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Duty Breach Remedies		
Area	Section/Case	Description
Company		
• Civil Penalty Provisions		Note: These are set out in s 1317E. Civil law standard applies.
	1317J(2)	Company may apply for damages where breached.
	1317(H)(1)	Court may order compensation (damages).
• General Law Breaches		
	Injunction	Stop or require the director to undertake a particular action.
	Compensation or damages	Where loss has occurred.
	Account of profits	Company does not suffer loss or damage. The director makes a profit and must pay it to the company. Regal (Hastings) v Gulliver: Directors profiting from an opportunity that belonged to the company; although it wasn't acted on by the company.
	Rescission of contract	Parties of a contract returned to the position they held before entering the contract.
	Constructive trust	An order that the director holds the property on trust for the company. Director cannot sell property and must return it upon request.
ASIC		
• Criminal action		
	Schedule 3	A breach of s 184 equivalents or 588G(3) attract either 2,000 penalty units, imprisonment for 5 years, or both.
	S 1311	5 pecuniary penalties for a prescribed offence
• Civil Penalty Provisions		Note: These are set out in 1317E
	S 1317G	ASIC can make a pecuniary penalty order up to \$200,000
	S 206C	Can make a disqualification order
	S 1317J(1)	ASIC may apply for damages where breached.
	S 1317H	Court may order compensation (damages).

Resolutions		
• Resolutions		
	S 9	A special resolution is defined as a 75%+ of those present who are entitled to vote. Ordinary resolutions require 50%+, and are referred to as 'resolutions.'

Job Type		
Area	Section/Case	Description
Director Types		
• Statutory Directors		
	S 9	Types of directors: a) A person who is properly appointed as director b) Unless the contrary intention appears, a person who is not validly appointed as a director if: (i) They act in the position of a director (de-facto); or (ii) The directors are accustomed to act in accordance with the person's instructions or wishes (shadow)
• De-facto Directors		
	Chameleon v Murchison Buzzle Operations	De-facto director is someone who carries out a large number of tasks that are typically expected of directors. Such as negotiating on company's behalf, deciding prospectus details, share issue or high-level management decisions. There must be a causal link between the instruction of the shadow director and the directors acting on it. For example, not something that would be done irrespective of instruction.
• Shadow Directors		
	Standard v Antico	A company can be a shadow director of another company.
• Officers		Note: The term officer includes directors.
	S 9	An officer includes: (a) a director or secretary of company; ;or (b) a person: (i) who makes or participates in making decision that affect the whole, or

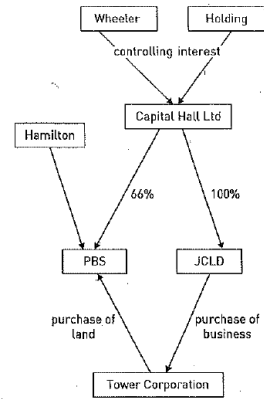
		<p>substantial part of making decisions affecting the business of the company</p> <p>(ii) who has the capacity to affect significantly the company's financial standing</p> <p>(iii) in accordance with whose instructions or wishes the directors of the company are accustomed to act</p>
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The "Best Interests" Duty – s 181		Note: A civil penalty provision and an equivalent criminal enforcement. Dishonest or reckless. S 184(1)
• Relevant Law		Note: Duty applies to "directors" (de-facto and shadow) and "officers" under s 9.
	<p>S 181(1)</p> <p>(a)</p> <p>(b)</p> <p>S 181(2)</p> <p>General Law</p>	<p>A director or other officer of a corporation must exercise their powers and discharge their duties:</p> <p>In good faith (honestly) in the best interests of the corporation; and</p> <p>For a proper purpose</p> <p>Important: The best interests duty is s 181(a), the proper purpose duty is s 181(b). Both are found in s 181. Need both.</p> <p>A person involved in the subsection (1) contravenes this subsection. S 79.</p> <p>The general law splits these two into two separate issues.</p>
• Company's Best Interests		
	<p>Greenhalgh v Arderne Cinemas</p> <p>Mills v Mills</p>	<p>Company's interests generally of its members (including future ones). Must look at interests 'as a whole.' For example, balancing interests of minority and majority members.</p> <p>The directors must act fairly, but not identically between the members of different classes. If low profits, may have to reduce dividends, affecting one class more than the other.</p>
	Kinsella v Russell; Walker v Wimborne	When a company is insolvent or nearly insolvent, the company's interests become those of the creditors rather than

