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Director/ Officer

S 9: Definition of a director

A director 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; or

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

Case Law: Standard Chartered Bank v Antico

- A company can be a shadow director of another company

Case Law: Buzzle Operations Pty Ltd v Apple Computer Pty Ltd

- In some circumstances it is possible for one person to be both a shadow director and de facto director
- There must be a causal connection between the instructions or the wish of the shadow director and the directors acting on it. It is not sufficient if the act that was specified in the instruction is something that the directors would do irrespective of the instruction
- For the directors to be 'accustomed to the act' in accordance with the instructions or wishes requires 'habitual compliance over a period of time'
- The directors must be collectively accustomed to act on the shadow director's instructions or wishes and it is sufficient if a 'governing majority' of the board is so accustomed to the act

S9: Definition of an officer

An Officer of a corporation means:

- (a) A director or secretary of the corporation; or
- (b) A person:
 - (i) Who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) Who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) In accordance with whose instructions or wishes the directors of the corporations are accustomed to act (excluding the advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) A receiver, or receiver and a manager, of property of the corporation; or

An administration of the corporation.

Care and diligence

6-element test

***Apply this test to each and every one of the directors**

1. Introduction of the law
2. Is the person a director?
3. What did they do? What are the facts? and should they have done something else? Were there any special skills? Standard of care
4. Did the director or officer rely on anyone? S189
5. Did the directors delegate?
6. Business Judgement rule

Introduction

If debating whether the decision could be made by a director: mention that it is a decision reserved for the board if it is.

RR S198A(1): Management of business

The business of a company is to be managed by or under the direction of the directors

RR s198A(2): Exercise of power

The directors may exercise all the power of the company except any other power that this Act or the company's constitution (if any) requires the company to exercise in general meeting

S180(1): Care and diligence- directors and other officers

A director is expected to discharge their powers with a degree of care and diligence that a reasonable person would exercise if they:

- (a) Were in the position of the director; and
- (b) Occupied the office and had the same responsibilities

Is the person a director/ officer?

*Refer to Director/ Officer page

What are the facts?

Case Law: Daniels v AWA Ltd

Every director must:

- Obtain a basic understanding of their company's business
- Keep informed about and monitor the company's activities
- Regularly attend board meetings
- Monitor the company's financial position

Case Law: ASIC v Vines

- Directors with special skills are held to the standard of a person professing to have those skills.
- The more the director is involved, the more is expected of the director
- Executive directors greater involvement in the business leads to a greater expectation of knowledge, focus and awareness

What did they do and what would a reasonable person do in their position?

S180(1): Care and diligence- directors and other officers

A director is expected to discharge their powers with a degree of care and diligence that a reasonable person would exercise if they:

- (a) Were in the position of the director; and
- (b) Occupied the office and had the same responsibilities

Did the directors rely on anyone?

S189: Reliance on information or advice provided by others

If the reliance of the director was made in

- (b)(i) good faith; and
- (b)(ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation

ASIC v Healey: Reliance defence not effective. Directors have to be able to make their own independent assessment, not allowed to rely on other people on basic accounting knowledge.

The reliance or advice is taken to be reasonable unless the contrary is provided

Did the directors delegate?

S198D: Directors may delegate any of their powers to any person, unless constitution restricts delegation. If the delegate is negligent, the director will be liable unless requirements of **s190** is satisfied

S190(1): If the directors delegate a power under s198D, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.

S190(2): Director not responsible in certain circumstances

The director is not responsible under subsection (1) if:

- (a) the director believed on reasonable grounds that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Act and the company's constitution; and
- (b) the directors believed:
 - i) on reasonable grounds; and
 - ii) in good faith; and
 - iii) after making proper inquiry if the circumstances indicated the need for inquiry;

that the delegate was reliable and competent in relation to the power delegated

Business Judgement rule

***Only applicable where the director has met the requirements of s180(1).**

***Use s180(3) before S180(2)**

s180(3): Business judgement means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation

***Establish if there is a business action**

S180(2): A director or other officer of a corporation who makes the business judgement is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgement if they:

- (a) Make the judgement in good faith and proper purpose; and