

Corps Exam Outline

Introduction, registration, classification	2
Separate legal entity, corporate groups	6
Piercing the veil (control and sub tests)	7
Insolvent trading	8
Debt capital	13
Share capital	14
- Alteration of class rights	16
- Capital reductions/SBB/FA	16
Dividends	21
Constitution and replaceable rules	21
Enforcement of constitution	22
Limits on alteration	24
Division of power	27
- Directors	29
- Officers	30
- Decision making	31
- Disqualification	32
- Members and general meetings	36
- Procedural irregularities	42
Directors' duties	43
- Care, skill, diligence	43
- Good faith + best interests	50
- Proper purpose	53
- Retain discretions	54
- Conflicts rule	55
- Statutory disclosure/MPI	56
- Related party transactions	58
- Profits rule	60
- Misuse of position	62
- Misuse of information	64
Consequences of contravention	65
Ratification and relief	66
- Company/shareholder ratification	66
- Court relief	67
- Exemption by company	68
Shareholder derivative actions	68
Shareholder personal action	70
Oppression, winding up, injunction	71
- Oppression	71
- Winding up	77
- Statutory injunction	81

Related party transactions – Ch 2E

As per **s208(1)**, officers of public companies cannot give financial benefits to related parties without member approval. The courts will first begin by considering whether the transaction confers a financial benefit (FB) per **s229** before turning to whether the recipient was a related party per **s228**. If the FB falls within the exceptions listed within **s210 – 216**, then there will be no need for member approval.

- Does the transaction involve giving a FB?

- **S229(1)(a)** - broad interpretation of 'giving a financial benefit' in determining whether a financial benefit has been given
 - **(1)(b)** – economic and commercial substance of benefit prevails over legal form
 - **(1)** – any consideration for the benefit is to be disregarded
 - **(2)** - can be indirect
 - **(3)** - examples
 - **(a)** - giving or providing finance or property
 - **(b)** - buying or selling an asset
 - **(c)** - leasing an asset
 - **(d)** - supplying or receiving services
 - **(e)** - issuing securities or granting an option
 - **(f)** - taking up or releasing an obligation

- Is it a related party?

- **(1)** – entity that controls a public co is a related party of the public co
- **(2)** – directors and their spouses
 - **(a)** – DR of public co
 - **(b)** – DRs (if any) of an entity that controls the public co
 - **(c)** – if public co is controlled by entity that isn't a body corp, those persons
 - **(d)** – spouses of person in **(a) – (c)**
- **(3)** – the parents and children of people in **(2)** are related parties
- **(4)** – entity controlled by related party in **(1) – (3)** is a related party of public co unless the entity is also controlled by the public co
- **(5)** – entity is a related party of public co at a particular time if they were a related party of a kind in **(1) – (4)** at any time within last 6 months (so former DR > 6 months ago not related party)
- **(6)** – an entity is a related party if at a particular time the entity believes/has reasonable grounds to believe that it is likely to become a related party of the public co of the kind in **(1) – (4)**
- **(7)** – an entity is a related party if the entity acts in concert with a related party of the public co on the understanding that the related party will receive a benefit if the public co gives the entity a FB

- Do any exceptions apply?

- **S210** – FB given on arm's length terms
 - Needs to be terms that are reasonable (or less to related party) when dealing at arm's length
 - **ASIC v Australian Investors Forum**
 - Reasonableness is determined by objective criteria
 - Measure against terms of a transaction that a public co would enter into if it were:
 - Unrelated to the other party to the transaction in any way, financially or through ties of family, affection or dependence
 - Free from any undue influence or pressure
 - Through its relevant decision-makers, sufficiently knowledgeable about the circumstances of the transaction, sufficiently experienced in business and sufficiently well advised to be able to form a sound judgment as to what is in its best interest
 - Concerned only to achieve the best commercial result for itself in all of the circumstances
 - **Regulatory Guide RG 76** - should at minimum consider following factors:
 - How the terms of the overall transaction compare with those of any comparable transactions between parties dealing on an arm's length basis in similar circumstances

