1. Director's Duties - Structure

Q1. Is X a director?

Directors [s 9]

- Appointed or alternate director; or
- De facto; or Shadow director.

Officers [s 9]

- A director or secretary; or
- Somebody who makes decisions that affect the whole or substantial part of the business / has the capacity to significantly affect the entity's financial standing / on whose instructions the board is accustomed to act.

Q2. Has X breached or will X breach a duty?

General Law	*Corporations Act 2001* (Cth)	Civil	Criminal	Statutory duty owed by:
2.1.1. Duty to act with reasonable care and diligence.	**2.1.2.** Duty to act with reasonable care and diligence [CPP]	s 180(1)	No	Directors & Other Officers
	2.1.3. Duty to prevent insolvent trading [CPP]	s 588G	s 558G(3), (3A), (3B)	Directors & Holding Company
2.2.1. Duty to act in good faith in the best interests of the company: s181(1)(a) **2.2.2.** Duty to exercise powers for proper purposes: s181(1)(b)	**2.2.3.** Duty to act in good faith in the best interests of the corporation and for a proper purpose [CPP].	s 181	No	Directors & Other Officers
2.3.1. Duty to disclose self-interested transactions **2.3.4** Duty to avoid conflicts of interest	**2.3.2.** Statutory duty of disclosure	s 191	s 191(1A)	ONLY Directors
	2.3.3. Voting On Self-Interested Transactions	s 194 - 195	s 195(1B)	ONLY Directors
	2.3.5. Related party transactions [CPP]	Ch 2E	s 209(3)	Complicated – see notes.
	2.3.6. Improper use of position [CPP]	s 182	s 184(1) & (2)	Directors, Secretaries, Officers & Employees
	2.3.7. Improper use of information [CPP]	s 183	s 184(1) & (3)	Directors, Secretaries, Officers & Employees

Q3. Does X have a defence?

- Reliance on information provided by others [s 189]
- Delegation of authority [s 190]
- Ratification
- Acting honestly and fairly: ought to be excused [s 1317/ 1318]
- Business Judgment Rule: statutory business judgement rule [s 180(2)] applies for duty of care and common law business judgement applies rule for all other duties: *Harlowe's Nominees*

Q1:
Is X a director OR officer?

Q1: Is X a director/officer?

The first question that must be decided with regard to any liability on the part of X is whether he could be considered as a director and/or officer of the corporation, which could imply a fiduciary or statutory duty upon him.

Statutory definitions

s9 – Director means:

(a) a person who:

(i) is appointed to the position of **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 may be a director if**:

(i) **they act in the position of a director** (de facto director); **or**

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

Subparagraph **(b)(iv) does not apply merely because the directors act on advice** given by a person in the **proper performance of functions** attaching to the **person's professional capacity**, or the person's business relationship with the directors or the company or body.

s9 – Officer 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;

(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 corporation are accustomed to act** (**excluding** 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 manager**, of the property of the corporation; or

d) an **administrator** of the corporation; or

e) an administrator of a deed of company arrangement executed by the corporation; or

f) a **liquidator** of the corporation; or

g) a **trustee** or other person administering a compromise or arrangement made between the corporation and someone else.

Restrictions on being a Director

- **Section 201B (Who can be a Director)**: Only an individual who is at least 18 years may be appointed as a director of a company: **s201B(1).**
    - Company may be held to be a Director in some cases: see below *Standard Chartered Bank v Antico.*
- **Section 206N (Automatic Disqualification):**
    - Certain criminal offences: **s206N(1)**
    - Undischarged Bankrupt: **s206N(3)**
- Court Power of Disqualification: **Sections 206C-F**
- If disqualified from being a director, can only be appointed as a director with ASIC's permission (s206F) or with leave granted by Court (s206G).

If the question does not expressly say that X is a director

In this case, X is not expressly regarded as such and therefore, ASIC/claimant has the onus to prove that X is a director or an officer under s9 of the Corporations Act. To determine this, the common law works in addition to the statute to find the test to determine whether an individual could be considered a director/officer. Of particular relevance, are the established tests relating to…

(a) Shadow directors

s9(b)(ii): the directors of the company or body are **accustomed to act in accordance with the person's instructions or wishes** (shadow directors).

