

BUSINESS ASSOCIATIONS

LAWS1091

FINAL EXAM NOTES

T1 – 2026

Business Associations – Final Exam Notes

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General Notes

Definition of Director (including shadow, de facto, etc)

De Facto Director = Normally someone with a position in the company, beyond just a member (i.e. secretary, another position), who acts in the position of a director. A de facto director is someone who **assumes and performs the functions of a director**, even though they were **never formally appointed**. Would a reasonable observer think this person is **part of the board**? (Substance over form) ASIC v Adler → confirms that statutory duties apply based on **function performed**, not title. **Example:** Someone regularly attends board meetings, votes on strategy, and signs off on major decisions—without formal appointment.

Shadow Director = Someone with a holding in the company, but provides directions behind the scenes to directors, whom are accustomed to following their instructions. A shadow director is someone whose **instructions or wishes the formal directors are accustomed to follow**. (**control-based**): Are the actual directors **effectively taking directions** from this person? **Important limit:** Professional advisors (lawyers, accountants) are **excluded** if merely giving advice in that capacity. **Example:** A major shareholder who never sits on the board but whose directions the board consistently follows.

S9AC(1) **director** of a company or other body means:

(a) a person who:

(i) is appointed to the position of a director; or

(ii) is appointed to the position of an alternate director and is acting in that capacity;

regardless of the name that is given to their position; and

(b) unless the contrary intention appears, a person who is not validly appointed as a director if:

(i) they act in the position of a director; or (**de facto**)

(ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes. (**shadow**)

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body. (**carve out for professional and business advisor**)

Definition of Officer

Officer = director or secretary, and who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or who has the capacity to affect significantly the corporation's financial standing; or in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or a receiver, or receiver and manager, of the property of the corporation or administrator or liquidator or trustee.

Member's General Meeting Rights

- **Examples** of key members' rights include, among others: calling for a meeting (s 249D, 249F), putting forward motions for meetings (s 249N), receiving annual reports (ss 314, 316), passing a special resolution to alter the Constitution (s 136(2)), appointment and removal of directors (ss 201G (replaceable rule), 203C (replaceable rule), 203D), access to minutes of members' meetings (s 251B), and applying for winding up of the company (s 461).
- Members' rights can also be defined in shareholder agreements or a company's constitution.

Member's voting rights include:

- on structure/constitution of company
- Adopt, modify or repeal constitution (s136)
- Vary or cancel class rights (Pt 2F.2)
- Certain share capital transactions
 - certain new share issues (e.g. varying class rights)
 - share buy-back
 - certain other capital reductions; subdivision or consolidation of capital

- provision of financial assistance
- to determine composition of board
 - **Pty Ltd** company – members may have right to elect (e.g. RR ss201G, 201H) or remove (e.g. s203C (RR)) directors
 - **Unlisted public** company – as above for election; members always have right to remove directors by ordinary resolution (s203D) – irrespective of constitution or employment contract
 - **Listed public** company – members always have right to elect, and remove (s203D), directors by ordinary resolution
- to veto certain transactions
 - Ch 2E – subject to certain exceptions, member approval is required for a public company, or an entity it controls, to give a financial benefit to a related party of the public company (s208)
 - LR Ch 10 – related party transactions (e.g. sale to/acquisition from a related party of substantial asset (LR 10.1))
 - LR Ch 11 – significant transactions (e.g. change in nature/scale of activities; disposal of main undertaking (LR 11.1, 11.2))
- to initiate members' voluntary winding-up
- to exercise members' reserve powers

Members Voting

- Members have the right to vote at a GM of the company unless the constitution provides otherwise (Pender v Lushington (1877) 6 Ch D 70)
- Right to vote usually set out in IGRs (e.g. s250E (RR)) or terms of issue – eg, show of hands/poll (see also s250K)
- Only members entitled to vote at GM (Shears v Phosphate Co-op Co of Australia Ltd (1988) 7 ACLC 812)
- CA or LR may disqualify certain members from voting on particular resolution (e.g. related party and associates under Ch 2E – s224)
- CA/LR/IGRs will specify whether resolution must be special or ordinary
- Member can appoint proxy – s249X

Overview of Director's Duties

Director's Duties

- Legal duties imposed on directors and other company officers
- Purpose is to ensure loyalty to the company
- Derived from 3 main sources:
 - equity (fiduciary duties)
 - common law (e.g. contract law)
 - statute (e.g. CA)
- Note: s 185 provides that ss 180-184 “have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation”

