Directors' Duties: Duty of Care and the Business Judgment Rule

8.1 What is the Purpose of Directors' Duties?

- Directors and officers exercise significant control over a company's property, affairs and decision-making.
- Directors' duties regulate the exercise of that power and establish minimum standards of corporate governance and accountability.
- The duties protect the company by requiring directors and officers to exercise their powers competently, carefully and for the purposes for which those powers were conferred.
- The duty of care and diligence is primarily concerned with competence, attention, oversight and the quality of the decision-making process.
- It does not require every business decision to succeed.
- Directors must be permitted to undertake legitimate commercial risks without courts substituting their own commercial preferences for decisions honestly and carefully made.
- The law distinguishes reasonable entrepreneurial risk-taking from conduct involving inadequate information, passivity, ignored warning signs or failure to perform minimum responsibilities.
- The statutory duties possess a public character because ASIC can enforce civil-penalty provisions even where the company or its shareholders do not pursue private relief.

8.2 The Structure of Directors' Duties

- **By whom duties are owed:** Duties may be owed by formally appointed directors, de facto directors, shadow directors and persons falling within the statutory definition of "officer".
- **To whom duties are owed:** The duty under **s 180(1)** is owed to the company, although ASIC may enforce the statutory duty in the public interest.
- **Sources of duties:** Obligations may arise under the **Corporations Act 2001 (Cth)**, common law, equity, the company's constitution, contract or other legislation.
- **Concurrent operation:** The statutory and general-law duties may operate concurrently.
- **General-law duty:** Modern authority recognises a duty requiring directors to exercise reasonable care when performing their office.
- A director's fiduciary obligations do not exclude the concurrent common-law duty of care.
- The general-law and **s 180(1)** standards are essentially equivalent, although their enforcement and remedies differ.
- **Civil-penalty framework: Section 180(1)** is a civil-penalty provision.
- ASIC may establish a statutory contravention without proving that the company suffered actual loss.
- Loss and causation remain relevant where compensation is sought.

- Potential consequences include a declaration of contravention, pecuniary penalty, compensation and disqualification.
- A contravention of **s 180(1)** does not require dishonesty.
- Shareholders cannot ratify a contravention of **s 180(1)** so as to extinguish its public-law consequences.
- **Section 300(10)** reinforces accountability by requiring relevant public companies to disclose the number of directors' and committee meetings held and each director's attendance.
- The statutory duty no longer carries a criminal sanction; the former dishonest-breach offence was removed because negligence concerns insufficient care whereas dishonesty involves conscious wrongdoing.

8.3 The Duty of Care and Diligence: s 180(1)

Corporations Act 2001 (Cth) — Duty of Care and Diligence

- **s 180(1) — Care and diligence: civil obligation**
- **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; and**
    - **(b) occupied the same office and had the same responsibilities within the corporation as the director or officer.**
- **The standard therefore considers both:**
    - **the corporation's circumstances; and**
    - **the particular office and responsibilities held by the director or officer.**

Nature of the Standard

- **Section 180(1)** establishes an objective but context-specific standard.
- The hypothetical reasonable person is placed in the particular corporation's circumstances and given the defendant's office and responsibilities.
- Ignorance, inexperience, inactivity and failure to inquire cannot reduce the standard below the minimum requirements of directorship.
- Relevant corporate circumstances include the company's size, complexity, business, financial condition, risk profile, listed status, governance structure and information systems.
- For a subsidiary, relevant circumstances may include parent-company supervision and the degree of managerial or financial integration within the group.
- Responsibilities may arise from legislation, the constitution, board resolutions, contracts, governance documents, committee membership and the practical distribution of work.
- Specialist qualifications, represented expertise or additional functions may increase what reasonable care and diligence require.

Competence-Based Duty and Minimum Oversight

- Every director must acquire at least a rudimentary understanding of the company's business.
- A person who lacks necessary knowledge must obtain it through inquiry or decline appointment.
- Directors must become sufficiently familiar with corporate affairs to form informed and independent judgments.
- Directors must take reasonable steps to place themselves in a position to guide and monitor management.
- They must maintain a continuing understanding of the company's activities and financial position.
- Directors must attend board meetings sufficiently regularly, and the board must meet as frequently and for as long as its responsibilities require.
- Directors need not inspect every daily transaction but must undertake general monitoring of corporate affairs, policies and management.
- The board must ensure that appropriate systems exist for supervising management and obtaining reliable information.
- Directors must apply an enquiring mind and cannot close their eyes to misconduct or warning signs.

