

#11 DUTY TO AVOID A CONFLICT OF INTERESTS

GENERAL LAW DUTY

- **Red flags:** This duty applies specifically to directors.
- The relationship between a director and the company is a recognised fiduciary one. As affirmed in *Boardman v Phipps*, [Director] is therefore bound by two key fiduciary obligations:
 1. **The conflicts rule:** not to place themselves in a position where personal interest may conflict with their duty to the company; and
 2. **The profits rule:** not to derive any unauthorised personal gain from their fiduciary position.
- [Plaintiff] will argue that, by [insert breach], [Director] has contravened the [conflicts rule / profits rule].

11.1 CONFLICTS RULE

- As established in *Boardman v Phipps*, a fiduciary breaches the **no conflicts rule** where there exists a **real and sensible possibility of conflict** between their personal interest (or another duty) and their duty to the beneficiary.
- [Plaintiff] will argue that such a conflict arose because [insert facts demonstrating the real and sensible possibility of conflict].

	COMMON CONFLICT SCENARIOS
[Director] contracting with the company.	Here, [Director] has contracted with the company in his / her personal capacity by [insert facts]. As such, [Director]'s personal interest conflicts with the interests of the company and the conflicts duty is automatically breached (<i>Aberdeen</i>). Per <i>Boardman</i> and <i>Aberdeen Railway</i> , the commercial fairness of the contract is irrelevant.
[Director] acting for two companies.	Red flag: D has an interest in another company contracting with the company Although it is common for Directors to hold more than one directorship, [insert company] is entitled to the unbiased and independent judgment of each of its Directors. As [Director] is a Director of [company 2], with whom [company] is transacting, [Director] may owe conflicting fiduciary duties, as he/she should be seeking the best deal for each company (<i>Aberdeen</i>).

	COMMON CONFLICT SCENARIOS
[Director] holds competing Directorships.	<p>In modern commercial environments, it is common for Ds to hold more than one directorship. As such, holding competing directorships will not automatically breach the no-conflicts rule (<i>Boardman</i>). [Director] will not be in breach unless:</p> <ul style="list-style-type: none"> ▪ it is contrary to either company's constitution; or ▪ it is contrary to any express or implied agreements with each company; or ▪ he/she divulges the confidential information of one company to the other (<i>Cott</i>). Here, [Director] is / is not in breach because [insert facts]. <p>Consider: Has the Director pursued the conflict by not complying with disclosure requirements? (<i>Fitzsimmons</i>).</p>
[Director] has a substantial SH.	<p>As such [Director] has a personal and financial interest in [company 2]. However, this is unlikely to amount to a conflict unless [Director] is the directing mind on both sides of the transaction or has effective control at a GM of [other company].</p>
Nominee Director.	<p>[Director] is a nominee Director who has been appointed to serve [insert party]'s interests. As such, [Director] will be in breach if there is a clear conflict between the interest of the company and the appointor. Here, there is a clear conflict between these interests because [insert facts].</p>
Related party transactions.	<p>Note: mandatory for public companies.</p> <p>See below.</p>

Fair Contact (No Loss) Benefit to the company?

[Director] may contend that no conflict arose because [the contract was fair / the company suffered no loss / the transaction ultimately benefited the company].

However, as confirmed in *Boardman v Phipps* and *Aberdeen Railway v Blaikie*, these factors are irrelevant to the question of breach. The duty is strict, liability arises from the existence of a conflict, not the outcome. A director cannot avoid accountability simply because the company was not harmed or benefited from the arrangement.

- Accordingly, [Director] will be in breach of the conflicts rule unless they secured the company's fully informed consent via a resolution passed at a general meeting.

11.2 PROFITS RULE

- [Director] will breach the profits rule where they derive an unauthorised benefit through misuse of their fiduciary position or from information obtained in their role as director (*Boardman v Phipps*).

- As held in *Keech v Sandford*, this duty is applied strictly, and liability arises regardless of whether the company suffered any loss.
- [Plaintiff] will argue that [Director] contravened the profits rule by [insert facts].

Director Taking Up an Opportunity

- As established in *Regal (Hastings) v Gulliver*, a director is prohibited from personally seizing a business opportunity that arises by virtue of their fiduciary position, even if the company could not or chose not to pursue it.

