

LAWS5108: Corporations Law Exam Notes

Steps Anna might to minimise or eliminate threat of her own liability:

- Duty of care, skill, diligence
- GFBI
- Ratification- take it before the GM with full/frank disclosure
 - o If ratified she might 'ought to be excused'
 - o Might not be able to ratify stat breach but can ratify GL breaches
- Relief- do all those things to protect herself so if she sought relief it is more likely to be granted
- Resigning- still under duties

Set aside can mean:

- 1) Equitable duties that allow for rescission (breaches of duties)
- 2) Setting aside/voiding for lack of authority (corp contracting)
- 3) Remedies that members can obtain
 - o Oppression can lead to setting aside
 - o Injunction= setting aside
 - o RPT via injunction- if there is a RPT and SH approval ([s208](#)) not obtained then there is breach of CA ie grounds for mandatory injunction to set aside.

TABLE OF CONTENTS

Table of Contents.....	1
1 Nature, Function, Origins & Regulation of Companies.....	8
1.1 What is a corporation/company?	8
1.2 Type of Companies.....	8

1

1.2.1	Proprietary companies.....	8
1.2.2	Public company.....	Error! Bookmark not defined.
2	Incorporation and its consequences.....	Error! Bookmark not defined.
2.1	Types and formation of corporations.....	Error! Bookmark not defined.
2.2	The separate legal entity doctrine.....	Error! Bookmark not defined.
2.2.1	Consequences of the separate legal entity doctrine.....	Error! Bookmark not defined.
2.2.2	Policy considerations and criticisms.....	Error! Bookmark not defined.
2.3	Lifting the corporate veil.....	Error! Bookmark not defined.
2.3.1	Lifting the veil at common law.....	Error! Bookmark not defined.
2.3.2	Lifting the veil under statute.....	Error! Bookmark not defined.
2.4	Corporate Groups.....	Error! Bookmark not defined.
2.4.1	Legal recognition of corporate groups.....	Error! Bookmark not defined.
2.4.2	What is a corporate group?.....	Error! Bookmark not defined.
2.4.3	Corporate personality in corporate groups.....	Error! Bookmark not defined.
2.4.4	Problems associated with corporate groups.....	Error! Bookmark not defined.
3	Formation and Establishment Issues.....	Error! Bookmark not defined.
3.1	Formation Options.....	Error! Bookmark not defined.
3.2	Registration process.....	Error! Bookmark not defined.
3.3	Types of companies.....	Error! Bookmark not defined.
3.4	Proprietary company.....	Error! Bookmark not defined.
3.4.1	Small Proprietary Companies.....	Error! Bookmark not defined.
3.4.2	Large Proprietary Companies.....	Error! Bookmark not defined.
3.4.3	A Sole Person Pty company.....	Error! Bookmark not defined.
3.5	Public companies.....	Error! Bookmark not defined.
3.6	Difference between public and proprietary.....	Error! Bookmark not defined.
3.7	Member Liability upon winding up.....	Error! Bookmark not defined.
3.7.1	Companies Limited by Guarantee.....	Error! Bookmark not defined.
3.7.2	Companies limited by shares.....	Error! Bookmark not defined.
3.7.3	Unlimited and no liability companies.....	Error! Bookmark not defined.
3.7.4	Changes in company type.....	Error! Bookmark not defined.
3.8	Establishment Issues.....	Error! Bookmark not defined.
3.9	Share Capital and Corporate Finance.....	Error! Bookmark not defined.
4	Internal Management: Internal Rules.....	Error! Bookmark not defined.
4.1	Nature of corporate governance rules:.....	Error! Bookmark not defined.
4.2	Sources of Corporate Government Rules:.....	Error! Bookmark not defined.
4.3	Replaceable Rules (RRs).....	Error! Bookmark not defined.
4.3.1	Sole Shareholders/Director Company.....	Error! Bookmark not defined.
4.3.2	Firm Specific Rules.....	Error! Bookmark not defined.
4.4	Mandatory Rules (that cannot be replaced).....	Error! Bookmark not defined.

