

*A guide to
directors' duties
and
responsibilities
for non-listed
public companies
and proprietary
companies in
Australia*

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1 *Executive summary*

1.1 *Sources of company law in Australia*

- The laws governing directors' duties and responsibilities come from three areas:
 - the common law (judge-made law)
 - statute law, under the *Corporations Act 2001* (Commonwealth) (the "Corporations Act")
 - a company's constitution.

1.2 *Summary*

- Directors duties in Australia are designed to promote good governance and ensure that directors act in the interests of the company – including putting the company's interests ahead of their own.

- This guide deals with directors' duties, obligations, and responsibilities in relation to common law and statutory obligations including:
 - duty to act bona fide (in good faith) in the interests of the company as a whole
 - duty not to act for an improper purpose
 - duties of care and diligence
 - duty to avoid conflicts of interest
 - duty not to make improper use of position
 - duty not to make improper use of information
 - duty not to trade while insolvent.

Footnotes in this document refer to specific provisions of the Corporations Act, case law and other relevant sources.

2 Common law duties

2.1 Duty to act bona fide (In good faith) in the interests of the company as a whole

Directors have a duty to act bona fide (in good faith) in the interests of the company as a whole. The test as to whether this duty has been complied with is a subjective test of “honesty or good faith”.¹

Directors breach the duty where they fail subjectively (ie, in their own minds) to give proper consideration to the company’s interests.² This will occur where, **for example**, a director assumes the company’s interests correspond with their own interests, and do not consider its interests as a separate entity.

However, there are qualifications on the above subjective test. It imports an objective standard (ie, what is reasonable in the eyes of an objective bystander) of whether an intelligent and honest person in the position of a director of the company concerned could, in the whole of the relevant circumstances, have reasonably believed that the transactions were for the benefit of the company.³

Therefore, if a director fails to consider the company’s interests in his or her own mind, but the transaction is in fact for the benefit of the company, there will be **no** breach of duty.

When considering the “interests of the company”, a director should have regard to the shareholders as a collective group. However, when the company is

insolvent (or at risk of becoming insolvent), the interests of creditors prevail.⁴

2.2 Duty not to act for an improper purpose

Directors must not use their powers for an improper purpose. This would include obtaining an advantage for themselves⁵, or defeating the voting power of existing shareholders by creating a new majority⁶ (as the power to issue shares must be exercised in the interests of the company as a whole). A proper purpose could be for the raising of capital⁷ or taking advantage of a genuine commercially favourable opportunity.⁸

Note that in promoting the interests of the company, a director may also indirectly promote his or her own interest.⁹

For example:

- 1 a director of Company A is paid according to performance
- 2 the director authorises a transaction with another company (Company B) on the basis that it will be in the interests of Company A
- 3 that transaction increases the company’s performance, thus increasing the director’s remuneration
- 4 the director has therefore indirectly promoted his/her own interest while promoting the interest of the company. The transaction is not

⁴ Kinsela v Russell Kinsela Pty Ltd (in liq) (1986) 4 NSWLR 722.

⁵ Mills v Mills (1938) 60 CLR 150 at 185.

⁶ Comptroller of Stamps v Howard-Smith (1936) 54 CLR 614.

⁷ Comptroller of Stamps v Howard-Smith (1936) 54 CLR 614.

⁸ Pine Vale Investments Ltd v East Ltd & East Ltd & Anor (1983) 8 ACLR 199.

⁹ Mills v Mills (1938) 60 CLR 150 at 163.

¹ Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285.

² Walker v Wimborne (1976) 137 CLR 1.

³ Charterbridge Corporation Ltd v Lloyds Bank Ltd [1970] Ch 62; Farrow Finance Company Ltd (in liq) v Farrow Properties Pty Ltd (in liq) (1997) 26 ACSR 544.

invalid because the director had in mind the best interests of the company.

Whether in fact a director's power was exercised for a proper or improper purpose is tested objectively – **for example**, in the case of borrowing money, by looking at how substantial an alleged need for borrowing was for a particular company.

