

LAWS2014 Corporations Law

Study Notes — Australian Corporations Law

Law stated as at October 2026

Colour key

Salomon v Salomon & Co

Case names — plum, italics

s 180(1) Corporations Act 2001 (Cth)

Legislation — navy

a company is a legal person separate from its members

Key principles — teal

members CANNOT ratify a breach of statutory duty

Critical points — deep red, soft rose tint

Structure follows the Semester 2, 2026 Learning Guide and Class Schedule (Lectures 1–12). Section references are to the Corporations Act 2001 (Cth) unless stated otherwise.

Contents

Topic 1: Introduction to Company Law (Lecture 1)	4
1. Regulatory Overview	4
2. Defining 'Company' and 'Corporation'	4
3. Overview of Different Business Structures	5
Topic 2: Incorporation, Corporate Personality and its Limits (Lecture 2)	6
1. Background	6
2. Process of Registering a Company	6
3. Separate legal entity and limited liability	6
4. Corporate Groups	7
5. Piercing the Corporate Veil	8
6. Establishing an Agency within a Corporate Group	10
7. Statutory Veil Piercing	12
8. Types of Companies	14
9. How do Companies Raise Money?	15
10. Debt Finance	16
11. Equity Finance	18
12. Hybrid Securities	20
13. Factors when Deciding Between Debt and Equity	20
Topic 3: The Corporate Constitution and Allocation of Power (Lecture 3)	21
1. The Corporate Constitution	21
2. Construction of the Constitution	22
3. Amending the Constitution	23
4. The Effect of the Constitution between Company and Member	27
5. Decision Making Organs	28
Topic 4: Meetings and Decision-Making in Companies (Lecture 4)	33
1. Members' Meetings	33
2. Problem Question	36
3. Directors' Meetings (Board Meetings)	38
4. The Duomatic Principle and Unanimous Assent	40
Topic 5: Directors and Officers — Appointment, Role and Removal (Lecture 5)	43
1. Introducing Directors and Officers	43
2. Appointing and Removing Directors	45
Topic 6: Corporate Contracting and Agency (Lecture 6)	48
1. Liability in Contract	48
2. Statutory 3rd Party Assumption as to Authority	51
Topic 7: Corporate Liability and Attribution (Lecture 7)	55
1. Liability in Tort	55
2. Overview: Corporate Criminal Liability	55
3. Corporate Actus Reus and Mens Rea	56
4. Corporate Criminal Liability Scaffold — Common Law (State) + Statute (Cth)	57
Topic 8: Directors' Duties — Duty of Care and the Business Judgment Rule (Lecture 8)	62
1. Overview of Duties	62
2. Source of the Duty of Care	62
3. Modern duty of care	62
4. Defences: Statutory right to delegate and rely on others: ss 189-90; 198D	64
5. Defence: Business Judgment Rule (Only Applies to Duty of Care)	66
Topic 9: Directors' Duties — Conflicts, Profits and Related Party Transactions (Lecture 9)	68
1. Breach of Fiduciary Duties	68
2. Attenuation of the Duty	70
3. Disclosure of Material Personal Interests (s 191)	70
4. Improper Use of Position (s 182) and Information (s 183)	72
5. Related Party Transactions (Only Public Companies)	73

Topic 10: Directors' Duties — Good Faith and Proper Purpose (Lecture 10)	76
1. Statutory Duty	76
2. Directors of Wholly Owned Subsidiaries Acting for Holding Company — Good Faith and Best Interests	76
3. Good Faith	76
4. Best Interests of the Company & Insolvency	77
5. Proper Purpose	77
6. Section 181 in General — Conflicts and Profits Rule	78
7. Consequences of Breach	78
Topic 11: Insolvent Trading and Consequences for Breach of Directors' Duties (Lecture 11)	80
1. An Overview of Insolvency	80
2. Insolvent Trading	85
3. Ratification of Conduct	89
4. Consequences for Breaching Duties	92
Topic 12: Minority Shareholder Remedies (Lecture 12)	94
1. Summary of Minority Shareholder Remedies	94
2. Minority Oppression	94
3. Statutory Injunctions	100
4. Statutory Derivative Action	101
5. Compulsory Liquidation Remedies / Just and Equitable Winding Up	104
6. Inspection of Books (s 247A)	105
Appendix: Regulated Offers of Securities (Ch 6D) — not in the 2026 Learning Guide	107
1. Types of Disclosure Documents	107
2. Issue Offers that Require a Disclosure Document	107
3. Content of Prospectus Documents	110
4. Procedure for Issuing Shares	110
5. Advertising Restrictions	110
6. Liability for Defective Disclosure and Available Defences	111
7. Defences to Defective Disclosure	111
8. Amending Defects: Supplementary or Replacement Prospectus	112
9. Role of ASIC	112
10. Unregulated Issue of Securities: Liability (Misleading or Deceptive Conduct)	112

