Corporations Act 2001 (Cth)

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INTRODUCTION TO OFFICERS' AND DIRECTORS' DUTIES

Definition of Officer

General principle: 'intended to capture those managing the corporation or its property' (*ASIC v King*).

s 9AC: 'officer' means:

(a) A director or secretary; or

(b) A person:

(i) who makes, or participates in making, decisions that affect the whole or substantial part of the business; or

- ➔ *ASIC v Adler*: Adler deemed an officer for participating in decisions affecting HIH's business.
- ➔ 'Participation' is a question of fact and degree – significance to be given to the role played by the person must be assessed (*Shafron v ASIC*).
  - ◆ Demonstrating a 'real contribution' insufficient.

(ii) who has the capacity to affect significantly the corporation's financial standing; or

- ➔ Consider role the person played in the 'management' of company (*ASIC v King*).
- ➔ Factors to consider (*ASIC v King*):
  - ◆ Quality of a person's capacity/actions and effects of such on management of company
  - ◆ Size of company
  - ◆ Corporate structure
  - ◆ Management structure
  - ◆ Identity and nature of persons involved

(iii) in accordance with whose instructions or wishes the directors are accustomed to act; or
(c) A receiver; or
(d) An administrator of the corporation; or
(e) An administrator of a DOCA executed by the corporation; or
(f) A restructuring practitioner; or
(g) A restructuring practitioner for a restructuring plan made by the corporation; or
(h) A liquidator; or

Directors'/Officers' duties

	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	✓	X	✓	✓	✓
Other employees	X	X	X	X	✓
Sources of the duties	CL, Equity, Statute: s 180	Statute: s 588G	Equity & Statute: s 181(1)(a)	Equity & Statute: s 181(1)(b)	Equity & Statute: ss 182, 183, 191

Defences

1. Reasonable reliance: s 189

- **Elements: s 189**
  - **(a)** Director relies on information/advice from reasonably reliable and competent sources; and
    - ➔ Director's reliance taken to be reasonable unless contrary is proved: s 189.
    - ➔ Directors should not uncritically accept contradictory financial information from management or auditors (*ASIC v Healey*).
  - **(b)** Reliance made in good faith and based on director's independent assessment of the advice.
    - ➔ Directors must assess unbiasedly, not necessarily comprehensively (*ASIC v Healey*).

2. Delegation: s 190

- Directors would ordinarily be responsible for delegate exercising their power: s 190(1)
- Can be relieved of responsibility for delegated acts if: **s 190(2)**
  - **(a)** Director reasonably believes at all times delegate would exercise power in conformity; and
  - **(b)** Director believed: on reasonable grounds, in good faith, and after making proper inquiry (if circumstances indicated need for inquiry) that delegate was reliable and competent.
- Director escapes responsibility if delegate acts fraudulently, negligently or beyond delegation scope.
- Directors can delegate to:
  - ○ Managing director: s 198C.
  - ○ A committee, single director, an employee, or any other person: s 198D.
- Core functions like monitoring performance and approving financial statements can't be delegated (*ASIC v Healey*).

3. Business judgment rule: s 180(2)

- **s 180(2):** A director/officer who makes a business judgment is taken to meet the requirements of (1), (care and diligence) and equivalent duties at **CL and in equity**, if they:
  - **(a)** make the judgment in good faith and for a proper purpose; and
    - ➔ Business judgment: any decision to take or not take action in respect of a matter relevant to the business operations of the company: s 180(3).
      - ◆ Eg: payment of a dividend.
    - ➔ The rule does not protect omissions to act, such as failure in oversight or monitoring – but must be an active, conscious, deliberate decision.
      - ◆ Failure to review loan documentation not sufficient: *Gold Ribbon v Sheers*.
    - ➔ Decision to disclose false ASX statements not a business judgment – decision related to compliance with CA, not business operations: *ASIC v Fortescue Metals Group Ltd*.
  - **(b)** do not have a material personal interest in the subject matter; and
    - ➔ Defence does not apply where directors stand to benefit personally from the decision.
    - ➔ Material implies real and substantial, not remote or trivial (*ASIC v Rich*).

Defences under s 588H

s 588H(2): Reasonable grounds to expect solvency

- Director **must prove:**

  1. Actual expectation of solvency

  - ➔ 'Expect' requires a higher certainty level than mere hope or suspicion (*Tourprint International Pty Ltd (in liq) v Bott*).
  - ➔ Timeframe: immediately before debt incurrence, eliminating hindsight review (*Metropolitan Fire Systems Pty Ltd v Miller*).

  2. Reasonable grounds for that expectation

HALL v POOLMAN	
HELD	Expectation must ensure the company remains solvent as per CA definition. Not appropriate to base solvency expectations on potential future profitability.

s 588H(3): Reliance upon information as to solvency provided by another

- Director believed on reasonable grounds that a competent person was monitoring the company's solvency and keeping the director informed.
- Director **must prove (s 588H(1)):**

  (a) Reasonable belief in a competent, reliable person providing adequate solvency information.

