TOPIC 3: THE CONSTITUTION AND REPLACEABLE RULES ('RRs')

THE COMPANY'S CONSTITUTION AND REPLACEABLE RULES (PART 2B.4)

A company's internal affairs are governed by *replaceable rules* contained in the Corporations Act **(CA, s. 141)**, unless they have been altered by an adopted *constitution* **(CA, s. 135(2)).** However, companies listed on the ASX, No Liability companies and companies limited by guarantee must have their own constitutions **(CA, s. 112(2)(b)).** Proprietary companies can choose to adopt RRs entirely **(CA, s. 135(1)).**

Issue 1: Adopting a Constitution

A company can adopt a constitution either (a) *upon registration*, if all members consent in writing **(CA, s. 136(1)(a)),** (b) *after registration*, if a special resolution is passed by members in a general meeting **(CA, s. 136(1)(b))** i.e. at least 75% of votes cast by members present and entitled to vote in general meetings **(CA, s. 9)**, or (c) *after registration* if a court orders the company to adopt a constitution under CA, s. 233 **(CA, s. 136(1)(b)).**

Issue 2: Modifying/altering/repealing a Constitution

A company may modify or repeal its constitution, or a provision thereof, by special resolution (at least 75% of votes) **(CA, s. 136(2)).**. *Re public companies*: must lodge the special resolution altering the constitution with ASIC within 14 days of the company modifying the constitution, with a copy of the modification attached **(CA, s. 136(5)).**

Issue 3: Power/Object Clauses

A constitution may have an objects clause stating the company's objects, or a power clause restricting its powers **(CA, s. 125(2).** An act of a company is not invalid merely because it goes beyond or breaches that clause **(CA, s. 125(2));** instead, there are internal consequences for directors. Further, objects clauses may be hampered by **CA, s. 129(1),** allowing a person to assume the company's constitution has been complied with in any dealing, thereby validating any contracts contrary to the constitution. However, a person is not entitled to this assumption if they knew or suspected at the time of the dealing that the assumption was incorrect **(CA, s. 128(4)).**

Issue 4: The Constitution as a Statutory Contract

General Rule: The constitution/replaceable rules have the effect of a contract between (a) the company and each member, (b) the company and each director/secretary, (c) a member and each other member - under which each person agrees to observe and perform the constitution and rules in **so far as they apply to that person* (CA, s. 140(1)).** Failure to comply with the replaceable rules is a breach of contract **(CA, s. 140(1)),** not a breach of the Corporations Act **(CA, s. 135(3)).** Thus, a breach of contract is not automatically invalid **(CA, s. 125(2)). NOTE:** No clause in the constitution can constitute a contract between a member and third party ***(Hickman).***

Enforcement of a Statutory Contract: Parties to the statutory contract can take legal action against each other to enforce their rights under the constitution ***(Hickman).*** *However, a member can only enforce rights in the constitution that attach them as a member ***(Eley).*** Rights attaching to members typically relate to governance of the company and the exercise of the company's constitutional powers. These typically include (a) the power to inspect the register i.e. list of shareholders, (b) the right to receive a share certificate, (c) the right to vote, (d) the right to receive informative notice of meetings, (e) the right to receive payment of dividends, etc ***(Bailey).***

Exception: If a plaintiff can prove a special contract exists between themselves and the company, they will be able to enforce under ordinary principles of contract, regardless of whether the person has a membership right or is a third party. The existence of a special contract is a question of fact. However, the special contract's terms may or may not be the same as the constitution's terms ***(Bailey).***

Remedies: As breach of RRs is a breach of the statutory contract, provisions in the *Corporations Act* relating to civil/criminal liability and injunctions do not apply **(CA, s. 135(3)),** and where the company breaches the statutory contract, the act is not automatically invalid **(CA, 125(2)).** However, the Court will normally award an injunction to prevent the company doing something contrary to the constitution, or a declaration establishing each party's rights and duties. Damages are generally not available **(CA, s. 1324).**

Issue 5: Limits of Alteration of a Constitution

Shareholder power to alter the company's constitution or RRs is not unlimited. Both the *Corporations Act* and common law impose limits and restrictions:

Statutory Limits

1. Entrenching provisions - the company's constitution may contain provisions restricting the company's ability to modify or repeal its constitution by imposing additional hurdles and requirements for alteration **(CA, s. 136(3)).**

2. Limitation on taking up more shares or increasing liability - unless they agree in writing, members cannot be bound by alterations made after the date they became members that (a) requires them to buy additional shares, (b) increases member liability to contribute to share capital, or otherwise pay money, to the company, or (c) restricts members' rights to transfer shares they already own **(CA, s. 140).**

3. Variation of class rights - companies which issue shares carrying special rights can only vary or cancel those rights (a) with the approval of the holders of the affected class, (b) by special resolution **(CA, s. 246B).**

Equitable Limits

1. Majority alteration - a majority's power to alter the constitution is subject to an equitable limitation that voting power be used for a 'proper purpose' ***(Gambotto).*** This requires a 3 step analysis:

a) ***Does the alteration create a conflict of interest and advantage between the majority and minority shareholding?*** **No:** the majority bears the onus of proving the alteration bona fide affects all shareholders equally ***(Allen v Gold Reefs).*** If this can be proved, the alteration is valid; **Yes:** Step 2.

b) ***Does the alteration involve an actual or effective expropriation of shares, or rights attaching to shares?*** **No:** Alteration is valid, unless it is (a) *ultra vires* - i.e. for a purpose beyond which is contemplated in the constitution; and (b) *oppressive to the minority shareholding* - i.e. an attempt to derive a benefit dishonestly ***(Grey Eisdell, Gambotto; cf. Peters).*** **Yes:** Step 3.