Financial Literacy and Board Information

- Every director must possess sufficient financial literacy to understand basic information relevant to the company.
- Directors are not required personally to audit the accounts, but they must read and understand financial statements.
- They must compare the statements with knowledge accumulated through their office.
- Apparent inconsistencies, omissions or warning signs may create a duty to investigate further.
- Directors must take a diligent and intelligent interest in board materials.
- Information overload does not automatically excuse inadequate engagement.
- The board controls the information it receives and should require management to present material in an intelligible form.
- Large electronic document dumps cannot substitute for an adequate board pack.

Executive and Non-Executive Directors

- Executive and non-executive status affects the contextual application of **s 180(1)** but does not create two separate duties.
- Executives generally have greater operational involvement, access to information and managerial responsibility.
- Non-executives may ordinarily rely more heavily on competent management and are not expected to possess the same detailed operational knowledge.

- Non-executive directors remain responsible for understanding the company, monitoring management and engaging with matters requiring board consideration.
- Non-executive status does not justify passivity or unquestioning reliance.

Public Character of s 180(1)

- **Section 180(1)** establishes a publicly enforceable norm as well as protecting the company's private interests.
- Its civil-penalty character means the duty is not confined to compensation for proven financial loss.
- The company's interests may include lawful and legitimate operation, regulatory compliance, reputation and preservation of licences necessary for its business.
- The company's interests cannot always be equated with the immediate preferences of its shareholders.
- Even unanimous shareholder approval cannot extinguish ASIC's power to enforce **s 180(1)**.
- Courts must nevertheless apply the statutory text rather than treat public policy as a separate, free-standing source of liability.

Responsibilities of Officers and Composite Corporate Roles

- **Section 180(1)** applies to officers as well as directors.
- An officer's responsibilities are identified from the functions actually undertaken, not merely the person's formal title.
- Where one person occupies a composite position, their responsibilities cannot necessarily be divided into artificial legal compartments.
- In *Shafron v ASIC*, the High Court treated Shafron's positions as company secretary and general counsel as a composite role.
- His responsibilities included advising James Hardie's chief executive and board about ASX disclosure and limitations in actuarial material relating to asbestos claims.
- Responsibilities under **s 180(1)** include functions actually performed regardless of whether they are labelled legal, secretarial, risk or managerial work.
- Professional expertise and direct involvement may increase the care and diligence expected of an officer.
- The extended statutory meaning of "officer" may also capture a person who participates in decisions affecting a substantial part of the business or can significantly affect the company's financial standing.

Responsibilities of the Chair

- The chair's role is not necessarily confined to ceremonial or procedural control of meetings.
- Additional responsibilities may arise from the constitution, governance arrangements, board practices, committee roles and functions actually undertaken.

- In a listed public company, relevant expectations may include organising and leading the board, controlling the agenda and ensuring adequate information flow.
- The chair may also be expected to facilitate proper discussion, monitor board performance and ensure that significant risks receive board attention.
- The chair's influence over board processes may support a higher level of responsibility under **s 180(1)**.
- A chair with financial expertise or additional audit-committee responsibilities may be required to do more than an ordinary non-executive director.
- Corporate-governance standards may evidence contemporary expectations but do not independently create legal duties.

Responsibilities of the Chief Executive Officer

- A chief executive officer ordinarily carries heavier responsibilities because of continuous involvement in management and superior access to operational information.
- The content of those responsibilities may be identified from employment terms, board charters, delegations, reporting lines and actual conduct.
- A chief executive officer is generally expected to monitor actual financial performance, sales, profitability, liquidity and significant operational risk.
- Combining the offices of chief executive and chair may create particularly substantial responsibilities because the person controls management and leads the board.
- A chief executive cannot ignore a known risk merely because another executive has more specialised financial expertise.
- Where information identifies a serious concern, reasonable care may require detailed forecasts, investigation, escalation and a warning to the board.
- In the Dick Smith Holdings litigation, the court examined dividend decisions by reference to each officer's responsibilities, knowledge of cash-flow concerns and the foreseeable risk to creditors.
- The chief executive breached the duty concerning the final dividend by failing to seek detailed daily cash-flow forecasts despite known liquidity risks.
- Historical profitability did not remove the obligation to consider current cash flow and creditor prejudice.
- In *Permanent Building Society (in liq) v Wheeler*, a conflicted chief executive could not avoid responsibility by abstaining and remaining silent about a risky and unfamiliar venture.
- A conflict may prevent voting but does not necessarily remove the obligation to disclose risk, warn the board or take reasonable protective action.

