



Corporations lecture notes

Corporations Law (Australian National University)



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Corporations Lecture Notes

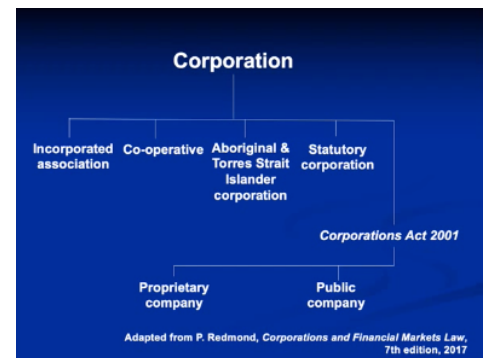
WEEK 1: THE NATURE OF THE CORPORATION

Key players in a company

- (1) directors and other senior offices
- (2) Shareholders
- (3) Creditors and employees

Corporations Act 2001 section 9

'Company' means a company that is registered under this Act'



Corporations Act 2001 section 124(1)

124 Legal Capacity and powers of a company

- (1) A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate, including the power to:
 - (a) issue and cancel shares in the company
 - (b) Issue debentures
 - (c) Grant options over unissued shares in the company
 - (d) Distribute any of the company's property among the members, in kind or otherwise
 - (e) Grant a security interest in uncalled capital
 - (f) Grant a circulating security interest over the company's property
 - (g) Arrange for the company to be registered or recognised as a body of corporate in any place outside this jurisdiction
 - (h) Do anything that is authorised to do by any other law (including a law of a foreign country)

A company limited by guarantee does not have the power to issue shares.

Note: for a company's power to use bonus, partly—paid, preference and redeemable preference shares see section 25A

COMMERCIAL EFFICACY = more important than doctrinal certainty

Corporate behaviour came before the technical law

- Technical law was largely retro-fitted to suit corporate demands
- This is largely a failure of parliament

'Law is to justice, as medicine is to health, as business is to...how would you complete this sentence?'
— Professor Colin Mayer, Oxford, 2018

Civil Penalty Regime (see *Corporations Act 2001*)

- applies to a number of parts of the *Corporations Act*
- Allows corporate regulator ASIC to take enforcement action in response to contraventions of designated sections
- Graduated approach to corporate law enforcement —> enforcement pyramid
- See readings for more information
- Top pyramid least frequently used, bottom most frequent



Contravention of civil penalty provision

- 2 outcomes of contravention
 - (1) ASIC applies for declaration of contraventions: s1317J(1)
 - pecuniary penalty order: s1317G — pay penalty as debt to ASIC
 - Individual = greater of 5000 pu or 3x benefit/detriment
 - Corporation = greater of 50 000 pu or 3x benefit/detriment or 10% of annual turnover (capped at 2.5million pu)
 - relinquishment order
 - disqualification order (s206C)
 - (2) Compensation order (ss 1317H and HA)
 - can be sought by ASIC or by company (s1317J)

WEEK 2: COMPANY REGISTRATION

2.1 Doctrine of Separate Legal Personality

- from the date it is created, a company has a separate and independent legal existence from the people who established the company, gave it capital or manage it
- Extension of having the same powers and capabilities of an individual in legal sense

2.2 Registration

- ASIC issues certificate of registration to company that has filled out relevant forms
- Give company an ACN, similar to TFN unique to company
- 'Phoenix Companies' → demonstrates issues with ease of creating a company
- S119 → becomes company once it is registered
 - s118
 - S119
 - s1274(A)
 - s124
- 3 basic steps
 - (1) reserve company name — ss147-161 (provisions for naming companies)
 - (2) Lodge prescribed documents (now done online, s117)
 - (3) Pay prescribed fees - \$512 for registration; \$52 for reservation of name
- consequences of registrations: from the date of registration a company....(s124)
 - can sue and be sued in its own name
 - has perpetual succession
 - can acquire, hold and dispose of property

2.3 Company Financing

- (1) Debt finance (company borrows money)
 - evidence of debt: debenture
 - Security
 - Repayment of principle by fixed date + payment of interest
- (2) Equity finance (company issues shares)
 - shareholders = members of company
 - dividends + possible surplus on winding up

Salomon v Salomon [1897] AC 22

Facts

- Salomon converts business to limited liability company
- Should Salomon be made responsible for liabilities of company?
- Used members of his family to reach maximum number of members

Decision/Impact

- question was whether it was in the spirit of the legislation to allow this company to have the full rights of companies
- K LJ "the pretended sale of the business was an utter fiction"
- Policy, purposively driven approach taken to this case
- House of lords treated matter as strict statutory interpretation → if the company had been validly incorporated it was a separate legal entity
 - Lord Halsbury: "either the limited company was a real entity or it was not. If it was, the business belonged to it and not to Mr Salomon and if it was not, there was no person and no thing to be an agent at all"
- Widely regarded as a precedent → no longer
- Resulted in state playing a significant role in the regulation of the corporate form

Explores 2 key ideas

- (1) doctrine of separate legal status: company is a legal entity, separate from its shareholders and directors
- (2) Principles of limited liability: once their shares are fully paid, shareholders are not liable for the company's debts

Misconceptions

- (1) shareholders own the company
- (2) Limited liability and separate legal status are the same thing

Benefits of doctrine of separate legal status

- implied transactions
- Permits easy aggregation of capital and other resources
- Encourages risk taking
- Give certainty to insiders and outsiders
- BUT may also give advantages to some over others

Common law exceptions

- Using separate legal status to avoid a legal obligation
- A shelf for fraud
- Company as 'agent' of a person (very difficult to establish)
- very difficult to persuade courts to turn back on this doctrine s

Statutory exceptions to the doctrine of separate legal status

- found throughout the *Corporations Act*
- s588G — directors liability for company debt

Corporate Groups (Parent & their subsidiaries companies)

- Walker v Wimborne (1976) "each of the companies [in a group] is a separate and independent legal entity"
- Re Southhard & Co [1989] Templemen LJ

Corporation or company?

- corporation defined in s57A - included a "company" and also "any body corporate"
- "company" defined in s9 as "a company registered under this Act"

Criteria for classifying companies

(1) is the company proprietary or public?

- Proprietary company***
 - Must have share capital — s112(1)
 - 1 to 50 members — ss 113(1) and 114
 - At least one director — s201A(1) [can also be shareholders]
 - No public offers of shares — s113(3)
 - Include "proprietary" or "pty" after name — ss148(2) & 149
 - Not required to hold an Annual General Meeting (AGM)
- Public Company
 - A company other than a proprietary company — s9
 - Minimum of 1 member but no max number — s114
 - Minimum of 3 directors — s201A(2)

(2) How is the liability of the company's members structured?

(3) What is the relationship of the company to other companies?

***Large Pty Company

- a Pty company meets at least 2 of the following criteria
 - Has a gross operating revenue of \$50m or more
 - Has gross assets of \$25m or more
 - Has at least 100 employees
- see s45A(3) and Corp regulations 1.0.02B

Special Resolution - s9

A resolution

- about which the required notice has been given
- Which is passed by at least 75 of the votes cast by members who are entitled to vote

How is the liability of company members structured?

s112:

- limited by shares (see also: s516, s148(2))

- Member need not contribute more than the amount unpaid on the shares in respect of which the member is liable as a present or past member
- Limited by guarantee (see also: s517, s148(2), s150; s45B)
 - Does not have share capital
 - Person becomes a member by promising that if the company is wound up they will pay a sum of money to the company
 - Must be registered as public company
 - ASIC may permit such a company to omit LTD if its for charity
 - If small does not need auditing or financial report
- No liability company
 - Has share capital but shareholders not liable to pay unpaid amount on shares if company winds up/ when called
 - Will have to forfeit shares if does not pay
- Unlimited with share capital

Subsidiary Company - s46

Company X —> *Company Y*, y is subsidiary of X if:

- X controls the composition of Y's board of directors OR
- X controls more than 1/2 the max number of votes that might be cast at a general meeting OR
- X holds more than 1/2 of Y's issued shares

WEEK 3: CORPORATE FINANCE

2 ways to look at corporate finance

- 1) how companies raise money
- 2) How companies structure their internal governance

Basic Picture:

- *In the beginning*: share capital on registration
- *Later on*:
 - Use retained profits
 - Call on unpaid share capital
 - Issue new shares
 - Borrow
 - Some or all of the above

No minimum capital requirement

- compare *companies Act 2006 (UK)* s763: minimum share capital requirement of \$50 000 for public companies

No standard pattern of corporate finance

Share v Debt Capital

- shareholders are members of the company
- They have membership rights: e.g
 - Voting rights
 - right to return of capital
 - Dividend rights
- also shareholders have lots of other protections available to them, including rights
- Creditors are not members, but have rights under contract and Corporations Act
- Voluntary and involuntary creditors
- Different types of voluntary creditors: e.g trade v finance creditors, secured or unsecured
- For finance creditors, the return on investment will be via interest
- Their claim on the company's assets ranks ahead of shareholders upon a liquidation

Share capital	Debt Capital
Shareholders are members who: <ul style="list-style-type: none"> - have rights (corp const. + corp act) - Are owed duties 	Creditors are 'outsiders' who: <ul style="list-style-type: none"> - have rights under contract and corp act - Are owed limited duties
Return on investment via dividend (directors discretion)	Return on investment via interest (no company discretion)
Repayment of capital on winding up - after creditors	Repayment of capital set by contract and statute (and may be secured)
Better for long term financing	

Issuing shares

A share is a legal chose-in action

- s124(1): a company can issue shares in itself
- s254B(1): can issue shares on such terms, and with such rights and restrictions, as it determines
- Compare issue price with market price
- s254A(1)(c): a shareholder may purchase partly-paid shares
 - s254M: the shareholder is then liable to pay some or all of the remaining amount when the company 'makes a call' on unpaid capital
- Uncalled capital + paid up capital = issued capital

Types of Shares — s254A

- preference shares: preference or priority over other shares e.g repayment of capital, participation in surplus assets and profits, and dividend entitlements (s254A(2))
- Redeemable preference shares: may be redeemed by company while it is still a going concern (s254A(3))
- Ordinary shares: a residual category
- Bonus shares (s254A(1))
 - shares for which no consideration is payable to the issuing company (s254A(1)(a))

Dividends

- s254U(RR) directors may determine that dividend is payable etc
- s254W(2) (RR for Pty co's) subject to the terms on which shares have been issued, the directors may pay dividends as they see fit
- s254W(1): in a public company each share in a class of shares has same dividend rights unless otherwise provided
- Cumulative preference shares

Source of Dividend Payments

- common law: paid only out of profits
- Capital maintenance principle (*Trevor v Whitworth*)

s254T: Three part test to pay dividends

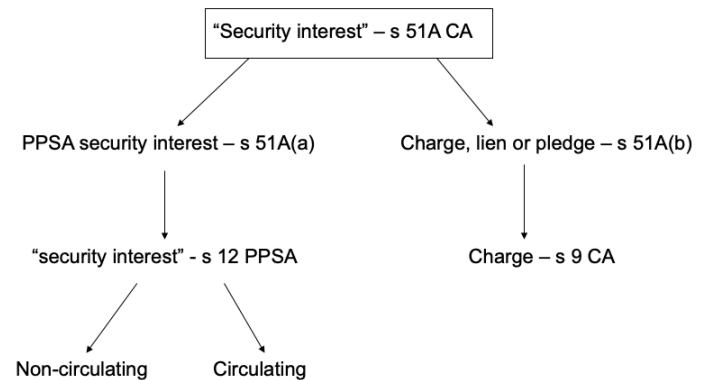
- 1) balance sheet test: companies assets must exceed liabilities immediately before the dividend is declared, and excess is sufficient for payment of the dividend (s254T(1)(a))
- 2) Fair and reasonable test: payment of dividend must be fair and reasonable to shareholders as a whole (s254T(1)(b))
- 3) Material prejudice test: payment of dividend must not materially prejudice company's ability to pay its creditors (s254T(1)(c))

Consequences

- decision to pay dividend can give rise to debt owed by company to shareholders
- Time at which debt arises determined by s254V, either
 - ss(1) when time fixed for payment arises, or
 - ss(2) when dividend is declared
- potential liability for directors under s588G

Debt Debentures

- common law meaning of debenture
 - 1) a document issued by a company that
 - 2) Acknowledges or creates a debt
- *Corporations Act* s9 definition of debenture: a 'chose in action'; some documents excluded
- Use of the word 'debenture' also regulated by s283BH



WEEK 4: INTERNAL MANAGEMENT OF A COMPANY

A company's internal management may be governed by:

- provisions of the *Corporations Act* that apply as replaceable rules;
- A constitution; or
- A combination of both

See s134:

