

# LAWS 1091 – Director’s Duties Flowcharts

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**General law duty of care and diligence:**

**Q1:**

**Duty of care:**

[1] The issue is whether [AMY] has breached the duty to exercise her powers with reasonable care and diligence. She may be liable for

- 1. failing to bring concerns to the board (*Vines*)
- 2. failing to monitor management (*Daniels, Healey, Friedrichs*)
- 3. failing to prevent the re-occurrence of illegal activities (*Maxwell*)
- 4. publishing the financial accounts without reference to the potential for financial consequences (*MacDonald, Healey*)
- 5. failing to attend board meetings, which contravenes the duty to be diligent.

[2] [AMY]

- 1. is a [DIRECTOR/OFFICER].
- 2. , although not a director or officer, occupies the office held by a director, and has the same responsibilities within the corporation, as a director or officer. On the facts, [Amy]
  - a. was specifically delegated the role of [ROLE] by [OTHER DIRECTOR].
  - b. has been given work which is usually distributed to an officer or director, that being [DESCRIBE ROLE]. That role carries with it the expectations and responsibilities which normally flow from the experience that a director brings.

[3] Since [AMY] was a [DIRECTOR/OFFICER], she owes a duty to the company as a whole to exercise her powers with care and diligence (*Greenhalgh*).

[4] At general law, a director or officer owes a duty to a company to apply reasonable care in the performance of their office (*Vrisakis*). The relevant issue is the **extent of the duty** that [AMY] owes to the company. A director is expected to uphold the same degree of skill in performance of duties as may reasonably be expected for persons of commensurate knowledge or experience, in the relevant circumstances (*MacDonald*).

[5] On the facts, [AMY] is

- 1.

<p><b>Ordinary director/officer</b></p>	<p>an ordinary director, since she does not appear to have been appointed because of a special skill that she possesses. As a result [AMY] will be held to the minimum standard of a reasonable person who has a rudimentary understanding of the business (<i>Daniels</i>).</p> <p>The standard necessarily involves being in a position to 'guide and monitor the management of the company' (<i>Daniels</i>) by</p> <ul style="list-style-type: none"><li><input type="checkbox"/> a. maintaining familiarity with the financial status of the corporation by regularly reviewing financial statements (<i>Daniels</i>)</li><li><input type="checkbox"/> b. regularly attending board</li></ul>
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	<p>meetings (<i>Vrisakis</i>).</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> c. continuing to keep informed about activities of the corporation (<i>Daniels</i>)</li> <li><input type="checkbox"/> d. generally monitoring corporate affairs and policies (<i>Daniels</i>).</li> </ul>
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2.

<p><b>Inexperienced/ inable director</b></p>	<p>an [INEXPERIENCED/INABLE] director, as she [ONLY JUST STARTED/ DIDN'T GET A FORMAL EDUCATION/ ETC.]. Nonetheless, [AMY] cannot rely on actual limitations in experience or ability as a defence (<i>Gamble</i>). This means that she will be held to the minimum standard of a reasonable person who has a rudimentary understanding of the business (<i>Daniels</i>).</p> <p>The standard necessarily involves being in a position to 'guide and monitor the management of the company' (<i>Daniels</i> by</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> a. maintaining familiarity with the financial status of the corporation by regularly reviewing financial statements (<i>Daniels</i>)</li> <li><input type="checkbox"/> b. regularly attending board meetings (<i>Vrisakis</i>).</li> <li><input type="checkbox"/> c. continuing to keep informed about activities of the corporation (<i>Daniels</i>)</li> <li><input type="checkbox"/> d. generally monitoring corporate affairs and policies (<i>Daniels</i>).</li> </ul>
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<p><b>Director/Officer with special skill</b></p>	<p>a director with special skill, and was appointed because of her ability to [LOOK AT FINANCIALS/ RUN A COMPANY/ ETC.]. Consequently, [AMY] will be held to the minimum standard of a reasonable person in her category of appointment (<i>Wheeler; Vines</i>).</p>
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4.

<p><b>Chairperson of board</b></p>	<p>the chairperson of the board. While the scope of the standard is different to an ordinary director, the standard of care is</p>
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**CONTINUED IN COMPLETE PAID FOR NOTES**

**Equity: Duty of care and diligence:**

**Q1:**

**Duty of care:**

[1] The issue is whether [AMY] has breached the duty to exercise her powers with reasonable care and diligence. She may be liable for

- 1. failing to bring concerns to the board (*Vines*)
- 2. failing to monitor management (*Daniels, Healey, Friedrichs*)
- 3. failing to prevent the re-occurrence of illegal activities (*Maxwell*)
- 4. publishing the financial accounts without reference to the potential for financial consequences (*MacDonald, Healey*)
- 5. failing to attend board meetings, which contravenes the duty to be diligent.

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  - a. was specifically delegated the role of [ROLE] by [OTHER DIRECTOR].
  - b. has been given work which is usually distributed to an officer or director, that being [DESCRIBE ROLE]. That role carries with it the expectations and responsibilities which normally flow from the experience that a director brings.

[3] Since [AMY] was a [DIRECTOR/OFFICER], she owes a duty to the company as a whole to exercise her powers with care and diligence (*Greenhalgh*).

[4] At general law, a director or officer owes a duty to a company to apply reasonable care in the performance of their office (*Vrisakis*). The relevant issue is the **extent of the duty** that [AMY] owes to the company. A director is expected to uphold the same degree of skill in performance of duties as may reasonably be expected for persons of commensurate knowledge or experience, in the relevant circumstances (*MacDonald*).

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<p><b>Chairperson of board</b></p>	<p>the chairperson of the board. While the scope of the standard is different to an ordinary director, the standard of care is</p>
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**CONTINUED IN COMPLETE PAID FOR NOTES**

## Statutory duty of care and diligence:

Q1:

### Duty of care:

[1] The issue is whether [AMY] has breached the duty to exercise her powers with reasonable care and diligence under the *Corporations Act 2001 (Cth)*, (CA) (S 180). She may be liable for

- 1. failing to bring concerns to the board (*Vines*)
- 2. failing to monitor management (*Daniels, Healey, Friedrichs*)
- 3. failing to prevent the re-occurrence of illegal activities (*Maxwell*)
- 4. publishing the financial accounts without reference to the potential for financial consequences (*MacDonald, Healey*)
- 5. failing to attend board meetings, which contravenes the duty to be diligent (S 180(1)).

[2] [AMY]

- 1. is a [DIRECTOR/OFFICER] (S 9).
- 2. , although not a director or officer, occupies the office held by a director, and has the same responsibilities within the corporation, as a director or officer (SS 180(1)(a), 180(1)(b)). On the facts, [Amy]
  - a. was specifically delegated the role of [ROLE] by [OTHER DIRECTOR].
  - b. has been given work which is usually distributed to an officer or director, that being [DESCRIBE ROLE]. That role carries with it the expectations and responsibilities which normally flow from the experience that a director brings.

[3] Since [AMY] was a [DIRECTOR/OFFICER], she owes a duty to the company as a whole to exercise her powers with care and diligence (*Greenhalgh*).

[4] Under the CA, a director or officer owes a duty to a company to apply reasonable care in the performance of their office (*Vrisakis*). The relevant issue is the **extent of the duty** that [AMY] owes to the company. A director is expected to uphold the same degree of skill in performance of duties as may reasonably be expected for persons of commensurate knowledge or experience, in the relevant circumstances (*MacDonald*).

[5] On the facts, [AMY] is

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<b>Ordinary director/officer</b>	<p>an ordinary director, since she does not appear to have been appointed because of a special skill that she possesses. As a result [AMY] will be held to the minimum standard of a reasonable person who has a rudimentary understanding of the business (<i>Daniels</i>).</p> <p>The standard necessarily involves being in a position to 'guide and monitor the management of the company' (<i>Daniels</i> by</p> <ul style="list-style-type: none"><li><input type="checkbox"/> a. maintaining familiarity with the financial status of the corporation by regularly reviewing financial statements</li></ul>
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	<p>(<i>Daniels</i>)</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> b. regularly attending board meetings (<i>Vrisakis</i>).</li> <li><input type="checkbox"/> c. continuing to keep informed about activities of the corporation (<i>Daniels</i>)</li> <li><input type="checkbox"/> d. generally monitoring corporate affairs and policies (<i>Daniels</i>).</li> </ul>
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4.

<p><b>Chairperson of board</b></p>	<p>the chairperson of the board. While the</p>
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**CONTINUED IN COMPLETE PAID FOR NOTES**

## ASIC Statutory duty of care and diligence:

Q1:

### Duty of care:

[1] In advising ASIC of whether [AMY]'s conduct has contravened any civil penalty provisions, ASIC may only bring proceedings against [AMY] in failing to uphold her director's duties. as constituting statutory breaches of the Corporations Act. Relevantly, the issue is whether [AMY] has breached the duty to exercise her powers with reasonable care and diligence under the *Corporations Act 2001 (Cth)*, (CA) (S 180). She may be liable for

- 1. failing to bring concerns to the board (*Vines*)
- 2. failing to monitor management (*Daniels, Healey, Friedrichs*)
- 3. failing to prevent the re-occurrence of illegal activities (*Maxwell*)
- 4. publishing the financial accounts without reference to the potential for financial consequences (*MacDonald, Healey*)
- 5. failing to attend board meetings, which contravenes the duty to be diligent (S 180(1)).

