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## Who is a director?

3 types of directors (s9(a))

- 1) A person appointed as a director
- 2) A de facto director: directors not formally appointed but who nevertheless act as a director  
**Deputy Commissioner of Taxation v Austin (1998) 28 ACSR 565**
- 3) A shadow director: **Buzzle operations pty ltd (in liq) v Apple computer Australia Pty Ltd [2010] NSWSC 233**

Excludes someone who merely provides advice as their job

## Who is an officer?

Covered in s9

**Shafron v Australian Securities and Investments Commission (2012) 247 CLR 465** Includes external administrators

## Remedies for breach of directors duties

*Under statute (AASIC)*

**s1317E(1)**- get a declaration of contravention

Once have a declaration of contravention can use it to apply for a pecuniary penalty(**s1317G**) or a disqualification order (**s206C**)

**s1317J(1)**- ASIC can apply for declaration of contravention, pecuniary penalty or compensation order.

**s1317J(2)**- Corporation may apply for compensation order

Note- no declaration needed for compensation order

*Under Equity (Common Law)*

Damages or compensation (to the company) for loss

Account of profits (to the company) for unlawful profit gain

Rescission of contract

## Duty of Care and Diligence

### *Statutory authority*

#### **s180(1)**

### *Common Law Authority*

Modern Baseline for duty of care: **Daniels v Anderson (1995)**

Directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company and this includes:

- ensuring they have knowledge about the business
- keep informed about its activities
- remain familiar with the financial account of the company
- make regular attendance at board meetings
- reasonably formed view of the company's financial capacity (added by **ASIC v Rich**)
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- The baseline standard can be raised **ASIC v Rich**, factors to consider
- type of company
- size & nature of business
- provisions of constitution
- composition of board
- distribution of work between board and officers
- status of company: listed or unlisted
- size
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## Analogous cases for breach of duty of care

### **ASIC v Macdonald (No 11) [2009] NSWSC 287**

- 1) CEO and General Counsel failed to advise the board that the draft announcement was expressed in too emphatic language regarding the adequacy of funding and in that respect, they were in breach of Section 180(1).
- 2) By failing to advise the board of the limited nature of the reviews of the cashflow model, the CEO, CFO and General counsel had breached s180(1)
- 3) All non-executive directors, CEO and General Counsel and CFO breached s180(1) by failing to ensure the ASX announcement was not misleading or deceptive.
- 4) CEO breached s180(1) in approving for release the Final ASX announcement.

### **Morely & Others v ASIC**

- the seven non-executive directors had not breached their statutory duty of care and diligence in relation to a Draft ASX Announcement as ASIC was unable to prove that the board had approved of the release to the ASX
- the general counsel had breached his statutory duty as he 'should not have stood by if the directors intended to approve a misleading ASX announcement' regardless of whether

external legal advice was given during the director meeting. The general counsel should also have ensured the board received advice concerning continuous disclosure obligations.

### **ASIC v Hellicar**

- the non-executive directors breached their duties as a director of the company by approving the company's release of a misleading announcement to the ASX
- Company secretary and general counsel breached their duties of care and diligence in failing to advise either the CEO or board that the company should disclose to the ASX certain information about the arrangements governing James Hardies' separation from two of its subsidiaries and that an actuarial study he had commissioned to predict asbestos-related liabilities suffered from critical limitations
- Inaccuracies in the recordings of their board meetings did not counter their probative value of what was done at the meeting.

### **Shafron v ASIC**

- Duty of a company secretary with specialist skills extended beyond pure company secretarial activities and included use of those special skills.
- Company secretary is an officer as they participate in decisions of significance for a company even if they are not involved in making the decision.
- Breach of s180 by failing to provide adequate advice to the company board and CEO in regard to the company's disclosure obligations.

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- **ASIC v Healey**

Directors must be able to

- read, understand and focus upon the contents of any reports they are required by law to approve or adopt (including financial statements)
- consider whether the statements are consistent with the director's knowledge of the company's financial position
- make further enquiries if necessary
- have sufficient financial skills to perform these tasks and to be able to understand basic accounting conventions, and proper due diligence in reading the financial statements

### RE: mistakes or errors

Obvious mistakes are not excusable, directors had mistakes because they relied exclusively on processes which the company had in place and on their advisors. None thought to consider the financial statements for themselves.

## **Defences for breach of duty of care**

**s180(2): Business judgment rule** - satisfied duty of care if they fulfil **s180(2)(a)-(d)**

What is a business judgment? **S180(3)** any decision to take or not take action in respect of a matter relevant to the business operations of the corporations.