NOTE: This includes the expropriation of valuable proprietary rights attaching to shares ***(Gambotto).*** The specific right needs to be identified in the exam (eg. right to receive dividends, right to vote etc).

c) ***Is the alteration for a 'proper purpose'?*** An alteration is invalid unless it is:

i: Done for a proper purpose: 'Proper purposes' include - (a) Preventing significant harm or detriment to the company (eg. where a shareholder is competing with the company, or (b) where it is necessary to meet legislative requirements in relation to maximum holdings ***(Gambotto,* High Court; cf. *Grey Eisdell*** *- competitor was buying shares from non-pawnbroker members; company feared it was part of a takeover; company sought to expropriate shares held by non-pawnbroker members; expropriation was not justified because a significant number of members were not pawnbrokers*); (b) To continue compliance with business regulation; (c) To help the company achieve a significant end **(cf. *Gambotto* -** *expropriation to secure taxation and administrative advantages for the majority is not a proper purpose*); (d) To retain existing tax benefits ***(Bundaberg -*** *constitution provided for forfeiture of shares from shareholders who ceased to be company suppliers; considerable tax advantages.* 'Improper purposes' include (a) expropriation which advances the interests of the company as an entity; (b) new taxation or administrative benefits; (c) personal gain by the majority shareholding ***(Gambotto).***

ii: Fair to the minority shareholding in all the circumstances: This has 2 elements - (a) *procedural fairness*: the majority of shareholders must disclose all relevant information leading up to the alteration. Shares to be expropriated must also be independently valued by an expert; and (b) *substantive fairness* - a fair price must be offered for the shares post expert independent valuation. If the price is less than market price, it is prima facie unfair. A fair price considers the value of company assets, market value of the shares, the nature of the corporation and the corporation's likely future ***(Bundaberg).***

Reducing Share Capital

A company is generally prohibited from reducing its share capital (***Trevor v Whitworth***). However, 3 exceptions apply:

EXCEPTION 1: CAPITAL REDUCTIONS (PART 2J.1)

A company can argue that certain actions which result in capital reduction are valid, provided **(CA, s. 256B(1)):**

1. They are fair and reasonable to the company's shareholders as a whole - factors include (a) the adequacy of consideration paid to shareholders; (b) whether shareholders would be deprived of some rights (in comparison to what they would receive upon winding up eg. surplus assets, full purchase price of shares repaid etc) **(*Re Fowlers* -** a proposal to return excess capital to ordinary shareholders but not to preference shareholders is prima facie unfair because the preference shareholders had priority in repayment of capital upon winding up**).**

2. It does not materially prejudice the company's ability to pay its creditors - 'material prejudice' occurs where there is a material diminution of a company's assets. The company has the onus of proving that the reduction does not substantially prejudice their ability to pay back creditors **(CA, s. 1324(1B); *Adler*, Santow J; confirming *Kinarra*). Fletcher's test:** *If the company makes the loan and did not get a cent back, would it still be able to pay creditors back in full?* If not, it will materially prejudice the ability to pay creditors.

3. Is the reduction approved by shareholders under CA, s. 256C? - This turns on whether it (a) *is a selective or equal reduction*, and (b) *involves share cancellation*:

(a) *If equal reduction* - i.e. every shareholder's ordinary shares are reduced in proportion to the amount of shares they own, where the terms of reduction are the same for each holder **(CA, s. 256B(2)):** must be approved by an ordinary resolution (51%) passed at a general meeting **(CA, s. 256C(1)).**

(b) *If selective reduction* - i.e. anything other than an equal reduction, where members are not treated equally and proportionally **(CA, s. 256B(2)):** must be approved by (a) a special resolution (75%) at a general meeting of the company (where the votes of people who are to receive payment/consideration as part of the reduction do not count), OR (b) by a unanimous (100%) resolution of ordinary shareholders **(CA, s. 256C(2)); AND**

(c) *If it involves a share cancellation* - must be approved by a special resolution (75%) of shareholders whose shares are to be cancelled **(CA, s. 256C(2)).** Only those shareholders whose shares are to be cancelled can attend; other shareholders or strangers cannot **(*Winpar Holdings*).**

NOTE: A notice of the meeting + information material to the decision on how to vote on the resolution (i.e. the effect of the reduction on shareholders; the interests of directors in the reduction; correction of any misapprehensions shareholders may have arising from accompanying reports or statements) must be given to shareholders and lodged with ASIC **(CA, s. 256C(4)(5)).** Resolutions approving the reduction must also be lodged with ASIC within 14 days of it being passed; the reduction cannot be made before then **(CA, s. 256C(3)).**

Consequences of Reducing Shares Improperly:

If a company makes a capital return, but does not meet the requirements of **s. 256B(1),** the transaction remains valid and the company is not guilty of an offence **(CA, s. 256D(2)),** BUT -

(1) An injunction/damages may be sought under s. 1324 - by members and creditors whose interests are materially prejudiced by the reduction.

(2) Persons involved breach a Civil Penalty Provision ('CPP') (CA, s. 256D(3)) - persons 'involved' include those who (a) aid, abet, counsel or procure the breach, (b) induce the breach by threats, promises or other means, (c) are knowingly concerned in or party to the breach, (d) have conspired with others to effect the breach. Thus directors can be liable **(CA, s. 79).** Such persons may be liable for fines, compensation or banning orders **(CA, s. 1317E). *Adler*:** Involved = actual knowledge of all essential facts.

(3) If persons involved acted dishonestly - they may be liable of a criminal offence **(CA, s. 256D(4)).**

(4) Capital reductions can breach director duties - even if the transaction is authorised by these sections **(CA, s. 260E).**

(5) Possible insolvent trading liability - if the company becomes insolvent after reduction its share capital. A reduction of capital constitutes incurring a debt for the purposes of s. 588G **(CA, s. 588G(1A)).**

EXCEPTION 2: SHARE BUY-BACKS (SBBs) (PART 2J.1)

Generally, a company cannot acquire shares in itself **(CA, s. 259A).** However, a company may buy back its own shares provided that (a) the SBB does not materially prejudice the company's ability to pay its creditors **(*Adler*),** and (b) the company follows the procedures laid down in *Div 2, Part 2J.1* (i.e. **ss. 257A-257J):**

(1) Identity the type of SBB: The *Corporations Act* permits the following 5 buy-back:

(1) *Minimum holding buy-back* - a buy-back of all a shareholder's shares in a company if the shares are less than a marketable parcel **(CA, s. 9);** (2) *Employee share scheme* - a scheme where shares can be acquired by or for the benefit of employees **(CA, s. 9);** (3) *On-market buy-back* - a buy-back resulting from an offer made by a listed company on a financial market **(CA, s. 257B(6));** (4) *Equal buy-back* - the company offers to buy back the same percentage of ordinary shares from every person who holds them, on the same terms (and must give a reasonable opportunity to participate i.e. more than 2 days) **(CA, s. 257B(2)(3));** (5) *Selective buy-back* - the company offers to buy some or all shares from a particular group of shareholders **(CA, s. 9).**

(2) Does the SBB exceed the 10/12 Limit (only for employee share scheme, on-market or equal buy-backs): Companies are able to buy back up to 10% of their shares within a 12 month period (the 10/12 limit) *without shareholder approval* and *with minimum procedural requirements*. An SBB will exceed the 10/12 limit if the company buys back 10% or more of the smallest number of voting shares held in the company within the previous 12 months **(CA, s. 257B(4)(5)).** EG: if a company currently has 100 voting shares, but at some point in the last 12 months had only 50 voting shares, a buy back of 5 voting shares exceeds the 10/12 limit.

