

# **CORPORATIONS LAW**

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# **CORPORATIONS LAW HYPO NOTES**

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## **Section 181. Duty of good faith/proper purpose: Topic IV 5**

*Duty to act in good faith in the best interests of the corporation: section 181(1)(a)* 5

*Duty to act for the proper purpose: section 181(1)(b)* 7

## **Section 180. Duty of care: Topic V 9**

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# Introduction: Who are the actors?

s 180: directors and officers owe duties (restatement of general law fiduciaries)

## Intro

### Primary actors

#### 1. Directors (s 9)

Duties: ss 180-3

Avoidance of conflict: ss 191, 194, 195

Duty to prevent insolvent trading: 588G

#### 2. Officers (s 9)

Duties: ss 180-3

#### 3. Employees (unlike general law)

Duties: ss 182-3

### Secondary actors

#### Persons involved (s 79)

See sections 181(2), 182(2), 183(2).

Ch 2E: financial assistance

NOTE that there is no 180(2) and no mention of 588G BEYOND a director.

#### **This has all been complicated by 1317E(4)(b): it extends to involvement.**

This is curious in the context of 180: competence required of a director! So someone encouraging that person is taken to be incompetent? Section 1317E(4) came through following the royal commission. Perhaps an unintended effect...

## QUESTION ONE: are we dealing with a director?

### Three categories

1. **s 9(definition of 'director')(a):** Someone duly appointed (by resolution duly made at valid meeting w/ quorum, etc). NOTE that this includes alternate directors: someone stepping in a duly-appointed directors place during absence [problem: poor remuneration + same risk!]
2. **s 9(definition of 'director')(b)(i):** De facto directors. Those acting even before/without being duly appointed. These are consensual arrangements.
3. **s 9(definition of 'director')(b)(ii):** Those whose wishes the company or directors are accustomed to follow: *Buzzle v Apple*. This requires considerable influence over a company!
  - (a) Must be influence over: all of the directors / a majority of them...
  - (b) Must be a pattern of behaviour: 'habitual compliance'
  - (c) Must show that the actions caused the directors 'managing. Will not be satisfied if the directors have free choice! Domination of the will of the directors...



## QUESTION TWO: are we dealing with an officer?

**Section 9(definition of 'officer')(a) includes directors.**

**Section 9(definition of 'officer')(b) captures the key decision makers (often the case where the directors delegate).**

- s 9(definition of 'officer')(b)(i):** any person who makes or participates in making a substantial part of the company's decisions, you are an officer. What does participate in a decision mean? Narrow interpretation decisively rejected: *Shafron*.
- s 9(definition of 'officer')(b)(ii):** a person with the capacity to significantly affect a company's financial status. Could refer only to the ability to do so! *ASIC v Adler* read down this provision. It applies only to person who have this capacity via their involvement in managing the business. Capacity comes via the role you play in managing the company! Probably adds nothing much to (b)(i). Capacity COULD be interpreted as the potential ability, eg, lenders, etc. But this was read down in *ASIC v Adler*.
- s 9(definition of 'officer')(b)(iii):** same terms of (b)(ii) for definition of 'director', see *Buzzle*.

## QUESTION THREE: are we dealing with a 'person involved'

CORPORATIONS ACT 2001 - SECT 79

### Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

- has aided, abetted, counselled or procured the contravention; or
- has induced, whether by threats or promises or otherwise, the contravention; or
- has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- has conspired with others to effect the contravention.

Liability for anyone involved in the contravention of a civil penalty provision: s 1317E. Also liability for a person involved in a company's contravention of Chap 2E (s 209(2)).