Finn J in ***Australian Securities Commission v AS Nominees Ltd*** (1995) - FCA: said

> *"The question the section (s 9) poses is: Where, for some or all purposes, is the locus of effective decision making?"*

& J Wells in ***Harris v S*** (1976) 2 ACLR 51 said **two requirements** must be proven:

1. *"Although the outside person calls the tune, it is the directors who dance in their capacity as directors",* i.e. it is his will, not the independent will of the board of directors, that determines their resolutions; and
2. *"The directors perform positive acts, not simply forbear to act or desist from acting."*

In *Harris v S*, the court found that, because the directors had not acted at all, the scheme manager of a scheme of arrangement could not be found to be a director.

- For a shadow director it is **not necessary that the influence or control be exercised over the entire field of a company's corporate activities**: ***Secretary of State for Trade and Industry v Deverell [2001] Ch 340.***

Cases on Shadow Directors

(1) Shadow director can be a corporation: *Standard Chartered Bank v Antico* (1995) - NSWSC

- **Facts:** Proceedings were commenced against Giant's directors under the predecessor to s588G (s556) for insolvent trading. Pioneer had a 42% shareholding in Giant and exercised a significant amount of control over its management.

- **Issue:** Could Pioneer be considered a shadow director of Giant?

- **Held:** Yes, Pioneer **WAS** a shadow director (although management control as a result of a large shareholding is generally not, in and of itself, sufficient to satisfy the section). The directors of Giant simply accepted the decisions effectively made by Pioneer. Pioneer used *financial control* as well as *management control*, which was enough to find it a director of Giant. Relevant considerations were as follows:

  (1) Pioneer was the **only significant shareholder** – 42%, whereas the next largest was 10% (effective control);

  (2) Giant followed Pioneer's requirements for **financial reporting**;

  (3) All **major strategic decisions** during the relevant period were effectively made by Pioneer; and

  (4) Several of **Pioneer's directors (3/11) on Giant's board of directors (3/8)** – Due to this situation, Pioneer told Antico, Quirk and Gardener what to do on Giant's Board. Giant's Board of Directors followed the advice and instructions of A, Q and G. Thus, Pioneer effectively instructing/advising Giant's Board of Directors.

(2) **The alleged director does not need to be involved in every, or even most, transactions undergone by the company. Strategic control, i.e. control when desired, is enough to prove a director under s9: *Australian Securities Commission v AS Nominees Ltd* (1995) - FCA**:

- **Facts:** Windsor founded a group of trustee companies of superannuation and unit trusts. The Australian Securities Commission (predecessor to ASIC) commenced proceedings to wind up three of those companies for extensive breaches of trust. Windsor didn't sit on the board of any of these companies, although exercised a significant amount of control over them. The boards were often asked to act partially to Windsor or act in ways that required the dereliction of their own and of their trust company's duties. In one instance, Windsor sacked the whole board of one company when they did not agree with his decision (notwithstanding his lack of power to do so) and none of the board questioned his power to do so.

- **Issue:** Was Windsor liable as a director of the companies as a shadow director? Could he rely on the 'advisor' protection of section 9?

- **Held:** Windsor **WAS** a shadow director. **Finn J –** In relation to section 9, *"The question the section poses is: Where, for some or all purposes, is the locus of effective decision making?* In this instance, Windsor was found to be a shadow director. Section 9 *"does not…require that there be directions or instructions embracing all matters involving the board… it only requires that, as and when the directors are directed or instructed, they are accustomed to act as the section requires"*.

(3) **Imposition of Commercial Conditions on a company that the Board has to follow does not make a person a Shadow Director or Officer of that company, nor does giving a person office space. The person's instructions/wishes must affect the Board's independent decision-making: *Buzzle Operations v Apple Computer [2011]***

- **Facts:** Buzzle, newly Est. Company, sold Apple products in Australia. This new company set up by merging six retailers that were formally separate companies with separate contracts with Apple. Several financial conditions placed on Buzzle in order for it to be granted a new contract to sell Apple products. After Buzzle set up, it collapsed within 3 months and went into liquidation. Following collapse, Liquidators wanted to sue Likidis (finance director of Apple) and Apple Australia Pty Ltd by arguing that they were either a director or officer of Buzzle.

- **Issue:** Were either Likidis or Apple a director or officer of Buzzle? If so, then Apple (and thus the liquidator) can recover the payments they made to Apple.

