

## Topic 6

### Director Duties

Director duties needed bc company is separate legal entity

- Decides who to hold accountable
  - o As s/h ability is limited
  - o s 198: gives most power to director – needs to be restricted by duties

#### General law duties

- General law origins: case law evolution
  - o Gives company right to take action against directors
  - o But difficult bc same directors are managing company
- Duties owed by **directors** and **senior executive officers**
  - o Fiduciary relationship w company – expected act in interest of company
    - Usually have contract
  - o Based on power exercised and vulnerability of company to wrongful action
- Duties owed to **companies**
  - o Only company can enforce breach of general law duty
- Rare: Duties owed to **individual s/h**
  - ***Bunninghausen v Glavanics***
    - B owned 5/6 share, G owned 1/6, B persuaded G to sell his share w/out telling G an offer where outsider offer a higher price to buy all shares
    - B was sole director, in fiduciary relationship with G (member), B owes duties to G
    - B breached not disclosing conflicted interest
  - o Diff ppl can enforce duty:
    - when member relied on director for info and advice – director owes duties to member
    - or in B v G: no trust relationship but director is in position of advantage to member and situation and exploited member

#### Statutory duties

- o s 180(1) (DoC and diligence)
- o s 588G (*only to directors* abt solvency, care and diligence)
- o s 191 (*only to director* avoid/disclose conflicts of interest)
- o s 181 (good faith and in interest of company and proper purpose)
- o s 182, 183 (*to all employee* no improper use of position or info)
- o Use *cases* to explain requirement of statute
  - But not detailing exactly how director should behave
  - To keep law up to date – so subject to specific case
  - MUST use cases to support statute law
    - Statute is there to give company right
- o Company and ASIC can take action
  - ASIC can seek criminal punishment

## Insolvent Trading

- Statutory duties (no general law equivalent)
- s 588G: directors have duty to prevent company incurring debts when company is insolvent or would become insolvent
  - o Most creditor can contract to protect w/out 588G: mortgage over property
  - o Duty owed by directors (shadow + de facto), *not* holding company
    - **Standard Chartered Bank v Antico**
  - o If company is subsidiary to a holding company (definition: s 46)
    - s 588V: parent company has duty not to operate subsidiary company when it's insolvent
      - if breach, liquidator sue holding co. and have it contribute to repay debt of subsidiary
      - rare: parent company also shadow director – then breach both 588V and 588G
- s 588G(1) : *not applicable to officers other than directors*

This section applies if:

  - (a) a person is a director of a company at the time when the company incurs a debt; and
  - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
  - (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent, as the case may be; and
  - (d) that time is at or after the commencement of this Act

+ 2 conditions from 588G(2)
- s 588G(2): liability provisions

By failing to prevent the company from incurring the debt, the person contravenes this section if: the person = director

  - (a) the person is aware at that time (when company incur debt) that there are such grounds for so suspecting (suspect company will insolvent); or
  - (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

Note: This subsection is a civil penalty provision (see section 1317E).

- o director only liable when
  - director aware of reasonable grounds for suspect insolvency (subjective test), or
  - a reasonable person in director's job in that company would aware reasonable grounds for suspecting insolvency (objective test)
    - **Metropolitan Fire Systems Pty Ltd v Miller, Commonwealth Bank of Australia v Friedrich, Green v CGU Insurance Ltd**
    - Not all director treated same way: non/executive

### Requirement for 588G: Debt

- s 588G(1A): definition of debt (deemed debt)

## Topic 7

### Director Duties Part II

#### s 181 Good faith of directors and other officers

A director or other officer of a corporation must exercise their powers and discharge their duties

- a) In **good faith** in the **best interests** of the corporation; and
- b) For a **proper purpose**.

