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Directors & Officers

STEP 1: WHETHER [DEFENDANT] FALLS UNDER THE DEFINITION OF A DIRECTOR

1) Appointment	s 9AC(1)(a)(i)	A director is a person appointed to the position of a director; or an alternate director under s 9AC(a)(ii) → regardless of the name of their position
2) De Facto	s 9AC(1)(b)(i)	They act in the position of a director, even without valid appointment Did the person perform real and substantial functions as a director?; participating in top-level mgmt, governance, driving force / practical controller, equal footing: Grimaldi
3) Shadow	s 9AC(1)(b)(ii)	Directors are accustomed to act in accordance with the person's instructions, excluding advice (1) there is an actual board of directors (2) shadow director gave directions (3) board acted in accordance with those directions (4) board lacks independent judgment: Re Hydrodam Example. Large shareholder who has an invitation to regularly attend board meetings who is persuasive and their advice is followed → can be sued the same as a director

STEP 2: WHETHER [DEFENDANT] FALLS UNDER THE DEFINITION OF AN OFFICER

Rule	
Rule	Pursuant to CA s 9AD , there are three limbs of the definition of an officer, which focus on <u>function</u> and effect of their actions <u>rather than their formal title</u> : Grimaldi
Other	s 9AD(1)(a) Or a director or secretary of the corporation (c) receiver; (d) administrator; (f) restructuring practitioner; (h) liquidator; (i) trustee; (3)(a) a partner in a partnership
Principle	A person cannot avoid liability simply by denying they formally hold office if they actually act in that role: Drysdale
1) Participation in Decision-Making	
Rule	s 9AD(b)(i) A person who makes or participates in the making of decisions that affect the whole or substantial part of corporate business activities falls within meaning of an officer
Test	Does not require financial decision-making authority; focuses on the role a person plays in the decision-making process even if someone else makes the final decision: Shafron v ASIC
Analogy	Shafron helped to develop + promote the proposal presented to the board, working with other executives to shape the proposal and present it: Shafron v ASIC Officer status arises from a person's involvement in a particular transaction and their actual contribution: Shafron v ASIC As a member of the subsidiary's investment committee, Adler participated in decisions affecting a substantial part of HIHC's business: ASIC v Adler
2) Capacity To Affect Financial Standing	
Rule	s 9AD(b)(ii) A person who has the capacity to significantly affect the company's financial position
Test	Requires a more ongoing or substantial role in company management (significant managerial role interpreted broadly), focusing on a person's actual capacity: ASIC v King
Analogy	King ceased to be a director but had continuing heavily involvement in company affairs which effectively gave him the capacity to influence its financial standing: ASIC v King Factors. Size of corporation, management structure, roles of individuals involved in management, changes in circumstances over time: ASIC v King
3) Accustomed To Act With Their Instructions	
Rule	s 9AD(b)(iii) Directors of the corporation are accustomed to act in accordance with their instructions, except if they are giving advice in their professional capacity
Test	Excludes advisory roles, commonly referred to as shadow officer limb; an advisor will only be an officer if they are actually involved in the company's mgmt + can ensure their advice is followed : ASIC v King An advisor merely gives advice but cannot play a role in management decisions to make sure their advice is followed, and cannot affect company's position: ASIC v King