Foreseeable Risk and Corporate Benefit

- The dominant approach balances the foreseeable risk of harm against the potential benefits reasonably expected from the conduct.
- A risk is foreseeable if it is not far-fetched or fanciful, but foreseeability alone does not establish breach.

- The assessment considers the probability and magnitude of harm, expected corporate benefits and the availability and burden of precautions.
- The analysis is prospective and must avoid hindsight.
- Actual harm is not required to establish a contravention of **s 180(1)**.
- Corporate harm may include civil liability, regulatory action, licence consequences, reputational damage, impaired commercial relationships, business disruption and threats to continued existence.
- Profitable conduct may still harm the company where it exposes the company to serious unlawful or illegitimate consequences.

Mistakes, Errors of Judgment and Corporate Contraventions

- An unsuccessful decision does not establish negligence merely because a commercial risk materialised.
- Courts consider whether the decision-making process satisfied the care and diligence expected at the time.
- Breach is more likely where a director failed to obtain information, ignored foreseeable risk, disregarded warning signs or failed to make an obvious inquiry.
- A company's contravention does not automatically establish a director's contravention of **s 180(1)**.
- A corporate contravention may nevertheless demonstrate a foreseeable risk of legal, regulatory or reputational harm.
- The director's liability must be established independently by applying **s 180(1)** to their conduct and responsibilities.

Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson (1995) 37 NSWLR 438

- **Court:** New South Wales Court of Appeal.
- **Judges:** Clarke JA and Sheller JA; Powell JA dissenting on the directors' common-law liability issue.
- **Facts:**
    - AWA Ltd was a large public company that manufactured, imported and exported electrical and electronic products.
    - Its overseas purchases exposed it to fluctuations in foreign-exchange rates.
    - AWA established a foreign-exchange operation intended to hedge against adverse currency movements.
    - Andrew Koval, formerly a trainee accountant, was appointed foreign-exchange manager.
    - Koval appeared successful because AWA's records reported substantial profits, but he was exceeding AWA's genuine currency exposure and accumulating enormous losses.
    - By September 1986, AWA's open foreign-exchange contracts exceeded $700 million.

- At 31 December 1986, its records omitted approximately $38.8 million in loans and showed an $18.3 million profit when the true position was a $25.6 million loss.
    - Deloitte confirmed an operating profit of approximately $16.068 million for the six months ending 31 December 1986, although AWA had suffered a substantial loss.
    - The board was told that the operation earned a $12 million realised profit in January 1987, exceeding the budgeted profit for the entire year.
    - The extraordinary figure startled and alarmed the non-executive directors, but they were reassured that the profit had been realised and examined by Deloitte.
    - AWA did not establish adequate controls until July 1987, when the board discovered losses of approximately $49.8 million.
    - John Hooke was AWA's chair and chief executive officer.
    - Deloitte possessed information concerning serious deficiencies in AWA's accounting records and internal controls.
    - AWA sued Deloitte, and Deloitte sought contribution from Hooke and three non-executive directors.
- **Reasoning:**
    - Clarke JA and Sheller JA held that every director owes the company a common-law duty to take reasonable care.
    - The traditional approach permitting extensive passivity, delegation and reliance no longer represented modern company law.
    - Directors must acquire a rudimentary understanding of the business, remain informed and take reasonable steps to guide and monitor management.
    - They must maintain familiarity with the financial position and inquire when information reveals warning signs.
    - Directors may rely on competent and trustworthy management where there is no reason for doubt, but reliance cannot remain blind after unusual results or control deficiencies emerge.
    - The law permits entrepreneurial risk-taking and does not equate every unsuccessful decision with negligence.
    - Hooke received warnings concerning inadequate controls, records, transaction limits and segregation of duties but failed to investigate or inform the board adequately.
    - His executive responsibilities and personal knowledge made continued delegation unreasonable.
    - The non-executive directors reasonably relied on management and Deloitte because critical warnings were not communicated to them and they requested investigation when the profits caused concern.
- **Outcome:** Hooke was negligent, but the non-executive directors were not negligent on the particular information and assurances available to them.
- **Principle:** Directors must acquire minimum competence, remain informed, monitor management and investigate warning signs; ignorance, passivity and unquestioning reliance are not defences.