Replaceable rules

- s141: listed in summary table
- s135(2): can be displaced or modified by company's constitution (but note s249X)
- Most are applicable to all companies; some applicable only to Pty Companies (e.g s1072G)
- s135(3): a failure to comply with a replaceable rule that applies to a company is not itself a contravention of the Act
 - However the conduct which constitutes the failure may constitute a breach or contravention of another provision in the act
- Can be amended or repealed by ordinary acts of Parliament and will then apply to all companies who have adopted that rule

The Corporate Constitution

s136(1)

- can be adopted when company is registered, or
- Can be adopted at any time after registration (via special resolution)

s125

- can limit company powers and set out company's objects - but **note s124**

Shelf companies would likely need to adopt a constitution once it has been bought

s249(Y) - Rights and Proxies subsection 2, 3

Compare list of replaceable rules to Rio Tinto constitutions

Altering the Constitution

s136(2) the company may modify or repeal its constitution, or a provision of its constitution, by special resolution

- members in general meeting have sole power to amend constitution

s136(3) + (4) possible to impose restrictions on alterations

- form of entrenchment: operates to entrench some things in company's constitution

Common Law restrictions on altering the constitution

- common for company constitution to define the rights of its shareholders
- Majority rule v minority protection?: if a majority group of shareholders of the same class want to vote to change constitution that disadvantages minority group of shareholders from a different class, what happens?
- What constitutes a majority: Voting rights in company allocated per share, not per shareholder
- Corporate democracy is very different to parliamentary democracy
- *Alloys v Gold Reefs of West Africa* [1900]

- **Peter's American Delicacy Co Ltd v Heath (1939)**
- **READ THIS CASE**

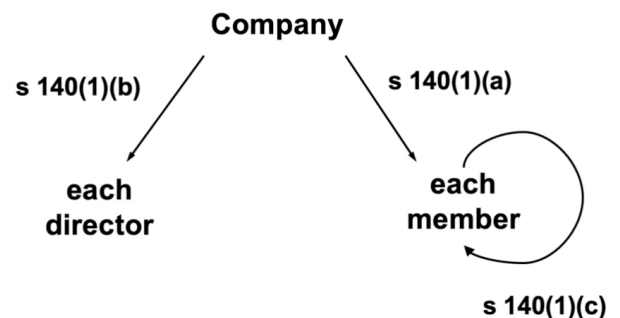
Gambotto v WCP Ltd (1995)

WRITE notes from textbook

- The expropriation power must be exercised for a “proper purpose”, distinguish between
 - Securing the company from detriment or harm rather than advancing the interests of the company or the majority
- it must not “operate oppressively in relation to minority shareholders”, it must “be fair in the circumstances”, that is
 - 1) procedurally fair; and
 - 2) Substantively fair
- McHugh judgement: an alteration to insert a power of expropriation into a company’s constitution is valid only if:
 - i) the acquisition of the shares is necessary “to protect or promote the interests of the company”; and
 - ii) The alteration is not oppressive to the minority shareholders

Legal status of constitution and replaceable rules

- contract between the company, each member and the director
- Hickman v Kent or Romney Marsh Sheep Breeders Association (1915)
- See textbook for full details



Eley v Positive Government Security Life Assurance Co

Interpreting the statutory contract

- generally, ordinary principles of contract law
- *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (2006)*: more notes in textbook
 - *Constitution must be read as...*
 - Commercial contract — business efficacy
 - a whole
 - In broad commercial context
 - Extrinsic evidence may be referenced
 - Courts can imply terms although it is slow to do so

Remedies for breach of statutory contract

- commonly: specific performance; injunction; declaration
- Rarely: damages or rectification

Variation of class rights

- variations of class rights are largely covered by the Corporations Act
- Law takes special interest in when and how shareholders' rights might be varied
- Variation is possible, but it is closely controlled, and the law is structured to try and ensure flexibility, when protecting against possible exploitation or unfairness

Classes of shares

- Corporations Act pt 2F.2 controls changes to “rights attached to shares in a class of shares”
- 3 antecedent questions
 - 1) is the share capital divided into classes?
 - *Clements Marshall Consolidated v ENT Ltd (1988)*: provides test
 - The court held the terms ‘classes’ was a simple expression of English language
 - ‘Classes’ refers to category of shares sufficiently different in its rights, benefits, disabilities and other instances to make it distinguishable from other categories of company shares
 - 2) Are the rights in question “class rights”?
 - *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Herald 1998*
 - Plaintiff company had acquired 10.7% of ordinary shares in defendant company

- Under comp const, P had rights of pre-emption over other ordinary shares in d company (iif another shareholder selling shares must be offered to P shareholder)
 - Rights over unissued shares and appoint shareholder
 - Judge claimed 3 categories of rights
 1. Rights attached to particular shares - held as class rights
 2. Rights conferred on a person (but not as a shareholder) - not class rights
 3. Rights conferred on a shareholder - held as class rights
 - judge held P rights fell within 3rd category, constituted class of shares which could be protected
- 3) Is there a 'variation or cancellation' of those class rights?
- historically courts have drawn distinction between variation of class rights and variation of the enjoyment of those rights
 - At common law: 2 key cases
 - Greenhalgh v Aderne Cinemas Ltd [1946]
 - White v Bristol Aeroplane Co Ltd [1953]

Corporations Act on variation of class rights

under the corporations Act s246C deemed variations

s246C(1): class of shares divided into further classes and rights of new classes not the same

s246C(2): rights attached to some shares in a class are varied

s246C(5): new share issue with new rights where no constitutional provision

s246C(6): issue of new preference shares

Procedure for variation of class rights

s246B: must be followed

Procedure specified in constitution? FOLLOW IT

If not then:

1. Special resolution at company general meeting and either
2. Special resolution at class meeting or
3. Written consent of members with 75% of votes

s246D

Shareholders with at least 10% of votes in a class can apply to the court to have the variations or cancellation of class rights set aside on the grounds that the variation is unfairly prejudicial to the applicants

WEEK 5: CORPORATE CONTRACTING

Contracts in the corporate world

1. Differences between individuals and contracting involving corporations; and
2. Typically corporate life is contract heavy

Architecture of law on corporate contracting

- part 2B.1, 2B.2, 2B.3
- (s124): corporate powers include those of an individual. This includes power to enter into contracts
- s126: capacity to enter into contracts
- however, statutory provision for corporate contracting is not exhaustive, the law on corporate contracting is a mix of the Act and the common law of agency
- However no definition of an agent, holding out, express or implied authority

3 ways of entering contracts

- they are respective
 - (1) direct entry
 - (2) Via the actions of an agent; and finally
 - (3) Via ratification

Necessary reading

- via ratification
- Pre registration contracts (s131-133 of Corps Act)

- Common law rule commonly referred to as the 'Indoor Management Rule' —> operation is limited by s128/129 of the Act

Direct Entry

127 Execution of Documents (including deeds) by the company itself

- (1) a company may execute a document without using a common seal if the document is signed by:
 - (a) 2 directors of the company; or
 - (b) A director and a company secretary of the company; or
 - (c) For a proprietary company that has a sole director - that director, if:
 - (i) the director is also the sole company secretary; or
 - (ii) If the company does not have a company secretary
- (2) A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:
 - (a) 2 directors of the company; or
 - (b) A director and a company secretary of the company; or
 - (c) For a proprietary company that has a sole director - that director, if:
 - (i) the director is also the sole company secretary; or
 - (ii) If the company does not have a company secretary

**“witnessing” needs to be confirmed by a signature, thus no real practical advantage of a common seal

- (4) this section does not limit the ways in which a company may execute a document (including a deed)

110A A company or its agent will be taken to have validly signed a Company Document by using an electronic method

Via an Agent

Order of Agents

- (1) Company
- (2) Board of directors (monitor, decision making — often includes independent and executive directors)
- (3) Management (day to day running — including managing director/CEO, CFO, COO)
- (4) Employees

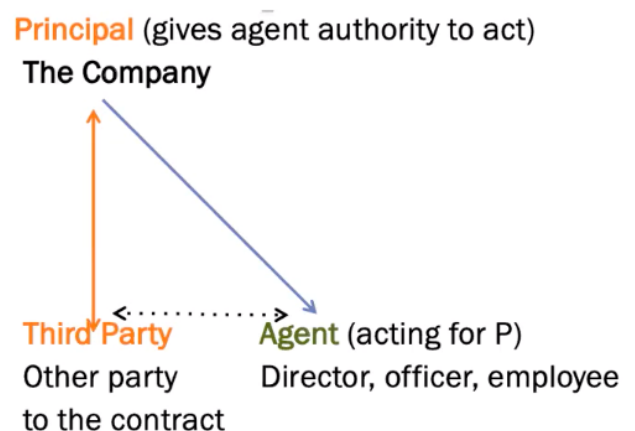
S126 Agent exercising a company's power to make contract and execute documents (including deeds)

- (1) a company's power to make, vary, ratify or discharge a contract, or execute a document (including a deed), may be exercised by an individual acting with the company's express or implied authority and on behalf of the company
- (2) This power may be exercised without using a common seal
- (3) This section does not affect the operation of a law that requires particular procedure to be complied with in relation to the contract or document (including a deed), in so far as the law is inconsistent with this section

Basic principles of agency law

The standard agency situation involved three parties: the agent who acts on behalf of and for the benefit of the principal in order to bring that principal into a contractual relationship with the third party

- in the company situation, the principle is the company as a separate legal entity and the agent will usually be a director or company officer/employee
- If the agent acts within authority and enters a contract for the principle with the third party: the principle will be bound although they were never directly involved
- If an agent does not have authority they may be liable to the principle or the third party
- Corporate law shaped to protect business convenience: leans towards protecting third party



Varieties of Authority

1. **Actual authority**, which can either be express or implied: signified by an agreement between the principle company and the agent; and

Express: delegation or conferral of power, either written or verbal

Implied: role authority, acquiescence

s198C Managing Director:

- (1) the directors of a company may confer on a managing director any of the powers that the directors can exercise
- (2) The directors may revoke or vary conferral of powers on the managing director

****conferral in s198C(1) is different to delegation in s198D**

s198D Delegation

- (1) unless the company's constitution provides otherwise, the directors of a company may delegate any of their powers to:
 - (a) a committee of directors; or
 - (b) A director; or
 - (c) An employee of the company; or
 - (d) Any other person
 - (2) The delegate must exercise the powers delegated in accordance with any directions of the directors
 - (3) The exercise of the power by the delegate is as effective as if the directors had exercised it
- RELEVANT DIFFERENCE: conferral does not carry any obligation on the part of managing director

Single Director

"unlike an MD, the single director is generally not empowered to bind the company in contract"

'The position of director does not carry with it a ostensible, meaning apparent, authority to act on behalf of the company. Directors can act only collectively as a board and function of an individual director is to participate in decisions of the board'

— Northside Developments Pty Ltd v Registrar, Justice Dawson

Acquiescence

Brick and pipe industries Ltd v Occidental Life Nominees Pty Ltd [1992]

FACTS

- all shares taken over by company which belonged to group company

2. **Apparent authority:** signified by a representation or holding out by the principle to a third party
 - quite different to actual authority although the end result can be the same
 - Signified by a representation or holding out by the principle, to the effect that the agent has the relevant authority
 - Ss128 + 29 of Corporations Act cover a lot of the same ground as the common law on apparent authority

Freeman & Lockyer v Buckhurst Park Properties [1964]

Test for AA

1. A representation:
 - via acquiescence
 - By 'permitting a person to act in a certain manner without taking proper safeguards against misrepresentation' (*Pacific Carrier Ltd v Paribas (2004)*) which may involve 'equipping an officer of the company with certain title, status and facilities' and allowing certain implications to be drawn from that
2. Made by a person with actual authority to enter into the contract
 - an agent cannot hold themselves out
 - Rep must come from a person within the company who has the actual authority to enter into the contract in question (*Crabtree-Vickers Pty v Australian Direct Mail Advertising and Addressing Co Pty Ltd (1975)*)
3. The 3rd party was induced by the representation to enter the contract in question
 - Major issue here is whether the other party knew or suspected that something was up
 - Ss128 + 29 have really taken up a lot of the work around this particular issue in corporate contracting

Statutory Assumptions ss128 & 129

- provide a degree of certainty and efficiency in corporate contracting
 - Do this by allowing 3rd parties to assume, effectively, that a company with whom they are dealing, has got it all together so to speak, and is doing everything right, in terms of the company's capacity to enter into contracts

s128 Entitlement to make assumptions

1. A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
2. A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
3. The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.
4. A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

s129 129 Assumptions that can be made under section 128

Constitution and replaceable rules complied with

- (1) A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.