Note: This subsection is a civil penalty provision (see s1317E)

- Director must act in good faith in the best interests of the company, and for a proper purpose
  - o Must do what they genuinely believe is best for the company, not themselves or a particular stakeholder group

Two separate issues: 2 general law duties

#### Good Faith

- Definition
  - o ***Charterbridge Corp Ltd v Lloyds Bank Ltd***
    - an intelligent and honest person, in the position of the company could in the whole of the existing circumstances, reasonably believe that the transactions were for the benefit of the company
  - o To act honestly

#### Best Interests

Examples:

- Received and personal benefit for their actions
- Acted honestly towards members; and
- Acted honestly towards each other
  - o Determined based on diff case → interests of diff ppl
- **Best interests to members:**
  - o **Director must look at company as a whole:**
    - ***Greenhalgh v Arderne Cinemas***
      - Director doesn't own duties to specific s/h but to company as a whole → often interests of majority members
    - Balance competing interests:
      - s/h wants dividend decrease profit of company
      - s/h in diff classes
    - Act fairly but not identically as between members of different classes
  - o Court *may* decide company as separate entity from members that has interest:

- *Darvall v North Sydney Brick and Tile Co Ltd*
      - Example: member wants quick money but transaction detrimental to company's future → directors may allowed to disregard members interests (not breach of duty)
  - **Best interests to creditors:**
    - **Solvent company:** act in members' interests
    - **Insolvent / nearly insolvent:** ONLY then interests of company become of creditors not s/h: ex. cannot remove asset to avoid debt = breach of duty
      - Has interests in creditor but not override primary duties members
      - Directors must not do anything prejudice company's ability to pay creditor:
        - ***Walker v Wimborne***
          - directors must consider both interests of s/h and d/h
          - failure to consider interests of creditor has adverse consequences for company
        - ***Kinsela v Russell Kinsela Pty Ltd (in liquidation)***
          - directors knew insolvency so transferred assets out of the company to keep them beyond the reach of the creditors
          - Breach of duty → Best interest of company extends to also creditors
            - Bc **facing insolvency:**
            - Although members voted yes on removing but now **creditor > member** interest
      - Directors have no duty enforceable by creditors but are owed to company
        - ***Spies v The Queen***
          - R/Queen = criminal case
          - Company take action against directors who breached not creditor
- **Best interests to corporate groups:**
  - Directors must act **honestly** and **reasonably believed** no conflict between represented parties and interest of company
    - ***Equiticorp Finance Ltd (in liq) v BNZ***
      - Uruz (a sub) of EHL (corporate group) borrowed \$200m from BNZ, loan guaranteed by EHL
      - BNZ worried risky loan → EFSL and EFL (subs of EHL) used \$50m deposit in BNZ to repay loan and offset risk
      - Then EHL collapsed, liquidator sued EFSL and EFL directors for breach of duty
        - **Test (objective):** an intelligent honest person in **position of director** would **reasonably believed** the decision would **benefit** the company

# Topic 10

## Remedies + Enforcement

### Remedies

#### Statutory Remedy - Oppression Remedy

- Pt 2F.1: most often used
- s 232: Grounds For Court Order (When can apply)  
The Court may make an order under section 233 if:
  - (a) the conduct of a company's affairs (s 53 wide: send notice, issue share, board decision and shareholder meeting); or
  - (b) an actual or proposed act or omission (not do what is obliged) by or on behalf of a company (by director, officers, employee, agent); or
  - (c) a resolution, or a proposed resolution, of members or a class of members of a company;**Is either:**
  - (d) contrary to the interests of the members as a whole (not just specific member); or
  - (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity (very wide).

#### Who can apply: s 234(a) to (e)

- s 234(a): a member, even if application relates to an act or omission that is *against*:
  - (i) applicant in capacity other than as a member; or
  - (ii) another member in capacity as a member;
    - o Can apply for remedy even application affect you more than just capacity as a member / affect other member
    - o Can apply on behalf of another member
    - o Usually small co.: member also mgmt, no able sell share
- s 234(b): person removed from members bc selective reduction
  - o Must be a member when legal action brought unless removed by selective reduction
- All co. can apply

#### Tests

- **Wayde v NSW Rugby League Ltd**
  - o Had to kick out one team: was a s/h in NSW
  - o Court decided prejudicial to the team: but *not unfair*
  - o Test oppression: no other reasonably director would have made same decision as this director
    - Every director would kick out team = no breach s 232
    - Honestly irrelevant, only effect relevant
- **Thomas v HW Thomas Ltd**
  - o Thomas required dividend, argued low div is oppression
  - o Low div policy ≠ oppression