4.5	Corporate Constitution	Error! Bookmark not defined.
4.5.1	Requirements for certain company types.....	Error! Bookmark not defined.
4.5.2	Adopting a constitution	Error! Bookmark not defined.
4.6	The Constitution as a contract – contractual effect of CC and RR.....	Error! Bookmark not defined.
4.6.1	Interpretation of the Statutory Contract	Error! Bookmark not defined.
4.6.2	Enforcement of statutory contract	Error! Bookmark not defined.
4.6.3	Distinctive Features of the Statutory Contract	Error! Bookmark not defined.
4.7	Alteration of the Constitution:.....	Error! Bookmark not defined.
4.7.1	General method of alteration CC and RRs	Error! Bookmark not defined.
4.7.2	Limitations on alteration.....	Error! Bookmark not defined.
4.7.3	How to impose restrictions on alteration?	Error! Bookmark not defined.
4.8	Objects Clauses, Limitations on Powers and Ultra Vires:	Error! Bookmark not defined.
5	Internal Management: The Board and the General Meeting	8
5.1	The Board of Directors	9
5.1.1	Who is a director?	9
5.1.2	Others involved in running a company	Error! Bookmark not defined.
5.1.3	Board meetings	Error! Bookmark not defined.
5.1.4	Interests and the recording of business.....	Error! Bookmark not defined.
5.1.5	Removal and Appointment of Directors	Error! Bookmark not defined.
5.1.6	4 methods of ceasing to be a director	Error! Bookmark not defined.
5.2	The Division of Powers between the Board and the GM.....	Error! Bookmark not defined.
5.2.1	Powers and duties conferred on the General Meeting	Error! Bookmark not defined.
5.2.2	Conferral of management powers on the Board	Error! Bookmark not defined.
5.2.3	Residual control in the GM	Error! Bookmark not defined.
5.3	Members	Error! Bookmark not defined.
5.3.1	Members meetings	Error! Bookmark not defined.
5.3.2	Who must have an AGM?	Error! Bookmark not defined.
5.3.3	Convening a meeting:	Error! Bookmark not defined.
5.3.4	Notice	Error! Bookmark not defined.
5.3.5	Member’s Resolutions	Error! Bookmark not defined.
5.3.6	Conduct of the meeting	Error! Bookmark not defined.
5.3.7	Procedural Irregularities:	Error! Bookmark not defined.
6	Directors Duties	10
6.1	Answer Structure	10
6.1.1	STEP 1: Do the Duties Apply to the Person in Question	10
6.1.2	STEP 2: What is the relevant conduct?	11
6.1.3	STEP 3: What is the relevANT DUTY?	11
6.1.4	STEP 4: was conduct Ratified/ RELIEF?	Error! Bookmark not defined.
6.1.5	STEP 5: Remedies?	Error! Bookmark not defined.