Topic 1: Introduction to Company Law (Lecture 1)

1. Regulatory Overview

1. **Functions:** ASIC *regulates* financial markets, securities, futures, corporations, superannuation, insurance, deposit taking, ASX market supervision, consumer credit and finance broking. The **main functions** registering companies, gathering and disseminating information about companies, education, modifying the law, registering auditors and liquidators, investigating and enforcing breaches of the law.
2. **Powers:** *ASIC Act 2001 (Cth)*, s 11(4): ASIC has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of, its function. Examples of power:
 - (a) The power to exempt compliance with *Corporations Act*
 - (b) The power to investigate and gather information
 - (c) The power to commence civil proceedings and criminal action as part of its enforcement strategy
3. **Civil Penalty:**
 - (a) **Definition:** Civil penalty is a fine assessed for a violation of a statute or regulation. It is a financial payment to put a price on contravention to deter contraventions and encourage compliance.
 - (b) **Categories:** *Corporations Act*, s 1317E: Civil penalty provisions categorised into:
 - (i) Corporations / Scheme CPP (e.g. director duties (ss 180(1); 181; 182; 183))
 - (ii) Financial services CCP (e.g. continuous disclosure (ss 674(2), 674(2A), 675(2), 675(2A)))
 - (iii) Uncategorised (e.g. the need for an Australian Financial Services License (s 911A(5B)))
 - (c) **Who can bring Civil Penalty Proceedings:**
 - (i) **ASIC can** apply for a **range** of orders: s 1317J(1)
 - (ii) The **company** can apply for a **compensation order**: s 1317J(2)
 - (iii) Company can intervene in an application for a declaration of **contravention or pecuniary penalty order**: s 1317J(3)
 - (d) **Declaration of Contravention (s 1317E):**
 - (i) **Pecuniary Penalty Order** (s 1317G)
 - **Maximum penalties (since 13 March 2019):** individuals — the greater of 5,000 penalty units or 3 times the benefit derived/detriment avoided; bodies corporate — the greater of 50,000 penalty units, 3 times the benefit, or 10% of annual turnover (capped at 2.5 million penalty units) (s 1317G).
 - (ii) Relinquishment Order (s 1317GAB) — amount benefit derived, and detriment avoided
 - (iii) **Disqualification Order** (s 206C)
 - (e) Refund Order: Contravention of s 962P (s 1317GA)
 - (f) **Compensation Order** (s 1317H)

2. Defining 'Company' and 'Corporation'

1. **Definition of CORPORATION:** s 57A *Corporations Act 2001*
 - (a) **Definition:** a company (s 57A(1)(a)) and any body corporate (s 57A(1)(b)); and an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property (s 57A(1)(c)); Aboriginal and Torres Strait Island corporation (s 57A(3))
 - (i) **Does not include:** An exempt public authority (s 57A(2)(a)); a corporation sole (s 57A(2)(b))
 - (b) **SCENARIO - Labelling of an Entity:** In *Queensland Rail Case (2015)*, the statute set up the transit authority by expressly stating that it was "not a body corporate" and that it had "separate legal identity". Despite this the Authority **was held to be a trading corporation** due to several factors:

- (i) The Authority is created as a separate right and duty bearing entity, which has rights to own, possess and deal with property. It has “perpetual succession” (at [38]).
- (ii) The Act was constituted with a **strong view of generating profits** (at [41]) given that the Authority was obliged and responsible to provide ministers with estimations of profits.
- (iii) The Authority operated as a **labour hire company** to provide labour used by Queensland Rail to operate services in Queensland which is regarded as a **trading** activity (at [42]).

