

GOOD FAITH / BEST INTERESTS DUTY s181(1)(a)

s 181 Good faith

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
- (a) in good faith in the best interests of the corporation; and
 - (b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is **involved in** a contravention of subsection (1) contravenes this subsection.

Directors owe a duty to act bona fide in the best interests of the company – a duty of good faith (**Richard Brady Franks v Price**).

STEP 1 – IS THE PERSON A DIRECTOR / SUBJECT TO DIRECTORS' DUTIES?

- [PERSON] is a **director** of [COMPANY] under the meaning of **s 9AC**, therefore s181(1)(a) directors' duties apply.
- [PERSON] is an **officer** of [COMPANY] under meaning of **s 9AD**, therefore s181(1)(a) directors' duties apply.

STEP 2 – IDENTIFY THE POTENTIALLY BREACHING CONDUCT

- [PERSON] may be in breach of s181(1)(a) because of following conduct XXXX.

STEP 3 – IS THIS CONDUCT IN THE BEST INTERESTS OF THE COMPANY?

In determining whether PERSON has acted in good faith, a subjective test with an objective bottom line will be applied (**Bell Group**).

A – SUBJECTIVE TEST

- Did the director act honestly, with the best intentions when considering the company's interests?
 - Subjective test with focus on state of mind of director (**Bell Group**).
 - Usually satisfied if director **genuinely believed** it is in the co's best interests.
 - Is the PERSON acting bona fide for the company or to achieve a **collateral purpose**?
- [PERSON] need clear evidence that they **SUBJECTIVELY** thought that the transactions were in [COMPANY'S] interests.
- Evidence to draw inferences about subjective state of mind:
 - Minutes of board meetings
 - Evaluative documents
 - Financial considerations

- Did the director take **steps to minimise risk**?
 - Independent valuation? 3P, independent expert valuation & terms of loan.
 - Board deliberation & documentation? Document discussions & reasons for entering the transactions.
 - Seek shareholder approval if required: if ss 208 - 210 apply, convene general meeting of minority shareholders.
 - Conflict management: Directors shld disclose conflicts (s191) & refrain from voting on matters where conflict of interest.
 - Legal advice? Obtain legal advice on compliance w/ related party provisions.

- *E.g. In the board meetings, A and B directors would need to be asking questions such as:*
 - *Why does CO need X?*
 - *Questioning the valuation of X, whether they should get an independent valuator.*
 - *Was X in good condition? Why is it underused?*
 - *Is it an upstream loan so there is unlikely any real benefit to CO from giving the loan.*
 - *Is there any benefit obtainable from the facts?*

- Do we **need additional facts**?
 - Exact terms of the transactions & whether they are on arm's length terms?
 - Confirmation of Co's financial position? Whether transactions are commercially justifiable?
 - Whether the board has considered alternative buyers or lenders?

B – OBJECTIVE TEST

XXXXX

STEP 4 – ACCESSORY LIABILITY FOR BREACH?

XXXXX

DUTY TO ACT FOR PROPER PURPOSES s 181(1)(b)

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STEP 1 – IS THE PERSON A DIRECTOR / SUBJECT TO DIRECTORS' DUTIES?

- [PERSON] is a **director** of [COMPANY] under the meaning of **s 9AC**, therefore s181(1)(a) directors' duties apply.
- [PERSON] is an **officer** of [COMPANY] under meaning of **s 9AD**, therefore s181(1)(a) directors' duties apply.

STEP 2 – IDENTIFY THE POTENTIALLY BREACHING CONDUCT

- [PERSON] may be in breach of s181(1)(b) because of following conduct XXXX.

STEP 3 – WHAT IS THE SUBSTANTIAL PURPOSE OF THE CONDUCT?