	Spies v The Queen	shareholders. For example, cannot remove assets. This is not a duty enforceable by creditors. Owed by directors/officers to the company. Creditors can bring action in other ways. Liquidator enforces this.
	Parke v Daily News	Interests of employees and other stakeholders should not be given priority over the interests of members. Directors may only take into account the interests of 'outsiders' where the benefit returns to the company.
The Proper Purpose Duty		
• Meaning Proper Purpose		
	Howard Smith v Ampol	Two step analysis: (1) Question of law = for what purpose is the power conferred? (2) Question of fact = what was the actual purpose for the exercise of power? -If the actual purpose (2) is inconsistent with lawful purpose (1), there is a breach of proper purpose.
	Whitehorse v Carlton	'Mixed purpose' = the directors have an improper purpose, but they dress it up as a proper one in the board minutes. Apply the 'but for' test: Without the improper purpose, would the directors have done this thing?
• Share issue: Improper		Note: a s 198A power
	Kokotovich Constructions Whitehorse v Carlton Howard Smith v Ampol Western Ventures v Resource ASIC v Investors Forum	Main purpose of share issue is to dilute a member's shareholding. Selling to friends/family. Out of oblivion. Entrenching control of the company in certain shareholders by issuing them more shares. Attempts to make a majority member a minority member Directors issuing selves shares. Feared they would be removed from the board at the GM. Issues selves \$7 million shares to defeat resolution that would remove them. Was not to raise capital as claimed. No deposit of cheque. Partly paid shares. Issued 210 million shares to themselves. \$0.0001 per share was paid. Only raised \$21,000. Hardly anything in comparison to share scale. Preserving power of existing company members.

• Other examples

Permanent Building v Wheeler



Hamilton: managing director and CEO of PBS
 Wheeler: chairperson of PBS, CHL and JCLD
 Holding: executive director of PBS and CHL

- W and H controlled CHL
- CHL controlled 100% of JCLD
- JCLD wanted TC to buy its business
- TC didn't have enough money

- H (managing), W and H (executive) directors of PBS
- Used 66%
- Caused PBS to buy land from TC
- Meant TC had enough money to buy the JCLD business

- Using PBS power to benefit JCLD
- Breach of duty: improper purpose
- Applying 'but for' test
- "official" proper purpose: PBS wants to expand into property development
- "But for" the evil motive: to put TC in funds to contract with JCLD, so that it can purchase the business and benefit the directors
- Without that motive, wouldn't have bought land

Advance Bank v FAI

Cannot use company money to campaign for director re-election.

Company Actions		
• Winding up		
	S 461(1)	
	(e)	Directors have acted in their own interests rather than members as a whole, or manner appearing unjust/unfair generally.
	(g)	Oppressive/unfairly prejudicial/unfairly discriminatory act or omission against a member(s) in any capacity.
	(k)	Just and equitable to wind company up.
	S 462(2)(a)	Company's right to apply
	S 467(4)	Court will not wind up company if believe that there is another remedy available or member is acting unreasonably: reluctant if solvent and has future
	Loch v John Blackwood	J+E; company wound up because its main purpose is to commit fraud on investors. Buying shares of minority members below market value.
	Tivoli Freeholds Ltd	Failure of substratum. The general intention and common investment understanding of members undermined. Entertainment, corporate raids.
	Ebrahimi v Westbourne Galleries Ltd	Breakdown in mutual trust. Breakdown in relationship between directors, voted off and excluded from company's management.
• Statutory Injunction		
	S 1324(1)(a)	Deals with contraventions of the Act
	S 1324(1)(b)	Attempted contraventions
	S 1324(1)	A person, whose interests have been, are or would be affected by the conduct.
	S 1324(10)	In addition to the injunction (compelling or restraining), or in substitution of it, court can order damages to be paid.
• S 140		
	S 140(1)(a)	Company's constitution has effect of contract between the company and each member.
	S 140(1)(b)	The company and each director and company secretary.
	S 135(3)	Failure to comply with replaceable rules, not a contravention of Act
	Eley v Positive Government	Contract is deemed a contract only as between the parties referred to in section.
	Rayfield v Hands	Contract law rules are used for interpretation and damages. If a member, director, or secretary does not comply, company can obtain declaratory or injunctive relief, or damages.
• Civil Penalty Provisions		Note: These are set out in s 1317E. Civil law standard applies.
	1317J(2)	Company may apply for damages where breached.
	1317(H)(1)	Court may order compensation (damages).
• General Law Breaches		

	<p>Injunction</p> <p>Compensation or damages</p> <p>Account of profits</p> <p>Rescission of contract</p> <p>Constructive trust</p>	<p>Stop or require the director to undertake a particular action.</p> <p>Where loss has occurred.</p> <p>Company does not suffer loss or damage. The director makes a profit and must pay it to the company. Regal (Hastings) v Gulliver: Directors profiting from an opportunity that belonged to the company; although it wasn't acted on by the company.</p> <p>Parties of a contract returned to the position they held before entering the contract.</p> <p>An order that the director holds the property on trust for the company. Director cannot sell property and must return it upon request.</p>
<ul style="list-style-type: none"> • Member's statutory derivative action 		<p>Note: the company is the victim of directors' behaviour. Remedies go to the company.</p>
	S 236(1)(a)(i)	Allows a member or former member to apply (also officer/former officer)
	S 237(2)	Criteria for granting leave to bring action:
	(a)	Probable that the company won't bring the proceedings or take responsibility; and
	(b)	The applicant is acting in good faith (honestly); and
	(c)	It is in the best interests of the company for leave to be granted; and
	(d)	There is a serious question to be tried. Does not involve the applicant proving the substantive issue; and
	(e) either	
	(i)	At least 14 days before making application, applicant gave notice to company of intention; or
	(ii)	It is appropriate to grant leave, even though (e)(i) is not satisfied.