2. Definition of COMPANY: s 9 Corporations Act 2001

- (a) **Definition:** Corporations formed or treated as being formed/registered under the *Corporations Act*
- (b) **SCENARIO - Foreign Registered Company:** In *Re Featherston Resources Ltd; Tetley v Weston* [2014], it was held that the NSW Supreme Court **DID NOT** have jurisdiction to grant leave to bring a derivative action (ss 236, 237 *Corporations Act*) in respect of a **foreign registered company** subject to a **foreign deed of company arrangement**.
 - (i) It was a registered foreign company under the *Corporations Act*. Brereton J drew a **distinction** between the concepts of "a **company registered under** THIS Act" and "a **foreign company registered** under Division 2 of Part 5B.2", being the relevant part of the Australian Act dealing with registration of foreign companies.

3. Overview of Different Business Structures

1. **Note — trusts:** A trustee holds legal title to property for beneficiaries; the three certainties (intention, subject matter, objects) must be satisfied and the trust must not infringe the rule against perpetuities (e.g. *Perpetuities Act 1984* (NSW)). **A trust is not a separate legal entity — it is a relationship.**

Topic 2: Incorporation, Corporate Personality and its Limits (Lecture 2)

1. Background

1. **Separate Legal Entity:** Once registered with ASIC, an entity is separate from its members and incorporators (see *s 124 Corporations Act*)
2. **Limited liability:** For members (*s 516 Corporations Act*)
3. **Types of companies:** Public ('Ltd') or proprietary ('Pty Ltd')
4. **Managed:** By the board of directors (*s 198A Corporations Act*) or their delegates
5. **Decision Making:** Board of directors; members in general meeting

2. Process of Registering a Company

1. **Section 117 Corporation:** To register a company — lodge an applications with ASIC:
 - (a) Reserve a **company name**
 - (b) Select **type** of company
 - (c) Select **name**, directors and members (obtain signed consent forms)
 - (d) Will a **constitution** be prepared (this is required if its is a public company)? Or will the **replaceable rules** (*s 141*) apply?
 - (e) Select a **register office**

3. Separate legal entity and limited liability

1. **Generally — Corporate veil / legal capacity:** The 'corporate veil' exists once a company is registered and it **separates** the company from the people who formed it (*s 124 Corporations Act*)
2. **Exists a corporate veil — even though he owned 20001/20007 shares:** The House of Lords in *Salomon v A Salomon & Co Ltd [1897] AC 22* held that as the company was duly incorporated, it is an **independent person with its rights and liabilities** appropriate to itself, and that "the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are" (at 30-31 (Lord Halsbury LC)).
 - (a) **Principle:** The **fact that a company which is properly formed according to the required formalities**, is totally controlled by one person, **does not establish agency**. A **company exists as a separate legal entity** — separate to its members and separate to its director.
 - (b) The company is a different person altogether for the subscribers to the memorandum. Even though the business is precisely the same after incorporation as before, with the same managers, same hands receiving profits, the company is not in law the agent of the subscribers or trustees for them (*per Lord MacNaughton (at 51)*).
 - (c) **Facts:** Mr Salomon ran a business as a sole trader. Set up a company with 20,007 shares which he'd held 20,001 for himself and his wife and 5 children held 1 share each. He sold the business to the company for shares and cash. A \$10,000 debt remained payable to Mr Salomon, evidence through debentures. He was a majority shareholder and primary creditor when the company wound up. Company law at that time only said it needed minimum of 7 subscribers to incorporate.
 - (d) **c.f.** Court of Appeal decision declaring the company to be a myth, reasoned that Salomon had incorporated the company contrary to the true intent of the then Companies Act, 1862, and was in fact an agent.
3. **Dual capacity — can be incorporator and employee same time — director separate from company:** *Lee v Lee's Air Farming Ltd [1961]*

10. Debt Finance

1. Features:

- (a) Company **required to pay interest** at an agreed rate (whether or not operations are profitable)
- (b) Company required to **repay principal at the end of agreed term** (may sometimes repay earlier)
- (c) Lender has **priority over shareholders** for repayment of principal on winding up
- (d) Lender is **not a member** of the company and has no membership rights (e.g. voting rights)
- (e) Lender has **no right to share** in surplus assets on a winding up (i.e. no right to a share of any assets left in a solvent company on a winding up after all legitimate claims are satisfied)
- (f) **Capital provided is for a short and finite time** -- expectation that it will be paid before company is wound up.