Opportunity rejected by Board for good business reasons	However, [Director] will argue that because the opportunity was properly declined by the Board on legitimate commercial grounds, they were entitled to pursue it personally and are not obligated to account to the company for any resulting profit.
Company consents	However, [Director] will argue that, consistent with <i>Queensland Mines v Hudson</i> , the company not only rejected the opportunity but also gave its consent, expressly or by conduct, for [Director] to pursue it personally.
Company counterargument	However, [Company] will argue that, as held in <i>O'Malley v Canadian Imperial Bank of Commerce</i> , it was [Director]'s role within the company that gave rise to the opportunity. As such, [Director] was not entitled to appropriate for personal gain any property or business opportunity that rightfully belonged to the company or was actively being pursued by it.

- On balance, [Director] will / will not be in breach of the profits rule for taking up the opportunity, as [insert facts]. Accordingly, [Director] will be liable unless they obtained the company's fully informed consent through a resolution passed at a general meeting.

11.3 FULL AND INFORMED CONSENT

- As confirmed in *Furs Ltd v Tomkies*, approval from the chair or another officer does not constitute full and informed consent of the company. Consent must come from the shareholders, following complete disclosure of the nature and extent of the conflict.
- Here, [Director] has/has not obtained full and informed consent because [insert facts]. As a result, they will be liable to equitable remedies.

11.4 REMEDIES

Conflict: Rescission

- As a result, the company is entitled to rescind the transaction. The contract is voidable at the company's election unless there has been full disclosure and approval by shareholders, or the transaction is otherwise authorised under the Constitution (*Levin v Clark*).

Profits: Account of profits

- In line with *Regal (Hastings)*, [Director] must account to the company for any benefit obtained in connection with their fiduciary position.
- Therefore, [Company] is entitled to an account of profits received by [Director], totalling [insert facts] (*Furs Ltd v Tomkies*; *Cook v Deeks*).
- **GO TO CONSEQUENCES.**

STATUTORY DUTIES

DUTY DISCLOSE MATERIAL PERSONAL INTERESTS

- [Director] may also be in breach of their duty to disclose any material personal interest in a matter relating to the company's affairs.
- Although the CA does not define "material personal interest", *Murray J in McGellin* held that such an interest exists where it has the capacity to influence the director's vote on the matter at hand.
- On balance, [interest] will / will not constitute a material personal interest because [insert facts].

Exceptions, per s 191(2):

- Membership interests held in common with all other members;
- Directors' remuneration;
- Contract requiring shareholder approval;
- Director giving guarantee etc. in relation to loan to the company
- Insurance of the director against liability incurred in that capacity;
- An indemnity under s 199A;
- Contracts with a related body corporate where the director's interest arises because the director is a member of both boards;
- For Pty's, where the other directors are aware of the nature and extent of the interest

- Under s 191(1), a director who has a material personal interest in a matter relating to the company must disclose that interest to the other directors, unless an exception under s 191(2) applies.
 - Here, an exception under s 191(2) applies because [insert facts]. Therefore, [Director] is not required to disclose the interest; **OR**
 - Here, no exception under s 191(2) applies because [insert facts]. Accordingly, [Director] is required to disclose the interest in the manner prescribed by s 193.

- Notice must give details of nature and extent of interest and its relation to company affairs.
- Notice must be given at director meeting as soon as practicable after director becomes aware of interest and must record interest in minutes.
- Standing notice can be given (including those not yet considered material personal interests).
- *Camelot Resources Ltd v MacDonald (1994)*: disclosure must be in sufficient detail for board as a whole to understand scope of benefit and potential profit to director.

PARTICIPATION IN MEETINGS

- This provision applies to **public companies**.
- Under s 195, [Director] must not be present or vote at a board meeting concerning a matter in which they have a material personal interest, unless:
 - the other directors (excluding the interested director) grant approval, subject to the Constitution (s 195(2)); or
 - ASIC grants an exemption or makes an order permitting participation (s 195(3)).
- On balance, this **has / has not** occurred. Accordingly, [Director] **will / will not** be entitled to be present and/or vote on the matter.

CONSEQUENCES OF BREACH

- Under s 195(5), a breach does not invalidate any resolution passed at the meeting.
- However, [Director] may still face liability under general law for breach of their equitable duty to avoid conflicts of interest.
- In addition, they may also be liable for breaching statutory duties under s 182 or s 183, depending on the nature and use of their position or information.

USE OF POSITION / INFORMATION

- These duties apply not only to directors, but also to **officers and employees**.
- [Director] also owes statutory obligations under ss 182 and 183, which prohibit the improper use of their position or confidential information to:
 - gain an advantage for themselves or another; or
 - cause detriment to the company.
- This principle was affirmed in *Adler*, where misuse of position and information gave rise to a breach.