Director or company secretary

- (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company
 - (a) has been duly appointed
 - (b) Has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company

Officer or agent

- (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company
 - (a) has been duly appointed; and
 - (b) Has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company
- (4) A person may assume that the officers and agents of the company properly perform their duties to the company

Document duly executed without seal

- (5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that, if any person who signs the document states next to their signature that:
 - (a) they are a director of the company — that is the case; or
 - (b) They are the company secretary of the company—that is the case; or
 - (c) They are the sole director of the company and that the company does not have a company secretary—that is the case
 - (d) They are the sole director and the sole secretary of the company—that is the case
- (6) A person may assume that a document has been duly executed by the company if:
 - (a) the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and
 - (b) The fixing of the common seal appears to have been witnessed in accordance with that subsection and subsection 127(2A)
For the purposes of making the assumption, a person may also assume that, if any person who witnesses the fixing of the common seal states next to their signature that:
 - (c) they are a director of the company — that is the case; or
 - (d) They are the company secretary of the company—that is the case; or
 - (e) They are the sole director of the company and that the company does not have a company secretary—that is the case
 - (f) They are the sole director and the sole secretary of the company—that is the case

- (7) A person may assume that an officer or agent of the company who has authority to issue a document or certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy
- (8) Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section
- if 3rd party wishes to rely on assumptions, then it is their responsibility to claim the benefit of/invoke ss128 and 129 (see for example *Bell Resources Holdings Pty Ltd v Commissioner for ACT Revenue Collections* (1990))
- Successful invocation of ss128 and 129 stops the company from arguing that the assumptions are false/incorrect (see for example *Story v Advance Bank Australia Ltd* (1993))

In order to rely on the assumption there must be...

1. 'dealings'
 - 'trigger' for s129 assumptions is 'dealings with a company' in s128 (dealings is not a defined terms)
 - Some judicial consideration of what 'dealings with a company might be'
 - Communications/negotiations etc can be dealings
 - Single instance of a dealing is fine for s128
2. State of mind of other party is relevant, potentially
 - non need to prove assumptions were actually made;
 - However 128(4) precludes reliance on assumptions in s129 if there is actual knowledge or suspicion that the assumption wasn't reliable
 - The existence of such knowledge or suspicion is a question of fact, needs to be established by the company: see *Re Matlic Pty Ltd (in liq)* (2014)
 - Some uncertainty as to what constitutes 'suspicion': see *Queensland Bacon Pty Ltd v Rees* (1966) more than 'mere idle wondering'
3. Real crossover between law of agency and s128+129, for our purposes this is particular evident in s129(3)
 - s129(3) appears to rely upon the 3 step Freeman & Lockyer test, as well as an understanding of role authority, need to plug these aspects of common law into this section to make it go

WEEK 6: DECISION MAKING WITHIN CORPORATIONS

I. Decision making within the corporation is divided between 2 principal decision making organs. These are respectively the board of directors and members in general meeting

- exactly how that division operates in practice will depend on range of different factors
- Very common for management to be given over to the board (s198A)

198D Delegation

- (1) unless the company's constitution provides otherwise, the directors of a company may delegate any of their powers to
 - (a) a committee of directors; or
 - (b) A director; or
 - (c) An employee of the company; or
 - (d) Any other person

***the delegation must be recorded in the company's minute book (see s251A)
- (2) The delegate must exercise the powers delegated in accordance with any directions of the directors
- (3) The exercise of the power by the delegate is as effective as if the directors had exercised it

II. The allocation of decision-making power is within a corporation, because both of these 2 decision making organs, the board and the members in general meeting, are regarded as being sovereign within the confines or limits of their power

- the law frowns on attempts at usurpation

III. The way in which corporate decisions making is structured reflects important historical and ideological influences, and that we should not take these influences as fixed and/or unassailable

- 'general assumption behind the laws relating to corporate governance is that it is the job of directors and not shareholders to be responsible' [Stephen Bottomely: Rethinking the Law on Shareholder-Initiated Resolutions at Company General Meetings]

- ‘129 the argument then is that along with their rights to participate in the company’s accountability processes, shareholders have come —> read article’

IV. The rules regarding decision making in corporations can flow from a variety of different sources, including

- Corps act
- Case law
- Corporate constitutions
- ASX rules and/or Corporate Governance Principles and Recommendations
- Regulatory Guidance

Major Players

Board of Directors

- 1) executive/non-executive directors
 - employees of the company that also have a seat on the board
 - Non-executive directors are appointed from outside the company, it includes independent and non-independent directors
- 2) Independent directors
 - recommendation 2.4 ASX Corporate Governance Principles and Recommendations 4th Ed
 - Sub-category of non-executive directors;
 - No existing employment or other relationship with the company that could compromise their capacity for independent judgement;
 - No standard definition of independence

Annotation to G20/OECD Principle VI.E (at page 50):

“In order to exercise its duties of monitoring managerial performance, preventing conflicts of interest and balancing competing demands on the corporation, it is essential that the board is able to exercise objective judgement. In the first instance this will mean independence and objectivity with respect to management with important implications for the composition and structure of the board. Board independence in these circumstances usually requires that a sufficient number of board members will need to be independent of management

“In countries with single tier board systems, the objectivity of the board and its independence from management may be strengthened by the separation of the role of chief executive and Chair. Separation of the two posts is generally regarded as good practice, as it can help to achieve an appropriate balance of power, increase accountability and improve the board’s capacity for decision making independent of management.”

Chairperson — an indispensable part of corporate decision making

248E Chairing Directors Meeting

- (1) the directors may elect a director to chair their meetings. The directors may determine the period for which the director is to be the chair
- (2) The directors must elect a director present to chair a meeting, or part of it, if:
 - (a) a director has not already been elected to chair the meeting; or
 - (b) A previously elected chair is not available or decline to act, for the meeting or part of the meeting

*this is replaceable rule —> could be done in a different way

** see *Colorado Constructions Pty Ltd v Platus (1966)*

249U Chair meetings of members (*replaceable rule — see 135*)

- (1) the directors may elect an individual to chair meetings of the company’s members
- (2) The directors at a meeting of the company’s members must elect an individual present to chair the meeting (or part of it) if an individual has not already been elected by the directors to chair it or, having been elected, is not available to chair it, or declines to act, for the meeting (or part of the meeting)
- (3) The members at a meeting of the company’s members must elect a member present to chair the meeting (or part of it) if:
 - (a) A chair has not previously been elected by the directors to chair the meeting; or
 - (b) A previously elected chair is not available, or declines to act, for the meeting (or part of the meeting)

- (4) The chair must adjourn a meeting of the company's members if the members present with a majority of votes at the meeting agree or direct that the chair must do so.

Who, in practice are the directors

- law is ostensibly rather natural about qualifications for appointment
 - Human individual of at least 18 years
- profound disparity between women and men: 30% women, 70% men —> highest ever recorded
- Only 100 of the top 200 surveyed companies have hit the 30% representation target
- As of Jan 2020, 91.5% of company chairpersons were men

Members

- retail (individual) investors
- Institutional investors (THE major players in terms of membership —> banks, super funds)

Role of the Board

- the board must act as a collective
- When it is acting collectively, the board is acting as the company
- Modern boards are comparably very hard working creatures — see by way of comparison the decision in *Re Cardiff Savings Bank* [1892]
- No exhaustive statement in the law as to the functions of the board —> direct reflection of the diversity of companies and their governance and management needs

“a board's functions, apart from statutory ones, are said to be usually four-fold: (1) to set goals for the corporation; (2) to appoint the corporation's chief executive; (3) to oversee the plans of managers for the acquisition and organisation of financial and human resources towards attainment of the corporation's goals; and (4) to review, at reasonable intervals, the corporation's progress towards attaining its goals”
— *AWA Ltd v Daniels* (1992), Rogers CJ

TABLE 2 Analysis of responsibilities reserved for the boards of top 20 companies

1. Strategic direction of the company (19/20)
2. Monitoring capital management, including approval of major capital expenditure (19/20)
3. Remuneration framework (19/20)
4. Risk management policy (18/20)
5. Overseeing succession planning (18/20)
6. Appointment and performance of CEO and senior management (18/20)
7. Budget/financial approval/financial performance (18/20)
8. Determination/approval of documents (as per constitution/statute/external regulation including financial reports and other reports) (18/20)
9. Review/monitor corporate governance policies and practices (16/20)
10. Overseeing external/internal audit activities and internal control and reporting systems (13/20)
11. Approval of acquisitions and divestments (13/20)
12. Evaluate board performance and composition (13/20)
13. Establishment and empowerment of the committees of the board (13/20)
14. Monitoring performance of management (13/20)
15. Corporate social responsibility (social, ethical and environmental impact of company's activities) (11/20)
16. Determine/approve dividend policy (9/20)
17. Review diversity initiatives and progress (8/20)
18. External auditor performance (8/20)
19. Right to alter matters reserved for its decision (7/20)
20. Other

Reagan Grayson-Morrison and Ian Ramsay,
“Responsibilities of the Board of Directors: A
Research Note” (2014) *Company and
Securities Law Journal* 69 at 74

The Role of the General Meeting

- interestingly, the role of the general meeting and the conduct of members meetings is pretty much the inverse of what we just discussed with respect to the board
- Unless there is a special provision for such involvement set out in the constitution, generally speaking members are far removed from the day to day management of business of the company
- Moreover the law provides quite strict controls on the conduct of meetings of members
- Members have various powers of decision making in the company, including (and this is a highly truncated list):
 - The ability to adopt or amend company constitutions (s136 CA)
 - Appointment of directors (s201G & s201H)
 - Removal of Directors (s203C and for public companies, s203D + s203E, and also the provision relating to the 'two strikes' rule in 250R, s300A(1)(g) & ss250V(1) & 250W(2))

Resolving Conflict between the Directors and the General Meeting

Member resolutions:

- s249N & s249P: shareholders with at least 5% of voting rights or 100 voting members may request
 - A resolution be added to the agenda of AGM or extraordinary meeting or

- That info, including a statement about the proposed resolution, be circulated to members —> the cost of the circulation of the statement or resolution is to be borne by the company if the material is received in time for it to be included with notice the meeting
- traditional view of shareholder involvement: traditional view of how shareholder can use their powers comes from older cases such as *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906]*
- Generally shareholders cannot
 - Usurp the directors' power or interfere with company business;
 - Impose their will on the board;
 - Director the board what to do;
 - Transact company business;
 - Determine matters of management;
 - Manage the company's business; or
 - Express an opinion about how directors power should be exercised
- decision in *ACCR v CBA (2016)* shows the way in which the law approaches the division of decision making labour between the board and the shareholders in general meeting
- But it is not clear or settled —> recent research from Stephen Bottomley argues for a re-think of the law on shareholder participation in corporate decision making, principally via the operation of non-binding advisory resolutions
- Bottomley distinguishes between 3 different types of shareholder resolution
 - 1) usurping
 - 2) Instructive
 - 3) Advisory (non-binding)
- bottomley argues that in case law following on from *Cuninghame* we see an inappropriate conflation of these various different types of resolutions
- This has had an unfortunately and unnecessarily dampening effect on shareholder participation in corporate decision making
- Bottomley ultimately advocates for a heightened capacity for shareholders to have conversations with board about important governance to have conversations with the board about important governance and management issues, and that this would best be achieved by statutory permission for non-binding advisory resolutions

Recent amendments: notices, meetings

- some important changes have been enacted as a result of the *Corporations Amendment (meetings and documents) Act 2022* which amended the *Corporations Act 2001* in important respects
- Relevantly for this week's lecture these principally related to:
 - Notices of meetings; and
 - How meetings are to be conducted
- these amendments (to notices of meetings and how they are conducted) take effect from 1 April 2022

WEEK 7: DIRECTORS DUTIES

Who is subject to DDs?

- it depends on the duty, duties may have different reach
- In the general law duties are owed by directors but directors includes 'a person who knowingly assumes the office of director without having been properly appointed' *Corporate Affairs Commission (NSW) v Drysdale (1978)*
 - I.e what we call de facto directors and shadow directors (see *Grimaldi v Chameleon Mining NL (No 2) (2012)*)
- also senior executives are bound — however — the content of the duties at general law may differ between directors and senior executives
- Regarding the statutory duties, things are a little easier to determine, this is because the relevant sections tell you who the duties apply to
- Often they will apply not just to directors, but to 'Officers', in s9 of the corporations Act 2001 both 'Director' and 'Officer' are defined terms

S9 — *director* of a company or other body means:

- a person who:
 - is appointed to the position of a director; or
 - Is appointed to the position of an alternate directors and is acting in that capacity
- Unless the contrary intention appears, a person who is not validly appointed as a director if:

- (i) they act in the position of a director; or
- (ii) The directors of the company or body are accustomed to act in accordance with the person's instructions or wishes

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

Note: Paragraph (b) — contrary intention — examples of provisions for which a person referred to in paragraph (b) would not be included in the term "director" are:

- section 249C: power to call meetings of a company's members
- Subsection 251A(3): signing minutes of meetings
- Section 205B: notice to ASIC of change of address

De facto directors and shadow directors

- DFDs: persons not formally appointed directors but who nevertheless act as a director
 - Key case: *Deputy Commissioner of Taxation v Austin (1998)*
- shadow directors are persons in accordance with whose wishes and instructions the directors of the company are accustomed to act
 - Key case: *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd [2010]*

s9 - officer of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) A person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) Who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) In accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) A receiver, or receiver and manager, of the property of the corporation; or
- (d) An administrator of the corporation; or
- (e) An administrator of a deed of company arrangement executed by the corporation; or
- (f) A liquidator of the corporation; or
- (g) A trustee or other person administering a compromise or arrangement made between the corporation and someone else.

