

Director duties -General Law: fiduciary duties

-Statute: the Corporation Act

Person owes director duties:

1. Director s9 –properly appointed director

-De facto director

-Shadow director

2. Officer s9 - director & secretary, sometimes receiver, administrator and liquidator

Recognition: who makes or participates in making decisions that affect the whole or a substantial part of a company's business, or

who has the capacity to affect significantly the company's financial standing, or

whose instructions or wishes the directors are accustomed to act (shadow officer)

Duties of loyalty and good faith (good faith = bona fide)

❖ Exercise powers/discharge duties in good faith in the best interest of the company

Best interest of company= company as a whole

General Law
Statute s181 (1(a) - Directors/ Officers

- When solvent, best interest of shareholders as collective group, not particular SH-
Percival v Wright p.391

If a resolution of one class of members was contrary to the interests of the member as a whole, as a detriment to other classes of members, a member may obtain a remedy s232

- If insolvent, should consider creditors' interests (do not prejudice ability to pay creditors)
–*Walker v Winborne*
- No interests of employees need to be considered at an expense of the interest of the company's SHs - *Parke v Daily News Ltd p.397*

Examples of breaches:

1. Overpayment of G/S: ASIC V ADLER
2. Loan unlikely to be repaid: WALKER V WINBORNE
3. Loans at less than market rates: RING V SUTTON
4. Guarantee of debt unrelated to business activities: ANZ V QINTEX
5. Sale of company at undervalue: COLEMAN V MYERS
6. Gratuitous payments to employees: PARKE V DAILY NEWS

Subjective Test: The duty to act in good faith in the company's best interest is subjective. It will be complied with if directors honestly believe that they acted in the company's best interests.

If the director was induced to believe that the company's interests correspond with their own interest and they then act affairs without consider its interest as a separate entity with its own SHs and creditors, this may cause a failure to comply with the duty.

For nominee directors, they are typically expected to act in the interests of their appointers rather than the company's SHs generally. Nominee directors are permitted to act in the interests of their appointer provided that they honestly and reasonably believe that there is no conflict between the interests of that appointer and the interest of the company.

Where the interests of a holding company and the subsidiary's minority SHs do not coincide, nominee directors appointed by the holding company are bound to put the interest of the subsidiary's SHs ahead of the interest of the majority SH. - *Scottish Co-operative Wholesale Soc Ltd v Meyer p.395*

❖ Exercise powers/discharge duties for a proper purpose

Consider the objective purpose of the power granted, and the actual purpose which motivate the exercise

General Law
Statute s181 (1(b)) - Directors/ Officers

Mixed purpose: which purpose was causative of the exercise of power?

Principle - *Ngurli Ltd v McCann*

The power must be used bona fide for the purpose for which it was conferred, which means to raise sufficient capital for the benefit for the company as a whole. It must not be used under the cloak of such a purpose for the real purpose of benefiting some SHs or their friends at the expense the interests of other SHs.

'But for' test: The impermissible purpose is causative in the sense that, but for its presence, no exercise of power would have been made.

- Issue shares: Ordinary purpose- raising capital for the company

Actual purpose- maintain control of the company's management or majority shareholding, *Ngurli Ltd v McCann*

-create or destroy the voting power of majority shareholders, *Howard Smith Ltd v Ampol Petroleum Ltd p.401* even apply where the directors may honestly believe their actions are in best overall interest of SHs - *Whitehouse v Carlton Hotel Pty Ltd p.401*

- Use of company funds to promote re-election of directors, *Advance Bank Australia Ltd v FAI Insurance Ltd p.404*
- Exercise management powers for improper use, *Permanent Building Society v Wheeler p.404*
- Exercise powers for the benefit of third parties, *Bell Group Ltd v Westpac Banking Corp p.405*

- Directors' refusal to register a transfer

Directors can suspect the breach of duty and obtain ratification from SH at a general meeting

A director may be in breach of duty to exercise powers for proper purpose even though the director wasn't involved in particular transaction. The duty is breached if the director disclosed a conflict of interest and abstained from voting but knew of the improper purpose and failure to take steps to prevent the transaction from proceeding.

❖ Avoid undisclosed conflicts of interest (may overlap with s181 and s180)

General Law
Statute s182 : directors, officers and employees must not improperly use position to gain advantage or cause detriment to corporation
s183 : directors, officers and employees must not improperly use info obtained from position to gain advantage or cause detriment to corporation
- Directors/ Officers/ <u>Employees</u>

Will apply in situations such as:

1. Self-interest transactions with the company, *Transvaal Lands Co v New Belgium p.418*
As the director of two companies that do business with one another, the director of the first company must not exercise his power for the benefit or gain of the second company without clearly disclosing the second company's interest to the first and obtain first company's consent.
2. Personal profits arising from acting as a director, *Regal Ltd v Gulliver p.427*
3. Bribes and other undisclosed benefits, *Furs Ltd v Tomkies p.433*
Directors who derive an undisclosed personal benefits breach their fiduciary and statutory duties irrespective of whether the company suffered loss as a result.
4. Misuse of company funds, *Paul A Davies Pty Ltd v Davies p.435*
Use of business funds must be used for the company's legitimate business purposes. Directors are under a duty not to obtain funds from the company for personal use without proper disclosure, and not to mix the company's funds with their own.
5. Taking up a corporate opportunity, *Cook v Deeks p.435*
While negotiating a contract for the company, without appropriate disclosure, the director arranges for the contract to be diverted from the company to the director personally or another company in which the director is involved.
6. Misuse of confidential info, *Riteway Express Pty Ltd v Clayton p.441*
7. Improper use of position, **s182**, *ASIC V Adler p.407, 430*
Improper: Director improperly use their position if they breach their fiduciary duties.
Directors may also improperly use their position if they act without authority, *R v Byrnes p. 429*
Principle-Impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that they have no authority to do.
8. Improper use of info, **s183**, *ASIC V Adler p.407, 430*
9. Competing with the company, *Hivac Ltd v Park Royal Scientific Instruments Ltd p.446*