

Corporations Law Exam Note

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List of provisions

Ones we might actually have a question about (IMO)

TOPIC 2	
S588G	insolvent trading
S588V-Y	holding company liability insolv trading
S134-141, 198, s201, 203, s248-250	all about meetings and notice and stuff
189, 190, 198	delegation by directors
1317	remedies stuff
DIRECTORS DUTIES	
S181(1)(a)	duty to act in good faith and 187 interest of corporate group
S181(1)(b)	duty to act for a proper purpose
S180 189 190	Duty of care
S191- 193	disclosure of material personal interest s194-195 voting by such
182, 183	misuse of position and misappropriation of company's property
Chapter 2E	related parties of public companies
Part 2.F1	oppression
Capital maintenance:	
S254T and s254U	dividends
S256A-256E	reduction of capital
S260A-E	Companies providing financial assistance for self-acquisition

ALL the provisions we studied

TOPIC 2

S112 – classes of companies

S45A

S113

S9 holding company

Ss46, 46 subsidiary

Ss50AA and 259E definition of control

S588G insolvent trading

S588H defences

S588J-U recovery from directors

S588V-Y holding company liability for insolvent trading

Topic 3

Company governance and voting

S134-141 internal governance rules

S201A decision making organs

S198A power of directors

S249Q shareholders can't interfere

S201E-201J appointment of directors

Ss203C-203F removal of directors

S248A and s248G

S189,190, 190C, 198D delegation

S250N, 250R, 250S AGMs

S249C and 249CA how to call

S249D and 249F how shareholders can requisition meeting

S249N and s249P shareholder proposing resolutions

S249H, s249J and s249L notice

S249T quorum

S250E and 250H votes per share

S250J voting by show of hands

S250K-M voting by poll

S1322 curing procedural irregularities

Topic 4

Sanctions for contravention of duties

S 13177E and 1317G civil penalties

S184 and 209(3) criminal penalties

Part 2D.6 disqualification

S1317H and 1317J compensation order

S1317S and 1318 Courts power to relieve director from liability

DIRECTORS DUTIES

S181(1)(a) duty to act in good faith and 187 interest of corporate group

S181(1)(b) duty to act for a proper purpose

S180, 189 and 190 – Duty of care

S191- 193 disclosure of material personal interest s194-195 voting by such

182 and 183 misuse of position and

misappropriation of company's property

Chapter 2E related parties of public companies

Topic 7 – shareholder action

Part 2F.1A derivative action

S461(1)(e)-(g) and (k) application to wind up company

Part 2.F1 oppression

Topic 8 – corporate liability

S124, 125 capacity and powers of company

S127-129 corporate authority and liability for obligations

Topic 9 – share capital

S124 power to issue shares

S254B terms on which issues

S254A and 254M partly and fully paid

S254A and s254B can issue different classes

S254D issues of shares in Pty

Capital maintenance

S254T and s254U - dividends

S256A-256E reduction of capital

- Liquidator asserts that payments were made by Asiatic which were not made bona fide in the interests of the company and constituted a misapplication of funds.
- Only reason for transferring the money was that the other company ‘needed the money’.
- Not suggested Asiatic received any benefit.
- Respondents (the directors) failed to appreciate that each company was a separate legal entity and that entry into each transaction required to be examined in the light of the interests of each company participating in it.
- Could not be justified on basis of benefiting the group: Asiatic did not stand to lose if the other company went into liquidation.
- The creditor of a company whether it is a member of a group or not must look to THAT company for payment. Her interests may be prejudiced by the movement of funds between companies in the event that the companies become insolvent.
- Thus the payment was misfeasance – because no prospect of advantage to Asiatic, (it was exposed to possibility of substantial loss), Asiatic seriously prejudiced its unsecured creditors – more than an improvident transaction reflecting an error of judgement; undertaken in accordance with a policy adopted by the directors in total disregard to the interests of the company and its creditors.

