

Directors and their duties under the corporation law of australia



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Introduction

Director of a company implies the individual who is in charge of the company. Directors are associated with the management of the company. The ownership of a company does not vest upon a director, they are the mere guardian of the company. The shareholders of a company are the owner of the company and the directors empowered with the management of the company. They are required to manage the affairs of the company on behalf of the shareholders and the company. The company is a separate legal entity and the directors are mere caretaker of the company.

This paper will strive to discuss the meaning of the directors and their duties under the Corporation Law of Australia. It will discuss the history and evolution of duties and responsibilities imposed upon a director, enumerating the present day duties and responsibilities. A distinction between the duties of a director in the proprietary company and public company will be drawn in this paper. It will also provide for the consequences that will follow in case the directors fail to comply with the duties and also the remedies that are available. The paper will also strive to make projections on the future of director's duties in Australia.

Discussion

The word director relating to a company has been defined in section 9 of the Corporations Act 2001. A director relating to a company implies a person who has been appointed as the director of a company (Hedges et al. 2016). It also includes a person who has been appointed as the alternate director

and is conducting his duties in that capacity. The name given to the position that the alternate director holding is irrelevant for the purpose of section 9 of this Act. When a person is not validly appointed as a director but is acting in the position of a director, the same will render him to be a director for the purpose of this Act (Hill and Conaglen 2018). In case a person is not appointed as a director but the directors of that company are acting or in a probability to act in conformity with the directions of the person will be considered to be a director for the purpose of this Act. However, in case the directors are acting under the advice of a person who is not appointed as a director and such an advice has been furnished by that person in pursuance of his professional capacity, such a person would not achieve the status of a director of a company for the purpose of this Act (Hedges and Ramsay 2016). The definition of the director of the company can be illustrated with the case of *Shafron v Australian Securities and Investments Commission* [2012] HCA 18.

Directors of a company being in a position of trust are imposed with certain duties under the Corporations Act. The duties of a director in connection with a company has been contained in section 180, 181, 182, 183, 191 and 588G of the Corporations Act 2001. Section 180 of the Act requires the directors of a company to exercise their powers imposed upon them as a director in a careful and diligent manner. The degree of diligence and care that needs to be exercised is of the same degree as that of a reasonable person put in a similar situation. The test determining the degree of care and diligence is an objective test (Méndez, Pathan and García 2015). The same was discussed in the case of *Australian Securities and Investments Commission v Sino*

Australia Oil and Gas Limited [2016] FCA 42; 111 ACSR 220. The director is required to act in a manner, which would ensure the best interest of the company.

Section 181 of the Companies Act 2001 requires a director to ensure good faith in their conduct in relation to the affairs of the company. The directors must strive to ensure the best interest of the company in their conduct as a directors of the company. Every actions undertaken by a director of the company in discharging their functions as a director must be in pursuance of a proper purpose (Barker 2016). The application of this section is evident in the case of Australian Securities and Investments Commission v Adler [2002] NSWSC 171.

Section 182 of the Corporations Act requires a restricts a director to utilize his position as a director in the company to serve his personal benefit. It also prohibits a director from indulging into any act as a director which will cause or is likely to cause detriment to the company (Appuhami and Bhuyan 2015). In the case of Australian Securities and Investments Commission v Vizard [2005] FCA 1037, it was held that the directors are under the obligation to refrain from using their position as a director to yield personal gain causing detriment to the company.

Section 183 of the Corporations Act prohibits a director from making the use of the any information that has been accessible to them by virtue of their position as a director for their own benefit or for a purpose which will cause detriment to the company (Ramsay 2015). The same has been applied in the

case of *Australian Securities and Investments Commission v Vizard* [2005] FCA 1037.

Section 191 of the Corporations Act requires a director to be accountable to the members of the company. A director is required to furnish the accounts of any personal gain that has been accrued to him by virtue of his position as a director. Section 588G of the Corporations Act 2001 restricts a director to indulge into any trading in case the company has become insolvent or is on the verge of insolvency and such probability of the company being insolvent is in the knowledge of the director (Varzaly 2015).