2. Types:

(a) Sources of debt:

- (i) Loan finance from banks
- (ii) Bonds
- (iii) Debenture issue
- (iv) Private finance (e.g. from shareholders)

(b) Secured debt finance vs. Unsecured debt finance:

- (i) **Secured debt**: A loan agreement under which a borrower pledges a specific asset or property which the lender can seize in the case of default

(c) Fixed securities vs. circulating security interests:

- (i) **Fixed**: e.g. mortgage or charge over land, chattels or marketable securities
- (ii) **Circulating**: e.g. **assets** (e.g. trading stock, debtors) that a company is usually able to use, dispose and **deal with in the ordinary course of business without** the **need** to obtain the **secured creditor's consent** e.g. AllPAAP securities under PPSA.

3. Chapter 6D and Chapter 7 Applies: A debenture is a 'security' under Chapter 7 s 761A, *Corporations Act*, and so are securities for Chapter 6D s 700 *Corporations Act*

4. Compliance required for issuance: Retail debenture issues require compliance Ch 6D and Ch 2L *Corporations Act* (debenture trust deed and a debenture trustee)

5. Company must maintain a register of debenture holders: Must have maintained register (s 171 *Corporations Act*)

6. Types of debt securities:

(a) Debt Finance: Personal Property Security (a circulating security interest)

- (i) **Definition of AllPAAP**: 'All present and after-acquired property'
- (ii) **To be enforceable, or 'perfected', need**:
 - A **loan agreement** specifying the terms and conditions
 - A **security deed** ('a General Security Agreement');
 - Security **needs to be registered** on the Personal Property Securities Register (**PPSR**) and satisfy all the requirements for perfecting an interest under the **PPSA**

(b) Debt Finance: Bonds

- (i) **Bond**: The borrower ('issuer') owes the holders ('bondholders') a debt and (depending on the terms of the bond) is obliged to pay them interest ('coupon') or to repay the loaned funds ('principal' or 'face value') at a later ('maturity')

Topic 3: The Corporate Constitution and Allocation of Power (Lecture 3)

1. The Corporate Constitution

1. Replaceable Rules:

- (a) **The Rules:** Replaceable rules are contained in a complete list in s 141 *Corporations Act*.
 - (i) Officers and Employees (s 194), Power of Directors (s 198A), Negotiable Instruments (s 198B), Managing director (s 198C), Company may appoint a director (s 201G), Director may appoint other directors (s 201H), Appointment of managing directors (s 201J), Alternate directors (s 201K), Remuneration of directors (s 202A), Directors may resign by giving written notice to company (s 203A), Removal by members — proprietary company (s 203C), etc. **Refer to section if required**
- (b) **Default:** Replaceable rule applies 'in default', but can be displaced by members adopting a constitution that provides for a different rule (s 135(2) *Corporations Act*)
- (c) **Public or Private:** Whether a rule is replaceable often **depends on** whether it is **public** or **proprietary**.
 - (i) Some **replaceable** rules **ONLY APPLY** to **proprietary** companies;
 - e.g. Discretion to refuse to register transfer of shares (s 1072G *Corporations Act*)
 - e.g. Voting and completion of transactions (s 194 *Corporations Act*)
 - e.g. Removal of directors by members (s 203C *Corporations Act*)
 - c.f. Removal of public company directors are dealt with in s 203D *Corporations Act*, and hence shows some replaceable rules are strictly for proprietary companies
 - (ii) Some **replaceable** rules are **MANDATORY** for **public** companies:
 - e.g. Appointment of proxies (s 249X *Corporations Act*)
- (d) **Not a breach of the Act, but the company constitution:** Non-compliance with replaceable rules is not itself a breach of the Act (s 135(3) *Corporations Act*)

2. Content of a Corporate Constitution

(a) Objects, Clauses and Limitations on Power:

- (i) **Legal Capacity:** Companies have **powers** of individual + body corporate (s 124)
- (ii) **Constitution Purpose:** Companies with a constitution can **state objects**, or limit their powers by stating an express restriction/prohibition (s 125(1) *Corporations Act*)
- (iii) **Types of companies:** **Types of companies** that have such provisions in their constitutions are:
 - Not-for-profits
 - Joint venture companies
 - No liability companies; and
 - Pre 1/7/98 that have no altered their memo

(b) Abolition of General Law Doctrine of Ultra Vires:

- (i) Companies which act outside their capacity (i.e. their objects or self-imposed restrictions on powers) are said to have acted '**ultra vires**'.
- (ii) **Act remains valid if ultra vires:** The **validity** of any act of the company that is **ultra vires** is preserved by ss 125-126.
 - **May be relevant:** An ultra vires act may be relevant fact in other actions under the *Corporations Act*, e.g. **breach** of duty by a director under Pt 2D.1; **oppression** under Pt 2F.1; or **winding-up** under s 461(1)(k)

