



# You've Entered Law Land

Exam script using IRAC method  
Disclosure excerpt from corporations law script

## Disclosure (this is a statutory duty, not just defence)

### ISSUE

- The issue is whether [person] breached [his/her] duty to disclose.

### RULE

- A director with a material personal interest in an affair of the company generally must disclose it (s191).
- Material personal interest is not defined in the act but it refers to a real and sensible possibility of conflict, and *McGellin v Mount* defined 'material' as referring to a situation that has 'the capacity to influence' the decision or vote.
  - An interest that is very small is not material in this context (*Grand Enterprises v Aurium*).

### ANALYSIS

- [Person] [is/is not] a director (s9).
- In this situation [director] [...]
- Notice must include details of the nature and extent of interest and the relation of the interest to the company (s191(3)(a)); see also *Camelot*. It must be given at a directors meeting as soon as practicable (s191(3)(b)).
- Here [...]
- In this situation:
  - disclosure was provided [in compliance/not in compliance] with s191(3).
  - there was no disclosure.
- [Person] will argue that he is exempted from disclosing his material personal interest to the other directors (s191(2)) because [...]
  - The contract is already approved by the members under s208 and won't create any further obligations (2)(a)(iii)

(Other subsections – these are unlikely to come up in exam)

- [director's] directorship in [the other company] is held in common with the other directors (2)(a)(i)
- It arises in relation to remuneration as a director of the Co (2)(a)(ii)
- The interest arises merely because [director] is [a guarantor/given indemnity/security] for a loan to the Co (2)(a)(iv)
- Arises merely because director has a right of subrogation re para iv (2)(a)(v)
- The interest in the contract only relates to director insurance against liability (2)(a)(vi)
- The interest relates to payment re indemnity allowed under s199A (2)(a)(vii)
- The interest arises in a contract that may benefit a related body corporate (2)(a)(viii)
  - Compared to an entirely separate company where director has mat personal interest
- The company is a Pty Co, and the other directors are aware of it (nature, extent, and relations to affairs of the company needed) (s191(2)(b)).
- He has satisfied s191(2)(c):
  - He has already given notice of interest (nature and extent, and relation to affairs of company needed)
  - [Other director] who wasn't there when first notice was given has subsequently received it
  - And the interest has not materially increased since notice.

**Comment [A1]:** Insert the name of the relevant person. The "issue" section should always be kept extremely concise

**Comment [A2]:** This probably should have been referenced.

**Comment [A3]:** This would only be used if relevant to the fact scenario.

**Comment [A4]:** Always consider the different possibilities for your exam script. Here, the alternative where the person is not a director would obviously cut the answer very short (and practically speaking, wouldn't found in an exam) – see below for better examples of alternative paths an answer can take.

**Comment [A5]:** Only describe the actions of the director that are relevant to the analysis.

**Comment [A6]:** This is not the fundamental rule being discussed so I didn't include it under "Rule". It would be used in most fact scenarios, but placing it here provides flexibility. It also helps the answer flow (though you would need to mention notice in the action of the director, above).

**Comment [A7]:** Quick conclusion before moving on the second part of the answer.

**Comment [A8]:** Always discuss the other side of the argument if you have covered it in class. You need to be able to weigh up the strength of both sides of the argument.

**Comment [A9]:** At this point, one of the alternatives below is used. It looks like I thought only one possibility would be on the exam – this would have been based on the material that the reading list or lecture slides covered.

- He has given standing notice under s192 and it is still effective (**s191(2)(d)**).
- If the constitution allows disclosure to the board instead of the members at a general meeting then this is sufficient (**Imperial v Coleman**). (CHECK whether this is for public and pty, or just pty)
  - Note: Section 191 acts in addition to, and not in derogation of, any other general law or constitutional requirements (**s193**). Therefore, just because a person complies with s191 will not excuse a breach of the general law or constitutional provisions.

**Comment [A10]:** This sentence doesn't really form part of the "script". As I mentioned, it is sometimes necessary to include lists in your notes, but it is better if they can be integrated.

**Comment [A11]:** I was obviously running behind schedule for this script. Always make sure you start early enough to finish!

**Comment [A12]:** Depending on the fact scenario, either this section, or the one below on public companies, will be relevant.

### Proprietary companies

- As a proprietary company, and having the **s191** requirements met [...]:
  - He can vote on matters that relate to his interest (**s194(c)**)
  - [transaction] can proceed (**s194(d)**).
  - He can retain the benefits (**s194(e)**).
  - Company cannot avoid the transaction (**s194(f)**).

### Public companies

- As [company] is a public company, [person] cannot normally be present at the meeting or vote on the matter (**s195(1)**).
- While [director] has breached this too, this contravention does not affect the validity of the transaction (**s195(5)**).
  - However, as the **s191** requirements have been met then s195(1) does not apply (**s195(1A)**)
  - However, the other directors (without a MPI) have passed a resolution which states the interest, and allows [person] to be present and vote (**s195(2)**)
  - However, ASIC has allowed him to do so (**s195(3)**)
  - While there are not enough directors to obtain a quorum, [the remaining directors] can call a general meeting to pass a resolution (**s195(4)**).

**Comment [A13]:** I would have included a one sentence conclusion either here, or below the following section if I had time.

## CONSEQUENCES OF BREACHING DISCLOSURE PROVISIONS

- A contravention of s191 will not affect the validity of the [transaction, agreement, instrument, resolution, or other thing] (**s191(4)**).
- However, breach of s191 it constitutes a criminal offence (up to \$1100 fine, 3 month jail), and breach of s195 is also a criminal offence with a fine up to \$550.

**Comment [A14]:** Consider what is really necessary for your answer; the main issue for most questions on disclosure would be whether it was breached or not – NOT what the consequences are.

This section was really just to pick up an extra half mark (if lucky), and ONLY if I was running on time. If I only had an extra 15 - 30 seconds for this question, I would have moved on to the next question (but I would have left a few lines free in case I had time at the end of the exam).

### **Imperial Mercantile Credit Association v Coleman (1873) LR 6 HL 189**

- Insufficient disclosure to only state that he (Coleman) was 'interested in the transaction'. More information was required.
- The interest was a sale of securities by the Co through a stockbroking firm in which he was the partner.

### **McGellin v Mount King Mining (1998) 144 FLR 288**

- 'Material' in material personal interest refers to a relationship or situation that has 'the capacity to influence' the director's decision.

### **Camelot Resources v MacDonald (1994) 14 ACSR 437**

- Notice must give sufficient detail.
- The constitution can provide for disclosure notice to be given to the board instead of shareholders. Failure to disclose will be voidable at election of company.
- Disclosure requirements are strict. Notice must include sufficient detail so that the board understands the scope of the interest.

**Comment [A15]:** I usually included a list of relevant cases at the bottom of a section. This is only to trigger your memory so keep the descriptions as short as possible.