- **Held:** Neither Apple or Likidis were directors or officers of Buzzle. Although Likidis had been given temporary office space at Buzzle Head Quarters, Likidis was only trying to inform Buzzle Shareholders that Apple would only agree to transfer the contract if certain conditions were met. Thus, Court held that comparing this relationship and these conditions would be akin to arguing that every single bank/creditor/lender are to become officers or directors of a company by simply placing conditions on the company for a contractual agreement. **Key Fact:** Buzzle Directors always made their own independent judgements/decisions and were not following the habitual advice of Apple or Likidis – they were only acting in their own company's interest.

(b) De facto directors

s9(b)(i): they act in the position of a director (de facto director);

Madgwick J in ***DCT v Austin* (1998)** 28 ACSR 565: The person must act in a manner that is distinctive of a director: ***Holpitt v Swaab; Standard Chartered Bank v Antico***. It is **a question of degree** determined in the context of the operations and circumstance of the particular company. Relevant considerations include:

- The size of the company: In a larger company, as a matter of practical necessity, it is necessary to grant some people a large amount of discretion when dealing with important matters. Thus, such people are less likely to be considered directors in larger corporations.

- Fields of expertise: A **person with large responsibilities in a particular field of expertise (or gives advice that is acted upon), for which they were employed to specialise (were engaged in a business relationship for),** may be **less likely** to be considered a director than someone making decisions about company affairs generally. (Comments in brackets refer to case in ***ASC v AS Nominees Ltd***)

- Perception from outsiders**: If the individual holds himself out as a director of the company, or others commonly believe him to be a director, then he may be considered a de facto director.** Justie Madgwick qualified this by saying that this was not a necessary requirement.

Cases on de-facto directors:

(1) May be director if X continues to perform his/her role after termination of directorship: *Mistmorn Pty Ltd (in Liq) v Yasseen* (1996) 21 ACSR 173

- Where a person continues to act in the mistaken belief, shared by fellow directors, that he or she is a director after his or her appointment as director has terminated, the person will generally be held to be a director within the meaning of the statute:

(2) Person who attends all board meetings & whose opinion is factored into decision making may be a de facto director: *Austin v Spencer (1999):*

- *Person attended all board meetings* and was *crucial to the decision making process* and **WAS** considered a de facto director.

(3) De facto director where control of the "practical direction of the company" or "driving force": *Harris v S (1976)* 2 ACLR 51

- Where a person has *"the practical direction of the company"* and is its *"driving force",* a person will be considered a de facto director.

- **Facts:** The directors were succumbing completely to this person's will and never acted as directors in that capacity.

- **Held:** A scheme manager that completely controlled the board was **not considered a shadow director**, but **WAS** considered a **de facto** director. Note: The scheme manager would have satisfied the 'shadow director' requirement, but for the requirement that the directors perform positive acts (as opposed to omissions) at the bequest of their shadow.

(4) De facto director where person acting in a role and **performing functions one would reasonably expect to have been performed by a director of that company given its circumstances** (i.e. the company's commercial context, operations and governance structure). Additionally, person **reasonably held out to be a director by the company Board as performing functions with their acquiescence:** ***Grimaldi v Chameleon Mining NL (No. 2)***

- **Facts:** Mr Grimaldi, officially a "consultant" or adviser to Chameleon, was given "unconstrained authority" to negotiate the acquisition of mining interest (though not the authority to formally bind the company), prepare and settle the contents of a prospectus and ASX releases, find investors to subscribe funds under the prospectus, and exercise ultimate authority over the company's proposed ASX listing.

- **Issue:** In his negotiations on behalf of Chameleon, Mr Grimaldi received a secret commission. If he was held to be a director (and therefore a fiduciary to the company), receiving such a payment would be unlawful.

- **Held:** Whilst not appointed a director, Mr Grimaldi had been "doing the work of a director" as he was acting in a role and performing functions one would reasonably expect to have been performed by a director of that company given its circumstances. Roles and functions so performed by a director will **vary with the commercial context, operations and governance structure** of the company. Here, Grimaldi assumed or performed functions which only a de jure director or Board can properly perform and was thus reasonably held out to be a director by the Board of the company. Grimaldi was allowed to perform these functions with the acquiescence of at least 2 of the executive directors.

- **Also NB:** Grimaldi's attendance at Board meetings by invitation and did not appear to regard him as a director as such. A rigid distinction between a de facto and a shadow director cannot be maintained.

(c) If the question does not expressly say that X is an officer

ASIC v Adler (2002)

- **Facts:** Adler made or participated in making decisions *affecting the whole or a substantial part of the business of the subsidiary* and also had the *capacity to affect significantly* the subsidiary's financial standing.