Australian Securities and Investments Commission v Rich [2003] NSWSC 85

- **Court:** Supreme Court of New South Wales, Equity Division.
- **Judge:** Austin J.
- **Nature:** Interlocutory decision concerning whether ASIC's pleaded case against One.Tel's former chair was legally arguable, not a final finding of breach.
- **Facts:**
    - One.Tel Ltd was a listed telecommunications company that entered administration and liquidation in 2001.
    - John Greaves was a non-executive director, board chair and chair of the Finance and Audit Committee.
    - He was a chartered accountant with extensive experience as a finance director or chief financial officer.
    - ASIC alleged that One.Tel's financial condition deteriorated significantly between January and May 2001.
    - By March 2001, it allegedly needed at least $287 million to continue operating and meet liabilities, excluding approximately $365 million in proposed capital expenditure.
    - ASIC alleged selective deferral of creditor payments, depletion of cash reserves, increasing overdue debts, an unplanned $26 million transfer and operating losses.
    - ASIC alleged that Greaves' chairmanship, committee role, expertise and One.Tel's circumstances gave him responsibilities beyond those of an ordinary non-executive director.
    - Greaves sought summary dismissal or strike-out of the claim.
- **Reasoning:**
    - Austin J rejected the argument that responsibilities under **s 180(1)(b)** are limited to formally delegated tasks.
    - Responsibilities may arise from practical corporate arrangements, the distribution of work, committee membership, expectations, experience and represented skills.
    - **Section 180(1)** establishes an objective minimum but applies contextually, and additional expertise may raise what reasonable care requires.
    - It was arguable that the chair of a listed public company had responsibilities concerning board performance, information flow, financial monitoring and reporting systems.
    - Voluntary governance codes do not independently create legal duties but may evidence contemporary practice and expectations.
- **Outcome:** Greaves' application was dismissed because ASIC's pleaded case concerning his enhanced responsibilities was legally arguable.
- **Principle:** Responsibilities under **s 180(1)(b)** include functions arising from actual corporate arrangements and expectations attached to the director's office and expertise.

Australian Securities and Investments Commission v Healey [2011] FCA 717

- **Alternative name:** The Centro case.
- **Court:** Federal Court of Australia.
- **Judge:** Middleton J.
- **Facts:**
    - The case concerned the 2007 financial reports of entities within the Centro property group.
    - The defendants included the non-executive chair, chief executive officer and other non-executive directors.
    - They were experienced, intelligent and conscientious, and ASIC did not allege dishonesty.
    - The directors approved financial reports classifying approximately $2 billion of short-term liabilities as non-current.
    - The debts were repayable or required refinancing within 12 months, and the entities had no unconditional right to defer settlement.
    - The reports also omitted substantial post-balance-date guarantees, including a guarantee concerning approximately US$1.75 billion.
    - Information concerning the debt maturities and guarantees appeared in board materials and was known to the directors.
    - Management and the external auditors also failed to identify or correct the errors before approval.
- **Reasoning:**
    - Middleton J held that every director has a core responsibility to participate in governance and guide and monitor the company.
    - Each director must personally read, understand and focus on financial statements before approving them.
    - Directors need not be professional accountants but must understand elementary concepts such as current and non-current liabilities.
    - They must compare financial reports with accumulated knowledge from board papers, discussions and transactions.
    - Management, audit committees and external auditors may assist but cannot replace each director’s personal judgment.
    - The obligation applied to executive and non-executive directors, although the chief executive’s access and responsibilities increased what was expected of him.
    - Honesty and good intentions did not establish reasonable care where the directors failed to undertake the required personal review.
- **Outcome:** Each director contravened **ss 180(1), 344(1) and 601FD(3)** by approving reports containing material misclassifications and omissions.
- **Penalty:** Declarations were made against the non-executive directors, but no further penalty was imposed on them after considering their honesty, lack of gain, prompt market correction and the personal consequences already suffered.

- **Penalty:** The chief executive officer received a $30,000 pecuniary penalty.
- **Relief:** Relief under **s 1317S** was refused because the failures were serious and general deterrence remained important.
- **Principle:** Directors must personally read, understand and critically assess financial statements; preparation may be delegated, but ultimate review and approval are non-delegable.

Australian Securities and Investments Commission v Cassimatis (No 8) (2016) 336 ALR 209; [2016] FCA 1023