[2] [AMY]

- 1. is a [DIRECTOR/OFFICER] (S 9).
- 2. , although not a director or officer, occupies the office held by a director, and has the same responsibilities within the corporation, as a director or officer (SS 180(1)(a), 180(1)(b)). On the facts, [Amy]
  - a. was specifically delegated the role of [ROLE] by [OTHER DIRECTOR].
  - b. has been given work which is usually distributed to an officer or director, that being [DESCRIBE ROLE]. That role carries with it the expectations and responsibilities which normally flow from the experience that a director brings.

[3] Since [AMY] was a [DIRECTOR/OFFICER], she owes a duty to the company as a whole to exercise her powers with care and diligence (*Greenhalgh*).

[4] Under the CA, a director or officer owes a duty to a company to apply reasonable care in the performance of their office (*Vrisakis*). The relevant issue is the **extent of the duty** that [AMY] owes to the company. A director is expected to uphold the same degree of skill in performance of duties as may reasonably be expected for persons of commensurate knowledge or experience, in the relevant circumstances (*MacDonald*).

[5] On the facts, [AMY] is

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<b>Ordinary director/officer</b>	an ordinary director, since she does not appear to have been appointed because of a special skill that she possesses. As a result [AMY] will be held to the minimum standard of a reasonable person who has a rudimentary understanding of the business ( <i>Daniels</i> ).  The standard necessarily involves being in a position to 'guide and monitor the management of the company' ( <i>Daniels</i> by <ul style="list-style-type: none"><li><input type="checkbox"/> a. maintaining familiarity with the</li></ul>
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	<p>financial status of the corporation by regularly reviewing financial statements (<i>Daniels</i>)</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> b. regularly attending board meetings (<i>Vrisakis</i>).</li> <li><input type="checkbox"/> c. continuing to keep informed about activities of the corporation (<i>Daniels</i>)</li> <li><input type="checkbox"/> d. generally monitoring corporate affairs and policies (<i>Daniels</i>).</li> </ul>
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<p><b>Director/Officer with special skill</b></p>	<p>a director with special skill, and was appointed because of her ability to [LOOK AT FINANCIALS/ RUN A COMPANY/ ETC.]. Consequently, [AMY] will be held to the minimum standard of a reasonable person in her category of appointment (<i>Wheeler; Vines</i>).</p>
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**CONTINUED IN COMPLETE PAID FOR NOTES**

## Equity: Duty to act in good faith and for a proper purpose:

Q1:

### Duty to act in good faith and for a proper purpose

[1] The issue is whether [AMY] has breached the duty to exercise her powers in good faith and for a proper purpose when she [DESCRIBE ACT].

[2] Since [AMY] was a [DIRECTOR/OFFICER], she owes a duty to the company as a whole to act in good faith and for a proper purpose (*Greenhalgh*).

[3] Good faith

In considering whether [AMY] breached her duty of care at equity, in equity, a director must believe that they are acting in good faith (*Fawcett*). This is a subjective test, which largely focuses on the state of mind of the directors, which is ascertained through the Court's consideration of the surrounding circumstances, and other materials throwing light upon [AMY]'s state of mind. From the facts, [DISCUSS FACTS], it is likely that [AMY]

- 1. IF [AMY] believed that, on the facts, she was acting in good faith: believed that she was acting on good faith because [APPLY FACTS]
  - a. IF AMY REMAINED SILENT: Silence is not a starting point from which to infer lack of good faith, as such, in [INSERT FACTS, i.e., refusing to register share transfer when absolute discretion is given to the board, etc. etc.]
  - b. IF AMY ACTED IN SELF-INTEREST: **NOT GOOD FAITH!**
  - c. IF AMY PROVIDES A STATEMENT OF HER INTENTIONS: Whilst [AMY]'s statements about her subjective intentions are not conclusive of her bona fides (*FAI Insurance*), in the circumstances, it [PROVIDES] compelling evidence that the good faith element is satisfied, particularly in light of the fact that [PROVIDE COMPELLING EVIDENCE].
  - d. IF AMY WAS CARELESS: Even though [AMY] was careless, carelessness does not constitute mala fides (*Gordon*).
- 2. IF [AMY] did not believe that, on the facts, she was acting in good faith: did not believe that she was acting in good faith because [APPLY FACTS]
  - a. IF AMY REMAINED SILENT: Further, while silence is not a starting point from which to infer lack of good faith, as such, in [INSERT FACTS, i.e., refusing to register share transfer when absolute discretion is given to the board, etc. etc.], [AMY]'s silence could [FACTS].
  - b. IF AMY ACTED IN SELF-INTEREST: This is particularly evident as [AMY] acted in her self-interests when she [FACTS]. Since there was a self-interest motivation, [AMY] cannot claim to be acting bona fide (*Howard Smith*).
  - c. IF AMY PROVIDES A STATEMENT OF HER INTENTIONS: Whilst [AMY]'s statements about her subjective intentions are not conclusive of her bona fides (*FAI Insurance*), in the circumstances, it [DOES NOT PROVIDE] compelling evidence that the good faith element is satisfied, particularly in light of the fact that [PROVIDE COMPELLING EVIDENCE].
  - d. IF AMY WAS CARELESS: Even though [AMY] was careless, carelessness on its own does not constitute mala fides (*Gordon*). However, here [FACTS].

[4] Proper purpose

Second, [AMY] must, on an objective basis, exercise her powers for the purpose for which they were conferred and not for any collateral purpose (*Wheeler*), with her motives for exercising the power irrelevant. First is a question of law, for what purpose [AMY] [may/may

not] exercise her power (*Howard Smith*). Considering the company's constitution, [AMY] appears to have the power to [APPLY FACTS, DISCUSS POWER].

- 1. IF THE CONSTITUTION CONFERRED ON THE BOARD POWER TO XYZ: Since the constitution conferred on the board the power to [refuse a share transfer without having to give a reason for the decision], the exercise of this power is simply subject to the bona fide requirement only (*Australian Metropolitan*). Consequently, it is irrelevant whether [AMY] acted for a proper purpose.
- 2. IF THE CONSTITUTION CONFERRED ON THE BOARD THE 'ABSOLUTE AND UNCONTROLLED' DISCRETION TO XYZ: Since the constitution conferred on the board the 'absolute and uncontrolled discretion' to [refuse a share transfer without having to give a reason for the decision], the exercise of this power is simply subject to the bona fide requirement only (*Fawcett*). Consequently, it is irrelevant whether [AMY] acted for a proper purpose.

Next is a question of fact, considering whether [AMY] objectively exercised her power within the category of permissible purposes (*Fawcett*). On the facts, [AMY] objectively

- 1. IF FAILED: failed to act in the interest of the company, but in fact, exercised power for an ulterior purpose, [DISCUSS ULTERIOR PURPOSE] (*Ure*). By [ACT], she failed to exercise her powers in a legitimate manner according to the constitution, and, 'but for' the impermissible purpose, the power would not have been exercised (*Whitehouse*), particularly as [FACTS] i.e., [AMY] would have been trying to advance the interests of [OTHER COMPANY]. Consequently, this element is likely to be satisfied.
- 2. IF SUCCEEDED: acted in the interest of the company, not having exercised power for an ulterior purpose (*Ure*). By [ACT], [AMY] exercised her powers in a legitimate manner according to the constitution, particularly as [FACTS] i.e., [AMY] would not have been trying to advance the interests of [OTHER COMPANY]. Consequently, this element is not likely satisfied.

#### [4] Best interest of the corporation

[AMY] must have acted in the best interests of the company as a whole (*Greenhalgh; Gold Reef*). Here, [AMY]

- 1. IF THE WHOLE COMPANY BENEFITED BUT A SPECIFIC PARTY ALSO BENEFITED/WAS DETRIMENTED: engaged in an activity which [benefited/detrimented] [RELATED ENTITY] within the same corporate group. When considering whether the company as a whole, which includes related entities, benefited from [AMY]'s conduct, it is likely that the company did benefit, as a whole, and thus that [AMY] acted with the best interests of the whole (*Maronis Holdings*).
- 2. IF ...: acted [THE SAME/DIFFERENTLY] between different classes of shareholders. As such, it cannot be said that she was acting with the best interests of the shareholders as a whole (*Mills*).
  - a. COUNTER TO THIS, IF THE SHAREHOLDER IS A PARTLY PAID FOR SHARE: However, as [XYZ] held shareclass [XYZ], which under the constitution is a partly purchased class of share, [AMY], in calling for this share to be paid in full, cannot be said to have unfairly determined [XYZ] in calling the share for a proper business purpose [DISCUSS PURPOSE], as it is part of the share agreement that these shares can be called upon, with [XYZ] knowing the risk when he purchased the shares.

**CONTINUED IN COMPLETE PAID FOR NOTES**

## Statutory duty to act in good faith and for a proper purpose:

Q1:

### Duty to act in good faith and for a proper purpose

[1] The issue is whether [AMY] is liable for breaching her statutory to act in good faith and for a proper purpose when she [DESCRIBE ACT] (S 181(1)).

[2] Since [AMY] was a [DIRECTOR/OFFICER], she owes a duty to the company as a whole to act in good faith and for a proper purpose (*Greenhalgh*).