(3) Is member approval needed?: *Selective buy-backs* - a unanimous resolution of all ordinary shareholders (100%) OR a special resolution of all shareholders (75%) is required to approve a selective buy-back before it is entered into (but votes of those from whom the company seeks to buy back the shares are not counted) **(CA, s. 257D). *Equal buy-back*** - no resolution of ordinary shareholders or any other resolution is required **(CA, s. 257B).**

(4) Procedure to be followed:

Procedures	Minimum Holding	Employee Share Scheme		On-market		Equal Share Scheme		Selective
		Within 10/12 Limit	Over 10/12 Limit	Within 10/12 Limit	Over 10/12 Limit	Within 10/12 Limit	Over 10/12 Limit	
Ordinary Resolution (s. 257C)	-	-	Yes	- Yes		- Yes		-
Special/Unanimous Resolution (s. 257D)	-	-	-	-	-	-	-	Yes
Lodge offer documents with ASIC (s. 257E)	-	-	-	-	-	Yes Yes		Yes
14 days' notice to ASIC (s. 257F)	-	Yes	Yes	Yes Yes		Yes Yes		Yes
Disclosure of relevant information when offer is made (s. 257G)	-	-	-	-	-	Yes Yes		Yes
Cancel shares (s. 257H)	Yes	Yes	Yes	Yes Yes		Yes Yes		Yes
Notify ASIC of cancellation	Yes	Yes	Yes	Yes Yes		Yes Yes		Yes

NOTE: For all SBBs - once the transfer is registered, all shares and rights attaching to the shares must be cancelled **(CA, s. 257H(1)),** and ASIC must be notified on the cancellation **(CA, s. 254Y).**

Consequences of Improper Buy-Backs - If a company makes a SBB improperly, the transaction remains valid and the company is not guilty of an offence **(CA, s. 259F(1)),** BUT -

(1) An injunction/damages may be sought under s. 1324; (2) Persons involved breach a Civil Penalty Provision ('CPP') (CA, s. 259F(2)); (3) If persons involved acted dishonestly - they may be liable of a criminal offence **(s. 259F(3)); (4) SBBs may breach directors duties, even if the transaction is authorised (s. 260E); (5) (5) Possible insolvent trading liability (s. 588G(1)(A)).**

EXCEPTION 3: FINANCIAL ASSISTANCE ('FA') FOR PURCHASE OF SHARES (PART 2J.3)

A company can argue that it has validly reduced its capital by providing FA to a party to acquire shares in it **(CA, s. 260A).**

Issue 1: Is there FA?

Impoverishment Test: When a company is worse off **(*Burton*)** - Financial - Does not have to be monetary assistance, but must make the purchaser better off financially (eg. loans, guarantees, giving security over the company's assets, releasing someone from an obligation early, forgiving a debt, paying a dividend, acquiring assets from a purchaser on inflated terms so they can buy shares). However, mere payment of a debt in the ordinary course of business, or a normal payment to creditors, is not FA **(*Adler; Burton*).** FA may be provided before or after acquisition of shares **(CA, s. 260A(2)(a)).**

Assistance (applies when the purchaser is acquiring shares): *Narrow approach* - the predominant legal position. Is the company detrimentally affected by the transaction? (eg. lending money without interest, making unsecured loans) **(*Adler*, per Santow J).** *Broad approach* - has the company provided a form of FA or furnished off something it needs or wanted to allow the transaction to be carried out **(*Burton*).**

Issue 2: s. 260A Test - A company may give FA if one of 3 requirements is met **(CA, s. 260A(1)):**

1. It does not materially prejudice the company, shareholders, or the company's ability to pay back creditors - *has the company diminished its financial resources, including its future resources, with the sale and purchase of shares?* It is the result rather than intention that is relevant. Indicators: having to pay back early, borrow money from the bank, acquire assets at an inflated price, loan to an insolvent borrower, guarantee obligations of a person likely to default **(*Burton*; approved in *Adler*).** Company prejudiced - detrimental changes to financial position/ability to conduct business (eg. inadequately secured loan). Shareholders prejudiced - eg. changes to dividends; fall in share price; Creditor prejudiced - transactions likely to lead to insolvency/not rapid (eg. no guarantee or security on loans). **NOTE:** The company bears the onus of showing no material prejudice **(*Adler* → *Kinarra*).**

2. Shareholders approve of the FA - (a) special resolution (75%) by shareholders at the general meeting, with no votes to be cast by persons acquiring shares, or their associates **(CA, s. 260B(1)(a);** OR (b) unanimous resolution (100%) at the general meeting by all ordinary shareholders **(CA, s. 260B(1)(b)).** Information relevant to the decision must be provided to all shareholders, and lodged with ASIC. Notice to ASIC must be given within 14 days after the resolution is passed, and there must be a notice period of 14 days before giving assistance **(CA, s. 260B(4)-(7)).**

3. FA is exempted under s. 260C: (1) *If it is in the ordinary course of business and consists of* - acquiring or creating a lien on partly paid shares; entering into an agreement to make payments on shares by instalments; providing finance; giving assistance on ordinary commercial terms; (2) *The company is a subsidiary of a borrower in relation to debentures, FA is a guarantee or other security given to the borrower to repay its liabilities, and guarantee is in the ordinary course of business*; (3) *FA given under an employee share scheme approved by* - resolution at a general meeting; OR, if the company is subsidiary of a domestic corporation, a resolution at the domestic corporation; (4) *A reduction of share capital*; (5) *A share buy-back*; (6) *Assistance given under a court order*; (7) *Discharge of liability on ordinary commercial terms*.

Consequences of Improper FA - same as *improper buy backs* (see left) BUT: (a) **Transaction valid and no offence (s. 260D(1);** (b) **Persons in breach of CPP (s. 260D(2));** (c) **Dishonesty (s. 260D(3)).**

TOPIC 6: CORPORATE CONTRACTING

Companies have the same powers and capacities of individuals, including the power to enter into contracts **(CA, s. 124(1)).**

DIRECT v INDIRECT CONTRACTS

Issue 1: Contracts entered into directly ('Direct Contracts')

RED FLAG: An executed document of some kind i.e. a mortgage, loan, guarantee etc.