Note: Section 201B contains rules about who is a director of a corporation

Officers

- the definition of officer also includes external administrators
- Key cases:
 - Re. Para (b)(i) = *Shafron v ASIC (2012)*; and
 - Re. Para (b)(ii) = *ASIC v King [2020]*

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

- according to *Shafron* we need to look at the person's conduct somewhat holistically, and not just say in relation to an alleged contravention of a statutory directors duty, so need to look at evidence of what they are in the habit of doing in the company on a day to day basis
- Also, regarding b(i), the court in *Shafron* made it clear that the distinction between 'makes, or participates in making' is a true distinction. So even if you are not someone who really calls the shots in a company, someone who has the final say on decisions like a director might, you may still be an officer on the basis that you are *participating* in the making of decisions that affect the whole, or a substantial part of the business of the corporation. It is enough that you are sufficiently involved in the making of these decisions (and of course it will be a question of fact and degree as to what involvement looks like here)

On para b(ii), who has the capacity to affect significantly the corporation's financial standing

- *King* gives us new insight into this provision —> 5/0 judgement by HCA finding Mr King an officer for the purposes of s9, the decision affirms important aspects of the previous *Shafron* decision

- Kiefel CJ, Gageler and Keane JJ found that for a person to be captured by para b(ii) of the s9 def of Officer, they needed to be involved in the management of a company, that is, someone who plays a role not just in the giving of advice but in *determining whether particular advice should be acted upon*
- "it is impossible to discern from the Act the intention that an officer of a holding company should fall outside para(b)(ii) of the definition in relation to a subsidiary if, as a matter of fact, that individual has the capacity to affect significantly the financial standing of the subsidiary, particularly where that individual has demonstrated that capacity by exercising it to the detriment of the subsidiary and its creditors and shareholders. AS the decision of Santow J in Alder illustrates, that the capacity arises, at least in part, by reason of a formal position in the holding company of the corporate group many will establish that the capacity exists and explain how that has come about. IT is certainly not a reason to deny that the capacity exists"

To whom are DDs owed?

- generally speaking, DDs owed to the company, means that the company itself is usually what we call 'the proper plaintiff' i.e the person who sues for a breach of the duties
- There are some exceptions, including instances where directors owe duties directly to individual shareholders, but let's not worry about that now, we can talk about that when we get to our discussion of Oppression and members' personal rights
- Even though duties are generally owed to the company, when it comes to the Statutory duties, ASIC is a major player, with broad enforcement powers

What do the duties look like?

- it depends but to make the duties more accessible, we are applying the following framework to our discussion of each of the DDs:
 1. Nature of the duty
 2. Source of the duty
 3. Standing (i.e who can take action with respect to a breach)
 4. Relevant standard for assessment of possible breach
 5. Defences
 6. remedies/consequences following from demonstrated breach
 7. Possible relief

Statutory Duty of Care and Diligence

1. Nature of the Duty

Directors and officers are under an obligation to act with a reasonable degree of care, skill and diligence in the running of their company or companies

2. Source of Duty

s180 Care and diligence—civil obligation only

Care and diligence—directors and other officers

- (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 office held by, and had the same responsibilities within the corporation as, the director or officer

Note: this subsection is a civil penalty provision (see section 1317E)

3. Standing

- ASIC has standing under s1317J(1) to seek a Declaration of Contravention, Pecuniary Penalty Order, or a Disqualification Order. Also under s1317GAB(2)(b) a relinquishment order
- The company itself can do things to action a breach
 - per s1317J(2) the company itself could seek a compensation order under s1317H for losses resulting from a breach of s180(1)
 - Also the company can seek to intervene in any proceedings commenced by ASIC under s1317J(3) but cannot be heard on all matters

4. Relevant standard

- its right there in the section, the standard of care that is required for a director to properly discharge their obligations to act with care, skill and diligence is generally understood to involve measuring the performance of a director against the performance of a 'reasonable person' acting as director of a company in the same circumstances and holding the same office and responsibilities
- Largely objective standard

- Court have agreed on a minimum standard for ALL directors (exec and non exec): directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company (*Daniels v Anderson*) and this includes:
 - Ensuring they have knowledge of the business
 - Keep informed about its activities
 - Remain familiar with the financial account of the company
 - Make regular attendance at board meetings
 - *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; ASIC v Adler* (2002) 41 ASCR 72, 167 citing *Daniels v Anderson* (1995) 37 NSWLR 438, 502-503 and *Cth Bank of Australia v Friedrich* (1991) 5 ASCR 115, 125
- a further standard was added but the court in *ASIC v Rich* (2009), namely to have a reasonably formed view of the company's financial capacity
- Also need to consider foreseeable risk of harm, and in particular, balance any possible risks of harm against any potential benefits to be accrued by the company (*Vrisakis v ASIC* (1993))
- In *ASIC v Cassimatis (No 8)* (2016) — 'foreseeable risk of harm' is not confined to financial harm, but can include harms to all interests of the company, including reputation
- In *Deputy Commissioner of Taxation v Clark* [2003] Spigelman CJ reviews the authorities, including those mentioned above and said:
 - 'what constitutes breach of standards of care and of diligence, in a particular case, will depend on a wide variety of circumstances including the precise nature of the business conducted by the company and the composition of its board. However, the case law indicates that there is a core, irreducible requirement of involvement in the management of the company'
 - 'although the standard of skill may vary in accordance with the particular skills of the director, the core, irreducible requirement of skill involves an objective test, such as "ordinary competence" (*3M Australia Pty Ltd v Kemish* (at 373) per Foster J) or "reasonable ability" (*Rema Industries & Services Pty Ltd v Coad* [1992] FCA 114; (1992) 7 ACSR 251 at 259, per Lockhart J). An equivalent objective test applies to the core, irreducible requirement of diligence, such as "reasonable steps to place themselves in a position to guide and monitor the management of the company", per Rogers J in *AWA Ltd v Daniels* (at 864), adopted by Clarke JA and Sheller JA on appeal in *Daniels v Anderson*.

5. Defences

s180(2) Business Judgement rule

(2) A director or other officer of a corporation who makes a business judgement is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgement if they:

- (a) make the judgement in good faith for a proper purpose; and
- (b) do not have a material personal interest in the subject matter of the judgement; and
- (c) inform themselves about the subject matter of the judgement to the extent they reasonably believe to be appropriate; and
- (d) Rationally believe that the judgement is in the best interests of the corporation

The director's or officer's belief that the judgement is in the best interests of the corporation is a rational one less the belief is one that no reasonable person in their position would hold.

Note: this subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arise under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this act or under any other laws

(3) In this section:

Business judgement means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation s190(2) *Delegation*

s190 Responsibility for action of delegate

- (1) if the directors delegate a power under section 198D, a director is responsible for the exercise of that power by the delegate as if the power had been exercised by the directors themselves
- (2) A director is not responsible under subsection (1) if:
 - (a) the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution (if any); and
 - (b) The director believed:
 - (i) on reasonable grounds; and

- (ii) In good faith; and
- (iii) After making proper inquiry if the circumstances indicated the need for inquiry the the delegate was reliable and competent in relation to the power delegated

In *ASIC v Adler* Santow J stated that whether there are reasonable grounds for a delegation must be determined in each case. However, his honour also set out the following general law principles as being potentially important in determining reasonableness

- the function that has been delegated is such that it is proper to leave it to the delegate;
- The extent to which the director is put on inquiry, or given the facts of a case, should have been put on inquiry
- The relationship between the director and the delegate must be such the the director honestly holds the belief that the delegate is trustworthy, competed ad someone on whom reliance can be placed. Knowledge that the delegate is dishonest or incompetent will make reliance unreasonable;
- The risk involved in the transactions and the nature of the transaction;
- The extent of steps taken by the director, for example, inquiries made or other circumstances leading the director to trust the delegate;
- wheether the position of the director is executive or non-executive (although his Honour noted that in *Daniels v Anderson* the majority of the NSW Court of Appeal moved away from this distinction between executive and non-executive directors)

s189 Reliance on information if advice provide by others

If:

- (a) a director relies on information, or professional or expert advice, given or prepared by:
 - (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - (ii) A professional adviser or expert in relations to matters that the director believes on reasonable grounds to b within the person's professional or expert competence; or
 - (iii) Another director or officer in relation to matters within the director's or officer's authority; or
 - (iv) A committee of directors on which the director did not serve in relation to matters within the committees authority; and
- (b) The reliance was made:
 - (i) in good faith; and
 - (ii) After making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; and
- (c) The reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this part or an equivalent general law duty;

the directors reliance on the information or advice is taken to be reasonable unless the contrary is proved.

"Where there is no cause for suspicion nor circumstances demanding critical and detailed attention, it is reasonable for an officer to rely on advice, without independently verifying the information or scrutinising the date or circumstances upon which that advice is based"

— *Justice Santow in Vines v Australian Scurities and Investments Commission (2007)*

6. Remedies/consequences for demonstrated breach

- as s180(1) is a civil penalty provision, consquncs for breach include: A declaration of contravention being issued on application by ASIC under s1317E(1). If a DoC is made, then ASIC can also apply for PPO undo s1317G(1). If a DoC is made then ASIC may also apply for a RO under s1317GAB(2)(a), which the court is empowered to grant under s1317GAB(1). Alternatively, a court may issue a RO of its own intiatatie inn proceedings under s1317GAB(2)(b). IF a DOC is made ASIC may also then apply for a Disqualification Order under s206C of the Act
- the corporation itself may do things like seek compensation orders for losses resulting from a breach of a civil penalty provision, so in this instance, a breach of the statutory duty of care may give rise to a compensation claim from the company itself via s1317H

7. Possible Relief

- exoneration by courts
 - ss1317S and 1318 are possibilities, the exact scope of s1318B is somewhat uncertain, courts tend to treat these sections as if they carry quite a bit of overlap
- Ratification: not an option for breaches of statutory duties

13175 Relief from liability for contravention of civil penalty provision

(1) in this section

Eligible proceedings:

- (a) means proceedings for a contravention of a civil penalty provision (including proceedings under section 588M, 588W, 961M, 1317GA, 1317H, 1317HA, 1317HC or 1317HE); and
- (b) Does not include proceedings for an offence (except so far as the proceedings relate to the question whether the court should make an order under section 588K, 1317H, 1317HA, 1317HB, 1317HC or 1317HE)

(2) If:

- (a) eligible proceedings are brought against a person; and
- (b) In the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:
 - (i) the person has acted honestly; and
 - (ii) Having regard to all the circumstances of the case (including, where applicable, those connected with the person's appointment as an officer, or employment as an employee, of a corporation or of a Part 5.7 body), the person ought fairly to be excused for the contravention;

The court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.

(3) In determining under subsection (2), whether a person ought fairly to be excused for a contravention of section 588G, the matters to which regard is to be had include, but are not limited to:

- (a) any action the person took with a view to appointing an administrator of the company or Part 5.7
- (4) If a person thinks that eligible proceedings will or may be begun against them, they may apply to the court for relief
- (5) On an application under subsection (4), the Court may grant relief under subsection (2) as if the eligible proceedings had been begun in the Court.
- (6) For the purposes of subsection (2) as applying for the purposes of a case tried by a judge with a jury:
 - (a) a reference in that subsection to the court is a reference to the judge; and
 - (b) The relief that may be granted includes withdrawing the case in whole or in part from the jury and directing judgement to be entered for the defendant on such terms as to costs as the judge thinks appropriate.
- (7) Nothing in this section limits, or is limited by, section 1317QC or section 1318.

1318 Power to grant relief

- (1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit
- (2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person, the person may apply to the Court for relief, and the Court has the same power to relieve the person as it would have had under subsection (1) if it had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty had been brought
- (3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge after hearing the evidence may, if he or she is satisfied that the defendant ought pursuant to that subsection to be relieved either wholly or partly from the liability sought to be enforced against the person, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.
- (4) This section applies to a person who is:
 - (a) an officer or employee of a corporation; or
 - (b) An auditor of a corporation, whether or not the person is an officer or employee of the corporation; or
 - (c) An expert in relation to a matter:
 - (d) A receiver, receiver and manager, liquidator or other person appointed or directed by the Court to carry out any duty under this Act in relation to a corporation
- (5) This section does not apply to a corporation that is an Aboriginal or Torres Strait Islander Corporation

Ratification

- a possibility, to a limited extent
- You cannot ratify away breaches of statutory director's duties, but ratification might be considered as a kind of mitigating factor when say seeking relief under ss1317S or s1318

General Law Duties of Care, Skill and Diligence

1. Nature of the Duty

Directors and senior executives are under an obligation to act with a reasonable degree of care, skill and diligence in the running of their company or companies.