The duties of a director of a company in its present form owes its roots in the common law. The duties and responsibilities that has been prevalent in Australia by virtue of the Corporations Act has evolved from the common law rules. Prior to this Act the laws relating to the directors duties was governed by the common law doctrines. All the disputes arising relating to the duties of a director has been addressed using the common law cases. Under the common law, the directors are required to exercise discretion while discharging their functions as a director. They should use an informed judgement while discharging their duties. Common law requires the directors to refrain from acting as a director for an improper purpose and avoid every chance of gaining personal benefits using the position as a director of the company. However, later on with the increasing complexities in the director functions and a drastic development in the corporate sector has escalated the number of disputes remarkably. This instance of considerable increase in the disputes relating to the directors duties a demand for a strong legislation has been marked (Keay 2015). The Australian Securities and Investment <https://assignbuster.com/directors-and-their-duties-under-the-corporation-law-of-australia/>

Commission has been created to address these issues that arises in this sector.

However, the formation of ASIC has addressed some of the issues but a need for a uniform legislation was required, which has marked the creation of the Corporations Act 2001. The Corporations Act provides for the duties of the directors. Under this Act, the director is supposed to act in a careful and diligent manner. The Act also restricts a director from gaining personal benefit by virtue of its position as a director. The director is prohibited from causing detriment to the company. The Act needs the director to be accountable to the company and furnish the details of all the gains that has accrued to him by virtue of his position as a director in the company (Hanrahan and Ramsay 2018). Under this Act, the director needs to refrain from the use of the information that has been accessible to him by virtue of his position as a director to gain personally or to act in a way with them that will cause detriment to the company. The present day duties related to a director of a company has been laid down in the Corporations Act 2001 and is binding on all the companies.

The duties of the directors that have been laid down in the Corporations Act is applicable in case of both the public company and the proprietary company. Both the directors of public companies and proprietary companies are required to abide by the duties of the directors. The duties of the directors relating to public company and proprietary company are similar. However, in case of public company a strict compliance of the provisions of the Act is required than the compliance requirement of the proprietary company. This is owing to the reason that the public company directors are <https://assignbuster.com/directors-and-their-duties-under-the-corporation-law-of-australia/>

dealing with the money belonging to the general public. This confers a high degree of care and diligence to be applied while dealing with the same. In case of proprietary companies, the directors are dealing with the money of the shareholders. Therefore, in case of public company, a more stringent compliance of the duties of the directors provided in the Corporations Act will be required.

The duties relating to the directors of a company as provided under the Corporations Act requires compliance. These duties are binding upon the directors of the company doing business in Australia. Any person being the director of a company contravening these duties will be liable for compensations and penalties under this Act. The Act also provides for a remedies and consequences that will follow in case the director of a company fails to comply with the Act while discharging his powers as a director in the company. The consequences and remedies that will follow in case a director has breached the duties that has been provided under the Act is contained in section 206C, 1317E and 1317H of the Corporations Act. Section 206C of the Corporations Act empowers the court to disqualify a director who has committed a breach of the duties of a director under this Act. Section 1317E of the Act empowers the court to declare a civil penalty against the director violating the provisions of this Act. Section 1317H of the Corporations Act empowers the court to declare compensation orders against the directors in case of breach of any of the duties as a director. Section 184 of the Act provides for a criminal penalty to the directors violating the duties (Summerhayes 2017).

The laws relating to the duties of the directors of a company as provided in the Corporations Act is adequate. It does not require any amendments or changes. However, a proper implementation of the same is required. The separate courts needs to be established for ensuring a speedy disposal of the disputes. ASIC needs to exercise a more firm control over the directors of the company. A further amendment of the laws relating to the same may lead to anomaly. Therefore, no future changes are required but a strong implementation is needed.

Conclusion

It can be concluded that a director relating to a company implies a person who has been appointed as the director of a company. It also includes a person who has been appointed as the alternate director and is conducting his duties in that capacity. The directors of a company is required to act in a careful and diligent manner. He should refrain from gaining any personal benefit from the position as a director in the company. The director is prohibited to refrain from leaking confidential information. The duties of a director of a company in its present form owes its roots in the common law. The duties and responsibilities that has been prevalent in Australia by virtue of the Corporations Act has evolved from the common law rules. The formation of ASIC has addressed some of the issues but a need for a uniform legislation was required, which has marked the creation of the Corporations Act 2001. The consequences and remedies that will follow in case a director has breached the duties that has been provided under the Act is contained in section 206C, 1317E and 1317H of the Corporations Act.

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