Topic 6: Corporate Contracting and Agency (Lecture 6)

1. Liability in Contract

1. **Corporate Capacity:** A company has the legal capacity and powers of an individual both in and outside Australia and has all the powers of a body corporate detailed in s 124(1). Although **X Person has acted in a way beyond the company objects**, an act of the company is **not invalid** merely because it is **contrary to or beyond** any objects in the company's constitution (s 125(2)).
2. **Authority of Organs and Agents:** As **X Person** has entered **X Company** into a contract with **Y Company**, the question is whether the agent purporting to act on the company's behalf have **authority to bind the company** (*Authority of Agent*), or whether the agent, in their exercising powers, was **acting bona fide for the benefit and proper purposes** of the company as a whole (*Director's Duties*).
 - (a) **[Directly with 3rd Party] X Company** may be regarded here to have executed the contract directly on its own behalf as the **document/agreement** has been executed **[With or Without Common Seal]**
 - (i) **Without a Common seal:** The company may execute a document if it signed by:
 - 2 directors (s 127(1)(a)), or
 - 1 director and the company secretary (s 127(1)(b)), or
 - **Sole director proprietary company:** where the sole director is also the sole company secretary (or there is no secretary), that director (s 127(1)(c)).
 - (ii) **Electronic execution:** Since 2022, documents may be signed electronically and directors may sign separate copies (split execution) (*Corporations Act Pt 1.2AA; s 127(3A)*).
 - (iii) **With a Common seal:** With a common seal, affixing a seal must be **witnessed by the same** group as the people above (s 127(2))
 - (b) **[Through an individual agent who acts on behalf of the company]** A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's **express or implied authority** and on behalf of the company, which is a power that **may** be exercised **without** using a **common seal** (s 126(1)).
 - (i) **Does not affect other required procedures:** This section does not affect operation of a law that requires a particular procedure to be complied with in relation to the contract (s 126(2))
 - (ii) **Authority at Common Law:** **When** will the company be **bound** by acts of an agent?
 - **Actual Authority (express or implied):**
 - **Expressly:**
 - **Constitution:** From a provision in the Corporation's Act or the Company's constitution (if it has one) (e.g. s 198A (**Replaceable Rules**))
 - i.e. when board exercises 'management' powers, it is acting as agent of the company with express actual authority
 - **Board Delegation:** By the board of directors delegating its power (e.g. s 198C(1) (**Replaceable Rules**))
 - i.e. the MD's service agreement will set out the powers and limits of authority delegated by the board
 - **Impliedly:** By implication from doing the things the principal says and does including (*Hely-Hutchinson v Brayhead Ltd [1968]*):
 - **Appointment to office: Appointing** someone to a certain position or office
 - **CEO or Managing Director — Yes:** Being appointed to this position involves a grant of implied actual authority to "do all such things as fall within the usual scope of that office" (*Hely-Hutchinson*)