Execution: A company may execute a document *with or without* using a common seal if the document is signed by, or the fixing of the seal is witnessed by, (a) 2 directors, (b) 1 director and a secretary, or (c) for a proprietary company with a sole director who is also the sole company secretary - that director. **(CA, s. 127(1)(2)).**

Contracts can be flawed because of (a) improper sealing, (b) improper or no board resolution, (c) failure to comply with the company constitution or RR, (d) invalid authority of the party entering into the contract.

NOTE: If a company executes a document in this way, people will be able to rely on the statutory assumptions in s. 129(5)(6):

1) Assumption document is duly executed without seal: A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with s. 127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary occupies both offices **(CA, s. 129(5)).**

2) Assumption document is duly executed with seal: A person may assume a document has been duly executed by the company if (a) the company's common seal appears to have been fixed to the document in accordance with s. 127(2), and (b) the fixing appears to have been witnessed in accordance with s. 127(2). For the purposes of making the assumption, a person may also assume that anyone who witnesses the fixing of the common seal and states next to their signature that they are the sole director and sole company secretary occupies both offices **(CA, s. 129(6)).**

HD Point: These assumptions are quite powerful as they allow a third party to basically accept a signing/sealing as valid if it looks right. However, a third party cannot blindly assume the document binds the company; they need to use other assumptions in s. 129 to build their case.

Issue 2: Contracts entered into via an agent ('Indirect Contracts')

RED FLAG: Normally contracts for goods and services.

Execution: A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's *express* or *implied* authority, and on *behalf of the company* **(CA, s. 126(1)).**

Express Actual Authority: The Board of Directors can grant actual authority to persons to act for the company **(CA, s. 198A RR** *for public companies*, **s. 198E RR** *for proprietary companies*). However, there needs be some kind of express authorisation i.e. a constitutional provision; communication between the company and agent; Board minutes; a service contract; deed appointing power of attorney; agreement between company and agent.

Implied Actual Authority: Authority can be implied from the employee's position. An agent is presumed to have the usual authority attaching to their position in the company: (1) Managing Director (including de facto MD)/CEO -broadest array of powers, and can bind the company in almost any agreement; (2) Directors - have very limited authority to bind the company; generally no implied authority; (3) Chairpersons - greater implied authority in public companies; (4) Company Secretary - implied authority to enter into contracts concerning administrative matters; 5) Employees with a specific position - broad array of powers in that role only (eg. a purchasing officer has broad powers to purchase goods and services).

Implied by Acquiescence: Authority can be implied by the company consenting to a course of similar prior dealing. However, this requires communication of consent through words or conduct, not mere silent acquiescence ***(Hely-Hutchinson v Brayhead -*** *Richards gave a guarantee 'on behalf of ' Brayhead; no MD appointed; Richards was acting as de facto MD; Board allowed this; Court held actual implied authority to bind the company*; **cf.** ***NAB v Sparrow*** *- finance agreement executed by only active director, signing as sole director and company secretary; other director agreed to step aside from managing before the negotiations leading to finance agreement began; constitution provided at 2 directors or 1 director and secretary to sign agreements; copy of constitution was provided to NAB; company went into liquidation; liquidator claimed company not bound by finance agreement; Court held director did not have actual or apparent authority - only conferred through constitution or Board resolution*).

Apparent/Ostensible Authority: Apparent authority is agency created because the company gave the impression to a third party that an agent has authority to act on their behalf (note: does not depend on any agreement between principal and agent). The principal (i.e. company) represents the agent has authority, is estopped from denying this authority. An agent will have authority provided the 3 requirements of the ***Freeman test*** (*K & H formed company to act as property developers; both directors and shareholders; no MD, but K acted as de facto MD, and H 'acquiesced'; K hired architects in company name; Court held K had apparent authority, so company bound)* are made out:

1. 'Holding out'/representation - there must be a representation that the agent had authority to enter into contracts of the kind sought to be enforced. Holding out may arise where a company equips an officer with a certain title, status or facilities, or permits them to act in a certain manner eg. when a company employs a 'buyer', they make a representation the person has authority to 'buy'. Acquiescence by the Board also amounts to a representation ***(Pacific Carriers v BNP;*** **cf.** ***Crabtree*****).** An appointment combined with silence is also sufficient to amount to a representation ***(Freeman,*** **per Lord Diplock).** **NOTE:** Appointment as director, compared with managing director, carries very limited authority ***(Freeman;*** **cf.** ***Crabtree*****).**

2. By some with actual authority - the representation must be made by the company, or someone with actual authority to act for the company (CEO generally; employee with specific position to act in relation to the things to which the contract relates) may cloak another party with the apparent authority to enter the contract. **NOTE:** De facto MDs can cloak others with apparent authority ***(Freeman).*** Express or implied authority is sufficient: De facto MD's have actual authority ***(Brick & Pipe)***; Directors have actual authority **(CA, s. 198A RR)**. Company secretaries have implied authority ***(Panorama).*** However, a representation by someone with only apparent authority is not enough. A person with no actual authority cannot make a representation which can be relied upon ***(Crabtree*** *- 4 directors on Board: B Snr, B Jnr, 2 wives; wives took not active role in company affairs; P, son of B Snr, employed but not director; committee of B Snr, B Jnr & P collectively managed company affairs; constitution provided for appointment of MD; B Jnr given MD role, but not formally appointed; no actual authority to manage company business, despite title; P negotiated contract, signed by P on B Jnr's behalf; TP refused to proceed with contract, arguing that P had authority to obtain quotations but not to finalise agreements on company's behalf; B Jnr had held out to TP that P had necessary authority to finalise contracts; Court held that because P had no actual authority; representation of authority came from B Jnr, who lacked authority; at most, B Jnr had apparent authority because Board held him out as MD; agent with merely apparent authority not capable of making representations; only person with authority was 3 man committee or Board.* **NOTE:** Decision heavily criticised because it had no regard for commercial practice; it is almost impossible for an outside in a third party's position to discover who has actual authority to make representations).

3. Reasonable reliance by the third party - the third party must act reasonably in relying on the representation. If the third party knew or ought to have known an agent had no authority, the company is not bound. Was the third party put on inquiry? **Note:** Mere silence from the company is insufficient for reasonableness; communication by words or conduct from the Board to the agent is needed (eg. failing to prevent an agent from so acting) ***(Freeman*** *- K acted as MD, engaging a firm of architects; firm brought action claiming payment for word when Freeman refused to pay fees; Board of Freeman, which had actual authority to manage company affairs, had held out K was its MD; firm bound by his actions*).