2. Source of the Duty

- equity
- tort law
- Contract

3. Standing: the company

4. Relevant standard for determining breach

- the standard of care that is required for a director to properly discharge their obligations to act with care, skill and diligence is generally understood to involve measuring the performance of a director against the performance of a 'reasonable person' acting as director of a company in the same circumstances, and holding the same office and responsibilities, so same as above with s180(1)
- This is a largely objective standard

5. Defences

- s180(2) the Business Judgment Rule
- s190(2) Delegation
- s189 Reliance

6. Remedies

- equitable compensation
- Common law compensation (damages)
- Equitable compensation available only where common law remedies are inadequate: *National Australia Bank v Bond Brewing Holdings Ltd (1990)*; *Permanent Building Society (in liq) v Wheeler (1994)*

7. Relief

- Exoneration by Court: may be possible under s1318
- Ratification by members: may be possible, but depends

WEEK 8: DIRECTOR'S DUTIES CONTINUED

General law duty to act bona fide in the best interests of the company

1. Nature of the duty

Directors and senior executives are under an obligation to act bona fide in the best interests of the company (the best interests duty)

2. Source of the duty

The general law best interests duty is an equitable duty. There is ongoing debate as to whether it should be properly regarded as the fiduciary duty (a special kind of equitable duty). The question of whether the duty is fiduciary is not merely academic — it has important implication for remedies that would be available for a breach of the duty for example, but we take it to not be fiduciary

3. Standing?

The company is the proper plaintiff re a breach of the general law duty to act bona fide in the best interests of the company

4. Relevant standard for assessment of possible breach

The standard is a combination subjective/objective standard. In order to satisfy their general law best interests obligation, a director needs to act honestly in what they believe is in the best interests of the company, and that belief needs to be objectively reasonable.

Test for Standard

- 1) did the director honestly believe that they were acting in the best interests of the company?
 - subjective analysis: consider evidence of the director's state of mind, what they believed about their conduct and its likely consequences for the company
 - *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008)*
- 2) Consider the objective *reasonableness* of the director's belief.
 - was the director's belief that they were acting in the best interests of the corporation *reasonable*?
 - The directors' belief that they were acting in the best interest of the company will be reasonable, *unless no reasonable director would hold it*
 - This involves objective analysis, which draws on the concept of the 'reasonable director'
 - See *Bell Group (in liq) v Westpac Banking Corporation (No 9)*

Combination of subjective/objective test is not ideal, consider the 'amiable lunatic' problem

A director's belief that their conduct is in the best interests of the company must be both honest and reasonably held:

'Bona fides cannot be the sole test, otherwise you might have a lunatic conducting affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational...'

— *Hutton v West Cork Railways Co (1883)*

- courts are slow to second guess director's business decisions, right to be reticent about
- Thinking about whether the relevant conduct was reasonable, in that it was not conduct that no reasonable director or board of directors would engage in, helps to give the courts a way of scrutinising directorial decision without having to second guess it
- The question of 'what are the company's best interests' is a vivid question in corporate law
- Best interests for solvent companies will be correlative with the best interests of the shareholders, taken as a whole (see *Ngulri Ltd v McCan (1953)*)
- Can include future shareholders, as well as current shareholders
- In a company that is approach insolvency, the interests of the shareholders is no longer regarded as a good measure of the company's own interests, rather the interests of the company include, perhaps first and foremost, looking after the interests of creditors (see *Walker v Wimbourne (1976)*)
- Directors can still consider other interests, like those of employees, the community, the environment BUT they cannot prioritise them over the company's interests in decision making (*Parke v Daily News Ltd [1962]*)
- In *Hutton v West Cork Railway Co* when considering the resolution to compensate employees when the company was dissolved, Lord Bowen said
 - 'the law does not say that there is to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company'
- corporate group structures can pose a challenge to directors trying to satisfy their best interests obligations e.g do they act in the best interests of individual companies or in the interests of the group as a whole
 - Mostly the duty to act bona fide in the best interests of the company applies to each company as a distinct legal person —> *Walker v Wimbourne* in which HC state that each corporations existence as a separate legal person with its own set of rights and interests of the individual companies in isolation, even in circumstances of intra-group loans or other intra-group decision making

S187 Directors of wholly-owned subsidiaries

A director of a corporation that is a wholly-owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if:

- (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and
- (b) The director acts in good faith in the best interests of the holding companies; and
- (c) The subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act

Duty to retain Discretions (part of relevant standard)

Thorby v Goldberg (1964)

- justice kit considered the duty to retain discretions and made the following observations
- 'there are many kinds of transactions in which the proper time for the exercise of the director's discretion is the time of the negotiation of a contract, and not the time at which the contract is to be performed. A sale of land is a familiar example...if at the former time they are bona fide of opinion that it is in the interests of the company that the transaction should be entered into and carried into effect, I see no reason in law why they should not blind themselves to do whatever under the transaction is to be done by the board.'

5. Defences

ss189 & 190 possible if relevant

6. Remedies/Consequences for breach

Popular remedies that courts have provided include:

- the setting aside of transactions or allotments, and also declaring that certain transactions or allotments are void, voidable or invalid (see *Mills v Mills (1938)*; *Ngurli Ltd v McCann (1953)*)
- Monetary relief in the form of damages or compensation has also been awarded by some courts (*Hirsche v Sims [1894]*; *Permanent Building Society (in liq) v Wheeler (1994)*) and;
- Injunctions (*Punt v Symos & Co Ltd [1903]*)

7. Possible relief?

- exoneration by court: see section 1318 again
- Ratification: also a possibility, discuss more closely in the context of fiduciary duties

Statutory Best Interests Duty s181(1)

1. Nature of Duty

As with the general law duty, the statutory best interests duty requires directors and officer to act in good faith in the best interests of the company

2. Source of the duty

s181(1) of the Corporations Act

s181 Good Faith—civil obligations

Good faith—directors and other officers

(1) director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose

Note 1: this subsection is a civil penalty provision

Note 2: section 187 deals with the situation of directors of wholly-wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection

Note 1: Section 79 defines involved

Note 2: This subsection is a civil penalty provision

3. Standing?

ASIC can take enforcement action, as the provision is both a civil penalty provision, and one that attracts possible criminal sanctions via s184 of the *Corporations Act*

The company itself - for example, it can take action to seek compensation orders for a breach of s181(1) that results in loss to the company (see s1317H)

4. Relevant standing for assessing possible breach?

Regarded as the same as that for the general law duty

5. Defences

Ss189 & 190 may be relevant depending on the facts

6. Remedies/Consequences following from demonstrated breach

- as s181(1) is a civil penalty provisions
 - A declaration of contravention may be issued on application by ASIC under s1317E(1). If a DoC is made, then ASIC can also apply for PPO under s1317G(1). If a DoC is made then ASIC may also apply for a RO under s1317GAB(2)(a), which the court is empowered to grant under s1317GAB(1).

- Alternatively, a court may issue a RO of its own initiative in proceedings under s1317GAB(2)(b). If a DOC is made ASIC may also then apply for a Disqualification Order under s206C of the Act as well
- the corporation itself may seek compensation orders for losses resulting from a breach of civil penalty provision, so in this instance, a breach of the statutory duty of care may give rise to compensation claim from the company itself via 317H
 - Statutory best interests duty is also subject to possible criminal sanctions

184 Good faith, use of position and use of information – criminal offences

(1) A director or other officer of a corporate commits an offence if they:

- (a) are reckless; or
- (b) Are dishonest

and fail to exercise their powers and discharge their duties:

- (c) In good faith in the best interests of the corporation; or
- (d) For a proper purpose

Note: section 187 deals with the situation of directors of wholly-owned subsidiaries

- a director who contravenes s184 may be subject to a fine, a term of imprisonment or both
- Like the penalties attached to breaches of the civil penalty regime, the penalties attached to breaches of the criminal penalty regime in the *Corporations Act* have recently been strengthened → new criminal penalties for an individual are described in Schedule 3 to the Act and also s1311A and 1311B
- Schedule 3 of the Act sets out all of the criminal penalties for the offence provisions in the Act, schedule 3 provides that the penalty for contravening s184 is up to 15 years imprisonment
- Need to consult s1311A & B to determine the possible criminal punishments for an individual or s1317C for a body corporate

If there are a mix of civil and criminal proceedings on foot in relation to particular conduct on the part of directors, or officers, then there is a specified order that those proceedings led to be run in (see ss 1317M, N and P)

7. Relief?

Exoneration by court

- with respect to civil penalty proceedings commenced in relation to a breach of the statutory best interests duty, then a director or officer could be excused, either wholly or partly by a court pursuant to s1317S of the Act
- In order to grant relief under s1317S, a court must be convinced that the director or officer acted honestly, and that, after consideration of all the circumstances, the director or officer ought fairly to be excused
- There may also be scope for relief under s1318 with respect to civil proceedings such as an application for a declaration of contravention etc
- There is no equivalent to s1317S with respect to the criminal penalty framework in the *Corporations Act*
- You can't ratify breaches of the statutory duties

Fiduciary duties — No conflicts and No profits rules

1. Nature of the duties

- A director, officer or other senior management employee is under a fiduciary duty of loyalty to the company, as well as fiduciary duty to account for profits gained
- These two duties are more colloquially referred to as the 'no conflicts' and the 'no profits' rules (see *Chan v Zacharia* (1984))
- Very often a breach of the no profits rule will also involve a breach of the no conflicts rule, however, they are distinct duties and should be treated as such, even if they overlap often (*Chan v Zacharia*)
- The following statement from Deane J is widely regarded as a class statement of the nature of fiduciary duties
 - "A person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between their fiduciary duty and their personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by user or by reason of his fiduciary position or of opportunity or knowledge resulting from it"
- conflicts can be person interest vs duty or duty vs duty
- There does not need to be any loss suffered by the company as a result of the conflict in order for the director to be in breach of the no conflicts likewise the no profits rule (*Gemstone Corp of Australia Ltd v Grasso*)

2. Source of the duty

- both the NC and NP rule are fiduciary duties, which means they are a special form of equitable duty
- Following the decision in *Breen v Williams*, Australia has adopted a more restricted view of fiduciary duties, only the prospective NC and NP rules are currently regarded as fiduciary duties

3. Standing: the company is the proper plaintiff

4. Relevant standard for assessment of possible breach

No Conflicts Rule

- Boardman v Phipps [1967] and Chan v Zacharia (1984) it was held that the relevant threshold for determining whether a conflict is in place is if 'there is a real, sensible possibility of conflict'

No Profits Rule

- classic statement of the operation of the NP rule is taken from *Dale v Inland Revenue Commissioners* [1954]: 'it is not that reward for services is repugnant to the fiduciary duty, but that they who have the duty shall not take any secret remuneration or any financial benefit not authorised by the law, or by their contract, or by the trust deed under which they act, as the case may be'
- Lord Macmillan in *Regal (Hastings) v Gulliver* [1942]: "the plaintiff company has to establish two things: (i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge of directors; and (ii) that what they did resulted in a profit to themselves."
- Not all profit is a problem: there does not need to be any loss suffered by the company for the no profit rule to be breached, so the profit does not need to come at the expense, per se, of the company (*Geemstone Corp of Australia Ltd v Grasso*) BUT it can — for example, if the director misappropriated company property for their own personal benefit this may produce a breach of the NP rule

Crucially, a director does not need to be acting dishonestly in order to breach either the no conflicts or the no profits rule (*Regal (Hastings)*)

- a director can breach their NC or NP obligations without telling any lies, or engaging in any kind of concealment or deception
- The fact that there is no need for dishonesty comes back to the fiduciary nature of the obligations — fiduciary duties are some of the strictest duties — the standards that are expected of fiduciaries are extremely high

Special topics in Standards — Corporate Opportunity

- line of cases that we call 'corporate opportunity' cases which tend to involve breaches of both the no conflicts and the no profits rules, and which illustrates how the courts have interpreted and applied these fiduciary obligations
- The phrase Corporate opportunity refers to a situation where an opportunity might come to a company director, or their associate, because of the director's position within the company
- When this happens, a question arises as to whether a director or directors would be entitled to pursue the opportunity themselves, either while continuing on as a director in the company, or even if the director resigns from the company in order to take up the opportunity, because of the strictness of the fiduciary obligations, the courts have almost always said that a director cannot take up such opportunities, however there are some limited exceptions to this rule, including where the company itself simply cannot take up the opportunity, even if it wanted to