- **Held:** He **WAS** considered to be an **"officer"** of a wholly owned subsidiary of a company where he was director.

Also see *Buzzle Operations Pty v Apple Computer [2011]* for discussion on Shadow Officer.

Further Notes:

Appointing Directors: section 201G (Replaceable Rule)
Directors are to be appointed by Shareholder elections at the company's AGM (s201G). However, in some cases, shareholders may be able to call special meetings for this purpose.

Removing Directors

A. Proprietary Companies (s203C: Removal of Directors by Members – Replaceable Rule)

A proprietary company may remove a director through an ordinary resolution (more than 50% of votes) of shareholders. Through a shareholders resolution, another director may be appointed.

B. <u>Public Companies (s203D: Removal of Directors by Members)</u>

A public company may by shareholder resolution remove a director from office despite anything in:

- the company's constitution: **s203D(1)(a)**
- an agreement between the company and the director: **s203D(1)(b)**
- an agreement between any or all members of the company and the director: **s203D(1)(c)**

If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution to remove the director does not take effect until a replacement to represent their interests has been appointed.

Notice of intention to move the resolution must be given to the company **at least 2 months before the meeting is to be held**. However, if the company calls a meeting after the notice of intention is given under this situation, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given: **s203D(2) CA.**

The **Director is entitled to put their case to members** by:

- Giving the company a written statement for circulation to members: **s203D(4)(a)**
- Speaking to the motion at the meeting (whether or not the director is a member of the company): **s203D(4)(b)**

The Director's statement does not have to be circulated to members if it is more than 1,000 words long or defamatory: **s203D(6).**

NB: Directors of public companies cannot be removed by other directors: **s203E CA.**

C. <u>Removing Executive Directors (s203F CA)</u>

A person ceases to be managing director if they cease to be a director: **s203F(1).**
The directors may revoke or vary an appointment of a managing director: **s203F(2).**

Potential problems with conflict between company constitution and employment contract. When drafting contracts for senior employees of the company who are also on the Board of the company, need to ensure that no conflict between the employment contract and company constitution. As there is usually a conflict with the employment contract and company constitution when removing directors, most ex directors get paid a set fee if they do leave.

<u>Importance of Independent (Non-Executive) Directors in Corporate Governance (listed companies)</u>

ASX Corporate Governance principles are *"soft laws"* – companies have a choice as to whether they follow these principles but if they do not, they must explain in the Annual Report to shareholders why the company is not following these Corporate Governance principles i.e. *"if not, why not?" approach*.

In determining the "independent" status of a director, the Board should consider whether the director:

1. Is a substantial shareholder of the company, or associated directly with a substantial SH
2. Is employed, or has previously been employed, in an executive capacity by the company or another group member, and at least 3 years have not passed since ceasing such employment and serving on the board.
3. Has been a material professional adviser or consultant to the company, or another group member, in the past 3 years.
4. Has been a material supplier or customer of the company, or other group member, in the past 3 years.
5. Has a material contractual relationship with the company, or another group member, other than as a director.

Thus, an Independent director must be able to act objectively without being swayed by their own financial interest. Independent Directors should comprise:

- Board majority
- Board committees
  - Audit
  - Nomination
  - Remuneration/compensation
  - Other situations

Gender Issues in Corporate Governance

ASX Corporate Governance Principles again promote an *"if not, why not"* approach, but only apply to listed companies. This is an example of a soft law impacted on by Liberal Feminist Theories (different to Radical + Social Feminist Theories).

Gender diversity:

- Measurable annual objectives to be disclosed in Annual Report
- Report on gender balance on board & in whole company

Director and Executive Remuneration (focus on listed companies)

A. Remuneration of Directors: section 202A (replaceable rule)

The directors of a company are to be paid the remuneration that the company determines by resolution: **s202A(1)**.

s202A(2): The company must also pay the directors' travelling and other expenses that they properly incur:

a. in attending directors' meetings or any meetings of committees of directors; and
b. in attending any general meetings of the company; and
c. in connection with the company's business

B. Executive Remuneration

- The remuneration of executives and senior managers is approved by Directors under their s198A CA power
- Public Listed Companies have Board Remuneration Committees: These committees are meant to have a majority of independent directors to manage the remuneration packages of the company's senior executives without bias or undue influence or interest.