Conclude: If the agent's apparent authority can be proved, it creates an agency by estoppel and the company will be estopped from asserting the agent lacked authority.

INDOOR MANAGEMENT RULE (IMR)

Rule: A person is not taken to have information about a company merely because the information is available to the public from ASIC **(CA, s. 130).**

This is the common law Indoor Management Rule (IMR).

IMR acts to remedy any defects where actual or apparent authority exists. A third party can argue IMR makes a company bound because the third party is not required to know the company's constitution **(s. 130)**, and is prima facie entitled to assume all internal procedural requirements have been met ***(Royal British v Turquand*** *- company's constitution empowered Board to borrow such sums as were authorised by a GM resolution; company borrowed money from Royal British on authority of 2 directors, who authenticated company seal; no authority given to directors at GM; company refused to repay, arguing Bank had constructive notice of constitution and should have been aware of lack of authority; Court held Bank is not required to inquire whether a resolution has been passed; company still bound because passing of resolution was an internal matter*).

Exceptions:

1) Where the third party knew the assumption was incorrect: Where a third party has actual knowledge that the purported agent lacked express actual authority, or the contract was defective in some way.

2) Internal irregularity where the third party is put on inquiry: A third party with notice or reasonable grounds for suspecting an irregularity is 'put on inquiry', and must make reasonable inquiries to ascertain the contract's validity. **Test:** A reasonable person in the third party's position would have been 'put on inquiry' and would have sufficiently investigated ***(Northside -*** *common seal of Northside was affixed to mortgage document securing a bank loan to a company controlled by a director and shareholder of Northside; mortgage over land owned by Northside, its only major asset; common seal affixed and signed by director as a director, and his son, who purported to sign as company secretary; son had not been appointed under constitution, but lodged documents showed him as secretary; other 2 directors (remaining shareholders) did not know of or authorise execution of the mortgage, nor of son's purported appointment as secretary; directors had no interest in borrowing company, and Northside derived no benefit from transaction; Court held Northside not bound by mortgage because affixing of common seal was invalid; although Bank entitled to assume common seal was properly affixed and internal proceedings had been carried out correctly, circumstances should have put Bank on inquiry; Bank should have made inquiries because the mortgage secured Northside's only major asset, and transaction was outside its usual business and not for its benefit; because Bank failed to make further inquiries, it was unable to rely on rule in Turquand's case.* **Note:** Case was decided under common law rules which no longer apply. Use statutory assumptions in addition to IMR to further third party case.

3) Forgery: Where a document is forged, a third party cannot rely on IMR. 2 situations: (a) where an unrelated person without an interest in the contract is providing authorisation, (b) where people who are part of the company have not given their authorisation ***(Northside).***

DIRECTORS DUTIES (STATUTORY + FIDUCIARY)

DUTY 1: TO ACT IN GOOD FAITH IN THE COMPANY'S BEST INTERESTS

RULE: Directors and officers must act in good faith in the best interests of the corporation **(CA, s. 181(1)(a)).** *Mirrored in the General Law as a fiduciary duty.*

Issue 1: Applies to - Directors; Officers (i.e. Senior Employees; Secretaries) **(CA, ss. 9, 181(1))**

Issue 2: 'Good Faith' - a director must act 'bona fide' in what they consider to be the company's best interests. There are 2 possible meanings of this: (a) *honestly*, with the best intentions (subjective test) ***(Re Smith v Fawcett)***, or (b) *genuinely*, in the sense the action was not distorted by some irregularity or impropriety (more objective test) ***(Hutton; Bell Group)***. A director will not comply with their duty merely by asserting they had an honest belief their actions were in the company's best interests. The duty is breached if a director acts in a way that no rational director would have considered to be in the best interests of the company ***(ASIC v Adler)***. Furthermore, while the Court will not second guess the commercial decisions of a company, it will look for objective evidence the director sought to benefit the company ***(Bell Group*, Owen J)**. Simply put, it is a ***subjective test with an objective bottom line*** *(Hutton*, Bowen J (obiter)).

Issue 3: 'In the Best Interests of the Corporation' - To whom is the duty owed?

1. To shareholders collectively v individual shareholders: Generally, the duty is owed to the collective body of members, not to individual shareholders ***(Percival v Wright)***. However, a duty can be owed to individual shareholders in very narrow circumstances:

(a) Family character of company (Coleman v Myers, Woodhouse J - MD of a family company arranged for the company to be taken over at an under-value by a new company controlled by him. Held: MD breached fiduciary duties owed to minority shareholders of the family company; MD failed to disclose material info concerning his potential profits, and mislead shareholders as to the true value of the company assets).

(b) Where there are very few directors and shareholders, and they have close relationships (Brunninghausen - company had 2 shareholders, who were also directors; G, the minority shareholder, despite being a director, was not involved in the company's management and had no access to financial records; after a falling out, B, the majority shareholder and MD, entered into negotiations to buy G's shares; unknown to G, another person approached B offering to buy all shares in the company; G eventually sold to B, who subsequently sold all shares for a higher price; G sued for breach of fiduciary duty. Held: B possessed special knowledge acquired while managing the company which provided an opportunity to sell company's business advantageously; opportunity belonged to company; **where there are negotiations for a takeover of the company, directors are required to promote joint interests of all shareholders - Handley JA).**

(c) Where shareholders depend on directors for information and advice - i.e. where directors have a high degree of inside knowledge ***(Brunninghausen)***.

(d) Where there is a relationship of confidence and trust *(Coleman v Myers)*.

(e) The significance of a certain transaction for the parties *(Coleman v Myers)* - i.e. if the transaction is directly between a director and shareholder, rather than the company and shareholder ***(Brunninghausen)*.**

2. To corporate groups: The duty is to act in the best interests of the individual company only, not in the best interests of the corporate group. If there is a conflict between the interests of a company and the interests of the group, directors must act in the interests of the company ***(Walker v Wimborne)*.** However, decisions made in the best interests of the corporate group might not be a breach if it benefits the individual company. Ask yourself, "are the company's and the group's interests one and the same?" (eg. where the whole group will fail if the decision isn't made to assist other companies) **(Equiticorp v BNZ** - funds were transferred from 2 companies in a group to satisfy the debt of a third; Held: Director of group justified in considering that the welfare of the group was immediately tied up with the welfare of the individual companies; transaction justified because parent of the group had guaranteed the debt which was repaid; alternative was disaster for the group, including 2 companies).

a) Director of subsidiary acting in the interests of the holding company: A director of a wholly-owned subsidiary is taken to act in good faith in the best interests of the subsidiary if (a) the subsidiary's constitution authorises the director to act in the best interests of the holding company, (b) director acts in the interests of the holding company in good faith, and (c) the subsidiary is not insolvent at the time the director acts, and does not become insolvent because of the act **(CA, s. 187).**

3. Employees: Directors cannot put employee interests above shareholder interests **(Parke v Daily News** - company controlled 2 newspapers, sold 1; directors intended to distribute surplus proceeds from sale among employees by way of compensation for dismissal; shareholder brought action to prevent payments; Held: directors breached fiduciary duties to act in the company's best interests because payments were not reasonably incidental to carrying on the business (i.e. wages), but 'gratuitous payments to the detriment of shareholders and company as a whole').

