180(1) - see *ASIC v Hellicar*.
- The *Wheeler* case provides a good example of the obligations imposed on senior executive officers such as the CEO.

#### **Permanent Building Society (in liq) v Wheeler**

- Facts
  - PBS sued its former board of directors, alleging breach of fiduciary duty and breach of DOC.
  - The allegations concerned the purchase by PBS of certain land from a company called Tower.
  - Tower had agreed to purchase a business operated by a company called JCLD, but only if PBS bought the land from Tower.
  - Two of the directors (including Wheeler) indirectly owned and controlled another company that had substantial interest in a company holding shares in JCLD and would thereby benefit from its purchase.
  - The transaction also involved irregular payments that tainted it as improper.
  - It was alleged that the three directors (including Wheeler) had an improper purpose of benefiting JCLD to the detriment of PBS.

- The remaining two directors (McGee and Hamilton) were alleged to have known of this improper purpose and failed to do anything to stop the transaction.
  - Of the five PBS directors, only Hamilton abstained from voting on the transaction due to his conflict of interest.
- Issue
  - Did Hamilton breach his DOC?
- Decision
  - Although Hamilton (H) had breached his DOC by simply abstaining from voting, PBS failed to establish that its loss was caused by H's conduct.
  - Ipp K made important points about the DOC:
    - The DOC arises under both common law and equity.
    - The test for assessing the directors' conduct is the same under both common law and equity.
    - As CEO and managing director of PBS, H had a positive obligation to protect the interests of PBS, which was not discharged by abstaining from the vote due to his perceived conflict.
    - PBS failed to establish on the evidence, that had H expressed concern at the transaction, the other four members of the board would have made a different decision. Therefore, the damage suffered by PBS was not caused by H's negligence.
    - Note: PBS did not sue under the statutory provision. Had it done so (following from *Vrisakis*) it may not have needed to prove damage.
- Significance
  - This case is significant for its recognition of both a common law and equitable basis for the DOC; also for the positive obligations imposed on the CEO and managing director due to his position and responsibility within the company.

### **ASC v Gallagher**

- Facts
  - G was a director of Rothwells and eventually became deputy chairman.
  - Rothwells was taken over by Laurie Connell who gained a controlling interest in the business and shifted its main operations from Queensland to Perth.
  - Connell formed an executive committee of the board with two other Perth directors, and they oversaw the running of the business.
  - Board meetings were infrequent (2 per year) but G communicated with the CEO on a regular basis.
  - When the company became insolvent, a rescue package was put together by the WA government and various banks to save the business.
  - It eventually became clear that the rescue package would not succeed.
  - The ASC sued G for breach of his DOC.
  - The trial judge dismissed the case against G on the basis that he was entitled to rely on the advice of professional advisors to the company and the experienced management team.
  - ASC appealed.
- Issue
  - Was G negligent for relying on the advice of management?
- Decision
  - Appeal dismissed.
  - The ASC had not established a case against G for breach of DOC.

- The circumstances did not give rise to suspicion of improper dealings that would have called for G to have made further inquiries.
- The test is an objective one: what an ordinary person, with the knowledge and experience of the defendant, might be expected to have done in the circumstances if he was acting on his own behalf.
- Directors must take reasonable steps to place themselves in a position to guide and monitor the management of the company.
- Significance
  - This case followed the decision in the AWA trial and is significant for its statement of the test for assessing the DOC.