- Nature and content of the bargaining process, including whether the entity followed robust protocols to ensure conflicts of interest were appropriately managed in negotiating and structuring the transaction
 - The impact of the transaction on the company and non-associated members
 - e.g. impact of dealing on financial position and performance of the company
 - Any other options that may be available to the entity
 - Expert advice received by the entity (if any)
 - **S211** – Reasonable remuneration
 - **(1)(a)** – if the benefit is remuneration to a related party as an officer/employee of:
 - **(i)** the public co
 - **(ii)** an entity the public co controls
 - **(iii)** an entity that controls the public co
 - **(iv)** an entity that is controlled by an entity that controls the public co
 - **(1)(b)** – and the remuneration is given the circumstances of the public co/entity giving remuneration and the related party's circumstances (including responsibilities involved in the office or employment)
 - **(2)(a)** – same as above but for payment of expenses incurred/to be incurred or reimbursement for expenses incurred by a related party in performing duties
 - **(3)** – superannuation and termination pay count as remuneration
 - **S212** – Reasonable indemnities, exemptions, insurance premiums and legal costs of liabilities of a related party who is an officer of the public co/entity incurred in their capacity
 - **S213** – Small amounts (<\$5000)
 - Up to 5k total per year calculated by all amounts given through public co and entities controlled by public co less amounts repaid and amounts that fall into **s210-216** exceptions
 - **S214** – Financial benefits given to a closely-held sub where there is 100% common ownership of the VOTING shares (disregard shares that aren't voting shares)
 - **S215** – Benefit is given to the related party in their capacity as a member of the public co and this benefit doesn't unfairly discriminate against other members of the public co
 - **S216** – Financial benefits given pursuant to a court order
- **Was there approval?**
- As per **s208**, member approval must be obtained by an ordinary resolution at a GM within 15 months BEFORE the transaction occurs. Per **s281**, the co must also lodge notice for the meeting of members and all relevant documents 14 days before notice is given to the members. An explanatory statement must accompany this notice (**s221(b)**) with the true potential costs and detriments from an economic and commercial point of view disclosed (**s219**). This includes opportunity costs, tax consequences and benefits foregone (**s219**). ASIC may give comments on the documents (**s220**), which must be included in the documents sent to members (**s221(d)**), but not on whether the proposed resolution is in the best interests of the co. With regard to voting, votes may not be cast by the related party or their associates (**s224(1)**), although ASIC may permit voting if it is satisfied that it will not cause unfair prejudice to the interests of any member (**s224(4)**). Where there is a contravention, the resolution will be valid unless it would not have passed without the contravening votes (**s225**).
- Where requirements haven't been met, on application of an interested person, the court can still declare them met if they have been substantially met – **s227**.
- **Consequences of breach**
- A contravention of **s208** does not affect the validity of the transaction and the co is not guilty of an offence (**s209(1)**). Persons involved may be liable under the civil penalty provisions (**s209(2); s1317E**). ASIC may apply for a declaration of contravention from the court (**s1317H**). If a declaration is granted, ASIC may seek a pecuniary penalty order of up to \$200,000 per contravention (**s1317G**), a civil penalty compensation order on behalf of the co (**s1317H**) and/or a disqualification order (**s206C**). The court may decline to impose a penalty (**Healey**) or relieve the DR from liability if they have acted honestly and ought fairly to be excused for their breach (**s1317S**).
- SEE PERSON INVOLVED ABOVE – **s79**
 - Dishonest breach = criminal offence – **s209(3)**
 - **ASIC v Adler**
 - DR was fully aware loan wasn't on reasonable arm's length terms as he instigated it

- DR involved because he authorised payment knowing about the relationship and ensured the transaction wouldn't be brought to attention of other DRs
- As per **s1317J(2)** the co may also bring proceedings for a compensation order under **s1317H** to recover any loss occasioned due to the breach.
- A court may order an injunction to stop the transaction (**s1324(1)**) or damages (**s1324(10)**).

No profits rule

Fiduciaries have a duty not to make undisclosed profits from their position (**Regal Hastings**). This is an obligation on directors (**Regal**) and senior employees (**Victoria University**). It is irrelevant whether or not the co could have exploited the opportunity or that the fiduciary was acting in good faith (**Regal**), and there is no requirement to establish loss (**Green v Bestobell**). There will only be a breach if the profit was gained from the fiduciary position, that is, it was within the scope of the fiduciary duty (**Peso Silver Mines**). On the facts...

- **Was it within scope?**
 - As the (insert profit) was/was not acquired by X through their position in the company, it is/isn't within the scope of their FD.
 - **Peso Silver Mines**
 - K was offered to co where C was MD → board refused since limited finance at the time
 - C approached later with same K and took up the K
 - When C was approached later, it was not in his capacity as DR but as an individual → not within scope
- **Was it a breach?**
- **Bribes and other undisclosed benefits**
 - **Boston Deep Sea Fishing & Ice v Ansell**
 - A was MD of company and organised construction of fishing boats on its behalf
 - A was paid commission by shipbuilders unbeknownst to co, also didn't know A was SH in ice-supplying co and a fish-carrying co who paid bonuses to SHs who employed their services
 - This was a secret profit arising from position → ALSO CONFLICT OF INTEREST
 - **Furs v Tomkies**
 - T was MD of F who negotiated sale of part of business
 - T negotiated with purchaser who insisted it would only buy if T agreed to work for them
 - T agreed and provided the purchaser with trade secrets (allowing them to buy at a lower price)
 - This was a BOFD → ALSO CONFLICT OF INTEREST
 - **Southern Cross Mine Management**
 - F was E's CEO who convinced board they needed an additional machine
 - F advised he formed a co that would buy the machine and lease it to E → board agreed
 - F misrepresented in failing to disclose that profits of new co would be 400%
 - F also misrepresented in saying original owner wouldn't sell to E (it was already sold to him) and that it was cheaper to hire than buy
- **Taking up a corporate opportunity**
 - **Regal Hastings**
 - Co DR and sec purchased shares in sub because HC didn't have enough finance
 - Sub used to purchase cinemas so that sub could be sold to purchaser → SH earned a profit
 - DR and sec liable for the profit made despite GF
 - **Cook v Deeks**
 - 3 DR wanted to exclude the 4th and diverted a contract to a newly formed co
 - This was a breach of FD and the contract was held on constructive trust for the co
 - **Omnilab Media**
 - DR assisted rival to take away co's leading role in negotiations in return for promise of money and a board seat on rival co → ALSO A CONFLICT OF INTEREST
 - **Green v Bestobell**
 - G used info from former position as manager of B to prepare a tender (successful), B's tender would come in third
 - This was a breach even though B wouldn't have won the tender