Even if the improper purpose is the main cause or just one of a number of contributing causes in the making of a decision, the decision will be invalid if, but for the improper purpose, the decision would not have been made.¹⁰

Where a director does use his or her power for an improper purpose, the company can void the Corporations Action.

2.3 Duties of care and diligence

Directors have a duty to be informed on the Corporations actual financial affairs of their company, including its solvency.¹¹ This duty is not diminished by delegating responsibility. Directors are unable to hide behind ignorance of the company's affairs, where that ignorance is of their own making.¹² This means that directors should question information that is put before them to ensure that it is truly representative of the company's position and not just accept what may be put to them by employees of the company. For example, if a director received a balance sheet that did not balance, it would be a breach of his or her duty of care and diligence not to ask for it to be corrected.

Directors are required to make an informed and independent judgement on decisions put to the board of directors¹³, and are required to place themselves in

a position to guide the company and monitor its management.¹⁴

2.4 Duty to retain discretion

Directors must not place themselves in a position where they are unable to make decisions in the best interests of the company. This would include entering into commercial transactions that could result in situations where they cannot take part in making a decision for the company¹⁵. **For example**, directors may not enter into transactions where they would have to put the interests of other parties ahead of interests of the company.

2.5 Duty to avoid conflicts of interest

Directors are regarded as having what are known as "fiduciary duties" owed to their company. This is an important legal relationship, and is a duty of trust and utmost good faith. In this context, directors must put the interests of the company ahead of their own.

Directors cannot put themselves into situations where they have (or may have in the future) a personal interest which conflicts (or may conflict in the future) with the interests of the company, which they are bound to protect.¹⁶ This will occur where there is a real possibility of conflict.¹⁷

A conflict of interest may be direct or indirect. Directors have a duty not to have a personal interest in a transaction with the company. A director will breach this duty where he or she enters into a contract with the company either directly (by personally contracting with the company) or indirectly (such as where the director is both a director and shareholder

¹⁰ Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285.

¹¹ Statewide Tobacco Services Ltd v Morley (1990) 2 ACSR 405.

¹² Statewide Tobacco Services Ltd v Morley (1990) 2 ACSR 405.

¹³ AWA Ltd v Daniels (t/as Deloitte Haskins & Sells) (1992) 7 ACSR 759.

¹⁴ Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson (1995) 37 NSWLR 438.

¹⁵ ANZ Executors & Trustee Co Ltd v Qintex Australia Ltd (recs and mgrs apptd) [1991] 2 Qd R 360.

¹⁶ Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461 at 471.

¹⁷ Phipps v Boardman [1967] 2 AC 46 at 124.

of another company which contracts with the first company of which he/she is a director).¹⁸

(a) *Qualification – Express provision in constitution*

There are qualifications with respect to the above duty. The company's constitution may expressly allow a director to have a personal interest in a contract with the company.¹⁹ Where this is the case, it will modify the director's fiduciary duties to a degree. The provision must be **strictly complied with** in order to prevent a breach of duty.²⁰ A director who is personally interested in a transaction through the company's constitution can still vote on the board of directors, but will still be subject to a duty to vote for the benefit of the company as a whole, unless relieved of that duty in some way.²¹

Certain constitutions may require disclosure of a personal interest in a contract to members at a general meeting before the contract can be entered into. Where this is the case, an exception applies where the directors are fully aware of the facts and, in the circumstances, the relevant director's interest is apparent.²²

For example, if a board of directors resolves to increase entitlements in their pension funds, it will not be necessary for each director to formally disclose to the board that their individual entitlements will increase.²³

(b) *Qualification – Full disclosure and approval*

Another qualification to the duty to avoid conflicts of interest is where a director makes **full** disclosure of the nature of his or her interest in the transaction to members of the company at a general meeting, and the

transaction is approved by ordinary resolution.²⁴

(c) *Consequences*

If a director is interested in a transaction with the company, and none of the above qualifications are met, the contract is voidable by the company. The board of directors would decide whether or not to institute proceedings to make the transaction void.