- **Court:** Federal Court of Australia.
- **Judge:** Edelman J.
- **Facts:**
  - Emmanuel and Julie Cassimatis were Storm Financial Ltd’s directors, sole shareholders and senior executive managers.
  - They exercised extraordinary control over strategy, operations, compliance and financial affairs.
  - Storm used a standardised investment model under which clients borrowed against their homes, obtained margin loans and invested in index funds.
  - Clients were encouraged to undertake further “step” investments and were given no meaningful adverse-market exit strategy.
  - ASIC’s case concerned retired or near-retirement clients with limited income, few assets and little capacity to recover from loss.
  - Advisers did not formulate advice independently and could not alter or reject centrally produced statements of advice.
  - The Cassimatises controlled the executive committee, board, payments, adviser appointments, workshops, sales targets and lender relationships.
  - Storm contravened former **ss 945A(1)(b) and 945A(1)(c)** by failing adequately to investigate vulnerable clients’ circumstances and providing inappropriate advice.
- **Reasoning:**
  - Edelman J balanced the foreseeable risk of harm against expected benefits and the burden of precautions.
  - Corporate harm included unlawful operation, regulatory action, licence consequences, reputational damage and threats to continued existence.
  - The Cassimatises’ knowledge, practical control and authority to introduce safeguards increased what reasonable care required.
  - Applying the model to vulnerable clients created a likely risk of inappropriate advice with potentially catastrophic consequences for Storm.
  - Reasonable precautions were inexpensive and included individual suitability assessment, independent scrutiny or excluding vulnerable clients.
  - Storm’s contraventions did not automatically establish the directors’ liability but demonstrated the foreseeable risk they should have addressed.
  - Sole shareholder approval did not eliminate Storm’s separate interests in lawful conduct, reputation and continued existence.

- **Outcome:** Both directors contravened **s 180(1)** by exposing Storm to foreseeable legal, regulatory, reputational and existential harm.
- **Subsequent history:** Their appeal was dismissed, and the High Court refused special leave.
- **Penalty:** Each received a $70,000 pecuniary penalty and a seven-year disqualification.
- **Principle:** A director may breach **s 180(1)** by failing to take readily available precautions against a foreseeable risk of serious unlawful conduct and consequential corporate harm.

Australian Securities and Investments Commission v Bekier (Liability Judgment) [2026] FCA 196

- **Court:** Federal Court of Australia.
- **Judge:** Lee J.
- **Facts:**
    - The Star Entertainment Group Ltd operated casinos in New South Wales and Queensland.
    - ASIC proceeded against former directors and senior officers, including CEO and managing director Matthias Bekier and company secretary, group general counsel and later chief legal and risk officer Paula Martin.
    - KPMG identified significant deficiencies in Star's anti-money-laundering and counter-terrorism-financing systems.
    - Suncity, Star's largest junket customer, operated the exclusive Salon 95 gaming room.
    - Information within Star indicated serious compliance concerns and possible money laundering or criminal activity in Salon 95.
    - Bekier's CEO report described the problems merely as "concerns" and failed to convey their seriousness.
    - Star also used a two-step China UnionPay process enabling customers to obtain and gamble funds despite restrictions on gambling use.
    - More than $900 million was obtained through this process between 2013 and 2019.
    - NAB sought confirmation about the process, but Star did not provide a complete and accurate account.
    - Martin knew NAB had not received an accurate account and participated in allowing an incomplete or misleading response.
    - The board was not consistently given complete information concerning adverse junket probity material or management's response.
- **Reasoning:**
    - Lee J applied **s 180(1)** individually by reference to Star's risk profile and each defendant's office, knowledge, access to information and responsibilities.
    - Non-executive directors may rely more heavily on competent management but remain responsible for active guidance and monitoring.

    - Directors must control, understand and interrogate board information; information overload and electronic document dumps do not automatically excuse inattention.
    - AI may assist directors where its use is controlled and transparent but cannot displace ethical reasoning, personal responsibility or informed human judgment.
    - Foreseeable harm included civil penalties, casino-licence consequences, reputational damage, impaired banking relationships and business disruption.
    - Bekier failed to address KPMG's findings and understated the Salon 95 risks.
    - A reasonable CEO would have informed the board fully and recommended at least suspending Suncity pending satisfactory probity information.
    - Martin's overlapping legal, risk and company-secretarial responsibilities could not be artificially divided.
    - She could not discharge her responsibility merely by reporting to Bekier where she knew that the board remained uninformed.
    - ASIC failed to prove its specific pleaded case against the seven non-executive directors, who possessed less operational information and were entitled to greater reliance on management.
- **Outcome:** Bekier and Martin contravened **s 180(1)**, while ASIC's claims against the seven non-executive directors were dismissed.
- **Penalty:** Bekier received a $700,000 pecuniary penalty and six-year disqualification; Martin received a $400,000 penalty and seven-year disqualification.
- **Principle:** The statutory standard must be applied individually, and senior executives responsible for serious legal, compliance or operational risks must ensure those matters reach the board.