7	Duty of Care, Skill and Diligence	12
7.1	Step 1- Explain the Duty.....	12
7.2	STEP 2: What is the Standard of Care Expected?.....	12
7.2.1	Standard of Care Required.....	12
7.2.2	Standard of Skill	Error! Bookmark not defined.
7.2.3	Standard of Diligence	Error! Bookmark not defined.
7.2.4	Standard of Delegation	Error! Bookmark not defined.
7.2.5	Standard of Reliance Required.....	Error! Bookmark not defined.
7.3	STEP 3: Does the BJR Apply?	Error! Bookmark not defined.
7.3.1	Question 1 – Is it a business judgement, or failure to act?.....	Error! Bookmark not defined.
7.3.2	Question 2 – Does the business judgement meet the following criteria?	Error! Bookmark not defined.
7.4	STEP 4: Conclude with remedies.....	Error! Bookmark not defined.
7.5	Cases	Error! Bookmark not defined.
8	Duties of Good Faith and Loyalty	Error! Bookmark not defined.
8.1	GOOD FAITH BEST INTERESTS (S181(1)(A)).....	Error! Bookmark not defined.
8.1.1	step 1. explain the provision	Error! Bookmark not defined.
8.1.2	STEP 2. Was the Director acting in Good Faith?	Error! Bookmark not defined.
8.1.3	Step 3. Were these actions in the Best Interests of the Company?	Error! Bookmark not defined.
8.1.4	step 4- were the directions involved in the contravention?.....	Error! Bookmark not defined.
8.1.5	Step 5- conclusion	Error! Bookmark not defined.
8.2	Proper Purposes (s181(1)(b))	Error! Bookmark not defined.
8.2.1	step 1- explain the provision.....	Error! Bookmark not defined.
8.2.2	Step 2- WHAT IS THE PURPOSE FOR WHICH THE POWER MAY OR MAY NOT BE EXERCISED (LEGAL TEST)?	Error! Bookmark not defined.
8.2.3	step 3- WHAT IS THE PURPOSE FOR WHICH THE POWER IS ACTUALLY EXERCISED (FACTUAL TEST)?	Error! Bookmark not defined.
8.2.4	Step 4- Mixed Purposes?.....	Error! Bookmark not defined.
8.2.5	Step 5- Conclude- whether it is a permissible purpose	Error! Bookmark not defined.
8.2.6	Examples of Proper and Improper Purposes	Error! Bookmark not defined.
8.2.7	Cases	Error! Bookmark not defined.
8.3	Conflicts Rule.....	Error! Bookmark not defined.
8.3.1	STEP 1 – WHAT IS THE CONFLICT RULE?	Error! Bookmark not defined.
8.3.2	STEP 2 – WHAT ARE THE RELEVANT INTERESTS?.....	Error! Bookmark not defined.
8.3.3	Step 3- Apply on the facts	Error! Bookmark not defined.
8.3.4	STEP 4 – HAS THE DIRECTOR DISCLOSED THIS CONFLICT	Error! Bookmark not defined.
8.3.5	Step 6 - HAS THERE BEEN AUTHORISATION OF RATIFICATION OF THE CONFLICT?	Error! Bookmark not defined.
8.3.6	STEP 7 – CONSEQUENCES	Error! Bookmark not defined.
8.3.7	EXAMPLES	Error! Bookmark not defined.

8.4	The Profit Rule (GL)	Error! Bookmark not defined.
8.4.1	STEP 1 – WHAT IS THE PROFIT RULE?	Error! Bookmark not defined.
8.4.2	Step 2- Did X make/retain a profit?	Error! Bookmark not defined.
8.4.3	Step 3 - HAS THERE BEEN AUTHORISATION OF RATIFICATION OF THE CONFLICT?	Error! Bookmark not defined.
8.4.4	Step 4- conclude.....	Error! Bookmark not defined.
8.5	Improper Use of Position (s182)	Error! Bookmark not defined.
8.5.1	Step 1- explain duty	Error! Bookmark not defined.
8.5.2	Step 2. Was X a director/officer/employee at the relevant time?	Error! Bookmark not defined.
8.5.3	Step 3. Were they making improper use of their position?	Error! Bookmark not defined.
8.5.4	Step 4. Was it to gain an advantage for themselves or 3P OR cause a detriment?..	Error! Bookmark not defined.
8.5.5	Step 5: Conclude	Error! Bookmark not defined.
8.6	Improper Use Information (s183)	Error! Bookmark not defined.
8.6.1	Step 1- explain duty	Error! Bookmark not defined.
8.6.2	Step 2. Was X a director/officer/employee at the relevant time?	Error! Bookmark not defined.
8.6.3	Step 3. Were they making improper use of info?	Error! Bookmark not defined.
8.6.4	Step 4. Was it to gain an advantage for themselves or 3P OR cause a detriment?..	Error! Bookmark not defined.
8.6.5	Step 5: Conclude	Error! Bookmark not defined.
8.6.6	Examples	Error! Bookmark not defined.
8.7	Related Party Transactions	Error! Bookmark not defined.
8.7.1	Step 1- explain provision.....	Error! Bookmark not defined.
8.7.2	Step 2 - Is it a public company?.....	Error! Bookmark not defined.
8.7.3	Step 3- Is there a financial benefit?	Error! Bookmark not defined.
8.7.4	step 5- THE BENEFIT TO A RELATED PARTY?.....	Error! Bookmark not defined.
8.7.5	step 6- Is there an exception?.....	Error! Bookmark not defined.
8.7.6	Step 7- If exception doesn't apply, HAS MEMBER APPROVAL BEEN SATISFIED?	Error! Bookmark not defined.
8.7.7	STEP 8 - WERE THE DIRECTOR INVOLVED IN THE CONTRAVENTION?.....	Error! Bookmark not defined.
8.7.8	Step 9- Consequences of Breach.....	Error! Bookmark not defined.
9	Members Remedies	Error! Bookmark not defined.
9.1	Introduction to members' remedies.....	Error! Bookmark not defined.
9.2	1) statutory derivative action.....	Error! Bookmark not defined.
9.2.1	Step 1- Explain the remedy	Error! Bookmark not defined.
9.2.2	Step 2 – Identify the wrongful conduct	Error! Bookmark not defined.
9.2.3	Step 3- standing	Error! Bookmark not defined.
9.2.4	Step 4- Does the applicant meet the criteria for leave (s237(2))	Error! Bookmark not defined.
9.2.5	Step 5- Has there been ratification of the relevant conduct? (s239)	Error! Bookmark not defined.
9.2.6	Step 6- What powers does the court have? (remedies)	Error! Bookmark not defined.

