

Meetings

Directors meetings

Before the meeting

_____ may attempt to argue that there has been a breach in the protocol of the Directors meeting. On the facts, it is evident that the meeting has been called by the director _____. (s 248CA). Further reasonable notice has been given to the other directors. (s 248C-RR). A meeting may be called by any director who gives reasonable notice to all directors on the board (s248C - RR) This is evident as ____ (facts) (can be given orally and was sent out to each director) thus in the circumstances this can be considered to be reasonable.

At the meeting

It appears from the fact that the meeting was place was sufficient as all directors were present and aware of the meeting place. (Poliwka v Heven Holdings) Further, a quorum is present on the facts. (s248F). The meeting was chaired by _____. (s 248E). All Directors are expected to attend all director meetings wherever they are able to. Thus the notice of the meeting does not need to be as detailed as that of a members meeting.

Passing resolutions

However, on the facts a cause of contention is witnessed within the matter relating to the passing of the resolution. An absolute majority of the directors is needed to pass the vote. (s 248G). This is/ is not evidenced on the facts _____. At the meeting, there is one vote per director and only a simple majority is required to pass the motion as a resolution. Further, the chair has the casting vote. (s248G).

A resolution must cannot remove directors (s203E) however it can appoint directors. (s201H).

Further, ____ (directors) use of (computer technology) during the meeting is permitted as long as all directors have consented. (s 248D). On the facts, it

can be assumed that this is permitted thus this does not invalidate the meeting.

Further, minutes must be kept of meetings. (s 251A).

Moreover, the purpose of the meeting and the resolution must be in relation to the management power of the directors. (s198A). This management power is given to the board collectively and is not to be actioned by an individual director unless formally delegated. (**Northside Developments Pty Ltd v R-G (NSW) (1990) 170 CLR 146**)

Barron v Potter

- ▶ **FACTS:** Two directors not on speaking terms. Quorum was two directors, with Potter as chairman with a casting vote. Mr Barron refusing to come to meetings, and Mr Potter met him as he came off a train at Paddington Station telling him they were holding a board meeting. Proposed appointing more directors, Barron objected. Mr Potter said he was using his casting vote & declared motion effective
- ▶ **HELD:** not effective as they did not agree to a meeting

Mcmaster v Eznut Pty Ltd (Administrators Appointed) [2006] WASC 109

- ▶ Company was insolvent and wanted to convene a meeting ASAP to see if they should appoint a voluntary administrator
- ▶ Short notice just prior to meeting okay where dir indicated he would not attend such a meeting anyway
- ▶ Director already knew the meeting was coming up and told the other directors he didn't agree with what was going to be proposed and if they wanted to call a meeting for that purpose he wasn't going to come anyway. Knew it was coming up sometime soon, they gave him a call just before the meeting and he reaffirmed that he wasn't going to attend
- ▶ Then tried to challenge the outcome of the meeting by claiming he was given insufficient notice but was unsuccessful

DIRECTORS'/OFFICERS' DUTIES: DUTY OF CARE, SKILL & DILIGENCE AND INSOLVENT TRADING

- Duty of care and diligence
- The business judgment rule
- The role of reliance and delegation
- Duty to Prevent Insolvent Trading

Duty of care and diligence CL and s 180(1)

It appears that **X** may have failed to act with care, skill and diligence by **(insert reason)** and may be in breach of both the general law and statutory duty in **s 180(1)**. The general law duty is worded slightly different from the statute; however, the standards of care are equivalent and hence they will be considered together.

Directors are under a duty of care to exercise a reasonable degree of care and diligence, imposed by **s180(1)**, the common law and equity. “*This means conduct ordinarily measured by reference to what the reasonable man of ordinary prudence would do in the circumstances*”: **Daniels v Anderson**. However, where an appointment to the board of directors is based on the appointee having some special skill, an objective standard of skill referable to the circumstances must be attributed. **ASIC v Vines**. Directors must comply with a ‘core, irreducible requirement of skill; involving objective tests of ‘ordinary competence’ or ‘reasonable ability: **DCT v Clark**.

The Test and Elements

1. First you need to show that there is a breach of standard of care of a reasonable director/officer
 - Contextual test
2. Need to show directors failed to balance risk with potential benefits

- The benefit to the corporation was not enough to justify the risks taken by the corporation (in acting too quickly or carelessly)
 - *Wheeler*, Business judgment rule: s.180(2)
3. If you trying to get **compensation from officer or duty** you need to show a **causal link** between breaching behaviour and losses (have to show that the breach of duty of care actually caused the losses)

It must first be analysed whether or not **X** had breached a standard duty of care, as set out in *Daniels v Anderson*. It must be noted that X cannot sit back and be a ‘dummy director’ in any circumstance. *Francis v United Jersey Bank*
 Thus, it is asserted that X has breached his/her standard of care by not _____. (one of the below).

- Minimum standards for all directors, exec and non-exec:
 - I. Gain familiarity with all aspects of the company’s business
 - II. Stay informed about the corporation’s business, make inquiries to make sure that their understanding of the business is up to date
 - III. Directors have to attend all meetings of the board of directors unless they have a serious reason for missing it such as illness (being on holiday may not suffice as could be conducted through video conferencing)
 - IV. Directors must *regularly review the company’s financial statements* and have the ability to understand the company’s financial situation when reviewing the statements – lack of knowledge is no excuse (*CBA v Freidrich* – court found not understanding financial statements was no excuse and found liable to pay compensation of \$90 million)
 - V. You cannot just focus on one area of special skill *you have to be an all rounder when it comes to supervising the company’s business* e.g. you cannot hire a government representative to help with the political side of the corporation and plead ignorance to other problems of the company
 - VI. Directors must *set up systems so the board can monitor the managers* e.g. external monitoring systems – directors need to see if managers are doing what they tell them
 - VII. Directors must prevent misconduct (duty to prevent misconduct of other directors or those in senior management if they are diverting money from the company etc. Can’t turn a blind eye to it/can’t shut their eyes to corporate misconduct:

Further, being of a high level of influence as the **(insert role in the company)**, **X** is under a significant burden to point out steps that could be

taken to reduce the possibility of a conflict of interest (*Permanent Building Society*). In the present case, **(apply to facts and give reasons i.e. did he/she cause detriment to the company?)** As such, **X** has failed to take the path to lessen the possibility of a detrimental conflict of interest. This is something a reasonable man of ordinary prudence in the position of a managing director would have done.

Further, it is clear that **X** is in breach of a standard of care of a reasonable director, if taken to court, the court will employ a balancing test to weigh up the risks versus the benefit in determining the reasonableness (*PBS v Wheeler*).

FACTS ??

Further, the words the '*corporations' circumstances*' 180(1) relate to **'the type of company, the size and nature of the company's business, the composition** of the board and the distribution of its work between the board and other officers. *CBA v Friedrich (1991)* **Apply the facts**. – This may be seen to be unreasonable based on the circumstances as a 'reasonable director' would not have done the same thing in that situation. (**look at experience below**). Nonetheless, a Directors must **take 'reasonable steps'** to place themselves in a position to guide and monitor the organisation effectively. *Gallagher* (On the facts it can be said.....

LOOK AT SPECIFIC POSITIONAL DUTIES/CASES?