C. Problems with Executive Remuneration

- Massive payments not based on company performance.
  - E.g. Paul Anthony, former CEO of AGL Energy Ltd: received a signing bonus, annual salary and termination payment of >$10m all in one year.
  - Average CEO Salary for publicly listed companies is $4.5m.
- Skewed Incentive Plans
  - Share Options: Board has generally set the 'strike price' of the shares too low, so executives can easily make a good profit with mediocre company performance
  - Bonuses based on share price: Issue of whether the company share price has increased due to the executive's performance (or due to other economic factors)
  - Manipulation of Inside Information: Executives delaying bad news until after they have sold their shares in the company – real temptation to engage in this activity as a lot of senior executive remuneration is based on the share price. This activity is generally illegal – Insider Trading
  - Termination payments & Non-Recourse Loans: Non-recourse loans are those loans given to senior managers and executives where the company does not demand the repayment of the loan. In effect, these loans are payments to senior executives.

D. Attempted solutions for Executive Remuneration Issues

- Disclosure requirements: Under **s300A CA**, Director's remuneration must be disclosed in the Annual Director's Report, along with an explanation of the Board's policies.
    - Levels of remuneration of each director and the five highest paid company executives
- Non-Binding Shareholder Votes: **s250R CA:** At a listed company's AGM, a resolution that the remuneration report be adopted must be put to a vote: **s250R(2)**. The vote on the resolution is advisory only and does not bind the directors of the company: **s250R(3).**
    - NB: If the Remuneration Report is rejected by more than 50% of the shareholders, there is a threat that SH will vote out the directors through a shareholder's resolution at a company meeting.
- "Two strikes" rule on above votes, 25% threshold **(sections 250U-Y)**
    - At the first AGM, more than 25% of shareholders must reject the remuneration report. No consequences for Board of Directors at this stage.
    - At second AGM, the Remuneration Report needs to address SH concerns from previous year's remuneration resolution. If, despite the Remuneration Report, more than 25% of shareholders again reject the remuneration report – "two strikes" will have occurred and there will be a shareholders resolution to hold a "Spill" meeting.
    - At "Spill" Meeting, shareholders will have the opportunity to vote out the company directors. A majority of SH Votes (>50%) will be required to vote out directors. If this threshold is achieved, there will be an extraordinary meeting later on in the year to elect new directors.
    - This rule gives shareholders a certain level of power to complain about executive remuneration.
    - However, the Australian Institute of Company Directors argues that SH are not smart enough to understand the "fair remuneration of executives".

Restrictions on Directors' and Officers' Actions

- Why? Due to Agency Problem – temptation for senior executives to use their power to divert money and resources to their own pocket, contrary to the company's interests. Also, temptation to be lazy and receive money/benefits without really working and providing value for it.
- What are the restrictions?
    - Market restrictions/incentives:
        - **Market Restrictions:** If directors perform poorly and the company does not make a decent profit, directors may lose their job. If a public company (with shares on the stock exchange), company may be taken over by a new shareholder/company that will put in place a new management team using their shareholder power. Thus, directors of poorly performing public companies risk losing their jobs.
        - **Market Incentives:** Directors being given a large amount of company shares, thereby aligning their interests and motivations with those of the company shareholders (thus also reducing agency costs).
    - Moral restrictions: Directors may not want their corporations to engage in harmful behaviour – possible that directors may be guided by their moral compass. Directors may also be concerned about their reputation in the community from the conduct of the corporation.
    - Legal Restrictions: These exist as cannot always depend on the market or moral restrictions
        - Directors'/officers' duties
        - Shareholders remedies
        - Disclosure requirements: Directors need to disclose certain information about their own personal interests (to avoid conflict of interests) in transactions concerning the company so that SH can assess whether the transaction is truly in the best interests of the company or not.

Q2:
Has X breached or will X breach a duty?

Q2: Has X breached a duty?

Directors owe duties under:

1. **Contract** (**actual and/or statutory** contract): **s 140 –** a company's constitution has effect as a contract between the company and each member, the company and each director/secretary & between members);
2. **Equity** (directors' **fiduciary duties** – no conflict; no profit; to act in good faith in the interests of the company; to use powers for a proper purpose; undivided loyalty and duty of confidentiality);
3. **Common Law:** Generally, each section 180-184 statutory duty also has an existing corresponding duty at common law. *See section 185 below.*
4. **Statute** (**s180 – duty of care and diligence; s181** – **good faith**; **s182** – **improper use of position**; **s183** – **use of inside information**; **s184** – **criminal offence** for breach of duties under ss 181-183 where contravened with intentional dishonesty or wilful disregard).