Queensland Mines Ltd v Hudson (1978)

"the board of the company knew the facts, decided to renounce the company's interest, whatever it was, in the Tasmanian iron ore venture, and assented to Mr Hudson doing what he could with the licences at his own risk and for his own benefit. The position after 13 February can be put in either of two ways. It can be said that from that date the venture based on the licences was "outside the scope of the trust and outside the scope of the agency" created by the relationship of director and company — a relationship which continued to exist between Mr Hudson and Queensland Mines. Or it can be said that on that date Queensland Mines gave their fully informed consent to pursue the matter no further and to leave Mr Hudson to do what he wished or could with the licences. In their Lordships' opinion it does not matter how it is put. ... [T]he facts of this case are that with the fully informed consent of the Queensland Mines board Mr Hudson was left on his own, for better or for worse, with the Tasmanian licences"

COMPARED WITH.... *Regal (Hastings) Ltd v Gulliver* [1942]

Directors and senior officers need to be very careful with respect to any commercial opportunities they find coming their way by virtue of their position as a director

Key things to look for

- 1) how has the opportunity come to the director? And;
 - 2) How does or would the company feel about it all?
- if the opportunity has come to the director because of their position as director, then that's likely to be a problem for them in terms of their being able to take it up, particularly if there is any possibility that by taking up the opportunity the director is diverting the opportunity away from the company itself (Re Colorado Products Pty Ltd (in prov liq) (2014))
 - There may still be a breach even if the opportunity has come to the director in some other capacity, but this is a particular risk factor
 - In terms of how the company feels about the opportunity, it's important to note that: 'a director must not usurp or divert a business opportunity in which the company is presently interested or could reasonably be expected to be interested. If there is some kind of constraint which might prevent the company from taking up the opportunity, then the director might still be prevented from acting on the opportunity. It depends on whether the impediment is one which the director could possibly assist to remove. If the director is able to remove the impediment, the conflict rule will apply to prevent the director from taking up the opportunity personally' (Fords' Principles)
 - Resignation by the director may not solve the problem
 - A director is still precluded from exploiting the opportunity where their resignation 'may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired' (Canadian Aero Service Ltd v O'Malley (1973))
 - See also Natural Extracts Pty Ltd v Stotter (1997)

5. Defences

For purpose of this course treat s189 and 190 as if they do not apply to breaches of the fiduciary no conflicts and no profits rule

6. Remedies

Possible remedies include:

- equitable compensation (need to prove causation between breach and loss)
- Injunction;
- Declaration;
- Accounts of profits (particularly relevant for breach of the no profits rule);
- Rescission;
- Constructive trust (particularly relevant for breach of the no profits rule); and
- Third party liability may be available in certain circumstances, so the rule in *Barnes v Addy* for example which allows a company to pursue any third parties who knowingly assist directors to breach their fiduciary duties to the company, and who benefit from that assistance (the availability of *Barnes v Addy* style relief was a big part of the Bell Group series of cases coming out of WA)

7. Relief

- seek relief under s1318
- Note that there is a difference between the relief granted by the court under s1318 and the relief granted by the company for a breach of fiduciary duties (ratification)
- Ratification makes it so that no breach of the duties ever occurred, it vanishes
- Whereas relief under s1318 does not remove the breach, it just excuses the director from some or all of the consequences flowing from it (ASIC v Healey (No 2))

Ratification

- a director can seek the consent of the company either prospectively — before they intend to do something that might see them act in breach of the NC NP rules OR Retrospectively — after they have gone and done the problematic thing
- Much safer for a director to secure the consent of the beneficiary BEFORE they do anything that is potentially problematic
- The consent of the beneficiary, in this instance the company, will only be good if it is fully informed, so a director must provide full disclosure of say, the nature of any conflict that they have to propose to have, or the nature of any profits that they have made, or propose to make (Winthrop Investments Ltd v Winns Ltd [1975])
- Winthrop Investments Ltd v Winns Ltd (No 2) (1975) on what proper disclosure looks like: 'the general principle of law, namely, that if a general meeting is called to approve an action or proposed action of

the directors it will not be effective unless there is a disclosure of material facts to enable shareholders to make a properly informed decision and an absence of material misrepresentation or material concealment'

- Miller v Miller (1995): "Ratification is not available where it would constitute a fraud on the minority (ngurli ltd v McCann (1953)), or misappropriation of company resources (Hurley v BGH Nominees Pty Ltd (1982)), or was entered into by an insolvent company to the prejudice of creditors (Kinsella v Russell Kinsella Pty Ltd (in liq) (1986)), or defeated a member's personal right (Residues Treatment & Trading Co Ltd v Southern Resources Ltd (No 4))..., or was oppressive or where the majority in general meeting acted for the same improper purpose as directors (Residues Treatment & Trading Co Ltd)"

WEEK 9:

S182 Misuse of Position

1. Nature of Duty

Under the misuse of position duty, directors, other officers and senior employees are prohibited from using their position to improperly advantage themselves or someone else, or to harm the company

2. Source of the duty

S182 Use of position—civil obligation

Use of position—directors, other officers and employees

- (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

Note: this subsection is a civil penalty provision (see section 1317E)

- (2) A person who is involved in a contravention of this subsection (1) contravenes this subsection

Note 1: section 79 defines involved

Note 2: this subsection is a civil penalty provision

3. Standing

ASIC has standing to enforce the misuse of position obligation in s182

The company could also take action, for example, to seek compensation for a breach of s182

4. Relevant standard for assessment of possible breach

So the standard here is really what the provision says — but before we can measure a director's conduct against s182, must fill conceptual gaps

- what is improper?
- What does 'gaining an advantage' or 'causing a detriment' look like?
- Who is 'someone else'?

Misuse of Position - s182

On impropriety for s182, it's an objective standard:

Key Case: R v Brynes (1995)

'impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and their purpose of intention in exercising the power are important factors in determining the question whether the power has been abused. But 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 they have no authority to do'

On 'gaining an advantage' or 'causing a detriment':

Key case: R v Chew (1992)

It is enough that a person is acting with the purpose of gaining an advantage or causing a detriment — it is irrelevant whether they manage to fulfil that purpose.

On 'someone else':

Can be either a human individual or indeed a corporation (See ASIC v Sommerville [2019])

- in *Re Wan Ze Property Development (Aust) Pty Ltd* (2012) the court found that a director of a company makes improper use of their position when they: (1) withdraw funds from the company's bank account for the benefit of themselves and others without the authority of the company; and (2) sell company property to an associate at an unreasonably discounted rate
- In *Fodare Pty Ltd v Shearn* (2011) the court found that A director of a company makes improper use of their position when they organise for some of the monies made from the sale of a property owned by the company to be paid to themselves and members of their family

5. Defences

Maybe ss190 and 189 if relevant

6. Remedies

- civil and potentially criminal
- A breach of s182 will also potentially be subject to criminal penalties as a result of the operation of s184(2) if the misuse of position has involved an element of dishonestly or recklessness

s184(2):

Use of position—directors, or officers and employees

(2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:

- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
- (b) Recklessly as to whether the use may result in themselves or some else directly or indirectly gaining an advantage, or in causing detriment to the corporation

(2A) to avoid doubt, it is not a defence in a proceeding for an offence against subsection (2) that the director, other officer or employee of the corporation uses their position dishonestly:

- (a) with the intention of directly or indirectly gaining an advantage for the corporation; or
- (b) With the result that the corporation directly or indirectly gained an advantage

A director who contravenes s184(2) may be subject to a fine, a term of imprisonment or both. The new criminal penalties for an individual are described in Schedule 3 of the Act and also s1311A and 1311B of the Act.

7. Relief?

Exoneration by court

- Section 182 is a civil penalty provision, so as with all civil penalty provisions, a defendant director could apply to a court for relief under s1317S
- S1318 may apply if there are civil proceedings on foot, say an application for a declaration of contravention
- There is no equivalent to s1317S or s1318 for the criminal liability under s184

Ratification

- shareholders cannot forgive breaches of statutory obligations

Misuse of Information — Section 183

1. Nature of duty

- Under the misuse of information duty, directors, other officers and senior employees are prohibited from using information that they have obtained through their work with the company to improperly advantage themselves or someone else, or to harm the company
- Because of the wording of s183 this obligation can extend beyond the life of a person's tenure in a company
- You can still breach s183 even if you are not currently a director, officer or senior employee

2. Source of the Duty

- the misuse of information duty lives in s183 of the Act

183 Use of information—civil obligations

Use of information—directors, other officers and employees

(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.

Note 1: This duty continues after the person stops being an officer or employee of the corporation

Note 2: This subsection is a civil penalty provision

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection

Note 1: section 79 defines involved

Note 2: this subsection is a civil penalty provision (see 1317E)

3. Standing

ASIC has standing to enforce the misuse of information obligation in s183. The company could take action too, say for compensation arising from a breach.

4. Relevant Standard

Like with s182, the standard here is really what the provision says — but before we can measure a director's conduct against s183, we must fill conceptual gaps

- what is improper ?
- What does 'gaining an advantage' and 'causing a detriment' look like?
- Who is 'someone else'?
- What is 'information'?

'Impropriety' and 'gaining an advantage', 'causing a detriment' and 'someone else' are the same as for s182

So what is 'information' for the purposes of s183

Key Case: **Digital Camera Network Pty Ltd v Omnilab Media Pty Ltd (no 2) [2011]**

- the thing that makes information information for the purposes of s183 is that it is acquired because of the director, other officer or senior employee's position within the corporation. The concept of information should be defined very broadly
- DTM Constructions Pty Ltd v Poole (2017): the court held that a director and officer of a building and construction company had breached their obligations under section 183 (and incidentally also 182) by diverting opportunities for building contracts from their company to other companies in which they were shareholders and directors
- Hurd v Zomojo Pty Ltd (2015) a director who improperly used both the intellectual property and connects of their company to create their own rival company, was somewhat unsurprisingly found to be acting in breach of their misuse of information obligations under s183

5. Defences

- try s190 or 189

6. Remedies

- civil and criminal just like s182
- Except here the relevant offence provisions are ss184(3) and (4)

s184(3)-(4) Use of information—directors, other officers and employees

(3) a person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:

- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
- (b) Recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

(4) to avoid doubt, it is to a defence in a proceeding for an offence against subsection (3) that the person uses the information dishonestly:

- (a) with the intention of directly or indirectly gaining an advantage for the corporation; OR
- (b) With the result that the corporation directly or indirectly gained an advantage

7. Relief

- Section 183 is a civil penalty provision, so as with all civil penalty provisions, a defendant director could apply to a court for relief under s1317S.
- Likewise s1318 if there were relevant civil proceedings on foot, say an application for a declaration of contravention
- There is no equivalent to s1317S or s1318 for the criminal liability under s184

Material Personal Interest s191

1. Nature of the duty

A director or company who has a material personal interest in something that relates to the affairs of the company must disclose that interest to the other directors

- from s193 this duty does not derogate from any of the fiduciary obligation in the general law
- The obligations in s191 is an additional disclosure obligation — it must be complied with
- The only people who don't have to comply with it are persons acting as sole directors in Pty companies
- Otherwise all directors must comply with this obligation all the time

2. Source of the duty

The duty to disclose material lives in s191

s191 Material Personal Interest

Director's *Director's duty to notify other directors of material personal interest when conflict arise*

- (1) A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.

(1A) For an offence based on subsection (1), strict liability applies to the circumstance, that the director of a company has a material personal interest in a matter that relates to the affairs of the company.

Note: for strict liability, see section 6.1 of the *Criminal Code*

(2) Hi

- (3) The notice required by subsection (1) must:

(a) give details of:

- (i) the nature and extent of the interest; and
- (ii) the relation of the interest to the affairs of the company; and

Effect of contravention by director

- (4) A contravention of this section by a director does not affect the validity of any act, transaction, agreement, instrument, resolution or other thing.

Section does not apply to single director proprietary company

- (5) This section does not apply to a proprietary company that has only 1 director.

3. Standing

- ASIC can enforce a breach of s191 disclosure obligations

4. Relevant Standard

- directors are under an obligation to disclose material personal interests
- Determining compliance with this obligation requires us to consider two antecedent questions
 - (1) what is a material personal interest? AND
 - (2) What does good or effective disclosure actually look like?