4. Creditors: When a company is insolvent, or nearing insolvency, a duty is owed to creditors. In such a case, shareholders cannot ratify or authorise a breach of this duty. However, shareholders can excuse such a breach if the company is solvent ***(Kinsela; Bell)***. This is because creditors bear the risk of the company's activities when the company becomes insolvent ***(Walker)*** But creditors cannot independently commence proceedings; only the liquidator can ***(Spies v R)*.**

5. Nominee Directors: Nominee directors vote in the company's interests where interests conflict. The constitution can explicitly or implicitly provide that the primary duty of the nominee director is to protect outside interests over the interests of the company **(Levin** - Levin purchased majority shareholder in a company; simultaneously mortgaged shares to vendor to secure payment of purchase price; company's constitution named C & R as governing directors; appointed to represent interests of vendor and mortgagee; constitution amended to allow C & R to exercise powers only in the event of default in payment of the loan to Levin; Levin challenged exercise of power on the basis that C & R's obligation was to company, not mortgagee; Held: constitution can provide for appointment of nominee directors; implied that C & R were expected to protect mortgagee's interests in the event of default).

Issue 4: Outcome if Breached

Persons involved **breach a CPP (CA, s. 181(2)).** 'Persons involved' include those who (a) aid, abet, counsel or procure the breach, (b) induce the breach by threats, promises or other means, (c) are knowingly concerned in or party to the breach, (d) have conspired with others to effect the breach. Thus directors can be liable **(CA, s. 79).** A director commits a **criminal offence** if they were intentionally or recklessly dishonest in the breach **(s. 184(1)(c)). Equitable remedies** are also available (injunctions**,** equitable compensation etc).

DUTY 2: DUTY TO EXERCISE POWERS FOR PROPER PURPOSES

RULE: Directors and officers must exercise their powers for a proper purpose ('PP') **(CA, s. 181(1)(b)),** and not for 'some purpose foreign to the power' ***(Ure)***. *Mirrored in the General Law as a fiduciary duty.*

Issue 1: Applies to - Directors; Officers (i.e. Senior Employees; Secretaries) **(CA, s. 9, 181(1)).**

Issue 2: TEST - 2 steps **(*Howard Smith*):**

1. What is the objective (i.e. legal) purpose for which the power was granted? (Question of Law) -

Proper purposes: Include (a) to raise capital ***(Whitehouse)***, (b) to address the company's financial issues ***(Howard Smith)***, (c) to advance the proper interests of the company by maximising share value ***(Darvell)***, (d) diluting the voting power of existing shareholders in special circumstances ***(Whitehouse)*.**

Improper purposes: Includes (a) defeat a takeover bid ***(Hogg; Howard Smith)***, (b) to weaken a dominant shareholding or defeat a voting power of existing shareholders by creating a new majority ***(Howard Smith; Whitehouse)***, (c) establishing control in self, family or associations, or benefiting one group of shareholders to the detriment of others ***(Whitehouse)*.**

Whitehouse v Carlton Hotel: Carlton Hotel was a family company, controlled by the father = governing director; father had sole power to issue shares; company's capital divided into 3 shares: 'A Class' for father, 'B Class' for wife, 'C Class' for two sons and four daughters (no voting rights); while father alive, only 'A Class' had voting rights; 'B Class' had voting rights upon his death; parents divorced; daughters sided with mother, sons with father; to ensure wife and daughters would not gain control upon his death, father allotted further 'B Class' shares to sons; allotment made without knowledge of wife, not recorded in company register; father eventually fell out with sons, purported to annul share allotment; sons bought action to have share register rectified to reflect allotment; company argued issue of 'B Class' was invalid because father had issued for improper purpose of realigning relative shareholders upon his death; Held: allotment invalid because of breach of duty by father; impermissible for directors to allot shares for the purpose of destroying or creating a majority of voting power.

Howard Smith v Ampol: Case arose out of a takeover bid for RW Miller; major shareholders: A & B → controlled 55% of issued capital; A & B decided to combine holdings and make a takeover bid for all other shares; Howard Smith (HW), company friendly to Millers' Board, made takeover bid offering higher price; to give HW best chance, Miller's directors issued sufficient shares to reduce A-B majority to a minority position; A-B challenged validity of share issue; Miller argued they were primarily motivated by the fact company was in urgent need of funds to finance tankers under construction and ease other financial problems; Held: Miller's directors breached and invalidated share issue; did not believe director's explanation for share issue; directors motivated primarily to reduce A-B to minority position to promote HW takeover bid; improper eventhough shareholders would have been able to obtain a higher price for shares if takeover successful.

2. What was the actual purpose of the exercise of the power? (Question of Fact) -

MULTIPLE PURPOSE SUB-TEST:

1. 'But For' Test: Where there is more than one purpose for a share issue, the 'but for' test is applied to work out whether the directors breached their duty and issued the shares for an improper purpose. Ask yourself: "but for the impermissible purpose, would the power have been exercised?" If the answer is no, the exercise is for an improper purpose ***(Whitehouse)*.**

2. Substantial Purpose Test: If there are multiple purposes, the Court will look at the substantial/dominant purpose. Acts will be acceptable if the dominant purpose was the proper purpose **(cf. *Howard Smith*).**

Issue 3: Outcome if Breached

Persons involved **breach a CPP (CA, s. 181(2)).** 'Persons involved' include those who (a) aid, abet, counsel or procure the breach, (b) induce the breach by threats, promises or other means, (c) are knowingly concerned in or party to the breach, (d) have conspired with others to effect the breach. Thus directors can be liable **(CA, s. 79).** A director commits a **criminal offence** if they were intentionally or recklessly dishonest in the breach **(s. 184(1)(d)). Equitable remedies** are also available (injunctions**,** equitable compensation etc). Shareholders also have a **personal right to sue** for improper allotment of shares ***(Residue)*.**