Duty of Care & Diligence → General Law + Statute

STEP 1: WHETHER THE DUTY OF CARE & DILIGENCE HAS BEEN BREACHED

Rule	
Rule	s 180(1) Director / officer must act with degree of care and diligence that a reasonable person would have if they were (a) in the same circumstances (b) in the same role with the same responsibilities
	Expected standard may be assessed by reference to the director's role + expertise, such as specialised officers having higher standards in certain areas: Daniels v Anderson
	Focuses on director's actual responsibilities, not just formal statutory duties: Cassimatis
Standard	Factors. Type of company, constitutional provisions, size + nature of company business, director's position + responsibilities, experience, skills, circumstances: ASIC v Adler
	CEO. Held to a higher standard of care due to their leadership + knowledge → standard assessed in light of leadership role, greater access to info + responsibility to monitor: Dick Smith Holdings
	Chair. Special responsibilities to lead board processes, ensure proper decision-making + oversee corporate decision-making: ASIC v Rich
	Reasonable director would not have procured a \$10m payment that prejudiced company, was not properly disclosed, not brought for approval / ratification (exposure to risk of illegality): ASIC v Adler
	CEO. Failed to ensure independent appraisal of investments, due diligence, safeguards against unlawful investments → could not just rely on director: ASIC v Adler
	CEO. Approved resolutions to pay dividends despite serious cash flow problems; duty to closely monitor financial performance + risks; failed to request more detail on cash flow: Dick Smith Holdings
Analogy	Failure to advise board about disclosure obligations and to inform board that estimates of liabilities were inaccurate as company secretary: Shafron v ASIC
	Financial Statements. Approval of financial statements containing obvious errors and grave omissions (incorrect numbers in the billions), which were basic accounting concepts: ASIC v Healy
	Approval of financial statements is a CORE MINIMUM board responsibility that cannot be delegated but directors here did not properly read or understand: ASIC v Healy
	CEO. Did not take steps to have proposal submitted for prior approval or later ratified; unusual features of transaction should have alerted him of high risk transaction: ASIC v Adler
Active Involvement Required	
Standard	Requires active involvement from directors where they cannot rely on lack of knowledge or failure to inquire (being passive, inactive, ignorance cannot be a defence): Daniels v Anderson
	Must take reasonable steps to monitor mgmt; familiar with fundamentals of company business; remain informed; generally monitor (not supervise daily); review financial statements: Daniels v Anderson
Analogy	Operations handled by a young manager who began speculative trading; oversight assigned to senior managers without experience in foreign trading; poor internal control systems; no proper record-keeping → CEO found negligence because he received info about serious deficiencies in internal control but failed to inform board: Daniels v Anderson
	CEO. Declared conflict of interest + simply abstained from discussions; had heavy responsibility as CEO to scrutinize the highly risky transaction and warn of harm: PBS v Wheeler
Balancing Foreseeable Risk With Benefit To Company	
Standard	Director only breaches s 180 if their conduct creates a reasonably foreseeable risk of harm to the company that a reasonable director would not have taken after weighing potential benefits: Vrisakis
	Risk alone does not equal a breach; there must have been an UNREASONABLE weighing of benefits → potential harm outweighed benefit to company: Vrisakis
Analogy	High risk investment model applied to financially vulnerable clients where advice breached laws requiring advice to have reasonable basis; reasonable directors would have recognised risk: Cassimatis
	Foreseeable risk of regulatory consequences + reputational damage outweigh benefit of profit to the company: Cassimatis

STEP 2: WHETHER THE DIRECTOR MAY RELY ON THE BUSINESS JUDGMENT RULE

Rule	Under s 180(2) , directors who make a business judgement will be protected from liability if it was honest, in good faith and informed → APPLIES ONLY TO SECTION 180(1) DUTY OF CARE
Onus	DIRECTOR must prove the elements, as it is not a threshold presumption of protection; director is also the one who holds his own knowledge: ASIC v Rich
Principle	Courts will not second-guess business decisions made in good faith as there is reluctance in interfering with mgmt decisions: Howard Smith v Ampol
2.1 Business Judgement	
Rule	s 180(3) Business judgement is any decision to take or not take action for a business operations matter
	Applies to (1) actual POSITIVE conscious decision (2) to take or not take action (3) concerning business operations of the company → NOT failures of oversight; omissions are NOT decisions: ASIC v Rich
Decision	Failure to review documents for loan assessment procedures cannot rely on rule as inaction shows lack of engagement in governance, NOT a business judgement: Gold Ribbon v Sheers
	Decision to not disclose accurate information to ASX was not a business judgement as it relates to compliance with the CA (s 180(2) is not intended to protect non-compliance): ASIC v Fortescue Metals
2.2 Good Faith	
Rule	s 180(2)(a) Judgement made in good faith for proper purpose
	Must be made honestly for proper corporate purpose: ASIC v Rich
2.3 No Material Personal Interest	
Rule	s 180(2)(b) Director has no material personal interest in the subject matter of the judgment
2.4 Informed Judgment	
Rule	s 180(2)(c) Inform themselves about the subject matter of the judgment to the extent they believe reasonably appropriate
Factors	Importance of decision, time available, cost of obtaining info, confidence in advisors, circumstances, competing board demands → assess decision-making prep rather than quality of decision: ASIC v Rich
	Directors approved a merger after a 20min presentation without reviewing documents, no valuation obtained, approval after 2h consideration; grossly negligent: Smith v Van Gorkom
Analogy	Directors knew or ought to have known that financial info given to the board did not accurately show the company's true financial positions: ASIC v Rich
	Directors relied on advisors conclusory fairness opinion without examining its basis; they had a duty to become reasonably familiar with advice before relying on it: Hanson Trust v ML SCM Acquisition
2.5 Rational Belief; Best Interests of Company	
Rule	s 180(2)(d) Rational belief that the judgement is in the best interests of the corporation
Test	Requires (1) subjective belief by the director that the decision benefits the company (2) objective rationality test for the belief → irrational where no reasonable person in that position would hold it: Rich
	Belief is rational if supported by arguable reasoning process; does not have to be persuasive to be rational: ASIC v Rich