2.6 *Duty not to disclose confidential information*

Due to their fiduciary role, directors have a duty **not** to abuse confidential information that they acquire as a result of their position. Information is considered confidential where:

- 1 the owner reasonably believes that:
 - a if the information were disclosed it would be in some way detrimental to him/her, or advantageous to others
 - b the information is confidential, secret and not in the public domain
 - c in light of the usage or practice of the particular industry or trade, the information would be regarded as worthy of protection.²⁵

Examples of this breach of duty would be disclosing details of the company's clients or suppliers in situations where such information would be considered to have been given in confidence²⁶ or as engaging in insider trading.²⁷

¹⁸ South Australia v Clark (1996) 14 ACLC 1019.

¹⁹ Woolworths Ltd v Kelly [1991] 22 NSWLR 189.

²⁰ Guinness plc v Saunders [1990] 2 AC 663.

²¹ Australian Growth Resources Corporation Pty Ltd v Van Reeseema (1988) 13 ACLR 261.

²² Woolworths Ltd v Kelly [1991] 22 NSWLR 189.

²³ Woolworths Ltd v Kelly [1991] 22 NSWLR 189.

²⁴ Woolworths Ltd v Kelly [1991] 22 NSWLR 189.

²⁵ Thomas Marshall (Exports) Ltd v Guinle [1979] Ch 227 per Megarry VC.

²⁶ Thomas Marshall (Exports) Ltd v Guinle [1979] Ch 227.

²⁷ Commissioner for Corporate Affairs v Green [1978] VR 505.

2.7 Duty not to abuse corporate opportunities

Directors must **avoid** situations where personal interests conflict, or may conflict, with those of the company.²⁸

This will occur where the Corporations Act of the director is so related to the affairs of the company that it is done in the course of management, and in utilisation of opportunities and special knowledge as director. There needs to be a causal connection between the director's fiduciary obligations and the opportunity.²⁹ It is necessary to look at the circumstances in which the opportunity arose; the nature of the opportunity; the nature and extent of the company's operations and the future operations of the company. If there is such a connection between the director's obligations and the opportunity, it is likely that the opportunity has been misused.

It is irrelevant if the company could not have exploited the opportunity itself³⁰, except where it is actually in the interests of the company that the director pursues the benefit.³¹

²⁸ Chan v Zacharia (1984) 154 CLR 178.

²⁹ SEA Food International Pty Ltd v Lam (1998) 16 ACLC 552.

³⁰ Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134.

³¹ Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134.

3 Statutory duties

The primary provisions in the Corporations Act regarding directors' statutory duties are under Chapter 2D of the Corporations Act, and include duties of care and diligence, good faith, improper use of position and information, and criminal offences.

Other provisions related to directors' duties are those regarding insolvent trading, disclosure of material personal interests, financial benefits to related parties, financial reporting, reliance on delegates and others, the company constitution and replaceable rules.

3.1 Section 180 – Duty of care and diligence and the business judgment rule

The duty of care and diligence features significantly under the common law, and is reinforced under section 180(1) of the Corporations Act. Section 180(1) provides that 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:

- 1 were a director or officer of a corporation in the corporation's circumstances
- 2 occupied the office held by, and had the same responsibilities within the corporation as a director or officer.³²

The reference to a reasonable person indicates an objective standard of care, consistent with the development of the equivalent fiduciary duty.³³ The foreseeable risk of harm is balanced against the potential benefits that could reasonably have been

expected to affect the company from the conduct in question.³⁴

The court also takes into account the subjective elements of the position of an officer and the particular circumstances of the relevant corporation in assessing whether the duty has been breached.³⁵

Section 180 incorporates a **business judgment rule** under section 180(2) of the Corporations Act, whereby the director must:

- 1 make their judgment in good faith for a proper purpose
- 2 not have a material personal interest in the subject matter of the judgment
- 3 inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate
- 4 rationally believe that the judgment is in the best interests of the corporation.

The director must satisfy these requirements in order to have been taken to have satisfied the statutory duty of care and diligence in respect of the particular business judgment.³⁶ A "business judgment" means any decision to take or not take action in respect of a matter relevant to the business operations of a corporation.³⁷

3.2 Section 181 – Duty of good faith

A director or other officer of a corporation must exercise their powers and discharge their duties:

³⁴ Halsbury's Laws of Australia [120-7456].