  - ➔ Belief in the existence of an adequate monitoring system.
  - ➔ No need to prove delegate's competence, only director's belief in it.

  (b) Expectation of continued solvency based on that information.

  - ➔ *McLellan v Carroll*: Director's reliance on external accountant's advice didn't meet defence requirements. Accountant's role didn't cover providing solvency information, thus reliance wasn't reasonable.

s 588H(4): Non-participation in management due to illness or good reason

- *Deputy Commissioner of Taxation v Clark*: Court emphasised disapproval of passive directors. Total non-participation doesn't warrant successful defence under s 588H(4), particularly reliance on a spouse.
  - If director would not have been any more involved in company management if they were not disabled by illness or other cause, that disability does not provide a defence.

s 588H(5): Director took reasonable steps to prevent the incurring of a debt

- Reasonable – Court considers factors like company size and complexity.
  - A director who argues in favour of voluntary administration but does not persuade a majority of fellow directors to this view may well escape liability.
- **Considerations:** s 588H(6)

  (a) Efforts to appoint an administrator

  (b) Timing of actions

  (c) Results achieved.

DIRECTORS' RELIEF FOR BREACH OF DUTY

Court relief: ss 1317S, 1318

- s 1317S: Allows Court to grant relief for contravention of specific civil penalty provisions.
- s 1318: Allows Court to grant relief for breach of duty, both general and statutory.
- Neither provision allows the Court to relieve a person from criminal liability.
- Remedy is discretionary and one that is rarely conceded: Middleton J in *ASIC v Healey*.

Requires a 3 stage inquiry: *ASIC v Healey*

1. **Honesty: considers if applicant has acted honestly**
   - ➔ s 1317(2)(b)(i) or s 1318(1).
   - ➔ A mere absence of dishonesty insufficient.
   - ➔ Person acts honestly if conduct is:

     (i) without deceit or conscious impropriety;

     (ii) without intent to gain an improper benefit or advantage; and

     (iii) without carelessness or imprudence that negates the performance of the duty in question.
   - ➔ Courts often deny relief, notwithstanding the director's honesty, on public policy grounds.
2. **Fair excuse: considers if the applicant ought fairly to be excused.**
   - ➔ s 1317(2)(b)(ii) or s 1318(1).
   - ➔ Consider degree the conduct fell short of the statutory standard of care and diligence, seriousness of the contravention and its potential or actual consequences, and any impropriety.
   - ➔ s 1317(3) – factors to be considered in determining fairness for contravention of s 588G:

     (a) Any action taken to appoint an administrator or restructuring practitioner; and

     (b) When the action was taken; and

     (c) The results of that action.
3. **Extent of relief: determines if relief should be granted wholly or in part.**
   - ➔ Consider general deterrence.

MCLELLAN v CARROLL	
FACTS	Carroll's actions aimed to expand the business, but faced challenges with unreliable equipment, leading to insolvency.
HELD	Carroll acted honestly, sought advice, monitored operations, and did not procrastinate. Relief granted for contravention due to the circumstances.

Voluntary administration

Seeks to maximise chances of insolvent company to continue or achieve a better return for creditors: s 435A.

1. Appointing an administrator

- Directors decide company insolvent or likely to become & administrator should be appointed: s 436A(1).
- Administrator may be appointed by a liquidator of the company (s 436B) or by a person entitled to enforce a security interest in the whole or substantially the whole of the company's property (s 436C).
- Appointment of administrator publicised and lodged with ASIC: s 450A(1).

2. Powers of administrator

- Must investigate the company's business, property and financials: s 438A.
- s 437A(1):
  - Control over company's property and business
  - May carry on that business and manage that property and those affairs
  - May perform any function and exercise any power that company or any of its officers could
- Must convene a meeting within 8 days after administration begins with creditors to determine whether to appoint a committee of creditors to consult with: ss 436E-436F.
- Must convene a second meeting within 21 days of appointment with creditors to decide on the company's future: s 439A(5).
  - Creditors may resolve: s 439C
    - Company execute a DOCA specified in the resolution
    - Administration should end and company be returned to control of directors
    - Company be wound up

3. Rights of a substantially secured party

- Within 13 days of administrator's appointment, a substantial secured party may enforce its security, usually be the appointment of a receiver or other agent: s 441A.
  - Enforced against all company property (all or nothing rule): s 441A(1)(b).
- No later than the next business day, administrator must notify the party of their appointment: s 450A(3).

4. Moratorium on proceedings

- General freeze on actions if no enforcement by secured party: ss 440A-440D, 440F.
  - Exceptions for proceedings commenced before the administration's commencement or in respect of perishable property: s 441F-441G.