- **Other Executive Officer — Limited:** Some implied a actual authority **reflect the scope of authority** that is usually delegated to someone doing their type of job in their type of company
 - e.g. HR manager to hire and fire; sale's director to enter sales contract
- **A Director Acting Alone/Chairperson — No:** Individual directors **DO NOT** usually have the power to bind the company (*Hely-Hutchinson v Brayhead Ltd* [1968]; *Brick and Pipe v Occidental Life Nominees* (1992)). A single director (in a **multi-director company**) can **ONLY** bind by: express grant of authority, **or** authority flowing from the conduct of the board as a whole.
- **Company Secretary — Limited to Admin:** Implied authority to execute contracts relating to **administration matters**: *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971].
- **Acquiescence: X Person** may have been deemed to be given actual authority impliedly if the Board of Director acquiesces to conduct of agent it, meaning that it has ratified the **ratified unauthorised actions** of the agent so that the company is a valid party to the transactions including similar transactions in the future (*Hely-Hutchinson*). In *Hely-Hutchinson*, Mr Richards was chairman and **de-facto managing director** of Brayhead and often committed Brayed to contracts without knowledge of the board and reported the matter afterwards, however the board would acquiesce, thus resulting in the acts being deemed the company's. Here, **X Apply the facts.**
- **Ostensible / Apparent Authority (Perception):** The company may also be bound to **X Contract** as **X Person** may have apparent authority, which can arise even where the **principal has NOT agreed** that **X Person** can act as agent on its behalf. There are three elements that are required. **Apply Below.**
 - **Three elements:** A 'holding out' by someone with actual authority on which the other person relied (*Freeman and Lockyear v Buckhurst Park Properties (Mangal) Ltd* [1964])
 - **A Holding out:** A **representation must be made to the third party** that the **agent has authority** to enter into a contract of the type in question on behalf of the company, which can consist of words or conduct. In *Freeman and Lockyear*, Kapoor was held to have ostensible authority as despite being merely a de-facto Managing Director and there being no communicated acquiescence by the board as a whole, the board allowed Kapoor to act and hold himself out as a managing director at the time to find a purchaser and perform that role. Here, **X Apply the facts.**
 - **By someone with actual authority:** (NOTE: Statute has changed this general law position) **See Class 12**
 - **Actual — Yes:** Representation must be made by company or someone **with actual authority (express or implied)** to act for the company either:
 - **Generally** (e.g. CEO); **or**
 - **In relation to the matters** to which the contract relates
 - **Apparent — No:** However, a representation by someone with **apparent/ostensible authority** is **insufficient**. A purported "agent" who **lacks actual authority, cannot make a legally recognised representation** as to his or her own authority (*Crabtree-Vickers v Australian Direct Mail Advertising* (1975)).

Topic 8: Directors' Duties — Duty of Care and the Business Judgment Rule (Lecture 8)

1. Overview of Duties

1. **By whom** are fiduciary duties owed?: **Statutory obligations** apply to **directors** and **officers** (and *sometimes* employees, former directors, former officers and former employees)
 - (a) **Definition of 'Officer':**
 - (i) **Makes major decisions:** **Makes**, or participates in making, **decisions** that affect the **whole, or a substantial part**, of the business of the corporation; **or**
 - (ii) **Impacts finances:** Who has the **capacity** to **affect significantly** the corporation's **financial** standing; **or**
 - (iii) **Accustomed to act:** In accordance with whose **instructions** or wishes the **directors** of the corporation are accustomed to **act**
2. **To whom** are duties owed?:
 - (a) **Solvent company — company as whole:** Directors of a solvent company **owe** their fiduciary duties to the **company as a whole, not to individual shareholders** (*The Bell Group Ltd (in liq) v Westpac (No. 9)* [2008])
 - (b) **Plaintiff is company:** The company is the proper plaintiff to seek redress for any wrong committed by the director (*Foss v Harbottle* (1843))
 - (i) **Recovered for the company:** Any profits received via shareholder derivative action will be **recovered for the company**

2. Source of the Duty of Care

1. Contract, Statute
2. Equity, Common Law — Generally enforceably **ONLY** by the company (or a liquidator acting for the company) or by statutory derivative action (**shareholders**)

3. Modern duty of care

1. **General Statement:**
 - (a) **[BOTH]:** Directors are under a duty to take '**reasonable care**' in the performance of their office to discharge their duties with care and diligence of a reasonable person who would occupy the office, which are imposed by common law (*ASIC v Adler* [2002]; *Daniels v Anderson* (1995)) and the statute under s 180. **The statutory duties are "in addition to and not in derogation of" the common law duties** (s 185).
 - (b) **[Common Law — If just Shareholders]:** Directors are under a duty to take '**reasonable care**' in the performance of their office which are imposed by common law (*ASIC v Adler* [2002]; *Daniels v Anderson* (1995)).
 - (c) **[Statute — If ASIC is Client]:** Under statute, which mirrors the general law, directors are under a duty to exercise their powers and discharge their duties with the degree of **care and diligence** that a **reasonable person** would exercise if they were a director officer of a corporation in the corporation's circumstances, **and occupied the office held** by and had the same responsibilities within the corporation, as the director officer (s 180(1)).
2. **Content of the Duty of Care:** The duty is assessed to an **objective** standard judged by what a reasonable director in the 'same position' would have done in a corporation in the 'corporation's circumstances' such as the **[Type/Size/Nature/Subsidiary/Constitution/Composition of the Board/Insolvency]** (*ASIC v Maxwell*)

Topic 9: Directors' Duties — Conflicts, Profits and Related Party Transactions (Lecture 9)