[3] Good faith

In considering whether [AMY] breached her duty of care (*Fawcett*). This is a subjective test, which largely focuses on the state of mind of the directors, which is ascertained through the Court's consideration of the surrounding circumstances, and other materials throwing light upon [AMY]'s state of mind. From the facts, [DISCUSS FACTS], it is likely that [AMY]

- 1. IF [AMY] believed that, on the facts, she was acting in good faith: believed that she was acting on good faith because [APPLY FACTS]
  - a. IF AMY REMAINED SILENT: Silence is not a starting point from which to infer lack of good faith, as such, in [INSERT FACTS, i.e., refusing to register share transfer when absolute discretion is given to the board, etc. etc.]
  - b. IF AMY ACTED IN SELF-INTEREST: **NOT GOOD FAITH!**
  - c. IF AMY PROVIDES A STATEMENT OF HER INTENTIONS: Whilst [AMY]'s statements about her subjective intentions are not conclusive of her bona fides (*FAI Insurance*), in the circumstances, it [PROVIDES] compelling evidence that the good faith element is satisfied, particularly in light of the fact that [PROVIDE COMPELLING EVIDENCE].
  - d. IF AMY WAS CARELESS: Even though [AMY] was careless, carelessness does not constitute mala fides (*Gordon*).
- 2. IF [AMY] did not believe that, on the facts, she was acting in good faith: did not believe that she was acting in good faith because [APPLY FACTS]
  - a. IF AMY REMAINED SILENT: Further, while silence is not a starting point from which to infer lack of good faith, as such, in [INSERT FACTS, i.e., refusing to register share transfer when absolute discretion is given to the board, etc. etc.], [AMY]'s silence could [FACTS].
  - b. IF AMY ACTED IN SELF-INTEREST: This is particularly evident as [AMY] acted in her self-interests when she [FACTS]. Since there was a self-interest motivation, [AMY] cannot claim to be acting bona fide (*Howard Smith*).
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  - d. IF AMY WAS CARELESS: Even though [AMY] was careless, carelessness on its own does not constitute mala fides (*Gordon*). However, here [FACTS].

[4] Proper purpose

Second, [AMY] must, on an objective basis, exercise her powers for the purpose for which they were conferred and not for any collateral purpose (*Wheeler*), with her motives for exercising the power irrelevant. First is a question of law, for what purpose [AMY] [may/may

not] exercise her power (*Howard Smith*). Considering the company's constitution, [AMY] appears to have the power to [APPLY FACTS, DISCUSS POWER].

- 1. IF THE CONSTITUTION CONFERRED ON THE BOARD POWER TO XYZ: Since the constitution conferred on the board the power to [refuse a share transfer without having to give a reason for the decision], the exercise of this power is simply subject to the bona fide requirement only (*Australian Metropolitan*). Consequently, it is irrelevant whether [AMY] acted for a proper purpose.
- 2. IF THE CONSTITUTION CONFERRED ON THE BOARD THE 'ABSOLUTE AND UNCONTROLLED' DISCRETION TO XYZ: Since the constitution conferred on the board the 'absolute and uncontrolled discretion' to [refuse a share transfer without having to give a reason for the decision], the exercise of this power is simply subject to the bona fide requirement only (*Fawcett*). Consequently, it is irrelevant whether [AMY] acted for a proper purpose.

Next is a question of fact, considering whether [AMY] objectively exercised her power within the category of permissible purposes (*Fawcett*). On the facts, [AMY] objectively

- 1. IF FAILED: failed to act in the interest of the company, but in fact, exercised power for an ulterior purpose, [DISCUSS ULTERIOR PURPOSE] (*Ure*). By [ACT], she failed to exercise her powers in a legitimate manner according to the constitution, and, 'but for' the impermissible purpose, the power would not have been exercised (*Whitehouse*), particularly as [FACTS] i.e., [AMY] would have been trying to advance the interests of [OTHER COMPANY]. Consequently, this element is likely to be satisfied.
- 2. IF SUCCEEDED: acted in the interest of the company, not having exercised power for an ulterior purpose (*Ure*). By [ACT], [AMY] exercised her powers in a legitimate manner according to the constitution, particularly as [FACTS] i.e., [AMY] would not have been trying to advance the interests of [OTHER COMPANY]. Consequently, this element is not likely satisfied.

#### [4] Best interest of the corporation

[AMY] must have acted in the best interests of the company as a whole (*Greenhalgh; Gold Reef*). Here, [AMY]

- 1. IF THE WHOLE COMPANY BENEFITED BUT A SPECIFIC PARTY ALSO BENEFITED/WAS DETRIMENTED: engaged in an activity which [benefited/detrimented] [RELATED ENTITY] within the same corporate group. When considering whether the company as a whole, which includes related entities, benefited from [AMY]'s conduct, it is likely that the company did benefit, as a whole, and thus that [AMY] acted with the best interests of the whole (*Maronis Holdings*).
- 2. IF ...: acted [THE SAME/DIFFERENTLY] between different classes of shareholders. As such, it cannot be said that she was acting with the best interests of the shareholders as a whole (*Mills*).
  - a. COUNTER TO THIS, IF THE SHAREHOLDER IS A PARTLY PAID FOR SHARE: However, as [XYZ] held shareclass [XYZ], which under the constitution is a partly purchased class of share, [AMY], in calling for this share to be paid in full, cannot be said to have unfairly determined [XYZ] in calling the share for a proper business purpose [DISCUSS PURPOSE], as it is part of the share agreement that these shares can be called upon, with [XYZ] knowing the risk when he purchased the shares.

**CONTINUED IN COMPLETE PAID FOR NOTES**

## ASIC Statutory duty to act in good faith and for a proper purpose:

Q1:

### Duty to act in good faith and for a proper purpose

[1] In advising ASIC of whether [AMY]'s conduct has contravened any civil penalty provisions, ASIC may only bring proceedings against [AMY] in failing to uphold her director's duties. as constituting statutory breaches of the *Corporations Act 2001 (Cth)*, (CA) .

Relevantly, the issue is whether [AMY] is liable for breaching her statutory to act in good faith and for a proper purpose when she [DESCRIBE ACT] (S 181(1)).

[2] Since [AMY] was a [DIRECTOR/OFFICER], she owes a duty to the company as a whole to act in good faith and for a proper purpose (*Greenhalgh*).

[3] Good faith

In considering whether [AMY] breached her duty of care (*Fawcett*). This is a subjective test, which largely focuses on the state of mind of the directors, which is ascertained through the Court's consideration of the surrounding circumstances, and other materials throwing light upon [AMY]'s state of mind. From the facts, [DISCUSS FACTS], it is likely that [AMY]

- 1. IF [AMY] believed that, on the facts, she was acting in good faith: believed that she was acting on good faith because [APPLY FACTS]
  - a. IF AMY REMAINED SILENT: Silence is not a starting point from which to infer lack of good faith, as such, in [INSERT FACTS, i.e., refusing to register share transfer when absolute discretion is given to the board, etc. etc.]
  - b. IF AMY ACTED IN SELF-INTEREST: **NOT GOOD FAITH!**
  - c. IF AMY PROVIDES A STATEMENT OF HER INTENTIONS: Whilst [AMY]'s statements about her subjective intentions are not conclusive of her bona fides (*FAI Insurance*), in the circumstances, it [PROVIDES] compelling evidence that the good faith element is satisfied, particularly in light of the fact that [PROVIDE COMPELLING EVIDENCE].
  - d. IF AMY WAS CARELESS: Even though [AMY] was careless, carelessness does not constitute mala fides (*Gordon*).
- 2. IF [AMY] did not believe that, on the facts, she was acting in good faith: did not believe that she was acting in good faith because [APPLY FACTS]
  - a. IF AMY REMAINED SILENT: Further, while silence is not a starting point from which to infer lack of good faith, as such, in [INSERT FACTS, i.e., refusing to register share transfer when absolute discretion is given to the board, etc. etc.], [AMY]'s silence could [FACTS].
  - b. IF AMY ACTED IN SELF-INTEREST: This is particularly evident as [AMY] acted in her self-interests when she [FACTS]. Since there was a self-interest motivation, [AMY] cannot claim to be acting bona fide (*Howard Smith*).
  - c. IF AMY PROVIDES A STATEMENT OF HER INTENTIONS: Whilst [AMY]'s statements about her subjective intentions are not conclusive of her bona fides (*FAI Insurance*), in the circumstances, it [DOES NOT PROVIDE] compelling evidence that the good faith element is satisfied, particularly in light of the fact that [PROVIDE COMPELLING EVIDENCE].
  - d. IF AMY WAS CARELESS: Even though [AMY] was careless, carelessness on its own does not constitute mala fides (*Gordon*). However, here [FACTS].

[4] Proper purpose

Second, [AMY] must, on an objective basis, exercise her powers for the purpose for which they were conferred and not for any collateral purpose (*Wheeler*), with her motives for exercising the power irrelevant. First is a question of law, for what purpose [AMY] [may/may not] exercise her power (*Howard Smith*). Considering the company's constitution, [AMY] appears to have the power to [APPLY FACTS, DISCUSS POWER].