### **ASIC v Healey (The Centro Case)**

- Facts
  - ASIC took action against several current and former directors and the former CEO (also a director) and CFO of the Centro Properties Group (CPG) for breaches of s180(1) and s344 (which covers compliance with financial reporting obligations).
  - CPG misstated its annual accounts by characterising billions of dollars of loans as non-current liabilities, when they were in fact merely bridging loans that needed to be refinanced quickly and should have been included in the current liabilities.
  - When the error was reported to the market, the price for CPG shares dropped substantially and CPG was forced to sell billions of dollars in assets to refinance its debts.
  - CPG management had assumed that the debts could be refinanced easily but the global financial crisis in 2007 made this very difficult.
  - The defendant claimed that they were entitled to rely on the auditors to notify them of the mistake.
- Issue
  - Were the directors and executive director negligent for failing to detect the accounting error?
- Decision
  - The defendants had failed to comply with their DOC under s180(1) and had contravened s344.
  - The directors were required to sign off on the financial accounts and were obliged to bring their attention to the accuracy of the information.
  - While the directors were not expected to double check all of the figures, the large amount of debt and the basic accounting distinction between the current and non-current liabilities was well known to all the directors who were experienced business people.
  - Each director is expected to take a diligent and intelligent interest in the information available to them, to understand that information and apply an enquiring mind to the responsibilities placed upon them.
  - The directors could not simply delegate their task in approving the financial statements to the audit committee and the external auditors.
- Significance
  - This case confirms that directors cannot delegate responsibility to management for tasks that they are specifically required to undertake (in this case, approving the accounts).

### **ASIC v Rich**



- Facts
  - ASIC sued several executive directors of the insolvent telephone company, One.Tel (OT) for breach of statutory duties.
  - One of these directors included Rich, who was an executive director, and also Greaves, who was a non-executive director and chairman of the company.
  - Greaves argued that he was not in breach of any duty in his conduct as an officer. He argued that his conduct as a non-executive chairman did not come under similar legal duties as executive officers.
  - However, G was a very experienced company officer and was also the chairman of the company's finance and audit committee.
- Issue
  - How could a claim for breach of DOC be framed against a non-executive chairman such as Greaves?
- Decision
  - The court found that G's non-executive status did not prevent him from owing a DOC to the company, particularly considering his substantial responsibility within the company.
  - G's conduct in failing to remain informed of the company's financial position was capable of giving rise to a claim that he had breached his DOC and diligence.
  - G's background and experience, in addition to his important role within the company (as finance and audit committee chairman) both contributed to the formulation of the requirements of his duties owed to the company.
  - He could not rely on his non-executive chairman status to justify failing to satisfy the basic requirement to remain properly informed regarding the company's financial position.
  - G had a duty to remain informed of the company's financial affairs.
  - Austin J recognised that chairmen may owe additional responsibilities to other company directors due to the role they play in the corporation.
- Significance
  - A failure to act with due care and diligence is established by assessing what a reasonable person would have done in the circumstances.

#### **ASIC v Maxwell**

- Significance
  - There may be a breach of the DOC for directors that allow a company to engage in conduct which could generate some form of prosecution or sanction which would cause harm to the company.
  - This includes actual or potential exposure of a company to civil penalties or other liability.

#### **ASIC v Macdonald (No 11)**

- Facts
  - Company tried to cut off their asbestos liabilities.
  - James Hardie decided to create a Medical Research and Compensation Foundation and give the company funds to manage the asbestos liabilities.
    - ASX Announcement: "The Foundation [MRCF] has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL [Coy and Jsekarb].  
JHIL CEO Mr Peter Macdonald said that the establishment of a fully-

funded Foundation provided certainty for both claimants and shareholders..."

- This statement was inaccurate - the funds were NOT sufficient
- Issue
  - Had the directors approved a false and misleading statement and therefore breached their s180 DOC?
- Decision
  - The court said yes.
- Significance
  - Held that three executive officers had breached their DOC and diligence in allowing incomplete information to be presented to the board regarding the sufficiency of funding that was provided to James Hardie Industries Ltd as part of a restructuring proposal which involved the company moving offshore to the Netherlands and leaving two subsidiary companies and a charitable compensation foundation in Australia to deal with future asbestos claims.

#### **ASIC v Cassimatis**

- For a breach of s180, there does not need to be financial harm, there can be harm to a company's reputation.
- The foreseeable risk of harm to the corporation which falls to be considered in s 180(1) is not confined to financial harm. It includes harm to all the interests of the corporation. The interests of the corporation, including its reputation, include its interests which relate to compliance with the law.