9.2.7	Step 7- Conclusion.....	Error! Bookmark not defined.
9.3	2) Personal Actions	Error! Bookmark not defined.
9.3.1	Step 1- Explain the remedy	Error! Bookmark not defined.
9.3.2	Step 2 – what personal right is being infringed?	Error! Bookmark not defined.
9.3.3	Step 3- Process for enforcing personal rights	Error! Bookmark not defined.
9.3.4	Distinguishing personal and derivative actions	Error! Bookmark not defined.
9.4	Oppression	Error! Bookmark not defined.
9.4.1	Step 1. Standing? (s234).....	Error! Bookmark not defined.
9.4.2	Step 2. What is the conduct that could enliven the oppression remedy?	Error! Bookmark not defined.
9.4.3	Step 3: Grounds (s232).....	Error! Bookmark not defined.
9.4.4	Step 4- Orders (s233)	Error! Bookmark not defined.
9.5	4) Winding up.....	Error! Bookmark not defined.
9.5.1	Step 1: Describe conduct/remedy	Error! Bookmark not defined.
9.5.2	Step 2. Standing (s462)	Error! Bookmark not defined.
9.5.3	Step 3. Grounds for compulsory winding up – s461 (1).....	Error! Bookmark not defined.
9.5.4	Step 4. Should the Court exercise its discretion?	Error! Bookmark not defined.
9.6	5) Injunction s1324	Error! Bookmark not defined.
9.6.1	Step 1. grounds - Has there been a contravention of CA?.....	Error! Bookmark not defined.
9.6.2	Step 2. Standing?	Error! Bookmark not defined.
9.6.3	Step 3: Was conduct ratified?.....	Error! Bookmark not defined.
9.6.4	Step 4. Consider factors in court’s discretion to grant injunction/remedy.....	Error! Bookmark not defined.
9.7	6) Equitable constraints on alterations to the constitution.....	Error! Bookmark not defined.
9.7.1	Equitable Constraints on the Power of Alteration - Pre-Gambotto.....	Error! Bookmark not defined.
9.7.2	Equitable Constraints on the Power of Alteration - Gambotto	Error! Bookmark not defined.
10	Ratification and Relief	Error! Bookmark not defined.
10.1	Ratification	Error! Bookmark not defined.
10.1.1	Step 1: What is ratification?.....	Error! Bookmark not defined.
10.1.2	Step 2: Is the breach ratifiable?	Error! Bookmark not defined.
10.1.3	Step 3- Have all the requirements for rat been met?.....	Error! Bookmark not defined.
10.1.4	Step 4: Do any other equitable limitations apply?	Error! Bookmark not defined.
10.1.5	Step 5: Effect of ratification	Error! Bookmark not defined.
10.2	Relief by the Court - ss1317S & 1318.....	Error! Bookmark not defined.
10.2.1	Step 1: What is relief?	Error! Bookmark not defined.
10.2.2	Step 2: Identify the duty in breach	Error! Bookmark not defined.
10.2.3	Step 3 (optional): Does s1318 apply?	Error! Bookmark not defined.
10.2.4	Step 4. Did the directions act honestly?	Error! Bookmark not defined.
10.2.5	Step 5: Ought fairly to be excused	Error! Bookmark not defined.
10.2.6	Step 6. Should they be relieved in whole or in part?.....	Error! Bookmark not defined.
10.2.7	Step 7: Effect of ratification	Error! Bookmark not defined.