TOPIC 3 – MANAGING COMPANIES

Internal governance rules

- A company's internal management may be governed by provisions of this Act that apply to the company as replaceable rules, by a constitution or by a combination of both: **s 134**.
- Table of replaceable rules contained in **s 141**.
- Constitution can displace or modify replaceable rules: **s 135(2)**.
 - A failure to comply with a Replaceable Rules is NOT of itself a contravention of the Act: **s 135(3)**.
 - *So, none of the provisions that say ‘in the event of a contravention of the act’ apply.*
 - RRs that apply to a company have effect as a contract: **s 140**.
- Constitution of a company (s 136)
 - Constitution can be adopted by special resolution: **s 136(1)(b)**.
 - ‘Special resolution’ is defined as a resolution, notice of which has been given under **s 249L(1)(c)**, and that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution: **s 9**.
 - *Note: value of vote is based on number of shares you own (if poll)*
 - *Note: a member is only entitled to vote if they show up – so if there are 10 shareholders and 8 show up and 6 vote yes, it passes (because 6 is 75% of 8).*
 - *Note: this also means that a small voting group (26%) can block changes.*
 - Constitution can be modified or repealed by special resolution: **s 136(2)**.
 - Note entrenchment and approval by entrenched provision: **ss 136(3), (4)**
 - (3) Company can provide that special resolution to modify the constitution will not have effect unless further requirements are met
 - (4) Unless the constitution provides otherwise, the company may modify or repeal a further requirement described in subsection (3) only if the further requirement is itself complied with
 - *[If you could say need 75% and Fred’s permission (s136(3)) and can’t remove/change that rule without Fred’s permission (s136(4))]*
 - One person companies do not need a constitution: **s 198E**.
 - Date of effect of adoption, modification or repeal of constitution (**s 137**): (a) if special resolution (i) on that date (ii) unless later date specified; or (b) if by court order, the date specified in that order.
 - ASIC may direct companies to lodge a copy of its constitution: **s 138**.
 - Company must send copy of constitution to members: **s 139**.
 - Constitution has effect as a contract: **s 140(1)**
 - NOTE: You can only enforce the contract if you are one of the parties as per s 140, and only in so far as the rules apply — so if you are a shareholder and an employee you wouldn’t be able to sue to enforce your rights as an employee as through a shareholder — stuck to enforcing your rights as a shareholder.

TOPIC 4 - DUTIES – GOOD FAITH AND PROPER PURPOSE

1. introduction to corporate governance

- SEE Essay EN

2. who is subject to duties? S9, s182, s183

- types of duties: statutory and general law
- directors = person appointed as director/alternative director (a)(i) OR (b) s9
 - unless contrary intention appears person who is not validly appointed IF
 - they act in the position of director or (i)
 - the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes (ii)
 - NB: Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body
- officers = (a) a director, OR (b) a person who: s9
 - (i) who makes or participates in making decision that affect the whole or a substantial part of the business of the company
 - (ii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
 - OR (c) receiver, (d) administrator, (e) administrator of a deed (f) liquidator (g) trustee.
- employees duties (limited – not liable for much) s182,s183
 - (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to: s182
 - (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.
 - (2) OR involved in a contravention of (1).
 - (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to: s183
 - (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.
 - (2) OR involved in a contravention of (1).

ASIC v Adler

- APPLICATION of officer definition.
- Q of whether Adler **was an officer** of HIHC, Mr A was a director of HIH, HIHC's holding company, Mr Adler was a person who participated in the making of decisions that affected the whole or a substantial part of the business' of HIH (s9 definition officer)
- investment decisions said to be of that character
- Mr A initiated first investment transaction, the \$10mil investment
- Mr A wrote letter saying that he approached W with an idea that I felt would be beneficial for myself (obviously) and to HIH – acting in relation to the transaction for both HIH and himself
 - in LMI A/asia Lt v Boulderstone said if the holding company was 'acting NOT as a negotiating or persuading outsider but as a participant in the subsidiary's own internal decision making'
- investment committee had responsibility for the making management and control of investments made by the HIH group of companies
- Refers to the Investment guidelines of investment committee
 - the terms of reference relate to the whole group and thus included HIH.
 - when regard had to the whole terms of reference nothing in them which is other than consistent with the proposition that HIH investment portfolio was overseen by the investment committee.
- clearly to the effect that A took a close interest in investment matters participating full in that category of decision affecting the business of HIHC
 - even if contend that investment committee's subject to direction and control of board of directors of HIH.
- thus = person who has capacity to affect significantly the corporation's financial standing THUS was an officer. Through involvement in investment committee which made investment decisions for HIHC

Buzzle Operations Pty Ltd v Apple Computer Australia

- TEST: SHADOW DIRECTOR
- people should not be permitted to hide behind formalities (when they are the real voice of the company)
- what is required to establish that a person is a shadow director?
 - Re Hydrodam
 - 1) who are the directors whether de fact or de jure
 - 2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so