DUTY 3: DUTY TO RETAIN AND NOT FETTER DISCRETION

RULE: While the Board can delegate powers to any person under s. 198D, a director is under a duty to bring an independent judgment to their decisions and keep their discretion unfettered (i.e. cannot decide something before the appropriate time) **(CA, s. 190).** *Mirrored in the General Law as a fiduciary duty.*

Issue 1: Applies to - Directors; Officers (i.e. Senior Employees; Secretaries) **(CA, s. 9, 181(1)).**

Issue 2: TEST - Directors are under a fiduciary duty to give active and adequate consideration to the exercise of their discretionary powers (i.e. must exercise independent judgment) and not fetter their discretion. Whether discretion is impermissibly fettered is assessed at the time the agreement was entered into, not the time when the promise was due to be performed. This does not prevent the company from entering into long-term contracts which bind it to a certain course of action ***(Thornby*** - *directors may enter into contracts on behalf of the company whereby they agree to vote in favour of a particular course of action if the properly consider this to be in the interests of the company at the time the agreement was entered into*). Directors will breach this duty if they enter into an agreement with outsiders that requires them to vote in a certain way at future board meetings, or follow directions from another purpose ***(ASIC v Macro*** - *investor agreed to become sole director and shareholder which would be subject to sole decision-making of Macro, over which investor had no real or effective control; entering into contract = fettering powers*).

Issue 3: Outcome if Breached

Equitable remedies are available (injunctions**,** equitable compensation etc).

DIRECTORS DUTIES - DUTY TO AVOID CONFLICT OF INTEREST (STATUTORY + FIDUCIARY)

Directors have a fiduciary duty to avoid conflicts of interest **(*Boardman*)** and unauthorised profits **(*Regal Hastings*).** Circumstances where this duty may arise include (a) a director entering into contracts which benefit them personally, (b) directors making personal profits from their position, (c) directors taking up a corporate opportunity belonging to a company and exploiting it personally, (d) directors using confidential information obtained out of their position and using it personally, or (e) competing with the company.

NO CONFLICTS RULE - GENERAL LAW (FIDUCIARY)

RULE: A fiduciary must not occupy a position where there is a 'real and sensible' possibility of conflict between their personal interests and the company's interests, unless the company's permission is obtained **(*Boardman*).**

Issue 1: Applies to - Directors **(*Regal Hastings; Aberdeen*)**; Senior Employees **(*Victoria University*).**

Issue 2: TEST - would a reasonable person think there is such a possibility of conflict? (*Boardman*). This duty is strictly applied; it is irrelevant whether the director makes a profit **(*Aberdeen*)**. A director can work for multiple companies, provided confidential information belonging to one company is not given to another company **(*Cott*).** If the director discloses their conflict and abstains from discussions and voting at GM's, it should be sufficient to absolve them. However, sometimes resignation is the only step a director can take to ensure they perform all their duties **(*Fitzsimmons*).**

Issue 3: Outcome if Breached

Equitable remedies are available (injunctions, equitable compensation etc).

NO PROFITS RULE - GENERAL LAW (FIDUCIARY)

RULE: A fiduciary must not use their fiduciary position, opportunity or knowledge gained from it to make an undisclosed personal gain **(*Regal Hastings*).**

Issue 1: Applies to - Directors **(*Regal Hastings; Aberdeen*)**; Senior Employees **(*Victoria University*).**

Issue 2: Potential Breaches

1. Misappropriation of property: It is a breach of duty for a director to appropriate property belonging to the company, unless the company permits the taking in the constitution and shareholders consent to the taking **(*Cook* - *3 directors formed a new company to carry out a contract of considerable value; Court held directors breached duty by diverting a contract to their newly formed company*).**

2. Resigning to exploit an opportunity: Directors cannot avoid liability by deciding to resign in order to exploit an opportunity that would have been in breach had they not resigned **(*IDC*).** The duty survives resignation where (a) it was prompted or influenced by personal ambitions, or (b) the director's position with the company led to the opportunity arising, rather than a fresh initiative by the director **(*Canadian Aero; cf. Regal Hastings* - *implied the fiduciary duty can be avoided by resigning from office*).** It is irrelevant that the company cannot exploit the opportunity itself due to lack of resources **(*Regal Hastings; IDC*).**

3. Earning profit through the company's opportunities: Directors breach their fiduciary duty by receiving personal profit through the company's opportunities. It is irrelevant that (a) the company could've earned the profits itself **(*IDC*),** (b) the directors acted in good faith **(*Regal Hastings; Furs*),** or (c) that the company suffered no detriment **(*Regal Hastings; Furs*).**

Furs v Tomkies: Furs processed fur for the manufacture of coats; Tomkies was its MD and had special knowledge of the tanning, dyeing and dressing operations of the business, including secret formulae (which were of considerable value); Tomkies instructed the Board to negotiate sale of the business for an initial asking price of 8,500 pounds + 4,500 pounds for the formulae; Tomkies began negotiation with potential purchaser; purchaser insisted would buy business only if Tomkies agreed to work for them; Tomkies disclosed this to the chairman, who advised the company could not afford to continue to employ him and to make the best arrangements for himself; purchaser hired Tomkies under 3-year contract, issuing him shares and paying him 5,000 pounds; Tomkies kept shares and money secret from Furs; Tomkies agreed to provide knowledge of secret formulae to purchaser; purchaser only offered to pay 8,500 pounds and nothing for formulae; Furs accepted reduced price; Furs later discovered Tomkies held shares and 5,000 payment; Furs sought to recover amount of profit he made by breach of duty; Held: Clear conflict of interest; Tomkies must account to Furs for profits he made; payment and shares in purchaser indicated Tomkies preferred his personal interest.

Issue 3: Factors in assessing whether fiduciary used their position/knowledge to make a personal gain (*Canadian Aero; Regal*)

1) The position/office held by the director or officer; 2) The nature, 'ripeness' and specificity of the corporate opportunity; 3) The director's or officer's relation to the company (*did it come to them solely by virtue of their position?*); 4) Amount of knowledge possessed and circumstances in which it was obtained **(*Furs*)**; 5) Whether the knowledge was special/private **(*Furs*)**; 6) The length of time between resignation and new endeavour **(*Cook; Furs*)**; 7) The circumstances under which the relationship was terminated (i.e. resignation, retirement or discharge) **(*Cook; Furs*)**.