10.3	Restrictions on Indemnity and Insurance	Error! Bookmark not defined.
11	Corporate Contracting	Error! Bookmark not defined.
11.1	Step 1: Introduction	Error! Bookmark not defined.
11.2	Step 2- Entering into contracts directly	Error! Bookmark not defined.
11.2.1	Directly without a seal	Error! Bookmark not defined.
11.2.2	Directly with seal.....	Error! Bookmark not defined.
11.2.3	Deed	Error! Bookmark not defined.
11.3	Step 3- Are there any issues with the authority of the Individual	Error! Bookmark not defined.
11.4	Step 4- Do any of the Statutory Assumptions apply?	Error! Bookmark not defined.
11.4.1	Step A- Must be a dealing	Error! Bookmark not defined.
11.4.2	STEP b- WHICH ASSUMPTIONS?	Error! Bookmark not defined.
11.4.3	Step C- Limitations on use of the statutory assumptions: 128(4) – knew or suspected	Error! Bookmark not defined.
	not defined.	
11.5	Step 5- Does Indoor Management Rule Apply?.....	Error! Bookmark not defined.
11.5.1	Exceptions	Error! Bookmark not defined.
11.6	Step 6: Executed by agent.....	Error! Bookmark not defined.
11.6.1	First, identify problems on the facts	Error! Bookmark not defined.
11.6.2	Actual Authority?	Error! Bookmark not defined.
11.6.3	Apparent authority	Error! Bookmark not defined.
11.7	Go to step 5 IMR	Error! Bookmark not defined.
11.8	Go to step 4 Stat Assumptions.....	Error! Bookmark not defined.

1 NATURE, FUNCTION, ORIGINS & REGULATION OF COMPANIES

1.1 WHAT IS A CORPORATION/COMPANY?

- A company is an artificial person that exists by virtue of the law.
- The company is effectively a legal device where this fictional legal entity acquires the legal rights, powers and liabilities of a natural person.
 - o A company can enter into contracts, own property, sue and be sued.
 - o If the company breaches that contract, it is not the people who work in the company or who own the company who are liable, it is the company as a separate legal entity that is liable, and so it is the company that is sued, and the company who exclusively has that liability.
- There are various stakeholders in a company, probably most significantly the owners or shareholders of a company, the company directors and the people who work in a company.
- **s9**: corporation has the meaning given by section **57A**
 - o **s 57A(1)** [definition]: Subject to this section, in this Act, “corporation” includes:
 - a company; and
 - any body corporate (whether incorporated in this jurisdiction or elsewhere); and
 - any unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or an office holder of the body duly appointed for that purpose.
- **s57A(2)** [Exception to definition] Neither of the following is a corporation:
 - o an exempt public authority
 - o a corporation sole.

1.2 TYPE OF COMPANIES

- **s 112**
- **Classification by liability of members**
 - o Companies limited by shares
 - o Companies limited by guarantee
 - o Unlimited companies
 - o No liability companies- mining co, must be public
 - o Proprietary Companies
 - o Public Companies

1.2.1 PROPRIETARY COMPANIES

- Proprietary co must satisfy the following 5 requirements:
 - o 1) Must have share capital (**s 112(1)**)

5 INTERNAL MANAGEMENT: THE BOARD AND THE GENERAL MEETING

- There are 2 organs involved in company management:
 - o The board of directors; (**s201**)
 - o The general meeting of members (**s231**)

5.1 THE BOARD OF DIRECTORS

5.1.1 WHO IS A DIRECTOR?

- Definition of 'director' – s9

s 9 director of a company or other body means:

(a) a person who:

(i) is **appointed** to the position of a director; or

(ii) is appointed to the position of an **alternate director** and is acting in that capacity;

regardless of the name that is given to their position; and

(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; or (*ie de facto director*)

(ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

(*ie shadow director*)

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 of the company or body.

