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1 Fundamental Ideas of a company

1.1 Remedies and defences

Defences

There are no available defences on the facts.

Standing

If there are no defences, x is most likely in breach of s 183. Both ASIC and the company have standing to bring an action for breaches under section y.

Remedies

Civil

As section y is a civil penalty provision, ASIC may first seek a declaration of contravention under section 1317E(1). There is no mistake of fact here (s1317QC) that might help them avoid a declaration being made. Very likely a DoC would be issued for Jia.

After a DoC is issued:

1. ASIC may seek pecuniary penalty orders for x under section 1317G.
 - a. In order to issue PPOs a court would need to be convinced of the gravity of the conduct (see the criteria in s1317G(1)(b)).
 - b. The maximum pecuniary penalty must not exceed the penalty applicable to the contravention of the civil penalty provision and the amount applicable to an individual is the greater of 5000 penalty unites, or three times the benefit derived and detriment avoided because of contravention (Section 1317G(2), (3))
2. ASIC may apply for a relinquishment order (s 1317GAB(2)(a)), which the court is empowered to grant (s1317GAB(1)),
3. ASIC may apply for a disqualification order.
4. Disqualification order under s206C – This is another possibility. The court needs to decide whether disqualification would be justified. ASIC is likely to apply for such an order for Jia because of dishonest conduct, particularly

Further, the corporation itself may seek compensation orders for losses resulting from the breach of a civil penalty provision.

- A breach of a statutory duty of care may give rise to a compensation claim from the company itself via section 1317H

Criminal

ASIC may also seek criminal penalties (if applicable) under x.

IF ASIC can show 'intention to gain advantage or cause a detriment' or that they acted recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

The maximum penalty for a breach of the criminal offence provisions here is either going to be 15 years imprisonment, a fine, or both. The max fine would be calculated as follows under s1311B (4):(c) 4,500

penalty units; and (d) if the court can determine the benefit derived and detriment avoided because of the offence—that amount multiplied by 3.

Relief:

There are mechanisms in the Corporations Act which give directors the opportunity to ask that the court shield them from the consequences of liability following a breach of duties, including s180(1).

- Section 1317S allows a court to grant partial or complete relief to a person who has contravened certain obligations.
 - o This targets breaches of civil penalty provisions
- Section 1318
 - o Similar excepts is used in relation to 'civil proceedings' in relation to negligence, default, breach of trust, or breach of duty.
 - o Civil proceedings for section 1318
 - o can include things like proceedings for a pecuniary penalty order, disqualification order, or compensation order.

Ratification

Ratification in general meeting is generally regarded as NOT being available as a source of relief for directors who breach their obligations under s180(1). This is because the statutory directors duties are regarded as having important public functions, including in relation to the quality and integrity of market performance.

1.2 Corporation stuff

3 Types of corporations

Corporation is defined in section 57A

- This includes 'a company' and also 'any body corporate'

Company is defined in section 9

- Defined as 'a company registered under this Act'

3.1 Criteria for classifying companies

1. Is the company proprietary or public?
2. How is the liability of the company's members structured?
3. What is the relationship of the company to other companies? (holding and subsidiary companies)

Proprietary companies

- Must have share capital
 - o S 112(1)
- 1 to 50 members
 - o Ss 113(1) and 114
- At least one director
 - o S 201A(1)
- No public offers of shares
 - o S 113(3)
- Include 'proprietary' or 'pty' after name
 - o Ss 148(2) and 149

Public companies

- A company other than a proprietary company
 - o S 9 definition
- Maximum of 1 member
 - o S 114; no maximum member
- Minimum of 3 directors
 - o S 201(A)(2)

Special resolution

Relates to company constitutions and changing that

S 9

A resolution:

about which the required notice has been given (see s 249L(1)(c)); and

which is passed by at least 75% of the votes cast by members who are entitled to vote

Large Pty Companies

A pty company that meets at least two of the following criteria:

- Has a gross operating revenue of \$50m or more
- Has gross assets of \$25 or more
- Has over 100 employees
- See s 45(A)(3) and Corp Regulations 1.0.02B

Structure of company members liability

- Per section 112

- Limited by shares
 - See also s 516, 148(2)
- Limited by guarantee
 - See also s 517, s 148(2), s 150, s 45B
- No liability company
 - See also s 148(4)
- Unlimited with share capital

Corporate liability

Can be direct (organic theory) / acting as the company

- Board resolutions are treated as the company
- Also through general meetings
- Essentially any action taken by organs of the company

or vicarious liability

Through employees and so on

1.3 Finance

Dividends

One characteristic of the share is the right to have some of the income stream of the company.

Section 254U

- Directors may determine that a dividend is payable etc.
- This is a replaceable rule

Section 254W(2)

- subject to the terms on which shares have been issued, the directors may pay dividends as they see fit
- This is a replaceable rule for Pty company's only

Section 254W(1)

- in a public company each share in a class of shares has same dividend rights unless otherwise provided.

Source of dividend payments

There is a common law principle that dividends is paid only out of profits. This has been replaced by the following three part test

Three part test - section 254T

1. Balance sheet test:
 - a. Company's assets must exceed liabilities immediately before the dividend is declared, and excess is sufficient for payment of the dividend – s 254T(1)(a)
2. Fair and reasonable test:
 - a. Payment of dividend must be fair and reasonable to shareholders as a whole – s 254T(1)(b)
3. Material prejudice test:
 - a. Payment of dividend must not materially prejudice company's ability to pay its creditors – s 254T(1)(c)

When does the company incur a debt - section 254V

(1) A company does not incur a debt merely by fixing the amount or time for payment of a dividend. The debt arises only when the time fixed for payment arrives and the decision to pay the dividend may be revoked at any time before then.

(2) However, if the company has a constitution and it provides for the declaration of dividends, the company incurs a debt when the dividend is declared.

2 Governing internal management.

Section	Base done	Comprehensive done	Full Done
2.1 Replaceable Rules			
2.2 Company constitution			

Section 134 of the Corporations Act sets out that a company's internal management may be governed by replaceable rules, a company constitution, or both.

Per section 140, a company's constitution and any replaceable rules that apply have effect as a contract:

- (a) between the company and each member,
- (b) the company and each director,
- (c) a member and each other member,

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

In *Eley v Positive Government Security Life Assurance Co*:

- the company constitution specified that Mr Eley should be appointed as the company solicitor. He was not appointed to the position and he took legal action as a solicitor, although he was also a member.
- It was found that he could not enforce the constitution as the constitution does not act as a contract between other persons and the company.