1. Breach of Fiduciary Duties

- The general rule is that directors who are in fiduciary positions, are **not entitled to make a profit** nor are they entitled to put themselves in a **position where interest and duty conflict** (Lord Herschell, *Bray v Ford* [1896]), meaning any real sense of 'possible conflict' (*Boardman v Phipps* [1967]; *Chan v Zacharia* (1984)), **UNLESS** there is express consent through a general meeting ratifying the conduct or the Constitution provides so (*Transvaal*). In this instance, **X Person has done what**. This is likely **[Select ONE or BOTH] a direct conflicts of interest** issue as the **transaction** is with a company is directly or indirectly interest in **// OR //** the director has made a secret profit by misappropriating corporate property, information or opportunities despite there being no formal transaction between the director and company. **Apply the Facts. Compare to a case below.**

(a) Conflict of Duties:

- Competing Directorships — Maybe:** A director who occupies a board position in a competing company is not necessarily in a breach of their fiduciary obligations. as more is required regarding the particular circumstances of the relationship (*Australian Careers Institute Pty Ltd v Australian Institutes of Fitness Pty Ltd* [2016] at [3]-[4] per Bathurst CJ). **Apply the Facts.**
 - Real or substantial possibility of conflict — Yes:** In *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* (2016), the director was held to breach their fiduciary duties as there was a real or substantial possibility of conflict between his duties between the two companies, as he had his personal interests in expanding ACI's fitness training business which would have necessarily impaired AIF National's capacity to achieve the objectives in the Shareholders Agreement (at [170]). Here there is also the real or substantial possibility for... **Apply the Facts.**
 - Transaction purchasing shares in company with interest, including as trustee — Yes:** In *Transvaal Lands Co v New Belgium (Transvaal) Land and Development* [1914], the involvement of directors in persuading the company to purchase shares in another company which the directors had interests in was of a direct conflict, even though one of the directors had indirect holdings being in a position of a trustee. **Apply the Facts.**
 - Same financial interests -- receiving shares — No:** In *Streeter v Western Areas Exploration* [2011], it was held that Streeter **did not breach** his fiduciary duty by receiving WANL shares options in the initial issue, or in the exploitation of the ANPC proposal as he was **not prohibited** and Streeter was only **approached** by WAE, a company seeking capital, because of his **reputation as an investor**. As there was no **positive duty** on Mr Streeter to acquire the ANPC proposal for WAE and as his **financial interests were the same** as WAE given he was also a director, shareholder and creditor in WAE, there was no conflict of interest. **Apply the Facts.**
 - Claimant benefited from conflict of interest — No:** In *Streeter v Western Areas Exploration* [2011], a **conflict of interest did arise** in connection with the sale of WAE's interest in the Cue tenements to WANL, because by the time the sale was finalised, Streeter was acting as director on both sides of the transaction. However, because WAE's interest was overvalued, WAE **benefited from the breach** and it **could not claim** the benefits obtained by Streeter from the same activity unless it unwound the whole transaction. **Apply the Facts.**
- (b) **Secret Profits:** To demonstrate secret profits, **X person** must prove that the act of the director **relates to the affairs** of the company **and** was **done in the course of management** and in utilisation of the **opportunities** and special knowledge as directors, no matter how well intentioned the director is; the act of the director results in **personal profit**; **and**; the company **did not give** its **fully informed consent** (Lord Russell at 144-45 in *Regal Hastings Ltd v Gulliver* [1967]). **X Apply the Facts.**

Topic 12: Minority Shareholder Remedies (Lecture 12)

1. Summary of Minority Shareholder Remedies

1. Enforcing Personal Rights:

- (a) Challenging improper share issues (*Residues Treatment*) — Rectification of member's register (s 175)
- (b) Enforcing 'members rights' in the constitution (s 140)
- (c) Statutory injunction (s 1324)
- (d) Minority oppression (s 232)
- (e) Just and equitable winding up (s 461(1)(k))

2. Enforcing Company Rights:

- (a) Statutory derivative action (Pt 2F.1A)

2. Minority Oppression

1. Standing: An application for an order under section 233 in relation to a company may be made by:

- (a) **Member of the company:** A member of the company, even if the application relates to an act or omission that is against: (i) the member in a capacity other than as a member; or (ii) another member in their capacity as a member (s 234(a)). **Apply the Facts. or**
- (b) **Person removed from register:** A person who has been removed from the register of members because of a selective reduction (s 234(b)). **Apply the Facts. or**
- (c) **Person who ceased to be a member of the company:** A person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member (s 234(c)). **Apply the Facts. or**
- (d) **A person to whom a share in the company has been transmitted:** A person to whom a share in the company has been transmitted by will or by operation of law (s 234(d)). **Apply the Facts. or**
- (e) A person whom ASIC thinks appropriate (s 234(e)). **Apply the Facts.**

