

**LAWS1091 – FINAL EXAM PREP FLOWCHART (READING TIME)**

**DIRECTOR DUTIES**

**1. Is the person a director or officer?**

**a. S9 CA**

**2. What duty is engaged?**

DUTY	APPLIES TO	SOURCE	GL PARALLEL
Care and diligence	D&O	<b>S180(1)</b>	CL negligence; equitable duty
Good faith / best interest	D&O	<b>S181(1)</b>	Fiduciary duty
Proper purpose	D&O	<b>S181(1)(b)</b>	Fiduciary duty
Misuse of position	D&O	<b>S182</b>	Fiduciary duty
Misuse of information	D&O	<b>S183</b>	Fiduciary duty
Conflict / secret profits	D&O		Fiduciary duty (Regal v Gulliver)
Insolvent trading	D ONLY	<b>S588G</b>	No GL equivalent

**3. To whom is the duty owed?**

- a. Company only → General rule (*Percival v Wright*)
- b. Exceptionally → Shareholders (*Coleman v Myers; Crawley v Short*)
- c. If insolvent or nearly insolvent → Creditors (*Kinsela; Bell Group*)

**4. Apply breach analysis**

DUTY	SOURCE	DESCRIPTION
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Care and diligence	<b>S180(1)</b>	<ul style="list-style-type: none"> <li>- Objective standard (<i>Daniels v Anderson</i>)</li> <li>- Includes reading reports, monitoring (<i>ASIC v Healey</i>)</li> <li>- Risk/benefit balance (<i>ASIC v Cassimatis; Vrisakis</i>)</li> </ul>
Good faith / best interest	<b>S181(1)</b>	<ul style="list-style-type: none"> <li>- Must act honestly for the benefit of the company (<i>Re Smith v Fawcett</i>)</li> <li>- No personal interest or improper purpose</li> </ul>
Proper purpose	<b>S181(1)(b)</b>	<ul style="list-style-type: none"> <li>- Share issue power must not be used to entrench control (<i>Whitehouse v Carlton</i>)</li> </ul>
Misuse of position / Information	<b>S182;</b> <b>S183</b>	<ul style="list-style-type: none"> <li>- Must not use for personal gain or to the detriment of the company</li> </ul>
Conflict / secret profits		<ul style="list-style-type: none"> <li>- Must avoid real or sensible possibility of conflict (<i>Boardman v Phipps</i>)</li> </ul>
Insolvent trading	<b>S588G</b>	<ul style="list-style-type: none"> <li>- Company must be insolvent or debt likely to make it so</li> <li>- Director knew or ought to have known</li> <li>- <b>Defence:</b> Safe Harbour (<b>s588GA</b>)</li> </ul>

## 5. Defences

DUTY	SECTION	DESCRIPTION
Business Judgment Rule	<b>S180(2)</b>	<ul style="list-style-type: none"> <li>- Must act in good faith, rationally and inform decision</li> </ul>
Reasonable Reliance	<b>S189</b>	<ul style="list-style-type: none"> <li>- Reliance on employee / expert advice</li> </ul>
Delegation	<b>S190</b>	<ul style="list-style-type: none"> <li>- Not liable if properly delegated</li> </ul>
Safe Harbour	<b>S588GA</b>	<ul style="list-style-type: none"> <li>- Must be taking a course likely to lead to a better outcome</li> </ul>

## 6. Consequences and remedies

	BREACH	REMEDIES
STATUTORY BREACHES	<b>S180 – 183</b>	<ul style="list-style-type: none"> <li>- Civil penalty (s1317G)</li> <li>- Compensation (s1317H)</li> <li>- Disqualification (s206C)</li> <li>- Injunction (s1324)</li> </ul>

		- Criminal if s184 breached
	<b>S588G</b>	- Compensation to creditors (s588M) - Civil penalty (s1317G) - Disqualification - Criminal penalties (s588G(3))
<b>GENERAL LAW / EQUITABLE BREACHES</b>	<b>Breach of fiduciary duty</b>	- Account of profits - Injunction - Equitable compensation - Rescission
	<b>Negligence</b>	- Common law damages

#### 7. Indemnity, insurance, exculpation

TOPIC	SECTION	RULE
<b>Indemnity prohibited for liability to company or penalties</b>	<b>S199A</b>	No indemnity for breaches of duty or criminal liability
<b>Insurance prohibited for wilful breach of ss182-183</b>	<b>S199B</b>	Company can't pay premiums to cover such breaches
<b>Directors' Report Disclosure</b>	<b>S300(1)(g), (8), (9)</b>	Must disclose indemnities and premiums paid

#### 8. Administration and solvency context

##### a. If company is insolvent or near

- i. Voluntary administration (**Pt 5.3A**)
- ii. Relevant for **s588G** analysis
- iii. Duty shifts: directors must consider creditors' interests (*Bell Group*)

## LAWS1091 – FINAL EXAM PREP FLOWCHART & SCAFFOLD

### DIRECTORS AND OFFICERS DUTIES

#### General Information

- S 9: definition of both directors and officers overlap;
  - Definition has **three limbs**
  - The term “officer” of a corporation, in addition to director, secretary and restructuring practitioner and external admins of the company includes persons:
- The purpose and effect of the extended statutory definitions is to enlarge the classes of persons concerned in the management and affairs of a corporation upon whom the legislative standards and liabilities are imposed, thus protecting the corporation and those who deal with it from the consequences of their conduct: *Grimaldi v Chameleon Mining NL (No 2)*

