

KEY ISSUES: LAW3112 CORPORATIONS LAW

Topic 1 - Understanding the Corporation: Introduction and Background to Corporations Law

Topic 2 - Setting up the Corporation: Incorporation

Topic 3 - Internal Governance: The Constitution and Replaceable Rules

Topic 4 - Funding the Corporation: Share (Equity) Capital, Debt Capital and Dividends Topic 5 - Decision-Making: the Board of Directors and Members Meetings

Topic 6 - External Relations: Corporate Contracting

Topic 7 - Accountability: Directors' Duties

Topic 8 - Accountability: Directors' Duties (Consequences of Contravention and Relief from Liability)

Topic 9 - Protecting Members: Members' Remedies

Topic 10 - Saving or Ending the Corporation: Corporate Morality

GENERAL ISSUES	
1. KEY ISSUE: SEPARATE LEGAL ENTITY AND PIERCING THE VEIL	2. KEY ISSUE: BREACH/ALTERING OF CONSTITUTION
Step 1: Is the company a separate legal entity? Step 2: What legal capacity and powers are being given to the company? Step 3: Is the corporate veil pierced?	Step 1: Define what occurs when there is a breach of the company's constitution Step 2: Discuss whether the constitution can be freely altered? <u>Statutory Limits</u>

<ul style="list-style-type: none"> • <u>Scenario 1:</u> Is the subsidiary an agent? • <u>Scenario 2:</u> Is a company being used to avoid a legal obligation under a contract or statute? • <u>Scenario 3:</u> Is the company a vehicle for fraud? • <u>Scenario 4:</u> Does the statutory insolvent trading regime apply? <ul style="list-style-type: none"> 1. Was the person a Director/Was the Company a Parent Company 2. Was the Director a Director when the Debt was Incurred? 3. Was the Company Insolvent? 4. Were there Reasonable Grounds? 5. Did the Director Fail to Prevent the debt despite there being reasonable grounds for insolvency? 6. Defences 7. Remedies 	<ul style="list-style-type: none"> • Entrenching provisions • Section 140(2) • Section 246(B) <p><u>General/Equitable Limits</u></p> <ul style="list-style-type: none"> • Gambotto- Conflict of interest but no expropriation of shares (or rights): valid • Gambotto- Conflict and expropriation of shares- invalid • Allen- No conflict of interest/advantage- majority must benefit <p>Step 3: Go to Issue 6 or 7</p> <p>Step 4: If breached, considered Directors Duties and Members Remedies.</p>
<p>3. KEY ISSUE: WHETHER A PERSON IS A DIRECTOR</p>	<p>4. KEY ISSUE: HOW TO REMOVE A DIRECTOR?</p>
<p>Step 1: Define where the decision making power has come from</p> <p>Step 2: Has Section 9 been followed.</p> <p>Step 3: Are they a de facto/shadow director?</p>	<p><u>Scenario 1:</u> Disqualification</p> <ul style="list-style-type: none"> • Step 1a: Has this occurred automatically under Section 206B? If yes, what are the effects? Does Section 206G now apply? • Step 1b: Has this concurred by the court under Section 206C, D, E? Does Section 206G now apply?

Step 4: Are they an officer?

Step 5: Ensure the qualifications are met in Section 201

IN TERMS OF GENERAL MEETINGS:

Step 1: Is the person who called the meeting eligible to?

Step 2: Are the rules for members being adhered to?

Step 3: If no GM, have the rules been adhered to in Section 249AB and Section 329?

Step 4: Is the meeting invalid under Section 1322?

- Step 1c: Has this occurred through ASIC under Section 206F? Does Section 206 GAB apply?
- Step 2: What can this disqualified person now do?
- Step 3: If breached, considered Directors Duties and Members Remedies.

Scenario 2: Resignation

- Step 1: Has the constitution and employment contract been considered?
Step 2: Has there been written notice under S203A RR.
- Step 3: If breached, considered Directors Duties and Members Remedies.

Scenario 3: Removal

- Step 1a: If a public company, has Section 203E been adhered to? Has Section 203D been followed?
- Step 1b: If a private company, has Section 203C RR been adhered to? Has Section 140(1)b) been breached?
- Step 3: If breached, considered Directors Duties and Members Remedies.

