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For a directors duties question:

1. Identify the directors / class of directors and their actions (*Write the Name of Director In Response + Write Actions*)

a. *The term "director" is defined in s9 of the Corporations Act 2001 to mean:*

- i. *a person validly appointed as a director or an alternate director;*
- ii. *a person, even though not validly appointed as a director, if that person acts in the position of a director (also known as a 'de facto' director);*
- iii. *a person, even though not validly appointed as a director, if the directors are accustomed to act in accordance with that person's instructions or wishes (also known as a 'shadow director')*

b. Have they breached any duties? For each set of directors, apply the below template (i.e. 181 is not applicable for this director):

c. S180 - Care & DD

- i. Rule
 - 1. S180 + Daniels v Anderson (1995)
- ii. Application & Defences?
 - 1. Yes/No
 - 2. Defences: BJR, RRD, DDD
- iii. Conclusion
 - 1. Yes/No

d. S588G - Insolvent Trading

- i. Rule
 - 1. Company Insolvent: S95 + Asic v Plyman (2003)
 - 2. Directors Breached: Section 588G
- ii. Application & Defences?
 - 1. Yes/No
 - 2. Defences: 588GA, 1317S, 588H (4 defences)
- iii. Conclusion
 - 1. Yes/No

e. S182-183

- i. Rule
 - 1. (Duty) S182-183 + (Disclosure Defence) S191 & S195
- ii. Application & Defences?

- How much will it cost to litigate?
- Look at the broad range of conduct covered by remedy?
- Avoid need for prior court consent
- Time/ Money/ Resources/ Energy

s 232 Minority Oppression Remedy: A member/former member or anyone with ASIC consent may bring an action under section 232 minority oppression remedy if the affairs of a company are conducted in a manner that is contrary to the interests of the members as a whole because they are oppressive, unfairly discriminatory or unfairly prejudicial.

This is determined objectively in *Wayde v NSW Rugby League Ltd (1985)*: “Was the decision made by the director a decision that no board of directors acting reasonably would have made? If it is not reasonable, the directors have breached s 232.

If breached, remedies are set out in section 233 (pick appropriate one):

- Wind up the company: s 233(1)(a)
- Modify the constitution: s233(1)(b)
- Regulate future conduct of company’s affairs: s233(1)(c)
- Order for shares of a member to be purchased by another member: s233(1)(d)
- Order purchase of shares to reduce company’s share capital: s233(1)(e)
- Order that a company institute or defend legal proceedings: s 233(1)(f) and (g)
- Appoint a receiver or receiver and manager: s33(1)(h)
- Restraining a person from engaging in certain conduct: s233(1)(i)
- Require a person to do a specific act: s233(1)(j).

S236-237 Statutory Derivative Action: A member on behalf of the company may seek court permission to take control of the company’s legal proceedings to enforce its rights under s 236. Section s 237(2) identifies the requirements for leave to bring an SDA, including:

- it is probable that the company will not itself bring the proceedings, or properly take responsibility for them
- the applicant is acting in good faith;
- it is in the best interests of the company that the applicant be granted leave;

S461(1)(k) Just and Equitable Ground for winding up: A member may seek a just & equitable winding up on the basis that they have a ‘justifiable lack of confidence’ in the management.

- Breakdown of mutual trust & confidence in their management (Ebrahimi)

- They can't rely on reasonable reliance defense as they should have a basic understanding of business & finance –can rely on others, but have statutory functions they can't delegate

ASIC v Adler – transaction with related party without the knowledge of the board, no disclosure – undocumented & unsecured payment of \$10 million to related party

- Adler breached duties under ss181-184 – disqualified for 20 years, pecuniary penalties
- S208 – when an entity is giving financial benefit to a related party, member approval must be obtained → a breach does not mean that the contract is invalid, the person who is involved simply contravenes a civil penalty provision under s1317E
- Related party – defined in s228 – controlling entities, directors & spouses/ parents & children; a party that acts on the understanding that they will receive a financial benefit

INSOLVENT TRADING

Morley v Statewide Tobacco Services Ltd

- Husband and wife both owned Tobacco stores. Wife took no part in day to day management for 29 years. The husband controlled all activities. But when the husband died, the wife asked the son to take over which caused the business to rapidly deteriorate and ended up in liquidation. Wife signed all the documents as director, signed a guarantee with ANZ for overdraft
- **Used reasonable reliance defense as she wasn't aware of financial position of the business of which the son controlled**
- **Personally liable: She Never asked questions or looked at the records and the son was not a reliable and competent person** → breached s588G

DCT v Clark [2003]

- Wife was a housewife and mother. Husband made her a director despite the fact she had no business experience or knowledge of duties. She signed unexplained documents.
- **Raised Absence due to illness or for 'other good reason'** – she didn't take part of management of the company because her husband was in charge
- **All directors, no matter how experience/ skilled/ knowledgeable, have a fundamental obligation to monitor the company's performance – you cannot be passive**

GOOD FAITH & PROPER PURPOSE

Kinsela v Rusell Kinsela Pty Ltd (In Liq) [1986] – good faith when insolvent

- Recognizes that as a company enters insolvency (only) the primary duty shift from shareholders to creditors. It also shows that the duty to consider creditor interests during insolvency cannot be relaxed or removed by shareholders