'Material Personal Interest'

Key Case: *Grand Enterprises Pty Ltd v Aurium Resources Ltd* (2009)

- 'material personal interest' for the purposes of s191 is going to be an interest 'which has a capacity or propensity to influence the director's decision in the administration of the company's affairs'.
- Material personal interests can come in all manner of different forms — they can be pecuniary, but they can also be non-pecuniary (Bell Group), it even seems that indirect interests may be enough to qualify for disclosure under s191

Good disclosure

Section 191(3) provides:

(3) the notice required by subsection (1) must:

- (a) give details of:
 - (i) the nature and extent of the interest; and
 - (ii) The relation of the interest to the affairs of the company;
and...
- (b) Be given at the directors' meeting as soon as practicable after the director becomes aware of their interest in the matter.

The details must be recorded in the minutes of the meeting

Key case: Camelot Resources Ltd v MacDonald (1994)

Justice Santow found that disclosure must be:

- of sufficient detail for the board as a whole to understand the scope of the benefit and potential profit to the director; and that
- The disclosure must be suitably express — so 'mere suggestions' at a meeting are unlikely to be sufficient. When you are giving details as to the nature and extent of the interest, you really need to spell it out

See also s192: standing notice is also a way to make good your disclosure, so long as all the requirements in ss191(2)(d) and 192 are complied with

5. Defences

Section 191(2) outlines a whole range of situations in which notice need not be given. That subsection provides as follows:

(2) the director does not need to give notice of an interest under subsection (1) if:

- (a) the interest:
 - (i) arises because the director is a member of the company and is held in common with the other members of the company; or
 - (ii) arises in relation to the director's remuneration as a director of the company; or
 - (iii) relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members; or
 - (iv) arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company; or
 - (v) arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to in subparagraph (iv); or
 - (vi) relates to contract that insures, or would insure, the director against liabilities the director incurs as an officer of the company (but only if the contract does not make the company or a related body corporate the insurer); or
 - (vii) relates to any payment by the company or a related body corporate in respect of an indemnity permitted under section 199A or any contract relating to such an indemnity; or
 - (viii) is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate; or
- (b) The company is a proprietary company and the other directors are aware of the nature and extent of the interest and its relations to the affairs of the company; or
- (c) All the following conditions are satisfied:
 - (i) the director has already given notice of the nature and extent of the interest and its relation to the affairs of the company under subsection (1);
 - (ii) if a person who was not a director of the company at the time when the notice under subsection (1) was given is appointed as a director of a company—the notice is given to that person;
 - (iii) the nature or extent of the interest has not materially increased above that disclosed in the notice; or
- (d) The director has given a standing notice of the nature and extent of the interest under section 192 and the notice is still effective in relation to the interest

Note: subparagraph (c)(iii)—the notice may be given to the person referred to in this subparagraph by someone other than the director to whose interests it relates (for example, by the secretary).

6. Remedies

- A person who fails to disclose a material personal interest as required by s191 commits a strict liability offence.
- Schedule 3 of the Act specifies that the penalty for a breach of s191(1) is 30 penalty units
- There are no longer any terms of imprisonment attached to strict liability offences in the Act

7. Relief

- there is no statutory relief available for a breach of s191
- Shareholders cannot forgive a breach of s191

Voting Restrictions on Interested Directors—Public Companies—s195

1. Nature of the duty

In public companies, any directors who have a material personal interest in a matter must absent themselves from a board meeting at which the matter is being discussed, and also, must refrain from voting, unless they have permission (either from the other directors, or from ASIC) or unless the interest falls within the exceptions set out in s191

- the obligations of directors in proprietary companies are quite different, and are set out in s194

2. Source of the duty

- lives in s195 of the Act

s195 Restrictions on voting—directors of public companies only

Restrictions on voting and being present

(1) a director of a public company who has a material personal interest in a matter that is being considered at a directors' meeting must not:

- (a) be present while the matter is being considered at the meeting; or
- (b) vote on the matter

(1B) An offence based on subsection (1) is an offence of strict liability.

Note: for strict liability, see section 6.1 of the *Criminal Code*.

Participation with approval of other directors

(2) The director may be present and vote if directors who do not have a material personal interest in the matter have passed a resolution that:

- (a) identifies the director, the nature and extent of the director's interest in the matter and its relation to the affairs of the company; and
- (b) States that those directors are satisfied that the interest should not disqualify the director from voting or being present

Participation with ASIC approval

(3) The director may be present and vote if they are so entitled under a declaration or order made by ASIC under section 196

Director may consider or vote on resolution to deal with matter at general meeting

(4) If there are not enough directors to form a quorum for a directors' meeting because of subsection (1), 1 or more of the directors (including those who have a material personal interest in that matter) may call a general meeting and the general meeting may pass a resolution to deal with the matter

Effect of contravention by director

(5) A contravention by a director of:

- (a) this section; or
- (b) a condition attached to a declaration or order made by ASIC under section 196;

does not affect the validity of any resolution.

3. Standing

ASIC has standing to enforce a breach of s195

4. Relevant Standard

The concept of 'material personal interests' that appears in s195 should be read in the same way as it is for s191

5. Defences

Section 195(1A) describes circumstances in which section 195(1) will not apply as follows:

s195 (1A) Subsection (1) does not apply if:

(a) subsection (2) or (3) allows the director to be present

or...

(b) the interest does not need to be disclosed under section 191

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the Criminal Code

So I s195(1A)(b) there are no voting restriction on directors in public companies with material personal interests if those interests are of a kind that fall within the exceptions listed in s191.

- section 191(2)(a) lists a number of circumstances where a director does not need to give notice of an interest because, as a general rule, the interest is not one that carries significant risk for the company

6. Remedies

- section 195 is a strict liability offence

- Penalty is slightly different however, as per schedule 3 of the Act the penalty for a breach of s195(1) is 20 penalty units

7. Relief

- section 195 SLO → no statutory relief

- Shareholders cannot ratify breach of s195

Australian directors are now required to apply for a Unique Director Identification Number

Rationale?

- help to combat illegal 'phoenixing'

- Help to track when disqualified directors are managing companies during their period of disqualification

- Help to guard against 'dummy' directors

- Help to bring to light 'rent-a-crowd' style directors (i.e. people who are directors on heaps of boards and who are so stretched they can't perform obligations properly)

Who needs it & when do you need it?

You need a director ID if you're a director of either a:

- company
- Aboriginal and Torres Strait Islander corporation
- corporate trustee, for example, of a self-managed super fund
- charity or not-for-profit organisation that is a company or Aboriginal and Torres Strait Islander corporation
- registered Australian body, for example, an incorporated association that is registered with the Australian Securities and Investments Commission (ASIC) and trades outside the state or territory in which it is incorporated
- foreign company registered with ASIC and carrying on business in Australia (regardless of where you live).

Date you first become a director

Date you must apply

On or before 31 October 2021

By 30 November 2022

Between 1 November 2021 and 4 April 2022

Within 28 days of appointment

From 5 April 2022

Before appointment

WEEK 10: STATUTORY DERIVATIVE ACTION AND ACTIONS FOR OPPRESSION

Lecture cover points

- oppression remedy
- Statutory derivative action
- Winding up

Some hurdles

- access to information
- Costs of action
- Collective action problems
- Ratification
- Majority control

Other options

- exit: sell shares and leave company
- Voice: exercise rights to speak at/call general meeting (s249D; s249F)
- Put up with it

'Charter' of members' remedies

- ss232-235: the oppression remedy
- ss236-242: statutory derivative action
- s 1324: injunction remedy

Oppression Remedy

- Part 2F.1 ss232-235
- Key provision is s232
 - Specifics types of conduct and criteria that may form basis for court under s233

Chapter 2F—Members' rights and remedies

Part 2F.1—Oppressive conduct of affairs

232 Grounds for Court order

The Court may make an order under section 233 if:

- (a) the conduct of the company's affairs; or
- (b) An actual or proposed act or omission by or on behalf of a company; or
- (c) A resolution, or proposed resolution, of members or a class of members of a company; is either...
- (d) Contrary to the interests of the members as a whole; or
- (e) Oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

Note: For affairs, see section 53

233 Orders the Court can make

- (1) the Court can make any order under this section that it considers appropriate in relation to the company, including an order:
 - (a) that the company be wound up;
 - (b) That the company's existing constitution be modified or repealed;
 - (c) Regulating the conduct of the company's affairs in the future;
 - (d) For the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law ;
 - (e) For the purchase of shares with an appropriate reduction of the company's share capital;
 - (f) For the company to institute, prosecute, defend or discontinue specified proceedings;
 - (g) Authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
 - (h) Appointing a receiver or a receiver and manager of any or all of the company's property;
 - (i) Restraining a person from engaging in a specific conduct or from doing a specified act;
 - (j) Requiring a person to do a specific act.

....

Order that the company be wound up

- (2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
- (a) as if the order were made under section 461; and
 - (b) With such changes as are necessary
- (3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
- (a) the order states that the company does have the power to make such a change or repeal; or
 - (b) The company first obtains the leave of the Court.

Oppression Remedy Questions

1) who has standing to bring an action?

s234

- a member of the company (NB s231, s234(a)(i) and (ii))
- A former member of the company (in limited cases), and
- A person considered appropriate by ASIC, having regard to investigations that ASIC is conducting into the company

2) what/whose conduct can be subject of an action ?

s232(a)-(c)

A member can seek an order concerning:

- the conduct of the company's affairs (s53)
- An actual or proposed act or omission by or on behalf of the company;
- A resolution (proposed or actual) of members or a class of members

3) Grounds for complaint?

s232(d)-(e)

- contrary to the interests of the members as a whole; or
- Oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members
- 'oppressive, unfairly prejudicial or unfairly discriminatory' (e)
 - Scottish Co-Operative Wholesale Society v Meyer [1959]
 - Re Jermyn Street Turkish Baths Ltd [1971]
 - Re Tivoli Freeholds Ltd [1972]
 - Re G Jeffery (Mens Store) P/L (1984)
 - Re H.W. Thomas Ltd (1984)
 - Wayde v New South Wales Rugby League Ltd (1985)
- 'contrary to the interests of the members as a whole'
 - 'for the benefit of the corporation as a whole' (Wayde's case)
- not likely to be oppressive/unfair
 - Inability to sell minority shares
 - Conservative management
 - Low dividends; high but reasonable directors' fees
 - Failure to pay dividends
 - Denial of access to corporate information
- likely to be oppressive/unfair
 - Diversion of corporate business
 - Manipulation of voting power
 - Group interests favoured over corporate interest (but note s187)
 - Failure to give access to corporate records + running company for personal agenda + no meetings
 - Low dividends + failure to review policy

4) Range of court orders?

s233(1)

- court may make 'any order...that it considers appropriate in relation to the company'
- Examples in section

Statutory Derivation Action

Part 2F.1A ss 236-242

s236

Person:

- brings proceedings on behalf of company; or
- Takes responsibility for proceedings to which company is a party

s236(2)

Proceedings brought in company's name

Standing to bring SDA

s236(1)

Standing is given to:

- a member, former member, or person entitled to be registered as member, of the company; or
- An officer or former officer of the company

Criteria for granting leave

s237(2)

- (a) probable that company will not bring proceedings; and
- (b) Applicant is acting in good faith; and
- (c) Granting leave is in the best interests of the company (note s237(3)); and
- (d) Serious question to be tried; and
- (e) 14 days written notice to company.

Note: Swanson v Pratt (2002)

Other Court Orders

- s241: wide discretion
- s242: costs orders

'Charter' of members' remedies

- ss232-235: the oppression remedy
- ss236-242: statutory derivative action
- s461: winding up
- s1324: injunction remedy

s232:

- limited grounds for making order ('oppressive'; 'unfairly prejudicial'; 'unfairly discriminatory')
- Broad discretion about orders that can be made

s461:

- wider grounds for making order
- Generally, only one order can be made — winding up

Winding up (s461)

Who has standing to apply

- s462(2)(c): a 'contributory': a person liable as member or past member to contribute to the property of the company if it is wound up: s9
- 'past member' within past 12 months: s521

Grounds for an application

- s461(1)(f)&(g)
- s461(1)(e); or
- s461(1)(k): 'just and equitable'
 - See examples of 'just and equitable' grounds in reading 14.40-14.40.15

Court orders

- winding up of company
- Note: s467(4) — any other remedy available?