- 1. IF THE CONSTITUTION CONFERRED ON THE BOARD POWER TO XYZ: Since the constitution conferred on the board the power to [refuse a share transfer without having to give a reason for the decision], the exercise of this power is simply subject to the bona fide requirement only (*Australian Metropolitan*). Consequently, it is irrelevant whether [AMY] acted for a proper purpose.
- 2. IF THE CONSTITUTION CONFERRED ON THE BOARD THE 'ABSOLUTE AND UNCONTROLLED' DISCRETION TO XYZ: Since the constitution conferred on the board the 'absolute and uncontrolled discretion' to [refuse a share transfer without having to give a reason for the decision], the exercise of this power is simply subject to the bona fide requirement only (*Fawcett*). Consequently, it is irrelevant whether [AMY] acted for a proper purpose.

Next is a question of fact, considering whether [AMY] objectively exercised her power within the category of permissible purposes (*Fawcett*). On the facts, [AMY] objectively

- 1. IF FAILED: failed to act in the interest of the company, but in fact, exercised power for an ulterior purpose, [DISCUSS ULTERIOR PURPOSE] (*Ure*). By [ACT], she failed to exercise her powers in a legitimate manner according to the constitution, and, 'but for' the impermissible purpose, the power would not have been exercised (*Whitehouse*), particularly as [FACTS] i.e., [AMY] would have been trying to advance the interests of [OTHER COMPANY]. Consequently, this element is likely to be satisfied.
- 2. IF SUCCEDEED: acted in the interest of the company, not having exercised power for an ulterior purpose (*Ure*). By [ACT], [AMY] exercised her powers in a legitimate manner according to the constitution, particularly as [FACTS] i.e., [AMY] would not have been trying to advance the interests of [OTHER COMPANY]. Consequently, this element is not likely satisfied.

#### [4] Best interest of the corporation

[AMY] must have acted in the best interests of the company as a whole (*Greenhalgh; Gold Reef*). Here, [AMY]

- 1. IF THE WHOLE COMPANY BENEFITED BUT A SPECIFIC PARTY ALSO BENEFITED/WAS DETRIMENTED: engaged in an activity which [benefited/detrimented] [RELATED ENTITY] within the same corporate group. When considering whether the company as a whole, which includes related entities, benefited from [AMY]'s conduct, it is likely that the company did benefit, as a whole, and thus that [AMY] acted with the best interests of the whole (*Maronis Holdings*).
- 2. IF ...: acted [THE SAME/DIFFERENTLY] between different classes of shareholders. As such, it cannot be said that she was acting with the best interests of the shareholders as a whole (*Mills*).
  - a. COUNTER TO THIS, IF THE SHAREHOLDER IS A PARTLY PAID FOR SHARE: However, as [XYZ] held shareclass [XYZ], which under the constitution is a partly purchased class of share, [AMY], in calling for this share to be paid in full, cannot be said to have unfairly determined [XYZ] in calling the share for a proper business purpose [DISCUSS PURPOSE], as it.

**CONTINUED IN COMPLETE PAID FOR NOTES**

## Equity: Duty to avoid conflicts of interest:

### Q1:

#### Duty to avoid conflicts of interest:

[1] The issue is whether [AMY] has breached the duty to avoid positions of conflict in her capacity as director. Notably, a mere fact of loss is insufficient to signal a failure of duty, but rather that [AMY] has placed herself in a position where she may conflict upon the interests of the company she is a director in.

#### [2] Fiduciary duty

The first issue to consider is whether a fiduciary relationship exists. A status-based fiduciary relationship exists between a director and the company (*Hospital Products*). The scope of this relationship would likely be found as extending to involve the director acting in the best interests of the company, and ensuring that she did not promote her own personal interests, with a duty owed to the company as a whole (*Greenhalgh*). Here, [AMY] is a [DIRECTOR (*Hospital Products*)/ SENIOR OFFICER IN A POSITION OF RESPONSIBILITY (*Boardman*); MANAGING DIRECTOR CARRYING ON BUSINESS (*Cooley*)], and so would be found as having owed a fiduciary obligation to the company.

#### [3] Prospective duties

Assuming a fiduciary duty is likely found out to which [AMY] is bound to, she would be found to be under two prospective fiduciary obligations (*Zacharia*). First, [AMY] must not obtain any unauthorised benefit from the relationship she has as the company's director (*Regal*); and second, as director, that she must not place herself in a position where there is a 'real or substantial possibility' that her interests or duties would conflict with the company's interests (*Howard*). These obligations aim to preclude [AMY], as director, from placing her personal interests above her fiduciary obligations.

- The duty still exists, even beyond resignation (*Regal (Hastings)*).

#### [4] Breach

From the facts,

- 1. IF A BREACH OCCURRED of the no-profits rule: a breach of the no profits rule likely occurred when [AMY] [APPLY FACTS], whereby [AMY] made unauthorised [profit/ interest/ opportunity], which was acquired by reason and within the scope of her position as a fiduciary, which she otherwise wouldn't have had the opportunity to profit on were it not for her role (*Regal*). 'By reason of using her position' (*Howard*) [AMY] [diverted a business opportunity/ misappropriated company property/ received secret profits] by [APPLY FACTS]. She would not have had the opportunity to make this profit were it not for her having been a director of the company. [AMY] likely breached her duty when
  - a. received secret profits: she received secret profits, wherein, she [was offered an opportunity in her capacity as director/ she used her position as director] to acquire shares, wherein the shares appreciated in value, making her a profit should the shares later be sold (*Regal*).
  - b. received a payment from party b: she received a payment from [party b] because her position as a managing director allowed her to negotiate a particular contract with the purchaser (*Tomkins*).

- c. Diverted business opportunity from one director: she diverted a contract opportunity from the company to another company in which [AMY] had an interest (*Bestobell*).
- d. misappropriated company property: she approved the sale of a company to another company, whereby she had an interest (*Cook v Deeks*).
- e. Sold shares to herself: she sold shares to herself, trading at a higher price compared to the market, making her a profit should she sell them (*Porcupine Mines*).
- f. Contracted to procure debentures: she contracted to procure debentures, using her position as director to convince the company to buy the debentures [AT A HIGHER THAN MARKET RATE], making her a profit (*Coleman*).

Since there was actual conflict, this will likely satisfy the no-profit rule (*CBA v Smith*)

- a. IF THE OPPORTUNITY WAS ACCEPTED TO THE COMPANY AND THEY REJECTED IT, THEN IT WAS OFFERED TO THE DIRECTOR INDIVIDUALLY: While the opportunity only arose by reason of [AMY]'s position in the company, that is, she only heard about the position in her capacity as a director. However, since the company rejected the offer, and it was later offered to [AMY] as an individual member of the public in her private capacity, she may be able to escape liability, particularly if there has been disclosure and consent provided (*Peso Silver*).
- b. IF DISCLOSURE AND CONSENT WAS PROVIDED: Should [AMY] notify the company with full and frank disclosure of interest that she would pursue the opportunity the company turned down herself, despite receiving the opportunity originally as a director of the company, and the company informed her that they had no objection in her doing so and passed a resolution confirming this, and [AMY] thereby resigned from the company to pursue the opportunity would result in her acting entirely on her own and at her own expense. As such, since [AMY] had disclosed the interest, the company was fully informed of the facts and had consented to her pursuit of the opportunity, whereby [AMY] can rely on the defence of informed consent.
- c. IF [AMY] QUIT HER JOB TO PURSUE THE OPPORTUNITY SHE HEARD ABOUT AS A DIRECTOR: The opportunity only arose by reason of [AMY]'s position in the company, that is, she only heard about the position in her capacity as a director. As such, even though [AMY] quit from her position of director to pursue the opportunity, her duties to the company are still considered to continue, and that she intercepted the opportunity of the company to accept the opportunity by taking it herself (*Canadian Aero*) The opportunity was not rejected by the company and later offered to [AMY], and so she did not accept the offer in private capacity, but instead took the opportunity from the company to accept it which she was director to (*Peso Silver*). As such, this would likely constitute a breach of the no-profit rule, even if she did leave as director of the company, with her duties continuing beyond her leaving the company.

It is irrelevant whether the company suffered any loss, or whether the director acted bona fide and without fraud, as the duty is strictly applied to hold [AMY] liable. All that is considered is whether an unauthorised profit was made in [AMY]'s capacity as

**CONTINUED IN COMPLETE PAID FOR NOTES**

**Statutory duty to avoid conflicts of interest:**

**Q1:**

**Statutory duty to avoid conflicts of interest:**

[1] The issue is whether [AMY] is liable under the statutory duty to avoid conflicts of interest in her capacity as director under the *Corporations Act 2001 (Cth)*, (CA). Notably, a mere fact of loss is insufficient to signal a failure of duty, but rather that [AMY] has placed herself in a position where she may conflict upon the interests of the company she is a director in.

**PICK [2]a Use of position or [2]b Use of information**

**OPTION 1:**

[2]a Use of position

[AMY] may be liable for improperly using her position when she

- 1. IF [AMY]/someone else gained an advantage: gained an advantage for [herself/ someone else] (S 182(1)(a)), by [FACTS]
- 2. IF [AMY] caused a disadvantage: caused a detriment to the corporation (S 182(1)(b), by [FACTS].