#### Three limbs of the definition

1. **Who make or participate in making decisions that affect the whole or substantial part of the company: s 9(b)(i)**
  - Set out in *Shafron v ASIC* (2012): the duty of care obligations imposed under s 180(1) are not limited to the discharge or responsibilities imposed on the officer under the *Corps Act* 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
- Distinguishes between *making decisions* and *participating* in those decisions: *Shafron*
  - Does not need to demonstrate that the person made a real contribution
  - Participation directs attention to the role that a person has in the ultimate act of making a decision
2. **Who have the capacity to affect significantly the company’s financial standing: s 9(b)(ii)**
  - Scope - look to the first limb and that reasoning/analysis is applicable but this limb is less episodic/transient
  - *ASIC v King* → s 9(b)(ii) definition of officer requires “consideration of the role of the person played in the management of the corporation” and is not limited to those who hold/occupy a named office, or a recognised position with rights and duties attached to it
3. **Shadow directors: in accordance with those who have instructions/wishes the directors of the company are accustomed to act (excluding advice given in a professional capacity or a business relationship with directors): s 9(b)(ii)**
  - Parallels the “shadow director” limb of the extended definition of director
  - Includes people not formerly employed by the company

De facto capacity within the second limb may engage this third limb

#### STEP 1:

**DIRECTOR / ALTERNATE DIRECTOR / DE FACTO DIRECTOR**

Are they a director or officer?	<p>[DEFENDANT] is a <b>director</b> of [COMPANY] under <b>s9(a)(i)</b> CA and is therefore subject to director's duties.</p> <p>[DEFENDANT] is an <b>alternate director</b> of [COMPANY] and is therefore acting in the capacity of a director (<b>s9(a)(ii)</b>).</p> <p>Whilst [DEFENDANT] is not a director, he/she may be deemed a <b>de facto director</b> in the sense that he/she 'acts in the position' of a director (<b>s 9(b)(i)</b>). The court will look to 'the nature of the functions or powers' exercised by [DEFENDANT], and the extent of the exercise of their powers (<i>Grimaldi</i>). Here, _____ (apply factors);</p> <ul style="list-style-type: none"> <li>- [DEFENDANT'S] relationship with [COMPANY] <b>evolved over time</b> into that of a director, as evidenced by (apply facts)</li> <li>- [DEFENDANT] performed the role and functions that constitute him/her a director for a <b>limited period of time</b>, as evidenced by (apply facts)</li> </ul> <p><b>OFFICER</b></p> <p>[DEFENDANT] is not a director and cannot be deemed a de factor or shadow director. However, the issue is whether he/she is an officer in [COMPANY].</p>
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## DIRECTORS DUTIES

### DUTY 1: SKILL, CARE AND DILLIGENCE

- *When [COMPANY / ASIC] is suing [DIRECTORS]*
- *If [INDIVIDUAL] wants to sue [DIRECTOR], may be able to bring a derivative action on behalf of the [COMPANY]*

General Information	<p><b>CARE AND DILLIGENCE</b></p> <ul style="list-style-type: none"> <li>● Different to general law → doesn't involve "skill"</li> </ul> <p>Owed by individual directors and officer who are personally liable for breach of duty</p> <ul style="list-style-type: none"> <li>● Corps Act s 180(1) → complement general law</li> <li>● <b>REMEDY: for a solvent company → remedies arising under a service contract</b> <ul style="list-style-type: none"> <li>○ Compensation → regardless of whether a civil penalty order has been sought in relation to the contravention of s 180(1) (1317H)</li> <li>○ ASIC can also pursue public enforcement of breaches of s 180(1) seeking payment of a pecuniary penalty/disqualification of a director/officer as well as private compensation remedies</li> </ul> </li> </ul> <p><u>Care, skill and diligence</u></p>
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	<ul style="list-style-type: none"> <li>● Objective test (what a ‘reasonable person’ with the same skills/knowledge as that director would have done in a similar position)</li> <li>● Owed by individual directors and officers who are personally liable for breach of duty</li> <li>● General law: courts applied law of negligence to directors so that duty of care owed not only in equity as an incident of the director’s office but also as tort: see <i>Permanent Building Society (in liq) v Wheeler</i></li> <li>● Equity: with equity’s less restrictive rules of causation, remoteness of damage and measures 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: <i>Westpac Banking Corporation v Bel Group Ltd (in liq) (No 3) (2012) 89 ACSR 1 at [903]</i></li> <li>● <b>REMEDY: Liquidated damages and equitable compensation</b> <ul style="list-style-type: none"> <li>○ Awarded for common law damages to compensate for the loss that would not have occurred but for the breach</li> <li>○ S 598 for breach (inter alia) of the general law duty of care</li> </ul> </li> </ul> <p><b>DUTY OF GOOD FAITH</b></p> <ul style="list-style-type: none"> <li>● Requires directors to act bona fide to the corporate interest</li> <li>● <b>REMEDY: rescission</b></li> </ul>
<p><b>ISSUE:</b> To whom is the duty owed?</p>	<p>The issue is whether [DIRECTOR] has breached the duty to exercise his/her powers with reasonable care and diligence. They may be liable for _____ [<b>describe conduct - what they failed to do</b>].</p> <ul style="list-style-type: none"> <li>- Failing to bring concerns to the board (<i>ASIC v Vines</i>)</li> <li>- Failing to monitor management (<i>AWA v Daniels, ASIC v Healey, CBA v Friedrichs</i>)</li> <li>- Failing to prevent the recurrence of legal activities (<i>ASIC v Maxwell</i>)</li> <li>- Publishing the financial accounts without reference for financial consequences (<i>ASIC v MacDonald, ASIC v Healey</i>)</li> <li>- Failing to attend board meetings a contraction duty to be diligent (<b>S 180(1)</b>)</li> </ul>