- **Directors** – a person who is described in the CA or constitution who is described as validly appointed – ie appointed by the CC provision and is elected
- **Alternate directors** – s201K
 - most constitutions and RRs allow directors, for some reason, who cannot turn up to meetings, to appoint an alternate to go for them (ie a proxy) HOWEVER they are not an agent – when the alternate is there, they have the powers of the director
 - Typically- when director is going to be overseas or on leave
- **de facto directors**
 - Person who was director and is no longer but continue to act as such eg their appointed terminated
 - These are people who are not exactly ever properly appointed as directors, instead they turn up as if they are directors. Still liable as if they were the director.
 - Eg **Austin** case- person consistently exercise top management function- even though not appointing they go to all board meetings and exercise high discretion
 - **Acts will still generally bind the company** (*Corporate Affairs Commission v Drysdale* (1978))
- **shadow directors** – s9
 - **Person not appointed but their wishes and instructions are customarily followed by other directors**
 - Eg if director of sub sib are instructed to follow wishes of parent co then the parent co could be found to be a shadow director.
 - Similarly often arises when you have director of parent co who gives instructions to the board of the sub sid and the parent co director could be found to be a director of the sub sid
 - A body corporate ie another company can be found to be a shadow director (*Standard v Antico*)
- Other (non-statutory) director terminology
 - **Managing Director (CEO):**
 - FT employee of company, most senior executive, they run the business.
 - **s 201J:** Director appointed to office of MD by other directors
 - **s 198C:** Directors can confer on MD any power that directors can exercise (directors can also revoke or vary powers of MD (S. 198C (2))
 - MD manages daily operations of the business
 - **Executive Directors**
 - Full time employee

- Involved in senior management of co under leadership of CEO
- Main role- daily management of co's business
- ED have dual relationship with the company- they are directors and they are also employees
- **Non-executive Directors**
 - Not involved in day to day ops of co, not employees
 - Participate in board business and as such has a monitoring role but not close to day to day running of co
 - Non-EDs have important role to play- they are more independent and removed from company- easier to take step back, criticize, push for change and make tough decisions
- **CFO**
 - Resp for managing financial position of company- financial risk, planning, keeping records
 - Often appointed director of company
- **COO**
 - Oversees business of company- 2nd in line to CEO and usually report to CEO and the board
 - May also be appointed as director or they may not be
- **Chairperson: s248E**

'The chairman is responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, for formulating the policy of the board and promoting the position of the company.'

– Rogers CJ, *AWA Ltd v Daniels* (1992) 10 ACLC 933; see also *ASIC v Rich* [2003] NSWSC 85.

6 DIRECTORS DUTIES

6.1 ANSWER STRUCTURE

6.1.1 STEP 1: DO THE DUTIES APPLY TO THE PERSON IN QUESTION

- **Common Law**
 - Directors (*Boardman*)
 - Senior Executives/Managers (*Green v Bestobell*) - by virtue of fid relationship
- **Statutory Duties**
 - Directors **s9**
 - **(a)(i) & (ii)** - Includes persons appointed as a director/alternate director (**s201K**) or is acting in that capacity
 - **(b)** - Includes people not formally appointed who are:
 - **(i)** - De facto directors: act in the position of director
 - *Mistmorn v Yasseen* – self-described consultant who undertook tasks typically expected of a director.
 - **(ii)** - Shadow directors: the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes
 - Where is the locus of effective decision making? Do the directors act without due consideration? (*ASC v AS Nominees*)
 - Not necessary to show they actually gave the instruction, but must show that if 3rd party played a tune, directors danced to it (*ACS v AS Nominees*)
 - A company can be a shadow director (*Standard Chartered Bank v Antico*)
 - Officers **s9** – includes:
 - **(a)** – Directors and Secretaries

