



A 'Shadow Director' is a person who is not validly appointed as a director of a company but is a person who the appointed directors of the company are accustomed to acting in accordance with that person's instructions or wishes.

A 'De Facto Director' is a person who is not validly appointed as a director of a company, but acts in the position of a director.

The implication of a person being a shadow director or a de facto director is that because that person has the potential to control decisions of the company, and exercises that power, the Corporations Act makes the shadow director or de facto director owe the same duties to the company as a formally appointed director.

By way of example, the Administrators of Queensland Nickel in their report to creditors asserted that Clive Palmer was a shadow director of Queensland Nickel, which Mr Palmer denies. Clive Palmer resigned as a director in February 2015 and his nephew Clive Mensink was then appointed as director and secretary. Prior to Queensland Nickel being placed in administration it was facing financial, workplace health and safety environmental issues. Queensland Nickel subsequently went into liquidation. The Administrators assert that Clive Palmer exercised powers in controlling the decisions of Queensland Nickel after he resigned as director. They assert he played a significant role in its day to day operations, such as supplier contract negotiations, employment matters and expressly approving or rejecting expenditure requests.

What factors indicate a person is a Shadow Director?

A governing majority of directors (as opposed to executives or employees) of the company must be accustomed to acting in accordance with the shadow director's wishes. This means the directors must perform positive acts in accordance with the shadow director's instructions on a regular basis and over a period of time. There must also be a causal connection between the instructions given, and the action taken by the directors.

What factors indicate a person is a De Facto Director?

Whether a person is a de facto director requires consideration of the duties performed by that person in the context of the particular company. Relevant factors include:

- Whether the person held themselves out as a director.
- Whether the company held out the person as a director.
- Whether others in the company considered the person a director.
- Whether those outside the company considered the person to be a director.



- The duties actually performed by that person.
- The size of the company, its structure, informal practice and allocation of responsibilities.

What are the implications of being a Shadow Director or De Facto Director?

Shadow directors and de facto directors are subject to the same duties as validly appointed directors. These include:

- To act in the best interests of the company and not for an improper purpose or to gain an advantage for themselves.
- To exercise powers and duties in good faith.
- Avoid conflict of interest.
- Not improperly use information of the company or their position and ensure it does not trade insolvently.

If a Court is satisfied a shadow director or de facto director breaches their duties, then the Court can make a declaration pursuant to Section 1317E of the Corporations Act and:

1. impose a fine of up to \$200,000.00; and,
2. disqualify the person from being a director or from managing companies; and,
3. If the company has suffered, or is likely to suffer, loss and damage as a result of the breach, the Court on the application of ASIC or a person nominated by ASIC, or an Administrator or Liquidator, can order the payment to the company of money, or transfer of property to the company, or payment of the amount of its lost or damage to the company.

The shadow director and de facto director, like other directors, can be personally liable for debts incurred by the company if it trades insolvently, and for unpaid PAYG and Superannuation Guarantee Charge liabilities.

If you are concerned that you or someone you know who is acting in an advisory capacity to a Company, may be acting as a Shadow Director or a De Facto Director, or would like assistance or more information regarding the possible implications, or with any business matter, please call our accredited business law specialist, [Michael Battersby](mailto:commercial@batemanbattersby.com.au) on 02 4731 5899 or email commercial@batemanbattersby.com.au.