

## **DIRECTORS DUTIES - SUMMARY**

### *Duties of care and diligence*

- s.180(1) - Duty to exercise care and diligence
- s.180(2) – The Business Judgement Rule (Defence)
- s.588G - Duty to prevent insolvent trading
- s.588GA - Safe harbour defence
- s.588H - Other defences

### *s.180(1) - Duty to exercise care and diligence*

Care and diligence - directors and other officers

s.180(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they

- a) Were a director or officer of a corporation in the corporation's circumstances
- b) Occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

### *The Business Judgement Rule -s180(2)*

s.180(2) - A director or other officer of a corporation who makes a business judgement is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgement if they

- a) Make the judgement in good faith for a proper purpose
- b) Do not have a material personal interest in the subject matter of the judgement
- c) Inform themselves about the subject matter of the judgement to the extent they reasonably believe to be appropriate
- d) Rationally believe that the judgement is in the best interests of the corporation.

The director's or officer's belief that the judgement is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

### *Director's duty to prevent insolvent trading by company - s588G*

s.588G(1) - This section applies if

- a) A person is a director of a company at the time when the company incurs a debt
- b) The company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt
- c) At that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be
- d) That time is at or after the commencement of this Act.

### *Safe harbour defence - s588GA*

#### *Other defences s-588H*

- The safe harbour provisions provide directors with an exception from insolvent trading liability where they are developing courses of action which are reasonably likely to lead to a better outcome for the company than administration or liquidation – s.588GA
- Defences under s.588H
- The Reasonable Grounds Defence – s.588H(2)
- The Competent and Reliable Person Defence – s.588H(3)
- The Illness/Absent from Management Defence – s.588H(4)
- The Reasonable Steps Defence – s.588H(5)

### *Duties of loyalty and good faith*

- s.181(1)(a) - Duty to act in good faith in the best interests of the company
- s.181(1)(b) - Duty to act for a proper purpose
- s.182 - Duty not to improperly use position
- s.183 - Duty not to improperly use information
- s.184 - Good faith, use of position and use of information - criminal offences
- Division 2 - Duty of Disclosure of, and voting on matters involving, material personal interests (s.191 – s.196)
- Chapter 2E - Related party transactions

*Good faith - directors and other officers*

s.181(1) A director or other officer of a corporation must exercise their powers and discharge their duties

- In good faith in the best interests of the corporation
- For a proper purpose

*Duty to not misuse position - s182*

Use of position--directors, other officers and employees

s.182(1) - A director, secretary, other officer or employee of a corporation must not improperly use their position to

- Gain an advantage for themselves or someone else
- Cause detriment to the corporation

*Duty to not misuse position - s183*

Use of information--directors, other officers

s.183(1) - A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to

- Gain an advantage for themselves or someone else
- Cause detriment to the corporation

*Good faith, use of position and use of information - criminal offences - s184*

s.184(1) - A director or other officer of a corporation commits an offence if they

- Are reckless
- Are dishonest; and fail to exercise their powers and discharge their duties
- In good faith in the best interests of the corporation; or (d) for a proper purpose.

s.184(2) - A director, other officer or employee of a corporation commits an offence if they use their position dishonestly

- With the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation
- 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.

s.184(3) - A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly

- With the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation
- 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.

*Division 2 - disclosure of, and voting on matters involving, material personal interests*

- s.191(1) - A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.
- s.192(1) - A director of a company who has an interest in a matter may give the other directors standing notice of the nature and extent of the interest in the matter in accordance with subsection (2)
- s.195(1) - A director of a public company who has a material personal interest in a matter that is being considered at a directors' meeting must not: a) be present while the matter is being considered at the meeting; or b) vote on the matter

## CONSEQUENCES OF BREACH

### *Remedies*

#### Remedies for breaches of general law duties

- Common law damages
- Equitable compensation or damages
- Account of profits (equity)
- Rescission (common law and equity)
- Declaration of trust (equity)
- Termination

#### Remedies for breaches of statutory duties

- S1324 → Injunctions and damages
- Compensation - s.588M (action by liquidator) and s.317H (action by company or liquidator)
- s.596, s.597 and s.598 → Court examination of director and remedial orders
- Oppression remedies/winding up – Under Pt 2F.1 and s.461(1) (winding up)

### *Civil penalties*

- Sections 180-183 and 588G are civil penalty provisions
- Aim of civil penalties is to punish misconduct that falls short of a criminal offence.
- ASIC can initiate civil penalty proceedings.
- Penalties for breach of civil penalty provisions (3 types):
  - s.206C and s.1317E → Disqualification order
  - s.1317E and s.1317G → Pecuniary penalty
  - s.1317H → Pay compensation to corporation

### *Criminal penalties*

- Under s.184, if any of the following sections are contravened
  - s.181(1)(a) - Duty to act in good faith in the best interests of the company
  - s.181(1)(b) - Duty to act for a proper purpose
  - s.182 - Duty not to improperly use position
  - s.183 - Duty not to improperly use information
- This may result in criminal offences, if the director or other officer was reckless or dishonest
- Dishonest insolvent trading is also an offence – s.588G(3)
- Criminal burden of proof and rules apply
- Maximum penalty for contravention of s.184:
  - Imprisonment for up to 15 years and/or
  - A fine which is the greater of 4,500 penalty units or if the court can determine the benefit derived or detriment avoided because of the contravention – that amount multiplied by three
  - Maximum penalty for contravention of s.588G(3) is a fine of up to 2,000 penalty units, imprisonment for up to five years, or both