- Likely won't be much information about WHY you have the power, courts will often say the **power has been given to you to ACT IN THE BEST INTERESTS of the company...**
- See whether co constitution permits the purpose of the power - in **Whitehouse v Carlton**, the CC conferred a power to issue shares.
- **POWER TO ISSUE SHARES?** Is the purpose **proper**?
 - ✓ Issuing shares to **raise capital** = proper purpose
 - ✓ Issuing shares to raise capital not immediately needed but because gave Woodside greater freedom to **plan future projects** with its partner, **Burmah (Harlowe's case)** = proper purpose.
 - ✓ Issuing shares to comply w **statutory requirements** to ensure sufficient minimum no. shareholders = proper purpose (**Pint v Symons**).
 - ✗ Issuing shares to attempt to defeat a hostile takeover ≠ not proper purpose (**Hogg v Cramphorn**).
 - ✗ Issuing shares to facilitate a takeover through reduction of existing majority or creation of a new majority ≠ proper purpose (**Howard Smith v Ampol**).
 - ✗ Issuing shares to entrench control in one group of shareholders at expense of another ≠ proper purpose (**Whitehouse v Carlton Hotel**)

- **MULTIPLE PURPOSES?**

- In *Howard Smith*, there were multiple purposes: While the immediate purpose was capital raising, the ultimate/sole purpose was to destroy an existing majority, or create a new majority which did not previously exist, which was invalid.

DIRECTOR DUTY TO AVOID CONFLICTS OF INTEREST

GENERAL LAW DUTIES OF CONFLICT

DUTY TO AVOID CONFLICTS OF INTEREST

STEP 1 – IS THE PERSON A DIRECTOR / SUBJECT TO DIRECTORS' DUTIES?

- [PERSON] is a **director** of [COMPANY] under the meaning of **s 9AC**, therefore GL duty to avoid conflict applies.
- [PERSON] is an **officer** of [COMPANY] under meaning of **s 9AD**, therefore GL duty to avoid conflict applies.

STEP 2 – IS THERE A CONFLICT?

The conflict can be:

- (1) INTEREST / DUTY CONFLICT (director's personal or external interest clashes w/ co's interests) or
- (2) DUTY / DUTY CONFLICT (duties to two different companies conflict).

Cases involving conflict:

- ✓ Substantial or significant shareholder of shares in the same company you are a director of = more likely conflict (**Walker v Nicolay**).
- ✗ Merely holding shares in same co you are director of ≠ unlikely a conflict if a minor shareholder (**Walker v Nicolay**)

XXXXXXXXXXXXX (MORE IN NOTES IF PURCHASE)

STEP 3 – IS THE LEVEL OF CONFLICT REQUIRED MADE OUT?

- [DIRECTOR / OFFICER] must not act where there is a real, sensible, or substantial possibility of conflict – not just a remote or fanciful chance (**Lord Upjohn, Phipps v Boardman**).
- REAL SENSIBLE POSSIBILITY TEST: Conflict exists if there's a genuine (not imaginary) risk that the director's personal interest or another duty could interfere with their company duties (**Phipps v Boardman**).
- SIGNIFICANT POSSIBILITY: HC confirmed there doesn't have to be actual conflict – a significant risk is enough (**Chan v Zacharia**)
- REAL OR SUBSTANTIAL POSSIBILITY: Emphasised seriousness of risk – more than theoretical or remote (**Hospital Products**).

STEP 4 – CONSEQUENCES OF BREACH (SEE BELOW)

STATUTORY DUTY NOT TO PROFIT THROUGH POSITION & INFORMATION

SECTIONS 182 & 183

A – MISUSE OF POSITION s 182

- Section 182(1) prohibits directors, other officers, and employees from improperly using their position to gain advantage for themselves or someone else, or to cause detriment to the company.
- Captures wider range of persons than the GL fiduciary obligation, which would be limited to senior employees.

B – MISUSE OF INFORMATION s 183

- Section 183(1) prohibits directors, other officers, and employees from improperly using information obtained by virtue of holding, or having held, such a position to gain advantage for themselves or someone else, or to cause detriment to the company.
- Captures wider range of persons than the GL fiduciary obligation, which would be limited to senior employees.

STEP 1 – IS PERSON A DIRECTOR, OFFICER OR EMPLOYEE?

- [PERSON] is a **director** of [COMPANY] under the meaning of **s 9AC**, therefore s182/3 duties apply.
- [PERSON] is an **officer** of [COMPANY] under meaning of **s 9AD**, therefore s182/3 duties apply.
- [PERSON] is an **employee** of [COMPANY], therefore s182/3 duties apply.

STEP 2 – INFORMATION/POSITION LINKED TO ROLE AT COMPANY?

- **INFORMATION** under s183 is broadly interpreted to include ALL information (**McNamara v Flaval**).
- Inc both confidential & non-confidential information.
- Internal company information.
- Non-public company information.

STEP 3 – IS IT IMPROPER USE?