³⁵ AWA Ltd v Daniels (1992) 7 ACSR 759; 10 ACLC 933.

³⁶ Halsbury's Laws of Australia [120-7456].

³⁷ s 180(3) Corporations Act 2001 (Cth).

³² s 180 Corporations Act 2001 (Cth).

³³ Statewide Tobacco Services Ltd v Morley (1990) 2 ACSR 405.

- 1 in good faith in the best interests of the corporation
- 2 for a proper purpose.³⁸

This provision is now more consistent with the fiduciary duty to act bona fide for the benefit of the company, providing for an obligation to act honestly at all times, despite any other conflicting duties.³⁹ Directors can be in breach of this duty where their power is exercised for an improper purpose, even if they believe they are acting honestly.⁴⁰

3.3 Section 182 – Duty not to make improper use of position

A director of a corporation must **not** improperly use their position to gain an advantage for themselves or someone else, or cause detriment to the corporation.⁴¹ A director contravenes this section when engaging in conduct with the intention and purpose of obtaining an advantage or causing a detriment, regardless of whether the benefit or detriment actually occurs in fact.⁴²

When a director acts despite being aware that the corporation is in an unstable financial situation (and potential insolvency), it may be considered a breach of section 182.⁴³

3.4 Section 183 – Duty not to make improper use of information

A person who obtains information because they are, or have been, a director of a corporation must not improperly use the information to gain an advantage for themselves or someone else, or cause detriment to

the corporation.⁴⁴ A director will be in breach of section 183 for engaging in conduct with the purpose and intention of obtaining a benefit for anyone or causing a detriment to the company, despite what actually occurs in fact.⁴⁵

A contravention of section 183 may occur where a director's conduct involves knowledge of the poor financial position of the company and the possibility of insolvency.⁴⁶

3.5 Section 184 – Criminal offences

The primary penalties for criminal offences in relation to directors' duties arise from section 184 of the Corporations Act. The criminal offences under section 184 include the following:

- 1 a director commits an offence if they are reckless or intentionally dishonest, and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose
- 2 a director commits an offence if they use their position with intentional dishonesty or recklessly in order to directly or indirectly gain an advantage for themselves, or someone else, or cause detriment to the corporation
- 3 a person who obtains information because they are, or have been, a director of a corporation commits an offence if they use the information with intentional dishonesty or recklessly in order to directly or indirectly gain an advantage for themselves, or someone else, or causing detriment to the corporation.⁴⁷

A director may also commit a criminal offence for failure to prevent the company trading while insolvent in a dishonest manner.⁴⁸

³⁸ s 181 Corporations Act 2001 (Cth).

³⁹ Halsbury's Laws of Australia [120-7445].

⁴⁰ Halsbury's Laws of Australia [120-7445].

⁴¹ s 182 Corporations Act 2001 (Cth).

⁴² R v Byrnes (1995) 130 ALR 529.

⁴³ Halsbury's Laws of Australia [120-7455].

⁴⁴ s 183 Corporations Act 2001 (Cth).

⁴⁵ R v Byrnes (1995) 130 ALR 529.

⁴⁶ Halsbury's Laws of Australia [120-7455].

⁴⁷ s 184 Corporations Act 2001 (Cth).

⁴⁸ Halsbury's Laws of Australia [120-7635].

3.6 Section 588G – Duty not to trade while insolvent

The directors' duty to avoid insolvent trading, related defences and consequences of breach are explained in Part 5.7B Division 3.A of the Corporations Act. A person breaches this duty under sections 588G(1) and 588G(2) where:

- 1 he or she was a director of the company at the time when it incurs a debt
- 2 the company is insolvent at that time or becomes insolvent by incurring that debt
- 3 at that time there were reasonable grounds for suspecting that the company was insolvent or would become insolvent and either:
 - a he or she was aware at that time that there were such grounds
 - b a reasonable person in a like position in a company in the company's circumstances would be so aware
- 4 he or she failed to prevent the company incurring the debt.⁴⁹

The director commits a criminal offence if the failure to prevent the company incurring the debt was dishonest.⁵⁰ The duty intends to increase a director's responsibility and protect the welfare of stakeholders in the company.⁵¹