Importance of the Source of Law

- Standing
 - Important as standing would allow different remedies dependent on the source of law
 - Need to match the plaintiff to the remedy based on the source of law
 - Who's the client -> what is their problem -> which source of law applies ?
- Defence
- Remedies
 - Under CA (ss 180-183) – civil sanctions
 - ASIC: declaration (s1317E), pecuniary penalty order (s1317G), injunctive relief (s1324), disqualification order (s206C), relinquishment order (s 1317GAB)
 - Company: declaration (s1317E), compensation orders (s1317J)
 - Breach of general law
 - Duty of skill, care and diligence: common law damages, limited equitable relief (possibly rescission)
 - Duty of good faith: injunction, declaration, rescission, consequential orders/rectification
 - Duty of loyalty: injunction, rescission, account of profits, equitable damages
 - Duty to not fetter discretion: injunction, rescission, rectification, equitable damages

Who owes duties ?

- Duties are owed by:
 - Directors (including de facto and shadow)
 - Officers (except Cas191, s588G - directors only)
 - Employees (ss182-3)

Who enforces duties ?

- Equitable and common law duties are enforced by the company itself
- CA duties can be enforced by the company or ASIC for the benefit of the company and the public generally

Consequence of Breach

Question of what remedy would be effective ?

Company remedies:

- breach of equitable/common law duty:
 - compensation/damages
 - account of profits
 - rescission of contract
 - Injunction
- contravention of statutory duty:
 - compensation order (s1317J(2))
- contravention of s588G:

- if company in liquidation, liquidator may seek compensation order against director (s588M)

ASIC remedies:

- contravention of ss180-183, 588G:
 - pecuniary penalty being the greater of 5,000 penalty units or if it can be determined, 3 times the “benefit derived and detriment avoided”: CA s. 1317G(3)
 - disqualification from management (s206C)
 - compensation order (s1317E)
- contravention of ss181-183, s588G recklessly/dishonestly:
 - fine, imprisonment or both (s184; s588G(3))

Accessorial liability

- A person who attempts to contravene a civil penalty provision or a person who is involved in a contravention of a civil penalty provision is taken to have contravened the provision: s1317E(4).
- A person is “involved” in a contravention if, and only, if the person:
 - has aided, abetted, counselled or procured the contravention;
 - has induced, whether by threats or promises or otherwise, the contravention;
 - has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
 - has conspired with others to effect the contravention: s79.

Directors’ and Officer’s Duties Table [9.20]

	Duty of care and diligence	Duty to prevent insolvent trading	Duty to act in good faith	Duty to act for proper purpose	Duty to avoid conflict of interest
Directors	✓	✓	✓	✓	✓
Officers	✓	✗	✓	✓	✓
Other employees	✗	✗	✗	✗	✓
Sources of the duties	Common law, equity and statute	Statute	Equity and statute	Equity and statute	Equity and statute

Definition of an officer [9.30]

- Overlapping with ‘director’
- Director is expressly included in the definition of an ‘officer’ (s 9) Equity and statute
- Extension of statutory duties to those below board takes ‘account of the fact that many companies are managed under the broad direction of the BoD rather than by the board itself’.
- Pursuant to s 9, the term ‘officer’ is defined to mean, in addition to a director, secretary, restructuring practitioner and external administrator of the company, persons:
 - Who make or participate in making decisions that affect the whole or a substantial part of the business of a company (subpara (b)(i));
 - Who have the capacity to affect significantly the company’s financial standing (subpara (b)(ii)); or
 - In accordance with those instructions or wishes the directors of the company are accustomed to act (excluding advice given in a professional capacity or a business relationship with directors (subpara (B)(iii)).

Structure of Liabilities of Directors and Officers [9.70-100]

Treating directors as *fiduciaries* and its implications [9.70]

- Directors are ‘fiduciaries’
- Directors stand in a fiduciary relationship with their company and save for exceptional circumstances, do not owe fiduciary duties to individual shareholders, creditors or other persons dealing with the company.

- Not every duty owed by directors is necessarily a fiduciary duty.