- **IMPROPER** is objectively considered to the standard of the conduct that would be expected of a person in the position of the alleged offender by **reasonable persons with knowledge of the duties, powers & authority of the position & circumstances of the case (R v Byrnes)**.
- **ACTUAL INTENT** of the director is not necessary consideration for breach – irrelevant.
- **DISHONESTY not needed** to have improper standard met (**Chew v R**).

CONDUCT WHICH = IMPROPER USE (from *Chew*):

- (1) ABUSE OF POWER: Using authority to gain personal or 3P advantage.
- (2) EXCEEDING AUTHORITY: Acting outside scope of role or company interests.
- (3) FAILURE TO DISCLOSE CONFLICT/INTEREST: Concealing personal benefit in decision-making.

EXAMPLES OF IMPROPER USE OF POSITION:

SCENARIO	TYPE OF IMPROPER USE	CASE
MD authorises large payments from company funds to another company they control.	Abuse of power for personal gain.	
Director of multiple companies arranges inter-company loans where both are insolvent.	Use of position causing detriment to company.	
Director ceases company's biz & transfers assets to another co they control (for no payment).	Diverting company opportunity for self-benefit.	
Director votes on board resolution without disclosing conflict & resolution benefits them.	Failure to disclose personal interest = improper use of position.	<i>Doyle v ASIC</i>
Officer uses company funds for personal living expenses.	Clear personal gain = improper use.	
Officer engages in scheme using company funds to indirectly acquire shares in company to boost share price (benefiting himself as SH).	Manipulation for personal financial gain.	<i>ASIC v Adler.</i>

EXAMPLES OF IMPROPER USE OF INFORMATION:

SCENARIO	TYPE OF IMPROPER USE	CASE
Director knew company was facing liquidity issues. Used that insider info to pay company funds to creditors where directors had personal interests. Left other creditors unpaid.	Director used confidential info to benefit himself & associates = IMPROPER USE.	<i>Grove v Flavel</i> Similar reasoning in <i>McNamara v Flavel.</i>
Telstra director used confidential info about Telstra's business relationships to buy & sell shares in other companies through his family trust.	Insider trading-like behaviour = improper use of information. Director misused inside info for personal financial gain & breached s 183.	<i>ASIC v Vizard.</i>

STEP 4 – APPLY THE PURPOSIVE TEST (TO GAIN ADVANTAGE/CAUSE DETRIMENT)

CORPORATE CONTRACTING

PRELIMINARY – HOW HAS THE CONTRACT BEEN ENTERED?

- (1) **DIRECTLY?** Through members in GM or board of directors.
- (2) **INDIRECTLY?** Through an agent (e.g employee) under s 126.

DIRECT EXECUTION? s127

STEP 1 – WHAT TYPE OF DIRECT EXECUTION? Section 127

- (1) **WITHOUT A COMMON SEAL s 127(1):**

A company may execute a document (inc contract) without using a seal if it is:

- (a) Signed by 2 directors OR
- (b) 1 director & co secretary OR
- (c) Sole director (Pty Ltd) – if they are also secretary or no secretary.

Can be electronic form s110.

- (2) **WITH A COMMON SEAL s 127(2):**

If using the company seal, the seal must be affixed to the doc and fixing of seal must be witnessed by:

- (a) 2 directors OR
- (b) 1 director and the secretary OR
- (c) Sole director (if also sec or none exists).

Electronic execution allowed: seal can be affixed and witnessed electronically if method indicates identity and intention s127(2A).

- (3) **AS A DEED s 127(3), (3A):**

Must STATE it is executed “*as a deed*” and can be executed as per **127(1) or (2)**.

Section 127(3A) allows: execution without a witness and physical or electronic signature.

- (4) **ANOTHER WAY s127(4):**

A company may also execute a doc in accordance with its CONSTITUTION if diff rules apply.

STEP 2 – IDENTIFY THE PROBLEM ON THE FACTS:

Is there a reason the co might not be bound?

- Has signature been forged?
- Did the director cease to be directors when signed “as directors”?

STEP 3 – IDENTIFY THE ASSUMPTIONS THE 3P MIGHT SEEK TO RELY:

Section 129 lists assumptions that [3Ps] can make when dealing with a company.

- 129(1) – Assume compliance w/ CC & RRs:

Can assume the company's internal rules (quorum, resolutions, procedures) have been properly followed.