If a director is unable to prevent a company incurring a particular debt, a **defence** is available where:

- 1 at the time the debt was incurred, a person **has** reasonable grounds to expect and **does** expect that the company was solvent at that time and would remain so even if it incurred the debt (s 588H(2))
- 2 the director believed on reasonable grounds that a competent and reliable subordinate was

monitoring the company's solvency position and keeping the director informed (s 588H(3))

- 3 at the time the debt is incurred, the director does not take part in management of the company because of illness or for some other good reason (s 588H(4))
- 4 the director took all reasonable steps to prevent the company incurring the debt (s 588H(5)).

3.7 Section 191–195 – Disclosure of material personal interests

Except in cases of sole director proprietary companies, a director with a material personal interest in a matter relating to company affairs must give the other directors of the company notice of that interest under section 191(1).

The Corporations Act provides an extensive list of interests which need not be disclosed under section 191(2), such as:

- 1 where the interest arises because the director is a member of the company and is held in common with the other members of the company
- 2 the company is a proprietary company and the other directors are aware of the nature and extent of the interest and its relation to the affairs of the company
- 3 the director has given a standing notice of the nature and extent of the interest under the Corporations Act and the notice is still effective in relation to the interest.

The notice,⁵² detailing the nature and extent of the interest and how it relates to the affairs of the company, must be given to the other directors as soon as reasonable after the director becomes aware of the interest.

Section 194 provides that directors of proprietary companies disclosing a material personal interest relating to company affairs may vote on matters that

⁴⁹ s 588G Corporations Act 2001 (Cth).

⁵⁰ s 588G(3) Corporations Act 2001 (Cth).

⁵¹ Woodgate v Davis (2002) 55 NSWLR 222.

⁵² s 191(3) Corporations Act 2001 (Cth).

relate to the interest and any transactions relating to the interest may proceed provided disclosure is made (where required) before the transaction is entered into.

With proper disclosure, the director may retain any benefits, and the company cannot avoid the transaction merely because of the existence of the interest.

3.8 Section 208–210 – Financial benefits to related parties of public companies

Section 208 of the Corporations Act requires shareholder approval when a public company gives a financial benefit to a related party. Pursuant to section 209, directors "involved" in the contravention of section 208 will be held liable. As a minimum, there is a need for independence and proper safeguards to be implemented for relevant transactions, such as adequate legal documentation and the prospect of security being provided.⁵³

When involved in any transactions in which there is a potential financial benefit to the director, the director should ensure that they are acting at "arm's length" (section 210);⁵⁴ ie, parties in a commercial context must act severally and independently in the transaction and possess no ability to exert influence over the other.⁵⁵

3.9 Section 285–318 – Financial reporting

The financial reporting provisions in the Corporations Act, including directors' reports, also relate to a director's duty to exercise their powers with care and due diligence. For example, directors may be subject

to penalty for failure to maintain proper financial records.⁵⁶

3.10 Others

Sections 189, 190 and 198D assist in determining when directors may reasonably rely on the information or advice of others and their responsibility for the Corporations Actions of delegates.

Pursuant to section 189, in proceedings for a potential breach of directors' duties, a director's reliance on another's advice is held to be reasonable if:

- 1 it was information or professional or expert advice given or prepared by:
 - a an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned
 - b a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence
 - c another director or officer in relation to matters within their authority
 - d a committee of directors on which the director did **not** serve in relation to matters within the committee's authority.
- 2 the reliance was made:
 - a in good faith
 - b 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.⁵⁷

⁵³ www.findlaw.com.au Checklist for Directors' Duties.

⁵⁴ www.findlaw.com.au Checklist for Directors' Duties.

⁵⁵ *Granby Pty Ltd v FCT* (1995) 129 ALR 503 ; 30 ATR 400; *Australian Trade Commission v WA Meat Exports Pty Ltd* (1987) 11 ALD 52; 75 ALR 287.

⁵⁶ s 286 Corporations Act 2001 (Cth).

⁵⁷ s 189 Corporations Act 2001 (Cth).