#### **Vines v ASIC**

- Facts
  - Vines (V) was the CFO of the GIO Group of companies during a time when the group was defending a hostile takeover.
  - V was also responsible for ensuring the quality of financial information that would be included in the target company's statement to shareholders (a key document designed to encourage shareholders not to accept the takeover).
  - ASIC alleged that V had breached his DOC by failing to provide the most up-to-date financial information before recommending a profit forecast to management and signing off on the forecast that was included in the target's statement.
  - The trial judge found that V was in breach of his DOC under s180(1).
  - V appealed.
- Issue
  - Did V act with reasonable care in relying on financial figures that were several weeks old and should he have done more to ensure the profit forecast was (and remained) accurate?
- Decision
  - V was found to have breached his DOC.
  - The court found that a reasonable CFO would have verified the information, especially when it was so readily available had V requested it.
  - V should not have simply relied on his subordinates to provide him with continuously updated information.
  - V should have been proactive - it was V's responsibility to ensure the flow of accurate information to the board and its advisors and by relying on old information (and not updating it by double checking the figures), V had failed in his responsibility.

<ul style="list-style-type: none"> <li>Significance <ul style="list-style-type: none"> <li>This case confirms that it is an <u>objective standard of care</u> imposed in both general law and statutory duties.</li> <li>The case also confirms the balancing exercise that directors and officers are required to engage in to comply with their DOC.</li> <li>Furthermore, the case recognises that the content of the duty will depend on the position held by the defendant.</li> </ul> </li> </ul>
<p><b>Shafron v ASIC</b></p> <ul style="list-style-type: none"> <li>Significance <ul style="list-style-type: none"> <li>This case demonstrates that it is not sufficient to leave financial matters to the CFO, if the officer is aware of relevant information as part of their role then they should bring that information to the company's attention.</li> <li>Despite the fact that this was a financial issue, S could not leave this to the CFO because he had been involved in the modelling process and was actually aware of the issue and should have raised it.</li> </ul> </li> </ul>
<p><b>Sheahan v Verco</b></p> <ul style="list-style-type: none"> <li>Failure to hold meetings can be a breach of s180.</li> </ul>
<p><b>Note</b></p> <ul style="list-style-type: none"> <li>Section 189 provides guidance for directors as to when reliance on others may be reasonable for the purposes of the DOC.</li> </ul>

## Defences

- There are two main defences to an action against directors or officers for their breach of duty:
  - The business judgement rule; or
  - Relief from liability by a court

<p><b>The Business Judgement Rule</b></p> <p>The business judgement rule (BJR) is contained in s180(2) which provides that a director or officer complies with their obligations under s180(1) and its common law and equitable equivalents provided that they have satisfied the following requirements:</p> <ol style="list-style-type: none"> <li>A business judgement was made by the director or officer; and</li> <li>The judgement was made in good faith and for a proper purpose; and</li> <li>The director or officer did not have a material personal interest in the subject matter of the judgement; and</li> <li>They informed themselves about the subject matter to the extent that they reasonably believed to be appropriate; and</li> <li>They rationally believed that the judgement was in the best interests of the corporation.</li> </ol>
<p><b>ASIC v Rich</b></p> <ul style="list-style-type: none"> <li>The court defined a business judgement to be a decision to take or not to take action in respect of matters relevant to the business operations of the corporation (including matters of planning, budgeting and forecasting).</li> <li>The court held that a failure by a director to undertake proper oversight of the company's affairs cannot be a business judgement.</li> </ul>

- The following factors are relevant for a consideration of whether a director's belief that they are properly informed is reasonable:
  - The importance of the business judgement to be made;
  - The time available for obtaining information;
  - The costs related to obtaining information;
  - The director's or officer's confidence in those exploring the matter;
  - The state of the company's business at the time and the nature of competing demands on the board's attention; and
  - Whether or not material information is reasonably available to the director.
- 'reasonably believe' - as long as the director reasonably believes that they had taken appropriate steps on the decision-making occasion to inform themselves about the subject matter then it is irrelevant whether they were actually aware of available information material to the decision.