8.4 Defence: The Business Judgment Rule: s 180(2)

Corporations Act 2001 (Cth) — Business Judgment Rule

- **s 180(2) — Defence**
- **s 180(2): A director or other officer who makes a business judgment is taken to satisfy:**
    - **the statutory duty of care and diligence under s 180(1); and**
    - **equivalent duties at common law and in equity,**
    - **in respect of that judgment if all requirements in s 180(2)(a)–(d) are satisfied.**
- **s 180(2)(a): The director or officer must make the judgment in good faith for a proper purpose.**
- **s 180(2)(b): They must not have a material personal interest in the subject matter of the judgment.**
- **s 180(2)(c): They must inform themselves about the subject matter to the extent they reasonably believe to be appropriate.**
- **s 180(2)(d): They must rationally believe that the judgment is in the best interests of the corporation.**

- **A belief is rational unless it is one that no reasonable person in the director's or officer's position would hold.**

Purpose, Scope and Threshold

- The rule protects qualifying disinterested business judgments made in good faith, on an appropriately informed basis and with a rational belief in corporate benefit.
- It reflects judicial reluctance to substitute the court's commercial opinion for management decisions and seeks to avoid hindsight bias.
- It applies only to **s 180(1)** and equivalent common-law and equitable duties, not other statutory obligations or laws.
- A business judgment is a conscious decision to take or not take action concerning a matter relevant to business operations.
- Planning, budgeting, forecasting, investment, financing, dividends and corporate strategy may qualify.
- Payment of a dividend may qualify because it affects the funds available for use in the corporation's business.
- A decision not to act qualifies only where the director considered the matter and consciously decided against action.
- Neglect, inattention, failure to consider safeguards and ordinary oversight failures are not business judgments.
- A decision merely not to comply with the **Corporations Act 2001 (Cth)** is not protected.
- In *ASIC v Fortescue Metals Group Ltd*, the Full Court treated an alleged decision not to disclose the true effect of framework agreements as a compliance decision rather than a business judgment.
- The Full Court stated that **s 180(2)** cannot exculpate a want of diligence producing a contravention of another provision where that provision has its own exculpatory regime.
- The High Court later overturned the continuous-disclosure finding and therefore did not determine the operation of **s 180(2)**.

Statutory Requirements

- **Good faith and proper purpose:** The judgment must genuinely be made for a corporate and proper purpose.
- **No material personal interest:** Each director must be assessed separately for an interest sufficiently significant to affect their judgment.
- **Appropriately informed:** The director must obtain and consider information to the extent they reasonably believe appropriate.
- Relevant considerations include the decision's importance, available time, information costs, confidence in advisers, the company's condition, competing demands and availability of material information.
- The court assesses the decision-making record as a whole rather than treating one procedural factor as decisive.

- Indicators of an appropriately informed process may include advance distribution of relevant documents, careful review, active questioning and consultation with independent legal or financial advisers.
- Other indicators include sufficient meeting time, consideration across more than one meeting, use of outside-director committees and genuine arm's-length negotiations.
- Reliance on a conclusory adviser's opinion is weaker where directors do not understand its basis or ask obvious questions.
- In *Smith v Van Gorkom*, directors lacked protection after approving a merger without reviewing the documents, obtaining a valuation or adequately investigating the chief executive's proposed price.
- In *Hanson Trust PLC v ML SCM Acquisition Inc*, directors could not rely uncritically on a fairness opinion where basic inquiry would have shown that no range of fairness had been established.
- **Rational corporate benefit:** The director must actually believe the judgment is in the corporation's best interests.
- The reasoning need not be objectively convincing, but it must be genuine and capable of rational explanation.

Onus of Proof

- The original reform proposals contemplated a rebuttable presumption modelled on United States law.
- Australian authority generally treats **s 180(2)** as a defence for which the director or officer bears the onus.
- This approach avoids requiring ASIC to prove absence of good faith or a material personal interest merely to establish negligence.
- The alternative presumption interpretation has been acknowledged but remains unresolved at appellate level.

Australian Securities and Investments Commission v Rich [2009] NSWSC 1229

- **Court:** Supreme Court of New South Wales.
- **Judge:** Austin J.
- **Facts:**
    - ASIC sought declarations that One.Tel's chair and three executive directors contravened **s 180(1)**.
    - ASIC alleged that the directors knew or ought to have known that financial information supplied to the board did not reflect One.Tel's true financial position.
    - The defendants denied liability and sought protection under **s 180(2)**.
- **Reasoning:**
    - Austin J distinguished open-ended general-law "business judgment considerations" from the defined statutory defence in **s 180(2)**.
    - General-law considerations form part of distinguishing negligence from an error concerning the commercial merits of a decision.

