

Definition of Directors

| Directors – Appointment, Role & Meetings | | |
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| Statutory Definition of Directors | <ul style="list-style-type: none"> ❖ Director: Includes not only those validly appointed as director or alternate director but also those appointed to position of director or alternative director & acting in capacity regardless of name of position; s 9AC CA ❖ In addition, the definition includes those: <ul style="list-style-type: none"> ➢ Who act in position of director i.e., de facto director; and ➢ In accordance w. those instructions or wishes the director of the company are accustomed to act i.e., shadow directors; s 9AC CA ❖ Displacing the definition in de facto & shadow directors by context; <ul style="list-style-type: none"> ➢ The power to call general meetings (s 249C); ➢ Signing minutes of general meetings (s 251A(3)); and ➢ Giving notice to ASIC of change of address (s 205B). ❖ Extended definitions of director apply to Pt 2D.1 imposing duties on directors & officers; s 179(2) CA ❖ A person can be a director where they are: <ol style="list-style-type: none"> 1. Appointed to role 2. De facto director 3. Shadow Director | |
| 1 Appointed to the position | <ul style="list-style-type: none"> ❖ Governing officials who under Constitution are not called directors e.g., governor, president, vizier ❖ Question of fact whether they are in effect directors | |
| 2 De facto directors | <ul style="list-style-type: none"> ❖ If person not appointed as director – can still be director if they act as such; s 9AC ❖ Dependent on role they play in company: <ul style="list-style-type: none"> ➢ E.g., acting as director post termination of director role ➢ Different title e.g., consultant – question of fact | |
| Factors relevant to whether someone is de facto director <ul style="list-style-type: none"> • Top management Position • Company Size • All aspects dealt w. • Perceived to 3rd parties | <ul style="list-style-type: none"> ❖ Ratio: Necessary but not sufficient that someone holds a top level of management functions to be qualified as ‘de facto director’ ❖ Relevant Factors Include: <ul style="list-style-type: none"> ➢ Size of company → In larger companies, employees given greater discretion than smaller companies & less likely to be a director ➢ Internal Practices & Company Structure → Employee w. specific expertise less likely to be director than someone concerned w. company affairs generally ➢ How putative director perceived to outsiders of company → Holding oneself out as director = relevant, absence will not prevent being deemed as director if dealings w. 3rd parties consistent w. that of director ❖ Held: D treated as de facto director – had practical direction of company & it’s ‘driving force’ | Deputy Commissioner of Taxation v Austin |
| Grimaldi found to be de facto director despite official position as ‘consultant’ | <ul style="list-style-type: none"> ❖ Issue: Whether Grimaldi ‘consultant’ able to negotiate but not bind Chameleon in contracts was a de facto director? ❖ Held: Yes – Grimaldi was de facto director ❖ Ratio: <ul style="list-style-type: none"> ➢ Key Question: Whether, in the circumstances of that company, what is being done ought reasonably be regarded as being a responsibility of a director of that company ➢ Designation as ‘consultant’ will not deny finding of de facto directorship – relo can evolve over time to be director relo ➢ Key Factor: Has company held Grimaldi to be director to 3rd parties? | Grimaldi v Chameleon Mining NL (No 2) |

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| <p>3 Shadow Directors</p> | <ul style="list-style-type: none"> ❖ Shadow Directors: Real, not nominal controllers of the company <ul style="list-style-type: none"> ➢ Don't actually have to give directions or instructions that cover all matters involving the board ➢ Persons in accordance with whose directions or wishes the directors are accustomed to act; s 9 CA ❖ A person is not a director merely because the directors act on advice given by that person in a professional capacity or business relationship – rather a board of directors claiming and purporting to act as such; Re Hydrodam (Corby) Ltd ❖ To establish shadow director position – need to allege & prove; Re Hydrodam (Corby) Ltd <ol style="list-style-type: none"> 1. Who are directors of company – whether de facto or de jure 2. The D directed those directors how to act in relation to the company or that he was one of the persons who did so 3. That those directors acted in accordance w. such directions; and 4. That they were accustomed so to act ❖ Key factors to consider: Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd <ul style="list-style-type: none"> ➢ Influence & control doesn't need to be exercised over the whole field of corporate activity for which directors are responsible; ➢ ALL directors don't have to be accustomed to act on the directions or the wishes of the shadow director <ul style="list-style-type: none"> ▪ Person who has 'governing majority' of board may be shadow director ➢ there must be a <i>causal connection</i> between the direction or wishes of the shadow director and the action taken by directors ➢ 3rd parties having commercial dealing w. company can insist on certain terms for continued support → THIS IS NOT SHADOW DIRECTOR <ul style="list-style-type: none"> ▪ Directors aren't compelled to follow wishes of 3rd party ➢ Despite s 201B (natural person) – contrary, a company can be a director <ul style="list-style-type: none"> ▪ Threshold: ❖ It may in particular cases extend the regime to a: <ul style="list-style-type: none"> ➢ Holding company; ➢ A controlling member; or ➢ Even the directors of a corporate member | |
| <p>If locus of decision-making rests w. 3rd party & they cannot secure 'advisor' protection under s 9</p> <p>May be shadow director</p> | <ul style="list-style-type: none"> ❖ Issue: Whether Windsor is a shadow director – '<i>a person in accordance with whose directions or instructions the directors of (ASN, Ample or both) are accustomed to act</i>' ❖ Held: Yes – Windsor was director under s 9 CA ❖ Legal Reasoning: <ul style="list-style-type: none"> ➢ It has contrived the transactions of significance in which they were to be involved. In my opinion it cannot be said that in those matters in which Windsor intruded, the boards of either company exercised an independent role at all ➢ Practical Question: Where, for some or all purposes, is the locus of effective decision making? If it resides in a third party such as Windsor, and if that person cannot secure the "advisor" protection of s 9, then it is open to find that person a director for the purposes of the <i>Corporations [Act]</i>. | <p>ASC v AS Nominees Ltd</p> |