In order to make this out, the following must be proved:

**ORRRR**

**OPTION 2:**

[2]b Use of information

[AMY] may be liable for obtaining information from her directorship, and then using that information to

- 1. IF [AMY]/someone else gained an advantage: gained an advantage for [herself/ someone else] (S 183(1)(a)), by [FACTS]
- 2. IF [AMY] caused a disadvantage: caused a detriment to the corporation (S 183(1)(b), by [FACTS].

In order to make this out, the following must be proved:

**CONTINUE HERE REGARDLESS OF YOUR OPTION [2]a Use of position or [2]b Use of information**

[3] Relevant personnel

First, [AMY] is a [director/secretary/officer/employee] of the relevant company, as as such, due to her role, she owes a duty to the company as a whole, and is subject to the duty to avoid conflicts of interest (*Greenhalgh*).

[3] impropriety

Second, it must be proven that [AMY] breached the standards of conduct that would be expected of a person in a position of the alleged offender by a reasonable person with knowledge of the duties, powers and authority of the position and circumstances of the case (*Byrnes*). The test is objective, it does not rely on the conscience of the person, and so it is irrelevant whether [AMY] was acting honestly or not. What must only be considered here is whether a reasonable person in [AMY]'s position as [director/secretary/officer/employee] [would/would not] have [APPLY facts]. Instead, the reasonable person would instead have [WHAT WOULD A REASONABLE PERSON IN [AMY]'s POSITION HAVE DONE]. Since a reasonable person would not have [AGAIN, facts], objectively, the conduct would likely be deemed as improper by the court.

### Disclosure and informed consent

In determining whether the conduct was improper, regard must be had as to whether [AMY] satisfied the statutory requirements for disclosure, and whether provided by [AMY] to the company, which then extended to her consent for her conduct (S 191(1)).

A. Material personal interest: First, [AMY]'s personal interest is a matter of 'real substance' (*McGellin*) because [FACTS]. In these circumstances, the interest [IS/ISN'T] substantially likely to have actual significance in deliberations (*Coleman*); second the interest [HAS/DOESN'T HAVE] the 'potential' to influence [AMY]'s behaviour in respect of [FACTS, voting, etc.] (*McGellin*).

- 1. IF MATERIAL: Since [AMY]'s interest is material and has the capacity to influence, the interest will likely be characterised as a material personal interest under S 191, wherein [AMY] is required to disclose the interest.
- 2. IF IMMATERIAL: Since [AMY]'s interest is immaterial and doesn't have the capacity to influence, the interest will likely be characterised as an immaterial personal interest under S 191, wherein [AMY] isn't required to disclose the interest.

B. Related to affairs: This interest is related to the affairs of the company because [FACTS].

C. Notice: Assuming [AMY] is considered to have a 'material personal interest' she is required to give explicit notice to the other directors of this interest (S 191).

- 1. IF THERE's no exception: As such, [AMY] must give explicit notice to the other directors of her interest at a directors' meeting (*Camelot Resources*) (S 193). In order to do so, [AMY] in her disclosure must satisfy the statutory requirements that must be adhered to. Her notice must A. give details of the nature and extent of the interest (S 191(3)(a)(i)); B. give details of the relationship of the interest to the affairs of the company (S 191(3)(a)(ii)); C. must be given at a directors' meeting as soon as practicable after the director became aware of their interest in the matter (S191(3)(b)). On the facts, in [AMY]'s disclosure there

- A. was sufficient detail, as she provided a level of information that enabled the board as a whole to understand the scope of the potential profit she would derive (*Camelot Resources*), whereby notice would take effect as soon as it was given.
- B. wasn't sufficient detail, as she provided only a mere 'suggestion' which was insufficient in enabling the board as a whole to understand the scope of the potential profit she would derive (*Camelot Resources*), [even if she informed one director of her intention in greater detail, she did not inform the entire board as a whole in the directors' meeting, and only provided a very surface level disclosure, that she was 'XYZ'].

- 2. IF THERE's an exception: However, a S191(2) exception to disclosure may be made out as

- A. INTEREST: the interest

- (i) Arises because the director is a member [i.e. a shareholder] of the company and is held in common with the other members of the company; or
- (ii) Arises in relation to the director's remuneration; or
- (iii) Relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members; or

**CONTINUED IN COMPLETE PAID FOR NOTES**

## ASIC Statutory duty to avoid conflicts of interest:

Q1:

### Statutory duty to avoid conflicts of interest:

[1] In advising ASIC of whether [AMY]'s conduct has contravened any civil penalty provisions, ASIC may only bring proceedings against [AMY] in failing to uphold her director's duties. as constituting statutory breaches under the *Corporations Act 2001 (Cth)*, (CA). Relevantly, the issue is whether [AMY] is liable under the statutory duty to avoid conflicts of interest in her capacity as director. Notably, a mere fact of loss is insufficient to signal a failure of duty, but rather that [AMY] has placed herself in a position where she may conflict upon the interests of the company she is a director in.

### PICK [2]a Use of position or [2]b Use of information

#### OPTION 1:

##### [2]a Use of position

[AMY] may be liable for improperly using her position when she

- 1. IF [AMY]/someone else gained an advantage: gained an advantage for [herself/ someone else] (S 182(1)(a)), by [FACTS]
- 2. IF [AMY] caused a disadvantage: caused a detriment to the corporation (S 182(1)(b), by [FACTS].

In order to make this out, the following must be proved:

#### ORRRR

#### OPTION 2:

##### [2]b Use of information

[AMY] may be liable for obtaining information from her directorship, and then using that information to

- 1. IF [AMY]/someone else gained an advantage: gained an advantage for [herself/ someone else] (S 183(1)(a)), by [FACTS]
- 2. IF [AMY] caused a disadvantage: caused a detriment to the corporation (S 183(1)(b), by [FACTS].

In order to make this out, the following must be proved:

### CONTINUE HERE REGARDLESS OF YOUR OPTION [2]a Use of position or [2]b Use of information

#### [3] Relevant personnel

First, [AMY] is a [director/secretary/officer/employee] of the relevant company, as as such, due to her role, she owes a duty to the company as a whole, and is subject to the duty to avoid conflicts of interest (*Greenhalgh*).

#### [3] impropriety

Second, it must be proven that [AMY] breached the standards of conduct that would be expected of a person in a position of the alleged offender by a reasonable person with knowledge of the duties, powers and authority of the position and circumstances of the case (*Byrnes*). The test is objective, it does not rely on the conscience of the person, and so it is irrelevant whether [AMY] was acting honestly or not. What must only be considered here is whether a reasonable person in [AMY]'s position as [director/secretary/officer/employee] [would/would not] have [APPLY facts]. Instead, the reasonable person would instead have [WHAT WOULD A REASONABLE PERSON IN [AMY]'s POSITION HAVE DONE]. Since a

reasonable person would not have [AGAIN, facts], objectively, the conduct would likely be deemed as improper by the court.

- IF [AMY] can rely on the defence of informed consent: In determining whether the conduct was improper, regard must be had as to whether there was a disclosure provided by [AMY] to the company, which then extended to her consent for her conduct (S 191(1)). From the facts [FACTS], and so [AMY] might be able to argue that she did not improperly use her position as she made a disclosure, which was consented to by the company.

### [3] Advantage/detriment

Third, [AMY]'s conduct must have been done with the purpose of [providing an advantage to someone other than the company/ imposing a detriment onto the company] (*Adler*). On the facts, [FACTS, someone gained an advantage or the company incurred a disadvantage, etc. etc., i.e., [AMY] obtained an advantage for [herself/someone else]]. As such, this element is [likely/unlikely] satisfied, as [CYZ, i.e., she wanted to obtain a personal benefit in the form of \$XX,XXX]. It is irrelevant whether, as a result of [AMY]'s conduct, [an advantage was gained by xyz/ a detriment was incurred by the company], as merely establishing that the purpose of [AMY]'s conduct was to [gain advantage/cause detriment] is sufficient in establishing this element (*Adler*). Here, [actual advantage/detriment was incurred OR/ the intention of incurring advantage/detriment] is likely made out, as established on the facts.

### [4] **Defences:**

#### Ratification:

Directors cannot rely on general law ratification to ratify breaches of statutory duties imposed on directors, as general meetings cannot ratify statutory breaches (*Carabelas*). As such, [AMY] cannot rely on ratification by the general meeting to escape liability.

#### Indemnification

While not a defence, [AMY] can rely on identification to indemnify her liability. The relevant identification being relied upon by [AMY] occurred when she [made an agreement/ made a payment] directly or through an enterprise entity to the company, to identify them in the event of [THE EVENT, apply]. Here, the indemnity sought was in relation to

- 1. IF for liability for legal costs: legal costs incurred in defending an action for liability (S 199A(3)) in resisting proceedings
  - a. in which the person is found to have a liability for which they could not be indemnified under S 199A(2)
  - b. related to criminal proceedings in which the person is found guilty
  - c. related to an action brought by ASIC or a liquidator for a court order, if grounds for making the order are found by the court to have been established (e.g. disqualification, oppression, civil penalties, injunction)
  - d. regarding proceedings for relief to a person under the CA in which the court denies relief, and as such is in an exclusionary category which the company cannot indemnify [AMY] for (S 199A(3)).
- 2. IF for liability other than for legal costs:
  - a. IF THE FOLLOWING:

**CONTINUED IN COMPLETE PAID FOR NOTES**

## Statutory duty to prevent insolvent interest:

Q1:

### Statutory duty to prevent insolvent trading

[1] The issue is whether [AMY] has breached her statutory duty to prevent insolvent trading under the *Corporations Act 2001 (Cth)*, (CA) when she [APPLY FACTS] (S 588G), as proven on the balance of probabilities by considering several criteria.