Directors' and officers' duties under corporate law [9.80]

- Range of statutory duties contained in Ch 2D of the CA apply to directors and other officers on top of the general law duties (s 185)
- The key statutory duties and/or obligations applicable to directors and officers are:
 - To exercise care and diligence (s 180)
 - To act in good faith in the interests of the company and for a proper purpose (s 181)
 - Not to improperly use their position to gain an advantage or cause detriment to the company (s 182); and
 - Not to improperly use information obtained as a director, officer, or employee. (s 183)
- Additional obligations imposed on public companies (and in rare instances, on proprietary companies too) under CH 2E of the CA and on secretaries pursuant to s 188.
- As directors' and officers' duties are generally owed to the company, the company naturally has standing to enforce the common law and equitable duties often referred to as "private enforcement".
- Moreover, pursuant to s 1317H, the company also has standing to seek compensation orders for breach of civil penalty provisions relating to the statutory duties and/or obligations set out in ss 180-183.
- By virtue of s 5 of the CA, ss 180-183 apply to acts or omissions outside Australia.

The scope of directors' personal liabilities [9.100]

- COAG principles regarding personal liability
- Council of Australian Governments

To Whom are the Duties Owed? [9.110-220]

General rule: to the company [9.110]

- **Percival v Wright [9.120]** is regularly cited as authority for the general rule that directors owe their fiduciary duties to the company, not individual shareholders.

Company as a whole ?

- *Greenhalgh v Ardene Cinemas Ltd* [1951] Ch 286

'... the phrase, the company as a whole does not...mean the company as a commercial entity distinct from the corporators: it means the corporators as a general body... that is to say, the case may be taken of **an individual hypothetical member** and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, **for that persons' benefit**'

- *Gaiman v National Association for Mental Health* [1971] Ch 317 at 330 - LTD Companies

'the association [a company limited by guarantee] is, of course, an artificial legal entity, and it is not very easy to determine what is in the best interests of the association without paying due regard to members of the association. **The interests of some particular section or sections of the association cannot be equated with those of the association, and I would accept the interests of both present and future members of the association, as a whole, as being a helpful expression of a human equivalent.**'

Present and future members? [9.140]

- In **Gaiman v National Association for Mental Health [9.150]**, Megarry J adopted a formulation of company interests which balanced the interests of present members against those of future members.
- The unusual facts of *Gaiman* may go a long way in explaining Megarry J's formulation.

Creditors? [9.160]

- Beyond doubt that there is no independent directors' duty owed to creditors under Australian law.
- This, however should not be misunderstood as saying that creditors interests are irrelevant
- They are clearly relevant and evidently grow in importance when the company moves from a viable going concern towards nearing insolvency.

Employees and other stakeholders? [9.170]

- Interests of members cannot be completely ignored or subjugated to the interests of other stakeholders, such as employees.
- *Parke v Daily News Ltd* [1962] Ch 927 [9.180]
 - Principle: Cannot give unreasonable gifts to those outside the company (e.g., ex-employees), and can only really give when will benefit company (i.e. where company is a going concern)
- *Teck Corp Ltd v Millar* (1973) 33 DLR (3rd) 288 [9.190]
 - Principle: Employees' interests can be taken into account to some extent (in and of themselves) if company is ongoing, however cannot disregard shareholders

Individual members [9.200]

- Despite *Percival v Wright*, a growing line of authority recognizes, in certain exception circumstances, directors may owe their duties to individual members.
- Duties are not owed to individual shareholders (*Percival*), except where an independent fiduciary duty arises, dependence on information and advice, relationship of confidence, significant of transaction, promotion by directors of action (*Brunninghausen, Coleman*)
- *Sifris J in Rozenbilt v Vainer* set out a non-exhaustive list of "certain special circumstances" that may give rise to a fiduciary relationship owed by directors to an individual shareholder.
 - a. Dependence or reliance by the shareholder on special knowledge, information and advice known by the director;
 - b. The existence of a relationship of trust or confidence, including the existence of a close personal connection;
 - c. The significance of a particular transaction to the shareholder, such as a transaction concerning their shares, with the potential to affect their interests in a practical sense;
 - d. The nature and extent of any positive acts taken by, or on behalf of, the directors to promote that transaction;
 - e. An undertaking, whether express or implied, by the director to act on behalf of another, or the existence of circumstances by virtue of which the shareholder is entitled to expect that the director would act in their interests;
 - f. The vulnerability of the shareholder, and the extent to which the director knows of that vulnerability; and
 - g. The structure of the shareholdings, including whether the alleged fiduciary holds a controlling interest in the company

[*Coleman v Byers*]

[*Brunninghausen v Glavanics*]

Directors' Duties in Corporate Groups [9.230-40]

- S 187 provides that a director of a wholly owned subsidiary is taken to act in good faith in the best interest of the subsidiary where the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company
- At general law, traditional position set out in *Walker v Wimborne* that each company in a corporate group is a separate legal entity, such that directors of any given company must consider only the interests of that company, is rooted deeply in respecting the concept of separate legal personality.

