

DIRECTOR'S DUTIES

Who owes duties?

- Directors (including de facto and shadow)
- Officers (except CA S191, S588G – Director's only)
- Employees (S182, 183)

	GL	Equity	Statute – ONLY ASIC
Duty of care, skill and diligence	daniels	Yes – not fid ob	S180(1)
Duty to act for proper purpose	X	Yes – fiduciary	S181
Duty to act in good faith	X	Yes – fiduciary	S181
Duty to avoid conflict and no profit	X	Yes - fiduciary	S182-183
Duty to prevent insolvent trading (DIRECTOR ONLY)	GL Residual	X	S588G

1) Standing

- a. GL/Equity: Company takes action against the Director (ASIC cannot directly take action – it can only do it in the name of the Co.)
- b. Statute: ASIC AND the Co can take action (only ASIC can enforce)

2) Substance: Refer to flow chart tables below

3) Defences: Refer to flow chart tables

- a. Eg. If fiduciary breach, director can call for meeting to ratify misconduct → if ratified, no action under equity, BUT no ratification under statutory duties

4) Remedies: Refer to Remedies and Sanctions table

- a. Under Corps Act (ss 180-183) – civil sanctions
 - i. ASIC: declaration (s1317E), pecuniary penalty order (s1317G), injunctive relief (s1324), disqualification order (s206C), a relinquishment order (s 1317GAB)
 - ii. Company: declaration (s1317E), compensation orders (s1317J)
- b. Breach of general law (depends on CL or Eq)
 - i. Duty of skill, care and diligence: common law damages, limited equitable relief (possibly rescission)
 - ii. Duty of good faith: injunction, declaration, rescission, consequential orders/rectification
 - iii. Duty of loyalty: injunction, rescission, account of profits, equitable damages
 - iv. Duty to not fetter discretion: injunction, rescission, rectification, equitable damages

General Law or Statute? What remedy does the client want?

Director can be liable to both general law remedies and statutory civil and criminal sanctions from same behaviour: s185

- I. If ASIC pursuing civil sanction → CA
- II. If company or disgruntled shareholder suing director for remedies → general law (Applies parallel to statute)

Step 1: Standing – Does ___ have standing to bring action?

Duty is owed to the company however ASIC has standing to sue in public interest: ASIC v Cassimatis

1. Breach of CA
 - a. ASIC enforces CA
 - b. Company has standing if seeking compensation – s1317
2. Breach of general law
 - a. Proper plaintiff for wrongs suffered by company is the company: Foss v Harbottle
 - b. Potential for derivative action by individual shareholder – s236

DIRECTORS DUTIES

Step 2: Is X a director? Who is liable for the duty?

1. At CA:
 - a. S180, S181, S183 – ‘Director or other officer’
 - b. S182 – ‘Director, secretary, other officer or employee
 - c. Director and officer defined in s9
 - d. S79: Involvement – Accessorial to ‘officers’ or ‘directors’. It is not necessary to be employed by or appointed to an office in a company to be involved
2. At general law
 - a. Directors
 - b. Senior executive officers

STEP 1: are they a director? OR are they an officer under s9 Refer to above**Director: includes...**

Procedural requirements (201H)

Appointed as a director (s198D)

- 1) Appt'd to director **s 9**
- 2) Who acts in position of a director (**de facto director**)
- 3) in accordance w/ whose instructions and wishes (**Shadow directors**)

Officer: includes

1. a director or secretary of the corporation; or
 2. 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 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 (then has received, administrator, liquidator)
- (b)(i): managers who are not members of the board
 - (b)(ii): managers who are not members of the board
 - (b)(iii): is the person a shadow officer?

To whom is the Duty owed?