Statutory duties

A director is responsible for the exercise of delegated power unless:

- 1 the director believed on reasonable grounds that the delegate would comply with the relevant duties imposed on directors
- 2 the director believed on reasonable grounds, in good faith, and after making proper inquiry, if needed, that the delegate was reliable and competent in relation to the power delegated.⁵⁸

⁵⁸ s 190 Corporations Act 2001 (Cth).

4 *Company constitution*

A corporation's internal management rules can also provide guidance on directors' duties by specifically stating obligations in the company constitution; **for example**, as mentioned above in **2.5(a)**.

Under section 134 of the Corporations Act, a company's internal management may be governed by provisions of the Corporations Law that apply to the company as "replaceable rules", by a constitution, or a combination of both. A company can also choose to have its internal management governed by one or more "replaceable rules" found in the Corporations Act instead of, or in addition to, its own constitution.

Section 140(1)(b) of the Corporations Act provides that the constitution and replaceable rules have the **effect of a contract** between the company and each director and secretary, under which each agrees to observe and adhere to the constitution and rules.⁵⁹

⁵⁹ www.cch.com.au [35-350] Effect of the constitution and replaceable rules – Officers.

5 Penalties

5.1 Criminal penalties

Breaching section 184, which lists certain offences (mentioned above in 3.5), attracts criminal penalty for dishonest behaviour. Similarly, a director contravening section 588G(3) (mentioned above in 3.6) faces criminal proceedings. The maximum penalty is a **fine of \$200,000 or five years imprisonment**, or both (Schedule 3 of the Corporations Act).

Section 206B of the Corporations Act provides for automatic **disqualification** from managing a corporation for criminal convictions.

5.2 Civil penalties

The sections of the Corporations Act attracting civil penalties (addressed in Part 9.4B of the Corporations Act) include:

- section 180(1) (mentioned above in 3.1)
- section 181 (mentioned above in 3.2)
- section 182 (mentioned above in 3.3)
- section 183 (mentioned above in 3.4)
- section 588G(2) (mentioned above in 3.6)
- section 209 (mentioned above in 3.8).

The Australian Securities and Investment Commission (ASIC) is the national body responsible for company registration and securities regulation in Australia. Under section 1317J(1) of the Corporations Act, ASIC can apply to the court for a:

- declaration of contravention
- pecuniary penalty order
- compensation order.

(a) Fines

The court may order a pecuniary penalty of up to **\$200,000** under section 1317G if:

- a declaration of contravention by the person has been made (section 1317E)
- the contravention:

- materially prejudices the corporation or its members
- materially prejudices the corporation's ability to pay its creditors
- is serious.

(b) Compensation to a corporation for damage resulting from the contravention

Pursuant to section 1317H, the Court may order a person to **compensate** a corporation for damage suffered by the corporation if:

- 1 the person has contravened a corporation civil penalty provision in relation to the corporation or scheme
- 2 the damage resulted from the contravention.

(c) Disqualification from managing corporations

Section 206C of the Corporations Act gives the court power to **disqualify** a person from managing corporations for a contravention of a civil penalty provision. A person disqualified may apply to the court for leave to manage a corporation under section 206G.

The courts have the power to grant officers (which include directors) relief from civil liability if the person has acted honestly and ought to fairly be excused.⁶⁰ Shareholders can ratify breaches of fiduciary duty, but there is doubt as to whether shareholders can ratify breaches of statutory duty.⁶¹

⁶⁰ ss 1317S and 1318 Corporations Act 2001 (Cth).

⁶¹ www.cch.com.au [142-020] Directors' and Officers' Duties – Liability and Relief From Liability.

6 Duties in practice – Examples of breaches in Australia

6.1 The Australian Securities and Investments Commission's (ASIC) Power to Ban directors

ASIC may apply to the court for a declaration of contravention of a civil penalty provision such as a director's duty under section 1317E. Once a declaration has been made, ASIC can seek, **for example**, a pecuniary penalty order under section 1317G or a disqualification order under section 206C. ASIC is permitted to commence separate civil proceedings if it wishes to pursue civil remedies following an unsuccessful prosecution.⁶²

ASIC is able to disqualify directors from managing corporations for certain periods of time due to the directors' contravention of their general, statutory or constitutional duties.