[*Walker v Wimborne*]

Duty of Care, Skill and Diligence

Overview of the Duties, Sources and Remedies [10.20]

- Duty of care, skill and diligence is a core, irreducible duty.
- Focus of duty – is director negligent?
- Sources of duty: s180(1); Equity; Common law; Contract of employment
 - Implied term of an employment contract of executive director that will possess and act with the skill of a reasonably competent person in his or her category of appointment (eg CFO, CEO etc) - Permanent Building society (in liq) v Wheeler (1994) 11 WAR 187; ASIC v Vines, also ASIC v Adler at 372

[GENERAL LAW]

- **First, the general law** imposes upon directors and other officers a duty to their company to apply reasonable care in the performance of their office. The source of such a duty arises from equitable obligations and the common law (through the tort of negligence and contract).
 - Directors may therefore be liable in an action for liquidated damages for breach of duty at common law and equitable compensation may also be available on the basis of restitutionary remedies.
 - [EQUITY] With equity's less restrictive rules of causation, remoteness of damage and measure of damages, "the link required by equity involves no inquiry as to whether the loss was 'caused by' or 'flowed from' the breach but merely whether the loss would have happened if there had been no breach.
 - Employment contracts will usually contain covenants on the director's part to meet performance standards appropriate to professional managers.
 - Even where no such express provision is made, however, it may well be an implied term of the contract that the director will perform her or his duties to professional standards of care and diligence, if not skill.

[STATUTORY SCHEME]

- **Second, the general law duty is complemented by a statutory duty of care and diligence contained in s 180(1) of the CA.**
 - S 180(1) is a civil penalty provision whose contravention attracts the penalty and compensation provisions of Pt 9.4B in addition to general law and other statutory remedies and obligations such as those arising out of contracts of employment: see s 185.
 - [DEFENCES] The CA provides a safe haven from liability for breach of duty of care in respect of business judgments if certain conditions are met (s 180(2)), and defines the circumstances in which directors and officers may rely upon information or advice provided by others: s 189.
 - These provisions apply not only for the purposes of the statutory duties of care and diligence but also for those arising at general law: see [10.220], [10.250]

Standard of Care – Approach

Statutory Regime: s180(1) Corporations Act

s 180(1)

- **A director or other officer must exercise the degree of care and diligence that a reasonable person would exercise** if they:
 - Were a director or officer of a company in the company's circumstances; and
 - Occupied the office held by, and had the same responsibilities within the company, as the director or officer
- Breach of s 180(1) does not constitute a criminal offence - only civil penalties apply

Standard of care – Modern approach

- s 180(1) as interpreted in Daniels v AWA Limited (and subsequently Daniels v Anderson)
- Generally, 'objective' test
- Compare with reasonable director in the same circumstance

- The content of the statutory and general law requirements are ‘essentially the same’: ASIC v MacDonald (2009) per Gzell J; ASIC v Adler (2002) 168 FLR 253
- No loss is required

Modern Duty of Care

- The weight of modern judicial opinion thus favours the view that directors now owe a single general law duty, recognised by both common law and equity, to take reasonable care.
- This view was buttressed via amendments to the statutory duty of care imposing a more strongly expressed objective standard of care, enforceable by ASIC under its public enforcement powers under the civil penalty scheme, as well as by private enforcement.
- Content of the Duty: s 180(1) [10.90]
 - It appears that the change of wording in the statutory formulation of the duty of care following [Daniels v Anderson](#) was intended to clarify that non-executive directors are not subject to the same standard of care as executive directors in view of their distinct roles, and to affirm that the standard of care, while varying along the two axes of the corporation’s circumstances and officer position and responsibilities, is objective. This should not be mistaken as representing a lower standard of care for non-executive directors as there are minimum standards that must be met by both executive and non-executive directors and directors may have additional responsibilities based on their skills and the nature of their engagement.
 - The statutory duty of care is a civil penalty provision which no longer attracts any criminal sanction for its breach

STEP 1. Core Legal Test – s180(1) Corporations Act

- What would a **reasonable person in the director’s position**, with their **responsibilities and the company’s circumstances**, have done? (Daniels)
- “Reasonable person” – defined as reasonable director – see above.