2. Definition of member: It is also noted that X Person/Body is a member of the company as they Pick: (a) are a member of the company on its registration; or (b) agree to become a member of the company after its registration and their name is entered on the register of members; or (c) become a member of the company under section 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares) (s 231)

- (a) **Not a member:** A person who has purchased shares but has not been entered on the register at the time the proceedings are commenced is not regarded as a member.

3. Minority Oppression: The court may make an order under s 233 if the conduct of a company's affairs or an actual proposed act or omission by or on behalf of a company or a resolution or a proposed resolution of members or a class of a company is either contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to or unfairly discriminatory against a member or members whether in that capacity or in any other capacity (s 232). **Here XXX.**

- (a) **Company affairs:** The conduct of a company's affairs; **or** (s 232(a))

(i) Conduct:

- In *Fexuto Pty Ltd v Bosnjak Holdings* [2001], it was interpreted that conduct refers to the what is being done rather than why it is being done and covers broad range of actions done by a broad range of people including [the actions of directors, controlling shareholders, persons with de-facto control of the corporation, a class of shareholders and even conduct of a related company] in this instance.

(ii) Company affairs: s 53

- The establishment, **membership, control, business, trading, transactions and dealings**, property liability and finances of the company (s 53(a))
 - The **internal management** and proceedings of the company (s 53(c))
 - The **ownership** of shares in the company (s 53(e)) including the circumstances under which a person bought or sold shares in the company (s 53(h))
 - Matters concerned with the **ascertainment of persons** who are or have been financially interested in the success or failure of the company or are or have been able to control or materially influence the policy of the company (s 53(g))
- (b) **Actual/proposed act/omission:** An **actual or proposed act or omission** by or on behalf of a company; **or** (s 232(b))
- (c) **Resolution:** A **resolution**, or a proposed resolution, of members or a class of a company; (s 232(c))

is either:

- (d) **Contrary to all members:** **Contrary to the interests** of the members as a whole; **or** (s 232(d))
- (i) e.g. breach of ss 181-183: *Campbell v Backoffice*
- s 181: Directors or other officers must exercise their power and discharge their duties in **good faith** in the best interests of the company and for a proper purpose (s 181)
 - s 182: Directors or other officers must not **improperly use their position** to gain an advantage for themselves or someone else or cause detriment to the corporation (s 182)
 - s 183: 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 advantage** for themselves or cause detriment to the corporation (s 183)
- (ii) **Objective:** Section 232(d) is an **objective** test determined by reference to whether the challenged conduct adheres to accepted standards of corporate behaviour or how reasonable directors would act in attending to the affairs of the company. The **decision of what is contrary to the interests of the members** as a whole **directs attention not to the interests** of the persons who are, in fact, the members for the time being, but rather on the **interests of a hypothetical individual member**.
- (e) **Most commonly used — oppression, etc.:** **Oppressive to, unfairly prejudicial to, or unfairly discriminatory** against, a member or members whether in that capacity or in any other capacity (s 232(e))
- (i) The majority position in case law is that the expressions “oppression”, “unfair prejudice” and “unfair discrimination” are to be **read together**, prescribing a single test rather than 3 alternative tests (*Wayde v NSW Rugby League [1985]*), though courts will frequently hear arguments based on one element (*Fexuto Pty Ltd v Bosnjak Holdings [2001]*)
- (ii) **Objective test:** Oppressive and unfairness is an **objective** test, **one of fact and degree**, which requires the Court to determine, whether **reasonable directors according to ordinary standards**, possessing any **special skill, knowledge or acumen possessed by the directors** and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision (*Wayde v NSW Rugby League [1985]* at [803]). Courts will look to the interests of the **majority and minority shareholders** and in particular identify the company’s **background** **and** the **reasonable expectations** of its shareholder. There is no need to establish any irregularity of breach of legal rights and mere prejudice or discrimination is not sufficient unless it is unfair (*Ibid*). Even if it is exercised in **good faith**, as long as it **impose a disadvantage, disability or burden on a member which amounts to unfairness** the court will intervene (*Ibid*).