  - **Section 180(2)** remains capable of protecting conduct that might otherwise contravene **s 180(1)** because it has specific requirements and a defined consequence.
  - Austin J regarded the statutory language concerning onus as ambiguous but concluded that the director or officer bears the onus of establishing **s 180(2)(a)–(d)**.
  - Requiring ASIC to disprove good faith or establish a material personal interest would add matters resembling more serious statutory contraventions to a negligence case.
  - The statutory requirements also concern matters principally within the director's knowledge.
  - A qualifying business judgment requires a conscious decision to take or not take action concerning business operations.
  - Planning, budgeting and forecasting may qualify because they provide the financial framework for business operations.
  - Mere neglect, failure to consider safeguards and ordinary monitoring failures do not involve a business judgment.
  - For **s 180(2)(c)**, the court examines the importance of the decision, available time, information costs, confidence in advisers, corporate conditions, competing demands and accessible material.
  - The director must inform themselves on the decision-making occasion, but protection may remain available despite unknown information where the director reasonably believed the steps taken were appropriate.
  - Under **s 180(2)(d)**, a rational belief must be supported by an arguable reasoning process.
  - The reasoning need not be objectively convincing or establish that the decision itself was reasonable.
  - The belief is assessed using the information obtained through compliance with **s 180(2)(c)**.
- **Outcome:** ASIC failed to prove its pleaded contraventions of **s 180(1)**, so the defendants did not need **s 180(2)** to avoid liability.
- **Principle: Section 180(2)** can operate as a substantive defence, but only for a conscious, informed, disinterested and rational business judgment; it does not protect passive oversight failures.

Australian Securities and Investments Commission v Bekier (Liability Judgment) [2026] FCA 196 — Business Judgment Application

- **Full facts:** See the case summary under 8.3.
- **Relevant facts:**
  - Bekier argued that his decision not to terminate Star's relationship with Suncity was protected by **s 180(2)**.
  - He admitted that he did not actively consider whether Star should suspend or terminate the relationship.

    - He relied on executive processes and made no inquiries directed to Suncity's suitability and reputation.
- **Reasoning:**
    - Lee J held that an omission qualifies only where the director consciously considers the matter and decides not to act.
    - Bekier never turned his mind to the issue and therefore made no business judgment within **s 180(3)**.
    - He also failed **s 180(2)(c)** because he had not informed himself about the subject matter.
- **Outcome:** Bekier could not rely on **s 180(2)**.
- **Principle:** An unconsidered omission cannot retrospectively be characterised as a protected decision not to act.

Business Judgment Exam Sequence

- Identify the precise decision to take or not take action.
- Establish that the director consciously considered the matter and that it concerned business operations.
- Determine whether the judgment was made in good faith for a proper purpose.
- Identify any material personal interest.
- Identify what information the director obtained and whether the director reasonably believed it was sufficient.
- Identify the reasoning connecting the decision with the corporation's best interests.
- Determine whether no reasonable person in the same position could have held that belief.
- Consider separately whether the conduct breached another provision or involved an unprotected oversight failure.

8.5 Defence: Delegation and Reliance: ss 198D, 190 and 189

Corporations Act 2001 (Cth) — Delegation and Reliance

- **s 198D — Delegation of directors' powers**
- **s 198D(1): Unless the company's constitution provides otherwise, the directors may delegate any of their powers to:**
    - **(a) a committee of directors;**
    - **(b) a director;**
    - **(c) an employee of the company; or**
    - **(d) any other person.**
- **The delegation must be recorded in the company's minute book under s 251A.**
- **For a CCIV, s 1224L applies instead of s 198D.**
- **s 198D(2): The delegate must exercise the delegated powers in accordance with any directions given by the directors.**