Common law duty is in addition to duty under case law:

- **Section 185:** Sections 180 to 184 have effect in addition to, and not in derogation of, the common law, other than subsections 180(2) and (3), which supersede the common law (and provide a defence to s 180(1).

Contract

- Breach of **contract; or**
- Breach of **company's constitution** under **s 140**.

Section 140: Effect of constitution and replaceable rules

(1) A company's **constitution** (if any) **and any replaceable rules** that apply to the company **have effect as a contract**:

(a) between the **company and each member**; and

(b) between the **company and each director and** company **secretary**; and

(c) between a **member and** each other **member**;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

Common law & s 180(1): Duty to exercise Reasonable Care and Diligence

- There is both a **common law** (non-fiduciary) duty for directors and senior officers to exercise **reasonable care** in the performance of their office; and
- A **statutory duty of care and diligence** in **s 180(1)**.
- Note **s 185:** The common law and statutory provisions operate concurrently.

2.1 Duties of Care, Skill and Diligence

Introduction

Three species of legal rule are directed primarily towards the problem of shirking and underperformance:

1. The **general law duty** upon directors and other senior officers to **act with reasonable care, skill and diligence.**

    - This duty of care, skill and diligence is of the same standard at common law and statute.
    - Unlike other statutory duties prohibitive in nature, this duty imposes a **positive obligation** on directors – liability is incurred for failure to meet the required standards.

2. Section **180(1)** which complements the general law, by imposing a duty on directors and other senior officers to act with **reasonable care and diligence**; and

3. Section **588G** which imposes a specific duty on directors to prevent their company from incurring debts whilst it is insolvent (insolvent trading).

2.1.1. Duty to act with reasonable care & diligence [General Law]

Summary: Applies to DIRECTORS & OFFICERS

The general law imposes an **Equitable Duty** upon **Directors and Other Officers** to **exercise reasonable care, skill and diligence in the performance of their office: *PBS v Wheeler.*** This duty arises not only in equity but also at **common law in tort** so that the directors/officers may be liable in an action for damages for **negligence: *Daniels v Anderson***. The **duty is not fiduciary**.

The general law duty is of particular significance for non executive directors since executive directors and corporate officers will generally also assume an obligation of careful and competent service as an express or implied term of their contract of service.

The Test & Elements

1. Breach of Standard of Care, Skill and Diligence of a Reasonable Director/Officer: *Daniels v Anderson (1995)*

- **Objective Test:** Did the director act in a manner consistent with ***"what the reasonable man of ordinary prudence would do in the circumstances"***: ***Daniels v Anderson (1995) – NSWSCA***
- **Contextual Test:** type of company (big/small; public/proprietary), responsibilities of the director/officer within the company: ***see below ASIC v Rich***

2. Balancing Risk with Potential Benefits: *PBS v Wheeler*

- Whether a director has exercised a **reasonable degree of care and diligence** *"can only be answered by **balancing the foreseeable risk of harm against the potential benefits** that could reasonably have been expected to accrue to the company from the conduct in question"*: ***ASIC v Doyle (2001);***
- In other words, whether any **jeopardy** to which the director exposed the company ***"obviously outweighed any potential countervailing benefits**, and whether there were reasonable steps that could have been taken to avoid them"*: ***ASIC v Maxwell* (2007).**
- Also see **Statutory Business Judgement Rule: s180(2)**

3. For compensation claims, CAUSAL link between Breach of Duty & Losses incurred: *PBS v Wheeler*

- Apply the **"BUT FOR" Test** for causation: ***Ipp J in PBS v Wheeler.*** Need to prove causation for both tortious and equitable duty of care (exception: secret profits – no causation requirement).

Examples

Daniels v Anderson (1995): *Leading case on current standard of the duty of care for Directors and Officers, esp. quotation from US case of Francis v United Jersey Bank.*

- ***Minimum Standards for all Directors (Executive and Non-Executive):***
  - Gain familiarity with all aspects of the company's business upon joining the board
  - Stay informed & make inquiries about the company's business
  - Attend all meetings of the board of directors (unless good excuse i.e. serious illness etc.)
  - Regularly review & understand company's financial statements – general responsibility over the whole company, as opposed to a specific area of expertise.
  - Set up proper monitoring systems e.g. internal and external auditing systems
  - Prevent corporate misconduct – if cannot stop this misconduct, they need to resign.