#### [2] Relevant personnel

First, [AMY] has been appointed to the position of [director (S 9(1)(i)) OR/ alternative director, and is acting in that capacity (S 9(1)(ii))]. Since [AMY] was a director, she owes a duty to the company as a whole under S 588G (*Greenhalgh*).

#### [3] Debt incurred

Second, when [AMY] was director of the company, it incurred debt in the form of

- 1. paying a dividend;
- 2. making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration);
- 3. buying back shares;
- 4. redeeming redeemable preference shares that are redeemable at its option;
- 5. issuing redeemable preference shares that are redeemable otherwise than at its option;
- 6. financially assisting a person to acquire shares (or units of shares) in itself or a holding company;
- 7. entering into an uncommercial transaction, other than that a court orders, or a prescribed agency directs, the company to enter into.
- 8. a contractual debt

(S 588G(1A)). The time at which this debt occurred was

- 1. IF paying a dividend: **when the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared.**
- 2. IF making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration): **when the reduction takes effect.**
- 3. IF buying back shares: **when the buy-back agreement is entered into.**
- 4. IF redeeming redeemable preference shares that are redeemable at its option: **when the company exercises the option.**
- 5. IF issuing redeemable preference shares that are redeemable otherwise than at its option: **when the shares are issued.**
- 6. IF financially assisting a person to acquire shares (or units of shares) in itself or a holding company: **when the agreement to provide the assistance is entered into or, if there is no agreement when the assistance is provided.**
- 7. IF entering into an uncommercial transaction, other than that a court orders, or a prescribed agency directs, the company to enter into: **when the transaction is entered into.**

8. IF a contractual debt: **upon the time stipulated for payment.**

[4] Whilst insolvent

Third, trading must have occurred

- 1. while the company was already insolvent at the time it incurred debt (S 588G(3)(b)) because it was unable to pay its debts, as and when they became due and payable (S 95A(1)).
- 2. whilst the company became insolvent by incurring debt (S 588G(3)(b)) because it became unable to pay its debts as and when they became due and payable (S 95A(1)).
- 3. whilst the company would become insolvent as a result of incurring the debt, or other debts (S 588G(3)(b)) because it would be unable to pay its debts as and when they became due and payable (S 95A(1)).
- 4. while the company was presumed to be insolvent because it
  - a. was being wound up. It must be presumed that the company was insolvent throughout the period beginning from the day on which insolvency is proved (S 588E(4)).
  - b. failed to keep and retain financial records that correctly recorded its transactions over the previous seven years and its financial position (S 588E(4)).

Considering the company's financial position holistically (*Southern Cross*), it is clear that there was an 'endemic shortage' of existing working capital (*Hymix Concrete*). As such, the company

- 1. does not have enough resources to meet its liabilities if and when they fall due;
- 2. cannot meet its liabilities through resources other than cash by sale or borrowing upon security;
- 3. even if the creditors were not to demand payment as per terms of trade, it is still unlikely that the company could meet its liabilities.

[5] Reasonable grounds for suspecting insolvency

Fourth, at the time [AMY] must have had reasonable grounds for suspecting that the company was insolvent, or it would become insolvent (S 588G(1)(c)), as objectively judged by the standard appropriate to a director of ordinary competence (*Metropolitan Fire System*). Here, [AMY] had a more than mere idle wondering whether the company was insolvent, as evidenced by [FACTS]. This suggests that she had an actual apprehension of the company's liquidity (*Queensland Bacon*).

[6] Awareness of insolvency

[AMY] must have been aware that there were grounds for suspecting insolvency (S 588G(2)(a)), or that a reasonable person in a similar position to herself would have been aware (S 588G(2)(b)).

First, in considering [AMY]'s actual awareness, there were reasonable grounds for suspecting that the company was insolvent, and that [AMY] had actual knowledge of the facts and circumstances concerning the company's financial condition, as [AMY] [FACTS]; had financial management expertise and had read the company's solvency reports; had discussed the financials of the company earlier with a director who had explained to her the

**CONTINUED IN COMPLETE PAID FOR NOTES**

## ASIC Statutory duty to prevent insolvent interest:

Q1:

### Statutory duty to prevent insolvent trading

[1] In advising ASIC of whether [AMY]'s conduct has contravened any civil penalty provisions, ASIC may only bring proceedings against [AMY] in failing to uphold her director's duties. as constituting statutory breaches under the *Corporations Act 2001 (Cth)*, (CA) . Relevantly, the issue is whether [AMY] is liable under the statutory duty to prevent insolvent trading when she [APPLY FACTS] (S 588G), as proven on the balance of probabilities by considering several criteria.

### [2] Relevant personnel

First, [AMY] has been appointed to the position of [director (S 9(1)(i)) OR/ alternative director, and is acting in that capacity (S 9(1)(ii))]. Since [AMY] was a director, she owes a duty to the company as a whole under S 588G (*Greenhalgh*).

### [3] Debt incurred

Second, when [AMY] was director of the company, it incurred debt in the form of

- 1. paying a dividend;
- 2. making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration);
- 3. buying back shares;
- 4. redeeming redeemable preference shares that are redeemable at its option;
- 5. issuing redeemable preference shares that are redeemable otherwise than at its option;
- 6. financially assisting a person to acquire shares (or units of shares) in itself or a holding company;
- 7. entering into an uncommercial transaction, other than that a court orders, or a prescribed agency directs, the company to enter into.
- 8. a contractual debt

(S 588G(1A)). The time at which this debt occurred was

- 1. IF paying a dividend: **when the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared.**
- 2. IF making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration): **when the reduction takes effect.**
- 3. IF buying back shares: **when the buy-back agreement is entered into.**
- 4. IF redeeming redeemable preference shares that are redeemable at its option: **when the company exercises the option.**
- 5. IF issuing redeemable preference shares that are redeemable otherwise than at its option: **when the shares are issued.**
- 6. IF financially assisting a person to acquire shares (or units of shares) in itself or a holding company: **when the agreement to provide the assistance is entered into or, if there is no agreement when the assistance is provided.**

- 7. IF entering into an uncommercial transaction, other than that a court orders, or a prescribed agency directs, the company to enter into: **when the transaction is entered into.**
- 8. IF a contractual debt: **upon the time stipulated for payment.**

[4] Whilst insolvent

Third, trading must have occurred

- 1. while the company was already insolvent at the time it incurred debt (S 588G(3)(b)) because it was unable to pay its debts, as and when they became due and payable (S 95A(1)).
- 2. whilst the company became insolvent by incurring debt (S 588G(3)(b)) because it became unable to pay its debts as and when they became due and payable (S 95A(1)).
- 3. whilst the company would become insolvent as a result of incurring the debt, or other debts (S 588G(3)(b)) because it would be unable to pay its debts as and when they became due and payable (S 95A(1)).
- 4. while the company was presumed to be insolvent because it
  - a. was being wound up. It must be presumed that the company was insolvent throughout the period beginning from the day on which insolvency is proved (S 588E(4)).
  - b. failed to keep and retain financial records that correctly recorded its transactions over the previous seven years and its financial position (S 588E(4)).

Considering the company's financial position holistically (*Southern Cross*), it is clear that there was an 'endemic shortage' of existing working capital (*Hymix Concrete*). As such, the company

- 1. does not have enough resources to meet its liabilities if and when they fall due;
- 2. cannot meet its liabilities through resources other than cash by sale or borrowing upon security;
- 3. even if the creditors were not to demand payment as per terms of trade, it is still unlikely that the company could meet its liabilities.

[5] Reasonable grounds for suspecting insolvency

Fourth, at the time [AMY] must have had reasonable grounds for suspecting that the company was insolvent, or it would become insolvent (S 588G(1)(c)), as objectively judged by the standard appropriate to a director of ordinary competence (*Metropolitan Fire System*). Here, [AMY] had a more than mere idle wondering whether the company was insolvent, as evidenced by [FACTS]. This suggests that she had an actual apprehension of the company's liquidity (*Queensland Bacon*).

[6] Awareness of insolvency

[AMY] must have been aware that there were grounds for suspecting insolvency (S 588G(2)(a)), or that a reasonable person in a similar position to herself would have been aware (S 588G(2)(b)).

First, in considering [AMY]'s actual awareness, there were reasonable grounds for suspecting that the company was insolvent, and that [AMY] had actual knowledge of the

**CONTINUED IN COMPLETE PAID FOR NOTES**

## 1 Statute: Related party transactions:

### Q1:

#### Related party transactions

[1] The issue is whether [PUBLIC COMPANY], in controlling the affairs of the company, was required to gain member approval for the financial benefit it provided [RELATED PARTY] under the *Corporations Act 2001 (Cth)*, (CA) (S 208). In order to consider whether this breach of director's duties arises, several factors must be considered and satisfied.