- **(b)** – A person who:
 - **(i)** participates in decision-making that affects the whole/substantial part of the business of the company
 - **(ii)** Has the capacity to affect the company's financial standing (i.e. CFO)
- 3P liability
 - You can be involved in breach of **s181(1)** (good faith); **182** (use of position); **183** (use of info) and **209(2/3)** (related party trans)
 - Involvement defined in **s79**
 - Aiding, abetting, counselling or procuring contravention
 - Knowledge of essential matters making up the contravention is necessary (**Giorginanni**)
 - Constructive knowledge is insufficient (**Maxwell**)
 - Don't need to know that the matters amounted to a contravention (**Yorke v Lucas**)
 - Inducing by threat/promise/otherwise
 - By act or omission, knowingly concerned or party to

6.1.2 STEP 2: WHAT IS THE RELEVANT CONDUCT?

- Brainstorm conduct on the facts that could constitute a breach of director's duties

6.1.3 STEP 3: WHAT IS THE RELEVANT DUTY?

7 DUTY OF CARE, SKILL AND DILIGENCE

7.1 STEP 1- EXPLAIN THE DUTY

- **Dir/officer** must exercise powers/duties w standard of care and diligence we would expect of a reasonable person, in the position of the officer/dir, in the particular company
 - o Arises from GL (in contract, tort, poss FD) and **s180(1)**.
- **s180(1)** A **director** or **officer** must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - o **a)** Were a director or officer of a corporation in the corporation's circumstances; and
 - o **b)** Occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

7.2 STEP 2: WHAT IS THE STANDARD OF CARE EXPECTED?

- Same standard applies under CA and GL (**Vines**)
- **A shifting objective test** (**Anderson; Daniels**)
 - o **As a minimum** put themselves in position where they can guide/monitor the co's activities and stay fully informed of financials (**AWA v Daniels**)
 - o **Baseline increased** if dir/officer has special/unique skill (**Rich**)
- **Consider:**
 - o **Care**- depends on the circumstances of the company and office/position within the company
 - o **Skill**- are they a lawyer, accountant? → increases base minimum standard
 - o **Diligence** – eg regularly attending board meetings, stayed informed of company's activities, if not what SHOULD they have done
 - o **Reliance** – Was reliance reasonable in the circumstances?
 - o **Delegation** – Was delegation reasonable in the circumstances?

7.2.1 STANDARD OF CARE REQUIRED

- **1) Depends on the circumstances of the co** (**Maxwell; AWA v Daniels**)
 - o 1) Type and size of co (private, family owned, large public co)
 - o 2) Nature of co's business, provisions in CC
 - o 3) Is the company listed? (more reliance on management, public policy)
 - o 4) Competence of management? (**MacDonald**)
- **2) Depends on the office/position within the co (what is customarily expected of that position?)** (**Shafron**)
 - o **Director**
 - Dirs are also employees- expected to know more due to involvement
 - A director/officer with expertise in the area owes a higher standard of care (**ASIC v Rich**)
 - Is co being taken in a **new direction**? (**PBS** – all dirs should inquire before novel transaction)
 - o **Non-executive directors**
 - Cannot fall below irreducible core to read/understand financials (**Daniels v Anderson**)
 - May have a lower standard than executive directors (**ASIC v Rich**)
 - o **Chairperson**
 - Has more than ceremonial duties (**ASIC v Rich** – although perhaps only applicable to public companies and chairpersons with extensive financial experience)
 - Must take steps to ensure material matters/documents are brought to board's attention
 - o **MD**

- Higher standard imposed (*PBS v Wheeler*)
- Expected to make inquiries/provide info to other directors in face of potential harm
- Expected to know disclosure obligations of public companies (*ASIC v MacDonald*)
- **Company Secretary**
 - Usually solely related to administrative tasks (but may have legal experience)
- **Financial Officer**
 - Under a duty to take care to prevent financial mishap (*Rich, Safron*)