STEP 2. Consider Standards & Factors (Daniels, Alder) + SEE STEP 4 (combine here).

Daniels v Anderson [1995] 37 NSWLR 438 – Minimum Standards of Directors

- AWA sued its auditors for negligence in not informing the board of suspect forex deals it had noticed
- Auditors claimed contributory negligence on the part of AWA
- Held
 - AWA was itself negligent
 - Minimum standards expected of all directors, irrespective of knowledge or experience or position held
 - Director is expected to attend all meetings unless exceptional circumstances, such as illness or absence from the State prevent him or her from doing so (Vrisakis v ASC (1993) 11 ACSR 162 at 170)
 - The court removed the rigid distinction between executive and non-executive directors, and instead the focus was placed on the role that a director was appointed to in light of that person’s experience and skill and the corporation’s circumstances
- Clarke and Sheller JJA at 501, 502, 504 - **[OBJECTIVE TEST]**
- **A person in the position of the director:**
 - **A director should become familiar with the fundamentals of the business (+ take reasonable steps to place themselves in a position to guide and monitor the management of the company)**
 - **A director is under a continuing obligation to keep informed about the activities of the business**
 - **Directorial management requires a general monitoring of corporate affairs and policies by way of regular attendance at board meetings**
 - **A director should maintain familiarity with the financial status of the company**
- **The standard of care will be influenced by the size and nature of the company. Thus, it is important to determine: - [CONSIDERATIONS]**
 - **the size and complexity of the company;**
 - **what the defendant director did within the company;**
 - **whether a ‘reasonable’ director would have done the same thing in that situation**

STEP 3. Was the Director reasonable in their action? (Variaskis; Cassimati)

Vrisakis v ASC (1993) 11 ACSR; ASIC v Cassimatis - Balancing of Foreseeable Risk and Benefit

- Vrisakis v ASC (1993) 11 ACSR 162, at 212:
 - **‘the question whether a director has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.’**
- Although liability under s 180(1) does not require actual harm or detriment to the company in contrast to liability in tort, the same balancing of foreseeable risk and benefit applies as under the general law duty.
- **What is meant by “harm”?**
 - Harm to any of the interests of the corporation.
 - Not only financial harm or loss to the company, but may also extend to unlawful conduct having non-pecuniary consequences, such as loss of corporate reputation.
 - For this reason, a corporation has a real and substantial interest in the lawful or legitimate conduct of its activities, even if profitable: ASIC v Cassimatis (Edelman J)
- **When is a risk of harm foreseeable?**
 - “A risk which is not far-fetched or fanciful is real and therefore foreseeable”: see Wyong Shire Council v Shirt
- Calculate (in a common-sense way) the balance of benefits and harms to the interests of the company, mainly thought of as financial interests: course of action may breach the duty of care if harms materially out-weigh benefits: Vrisakis v ASC (1993); Permanent Building Society (in liq) v Wheeler (1994); ASIC v Cassimatis (No 8) [2016]
- Edelman J in ASIC v Cassimatis:
 - The reference to “harm” is best understood as a reference to any of the interests of the corporation, interests which are not limited to pecuniary loss or financial harm but might extend to unlawful conduct having non-pecuniary consequences, such as a loss of corporate reputation.
 - Balancing foreseeable risk of harm against potential benefit is an imprecise exercise.
 - The assessment of foreseeable risk and benefit must, at least in the context of applying s 180(1), take place from the perspective of the corporation’s circumstances and the office and responsibilities of the individual director whose conduct is in question.
 - Must have regard to the way “in which work is distributed within the corporation and the expectations placed by those arrangements on the shoulders of the individual director or officer”
 - When considering company’s circumstances, necessary to have regard to whether company is listed and in the case of a parent company, to the size and nature of the business of its subsidiaries if they are under the general supervision of the parent.
 - Had actual knowledge of wrongdoing or ‘risk’ of harm

ASIC v Healey (2011) 83 ACSR 484 – Demonstrates the minimum obligations imposed on all directors, irrespective of the nature of their appointment, especially as these obligations relate to financial numeracy and financial certification of annual financial statements.