Scenario 4: Retirement

	<ul style="list-style-type: none"> • Step 1: Is there an appointed term? • Step 2: Are they running again?
6. KEY ISSUE: IS COMPANY ENTERING DIRECTLY INTO A CONTRACT:	7. KEY ISSUE: IS THE COMPANY ENTERING INTO THE CONTRACT INDIRECTLY THROUGH AN AGENT?
<p><u>Scenarios:</u></p> <ol style="list-style-type: none"> 1. Was there a failure to comply with the company's constitution or replaceable rules (RR)? 2. Has a contract by the company been incorrectly executed? <p>Step 1: Apply Section 127: authorisation under either (1) or (2). Is there a common seal?</p> <p>Step 2: Look at the constitution to see if there is a relevant rule.</p> <p>Step 3: Where is the authority to enter the contract coming from? Substantive or formal authority?</p> <p>Step 4a: If there was no authority, is there actual or ostensible authority that allows Section 128 (1) to apply?</p>	<p><u>Scenarios where this will arise:</u></p> <ol style="list-style-type: none"> 1. Third party wants to enforce what they claim is a valid contract with the company (but which the company claims is invalid) 2. Contract came about as a consequence of interaction between a third party and one or more natural persons purporting to represent the company. 3. Company claims the contract invalid and not binding because the company representative has no authority to bind the company under the contract. <p>Step 1: Is there actual authority under Section 126?</p> <ul style="list-style-type: none"> • Express actual authority • Implied actual authority <p>Step 2: Is there apparent/ostensible authority?</p> <ul style="list-style-type: none"> • Apply three step test from Freeman

<p>Step 4b: If there was no authority, is there actual or ostensible authority that allows Section 128 (4) to apply?</p> <p>Step 5: If yes, to either, go through assumptions under Section 129?</p> <p>Step 6: Consider IMR, if not a part of 129.</p> <p>Step 6: If no exceptions apply and there is breach, go through relevant Directors Duties and Remedies.</p>	<p>Step 3a: If there was no authority, is there actual or ostensible authority that allows Section 128 (1) to apply?</p> <p>Step 3b: If there was no authority, is there actual or ostensible authority that allows Section 128 (4) to apply?</p> <p>Step 4: If yes, to either, go through assumptions under Section 129?</p> <p>Step 5: Consider IMR, if not a part of 129.</p> <p>Step 6: If no exceptions apply and there is breach, go through relevant Directors Duties and Remedies.</p>
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DIRECTORS DUTIES

EXAM TIP: Focus on this topic the most...

If breached - talk about removal of director.

8. KEY ISSUE: DUTY TO ACT IN GOOD FAITH AND BEST INTERESTS	9. KEY ISSUE: DIRECTOR HAS BREACHED PROPER PURPOSE DUTY
<p>Step 1: Discuss issue 1 above</p> <p>Step 2: State that statutory and common law closely mirror each other</p> <p>Step 3: Is there a duty for the Director to act in good faith and in the best interests of the company?</p> <ul style="list-style-type: none"> • Section 181- subjective test 	<p>Step 1: Discuss Issue 3.</p> <p>Step 2: State that there is a fiduciary duty to avoid undisclosed conflicts between personal interests and the interest of the company, whilst there is no statutory duty, 182-183 deals with improper use of position.</p> <p>Step 3: Identify the objective purpose for which power has been granted.</p>

- Objective bottom line
- Consider Section 182, 183, 184(2)-(4), 588G depending on facts

Step 4: Has the Director acted in the best interests of the company?

- Consider shareholders as a group
- Consider broad company
- Consider individual benefit

Step 5: Do any exceptions apply?

- General test in Glavanics v Brunninghausen:
- Two exceptions in Glavanics v Brunninghausen
- Apply the exception depending on the type of company.

Step 6: If they have breached duty, consider consequences in respect of who is bringing the claim.

- ASIC bringing claim: Issue 21
- Members bringing claim
 1. Are they seeking to bring claims under SDA: Issue 15.
 2. If no, bringing claim personally through:
 - Equity: Issue 20
 - CA: Issue 16, 17, 18
 - Contract- Issue 19

Step 4: Identify what the purpose of what motivated this exercise of power was.

Step 5: Did they align?

Step 6: Do the statutory exceptions apply?

Step 7: If there are multiple purposes:

1. Identify the substantial purpose.
2. Identify the improper purpose.
3. Would the power not have been reversed but for the improper purpose?

Step 8: If they have breached duty, consider consequences in respect of who is bringing the claim.

- ASIC bringing claim: Issue 21
- Members bringing claim
 1. Are they seeking to bring claims under SDA: Issue 15.
 2. If no, bringing claim personally through:
 - Equity: Issue 20
 - CA: Issue 16, 17, 18