For example, in a statement dated 5 December 2006, ASIC banned nine directors of failed companies for their individual breaches, including trading while insolvent, uncommercial and fraudulent transactions, failure to exercise duties in good faith and in the best interests of the corporation, failure to maintain proper financial records, failure to pay taxes due to the Australian Taxation Office (ATO), failure to pay statutory debts, and failure to provide administrators with a statement of company affairs.⁶³

6.2 ASIC v Adler and Ors⁶⁴

In issue was a payment of \$10M by an HIH subsidiary to a company of which Rodney Adler was a sole director. By use of a trust mechanism, approximately \$4 million was used to acquire HIH shares, venture capital unlisted investments were purchased from another Adler company, and loans were made to entities which were associated with Adler.⁶⁵

These transactions occurred with no board or member approval and without disclosure – the loans were given without proper documentation or security being sought and the payment was made so that it would not come to the attention of other HIH directors.⁶⁶

Adler was found to have contravened four sections of the Corporations Act relating to a director's duty to act in good faith and for a proper purpose (section 181), duty not to improperly use position (section 182), duty not to improperly use information (section 183), and the duty to act with due care and diligence (section 180).

The court found that three former directors of HIH, together with a corporation controlled by the defendant, were “knowingly concerned in” a contravention of the related party rules (under section 79 of the Corporations Act), even if they did not appreciate it was a contravention having mistakenly considered that the transaction fell within the “arm's length” exception (under section 210 of the Corporations Act, as mentioned above in **3.8**).

⁶² Halsbury's Laws of Australia [3.2.0498] Procedure in civil penalty application.

⁶³ www.asic.gov.au.

⁶⁴ [2002] NSWSC 171.

⁶⁵ ASIC v Adler & Ors [2002] NSWSC 171.

⁶⁶ ASIC v Adler & Ors [2002] NSWSC 171.

6.3 *ASIC v Rich*⁶⁷

One.Tel, a telecommunications company, was placed into voluntary administration in May of 2001 and went into liquidation in July 2001. Greaves, a non-executive chairman of directors, was accused of breaching his statutory duty of care by ASIC. ASIC had decided to accuse Greaves and not other non-executive directors on account of his position as chairman of the board and, finance and audit committees of One.Tel.

It was held that on account of his substantial commercial experience, qualifications (as a chartered accountant) and his role within the company (in addition to being a non-executive director) that he had responsibilities within the corporation that amounted to directors' duties. As such, he was unable to counter ASIC's accusations, which allowed for an action against Greaves under section 180(1) of the Corporations Act (duty to exercise care and diligence).

6.4 *ASIC v Vizard*⁶⁸

Mr Vizard was a director of Telstra and obtained confidential information by reason of his position as a director. Vizard made improper use of that information by basing his decision to purchase or sell shares on the information, in order to obtain an advantage for himself, a company he established, and a trustee company in which he and his family beneficially held shares.

It was held that Vizard had contravened section 183, ie, the duty of a director to refrain from using confidential information obtained during the course of a directorship for an improper purpose. The court ordered pecuniary penalties and a disqualification order against Vizard.

6.5 *ASIC v Vines*⁶⁹

Mr Vines was found to have failed to exercise due care and diligence (section 180) by misleading or providing inadequate disclosure of material information to the board of directors (sections 190 – 195). The defective disclosures related to matters within Mr Vines' personal knowledge, in circumstances where the board was relying on him to make timely, accurate and complete disclosure of all material matters.⁷⁰

This decision is a reminder to company officers of the difficulties which they will encounter if they are found to have contravened their statutory duty of care and diligence and wish to be exonerated from civil penalty.

⁶⁷ Australian Securities and Investments Commission v Rich and Others (2003) 44 ACSR 341.

⁶⁸ ASIC v Stephen William Vizard [2005] FCA 1037.

⁶⁹ ASIC v Vines [2006] NSWSC 760.

⁷⁰ www.findlaw.com.au Court Declines To Grant Relief From Civil Penalties To Company Officer.

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