

## TOPICS

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1. **DIRECTORS**

1.1 Are they a director

1.1.1 [If validly appointed: no issue]

1.1.2 [If not]

- (A) Definition of director includes a person who acts in the position of a director (para (b)(i); *Grimaldi*)
- (B) If directors of the company are accustomed to act in accordance with the person's instruction, they are a director (s 9 definition of director para (b)(ii); *Antico*)  
[If a person validly appointed as nominee director, consider whether the nominating holding company is a director]

1.2 Duties

1.2.1 Duty of care and diligence (statutory duty (s 180(1)); duty of care in tort of negligence (*Daniels*) and duty in equity (*Wheeler*))

- (A) Standard of care: a reasonable person
- (B) Content: the duty requires directors
  - (1) to become familiar (and stay up to date) with the company's or group's organisational structure and business operations (*Daniels*)
  - (2) to know something about the industry in which the company operates (*Daniels*)
  - (3) to follow authorised practices and put in place safeguards (*Adler*)
  - (4) to attend board meetings (and stay awake), and read the board reports and papers (*Hellicar*)
  - (5) have (or acquire) skills in reading financial statements and how to interpret them (*Healey*)
  - (6) set company policies, monitor their implementation and the general internal functioning of the company (*Daniels*)
  - (7) bring to the attention of the entire board any matters which are relevant to the company's operations or a matter being examined by the board (*Rich*)
- (C) Defence
  - (1) Business judgment rule (s 180(2))
    - (a) There must be a "decision to take or not to take action"
    - (b) The director is acting in good faith for a proper purpose and without material personal interest in the subject matter
    - (c) They make their decision after informing themselves about the subject matter to the extent they believe to be appropriate and their belief about the appropriate extent of information gathering is reasonable
    - (d) They believe that their decision is in the best interests of the corporation and that belief is rational  
(*Rich*)
  - (2) Reliance (s 189)
    - (a) Director's reliance on information or advice given by others is prima facie taken to be reasonable if
      - (i) director relies in good faith
      - (ii) information / advice is given or prepared by
        - an employee: the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned or
        - professional adviser / expert: director believes on reasonable grounds that matter is within the person's competence or

**Financing the company's operations****6.3.1**

- (8) equity votes; debt doesn't
- (B) Tax
  - (1) for company: interest reduces tax, dividends don't
  - (2) for investor: interest taxed in full, dividends carry tax credit

**6.3 Fundraising****6.3.1 By debt****(A) Sources**

- (1) Insiders (the shareholders, their families, the in-house finance company in a large corporate group)
- (2) Single external commercial lenders (such as a retail bank, finance company or investment bank)
- (3) The public at large (via a debenture issue)

**(B) Proprietary company**

- (1) Proprietary companies will usually borrow from
  - (a) Shareholders and their family
  - (b) Single bank / financial institution
  - (c) Suppliers / leasing companies / floor plan
- (2) Proprietary companies are prohibited from raising funds in a manner that would require disclosure to investors under Chapter 6D of CA (s 113(3)): offer of 'securities'

**113 Proprietary companies**

(3) A proprietary company must not engage in any activity that would require disclosure to investors under Chapter 6D, except for:

- (a) an offer of its shares to:
  - (i) existing shareholders of the company; or
  - (ii) employees of the company or of a subsidiary of the company; or
- (b) a CSF offer.

'Security' is defined in s 761A to include borrowing in the form of a 'debenture'. A loan from a single lender should not involve a 'debenture' although there is some room for concern on the current drafting (see below).

**(C) Public company****(1) Issue debenture**

Most commonly debentures are used when foreign lenders are involved (especially foreign commercial lenders) because there are tax advantages to borrowing money from foreign lenders this way under s. 128F Income Tax Assessment Act, 1936

**(a) Definition of debenture**

The term 'debenture' is defined in s. 9:

A chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body. The chose in action may (but need not) include a security interest over property of the body to secure repayment of the money

Excluding:

- (i) loans between commercial businesses - para (a)
- (ii) borrowing by Australian banks - para (b)
- (iii) borrowing by issuing a cheque, money order or bill of exchange - para (c)
- (iv) intra-group loans - para (e)

**debenture** of a body means a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body. The chose in action may (but need not) include a security interest over property of the body to secure repayment of the money. However, a debenture does not include:

(a) an undertaking to repay money deposited with or lent to the body by a person if:

(i) the person deposits or lends the money in the ordinary course of a business carried on by the person; and

(ii) the body receives the money in the ordinary course of carrying on a business that neither comprises nor forms part of a business of borrowing money and providing finance; or

(b) an undertaking by an Australian ADI to repay money deposited with it, or lent to it, in the ordinary course of its banking business; or

(c) an undertaking to pay money under:

(i) a cheque; or

(ii) an order for the payment of money; or

(iii) a bill of exchange; or

(e) an undertaking by a body corporate to pay money to a related body corporate; or

(f) an undertaking to repay money that is prescribed by the regulations.

For the purposes of this definition, if a chose in action that includes an undertaking by a body to pay money as a debt is offered as consideration for the acquisition of securities under an off-market takeover bid, or is issued under a compromise or arrangement under Part 5.1, the undertaking is taken to be an undertaking to repay as a debt money deposited with or lent to the body.

Definition of 'debenture' appears broad enough to cover every type of secured or unsecured borrowing.

The exclusions are helpful but they do not cover the field and the possibility remains that some kinds of corporate fund-raising might still involve a 'debenture'.

#### **Handevel**

it has been said again and again that the word "debenture" has no precise meaning' and 'any discussion of the nature of a debenture must begin with the statement that English judges of great authority have confessed that the term defies accurate definition.

Current commercial practice appears to have adopted the position that a borrowing only involves a 'debenture' if the borrowing is done under an instrument and the document is labelled 'Debenture'.

#### (b) **Disclosure regime for issuing securities: Ch 6D**

The rules in Ch 6D govern the issue of every type of 'security'. Details see 6.3.2(B)

'Security' is defined in s. 761A to include 'a debenture of a body' and a right or option to acquire a debenture.

#### (c) **Special commercial structure for debenture issue: Ch 2L**

##### (i) **Structure**