Week 11: Corporate Insolvency

Global view of Australian DDs framework

- s588G is part of the directors duties

588G Director's duty to prevent insolvent trading by company

- (1) This section applies if:
- (a) a person is a director of a company at the time when the company incurs a debt; and
 - (b) The company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt;
 - (c) At that time, there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent, as the case may be; and
 - (d) That time is at or after the commencement of this Act
- (2) By failing to prevent the company from the debt, the person contravenes this section if:
- (a) the person is aware at that time that there are such grounds for so suspecting*; or
 - (b) A reasonable person in a like position in a company in the company's circumstances would be so aware.
- The diagram illustrates the duties of a director. At the top, a semi-circle is divided into three segments: 'Company decisions', 'Loyalty and good faith', and 'Duties for a proper purpose'. These are collectively labeled 'THE DUTIES'. Below this, a larger semi-circle is divided into two segments: 'Care and Diligence' and 'Duty to act with reasonable care and diligence'. Arrows point from 'Care and Diligence' to a box labeled 'Duty to act with reasonable care and diligence: s 180'. Arrows point from 'Duty to act with reasonable care and diligence' to a box labeled 'Duty to prevent insolvent trading: s 188B'. A dashed line labeled 'Statutory Duties' points from the top left towards the 'Duty to prevent insolvent trading: s 188B' box. A dashed line labeled 'General Law Duties' points from the top right towards the 'Duty to prevent insolvent trading: s 188B' box.
- The duties can be divided into two broad categories:
- * care, skill and diligence, and
 - * loyalty and good faith.

NOTE: does not apply to officers

Suspects*

- “suspects”: somewhere between actual belief and mere speculation (*Queensland Bacon Pty Ltd v Rees* (1966))

When is a debt incurred?

588G (1A) for the purposes of this section, if a company takes action set out in column 2 of the following table, it incurs a debt at the time set out in column 3

Hawkins and Bank of China (1990)

- held that contracts involving supply of goods to the company in the future, with payments of the goods being required after delivery, the debt isn't good when the goods are ordered
- Not settled law

Credit Corporations Pty Lt and Atkins (1999)

- held that the debt is incurred when the goods are delivered
- Unclear which precedent courts will follow

s588G requires that a company is or will be insolvent

s95A - cash flow test

- defines insolvency as “the company’s capacity to pay it debts as and when they become due and payable”
- Insolvency for those purposes is not judged simply by whether a company’s liabilities exceed its assets, looks to the cash flow position of the company

Remedies

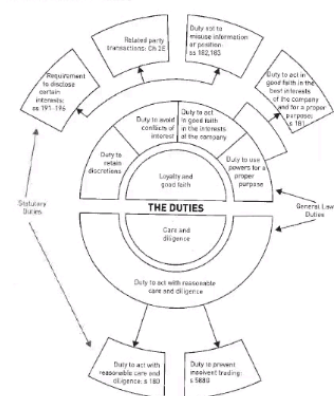
- s588G = civil penalty provision + criminal offence (s588G(3))
- s588J: compensation to company

Safe Harbour and defences

s588GA

- (1) 'safe harbour' if debt incurred while developing 'courses of action that are reasonably likely to lead to a better outcome for the company'
- (2) List of factors to decide if a course of action is 'reasonably likely to lead to...'

Figure 11.1 Classification of duties



The duties can be divided into two broad categories:

- * care, skill and diligence, and
- * loyalty and good faith.

When debts are incurred		[operative table]
Action of company	When debt is incurred	
1	paying a dividend	when the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared
2	making a reduction of share capital to which Division 1 of Part 21.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration)	when the reduction takes effect
3	buying back shares (even if the consideration is not a sum certain in money)	when the buy-back agreement is entered into
4	redeeming redeemable preference shares that are redeemable at its option	when the company exercises the option
5	issuing redeemable preference shares that are redeemable otherwise than at its option	when the shares are issued
6	financially assisting a person to acquire shares (or units of shares) in itself or a holding company	when the agreement to provide the assistance is entered into or, if there is no agreement, when the assistance is provided
7	entering into an uncommercial transaction (within the meaning of section 588FB) other than one that a court orders, or a prescribed agency directs, the company to enter into	when the transaction is entered into

Defences

s588H: a defence applies if...

1. reasonable grounds to 'expect' solvency: higher test than 'suspect' e.g. *Tourprint International Pty Ltd v Bott (1999)*
2. Reliance on information from other person
3. Because of illness or other good reasonable reason the director did not take part in management of company
4. Director took all reasonable steps taken to prevent incurring of the debt

3 & 4: establishing either of these defences requires that the defendant has to introduce evidence about...

1. The role which they played in the company
2. The extent of their involvement in management through their relation with other directors and senior executives
 - it is in this context that the courts have used the insolvent trading section to make statements about the standard of care which is required of directors
 - Combination of s588G and the voluntary administration procedure has proven to be important: potential liability under s588G acts as an incentive for directors to enter voluntary administration
 - Section 588GA was introduced to encourage directors to try and restructure the company informally rather than prematurely entering voluntary administration

Types of insolvency processes

1. Non-liquidation arrangements
 - A) receivership
 - B) Voluntary administration — only one studied in this course
 - C) Scheme of arrangement

Voluntary administration

Part 5.3A Corporations Act

435A Object of Part

The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

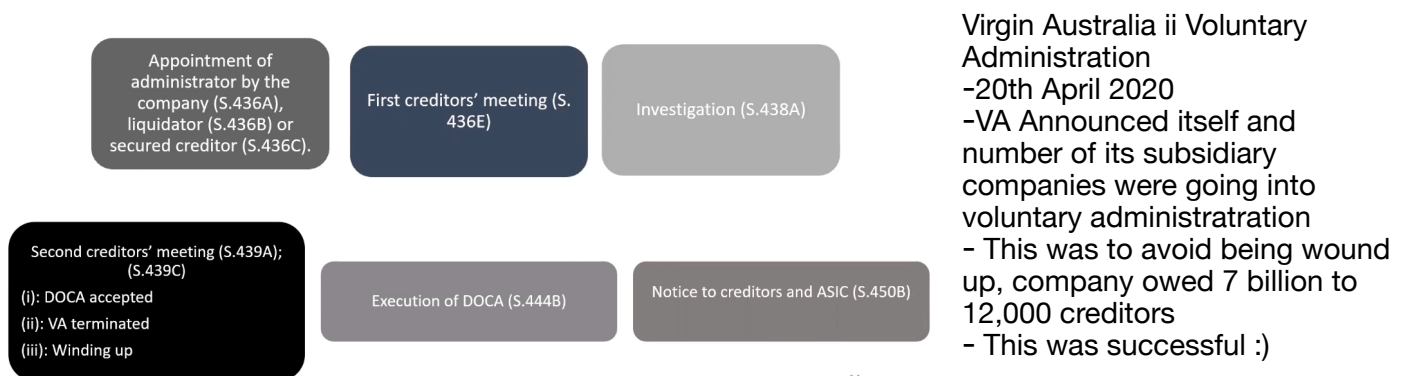
- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) If it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

Note: schedule 2 contains additional rules about companies under external administration

Three possible outcomes:

- 1) Administration cancelled: return to business
- 2) Winding up (liquidation)
- 3) Deed of Company Arrangement

Process of voluntary administration



Straw Bridge in the matter of Virgin Australia Holdings Administrators Appointed 2020

- federal court approval of an application filed by the administrators —> April 30th first meeting of creditors
- FC approved it could be an online meeting
- Outcome of meeting —> appointment of committee of inspection to represent creditors interests

Voluntary administration begins when

S435C(1) — the administrator is appointed, by any of:

- directors
- Liquidators
- Creditor with security over whole company's property

Directors appoint administrator

436A Company may appoint administrator if board thinks it is or will become insolvent

- (1) a company may by writing appoint an administrator of the company if the board has resolve to the effect that:
 - (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
 - (b) An administrator of the company should be appointed
- (2) Subsection (1) does not apply to a company if a person holds an appointment as liquidator, or provisional liquidator, of the company

Who can be appointed?

- administrator must be a registered liquidator: s448B
- Must not be disqualified because of matters listed in s448C: focus on independence

The administrator's powers

ss 437A & B

Administrator has full control of the business and becomes the company's agent eg:

- carry on company's business
- Terminate or dispose of some/all business
- perform functions & exercise powers of company officers
- remove directors (s442A)

While under VA

directors:

- remain in office BUT require approval of administrator to exercise powers or functions (s198G(3))
- Must provide report on business, property and financial circumstances (s438B(2))

Shareholders

- cannot transfer shares w/out administrators consent or court authority (s437F)

Creditors

- Restrictions on court actions: s440A-F

Administrators Liability

- liable for debts he or she incurs (s443A)
- BUT has right to indemnity under s443D
- As an officer under s9, subject to statutory duties in ss180-184 + owe fiduciary duties

Process of administration

- 1) 1st meeting of creditors held to consider committee of inspection; confirm or substitute appointment (s436E)
- 2) s438A Administrators investigate and form an opinion on whether it would be in the creditors interest to:
 - execute a deed of arrangements
 - Administration should end
 - The company should be wound up
- 3) Approximately 20 days later, 2nd meeting of creditors decides on company's future (s 439A and C)

Deed of Company Arrangement (DOCA)

- binds all creditors to the company s444D (but only secured creditors if they vote in favour)
- Binds the company and company officers s444G

Termination of DOCA

s445C

- court order under 445D: false misleading information
- Vote of creditors s445CA: breach of DOCA
- Circumstance specified in Deed
- Administrator's notice of termination s445FA: purpose achieved

Coronavirus and s588G

- Coronavirus Economic Response Package Omnibus Act 2020 (cth) passed on 23 march 2020
- Adds s588GAAA to Corporations Act 2001
- s588G(2) does not apply to a person and a debt incurred by a company if incurred:
 - In ordinary course of company's business
 - During six month period in which section operates
 - Before commencement of voluntary administration or liquidation during that period
 - Extended to 31 December 2020
- Reactions: the safe harbour changes have had a mixed reception, being seen as favourable to the larger enterprises, rather than the smaller small to medium enterprises, and as being adverse to creditors generally

Business Restructuring and Small Business Liquidation processes

- September 24 2020 gov announced the introduction of a new debit restructuring process for small business
- In force from 1 Jan 2021
- Part 5.3B of Corps Act aims to allow a faster and less complex process to restructure existing debts and maximise their chances of survival

Further insolvency reforms to support business dynamism

- government has announced (3 may 2021) plans to review whether the insolvent trading safe-harbour provisions, which were introduced in 2017 and designed to promote a culture of entrepreneurship and innovation by providing breathing space for distressed businesses, remain fit for purpose.

Week 12: Liquidation

What is liquidation? Why do we need a formal process?

- liquidation or 'winding up' its the process that ultimately leads to the dissolution of the company and the ends of its business operations: when the liquidation process is completed the company is de-registered by ASIC and the company's existence as a separate entity ceases
- A formal process helps prevent a race to court by creditors seeking repayment

Objectives of liquidation

- gather and 'realise' the company's assets
- Ensure fair and equitable distribution of company property among creditors and then (possibly) shareholders
- examine the company's transactions and action of the company's officers leading up to the liquidation

Compulsory winding up due to company's insolvency — pt 5.4

- on application, the court may order than an insolvent company be wound up (s459A)
- Who can apply to the court? (s459P(1))
 - Company
 - Creditor
 - Director
 - Contributory
 - Liquidator
 - ASIC

Types of creditors in s456P

- Secured
- Contingent: e.g tort claimant — may cause some difficulties for liquidator, may have to decide how contingent the debt is
- Prospective: debt is due but not immediately payable

Proving insolvency

- s95A definition of solvency and insolvency = inability to pay debts as and when they become due and payable
- s459C statutory presumptions of insolvency - including 'statutory demand'
 - Can be invoked for debt as low as \$2000
 - Simply a question of filling out relevant form
 - Court considers the application but company can refute/oppose it

Commencement

- generally, winding up commences on the day the order for winding up is made (s513A(e))
- If a company has been under voluntary administration and then goes into winding up, commencement is day the administration began (s513A(b))
- Order applies to all creditors and contributories (s471)

Appointment of liquidator

- court appoints official liquidator (s472)
 - Dual responsibility: (1) officer of company (2) to the court in regards to ethical proceedings
- Liquidator takes control of company's property (s474)
- Company cannot dispose of its property (s468)
- Members cannot transfer shares without consent of liquidator (s468A)
- Creditors cannot proceed with individual debt enforcement
- Employees: employment is terminated

Liquidator's power & duties

- general powers: s477(1)
 - Carrying on company's business for the purpose of winding up, ONLY
- Specific powers: s477(2)
 - Bring or defend legal proceedings in the company's name
 - Sell or dispose of company property
 - To do all things necessary for winding up the affairs of the company and distributing its property
- General duties of a company officer
- Specific duties e.g.
 - Collect, realise & preserve company assets (s474)
 - Repay company debts (s478)
 - Bring about de-registration of company (ss 480, 481)

Repayment of creditors

- all claims rank equally (s555 the pari passu principle)
- BUT 'preferred creditors' are paid in full before other unsecured creditors (s556)
- If there is not enough to pay out PCs in full, it is distributed proportionally
- Ranking preferred debts s556:
 1. Expenses of winding up
 2. Employee wages, superannuation
 3. Worker's compensation (not including in tort)
 4. Leave payments
 5. Unsecured creditors
 6. Shareholders (will not happen in insolvency winding up) in accordance with rights under company constitution