Use of position	A director, secretary, other officer or employee of a corporation must not improperly use their position to: a) gain an advantage for themselves or someone else; or b) cause detriment to the corporation. A breach of (1) is a breach of a civil penalty provision.	S 182 (1)
		S 182 (2)
Use of information	A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to: a) gain an advantage for themselves or someone else; or b) cause detriment to the corporation. A breach of (1) is a breach of a civil penalty provision.	S 183 (1)
		S 183 (2)

- As established in *R v Byrnes*, whether [Director / officer] has improperly used their position or information under s 182 or s 183 is determined objectively. The test is whether their conduct fell below the standard expected of a reasonable person in their position.
- [Insert party] will argue [Director / officer] breached this duty by [insert facts].

If relevant: Per *Chew*, [Director / officer]'s purpose is the relevant consideration. It is irrelevant if the benefit or detriment did not actually eventuate.

- On balance, [Director / officer] has/has not contravened [s 182 / s 183] as [insert facts]. Accordingly, they will be liable for breaching a civil penalty provision.
- **GO TO CONSEQUENCES.**

RELATED PARTY TRANSACTIONS

- [Plaintiff] will argue that [Director] contravened s 208 by entering into a transaction with a related party without obtaining prior member approval.
- Under Chapter 2E, public companies must obtain **member approval before providing financial benefits to related parties**, as such arrangements may pose a risk to the company's interests (s 207).
- Here, [insert party] is [insert relationship to Director], making them a related party under [insert section].

RELATED PARTIES		
Controlling entities	An entity that controls a public company is a related party of the public company.	S 228(1)
Directors and their spouses	<p>The following persons are related parties of a public company:</p> <ul style="list-style-type: none"> a) directors of the public company; b) directors (if any) of an entity that controls the public company; c) if the public company is controlled by an entity that is not a body corporate--each of the persons making up the controlling entity; d) spouses of the persons referred to in paragraphs (a), (b) and (c). 	S 228(2)
Relatives of directors and spouses	<p>The following relatives of persons referred to in subsection (2) are related parties of the public company:</p> <ul style="list-style-type: none"> a) parents; b) children. 	S 228(3)
Entities controlled by other related parties	An entity controlled by a related party referred to in subsection (1), (2) or (3) is a related party of the public company unless the entity is also controlled by the public company.	S 228(4)

Related party in previous 6 months	An entity is a related party of a public company at a particular time if the entity was a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time within the previous 6 months.	S 228(5)
Entity had reasonable grounds to believe it will become related party in future	An entity is a related party of a public company at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time in the future.	S 228(6)
Acting in concert with related party	An entity is a related party of a public company if the entity acts in concert with a related party of the public company on the understanding that the related party will receive a financial benefit if the public company gives the entity a financial benefit.	S 228(7)

- Further, the benefit is a financial benefit because [insert facts].

Giving a financial benefit includes there following (s 229(2)):

Giving a financial benefit indirectly, including indirectly, for example, through 1 or more interposed entities; Giving a financial benefit by making an informal agreement, oral agreement or an agreement that has no binding force;

Giving a financial benefit that does not involve paying money (for example by conferring a financial disadvantage).

The following are examples of giving a financial benefit to a related party (s 229(3)):

giving or providing the related party finance or property;

buying an asset from or selling an asset to a related party;

leasing an asset from or to the related party;

supplying services to or receiving services from the related party;

(a) issuing securities or granting an option to the related party;

(b) taking up or releasing an obligation of the related party

- Accordingly, the transaction will be improper unless it falls within a statutory exemption or has been approved by shareholders.

EXEMPT TRANSACTIONS

- [Director] will argue that the transaction is exempt on the basis of [insert applicable exemption], as permitted under ss 210–216:

Arms-length	[Director] will argue that the terms of the transaction were at arms' length because [insert facts]. Per s120, member approval is not needed to give a financial benefit on terms that: a) would be reasonable in the circumstances if the public company or entity and the related party were dealing at arms' length; or b) are less favourable to the related party than the terms referred to in para (a). Unreasonable loan terms? However, [plaintiff] will argue that the loan terms are unreasonable, as in <i>Adler</i> , therefore the terms of the transaction cannot be viewed as being at arms' length.	S 210
Reasonable remuneration	The transaction involves reasonable remuneration, or reimbursement of expenses to an officer/employee.	S 211
Indemnity / insurance / legal costs	The transaction involves an indemnity, exemption or insurance premium in respect of a liability incurred as an officer of the public co or entity or an agreement to give an indemnity, exemption or to pay an insurance premium of that kind and to give the benefit would be reasonable in the circumstances of the public co or entity giving the benefit. Payments in respect of legal costs incurred for a RP who is an officer of the public co or entity and the legal costs are for the defending of an action for a liability incurred as an officer of the public entity and the benefit is reasonable in the circumstances of the public co giving the benefit.	S 212
Less than \$5000	The value of the transaction is less than \$5,000 where it is a payment to a D/spouse.	S 213
Body corporate / subsidiary	Financial benefit is given by: a) by a body corporate to a closely-held subsidiary of the body; or b) by a closely-held subsidiary of a body corporate to the body or an entity it controls. A body corporate is a closely-held subsidiary of another body corporate it, and only if, no member of the first-mentioned body is a person other than: a) the other body; or b) a nominee of the other body; or c) a body corporate that is a closely-held subsidiary of the other body because of any other application or applications of this subsection; or d) a nominee of a body referred to in para (c).	S 214
Member	Financial benefit is given to the RP in their capacity as a member of the public company and giving the benefit does not unfairly discriminate against the other members of the public company	S 215
Court order	Financial benefit is given under an order of a court.	S 216

- On balance, the transaction will / will not be exempt from s 208.

- As the financial benefit does not fall within any of the above exceptions, member approval by ordinary resolution in general meeting must be obtained in accordance with ss 217-227.
- Further, the benefit must be provided within 15 months of approval (s 208(1)).

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ASIC may comment	ASIC may comment on a proposed resolution, but cannot make comment about whether the proposed resolution is in the company's best interests.	S 220(1)
Notice of meeting	<p>The notice of convening the meeting:</p> <p>(a) must be the same, in all material aspects, as the proposed notice lodged under s 218; and</p> <p>(b) must be accompanied by an explanatory statement that is the same, in all material respects, as the proposed explanatory statement lodged under s 218; and</p> <p>(c) must be accompanied by a document that is, or documents that are, the same, in all material respects as the documents lodged under s 218(1)(c); and</p> <p>(d) if ASIC has given the to public co, comments – must be accompanied by those comments; and</p> <p>(e) must not be accompanied by any other docs.</p>	S 221
Material put to members	Each other document put to members must be the same, in all material respects, as a document lodged under s 218(1)(d).	S 222
Cannot be varied	The resolution must be the same as the proposed resolution set out in the proposed notice lodged under s 218.	S 223
Voting by or on behalf of related party interested in proposed resolution	A vote must not be cast by or on behalf of a related party of the public co to whom the resolution would permit a financial benefit or an associate of the related party.	S 224(1)
	However, this does not apply if the vote is cast by a proxy appointed by writing that specifies how the proxy is to vote on the proposed resolution and is not cast on behalf of a related party or associate.	S 224(2)
	ASIC may declare that a related party may vote but only if satisfied that the declaration will not cause unfair prejudice to any member of the co.	S 224(4)
Voting on the resolution	If any votes on resolution are cast in contravention of s 224(1), it must be the resolution would still be passed even if those votes were disregarded. If a poll was duly demanded, the following apply (s 225(2)):	S 225(1)
	• In relation to each member of the public co who voted on the resolution in person, the public co must record in writing the member's name and how many votes the member cast for the resolution and how many against	S 225(2) S 225(3)
	• IN relation to each member of the public co who voted on the resolution by proxy or by a representative, the public co must record in writing the members name, the proxy's name, how many votes cast and how many of those votes were for and against the resolution.	S 225(4)
	These records must be retained for 7 yrs after the day resolution is passed. A failure to do things in ss (3)-(5) is an offence of strict liability.	S 225(5) S 225(6)
Notice to be lodged	The public co must lodge a notice setting out the text of the resolution within 14 days after the resolution is passed.	S 226
Declaration of compliance	The Court may declare that the conditions prescribed by this division have been satisfied if it finds that they have been substantially satisfied.	S 227(1)

CONSEQUENCES OF BREACHING A DUTY

GENERAL LAW REMEDIES

- Available for CSD and fiduciary duties (GF and best interests, proper purpose, duty to retain discretions and duty to avoid undisclosed conflicts)

Damages / Compensation	<ul style="list-style-type: none">• Common law damages (to return the plaintiff to their pre-breach position)• Equitable compensation (measured against the company's loss) – key remedy for breach of CSD.
Account of Profits	Equitable remedy available where a Director has made an unauthorised profit- key remedy for breach of profits rule
Rescission	Applicable where there has been a breach of fiduciary duty arising from an undisclosed interest in a contract. Subject to the constitution, the contract is voidable at the election of the company.
Injunction	May be prohibitory (i.e. stop the Director from doing something) or mandatory (make the Director to do something)
Constructive Trust	Where directors acquire property in breach of a fiduciary duty, the company can seek a declaration that the property is held, by the director, as a constructive trustee.

STATUTORY REMEDIES: CIVIL PENALTY PROVISIONS

- Applies to CSD, GF&PP, use of position, use of information and insolvent trading.
- Consequently, [Defendant] has breached a civil penalty provision.

DECLARATION OF CONTRAVENTION: (ASIC MUST APPLY)

- Accordingly, ASIC may apply to the court for a declaration of contravention under **s 1317E**. Per *ASIC v Rich*, admissions, statements of agreed facts, and other evidentiary material must be placed before the court to satisfy it of the contravention.
- On balance, the court will/will not grant a declaration of contravention. Per **s 1317E(2)**, the declaration must specify:
 - the court that made the declaration;
 - the provision contravened;
 - the name of the person who contravened the provision; and
 - the conduct that constituted the contravention.

PECUNIARY PENALTY: (ASIC MUST APPLY)

- Following a declaration, the court may order a pecuniary penalty (s 1317G) if the contravention materially prejudiced the company, its members, or creditors, or is otherwise serious.
- Here, this is / is not satisfied because [insert facts].
- The court is therefore likely/unlikely to order a penalty of up to \$200,000. Where ASIC and the company agree on the penalty amount, the court will not depart from it unless clearly excessive (ASIC v Vizard).

DISQUALIFICATION: (ASIC MUST APPLY)

- Once a declaration is made, the court may disqualify [defendant] as a Director (s 206C) if justified by corporate conduct standards or other relevant factors.
- On balance, disqualification is / is not likely because [insert facts].

COMPENSATION ORDER: (COMPANY OR ASIC MUST APPLY)

- Relevant for SDAs.
- [Company / ASIC] may also seek a compensation order under s 1317H.
- Per s 1317J(2), this is available even without a declaration of contravention.
- Per s1317H(1)(b), damages must result from the contravention.
- Here, this will / will not be satisfied because [insert facts].

Causation is a question of fact to be determined by common sense.

Damage includes any profit made by the defendant or diminution in value of property.

STATUTORY CRIMINAL PENALTIES

- **Note: does not apply to CSD.**
- Additionally, [defendant] could be charged under s 184 where a breach of [s181 / 182 / 183] is carried out with intentional dishonesty or recklessness.

Good faith	<p>A director or other officer of a corporation commits an offence if they:</p> <ul style="list-style-type: none"> a) are reckless; or b) are dishonest; <p>and fail to exercise their powers and discharge their duties:</p> <ul style="list-style-type: none"> c) in good faith in the best interests of the corporation; or d) for a proper purpose. 	S 184(1)
Use of position	<p>A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:</p> <ul style="list-style-type: none"> a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation. <p>To avoid doubt, it is not a defence in a proceeding for an offence against ss (2) that the director, other officer or employee of the corporation uses their position dishonestly:</p> <ul style="list-style-type: none"> a) with the intention of directly or indirectly gaining an advantage for the corporation; or b) with the result that the corporation directly or indirectly gained an advantage. 	<p>S 184(2)</p> <p>S 184(2A)</p>
Use of info	<p>A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:</p> <ul style="list-style-type: none"> a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation. <p>To avoid doubt, it is not a defence in a proceeding for an offence against ss (3) that the person uses the information dishonestly:</p> <ul style="list-style-type: none"> a) with the intention of directly or indirectly gaining an advantage for the corporation; or b) with the result that the corporation directly or indirectly gained an advantage. 	<p>S 184(3)</p> <p>S 184(4)</p>

- On balance, this will/will not be met.
- Consequently, [defendant] may face a fine of up to \$340,000 and/or imprisonment for up to 5 years.
- Per ss 1315-1316, ASIC or the DPP may initiate criminal proceedings within 5 years of the breach.