### The Business Judgement Rule

- Held within s180(2) of the CA - can only be used as a defence for breaches of s180(1) and its common law equivalents.
- Courts have consistently declared that they will not review the merits of business decisions made by directors in good faith and with due care: *Harlow Nominees Pty Ltd v Woodside; Howard Smith Ltd v Ampol*
- Receivers can rely on the BJR: *Deangrove v Buckby*

<b>180(2)</b>	<p>A director or other officer of a corporation who makes a business judgement is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgement if they:</p> <ol style="list-style-type: none"> <li>Make the judgement in good faith for a proper purpose; and</li> <li>Do not have a material personal interest in the subject matter of the judgement; and</li> <li>Inform themselves about the subject matter of the judgement to the extent they reasonably believe to be appropriate; and</li> <li>Rationally believe that the judgement is in the best interests of the corporation</li> </ol> <p>The directors or officers' belief that a judgement is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.</p> <p>Note: s180(2) only applies in relation to duties under s180 and their equivalent duties at common law or in equity - it does not operate in relation to duties under any other provision of this Act.</p>
<b>180(3)</b>	<p>In this section, 'business judgement' means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.</p> <ul style="list-style-type: none"> <li>• Director must turn their mind to something and make a decision. If they fail to turn their mind to something then this defence will not apply.</li> <li>• It is not a business judgement to decide whether or not to comply with a legal requirement.</li> </ul>

<b>Informed to extent reasonably believe to be necessary</b>	<p>Must look at the circumstances.</p> <ul style="list-style-type: none"> <li>Decision must be made on a credible set of evidence.</li> <li>Objective element = 'reasonably'</li> </ul>
<b>Rational Belief</b>	<p>The defendant believed that their judgement was in the best interests of the corporation and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief: <i>ASIC v Rich</i>.</p> <ul style="list-style-type: none"> <li>Lower standard than a reasonable belief.</li> <li>It is a belief that a rational person could arrive at in the circumstances.</li> </ul>
<b>181</b>	<p>1. A director or officer must exercise their powers and discharge their duties:</p> <ol style="list-style-type: none"> <li>In good faith in the best interests of the corporation; and</li> <li>For a proper purpose</li> </ol>
<b>191</b>	<p>Directors must notify other directors of material personal interest when conflict arises.</p> <p>1. A director who has a material personal interest in a matter that relates to the affairs of the company must give other directors notice of the interest.</p>

#### **ASIC v Rich**

- Directors have to show that they meet the four requirements to satisfy the BRJ.
- The onus lies with the director.

#### **Note**

- The BRJ is only concerned with positive actions: *Fortescue Metals*
  - Must be a decision consciously made on a matter relevant to the corporations' ordinary business operations
- In a problem question, must specifically identify what the judgement is.

#### **Example**

Which of these would not be considered a business judgement?

- A decision to hire a new CEO
- A decision to enter into a lease agreement for new business premises
- A decision to issue shares
- A decision regarding changes to the product line

Answer = 1

### Consequences of Contravention

<b>Contravention</b>	<b>Enforceable by</b>	<b>Consequences for director/officer</b>	<b>Relief</b>
Common law duty of care	Company	Damages	Section 1318
Equitable duty of care	Company	Equitable compensation	Section 1318

		Rescission Constructive trust Account of profits Injunction	
Statutory duty of care: s180(1)	Company or ASIC	Statutory injunction: s1324 Receiver appointed: s1323 Damages: s1317H Pecuniary penalty: s1317G Disqualification order: s206C	Section 1317S

**Important Tip**

- The BJR in s180(2) DOES NOT apply to all directors' statutory duties, only the duty of care under s180(1).
- In order to obtain relief from the court under ss1318 or 1317S, the defendant director or officer must establish that they acted honestly, and in all the circumstances 'ought fairly to be excused' from liability.