

Duty to avoid conflict of interest

Conflicts of interest

- Underlying theme – directors must not place themselves in a position where they put their interests ahead of the interests of the company
- Disclosure - In many cases (but not all) liability arising as a result of a conflict of interest can be avoided if the conflict is disclosed in advance
- Duty to avoid undisclosed conflicts between director's personal interests and interests of the company

Statutory duties

Improper use of position and information

All directors are under statutory duties to avoid conflicts of interests and self-interested transactions with the company. Will be in breach of duty by accepting financial benefit without disclosure

S182(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation

(Regal (Hastings) Ltd v Gulliver (1967)) – employees and officers must not improperly use their position to gain an advantage for themselves or for any other person or to cause detriment to the corporation. Reinforces fiduciary duty that person in position of trust should not gain an advantage

Southern Real Estate Pty Ltd v Dellow (2003) – S182 breach overlaps with S180 and S181

S182 breach is civil penalty provision S1317E

Improper – conduct that is inconsistent with duties, obligations, and responsibilities of officer (Grove v Flavel (1986)). Director breach fiduciary duties if they improperly use their position and information gained from that position.

R v Burnes (1995) – director may improperly use position if they act without authority

Chew v R (1992) – to gain advantage or cause detriment must be purposive

Doyle v ASIC (2005) – director may gain advantage even where profit has not been obtained

For more refer to p.429-433

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

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

Assumptions under s129

S126: a company can contract through an agent and a company will be bound by the acts of its agents in the same way as any other principal.

2 overlapping approaches:

- Common law agency
 - Actual authority
 - Express: a person to whom a power of attorney has been granted. The power of attorney is the appointment of an agent by deed. The extent of the attorney's actual authority is usually set out in the document that creates the power.
 - Implied: most frequently arises when an agent is placed in a particular position by the principal (*Hely-Hutchinson v Brayhead Ltd*: an agent who is appointed to manage a business has implied authority to make all those contracts that a manager in such a position customarily has)
 - Apparent or ostensible authority: arises if a principal gives the impression that an agent has authority to contract on the principal's behalf.
 - A principal is not bound by a contract on the representations of the agent.