#### [2] Applicable company

First, [PUBLIC COMPANY] is a publicly listed company (S 208(1)), which has shareholders, being limited by shares, has at least three directors [LIST DIRECTOR NAMES] (S 201A) and a company secretary [LIST SECRETARY NAME] (S 204A).

#### [3] Related party

Second, [NAME OF THE OTHER PERSON/COMPANY IN THE TRANSACTION] is a related party in this transaction, as

- 1. IF ITS PRESENTLY A RELATED PARTY:
  - a. it is an entity that controls [PUBLIC COMPANY NAME] (S 228(1));
  - b. [NAME] is a director of [PUBLIC COMPANY NAME] (S228(2)(a));
  - c. [NAME] is the [spouse/defacto partner] of [ONE OF THE ABOVE, i.e., the spouse of the director of the public company] (S 228(2)(d));
  - d. [NAME] is the [parent/child] of [ONE OF THE ABOVE, i.e., the child of the director of the public company] (S 228(3));
- 2. IF ITS ACTING IN CONCERT:
  - a. [RELATED PARTY] is a related party because it acted in concert with [OTHER RELATED COMPANY] of [COMPANY], on the understanding that [RELATED PARTY] would receive a financial benefit if the public company gives the entity a financial benefit (s 228(7)).
- 3. IF ITS A PREVIOUS RELATED PARTY:
  - a. while [RELATED PARTY] is not a related party at this time, it was a related party of the [COMPANY] within the previous six-months (S 228(5) as it was an entity that controlled [PUBLIC COMPANY NAME] (S 228(1));
  - b. while [NAME] is not a related party at this time, he was a related party of the [COMPANY] within the previous six-months (S 228(5) as he was a director of [PUBLIC COMPANY NAME] (S228(2)(a));
  - c. while [NAME] is not a related party at this time, he was a related party of the [COMPANY] within the previous six-months (S 228(5) as he was the [spouse/defacto partner] of [ONE OF THE ABOVE, i.e., the spouse of the director of the public company] (S 228(2)(d));
  - d. while [NAME] is not a related party at this time, he was a related party of the [COMPANY] within the previous six-months (S 228(5), as he was the [parent/child] of [ONE OF THE ABOVE, i.e., the child of the director of the public company] (S 228(3));
- 4. IF IT WILL BECOME A RELATED PARTY:
  - a. while [RELATED PARTY] is not a related party at this time, it is enough that [RELATED PARTY] has reasonable grounds to believe that it is likely to

become a related party of [COMPANY] (s 228(6)), as it will be an entity that controls [PUBLIC COMPANY NAME] (S 228(1));

- b. while [RELATED PARTY] is not a related party at this time, it It is enough that [RELATED PARTY] has reasonable grounds to believe that he is likely to become a related party of [COMPANY] (s 228(6)), as he will be a director of [PUBLIC COMPANY NAME] (S228(2)(a));
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#### [4] Financial benefit

Third, a financial benefit [HAS/HASN'T] been imposed. The court will apply a broad interpretation as to what is a financial benefit (S 229(1)(a)). Generally, the court will conclude that any benefit that can generate money for someone involves a financial benefit (*Adler*).

Here, [COMPANY/ENTITY]

- 1. provided [RELATED PARTY] with [finance/ property/ money];
- 2. [bought/sold] an asset which belonged to [RELATED PARTY];
- 3. leased an asset from [RELATED PARTY];
- 4. [supplied/reecieved] services from [RELATED PARTY];
- 5. [issued securities/ granted options] to [RELATED PARTY];
- 6. [took up/ released] an obligation of [RELATED PARTY];

This financial burden was given

- 1. directly;
- 2. indirectly , through one or more interposed entities (S 229(2)(a));
- 3. through an [informal agreement/ oral agreement/ agreement with no binding force] (S 229(2)(c));
- 4. as a non-monetary benefit, in the sense that [COMPANY] conferred a financial advantage on [RELATED PARTY], rather than simply paying money (S 229(2)(c)).

even though [COMPANY] may argue that they gave the benefit to [FACTS, i.e., help the company], the court may disregard any consideration that may be given for the benefit, even if the consideration is adequate (S 229(1)(c)).

#### [5] Exceptions

Fourth, in considering whether the transaction was exempted,

- 1. the exemption contained in
  - a. S 210, that the transaction was arm's length terms might be open to consideration as the transaction was arguably conducted at market value, as, from the facts [FACTS, i.e. the asset was worth \$100,000, and the purchase of the asset was \$100,000. Consequently, as the transaction occurred at

**CONTINUED IN COMPLETE PAID FOR NOTES**

## 2 ASIC Statute: Related party transactions:

### Q1:

#### Related party transactions

[1] In advising ASIC of whether [PUBLIC COMPANY]'s conduct has contravened any civil penalty provisions, ASIC may only bring proceedings against [PUBLIC COMPANY] in failing to uphold its duty under the *Corporations Act 2001 (Cth)*, (CA). Relevantly, the issue is whether [PUBLIC COMPANY], in controlling the affairs of the company, was required to gain member approval for the financial benefit it provided [RELATED PARTY] (S 208). In order to consider whether this breach of director's duties arises, several factors must be considered and satisfied.

#### [2] Applicable company

First, [COMPANY NAME], is a publicly listed company (S 208(1)), which has shareholders, being limited by shares, has at least three directors [LIST DIRECTOR NAMES] (S 201A) and a company secretary [LIST SECRETARY NAME] (S 204A).

#### [3] Related party

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- 1. IF ITS PRESENTLY A RELATED PARTY:
  - a. it is an entity that controls [PUBLIC COMPANY NAME] (S 228(1));
  - b. [NAME] is a director of [PUBLIC COMPANY NAME] (S228(2)(a));
  - c. [NAME] is the [spouse/defacto partner] of [ONE OF THE ABOVE, i.e., the spouse of the director of the public company] (S 228(2)(d));
  - d. [NAME] is the [parent/child] of [ONE OF THE ABOVE, i.e., the child of the director of the public company] (S 228(3));
- 2. IF ITS ACTING IN CONCERT:
  - a. [RELATED PARTY] is a related party because it acted in concert with [OTHER RELATED COMPANY] of [COMPANY], on the understanding that [RELATED PARTY] would receive a financial benefit if the public company gives the entity a financial benefit (s 228(7)).
- 3. IF ITS A PREVIOUS RELATED PARTY:
  - a. while [RELATED PARTY] is not a related party at this time, it was a related party of the [COMPANY] within the previous six-months (S 228(5) as it was an entity that controlled [PUBLIC COMPANY NAME] (S 228(1));
  - b. while [NAME] is not a related party at this time, he was a related party of the [COMPANY] within the previous six-months (S 228(5) as he was a director of [PUBLIC COMPANY NAME] (S228(2)(a));
  - c. while [NAME] is not a related party at this time, he was a related party of the [COMPANY] within the previous six-months (S 228(5) as he was the [spouse/defacto partner] of [ONE OF THE ABOVE, i.e., the spouse of the director of the public company] (S 228(2)(d));
  - d. while [NAME] is not a related party at this time, he was a related party of the [COMPANY] within the previous six-months (S 228(5), as he was the [parent/child] of [ONE OF THE ABOVE, i.e., the child of the director of the public company] (S 228(3));

4. IF IT WILL BECOME A RELATED PARTY:
- a. while [RELATED PARTY] is not a related party at this time, it It is enough that [RELATED PARTY] has reasonable grounds to believe that it is likely to become a related party of [COMPANY] (s 228(6)), as it will be an entity that controls [PUBLIC COMPANY NAME] (S 228(1));
  - b. while [RELATED PARTY] is not a related party at this time, it It is enough that [RELATED PARTY] has reasonable grounds to believe that he is likely to become a related party of [COMPANY] (s 228(6)), as he will be a director of [PUBLIC COMPANY NAME] (S228(2)(a));
  - c. while [RELATED PARTY] is not a related party at this time, it It is enough that [RELATED PARTY] has reasonable grounds to believe that he is likely to become a related party of [COMPANY] (s 228(6)), as he will be the [spouse/defacto partner] of [ONE OF THE ABOVE, i.e., the spouse of the director of the public company] (S 228(2)(d));
  - d. while [RELATED PARTY] is not a related party at this time, it It is enough that [RELATED PARTY] has reasonable grounds to believe that he is likely to become a related party of [COMPANY] (s 228(6)), as he will be the [parent/child] of [ONE OF THE ABOVE, i.e., the child of the director of the public company] (S 228(3));

#### [4] Financial benefit

Third, a financial benefit [HAS/HASN'T] been imposed. The court will apply a broad interpretation as to what is a financial benefit (S 229(1)(a)). Generally, the court will conclude that any benefit that can generate money for someone involves a financial benefit (*Adler*).

Here, [COMPANY/ENTITY]

- 1. provided [RELATED PARTY] with [finance/ property/ money];
- 2. [bought/sold] an asset which belonged to [RELATED PARTY];
- 3. leased an asset from [RELATED PARTY];
- 4. [supplied/reecieved] services from [RELATED PARTY];
- 5. [issued securities/ granted options] to [RELATED PARTY];
- 6. [took up/ released] an obligation of [RELATED PARTY];

This financial burden was given

- 1. directly;
- 2. indirectly , through one or more interposed entities (S 229(2)(a));
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- 4. as a non-monetary benefit, in the sense that [COMPANY] conferred a financial advantage on [RELATED PARTY], rather than simply paying money (S 229(2)(c)).

even though [COMPANY] may argue that they gave the benefit to [FACTS, i.e., help the company], the court may disregard any consideration that may be given for the benefit, even if the consideration is adequate (S 229(1)(c)).