- 1) The duty is owed to the Co., but when ASIC is taking action there is a recognition of the public nature of directors/officers duties (**ASIC v Cassimatis**)
- 2) The best interests of the Co. present and future shareholders (Greenhalgh) → hypothetical member, depending on the circumstances of the Co and the power to be exercised (Bell Group v Westpac Ltd)

STEP 3: APPLY EXPANDED TESTS FOR DIRECTORS' DUTIES BELOW**STEP 4: Sanctioning Directors and Officers duties**

General law remedies

- I. Liable for general law damage if they are guilty of the tort of negligence or has breached his contract
- II. Liable for equitable compensation in an action by the company as a result of breach of fiduciary duties since this is an equitable claim. Or, in equity for breach of fiduciary duties, could be ordered to have an account of profits taken as in a situation where he may be compelled to disgorge a profit which he has wrongly made in breach of his fiduciary duties
- III. Subject to an Injunction

Range of Criminal penalty Provisions:

- directors' and officers' duties (**ss 180(1), 181(1)(2), 182(1)(2), 183(1)(2)**);
- insolvent trading **s 588G(2)**
- measures relating to managed investment schemes: **s 1317E(1)???**

Consequences of contravening civil penalty provision: Refer to Remedies and Sanctions table below

5A: DUTY OF CARE

If proven that the duties are breached under CL and statute are the same, then if the director breached one then all are breached

- ASIC is the ONLY prosecuting authority under s180
- This does not prevent co. from claiming the directors have breached the CA → it only prevents Co. from seeking exclusive ASIC penalties – Co. can seek comp under s 1317H

Step 1: Are they a director or an officer?

Apply tests on pg. XX

1. Content of statutory and general law requirements 'essentially the same': ASIC v Macdonald; Daniels v AWA Ltd
2. Content of Stat and eq duties are same: Permanent building society v wheeler
3. If one test is proven, the others will be too.

Step 1A: To whom are the duties owed?

1. Owed to the company generally (Spies v the Queen), not individual shareholders (Percival) or a parent company (Barnes)
2. Special circumstances (eg. small family business) w/ special relationship btw Director-Shareholder = Fid duty. (Coleman; Ensham; short)

Step 2: Substance of duty + Determining breach

General Law – Daniels v AWA

Step 1: The Duty of Care – AWA v Daniels

Directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company.

1. Director cannot rely on ignorance/failure to inquire as protection against liability for negligence: Daniels v AWA
2. Directors cannot rely on fact that they are non-executive directors/have no knowledge in area – expected to acquire at least a 'rudimentary understanding' of business.

Consider:

1. Size and complexity of company
2. What defendant director did within the company
3. Whether a 'reasonable' director would have done the same thing in that position.

Step 2: Reasonable Person Test – Objective test (ASIC v Rich; Daniels v AWA)

1. Vrisakis v ASC: whether director has exercised a reasonable degree of care and diligence can only be answered by balancing the **foreseeable risk of harm** against potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.
2. Balancing: A risk which is not far-fetched or fanciful is real and therefore foreseeable": see *Wyong Shire Council v Shirt*
 - Calculate balance of benefits and harms to interests of the company, mainly thought of as financial interests: course of action may breach duty of care if harms materially outweigh the benefits: *Vrisakis v ASC* (1993); *Permanent Building Society (in liq) v Wheeler* (1994); *ASIC v Cassimatis (No 8)* [2016]
3. Harm is with regards to any interest of a company not just financial such as reputation: ASIC v Cassimatis