ASIC v Adler (2002) 168 FLR 253 – Application of s180 + General Principles

Nature of the Duty

- Directors owe a duty of **care and skill** at:
 - Common law (negligence)
 - Equity
- This duty is **not fiduciary** in nature
- s 180(1) **largely reflects the general law** (same substantive content)
- For executive directors:
 - There is an **implied contractual term** that they possess and exercise the skill of a reasonably competent person in their role (*PBS v Wheeler*)

Core Standard of Care (THE TEST)

The central question: What would an **ordinary reasonable person**, with the **director's knowledge, experience, and responsibilities**, have done in the circumstances?

Key features: **Objective test**, but:

- **Contextualised** by:
 - Company circumstances
 - Director's role and responsibilities

Content of the Duty (What Directors Must Actually Do)

A. General Oversight Obligations (*Daniels v Anderson principles*)

Directors must take reasonable steps to:

- Understand the **fundamentals of the business**, **Keep continuously informed**, **Attend board meetings**, Monitor corporate affairs and policies, Maintain familiarity with the **financial position**
 - Cannot avoid liability by claiming inability to read financials

B. Active Engagement Requirement

- Directors must **place themselves in a position to guide and monitor management**. Duty is **ongoing**, not passive

C. Systems and Controls

Failure may breach s 180 if director does not ensure: Proper **internal controls**; Adequate **audit systems**; Compliance with authorised financial practices

D. Beyond Area of Expertise

- Directors with **special expertise**: Are **not confined** to that area; Must still monitor broader company affairs

E. Heightened Vigilance Situations

Where there is:

- Conflict of interest
- Related-party transactions
- Unusual/high-risk dealings

→ Directors must exercise "**special vigilance**" and ensure:

- Proper approvals
- Safeguards are in place

Balancing Risk and Harm – Reasonable Person Actions

- A. Would a person in their position would have done the same thing ?

Reliance, Delegation and Practical Limits

A. Reliance on Others

Directors may rely on management/advisors **without verification** IF reasonable

Reliance becomes **unreasonable if**:

- Director knew or **ought to have known** something was wrong
- There are **red flags**

B. Factors for Reasonable Reliance

Consider:

1. Was the function properly delegable?
2. Was the director put on inquiry?
3. Was the delegate:
 - Trustworthy?

- Competent?
- 4. Nature and risk of the transaction
- 5. Steps taken by the director (inquiries, checks)
- 6. Role of director (executive vs non-executive)

C. Delegation

- Permitted under ss 198D, 190
- BUT:
 - Directors must still **supervise**
 - Delegation ≠ abdication of responsibility

5. Contextual Factors Affecting the Standard

When assessing breach, courts consider:

- Company size and complexity
- Director's role (ED vs NED)
- Level of responsibility
- Nature of the transaction
- Risk profile of the decision

STEP 4. Are there higher standards imposed?

Are higher standards imposed on any directors?

- Chair
 - subject to same duties as other directors (ASIC v Mitchell (No 2) [2020] FCA 1098); The position of Chair imports more than merely procedural matters: Austin J in ASIC v Rich [2003] NSWSC 85, citing AWA Ltd. v Daniels (1992) 7 ACSR 759:
 - To ensure the Board adequately, properly and promptly addresses financial position of the company in regular meetings and by considering financial reports;
 - To require a functioning and effective finance and audit sub-committee of the Board comprising independent directors;
 - To require Board to establish internal audit process;
 - To assess whether information provided to the Board was accurate, complete, reliable and timely.
- Executive directors v non-executive
 - ED are expected to display a higher level of care than NED in relation to their area of responsibility (Vines v ASIC [2007] NSWCA 75)
 - Minimum standard expected of all directors, including NED (Sheahan v Verco [2001] SASC 91)
- Directors with special skills
 - Conduct of NED with special skills will be tested according to what would be reasonable conduct by a director with such skills (Gold Ribbon (Accountants) Pty Ltd v Sheers [2005] QSC 198)
- Secretary and General Counsel [10.150]
 - • Court in Shafron v ASIC held that the obligations imposed under s 180(1) are not limited to the discharge of responsibilities imposed on the officer under the CA but include whatever responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.
- Chief Executive Officer [10.190]
 - **Permanent Building Society** and **ASIC v Adler** speak to the special/heavier responsibilities imposed on CEOs compared to other officers or directors, which become more pronounced when that position is coupled with that of chair.

Permanent Building Society (in liq) v Wheeler (1994) 11 WAR 187 – Application of duty of care to a CEO and the higher burden of care that is required