<ul style="list-style-type: none"> • Creditors bringing claim: Issue 22 <p>Step 7: Consider exoneration by the company.</p> <p>Step 8: Consider possible relief by the courts for civil penalties and general law penalties</p>	<ul style="list-style-type: none"> • Contract- Issue 19 • Creditors bringing claim: Issue 22 <p>Step 9: Consider exoneration by the company.</p> <p>Step 10: Consider possible relief by the courts for civil penalties and general law penalties</p>
10. KEY ISSUE- DIRECTOR HAS BREACHED DUTY TO DISCRETION	11. KEY ISSUE: DIRECTOR HAS BREACHED NO CONFLICTS RULE
<p>Step 1: Discuss Issue 3.</p> <p>Step 2a. Has the Director fettered the exercising of future discretion?</p> <p>Step 2b: Has the Director agreed to vote in a certain way at future meetings?</p> <p>Step 3: If they have breached duty, consider consequences in respect of who is bringing the claim.</p> <ul style="list-style-type: none"> • ASIC bringing claim: Issue 21 • Members bringing claim <ul style="list-style-type: none"> 1. Are they seeking to bring claims under SDA: Issue 15. 2. If no, bringing claim personally through: 	<p>Step 1: Discuss Issue 3.</p> <p>Step 2: Discuss fiduciary duty <ol style="list-style-type: none"> 1. RP test 2. Apply case law- Boardman v Phipps, GFIN, Aberdeen </p> <p>Step 3: Discuss whether disclosure obligations have been met as a defence in equity (Regal).</p> <p>Step 4: Discuss statutory duty under Chapter 2E <ol style="list-style-type: none"> 1. State Section 208 2. Define related party under Section 228 3. Does transaction involve giving financial benefit under Section </p>

- Equity: Issue 20
- CA: Issue 16, 17, 18
- Contract- Issue 19
- Creditors bringing claim: Issue 22

229, under which category?

4. Who is giving this benefit under Section 229(3)?
5. Has shareholder approval been gained?
6. If not, does an exception in Section 210-216 apply?

Step 4: Consider exoneration by the company.

Step 5: Consider possible relief by the courts for civil penalties and general law penalties

Step 5: Discuss whether disclosure obligations have been met as a defence: Section 191(1)

- Material personal interest
- Disclosure under 191
- Exception under 191 (2)
- Has it been a breach?
- Has Section 193 been complied with
- If it is a public company, has Section 195 been complied with?
- If it is a private company has Section 194 been complied with?
- Consider ratification

Step 6: Consider general law remedies available if breach

- Rescission of contract
- Contract ratification by resolution of shareholders at GM provided there is full disclosure (Furs).

Step 7: If they have breached duty, consider consequences in respect of

	<p>who is bringing the claim.</p> <ul style="list-style-type: none"> • ASIC bringing claim: Issue 21 • Members bringing claim <ul style="list-style-type: none"> 1. Are they seeking to bring claims under SDA: Issue 15- likely to be Section 1324. 2. If no, bringing claim personally through: <ul style="list-style-type: none"> • Equity: Issue 20 • CA: Issue 16, 17, 18 • Contract- Issue 19 • Creditors bringing claim: Issue 22 <p>Step 8: Consider exoneration by the company.</p> <p>Step 9: Consider possible relief by the courts for civil penalties and general law penalties</p>
<p>12. KEY ISSUE- DIRECTOR HAS BREACH NO PROFITS RULE</p>	<p>13. KEY ISSUE- DIRECTOR HAS BREACHED DUTY OF CARE AND DD</p>
<p>Step 1: Discuss Issue 3.</p> <p>Step 2: Discuss fiduciary duty and statutory duty for different scenarios:</p> <ul style="list-style-type: none"> 1. When there been a personal gain <ul style="list-style-type: none"> • Boardman; Chan; Chew 2. When there been misappropriated company property 	<p>Step 1: Discuss Issue 3.</p> <p>Step 2: Consider objective test in Daniels v Anderson</p> <p>Step 3: Consider relevant facts from AWA v Daniels</p>

- Totex-Adon Pty Ltd v Marco (1982))

3. When there been a misappropriated business opportunity (Cook)
4. When the Director took a bribe or undisclosed benefit?
 - Furs Ltd v Tomkies
5. When the Director has improperly used their position
 - Regal Hastings
 - Section 182
6. When Director has taken up corporation opportunity
 - Cook v Deeks [1916])
7. When Director misuses confidential information
 - Wright v Gasweld Pty Ltd (1991)
 - Forkserve Pty Ltd v Jack & Aussie Forklift Repairs
 - Apply Section 183
8. When Director tries to enter into competition with their company
 - Bell v Lever Bros Ltd [1932]
 - Markwell Bros Pty Ltd
 - Hivac Ltd v Park Royal Scientific Instruments Ltd

Step 3: Discuss whether disclosure obligations have been met as a defence in equity (Regal).

Step 4: Has Section 180 (1) been adhered to?

Step 5: Has the Director been diligent in accordance with ASIC v Rich

Step 6: Consider the different standards for the different directors.

Step 7: Do any defences apply?

1. SBJ
2. Reliance on others
3. Delegation of responsibility to others

Step 7: If they have breached duty, consider consequences in respect of who is bringing the claim.

- ASIC bringing claim: Issue 21
- Members bringing claim
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