Issue 5: Defences - Permitting the Director to Benefit - a director can procure a personal profit from the company provided there is approval by shareholders at a GM, passed by ordinary resolution, after the director gives full and frank disclosure of the breach or the likely breach of conflict of interest **(*Cook*).** Only members in a GM can ratify a breach **(*Regal Hastings*),** unless the Board represents all shareholders **(*Queensland Mines*).**

Other exceptions: (1) Where the Board has rejected the opportunity, and the director has taken up the opportunity personally *without using information gained as director* **(*Peso Silver* - *mining claim offered to Peso by prospector; offer rejected by directors acting in good faith, in company's interest; later, Cropper, the MD, was privately approached to take up the claim; Mayo Silver incorporated for this purpose; Peso sought declaration that Cropper's shares were held in trust for Peso;* Held: *Cropper approached to take up claim in capacity as individual, not as director.*

Issue 4: Outcome if Breached - Equitable remedies (equitable damages; account of profits (even if they could not have profited anyway: ***Green***); money held on constructive trust for the company: ***Cook***, contract is voidable: ***Whitehouse; Kinsela***).

DUTY NOT TO MISUSE POSITION AND COMPANY INFORMATION (NO PROFITS RULE) - STATUTORY

RULE: A director, secretary, officer or employee must not improperly use their position, or information obtained by virtue of their position, to gain a personal advantage or cause a detriment to the company **(CA, s. 182(1), 183(1)). NOTE:** This duty continues even after the person stops being a director, officer or employee of the company.

Issue 1: Applies to - Directors; Secretaries; Officers; Employees.

Issue 2: TEST

The test for impropriety is **objective:** a breach of standards of a reasonable person in the director's position, with the director's knowledge of their duties, their powers, the authority of their position and the circumstances of the case **(*R v Byrnes* - *2 directors, without authority of the board, arranged for the company seal to be affixed to a guarantee and other documents that provided security for a loan to another company they controlled; directors breached s. 182 eventhough they reasonably but mistakenly believe executing documents was in the interest of the company*).** However, the offender's **subjective state of mind** is important in an abuse of power: the offender's knowledge of the circumstances in which the power is exercised, and their intention in exercising the power, are important factors in determining whether the power has been abused **(*R v Byrnes; Chew*).** **NOTE:** The defendant need not actually gain a personal advantage or cause a detriment to the company for breach to be made out.

Issue 3: Outcome if Breached

Persons involved **breach a CPP (CA, s. 182(2), 183(2)).** 'Persons involved' include those who (a) aid, abet, counsel or procure the breach, (b) induce the breach by threats, promises or other means, (c) are knowingly concerned in or party to the breach, (d) have conspired with others to effect the breach. Thus directors can be liable **(CA, s. 79).** A director/secretary/officer/employee commits a **criminal offence** if they were intentionally or recklessly sought to gain a personal advantage or cause a detriment **(s. 184(2), 184(3)).**

DUTY TO DISCLOSE MATERIAL PERSONAL INTERESTS

RULE: A director with a **material personal interest** ('MPI') in a matter relating to the company's affairs must give other directors notice of that interest. The interest does not need to be financial or pecuniary **(CA, s. 191(1)).**

Issue 1: TEST - an MPI is an interest which can influence the director's vote on a decision to be made. However, the interest must be a substantial interest, such that a reasonable person would believe the director might be influenced by it (*McGellin* - *director regarded as a having MPI in board discussions about whether the company should issue shares to him*).

Issue 2: Notice Requirements - the notice must detail (a) the nature and extent of the interest, and (b) its relation to the company affairs, AND given at a directors' meeting as soon as practicable after the director becomes aware **(s. 191(3)).**

Issue 3: Exceptions - a director need not give disclose their interest if:

(a) **Membership:** It arises by virtue of being a member of the company **(s. 191(2)(a)(i)).**

(b) **Director's remuneration:** The interest arises in relation to the director's remuneration **(s. 191(2)(a)(ii)).**

(c) **Contract subject to shareholder approval:** The interest relates to a contract the company is entering into that is subject to member approval **(s. 192(2)(a)(iii)).**

(d) **Indemnity:** The interest arises merely because the director has given a guarantee, indemnity or security for a loan to the company, or has a right of subrogation in relation to the guarantee or indemnity **(s. 192(2)(iv-v)).**

(e) **Insurance contract:** The interest relates to a contract insuring the director for liability as an officer of the company (but only if the contract does not make the company an insurer) **(s. 191(2)(a)(vi)).**

(f) **Indemnity contract under s. 199A:** The interest relates to an indemnity contract permitted by s. 199A **(s. 191(2)(a)(vii)).**

(g) **Director of 2 companies:** The interest is in a contract for the benefit of, or on behalf of, another company, and the interest arises merely because the director is a director of that other company **(s. 191(2)(a)(viii)).**

(h) **Other directors aware:** *Proprietary company* - the other directors are aware of the nature and extent of the interest and its relation to company affairs **(s. 191(2)(b)).**

(i) **Notice given to new director:** The director has already given notice, a director who was not a director at the time of the notice is then given notice, and the interest has not materially increased above that disclosed previously **(s. 191(2)(c)).**

(j) **Standing notice:** The director has given valid standing notice of the nature and extent of the interest under s. 192, and notice is still effective **(s. 191(2)(d)).**

(k) **Single director company:** *Proprietary company* - This rule does not apply to single director companies **(s. 191(5)).**

Issue 4: Voting by Director with an MPI

Proprietary companies - If a director has validly disclosed an MP, (a) the director can vote on matters relating to the interest, (b) the director can retain the benefit of any transaction relating to the interest, and (c) the company cannot avoid the transaction purely because the transaction exists **(s. 194 RR). NOTE:** This is an RR which may be overridden by the company constitution **(s. 193).**

Public companies - If a director has an MPI in a certain matter, the director cannot vote on the matter or attend meetings where the matter is being discussed **(s. 195(1)).** Exceptions: (1) If other directors pass a resolution that the director be permitted to vote or attend meetings **(s. 195(2));** (2) If ASIC permits under s. 196 **(s. 195(2)).**

Issue 5: Outcome if Breached

Proprietary companies - Breach of ss. 191-195 attracts a fine of up to 10 penalty units, or imprisonment for 3 months, but does not invalidate the transaction, resolution or thing **(s. 191(4)).**

Public companies - Breach of s. 191 attracts a fine of 5 penalty units, but does not invalidate the transaction **(s. 191(4)).**