#### [5] Exceptions

Fourth, in considering whether the transaction was exempted,

- 1. the exemption contained in

**CONTINUED IN COMPLETE PAID FOR NOTES**

## Derivative action: General law, statutory or equitable breaches

### [WHEN A MEMBER/SHAREHOLDER WANTS TO SUE A DIRECTOR IN THE NAME OF THE COMPANY]

[1] Here, the company [FACTS, i.e., what did the company do which makes [INDIVIDUAL] WANT TO STOP IN TO INTERVENE IN PROCEEDINGS?]. Thus, the issue is whether [INDIVIDUAL] is able to bring proceedings on behalf of the company. For [INDIVIDUAL] to bring a statutory derivative action under the *Corporations Act 2001 (Cth)*, (CA), a number of elements must be satisfied.

#### [2] Standing

First, [INDIVIDUAL] must have standing, so to bring a derivative action. Here, [INDIVIDUAL] [APPEARS/ DOESN'T APPEAR] to have standing to bring a derivative action, as he is

- 1. a member/shareholder
- 2. a former member/shareholder
- 3. a person entitled to be registered but has not yet bought shares
- 4. an officer
- 5. a former officer
- 6. a secretary

of the company, and thus [WOULD HAVE/ WOULDN'T HAVE] grounds of standing to bring a derivative action under S 246. As the action is being pursued 'on behalf of' the company, in the sense that [INDIVIDUAL] is able to assert a cause of action for which the company could sue in its own name, [INDIVIDUAL] [would/wouldn't] likely succeed in establishing standing (*Oates*).

#### [3] Leave

Second, applying the S 237(2) leave test, [INDIVIDUAL] bears the burden of satisfying that, on the balance of probabilities, that the requirements of S 237 have been fulfilled (*Swannsson*). These are, that:

A. It is probable that the company will not itself bring proceedings: On the facts, while it may not be apparent that the company will not bring proceedings themselves, in these circumstances, it could be inferred that the company will not do so due to [FACTS, i.e., the directors have hijacked the company's general meeting, etc. etc.], thereby satisfying S 237(2)(a).

B. That [INDIVIDUAL] is acting in good faith: First, [INDIVIDUAL] must have an honest belief that a good cause of action exists because [FACTS, i.e., he conducted an inquiry as a member], and that there is a reasonable prospect of success because [FACTS, i.e., the derivative action that [INDIVIDUAL] is bringing is capable of redressing injury] (*Swannsson*); and second, [INDIVIDUAL] appears to be bringing the derivative action for a [collateral/ non-collateral] purpose, as

- 1. A COLLATERAL PURPOSE:
  - A. there is no ulterior motive in the form of [FACTS];
  - B. the action is only being brought to receive a benefit which, in good conscience, the applicant should not receive;
- 2. A NON-COLLATERAL PURPOSE
  - A. there is an ulterior motive in the form of [FACTS].

**CONTINUED IN COMPLETE PAID FOR NOTES**

## Oppression: STATUTE

[1] The issue is whether [MINORITY SHAREHOLDER INDIVIDUAL] can apply for an order against the company for [DESCRIBE OPPRESSIVE CONDUCT] on the basis that it is deemed oppressive under the *Corporations Act 2001 (Cth)*, (CA) (S 233).

### [2] Standing

In order for [MS INDIVIDUAL] to bring an order against the company for oppressive conduct, he must have standing to apply for an order under S 233, on the basis that he is

- 1. a member/shareholder of the company (S 234(a)).
- 2. a former member of the company who was removed from the register due to specific reduction (S 234(b)).
- 3. a former member whose application relates to why they ceased to be a member (S 234(c))

and therefore has standing

### [3] Grounds for oppression

[MS INDIVIDUAL] can rely on

- 1. the conduct of the company's affairs, that, in being [DESCRIBE] (S 232(a));
- 2. the [actual/proposed] [act/ommission] done by or on behalf of the company, that, in being [DESCRIBE] (S 232(b));
- 3. a [resolution/proposed resolution] of members, that, in being [DESCRIBE] (S 232(c))

as grounds for oppression, on the basis that the conduct was

- 1. contrary to the interests of the members as a whole (S 232(d)), in the sense that [FACTS, i.e., breaching directors' duties is antithetical to how members expect [COMPANY] to act;
- 2. oppressive in being unfairly prejudicial or discriminatory against members (S 232(e)), in the sense that it could be argued to be 'commercially unfair', as it was [contrary to the interests of the members/ oppressive/ unfair] on an objective basis because [APPLY FACTS] (*45 Fiers Ave*). Thus, a reasonable director [would/would not] have acted in the same was as the company did (*Wayde*).

**WHAT CAN'T BE ARGUED AS OPPRESSIVE IS** a 'management decision' the board ordinarily have the right to exercise:

- Analogous to *Re G Jeffrey*, [MEMBER] did not agree with the decision of [BOARD]. Since [describe conduct relied upon for oppressive] can be characterised as a 'management decision' and the board ordinarily have the right to exercise this power (S 198A(1)), the shareholder likely has no right to complain against the conduct. It cannot be deemed oppressive conduct on the part of the [COMPANY] (*Re G Jeffrey*).

**CONTINUED IN COMPLETE PAID FOR NOTES**

## Fraud upon the minority: EQUITY

[1] The issue is whether [MINORITY SHAREHOLDER INDIVIDUAL] can apply for an order against the company for [DESCRIBE OPPRESSIVE CONDUCT] on the basis that it is as a fraud on the minority. The oppressive conduct may open [DIRECTORS] up to the possibility of being sued in the equitable doctrine of fraud on the minority (*Gambotto*), on the basis that a shareholder has a personal right, as grounded upon equitable principles, to be protected against solution of their voting rights in the company by improper action on the part of the directors (*Residues Treatment*).

### [2] Minority shareholder

Here, [SHAREHOLDER] is a minority shareholder, and may argue that the shareholder majority are exercising their voting rights in a manner which is oppressing the minority (*Cookes v Deeks*) by [FACTS, i.e., altering the constitution, expropriation like forced transfers of shares from one shareholder to another (*Gambotto*); cancellation of shares (*Owners Strata 3529*; alteration of constitution to enable disenfranchisement of one class of shareholders (*Australian Fixed Trusts*).

In order to excuse their conduct, the [Director] would have to demonstrate that they are:

1. Acting for a proper purpose: Here, [Director] [IS/ ISN'T] acting for a proper purpose as:

- 1. Proper purpose:
  - a. they are attempting to secure the company from significant detriment or harm (i.e., shareholders harming the company) (*Gambotto*);
  - b. expropriation is necessary to ensure that the company can continue to comply with a regulatory regime (*Gambotto*).
  - c. rectifying the number of shareholders to comply with S 113(1)
- 2. Improper purpose:
  - a. their purpose is merely to secure new corporate structure or new commercial advantage (*Gambotto*);
  - b. their purpose is to advance the interests of the company as a legal or commercial entity (*Gambotto*);
  - c. even if expropriation is fair, it only advances the interests of the majority or corporators (*Gambotto*).

2. In a manner that does not oppress the minority: Here, [Director] will have to argue that their conduct is fair, the test being whether [their conduct, i.e., the expropriation of the shares] is 'fair in all the circumstances' (*Gambotto*). There must be no discrimination between the majority and minority shareholders for the purpose of giving the former an advantage (*Arderne Cinemas*). With reference to the [assets, market value, dividends and nature of the corporation] (*Gambotto*), expropriation of the shares was [fair / unfair] because [FACTS, apply the above factors].

### [3] [ADDITIONAL MISC FACTS]:

In the practice the constitution said the class B shares were partially paid and directors could call on them at any time, as an example. So if this is relevant you can argue against a finding of fraud on the minority, etc.

**CONTINUED IN COMPLETE PAID FOR NOTES**

# Distinguishing Director's Duties:

## 1. Duty of Care and Diligence

**Source:** Common law, equity, statute, ASIC

**Trigger:**

- A director/officer fails to act with the reasonable care and skill expected in their role.
- Includes *not* keeping informed, missing meetings, ignoring financial red flags, failing to monitor management, signing off without checking.

**Examples:**

- Not reading financial statements before approval.
  - Letting unsafe practices continue.
  - Failing to supervise a risky transaction.
- Think:** "Negligence" in running the company — whether actively doing something careless or passively failing to act.
- 

## 2. Duty to Act in Good Faith and for a Proper Purpose

**Source:** Equity, statute, ASIC

**Trigger:**

- Director uses powers for the wrong reason, even if they think it benefits the company.
- Must act in the *best interests of the company as a whole* and for purposes allowed by the constitution/law.

**Examples:**

- Issuing shares to dilute a rival's voting power rather than to raise capital.
  - Selling assets cheaply to a friend for personal reasons.
- Think:** Motive and purpose matter — if the *main* purpose is improper, this duty is in play.
-

**CONTINUED IN COMPLETE PAID FOR NOTES**