- **s 198D(3): The delegate's exercise of the power is as effective as if the directors had exercised it.**
- **s 190 — Responsibility for actions of a delegate**
- **s 190(1): Where directors delegate a power under s 198D, each director is responsible for the delegate's exercise of that power as if the directors had exercised it themselves.**
- **s 190(2): A director is not responsible under s 190(1) if both requirements in s 190(2)(a)–(b) are satisfied.**
- **s 190(2)(a): The director must have believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors by:**
    - **the Corporations Act 2001 (Cth); and**
    - **the company's constitution, if any.**
- **s 190(2)(b): The director must have believed that the delegate was reliable and competent in relation to the delegated power:**
    - **(i) on reasonable grounds;**
    - **(ii) in good faith; and**
    - **(iii) after making proper inquiry, if the circumstances indicated a need for inquiry.**
- **s 189 — Reliance on information or advice**
- **s 189(a): A director may rely on information or professional or expert advice given or prepared by:**
    - **(i) an employee whom the director believes on reasonable grounds to be reliable and competent concerning the relevant matters;**
    - **(ii) a professional adviser or expert concerning matters the director believes on reasonable grounds to be within that person's professional or expert competence;**
    - **(iii) another director or officer concerning matters within that director's or officer's authority; or**
    - **(iv) a committee of directors on which the director did not serve, concerning matters within the committee's authority.**
- **s 189(b): The reliance must be:**
    - **(i) in good faith; and**
    - **(ii) after the director independently assesses the information or advice, having regard to:**
        - **the director's knowledge of the corporation; and**
        - **the complexity of the corporation's structure and operations.**
- **s 189(c): The statutory presumption applies where the reasonableness of the reliance arises in proceedings determining whether the director performed:**
    - **a duty under the relevant Part; or**
    - **an equivalent general law duty.**
- **Where s 189(a)–(c) are satisfied, the director's reliance is taken to be reasonable unless the contrary is proved.**

Distinguishing Delegation and Reliance

- **Delegation:** A director authorises another person to exercise a power or perform a function.
- **Reliance:** A director uses information or advice supplied by another person when performing the director's own function.
- **Section 198D** determines whether a power may be delegated, **s 190** determines responsibility for its exercise and **s 189** governs presumed reasonable reliance.
- A single factual situation may require all three provisions.

Delegation and Responsibility

- Delegation enables distribution of functions that directors cannot practically perform personally.
- Under **s 190(1)**, responsibility for the delegate's exercise of power is the default position.
- The director must establish **s 190(2)** to avoid responsibility.
- Belief in the delegate's reliability and competence must be held in good faith and on reasonable grounds.
- Proper inquiry is required where warning signs indicate a need for it.
- If **s 190(2)** is satisfied, a director may avoid responsibility even where the delegate acts negligently, fraudulently or outside the intended scope.

Reasonable Reliance

- **Section 189** creates a statutory presumption rather than an unrestricted right to accept another person's conclusions.
- The director must reasonably believe that the source is reliable and competent and must rely in good faith.
- The director must independently and impartially assess the information or advice against their corporate knowledge.
- Independent assessment need not be comprehensive or inherently sceptical, and directors need not reproduce an expert's technical work.
- Reliance becomes less reasonable where the director possesses contrary knowledge, the advice is qualified or warning signs require inquiry.

Non-Delegable Responsibilities and Limits

- Delegation does not permit directors to abandon core governance obligations.
- Non-delegable responsibilities include monitoring corporate affairs, maintaining familiarity with financial position, reading financial statements and inquiring into apparent errors.
- Management, accountants, committees and auditors may assist but cannot displace the directors' personal obligation to apply their minds.
- **James Hardie litigation:** Board approval of a misleading ASX announcement concerning asbestos compensation funding was too important to be left to management.

- ***ASIC v Healey*:** Financial-report preparation could be delegated, but personal review, understanding and approval could not.
- ***Dick Smith*:** Reasonableness of delegation and reliance depends on the director's office, assigned responsibilities, knowledge and warning signs.
- ***Daniels v Anderson*:** Reliance on competent management and advisers is possible until extraordinary results or control deficiencies make further inquiry necessary.

Delegation and Reliance Exam Sequence

- Identify the power, function, information or advice involved.
- Determine whether the power was delegated under **s 198D**.
- Apply the default responsibility rule in **s 190(1)**.
- Determine whether the director satisfied every requirement of **s 190(2)**.
- Identify whether the function was a non-delegable board responsibility.
- For reliance, identify whether the source falls within **s 189(a)**.
- Determine whether reliance occurred in good faith and after independent assessment under **s 189(b)**.
- Consider the director's knowledge, the company's complexity and any warning signs requiring inquiry.
- Determine whether the statutory presumption applies under **s 189(c)**.

Cases by Topic

- **Objective minimum competence and monitoring:** *Daniels v Anderson*.
- **Contextual responsibilities and enhanced chair role:** *ASIC v Rich* [2003] NSWSC 85.
- **Financial literacy and non-delegable financial reporting:** *ASIC v Healey*.
- **Foreseeable regulatory harm and controlling directors:** *ASIC v Cassimatis (No 8)*.
- **Individual responsibility, board information and escalation:** *ASIC v Bekier*.
- **Conscious judgment required for s 180(2):** *ASIC v Bekier*.
- **Limits on delegation and reliance:** *Daniels v Anderson*, *ASIC v Healey*, the James Hardie litigation and *Dick Smith*.