Common law causation test – March v Stramare

Unbroken chain of liability, unless there is an intervening act

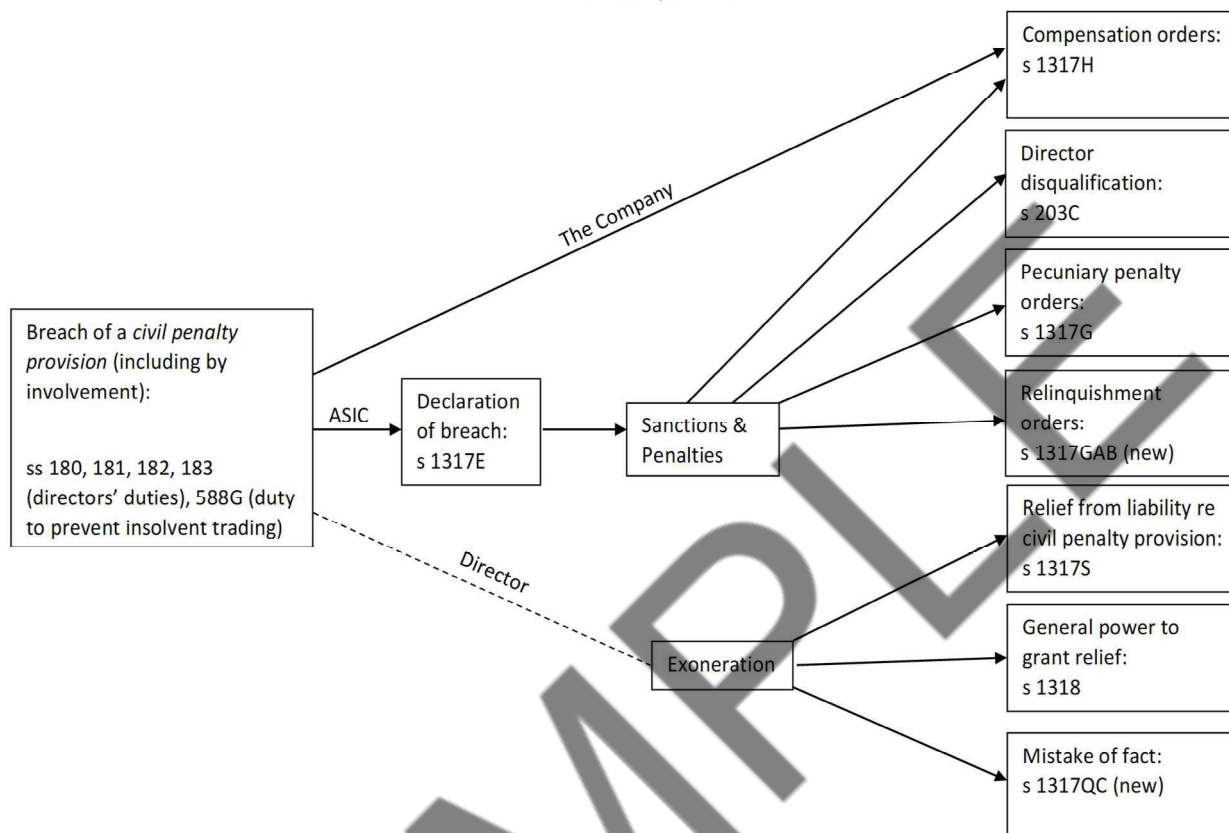
Equity

- Content of Stat and eq duties are same: Permanent building society v wheeler
- the quantum of damages for breach of the eq duty or the GL duty arising out of the same facts may differ significantly because conditions such as foreseeability and remoteness, to which damages at CL are subject, are not relevant to equitable compensation: Daniels v Anderson

REMEDIES & SANCTIONS FOR BREACH OF DDs

Statutory Sanctions

Flow Chart – Statutory Sanctions & Penalties



- **Civil penalty provision:** a CA section which, if breached, allows ASIC to seek civil penalties against the person who breached it. All of the statutory directors' duties are civil penalty provisions: **ss 180, 181, 182, 183, and 588G**.
- **Pecuniary penalty orders:** a CA statutory sanction requiring person who has breached a civil penalty provision to pay a penalty to the Cth under court order.
- **Relinquishment orders:** a statutory sanction under the CA that requires a person who has either made profit or avoided losses by breaching a civil penalty provision to pay the said profit/avoided losses to the Cth as a penalty under court order.
- **Compensation orders:** a statutory remedy under the CA that requires a person who has breached a civil penalty provision to **pay back any losses caused by the breach**. This is analogous to the general law compensation for wrongs, but is calculated at the statutory measure: **Adler v ASIC NSWCA**
- **Disqualification:** DQ of a person from managing companies **s206C CA**

1. Who may apply for a declaration or order?

ASIC may apply for a declaration of of contravention, a pecuniary penalty order or a compensation order: s 1317J(1).

- **The corporation**, or the **responsible entity** for the registered scheme, may apply for a compensation order: s 1317J(2).
- They may **intervene** in an application for a declaration of contravention or a pecuniary penalty order in relation to the corporation or scheme. They are entitled to be heard on all matters other than whether the declaration or order should be made: s 1317J(3).

2. When must they apply by? Time limit – Proceedings for declaration for contravention, pecuniary penalty order, or compensation order may be started no later than 6 years after the contravention: **1317K**

STEP 1: Declaration of contravention of civil penalty provision (s1317E)

Gateway provision

- If court is satisfied that person has contravened civil penalty provision, it must make a declaration of contravention. It is **necessary** to obtain such a **s 1317E** declaration before pursuing most of the other statutory sanctions (s1317E(1)), such as orders for pecuniary penalties, relinquishment and/or disqualification of directors.
- The 'civil penalty provisions' which must be breached in order to obtain a **s 1317E** declaration are listed in **sub-s (3)**. They include: the directors' duties (**ss 180, 181, 182, 183**), and the directors' duty to prevent insolvent trading (**s 588G**).
- Declaration should specify civil penalty provision contravened, person who contravened, conduct that contravened and company to which conduct related: s1317E(2)
- Seeking Orders (**s 1317J(1),(4) CA**): Only ASIC may apply for a **s 1317E** declaration of contravention, and for consequent orders for pecuniary penalties (s1317G), relinquishment (S1317GAB), disqualification of directors and/or compensation.

DQ of director – s206A

S206(1) – On application by ASIC, court may disqualify a person from managing corporations for a period that the Court considers appropriate if:

- a) A declaration made under s1317E that person has contravened civil penalty provision
- b) Court is **satisfied** that **disqualification is just**

'disqualification is just'

- Person's conduct in relation to the management, business or property of any corporation: **s206C(2)(a)**; and
 - That is, are they a 'fit and proper person to manage a corporation': *Vines*.
- Any other matters the Court considers appropriate: **s 206C(2)(b)**. These can be organised into 4 general categories: **ASIC v Adler; ASIC v Healey (No 2)**.
 - 1. **[Paramount purpose]** The protection of the public and individuals like consumers, creditors, shareholders and investors (not punitive);
 - 2. Nature and seriousness of the contraventions;
 - Size of any losses suffered by the corporation, its creditors and consumers
 - 3. Retribution and deterrence;
 - General deterrence ie, 'send a message' to the community
 - Achieve retribution
 - Deter person from re-offending
 - 4. Mitigating factors
 - Contrition
 - Person's previous good character
 - Personal hardship (Does not carry great weight against need to protect the public – **ASIC v Adler**)
 - Likelihood of reoffending

Factors which lead to disqualification for X years

MEMBERS REMEDIES

Class	Source	Nature	Remedy	
Class 16	General law	Personal rights	Contract: when shareholder is also in another contractual relationship with coy	
		Personal rights	Fiduciary duties: owed to a shareholder or a shareholder group (extremely rare)	e.g. <i>Coleman v Myers</i>
		Personal rights	Equitable fraud by majority in GM on rights of minority shareholders	e.g. <i>Gambotto</i>
	Statute	Personal rights	Deemed statutory constitutional contract	CA s140
		Personal rights	Statutory injunction power (available to members & ors)	CA s1324
Class 17	Statute	Personal rights	Statutory oppression action (available to current & former members)	CA Part 2F1 esp ss232-233
		Personal rights	Statutory winding-up on just & equitable ground (available to members & ors)	CA Part 5.4A esp ss461-462
		Derivative rights	Statutory derivative action (available to members & ors)	CA Part 2F1.A esp ss236-237

Four dimensions of shareholder remedies

1. **Shareholders' personal actions** (fruits go to shareholders but rare)
2. **Shareholders' derivative actions** (fruits go to company)
3. **Winding up on 'just and equitable' grounds** (rare remedy, must be in insolvency realm)
4. **Oppression remedy** (most frequently used of the shareholder remedies)

Starting point: Foss v Harbottle

Principles:

1. The company is the proper plaintiff (only the company can sue for wrongs done to it)
2. Majority rules/internal management (court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.)

Step 1: Standing

However, under general law – the minority may have the right to take action where:

A. Infringement of a member's Personal rights

Member may be given a personal right:

- As part of an express contract (btw company/member or member/ other member)
- Under the statutory contract: s140 See below
- Under the act s249F
- General law (right to receive notice of and attend and vote at meetings; right to receive dividends)

Claim for breach of contract or injunction to prevent infringement of rights

B. Fraud on the minority

Generally, members can exercise their right to vote as they wish, however this is subject to the fraud on the minority doctrine.

Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656:

'[The power of a three fourth majority to alter company articles must] like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded\

- Company as a whole meaning corporators as a general body rather than commercial entity

Fraud on the minority has featured in a variety of situations: