# Finding the Fiduciary:

# Recognition of the Director-Shareholder Relationship in Closely Held Companies

**Beth Nosworthy**
BSc(Ma&Comp Sc) Hons LLB GDLP BCL(Oxon)
Adelaide Law School
Faculty of the Professions
University of Adelaide
31 October 2013

TABLE OF CONTENTS

## ABSTRACT

The fiduciary obligation is an accepted equitable doctrine within Australian law. Its role within the corporate field, as a duty applied to directors and owed to the company, is also well accepted. This thesis examines the role of the fiduciary obligation in general, and specifically in relation to directors.

The examination begins with the development of the fiduciary obligation in equity, and addresses the difficulty of developing a doctrinal definition for the obligation. This is useful when analysing the most recent High Court decisions on this obligation, and applying the obligation to directors within corporate law, particularly in light of inconsistent use of language in that field.

The thesis clarifies the content of the obligation, and recognises exceptions to the default position that fiduciary obligations are owed to the company. The thesis proposes a definition of a closely held company, which encompasses these exceptions, and recognition of the relationship between directors and shareholders in a closely held company as subject to fiduciary obligations.

Finally, the thesis makes recommendations as to the method of recognising this relationship at law within Australia, to provide greater clarity to both directors and shareholders.

## THESIS DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution to Beth Nosworthy and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

I give consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the *Copyright Act 1968* (Cth).

I also give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library catalogue and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

Signed

Dated

## ACKNOWLEDGEMENTS

Throughout the course of completing my thesis, I have been supported by the advice, assistance and encouragement of all those around me. My supervisors, Associate Professor Christopher Symes, Associate Professor Jim Hambrook and Senior Lecturer David Wright of the University of Adelaide, and Professor Vicki Waye at the University of South Australia have been the source of invaluable counsel through this process, and I am very grateful for their supervision.

At the commencement of my PhD I was fortunate to be supported by the Zelling-Gray scholarship, which enabled me to study full-time and devote my energies to the process. The Thesis Writing Group formed within the post-graduate students at the Adelaide Law School provided an excellent sounding board for many drafts, and I am thankful for their generosity. My development as an academic led to appointment as a lecturer at the Adelaide Law School, where my colleagues have provided me with significant advice, assistance and a shoulder, when necessary. I am indebted to the Dean, Professor John Williams, for his support throughout this process. I am especially thankful to Gabrielle Appleby, David Brown, Anne Hewitt, Suzanne Le Mire, and Bernadette Richards. The assistance of the post-graduate coordinators including Judith Gardam, Judith Bannister and John Gava was invaluable, as were the library staff in the Sir John Salmond Law Library, in particular Margaret Priwer. To academics further afield who were generous with their time, particularly the Honourable Paul Finn and Elizabeth Boros, I extend very grateful thanks.

The personal support provided by my family and friends was, without a doubt, instrumental in the completion of my thesis. I wish to acknowledge my family, Ian and Susie Nosworthy and Jane and Paul Cantale, for their faith in my capacity to complete this project and dedicated hours of proof reading. Last, but never least, my love to my husband, Craig, for his incredible support and dedication to this endeavour. It may have been my thesis, but you were there every step of the way, and I cannot thank you enough.

# 1 A FIDUCIARY DUTY TO SHAREHOLDERS: AN INTRODUCTION

## *1.1 The Closely Held Company*

It would be a rare student of corporate law in the past century who had not been exposed to the old English case of *Salomon v Salomon & Co*.[1] Often used to assist in understanding the impact of the separate legal entity afforded to the corporate person,[2] it can also be viewed as a classic example of a closely held company. Prior to incorporation, Mr Salomon operated his shoe business as a sole trader, employing his sons. Post-incorporation, Salomon & Co had seven shareholders, each holding one share: Mr Salomon, Mrs Salomon, and five of the Salomon children. The legislation in place at the time required a minimum of seven members in order for incorporation to validly take place.[3] Their Lordships acknowledged that, other than Mr Salomon, the other six members shares were of 'little more than nominal' value,[4] but finding that was no bar to the acknowledgement of the company as a separate legal entity. Whilst that in itself may be true, very little regard was paid throughout the judgment to the impact on the other members caused by Mr Salomon directing the company to purchase his business at excessive value.[5] The benefit of the sale to Mr Salomon was great: a further 20,000 shares valued at £1 each, £1,000 in cash, the discharge of £8,000 debts he owed as a sole trader and a debenture issued personally to him for £10,000. The other members each maintained their sole share in the company, which now owned a business

---

1 *Salomon v Salomon & Co* [1897] AC 22.

2 Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook Co, 16th ed, 2012) 32-35; R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths Australia, 14th ed, 2010) 120; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 147.

3 *Companies Act 1862* 25 & 26 Vict, c 89 s 7(1).

4 *Salomon v Salomon & Co* [1897] AC 22, 45 (Lord Herschell).

5 Mr Salomon and his two eldest sons were the three directors of the company.

which cost it more than it was worth.[6] Mr Salomon's behaviour might be questionable in relation to the directors' duties as we perceive them today, but does not overtly breach the traditional duties of care skill and diligence, good faith and proper purpose, use of position and information.[7] Nor would the members' remedies available today be of great assistance to the other members.[8]

In the specific case of *Salomon v Salomon & Co*, the other members did not obviously lose anything. In fact, they gained a small interest in a business already tied to their family. They assisted their father retain his business and convert it into a company form, as many family members might be prepared to do. However, it would not be hard to change the facts slightly to see the other members suffer substantial loss and remain without significant remedial options – as was the case in *Brunninghausen v Glavanics*.[9] The particular mischief caused by the legislative requirement for a minimum of seven members has been remedied now by the ability to incorporate a sole member/director company, but the underlying potential detriment to members of closely held proprietary companies remains. Their position contrasts starkly to members of public companies, as highlighted recently by Rupert Murdoch, who stated that 'any shareholders with

6 Lord Macnaughten discusses that the other shareholders had 'no good ground for complaint on the score of overvaluation' due to their relationship to Mr Salomon: *Salomon v Salomon & Co* [1897] AC 22, 49.

7 *Corporations Act 2001* (Cth) ss 180-184. All duties will be discussed in full in the later stages of this thesis, in particular Chapter 3.3 in relation to the fiduciary obligation and Chapter 4.5.1 in relation to the other statutory duties and their equivalents at common law and equity. The liquidator in Salamon did contend that Mr Salamon may have breached his fiduciary obligations as a promoter to the company for the pre-incorporation negotiations made, which was particular to the facts in this case.

8 *Corporations Act 2001* (Cth) ss 232-242. Again, these members' remedies will be discussed in full throughout the later chapters of this thesis, particularly at Chapter 4.6.

9 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, which involved a furniture company with two brother-in-law director-members, one of whom hid an offer for the business from the other, and consequently paid less to buy out the uninformed member's shares following a dispute. The intricacies of this case, and others like it, will be discussed in Chapter 3.4.

complaints should take profits and sell!'[10] When combined with the recognised issues of corporate regulation and punishment, a lacuna in the current legal approach to closely held proprietary companies becomes apparent.

> Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?
>
> Edward, First Baron Thurlow 1731-1806[11]

Lord Chancellor Thurlow's observation is often used to highlight the difficulties surrounding the punishment of corporations, but is also relevant when considering the legal obligations owed by, to and within a company. The corporate 'form' suffers from a fundamental deficiency: while it is certainly a distinct legal person, in addition to having no physical form for punishment, there is no obligation for it to have a single active consciousness. Instead, it may have a multiplicity of consciousness. A company, as defined within the *Corporations Act 2001* (Cth) ('the *Corporations Act*'),[12] has two decision-making organs – the board of directors and the members in general meeting, that operate somewhat independently from one another.[13] Further complicating matters, neither of these decision-making organs must be populated by a single natural person but

---

10 Personal comment by Rupert Murdoch, Chairman and Chief Executive Officer of News Corporation, on the social-media network twitter, 11 October 2012, 15:41; Andrew Edgecliffe-Johnson, 'Murdoch hopes for peaceful annual meeting', *The Financial Times (FT.com)* (New York), 15 October 2012 <http://www.ft.com/cms/s/0/d619e5ba-16e3-11e2-8989-00144feabdc0.html#axzz2A6C7z0x9>.

11 Mervyn A King, *Public Policy and the Corporation*, Cambridge Studies in Applied Econometrics (Chapman and Hall, 1977) 1, as cited in John C Coffee Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1980) 79 *Michigan Law Review* 386; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 146.

12 The various company structures are outlined in the *Corporations Act 2001* (Cth) s 112, and dealt with within the thesis in greater detail during Chapter 3. This introduction deals at the very abstract level with the most common forms of the company, which can, admittedly, include single director/shareholder proprietary companies, which arguably do have a single consciousness, with only one 'active' decision-making organ populated by one person.

13 Adopting the organic theory of the company, where a normal, solvent company will have two decision-making organs, the board of directors and the members in general meeting: R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 14th ed, 2009) 221.

can be a collective of a number of natural persons. These decision-making organs have varied interests, values, ideals and goals, and may also vary in the projection of these interests, values, ideals and goals from day to day, depending upon precisely who constitutes that organ at the time.

## *1.2 Contribution*

Thurlow's identification of the corporate phenomenon cited above is not a lament unique in the history of corporate law. The company in particular and corporations in general are the subject of a vast amount of academic scholarship and judicial decisions.[14] The history of the modern company is examined in depth in many sources, both primary and secondary, as is the development of corporate law itself. There are a great number of theoretical debates about the nature of the corporation, which have spawned various theories of the corporation, such as managerialist, contractual and communitarian theories.[15] As noted in Tomasic, Bottomley and McQueen, rather than ascribe wholly to one theory, the Australian corporate environment operates with a level of pragmatism, drawing from the most convenient or appropriate theory to deal with the current issue to hand.[16]

---

14 Please refer to the 'Definition of terms' outlined below in Chapter 1.3.

15 Whilst this thesis does not focus in detail on corporation theory, please see the detailed general summary available in Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 51-66.

16 Ibid 66.

An extension of this pragmatic approach is the differing legislative measures applied to the various types of company permitted under the *Corporations Act.*[17] Another complexity is the diverse sources of regulation imposed upon all companies, both within the field known as corporate governance and beyond it, including instances where various sources impose the same (or slight variations on the same) duty contemporaneously.[18]

Equally, the field of equity, and in particular the fiduciary obligation, has received a great deal of academic and judicial commentary.[19] As a field of law with a vast history to draw upon, equitable judgments provide the opportunity not only to chart the jurisprudential growth of equitable principles, but also a unique perspective on the path and development of the corporate form. Both generally and specifically in relation to corporate law, the fiduciary obligation has been the topic of much debate, focussing primarily on the definition of the obligation and whether its application is proscriptive or prescriptive.[20]

Despite the volume of material touching on the concept of the company, and separately on the concept of the fiduciary obligation, the particular inter-relationship of a director's fiduciary obligation to the company is not consistently defined throughout equitable or corporate law scholarship. This has led to conflation, both academically and judicially,

---

17 ` See, for example, the various distinctions already present in the *Corporations Act*, such as s 45A (distinguishing small and large proprietary companies), s 135 (the replaceable rules, which can operate as a default position in relation to company management unless displaced by a company constitution, which deal on occasion quite differently with public and proprietary companies) ss 194-195 (a replaceable rule for proprietary companies in relation to director disclosure and voting, in contrast to the provision affecting public company directors in the same circumstances); *Corporations Act 2001* (Cth) s 112.

18 These regulations will be dealt with in Chapter 4, and specific discussion of corporate governance and the directors' duties in particular, will be covered in greater detail within that chapter.

19 Both the academic and judicial discourse on this field will be discussed in detail in Chapters 2 and 3.

20 Past outcomes and the ongoing debate in this area is detailed in Chapter 2.2.3.

of the terms 'fiduciary' and 'equitable' and, given the focussed aims underpinning the fiduciary obligation contrasted with the general aims of equity, that is problematic.[21] In the process of addressing the specific question within the thesis of the possibility of a director-shareholder fiduciary obligation, these doctrinal anomalies within both equity and corporate law will be addressed.

Firstly, academic and practitioner texts identify instances of fiduciary 'rules' in addition to the general fiduciary obligation, such as the misappropriation rule and the business opportunity rule. This thesis will demonstrate that these are, actually, specific practical applications of the underlying fiduciary obligation which arise due to the idiosyncracies of the director-company relationship. While this will not affect the application of these rules, it will clarify the discussion of the fiduciary obligation as it applies to directors. The thesis will then commence discussion of the more particular anomalies which have arisen.

Secondly, a number of general equitable principles are often conflated with the specific prohibitions arising under the fiduciary obligation. The duty to act *bona fide* in the best interests of the company[22] is often attributed as a fiduciary, rather than an equitable doctrine. Similar mislabelling occurs in relation to the duty of due care and skill.[23] The equitable debate regarding the primary nature of the fiduciary obligation as proscriptive or prescriptive has bled into corporate law scholarship as the 'fiduciary duty to disclose'.[24] This thesis will demonstrate through a detailed examination of the relevant

---

21 This is discussed within the thesis particularly at Chapter 3.3.3 and 4.5.

22 *Corporations Act 2001* (Cth) s 181, addressed in greater detail at Chapter 3.3.3.1.

23 *Corporations Act 2001* (Cth) s 180, again addressed in depth at Chapter 3.3.3.2.

24 Arising from a number of judgments, most noticeably *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 and *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626, and addressed specifically in Chapter 3.3.3.3.

case law that this 'duty' is the result of directors utilising the equitable defence of fully informed consent. This understanding can be used to inform discussion of the true content of the fiduciary obligation, and to establish the foundations from which to consider the beneficiary of such a duty.

Finally, a number of cases where the courts recognise circumstances in which it was appropriate for the beneficiary of the fiduciary obligation to be the shareholder have been handed down,[25] but the wider implications of these decisions on the doctrine of the fiduciary obligation as well as the field of corporate law have not been fully explored. A short article by Saunders in 2004 raised some of the cases drawn upon later in this thesis in the context of discussion about various personal actions available to shareholders, but suggested that the exact scope of these cases remains uncertain.[26] This thesis addresses these uncertainties. The aim of this thesis is to analyse both the fiduciary obligation as owed by directors, and the expansive case law in relation to the practical application of this duty, and define the circumstances in which the company beneficiary could give way to the shareholder beneficiary.

### *1.3 Definition of Terms*

Throughout the thesis, the terms 'company' and 'corporation' will be given their definitions as contained within the *Corporations Act*. A 'company' is defined in s 9 as 'a

[25] *Allen v Hyatt* (1914) 30 TLR 444; *Coleman v Myers* [1977] 2 NZLR 225; *Brunninghausen v Glavanics* (1999) 46 NSWLR 538; *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128; *Crawley v Short* (2009) 262 ALR 654; *Jones v Jones* (2009) 27 ACLC 1021; all of which will be analysed in Chapter 3.4.

[26] Ben Saunders, 'Putting the Spoils of Litigation into the Shareholders' Pockets' (2004) 22 *Company and Securities Law Journal* 535.

company registered under this Act',[27] whereas a corporation is defined in s 57A to include 'a company; and a body corporate (whether incorporated in this jurisdiction or elsewhere); and an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for such a purpose.' The conflict between the older English term 'company' and more modern North American terminology of 'corporation' is quite apparent in Australia, as a company is but one type of corporation for the purposes of the *Corporations Act.* Companies are the most common and economically significant form of corporation in Australia.[28] As the term 'company' has the more specific meaning within the *Corporations Act* and 'corporation' the more general, company will be used throughout this thesis in line with that narrower definition.

The term 'director' is given its definition according to s 9 of the *Corporations Act*, however recognition is made that many of the obligations placed upon directors are also assigned to those acting in 'director-like' capacity, such as officers and senior management.[29] This thesis notes the circumstances in which the broader consideration of the term 'director' is necessary, either under the relevant statutory provisions or at common law and equity.

The majority of the discussion within this thesis will use the term 'shareholder' to denote a member as defined by s 231 of the *Corporations Act*, due to the limitation discussed

---

27 Further definitional terms apply to companies considered within certain Chapters or Parts of the *Corporations Act*: *Corporations Act 2001* (Cth) s 9 'company'.

28 Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 4.

29 *Corporations Act 2001* (Cth) s 9 'officer' covers such persons, and directors obligations are, under the Act, owed in the most part by officers also. Individual instances where this is not true will be highlighted.

below under 'Scope'.[30] When the discussion raises other types of companies other than those limited by shares, direct reference to the particular type will be made at that time. Reference to 'the shareholders' as a cohort must also be recognised as distinct from the concept of 'the shareholders acting in general meeting', which is an organ of the company.[31] Again, these principles will be discussed in detail in the body of the thesis.

This thesis seeks to establish is the definition of a 'closely held company', for the purposes of refining the fiduciary obligation.[32] Consequently, this term is not defined at the outset, but rather the definition is developed across the body of the thesis as a whole. A preliminary working definition of a 'closely held company', which is further expanded and justified throughout the body of the thesis, is a proprietary company structure with few directors, few shareholders – and often one or two persons occupying both positions – potentially with familial or, at least, significantly close ties.

### *1.4 Scope*

This thesis focuses on the particular impact of fiduciary obligations within the field of corporate law for a number of reasons. Firstly, there is evidence of a clear historical development of the fiduciary obligation, consisting of a duty of loyalty and a duty to account for benefits gained,[33] and also of its application to the director-company relationship. This clarity assists in establishing the content of the duty and, consequently,

---

30 Chapter 1.4.

31 Adopting the organic theory of the company, where a normal, solvent company will have two decision-making organs, the board of directors and the members in general meeting: R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 14th ed, 2009) 221.

32 That is, not for other purposes, such as the reporting obligations such as established by *Corporations Act 2001* (Cth) ss 45A(2) and 293(1), for example.

33 Although the content of the fiduciary obligation is further developed in Chapter 2, this brief formulation is accepted in a general way in all common law countries: P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1.

its role within corporate law and governance, which has not previously been explored in such depth.[34] The discussion in this thesis is generally limited to the development of this obligation and relationship within the Australian context, although the historical connection of Australia and its legal system to England necessitates reference to both the case law and legislation of that jurisdiction. Reference to contemporary judicial trends within the broader common law systems is also made where relevant.

Secondly, the fiduciary obligation is particularly concerned with the 'conscience' of the duty-bound party, which makes it an ideal tool for study in the case of directors, in light of the focus of modern corporate governance.[35] Although the outcome of this study may elucidate other duties owed by directors, its primary purpose is to clarify the particular position of the fiduciary obligation within corporate law.

Finally, given that directors are subject to many duties from various sources, pragmatism necessitates that this thesis be limited to one duty in particular. Attempting to canvass all duties owed by directors is beyond the scope of such a study, but where relevant, brief description of the relevant statutory and other duties of directors will be made, in order to consider whether the findings within this study may be extrapolated to other like duties.

For similar reasons, the primary companies to be considered will be companies limited by shares, whether public or proprietary. Companies limited by shares represent the vast

---

34 Significant works contributing to this field include, eg, P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977); J R F Lehane, 'Fiduciaries in a Commercial Context' in P D Finn (ed), *Essays in Equity* (Lawbook Co, 1985) 95; John Glover, *Commercial Equity - Fiduciary Relationships* (Butterworths, 1995); Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005); Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005). None of these works focus explicitly on the company-director relationship.

35 This term will be discussed and defined in greater detail in Chapter 4.

majority of companies registered in Australia,[36] so this limitation does not unduly restrict the scope of this thesis.[37] As mentioned previously in this section, although the majority of the discussion will be made using the term 'shareholder', rather than the more generic 'member', it is not suggested that the findings of this study and propositions made are only applicable to shareholders: simply that they are the most appropriate point of commencement due to the numerical supremacy of companies limited by shares.

This thesis takes a traditional legal scholarship approach considering the primary sources of case law and legislation and relevant academic secondary sources, although it relies on the statistical and empirical work undertaken by other academics.

### *1.5 Structure*

This thesis is divided into six chapters, across which it will examine four important aspects of the fiduciary obligation within corporate law. Firstly, it will discuss the fiduciary obligation as a principle, highlighting its historical basis and the difficulties faced when attempting an abstract definition. Secondly, it will examine whether, in the specific circumstance of the fiduciary obligation owed by directors, it could or should to be owed to shareholders, rather than to the company given the modern development of the corporate form, and what limitations ought to be placed on such an obligation. Thirdly, it will contemplate whether this change would be consistent with and helpful to current corporate governance philosophy. Finally, it will consider, if a change is warranted, how such a change could be implemented in Australian law.

36 More than 99 per cent: Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 5.

37 Therefore this thesis will not expressly deal with companies limited by guarantee, or no liability companies, as defined by *Corporations Act 2001* (Cth) s 9, except where mention of such companies is made explicitly.

From these four aspects, this thesis is divided into six chapters, five of which follow this brief introduction to each of the topics to be covered. **Chapter Two** briefly charts the development of equity, from the Court of Chancery to its existence under (and the impact of) a judicature system. A similar exercise is undertaken in relation to the fiduciary obligation, following its inception in the Court of Chancery to its modern application by the Australian judiciary, before moving on to discuss the difficulty with developing an abstract definition of the fiduciary obligation. The most frequently raised defintions are discussed, highlighting their particular individual weaknesses. The most recent application of the fiduciary obligation by the High Court concludes this discussion. Chapter Two is intended to place the fiduciary obligation into context within the broader field of equity, to provide a position from which to consider its application to corporate relationships.

In **Chapter Three**, the current operation of the fiduciary obligation in the field of corporate relationships is analysed in light of the historical development of the corporation and other duties imposed upon directors. The historical context and policies which influence the development of corporate law result in a primary focus on encouraging economic activity, which curtails the potential utility of the fiduciary obligation, focussed as it is on conscience, to some degree. The cases in which the courts have held a fiduciary duty to be owed directly to shareholders are outlined, and the most frequently raised definitions (as discussed in Chapter Two) will be applied to the director-shareholder relationship. Chapter Three concludes with a consideration of whether the fiduciary obligation, currently owed by the director to the company with some limited exceptions, might be more appropriately owed to the shareholders on a wider basis. It is argued that, in the explicit circumstances to be defined in Chapter Five, it is more realistic to acknowledge that directors to owe their fiduciary obligation to the shareholders.

**Chapter Four** discusses the role played by the fiduciary obligation within the current philosophy of corporate governance. The various legal, quasi-legal, managerial, market-based and commercial cultural norms currently contributing to the state of corporate governance in Australia will be outlined, in particular the duties placed on directors at common law and equity, and their counterparts under the *Corporations Act.* This chapter examines whether causing directors to owe their fiduciary obligation to shareholders would be consistent with, and even enhance, corporate governance ideals. Drawing from the substantial scholarly work which exists within this field, it will review the alternative actions currently available to shareholders and the remedies which would be available, should such a change be implemented.

**Chapter Five** considers the various methods by which a fiduciary obligation to the shareholder could be imposed on directors. Drawing on the discussion of directors' duties in Chapter Three, while recognising the potential problems with legislative enactment, it argues that this would be a more effective initial method of implementation, at least initially, due to the uncertain position of intermediate courts in the development of equitable principles. It will also discuss the potential inhibitors for a fiduciary obligation to shareholders, such as the issue of management of conflicts in diversely held companies and isolating shareholdings in publicly traded companies. Chapter Five explains that, for practical purposes, fiduciary obligations ought to be owed by directors to individual shareholders only in the instance of closely held companies, and establish a definition for this term.

**Chapter Six** will draw together the key elements from each preceding chapter, to reinforce the conclusion that, in certain circumstances it would not only be appropriate, but beneficial for directors to owe their fiduciary obligations to shareholders.

In summary, the eight propositions that are supported by this thesis are that:

1. Fiduciary obligations in Australia are proscriptive, consisting of a duty of loyalty and a duty to account for benefits gained;
2. Despite difficulties with acceptance of a general proposition supporting fiduciary obligations, the current High Court holds fiduciary obligations to arise in circumstances which combine voluntary assumption with vulnerability or disadvantage;
3. There are recognised exceptions to the standard position that fiduciary obligations are owed by directors to their company, and not to the shareholders;
4. These exceptions primarily involve 'closely held companies';
5. In closely held companies, the shareholder is the appropriate beneficiary of fiduciary obligations owed by directors;
6. Recognising the shareholder as beneficiary of fiduciary obligations within closely held companies is consistent with corporate governance philosophy in Australia;
7. Recognising the shareholder as beneficiary of fiduciary obligations within closely held companies does not conflict with the other duties owed by directors, nor the other remedies available to shareholders; and

8. Although the most jurisprudentially sound method of implementation may be through the courts and equity, the more immediate method of implementation is via legislative intervention.

This thesis will clarify the current anomalies in approach to the fiduciary obligation across field of legal study, and provide an accurate statement of the content of the fiduciary obligation at operation within Australian law. After consideration of the alternatives already provided by the judiciary and academics, it will formulate the most appropriate method of recognising those relationships in which such an obligation will be owed. The circumstances defined by the term ‘closely held company’ will be shown to be sufficiently different from other corporate forms that refining the fiduciary obligation to be owed by the directors to the shareholders, instead of to the company, can be justified.

# 2 DEFINING THE FIDUCIARY OBLIGATION

## 2.1 *Introduction*

Before advancing the propositions supported by this thesis, an examination of the essence of the fiduciary obligation is vital. In order to argue that circumstances exist where the fiduciary obligations should recognised within the director-shareholder relationship, the current doctrine of fiduciary obligations must be defined and understood.

The fiduciary obligation, like many legal principles, owes much to its origins, and it is important to place it appropriately within its historical context. As an equitable principle, that context includes the development of the equity jurisdiction in England, and its eventual cohabitation with the common law under the judicature system.[1] Although the law has developed significantly since the 1800s, Australia, as a member of the former British Empire, historically owes much of its legal system and court structure to that which was inherited from England at the time of settlement.[2] This chapter will review the origins of the Court of Chancery, the implementation of the judicature system and its eventual transplantation to the Australian setting, and discuss the developments of what we now consider to be the hallmarks of the fiduciary obligation throughout this period.

As this review of the fiduciary obligation is undertaken, it becomes apparent that, although the fundamental rules underlying the fiduciary obligation were established early

---

1 The system put in place by the Imperial *Judicature Act 1873* 36 & 37 Vict c 66, which brought the administration of the two distinct bodies of the common law and equity under the control of the one court, as discussed in detail below.

2 Stuart Macintyre, *A Concise History of Australia* (Cambridge University Press, 3rd ed, 2009) 16.

on, it continues to defy easy definition as an abstract concept. Additionally, language describing this obligation continues to shift, as this chapter analyses the logic of the replacement of the once-common description of a 'fiduciary relationship' with the approach to the 'fiduciary obligation'. The debate regarding the prohibitive nature of the fiduciary obligation is also addressed, and its prevention of greater certainty within this field.

Despite these potential inhibitors, the chapter concludes that the fiduciary obligation now occupies a firm position within certain categories of relationship, and both the remedies for breach and the defences to claims of breach have been clearly established, providing sufficient certainty for the principle to be applied more widely. This provides an appropriate foundation for the discussion of the role of the fiduciary obligation within the wider corporate context which takes place in the chapters that follow.

### 2.1.1 *The Development of the Equity Jurisdiction in England*

The fiduciary obligation is a principle of equity, which, in Anglo-Australian law, is the title used to describe the body of law that, prior to the introduction of the judicature systems, was administered in England by the Court of Chancery.[3] The Court of Chancery evolved in response to perceived flaws with the common law system. Originally established in the twelfth century, the common law system developed in the thirteenth and fourteenth centuries until it became a requirement that matters coming

[3] G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 1. This thesis will contain a very brief history of the Court of Chancery. For further detailed information, see generally: G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011); Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012); R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002).

before the courts fell into one of the recognised 'forms of action'.[4] The form of action by which the matter was brought to court dictated the way in which it would proceed before the court, from the originating process to the procedure to be followed and, ultimately, to the final relief available. For those unable to use one of the forms of action, or those disappointed or frustrated by the common law, an avenue of relief was available through petitioning the King to provide justice.[5]

After a time, these petitions came to be addressed to the Chancellor as head of the Chancery, the King's secretariat and the office responsible for issuing royal writs.[6] Initially when dealing with these applications for extraordinary justice, the Chancellor was performing an executive rather than a judicial function, and it was some time later that the title the Court of Chancery came into use.[7] The Court of Chancery was improved and regularised under the Chancellors through the 1500 and 1600s. By the end of the term of Lord Nottingham, who was Chancellor from 1672 to 1683 and who is often described as the father of modern equity,[8] a coherent body of equitable principles had emerged. These principles are collectively referred to as the 'equitable maxims', generalisations which are reflected within most doctrines of equity and the remedial

---

4 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 1.

5 Frederic William Maitland, 'Trust and Corporation' in H. D. Hazeltine, G. Lapsley and P. H. Winfield (eds), *Maitland: Selected Essays* (Books for Libraries Press, Inc, 1936) , 157; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 1-2.

6 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 4; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 1-2.

7 According to Simon Chesterman, 'Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of the Law'' (1997) 24(3) *Journal of Law and Society* 350, 352, first mention was in the Statute of 1340; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 4-5.

8 See for example, John Lord Campbell, *The Lives of the Lord Chancellors and the Keeper of the Great Seal of England* (John Murray, 1845), 378; David Sugarman and Ronnie Warrington, 'Land Law, citizenship and the invention of "Englishness".' in John Brewer and Susan Staves (eds), *Early Modern Concepts of Property* (Routledge, 1996) , 118; Dennis Klinck, 'Lord Nottingham and the Conscience of Equity' (2006) January *Journal of the History of Ideas* 123, 124.

responses available through them.[9] Although these maxims were developed in latin, they have been translated into English, for example: 'he who seeks equity must do equity';[10] and 'he who comes to equity must do so with clean hands'.[11] Collectively, the maxims are still seen as explaining the 'nature of equity'.[12]

Ultimately, the Chancellors' focus on conscience in individual cases led to conflict between the common law and equity jurisdictions, perhaps most notoriously in the *Earl of Oxford's Case.*[13] There, the common law judgment of Coke CJ of the King's Bench was prevented from being enforced by an injunction issued by the Lord Chancellor, Lord Ellesmere, before whom it had been successfully argued that the common law judgment had been obtained by fraud. It was established that Chancery could set aside judgments made at common law where they were against conscience, so that when equity and the law came into conflict, equity should prevail.[14] As the common law and equity were administered by separate court systems, this led to delays and difficulties when conflicts arose between the two, such as where a defendant at common law had a good equitable defence to the claim but could not raise it in the common law court.[15] The only solution available was, as demonstrated in the *Earl of Oxford's Case*, the common injunction which stopped the proceedings at common law.

---

9 Some maxims have fallen out of use, or are recognised now 'more in the breach than in the observance': Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 25.

10 Traditionally recognised as developing from *Colvin v Hartwell* (1837) 7 ER 488.

11 Traditionally recognised as developing from *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318.

12 Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 25. See also: Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 28-38; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 15-22; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002).

13 (1615) 1 Ch Rep 1.

14 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 3; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 8.

15 Ibid.

As a response to such frustrations, the system was reformed by the enactment of the *Judicature Act 1873*.[16] This Act brought the administration of these two bodies of law under the control of the one court with five divisions.[17] Under the judicature system, no party could be required to start an action again because they had come to the wrong jurisdiction – they could instead be transferred to the correct division. Section 25(11) of the *Judicature Act* enshrined Sir Francis Bacon's resolution to the *Earl of Oxford's Case* in legislation, ensuring that in cases of conflict between the rules of the common law and equity, equity prevailed.[18] Although now it is clear that only the administration of the legal principles from these jurisdictions were 'fused', and not the principles themselves,[19] it was not always so. In the early days of the judicature system in England, a number of decisions proceeded on the erroneous assumption that the *Judicature Act* had united the principles of common law and equity into the one system, from which desired pieces could be selected as suited the case before the court.[20] But, as is generally recognised, that was not the intention of the legislature in bringing in a judicature system.[21] In *Salt v Cooper*[22] Sir George Jessel MR observed that

> the main object of the Act was to assimilate the transaction of Equity business and Common law business by different Courts of Judicature. It has been sometimes inaccurately called 'the fusion of Law and Equity'; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act.[23]

---

16 36 & 37 Vict c 66 ('*Judicature Act*').

17 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 45.

18 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 3.

19 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 53.

20 Ibid 52-53.

21 Although some suggest the full implications of fusion remain to be uncovered: L.S. Sealy, 'Fiduciary Obligations, Forty Years On' (1995) 9 *Journal of Contract Law* 37, 52.

22 (1880) 16 Ch D 544.

23 Ibid at 549; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 53.

This statement has since been reflected in judgments of various appellate courts.[24] Nonetheless there have been judicial instances of the 'fusion fallacy', where a remedy previously unavailable in that jurisdiction has been administered, or a principle from another jurisdiction imported and sometimes modified.[25]

### 2.1.2 *The Court System in Australia*

Prior to the *Judicature Act*, Australia was colonised by the British,[26] and the court system established here closely mirrored that of England at that time. In New South Wales, the Supreme Court was vested with the jurisdiction exercised by the Lord Chancellor in England.[27] Ironically, that permitted the fusion of the administration of common law and equity in the one court nearly fifty years before the judicature system was introduced in England. However the lack of a common procedure prevented this early arrangement from operating as a proper judicature system[28] and in 1840 that arrangement was undone by the *Administration of Justice Act (NSW)*.[29] Thereafter, until the *Supreme Court Act*

---

24 See for example *O'Rourke v Hoeven* [1974] 1 NSWLR 622, 626 (Glass JA); *Bank of Boston Connecticut v European Grain and Shipping Ltd (The Dominique)* [1989] AC 1056, 1109 (Lord Brandon); *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, 691 (Mummery LJ).

25 See, eg, *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298. See generally R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 54.

26 The British settlement fleet led by Captain Aurthur Phillip first landed at Botany Bay on 18 January 1788, Stuart Macintyre, *A Concise History of Australia* (Cambridge University Press, 3rd ed, 2009) 16.

27 Section 9 of the Charter of Justice, Letters Patent issued under authority conferred by 4 Geo 4 c 96, a grant of power continued by the *Australian Courts Act 1828*, 9 Geo 4 c 83, s 11; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 5; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 12.

28 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 13-14.

29 *Administration of Justice Act 1840* (Imp) 4 Vict, c 22.

*1970* (NSW), the equity jurisdiction of the Supreme Court of New South Wales was administered separately from the common law.[30]

In contrast, after the establishment of the Supreme Court of South Australia,[31] the *Supreme Court Procedure Act 1853* was passed, which anticipated the eventual reforms to the system in England.[32] The Imperial *Equity Act 1866*[33] and *Supreme Court Amendment Act 1867*[34] implemented a judicature system in South Australia, and the two systems were ultimately fused by the *Supreme Court Act 1878*.[35] The other Australian states maintained a similar separation to that of NSW and England until 1876 in Queensland, 1880 in Western Australia, 1883 in Victoria and 1932 in Tasmania.[36] In New South Wales, fusion was not achieved until the *Law Reform (Law and Equity) Act 1972* (NSW) came into force.[37]

### 2.1.3 *The Development of the Fiduciary Obligation*

Although equity is no longer administered in a separate jurisdiction, it retains its distinctive character. One child of equity is the fiduciary obligation.[38]

---

30 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 14-15.

31 *South Australia Act 1834* (Imp) 4 & 5 Wm 4, c 95 s 2; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 21-22.

32 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 22.

33 *Equity Act 1866* (Imp) 30 Vict, c 20.

34 *Supreme Court Amendment Act 1867* (Imp) 32 Vict, c 7.

35 *Supreme Court Act 1878* (Imp) 41 & 42 Vict, c 116.

36 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 18-21, 50.

37 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 6; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 50-51.

38 The phrase 'child of equity' is adapted from a description by Justice Kirby in the W A Lee Equity Lecture (Queensland University of Technology, 19 November 2008) later published as: Michael Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 452-453, which he acknowledged as drawn from a metaphor by Lord Denning.

> [I]f a confidence is reposed, and that confidence is abused, a court of equity shall give relief.
>
> *Gartside v Isherwood* (1788) 28 ER 1297, 1298[39]

The term ‘fiduciary’ is a relative newcomer in equity, in that it only achieved frequent recognition in the law reports towards the middle of the 1800s.[40] Relationships now referred to as fiduciary were previously termed matters of ‘confidence’ or ‘trust’, as indicated by the quotation from *Gartside v Isherwood*.[41] This was appropriate while the Court of Chancery granted relief based on broad principles and had a degree of discretion, as relationships of trust had long attracted the protection of the courts.[42]

However, as equity developed rules and a technical vocabulary, the meaning of the word ‘trust’ formalised, and it became inaccurate to apply it so broadly.[43] Use of words such as ‘confidence’ also fell out of favour.[44] Counsel and the courts for some time described such relationships as quasi-trust or for ‘some intents and some purposes’[45] a trust. From a modern standpoint, this mislabelling is curious, because whilst all trust relationships contain fiduciary obligations, it is not true that all circumstances which involve fiduciary obligations are also trusts.[46] Still, the remedies following a breach of a fiduciary

---

39 Lord Thurlow LC cited this principle as being the only one on which the case of *Filmer v Gott* (1774) 2 ER 156, to which Mr Attorney-General Wedderburn for the plaintiff had referred, could have been supported: Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 352.

40 L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, L.S. Sealy, 'Some Principles of Fiduciary Obligation' (1963) *Cambridge Law Journal* 119, as cited in P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 1; L.S. Sealy, 'Fiduciary Obligations, Forty Years On' (1995) 9 *Journal of Contract Law* 37, 38.

41 *Gartside v Isherwood* (1788) 28 ER 1297, 1298.

42 Robert Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285, 285.

43 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 1; L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 70.

44 L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 71.

45 *Cholmondeley v Clinton* (1821) 4 ER 721, 754.

46 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 57.

obligation remain closely aligned to the remedies for breach of trust, reflecting this historical position.[47]

Although the actual word 'fiduciary' can be found as early as 1717,[48] it failed to find favour with the judiciary of the time. The word 'fiduciary' itself has its etymological origins in the Latin noun *fiducia*, meaning confidence, trust or reliance, and the adjective *fiduciarius*, something entrusted or given in trust, both of which are derived from the verb *fido*, meaning 'to trust'.[49] Although the label was used infrequently by the courts, it was adopted in many of the published works on equity available from the 1820s.[50] As recently as 1963, an academic felt it necessary to explain that 'for convenience' the word 'fiduciary' was used as a noun, with 'beneficiary' as its counterpart.[51]

From its earliest applications, certain features still visible in the modern application of fiduciary obligations were evident. *Keech v Sandford*[52] is recognised as being 'the progenitor of the modern fiduciary concept.'[53] *Keech* concerned a trust established in favour of an infant over the lease of rights to a market in the town of Romford. Prior to the expiration of the lease, the trustee sought to renew the lease in favour of the infant, but the lessor declined. When the lease subsequently expired, the trustee obtained a new lease for the market in his own name. An action was brought against the trustee for an

---

47 Remedies will be discussed generally below at Chapter 4.6.

48 *Bishop of Winchester v Knight* (1717) 1 PWms 406, 407 (Cowper LC); as cited in L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 72.

49 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 81.

50 L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 72.

51 Ibid 119 at footnote 1. There is some inconsistency in the terms used to describe the counterpart to the fiduciary across equity scholarship, with some modern academics preferring 'principal', possibly from the agent-principal relationship (see, eg, G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 100) whilst others retain 'beneficiary', which demonstrate the roots of the principle within the trustee-beneficiary relationship.

52 (1726) Sel Cas Ch 61, 25 ER 223 ('*Keech*').

53 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 58, although Rotman then proceeds to discuss *Walley v Walley* (1687) 1 Vern 484 as potentially the first example of the application of the fiduciary principle.

assignment of the lease to the infant, and an account of profits obtained under the lease. Lord Chancellor King found that the trustee held the renewal of the lease for the infant, and that any profits must be disgorged. In his very brief judgment, Lord Chancellor King said:

> This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is obvious what would be the consequence of letting trustees have the lease, on refusal to renew to the *cestui que* use.[54]

This extract highlights the strict nature of fiduciary obligations: the court looks not only to the existence of actual harm or abuse of the beneficiary's interests, but also to the potential harm to those interests.

There was no suggestion of fraudulent activity in *Keech*, but it was 'proper' that the rule against conflicts be strict in its application. This theme was continued in the case law which followed, such as where it was described as 'dangerous' to permit a trustee to deal with shares which had previously been part of the estate over which he was an executor.[55] The courts initially referred to the potential evidentiary difficulties of establishing whether a fiduciary had 'made advantage' as motivation for the strict application of the fiduciary obligation.[56] But as Rotman points out, the real rationale underlying the strict application of the rule against conflicts is that the potential for fiduciaries' self-interested behaviour at the expense of their beneficiary is so great that it must be prohibited.[57] He compares the strict application of the conflicts rule to taking

---

[54] *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223, 223. This extract in fact amounts to the majority of the judgment. Only the first and final sentences have been excluded.

[55] *Blewett v Millett* (1774) 7 Bro PC 367, 373.

[56] *Ex parte Lacey* (1802) Ves Jun 625, 627; *Re James* (1803) 8 Ves Jun 337, 345.

[57] Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 63-64.

away the fruit of temptation, rather than simply moving it to a higher shelf,[58] which would be the case if the rule required *mala fides* or the existence of actual harm.[59]

Although these early cases mention 'rules' regarding the fiduciaries' behaviour, the expression of these rules as we would recognise them today, was not immediate in the early case law. Establishing the content of the two duties which form the fiduciary obligation, a duty of loyalty and a duty to account for benefits gained – more informally termed the 'no conflict' and 'no profit' rules by many academics[60] – was not the focus of the early development of the fiduciary concept. Instead, focus fell on the relationships in which such duties arose, laying the juridical groundwork for the scope of the fiduciary obligations' application. For example, *Billage v Southee*,[61] which declared that doctor-patient relationships contain fiduciary elements, was decided long before the precise nature of fiduciary obligations had been widely accepted.[62]

Most of the early cases had dealt with conflicts in a similar broad manner to *Keech*. The first explicit reference to the 'no conflict' rule appears in *Hamilton v Wright*,[63] which was followed eight years later by the classic description of the rule in *Aberdeen Railway Co v*

---

58 Ibid 64. The 'fruit of temptation' analogy has been used by a number of authors, including Conaglen, who cites *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 406-407 as authority: Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) July *Law Quarterly Review* 452, 463.

59 Despite this lack of a requirement for *mala fides*, the judiciary has remained interested in the evidentiary difficulties of establishing some kind of *mala fides* when dealing with fiduciary obligations. See, for example, , the discussion of *Parker v McKenna* (1874) LR 10 Ch App 96 on the following page; *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 154; *Chan v Zacharia* (1984) 154 CLR 178, 204.

60 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 100; Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 347; *Moss v Moss (No 2)* (1900) 21 LR (NSW) Eq 253; *Chan v Zacharia* (1984) 154 CLR 178. The 'no conflict' and 'no profit' rules will be the description used by this thesis.

61 (1852) 68 ER 623.

62 It is not generally accepted in Australia today that the doctor-patient relationship contains fiduciary obligations per *Breen v Williams* (1996) 186 CLR 71; cf the Canadian approach in cases such as *McInerney v MacDonald* (1992) 93 DLR (4th) 415.

63 (1842) 8 ER 357, 361.

*Blaikie Bros*.[64] Blaikie Bros contracted with the Aberdeen Railway Co to supply iron chairs for the railways. When the contract was partially complete, with 2710 tons of chairs already supplied, the Railway Co refused to accept the 1440 tons remaining to be supplied (and for which payment was yet to be made). Blaikie Bros sought a decree that the Railway Co was obliged to complete the contract or to pay damages. The Railway Co sought to have the contract set aside on the basis that a director of the Railway Co, Mr Thomas Blaikie, was the managing partner of Blaikie Bros, and as such could not contract on behalf of the Railway Co with another entity in which he had an interest. After deciding a preliminary matter, Lord Cranworth LC went on to discuss whether the law precluded a director from dealing on behalf of a company with himself, or with a firm in which he is a partner.

> The Directors are a body to whom is delegated the duty of managing the general affairs of the Company.
> A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. *And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.*
> So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.[65]

Individual expression of the specific conflict of interest and duty relating to the fiduciary and profits, now known as the 'no profit' rule, which has been attributed in some part to the emergence of the concept of corporate personality,[66] also took place after the pronouncement in *Keech*, towards the latter half of the 19$^{th}$ century. In *Parker v*

[64] (1854) 1 Macq 461.

[65] *Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq 461, 471 (emphasis added).

[66] John Glover, *Commercial Equity - Fiduciary Relationships* (Butterworths, 1995) 147, although the author cites no authority for this proposition and, in fact, lists various cases concerning the profit rule which were decided nearly 20 years prior to the decision in *Salomon v Salomon & Co* [1897] AC 22.

*McKenna*, Lord Cairns LC discussed the application of the 'no profit' rule, but couched it in the language of agency, rather than fiduciary obligation:

> The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the Court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, in my opinion, account to their principal.[67]

The development of the 'no profit' and 'no conflict' rules continued, and they remained conjoined in academic and judicial writing.

*Bray v Ford*[68] involved a dispute within the leadership of Yorkshire College. The vice-chairman of the College, who had also acted a solicitor for the College, sued the governor of the College for libel following a letter being distributed amongst persons associated with the College. The letter accused him of, amongst other things, 'whilst holding a fiduciary position … illegally and improperly … making a profit as [the College's] paid solicitor.'[69] Lord Herschell expressed the 'no profit' rule thus:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position… is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based upon the consideration that, human nature being what it is, there is danger of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.[70]

As can be seen, the expression of the rule mentions conflict of interest and duty in the context of making a profit, which reflects the fact that on most occasions when the 'no

---

67 *Parker v McKenna* (1874) LR 10 Ch App 96, 118.
68 [1896] AC 44.
69 *Bray v Ford* [1896] AC 44, 44.
70 Ibid 51-52.

profit' rule is breached there will be a concurrent breach of the 'no conflict' rule.[71] However, it was eventually settled that the concept of 'no profit' is not so broad as to imply that the fiduciary is not entitled to be paid for his or her work. It was put best by Lord Normand in *Dale v Inland Revenue Commissioners*:[72]

> it is not that reward for services is repugnant to the fiduciary duty, but that he who has the duty shall not take any secret remuneration or any financial benefit not authorised by the law, or by his contract, or by the trust deed under which he acts, as the case may be.

The 'no profit' rule has been described as hard to analyse, as most of the cases where a profit is made in breach of fiduciary obligations also involve the breach of the 'no conflict' rule.[73] As such, for much of its history, judicial discussion of the 'no profit' rule was either couched in terms of, or as a sub-rule of, the 'no conflict' rule. For example, in *Boardman v Phipps*, Lord Upjohn stated that it was a

> fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position of conflict.[74]

Both the 'no profit' and 'no conflict' rules were adopted into Australian jurisdictions as settled principles applicable to those occupying a 'fiduciary position',[75] and the High Court of Australia ultimately clarified that the two rules, 'while overlapping, are distinct'.[76]

---

71 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 100.
72 [1954] AC 11, 27.
73 Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) July *Law Quarterly Review* 452, 465-466.
74 *Boardman v Phipps* [1967] 2 AC 46, 123.
75 *Moss v Moss (No 2)* (1900) 21 LR (NSW) Eq 253, 258 (Simpson CJ in Equity).
76 *Chan v Zacharia* (1984) 154 CLR 178, 199.

The late 19th and early 20th centuries saw equity dealing with scandals associated with public company floatations,[77] enabling further refinement of the fiduciary principle through cases such as *Gluckstein v Barnes*,[78] *Re Coomber*[79] and *Nocton v Lord Ashburton*.[80] These cases, amongst others, began to address areas such as the defences available to claims of breach of fiduciary duties, the emergence of the fiduciary obligation separate from the concept of fiduciary relationship, and remedies available for breach of duty.

Although the law of trusts was a recognised branch of law with rules and principles which were enunciated in text books, Sealy highlights that it was thought that the law of fiduciary obligations would not be expressed in texts, despite sharing its basis with the law of trusts.[81] As discussed above, for a significant time, fiduciary relationships were defined on the basis that, should a wrong arise under the relationship, the same remedy would exist against the wrongdoer as would exist against a trustee.[82] This reverse-engineering approach to the fiduciary concept was both misleading and incorrect, as the authorities also made it plain that not all trust principles applied to every fiduciary relationship.[83]

The absence of the fiduciary obligation from academic texts remained until the late 1900s. In his seminal 1977 text 'Fiduciary Obligations', Finn rejects the use of the phrase 'fiduciary relationships' in favour of 'fiduciary obligations', as he believes that it

77 L.S. Sealy, 'Fiduciary Obligations, Forty Years On' (1995) 9 *Journal of Contract Law* 37, 40-42.
78 *Gluckstein v Barnes* [1900] AC 240.
79 *Coomber v Coomber* [1911] 1 Ch 723.
80 *Nocton v Lord Ashburton* [1914] AC 932.
81 L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 72.
82 *Re West of England and South Wales District Bank, ex parte Dale & Co* (1879) 11 Ch D 772, 778 (Fry J); as cited in L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 72.
83 *Coomber v Coomber* [1911] 1 Ch 723, 728-729 (Fletcher-Moulton LJ); as cited in L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 73.

was not merely because a person was labelled a fiduciary that a certain rule would be applied to them, but because a particular equitable rule applied to a person that they would be a fiduciary for the purposes of that rule.[84] He compares the position to that of the law of torts: a particular obligation will be imposed upon a person because that person is carrying out particular activities which require the law's regulation.[85] Still, Finn believes that it is necessary to 'define who Equity would ordain as fiduciary', but that this definition is only the first step in the process.[86]

Although the relationship plays a pivotal role in attracting the supervision of equity through the fiduciary obligation, a finding that one party is a fiduciary does not consequently mean that all or potentially any other obligations arising from the relationship will be fiduciary in nature.[87] Therefore, discussing specific 'fiduciary obligations' owed by one party to another is preferred to labelling the entire relationship a 'fiduciary relationship'.[88] This terminological change is important as it more appropriately describes the legal situation, and will be adhered to throughout this thesis.

---

84 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 2.

85 Ibid.

86 Ibid, and repeated in later discussion at 201.

87 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 99; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 180-181; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1 [4552].

88 Unfortunately, the High Court of Australia has returned to the language of 'fiduciary relationships' throughout its recent judgment, *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.

## 2.2 *The Australian Approach to the Fiduciary Obligation*

### 2.2.1 *The Fundamental Position*

Finn's text, 'Fiduciary Obligations', is internationally recognised as one of the first texts dedicated to the topic, and commenced a period of refinement of the concepts which had, by this time, been established through the case law discussed above. The current 'accepted mainstream' of the fiduciary obligation, as Finn acknowledges, revolves around the duties of good faith imposed to exact standards of good conduct from persons unable to deal with each other at an arm's length due to their relationship.[89] As the relationship between the parties plays a pivotal role in attracting the supervision of equity through the fiduciary obligation, it has been said that the obligation itself may vary depending on the nature of the underlying relationship.[90] Unfortunately, there is no universally accepted definition of a relationship which attracts fiduciary obligations, nor a universally accepted test for determining when a fiduciary obligation will attach to a relationship.[91] One consequence of this uncertainty is the conservative approach taken by Australian courts in this field.[92] This will be relevant when considering the likely response to a proposed recognition of a director-shareholder fiduciary obligation.

Although a degree of uncertainty flows from the inability to enunciate a universally accepted conceptual position defining when fiduciary obligations will attach to a

---

89 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 78.

90 *Chan v Zacharia* (1984) 154 CLR 178, 195 (Deane J).

91 These combine to create another reason why the phrase 'fiduciary relationship' should be avoided: Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 180. This is not the only area of law where such uncertainty prevails (see, for example, the law of torts). However, the scope of this thesis is limited to the discussion of the fiduciary obligation.

92 See, for example, the discussion to follow in relation to the expansion of the categories of relationship where a fiduciary obligation will be owed.

relationship,[93] Australian courts have firmly established that certain categories of relationships are fiduciary in nature. Demonstrating that the relationship falls within one of those categories will be sufficient to attach a presumption of fiduciary obligations,[94] although the manner of this attachment remains debated.[95] Since the decision of *Hospital Products v United States Surgical Corp*,[96] the following relationships[97] are recognised as founding a presumption of fiduciary obligations:[98] trustee-beneficiary, solicitor-client, director-company, promoter-company, agent-principal, partner-partner, employee-employer.[99] More controversial categories of relationship are the priest-penitent; doctor-patient; Crown-Indigenous person; and parent-child relationships; which have been found to be the basis for fiduciary obligations in only limited cases.[100] Parties to relationships which are considered to be analogous to those contained within the list, or new relationships entirely, can still find themselves bound by fiduciary obligations on an

93 At least one academic argues that, according to case law, the outcome is not uncertain at all – it is simply a matter of courts and then later academics failing to articulate a coherent conceptual position: Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 400.

94 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 111-112; Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 340.

95 See discussion of the various definitional debates below from Chapter 2.2.2 on.

96 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (‘*Hospital Products*’).

97 As will be discussed in detail shortly, this list is not exhaustive.

98 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68 (Gibbs J), 96 (Mason J); *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 61 (Sopinka J).

99 These categories are the common listed relationships: G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 111; Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 340. ‘Employee-employer’ does on occasion cause controversy, as not all employees will be sufficiently senior to attract the interest of equity. However, the majority of commentators and the High Court in both *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 included that relationship on the status-based list (*contra* G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 111).

100 In Australia, *Johnson v Buttress* (1936) 56 CLR 113, 134-5, *Breen v Williams* (1996) 186 CLR 71 are authorities in relation to the doctor-patient relationship; *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 555 refers to the priest-penitent relationship without any further discussion. There are Canadian authorities for doctor-patient and parent-child relationships: *Norberg v Wynrib* (1992) DLR (4th) 449, *McInerney v MacDonald* (1992) 93 DLR (4th) 415 and *M(K) v M(H)* (1992) 96 DLR (4th) 289 respectively. The Crown-Indigenous person relationship is not acknowledged under Australian law as one where a fiduciary obligation operates, due to the limitations in the approach to the fiduciary obligation as being wholly proscriptive and concerned with ‘economic’ interests: *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 111-113, 203-204; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 158.

*ad hoc* basis, as has regularly been the case in relation to the following relationships: bank-customer;[101] financial advisor-client;[102] manufacturer-distributor;[103] and between joint venturers.[104]

Flannigan refers to the list of nominate categories above as the 'status-based' fiduciary relationships.[105] He cautions that some of these status-based fiduciaries are not 'trusted' at all, which, he concludes, suggests that there ought not be any status-based fiduciary relationships, but that the existence of a fiduciary relationship should always be established on the facts.[106] Whilst the label of status-based fiduciary relationships is accepted, as is the concern that the underlying justification is not always 'trust',[107] Flannigan's suggestion that status-based relationships should not exist may be one step too far. The presumption created by the existence of the relationship is rebuttable, and so, in fact, the existence of a relationship in which fiduciary obligations flow is always established on the facts. Finn also cautions that a fiduciary for one obligation is not *ipso*

101 *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390.

102 *Contra Pavan v Ratnam* (1996) 23 ACSR 21; but *LT King Pty Ltd v Besser* (2002) 172 FLR 140, which applied the Canadian authority of *Hodgkinson v Simms* [1994] 3 SCR 377; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 (21 September 2012). This could be seen as a more broad category which incorporates bank-customer also. The relationship of stockbroker-client has on occasion been included in the status-based relationships following *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, particularly Brennan J at 385, and could be read as a specific instance of a 'financial advisor' who was a stockbroker. In *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 (21 September 2012), the plaintiffs contended that a contractual obligation existed which formed a positive duty which mirrors the fully informed consent defence. Rares J declined to find such a positive contractual obligation, but did accept that the fiduciary obligation itself was not excluded by the contractual relationship between the advisor and clients in these circumstances: [729]. Although citing the relevant authorities throughout the discussion which follows, Rares J does not overtly state whether the financial advisor-client relationship is being held to contain a fiduciary obligation on an *ad hoc* basis, or whether he believes it to be part of the status-based relationships which automatically attract the interest of equity. The language Rares J employs at [732]-[733] may suggest the latter.

103 As discussed in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

104 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 151 CLR 1; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 203 CLR 89; *Friend v Booker* (2009) 239 CLR 129.

105 Robert Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285, 294.

106 Ibid, particularly the discussion within footnote 45.

107 The potential justifications for a fiduciary obligation will be discussed in the following sub-heading, "The Definitional Debate": see Chapter 2.2.2.

*facto* a fiduciary for all, or potentially any, other obligations,[108] and that the finding of a fiduciary relationship only marks the beginning of the enquiry.[109] This is eminently logical.

A further and perhaps more pertinent caution against this 'list method' comes from Weinrib. He fears that a 'list of nominate relations dulls the mind's sensitivity to the purposes for which the list has evolved and tempts the court to regard the list as exhaustive and to refuse the admittance to new relations which have been created as a matter of business exigency.'[110] Although the High Court quite firmly states on this point that the categories of relationship are not regarded as closed,[111] shortly thereafter in the same judgment Gibbs CJ notes that his Honour 'doubt[s] it [is] fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist.'[112] The risk of a closed mind and lack of guidance as to how the criteria should be applied are concering. This area remains one in which the Australian courts have been cautious, as can be seen in the lack of expansion of the categories since *Hospital Products*.[113]

Although Mason J dissented in *Hospital Products*,[114] his Honour's position on fiduciary obligations has been adopted by the recent joint judgment of the High Court in *John*

108 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 2.

109 P D Finn, 'Fiduciary Law and the Modern Commercial World' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, 1992) 37 as cited in L.S. Sealy, 'Fiduciary Obligations, Forty Years On' (1995) 9 *Journal of Contract Law* 37, 41.

110 Ernest J Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, 5.

111 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68 (Gibbs CJ).

112 Ibid 69 (Gibbs CJ).

113 See especially Michael Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 457 on.

114 Justice Mason found that Hospital Products owed fiduciary obligation for the limited purpose of protecting and promoting USSC's Australian product goodwill, because USSC had entrusted HP with the responsibility of promoting their products within Australia: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 100. The majority of the High Court found there

*Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*.[115] This adoption was not explicit approval, however, as the High Court merely examines the position to which the parties had agreed[116] – which was Mason J's position. It is clear from this decision that the High Court is maintaining what it has now termed the 'accepted traditional categories' list approach. This choice of label, replacing 'status-based relationships', is interesting in itself. An expansion to a list described as the 'accepted traditional categories' seems less likely than one called the 'status-based relationships'. After all, a relationship type which has not previously been regarded as including fiduciary obligations does not fit linguistically or logically into a list described as the 'accepted traditional categories', as it cannot be either 'accepted' or 'traditional'. However, the status-based relationships are those which have traditionally been recognised to include fiduciary obligations, and it may be that this change is only semantics. In this thesis, the description of 'status-based relationships' is preferred, as a more objective language choice.

Additionally, the Court in *JAC v White City* reiterates that the 'critical feature' of these status-based relationships is

> 'that the fiduciary undertakes or agrees to act *for or on behalf of* or *in the interests of* another person in the exercise of a *power* or *discretion* which will affect the interest of that other person in a legal or practical sense.' From this power or discretion comes the duty to exercise it in the interests of the person to whom it is owed.[117]

---

to be an implied term of the contractual relationship that HP would use its best efforts to promote the sale of USSC products within Australia, but no fiduciary oblgation.

115 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 ('*JAC v White City*').

116 Ibid 34.

117 Ibid 34-35, quoting *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96-97 (emphasis added by the High Court in *JAC v White City*).

Another area of certainty in addition to the status-based relationships is the formulation of the fiduciary obligations themselves, which have been described as a 'bedrock of two negative principles'.[118] A person who owes a fiduciary obligation to another ('the fiduciary') must not place themselves in a position where their personal interests or duties conflict with, or may possibly conflict with, the interests of the person to whom the duty is owed ('the beneficiary'), nor may they secretly profit from the relationship.[119] These prohibitions are better known today in Australia as the 'no conflict' and 'no profit' rules. It remains true that acting *mala fide* is not necessary to breach the 'no conflict' rule, maintaining the strict nature of the obligations from its early sources.[120]

As the obligations are formulated to protect the beneficiary, the fiduciary may be excused by obtaining fully informed consent from the beneficiary, either prior to a potential breach, or via retrospective absolution.[121] This, in essence, adds to the proscriptive duty[122] a positive obligation of full disclosure from the fiduciary in relation to conflicts or profits arising in the course of the relationship, as fully informed consent cannot be obtained without full disclosure.[123] The onus of proving the beneficiary's fully informed consent naturally rests on the fiduciary.[124] The remedies for a breach of a fiduciary

---

118 Charles Harpum, 'Fiduciary Obligations and Fiduciary Powers - Where Are We Going?' in Peter Birks (ed), *Privacy and Loyalty* (Oxford University Press, 1997) 145, 147.

119 *Moss v Moss (No 2)* (1900) 21 LR (NSW) Eq 253, 258 (Simpson CJ in Equity). As discussed above, although the two concepts emerged separately from the case law, they are collectively known as the fiduciary obligations.

120 As discussed above, removing the fruit of temptation rather than moving it to a higher shelf: Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 64.

121 Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 347. In relation to timing of consent, and commercial knowledge, see also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 203 CLR 89.

122 For further discussion of the 'proscriptive/prescriptive' debate, please see Ch 2.2.3 below.

123 For example, see *Boardman v Phipps* [1967] 2 AC 46. The controversial argument that this obligation of full disclosure is a 'fiduciary duty of disclosure' will be dealt with at Ch 3.3.3.3 below.

124 *Maguire v Makaronis* (1997) 188 CLR 449, 466-467 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

obligation include injunction, constructive trust, account of profits, rescission, tracing and equitable compensation.[125]

### 2.2.2 *The Definition Debate*

Given that the Australian position is that the recognised 'list' of fiduciary relationships is not 'closed',[126] it would be reasonable to think that there must be common components which might see other categories of relationship added to the list, such as director-shareholder. However, a comprehensive and accepted statement of principle has remained elusive to Australian courts and commentators,[127] leading Mason CJ to pronounce fiduciary obligations as a 'concept in search of a principle.'[128] The debate is further heightened as the various proponents of fiduciary theory do not agree whether fiduciary obligations arise out of the relationship, or are imposed on the relationship.[129] Other jurisdictions also grapple with this 'definition by description'[130] problem, as highlighted in the Canadian formulation found in *Frame v Smith.*[131] The accuracy of this criticism will be discussed following consideration of the principles which have received most attention. If a successful case is to be put forward that fiduciary obligations apply between directors and shareholders, then the potential general justifications for fiduciary obligations should be further examined.

---

125 Remedies will be discussed in detail in Chapter 4.6 below.

126 Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 340; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002), 157.

127 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 106-111.

128 Sir Anthony Mason, 'Themes and Prospects' in P D Finn (ed), *Essays in Equity* (Lawbook Co, 1985) 246.

129 Indeed, many use the notions of 'arising' and 'imposing' interchangeably: see, for example, Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 133, where the author commences with a discussion of obligations that are imposed by equity, and then duties which arise from relationships. Ultimately that debate can be set to one side: as noted by Gibbs CJ in *Hospital Products* (1984) 156 CLR 41 at 68–69, rather than focussing on whether it is undertaken or imposed, fiduciary law may also be understood in terms of the purposes of which the law serves.

130 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 84.

131 *Frame v Smith* [1987] 2 SCR 99, 136 (Wilson J, in dissent).

Various rationales for fiduciary obligations have been identified over time, including:

1. voluntary assumption of a position that requires one party to further the interests of another party;
2. ‘trust and confidence’ or the ‘entrusting’ element between the parties;
3. a reasonable or justifiable expectation of loyalty;
4. unjust enrichment;
5. vulnerability or disadvantage; and
6. limited access arrangements.

Some of these rationales are principle-based and others are descriptive, but all have inherent weaknesses both in general, and specifically in regards to the relationship between directors and shareholders, which are not necessarily overcome even when some rationales are considered in combination with one another. Discussion of each of these justifications now follows, alongside highlights of the arguments in favour and opposed, concluding with the most recent authority from the High Court of Australia.

#### 2.2.2.1 *Voluntary Assumption*

A simple answer to the question, ‘Who is a fiduciary?’ is, ‘A fiduciary is a person who undertakes to act in the interest of another person.’[132] Finn, an early academic proponents of this theme, now repudiates this explanation on the ground that a ‘fiduciary responsibility ultimately, is an imposed not an accepted one.’[133] Furthermore, the status of ‘voluntary assumption’ in Australian law is unclear, as a result of the various

---

[132] Professor Austin W Scott, 'The Fiduciary Principle' (1949) 37 *California Law Review* 539, 540; also discussed in Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 910.

[133] P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 54.

judgments from the High Court of Australia in *Hospital Products*.[134] After a detailed examination of the judgments in that case, Austin concludes that the High Court did not adopt the Court of Appeal's test, but neither did they not provide their own.[135] The 'voluntary assumption' theme to fiduciary obligations appears in the dissenting judgment of Mason J in *Hospital Products*, where his Honour describes the undertaking or agreement on the part of the fiduciary as the first theme of 'the critical feature'[136] visible in status-based relationships.

His Honour stresses in *Hospital Products* 'that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.'[137] This theme was adopted by the parties to the *JAC v White City*[138] litigation, and consequently was considered by the High Court decision on that case. As discussed previously, the High Court did not overtly approve, or disapprove, of this approach, consequently leaving its status in Australian law unclear.

However, as with many simple answers, the flaw is that it is not sufficiently comprehensive. There is not always such a moment of voluntary assumption in relationships that attract fiduciary obligations, and even if it does exist, it can be hard to define.[139] A fiduciary principle based on the element of voluntary assumption runs the risk of excluding those relationships which are not grounded in some form of

---

134 (1984) 156 CLR 41.

135 R P Austin, 'Commerce and Equity – Fiduciary Duty and Constructive Trust' (1986) 6 *Oxford Journal of Legal Studies* 444, 446.

136 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96. The second theme, vulnerability, is discussed separately below at Ch 2.2.5.

137 Ibid 96-97.

138 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 34-36.

139 Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 910-911.

agreement,[140] such as those found when a constructive trust is imposed, or the relationship between majority and minority shareholders.[141] The latter relationship is not recognised in Australia as giving rise to a status-based fiduciary obligation, but this does not mean that there cannot be a fiduciary obligation imposed between them in certain circumstances. Dal Pont also notes that even where an undertaking is visibly present, difficulties remain in distinguishing between whether the obligation under which the parties are acting is fiduciary or an express or implied contractual good faith obligation.[142]

#### 2.2.2.2 *The 'Entrusting' Element*

Dal Pont raises another potential basis of fiduciary obligations, as does DeMott, albeit from slightly different angles. Dal Pont discusses relationships of 'trust and confidence',[143] whereas DeMott discusses the 'entrusting' element of many fiduciary relationships.[144] These can both be seen as one party reposing something to the care of the other. As DeMott explains, the concept of 'entrusting' works well when there is property involved but it is hard to discern where less tangible interests, such as the promotion of one beneficiary's interests over those of the fiduciary, are involved.[145] Dal Pont's explanation of 'trust and confidence',[146] which would cover the reposing of confidence in a solicitor-client relationship in a way in which 'entrusting' cannot, also suffers when viewed in light of the case law.

---

[140] G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011), 108.

[141] Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 910-911.

[142] G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 108.

[143] Ibid 107.

[144] Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 912.

[145] Ibid.

[146] G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 107.

This element appeared initially to receive firm approval in the Australian courts. A fiduciary relationship was to be found 'where the facts show the relationship was based on mutual confidence',[147] and '[t]he [fiduciary] duty arises when, and because, a relationship or confidence exists between the parties.'[148]

Despite his Honour's earlier positive treatment of this theme in *Daly v Sydney Stock Exchange Ltd*,[149] Gibbs CJ clarifies in *Hospital Products* that a subjective element of trust or reposing of confidence is not determinative of the existence of fiduciary obligations.[150] There needs to be a further step taken by the parties, either through an obligation for both to act on the basis of mutual trust and confidence, or where that trust and confidence is directed to the subordination of self-interest in one party to the interest of the other.[151] This analysis is not satisfactory even for the accepted status-based categories. A fraudulent solicitor will still owe fiduciary obligations to their client, even where the solicitor is fully aware from the outset that they are not subordinating their own interests. If the client is aware that their solicitor has behaved fraudulently in the past,[152] or even is behaving fraudulently now in some other matter – but is not aware that they are fraudulent in relation to them as a client[153] – does that make them any less a beneficiary of a fiduciary obligation because they cannot be said to repose 'trust and confidence' in the solicitor? The answer must be no. Dal Pont agrees with this

[147] *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1, 11.
[148] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 377.
[149] Ibid.
[150] (1984) 156 CLR 41, 69 (Gibbs CJ).
[151] G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 108-109.
[152] Such knowledge could be available due to appearances before the Legal Practitioners Conduct Board, empowered under the *Legal Practitioners Act 1981* (SA) to investigate lawyers in relation to suspected, or alleged, unprofessional or unsatisfactory conduct.
[153] If the client was aware that the solicitor was being fraudulent in relation to their dealings with one another, there could arguably be waiver – the fiduciary obligation may still exist, but it has been waived by the client continuing to deal with the solicitor in spite of their knowledge of the fraud.

conclusion that ‘it is clear that a subjective element of trust or reposing of confidence is not determinative.’[154]

2.2.2.3 *Reasonable or Justifiable Expectation of Loyalty*

An expectation of loyalty by the fiduciary has been propounded as a general justification by courts and academics for some time, in various guises. The two in most commonl usage are a ‘reasonable’ expectation,[155] and a ‘justifiable’ expectation[156] of loyalty.

As with the justifications for fiduciary obligations discussed above, ‘reasonable’ expectation has inherent weaknesses. Firstly, it is possible that no reasonable expectation of loyalty could be formed, even in circumstances where the principal would be entitled to expect loyalty, for example where the fiduciary has a history of disloyal conduct.[157] The example of the fraudulent solicitor serves well again here. The requirement for a ‘reasonable’ expectation also overlooks the entitlement to loyal conduct created by the fiduciary obligation when a party is subject to them.[158]

DeMott overcomes this weakness by rephrasing this criterion as a ‘justifiable’ expectation of loyalty.[159] Unlike a reasonable expectation, a beneficiary’s expectation of loyalty may be justifiable even where they have some doubt as to whether the

---

154 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 107.

155 P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 46, and applied judicially by his Honour in *Gibson Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569.

156 Deborah A DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona Law Review* 925.

157 Ibid, as discussed in Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 495.

158 Deborah A DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona Law Review* 925, 939.

159 Ibid.

expectation will be fulfilled, again, such as in the case of the fraudulent solicitor. However, it becomes clear through DeMott's discussion of when a justifiable expectation will result in fact-based fiduciary accountability that the test she is actually advocating is the 'reposing of "substantial trust"',[160] because it is only in circumstances in which 'one party is invited to and does repose substantial trust in the other's fidelity' which 'should justify an expectation of loyalty'.[161] Tuch expounds another principal weakness of this criterion (in either incarnation), in that it fails to explain the proscriptive nature of fiduciary obligations.[162]

#### 2.2.2.4 *Enrichment of the Fiduciary*

The enrichment of the fiduciary at the expense of the beneficiary is advocated as a descriptive method of determining whether a fiduciary had breached obligations and what relief ought to be available.[163] This method suffers from the complaints made above, in that it lacks an overriding principle to explain how some are subject to fiduciary obligations when others are not[164] – it is, in essence, reverse-engineering on a case-by-case basis: the result is justified *ex post facto* and cannot be used to predict when a person will owe fiduciary obligations. Unjust enrichment does not entirely deal with an

---

160 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 422-423.

161 Deborah A DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona Law Review* 925, 940-941.

162 Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 495-496.

163 Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 913.

164 Ibid.

honest director,[165] where there is arguably no element of 'at the expense of' the beneficiary.[166]

On a more fundamental level, this method fails to consider the circumstances where a fiduciary is in breach of the 'no conflict' rule, but has not breached the 'no profit' rule, for example, where a director personally pursues a public call for tender, although they are aware that their company is also putting forward a tender, although they are not involved with the company's tender process. This is clearly a breach of the 'no conflict' rule as the director's interests are competing personally with the company's, but any profit obtained if the director won the tender personally would not be by virtue of the fiduciary position, as the call for tender was public.[167] Although these two rules are regularly breached in conjunction, they are not doctrinally conjunctive[168] – leaving this method unable to justify the most primary element of the obligation.

#### 2.2.2.5 *Vulnerability or Disadvantage*

Another descriptive theory is one of vulnerability or disadvantage between the parties, which is the second theme highlighted by Mason J's dissenting judgment in *Hospital Products*.[169] It is this vulnerability or discrepancy in power between the parties that attracts the interest of equity and imbues the relationship with fiduciary obligations. This

---

165 Ibid 913.

166 The case examples of *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 and *Boardman v Phipps* [1967] 2 AC 46 will be discussed in detail below at Chapter 3.3.3.4.

167 This example is set out by Virgo during a discussion of the interrelationship of the 'no conflict' and 'no profit' rules: Graham Virgo, *The Principles of Equity and Trusts* (Oxford University Press, 2012) 504.

168 Ibid 505.

169 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 92. It was also discussed at 142 of *Hospital Products* by Dawson J and academically; Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 914; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 108-109.

basis would go some way to explaining the historically strong prophylactic nature of fiduciary rules,[170] and the relative lack of interest in the *bona fide*s of the fiduciary. But although vulnerability is often present in fiduciary relationships, it is also present in many relationships which are not fiduciary[171] (such as the state and its citizens). As the Full Court of the Federal Court notes in *News Ltd v Australian Rugby Football League Ltd*[172] vulnerability is an element of many non-fiduciary relationships in which the law intervenes.[173] It is also possible to see the vulnerability of one party simply as the corollary of the ability to do harm by the other party.[174]

Again, this theory is also dependent on a close examination of the facts, as two beneficiaries in the same category of relationship may be more or less vulnerable depending on the facts, such as a client with more specialist knowledge in the area of consultation than their solicitor, when compared with a client with no knowledge of that area. This variation in vulnerability between clients would have no bearing on the substance of the fiduciary obligations of the solicitor, nor on what behaviour from the solicitor would be considered as breaching those obligations.[175]

---

170 Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 914.

171 Ibid.

172 (1996) 64 FCR 410.

173 This conclusion has been mirrored in Canada: *Hodgkinson v Simms* [1994] 3 SCR 377, 405 (per La Forest, Heureux-Dube and Gonthier JJ); and reiterated within Australia: *C-Shirt Pty Ltd v Barnett Marketing & Management Pty Ltd* (1996) 37 IPR 315, 336.

174 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 109; Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 126, 134.

175 As mentioned previously, this question is not unique to the fiduciary obligation, or even to equity; it also arises in other areas of law, such as the law of torts.

#### 2.2.2.6 *Flannigan's 'Limited Access' justification*

Flannigan posits a general justification in the following terms: 'fiduciary accountability is designed to control the opportunism of those trusted with a defined or limited access to the assets of others' and it 'represents a relatively narrow form of social regulation' in that '[i]t is concerned exclusively with controlling opportunism on the part of those with limited access.'[176] This description assists in understanding why strict discipline is appropriate in relation to fiduciary obligations, but the use of the word 'assets' in Flannigan's analysis suffers from similar weaknesses to the justifications discussed above. Not all relationships which attract fiduciary obligations necessarily involve tangible assets, which is usually the definition assigned to that word. A priest can hardly be said to have access (limited or otherwise) to any asset of a penitent other than their confession, and yet Handley JA sees this relationship as imposing fiduciary obligations.[177]

If the word 'asset' is defined broadly to include, for example, intellectual property rights, business opportunities, an expectation of confidentiality, sensitive business information and so on, then this issue becomes less pronounced. Opportunities open to the company have been treated as akin to the property of the company,[178] making them 'assets' in any real understanding of that word. In a more recent publication, Flannigan does not re-define what he considers to be 'assets', but instead rephrases his initial statement as '[w]hen actors undertake to serve the interests of others, they acquire access to the assets and opportunities associated with the undertaking. That access may be exploited to serve

176 Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277, 278, 279.

177 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 555.

178 *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; see discussion below at Chapter 3.3.4.

their own interests.'[179] While now undoubtedly including 'opportunities' within his definition, this does not in fact make matters any clearer as it introduces the concept of 'undertaking' which was found to be problematic above.

In a 2009 article, Flannigan states that '[t]he perception that the core character of fiduciary accountability is uncertain or controversial is a recent development', having arisen only in the past five decades.[180] He insists that there is no lack of clarity in the early English cases, and that the function of fiduciary regulation has always been 'to control the opportunism of those who entered into or assumed limited access arrangements.'[181] Whilst it is certainly clear from the case law that controlling opportunism by the fiduciary has always been at the heart of this principle, the second half of Flannigan's concept is not visible in or entirely consistent with the case law, for the reasons discussed above.

#### 2.2.2.7 *Tuch's 'Key Features'*

In his article focussing on financial advisers in change-of-control transactions,[182] Tuch highlights five key features which have been endorsed by the courts as identifying a fiduciary character in 'non-conventional' relationships:

1. An undertaking by the fiduciary to act in the interests of the beneficiary;
2. A relationship of trust and confidence;
3. Vulnerability either to another's power or necessitating reliance;

---

179 Robert Flannigan, 'The Economics of Fiduciary Accountability' (2007) 32 *Delaware Journal of Corporate Law* 393, 394.

180 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 376.

181 Ibid 376-377.

182 Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488.

4. Power by the fiduciary to affect the interests of the beneficiary in a real or practical sense; and
5. A reasonable expectation that the fiduciary will act in the interests of the beneficiary in and for the purposes of the relationship.[183]

Clearly, these 'key features' reflect the various justifications outlined above, and when listed in this fashion assist in identifying why they fail when considered in isolation from one another. Although Tuch discusses these features in respect of those relationships which fall outside of the status-based list of fiduciary relationships, there is no reason why they cannot be applied as indicia in all relationships. Indeed, as Tuch also notes, the alternative method propounded by the courts of analogising the relationship in question to one of the accepted status-based relationships necessarily requires consideration of these elements to establish and support the analogy.[184]

The fifth and final criterion Tuch mentions, the reasonable expectation that the fiduciary will act in the interests of the principal in and for the purposes of the relationship, is also advocated by Finn.[185] Tuch accords this criterion particular emphasis because it not only carries doctrinal legitimacy,[186] but also assists in the practical application of the doctrine to varying relationships and provides a normative basis for assessing whether the extension of fiduciary obligations to a particular relationship is justified.[187] Unfortunately, as with the various justifications for fiduciary obligations discussed

183 Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 494. In the original publication, the word 'principal' was used in place of the term beneficiary – but that appears to be due to the particular subject-matter on which Tuch focussed, namely financial advisors.

184 Ibid 495.

185 P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 46.

186 Tuch highlights various cases where this criteria has received a measure of judicial acceptance, whilst noting that Justice Finn's scholarship generally has influenced the development of Anglo-Australian fiduciary doctrine more broadly: Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 495.

187 Ibid.

above, this 'reasonable expectation' has inherent weaknesses. Firstly, no reasonable expectation of loyalty may be formed even in circumstances where the principal would be entitled to expect loyalty, such as where the fiduciary has a history of disloyal conduct,[188] such as the fraudulent solicitor discussed above. The requirement for a 'reasonable expectation' also overlooks the entitlement to loyal conduct created by the fiduciary obligation when a party is subject to them.[189] DeMott overcomes this weakness by rephrasing this criterion as a 'justifiable expectation' of loyalty. Tuch finds the other principal weakness of this criterion to be that it fails to explain the proscriptive nature of fiduciary obligations.[190] These weaknesses are perhaps lessened when this criterion is considered as one of a list, rather than as the sole general justification for fiduciary obligations.

#### 2.2.2.8 *The Current Australian Position*

Following *JAC v White City*,[191] it ought to be considered that the 'critical feature' for identifying relationships where fiduciary obligations exist is a combination of the voluntary assumption and vulnerability or disadvantage justifications. As has been discussed above, Mason J identifies a twofold test in *Hospital Products*[192] to which the Court is directedby the parties in *JAC v White City*: there must be an undertaking or agreement by the fiduciary to act for or on behalf of or in the interests of the beneficiary; and that undertaking or agreement must be in relation to the exercise of a power or

188 Deborah A DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona Law Review* 925, 938-939, as discussed in Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 495.

189 Deborah A DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona Law Review* 925, 939.

190 Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 495-496.

191 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.

192 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96-97.

discretion which will affect the interest of that other person in a legal or practical sense. Justice Mason follows his expression of this 'critical feature' with remarks which placed an emphasis on the vulnerability of the beneficiary. By contrast, the Court in *JAC v White City* omits those references to vulnerability, and instead continues to say that '[f]rom this power or discretion comes the duty to exercise it in the interests of the person to whom it is owed.'[193]

The judgment in *JAC v White City* identifies that phrases such as 'for or on behalf of' must be understood in a reasonably strict sense, otherwise they risk becoming circular.[194] Further, the Court expressly reiterates the limitation placed by Mason J on the fidcuairy obligation which arises within a contractual scenario in *Hospital Products*: that, where a contract exists which governs the basic rights and liabilities of the parties, any fiduciary obligations must accommodate themselves to the terms of that contract.[195]

In spite of the longstanding academic criticism, the current position of the High Court is that the hallmarks of a relationship in which fiduciary obligations exist are a combination of the voluntary assumption and vulnerability or disadvantage justifications.

#### 2.2.2.9 *Conclusions on the Definition Debate*

Various propositions have been put forward as general justifications for fiduciary obligations, none of which are without weakness. The most appealing proposition is the 'Key Features' list of criteria, which does not advance the theory of fiduciary obligations

---

193 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 34-35.

194 Ibid 35, citing J R F Lehane, 'Fiduciaries in a Commercial Context' in P D Finn (ed), *Essays in Equity* (Lawbook Co, 1985) 95.

195 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 35-36 citing *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 97.

far beyond the methodology of definition by analogy to the status-based relationships. There is no settled answer to the question of when fiduciary obligations will arise, which has been acknowledged as a 'notoriously intractable'[196] question. Although each of the propositions discussed cannot individually be seen as a satisfactory sole justification for the fiduciary concept as a whole, the elements they consider can be useful as 'fiduciary indicia'[197] of why a director, for example, is regarded as one of the status-based fiduciaries.[198]

### 2.2.3 *The Proscriptive/Prescriptive Debate*

There has been a great deal written about whether or not fiduciary obligations impose prohibitive (negative) duties or prescriptive (positive) duties.[199] The High Court in *Breen v Williams*[200] emphasised that, in Australia, fiduciary duties are proscriptive or prohibitive in nature.[201] Commentators interpret this as the Court marking a line between the domain of contract and tort law on the one hand, and the fiduciary obligation on the other. To impose fiduciary obligations in a prescriptive manner would place a positive duty to act in the interests of the person to whom the duty is owed, which the Court deems undesirable for a fiduciary obligation.[202] As such, the Australian fiduciary obligation is instead a form of negative assurance or protection, in that it prohibits the

---

196 Ernest J Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, 5.

197 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 110.

198 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96.

199 This labelling is taken from Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 182.

200 *Breen v Williams* (1996) 186 CLR 71

201 Confirmed more recently in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197-199 (McHugh, Gummow, Hayne and Callinan JJ).

202 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 100, citing *Breen v Williams* (1996) 186 CLR 71, 95 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ) and also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 (McHugh, Gummow, Hayne and Callinan JJ). The particular circumstances surrounding directors in fact appear to contradict this finding by the Court, as will be discussed in Chapter 3.

fiduciary from acting inconsistently with the interests of the beneficiary of the duty.[203] There is academic support for this position, founded not only on the practical difficulty of *ex ante* constraints on conduct which can be performed in a variety of unobjectionable ways,[204] but also on the potentially 'chilling effect on entrepreneurial activity that imposing strict duties of care and skill would have, and to avoid the uncertainty of application that imposing broad prescriptive duties would involve.'[205]

Mason J in his oft-cited judgment in *Hospital Products*[206] stated that:

> In these situations [where contractual and fiduciary relationships co-exist between the same parties] it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

This conclusion appears, at first glance, to be in conflict with the later statement from *Breen v Williams*[207] that fiduciary obligations are proscriptive obligations imposed by law, and not merely an accepted or consensual responsibility.[208] However, this is not the case. It is a matter of distinguishing the source of an obligation from matters which affect its scope. Whilst fiduciary obligations are proscriptive, they can be modified or

[203] This is not the case in all jurisdictions, but as this thesis deals with the Australian jurisdiction, only brief mention will be made of other relevant authorities throughout.

[204] R C Nolan, 'The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report' (2005) 6 *Theoretical Inquiries in Law* 413, 422-423 as cited in Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 496.

[205] Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 496. This theme will be further advanced in later chapters under the discussion of the role of the fiduciary obligation within broader corporate governance mechanisms.

[206] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 97 (Mason J).

[207] *Breen v Williams* (1996) 186 CLR 71.

[208] Neil J Young QC, 'Conflicts of Interest in the context of Private Equity Transactions' (Paper presented at the Law Council Workshop, Stamford Grand Glenelg, 21 July 2007) 9.

displaced by contract both before and after they arise, even to the extent of excluding liability in the event of a breach of fiduciary obligation.[209]

The ability to contractually amend fiduciary obligations does not render them irrelevant for a number of reasons. The parties may choose not to contract around fiduciary obligations.[210] The position of the parties prior to any contractual amendment may be important in light of how they modify their fiduciary obligations, and may help them decide whether such modification is warranted. Tuch notes perhaps the most important point: parties who enter into a contract some time after their relationship commences may find that their contractual negotiations are subject to fiduciary constraints which have already arisen within their relationship.[211]

### *2.3 Conclusions*

As a child of equity,[212] conscience is at the heart of the fiduciary obligation. The fiduciary obligation has developed from a case-by-case application by the courts to the more settled rules which underpin the principle today. In this way, the fiduciary obligation has mirrored the development of the equity jurisdiction itself from its initial focus on relief for the petitioner to the body of equitable principles which co-exists with the common law within the modern judicature system. Through the historical

---

209 Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488, 505.

210 Ibid.

211 Ibid.

212 As mentioned previously, the use of the analogy of a child stems from a description by Justice Kirby in the W A Lee Equity Lecture (Queensland University of Technology, 19 November 2008) later published as: Michael Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 452-453, which his Honour acknowledged as drawn from a metaphor by Lord Denning.

background, it can be seen that the fiduciary obligation developed as a strict prophylaxis against self-interested behaviour in certain circumstances.

In more recent years, it has been recognised that the fiduciary obligation is separate from, and indeed more appropriate than, the concept of fiduciary relationship. Although debate as to those circumstances remains, the content of the fiduciary obligation is clear. The bedrock of the two rules, 'no conflict' and 'no profit' provide a solid foundation from which to argue regarding when the obligation will be imposed, and how. Equally certain is the defence available to claims of breach of fiduciary duties, that fully informed consent has been obtained. This chapter has established the first two propositions put forward by this thesis:

**Proposition 1:**

Fiduciary obligations in Australia are proscriptive, consisting of a duty of loyalty and a duty to account for benefits gained.

**Proposition 2:**

Despite difficulties with acceptance of a general proposition supporting fiduciary obligations, the current High Court of Australia holds fiduciary obligations to arise in circumstances which combine voluntary assumption with vulnerability or disadvantage.

From this position of clarity, a solid foundation exists from which to consider the particular application of the fiduciary obligation to directors. In order for that discussion to have an appropriate stage, the next chapter provides a brief canvas of the corporate form and its regulation over recent years. It considers the application of the fiduciary obligation to the director-shareholder relationship, and its current operation within the modern Australian legal landscape.  It highlights some anomalies of expression and approach between corporate law and equitable scholarship, and addresses the specific fact-based instances where courts have found fiduciary obligations owed to shareholders by company directors.

# 3 A FIDUCIARY OBLIGATION OWED TO SHAREHOLDERS

## *3.1 Introduction*

The last chapter focussed on the birth and development of the fiduciary obligation as a principle of equity. It clarified the difficulties in ascribing a particular justification for fiduciary obligations, and their status within Australia as proscriptive duties only. This chapter focuses on the particular application of the fiduciary obligation to directors. Although the fact that directors owe their fiduciary obligations to the company has been conventional wisdom both academically and in case law for more than a century,[1] in his 1977 book on fiduciary obligations Finn stated that he considered it 'remarkable'[2] that directors owe their fiduciary obligations to the company and not to its shareholders. Initially, that fact does appear remarkable. Without the shareholder, there can be no company, as there would be no capital investment to employ for the company's use at the direction of the directors. The surrender of their assets to the corporation, to be managed by its directors might seem to entitle shareholders to the protected position as the beneficiary of fiduciary obligations from these directors.

In making this statement, Finn may have been influenced by scholarly works in Law and Economics which had gained prominence in the in 1960s.[3] By its nature, work in this

---

1 *Carpenter v Danforth* 52 Barb 582 (NY, 1868) is cited by a Canadian academic as one of the earliest examples (Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 412) but the principle is arguably clear to be seen in *Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq 461. It can certainly be said to exist since the advent of separate legal personality in *Salomon v Salomon & Co* [1897] AC 22, and has only been strengethened by *Percival v Wright* [1902] 2 Ch 421.

2 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977), 11.

3 Richard Posner, 'An Economic Approach to the Law' (1975) 53 *Texas Law Review* 757 discusses this ascendancy. The field of Law and Economics is an approach to legal theory which applies economic principles and methods to law, such as that championed by the University of Chicago Law School. For a detailed discussion of the field, see generally, Richard Posner, *Economic*

field refers to the relationship between directors and shareholders as ultimate recipients of the company's wealth, more than to the relationship between directors and companies.[4] From an economist's perspective, the company is a mere legal fiction interposed between the directors and the real stakeholders, the collective body of shareholders.[5] But even Berle and Means' classic formulation of the separation of ownership and control is predicated on an assumption that '[a]ny fair statement of the law would have to be based on the theory that the fiduciary duties of director were limited to the corporation.'[6] Shareholders do not own the assets of the company; they own a 'bundle of rights associated with the corporate enterprise.'[7] However, Rotman notes that, given the various corporate forms which exist and the various parties which hold an interest in them at different times, the proposition that directors owe their fiduciary obligations to 'the company' only narrows slighly the question of 'who' is the beneficiary of the obligation.[8]

In order to understand the development of the fiduciary obligation in relation to directors, this chapter firstly provides a brief historical overview of the corporate form and

---

*Analysis of Law* (Aspen Publishers, 7th ed, 2007) and for its application to corporate law, Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, Reprinted ed, 1996).

4 For example, work involving the Prisoner Dilemma or Free Rider problems discuss the behaviour of the human actors in the situation, ignoring the imposition of the corporation between the parties as it cannot act on its own behalf. See eg, Henry G Manne, 'Our Two Corporation Systems: Law and Economics' (1967) 53(2) *Virginia Law Review* 259. This is not to suggest that only this field recognises the shareholder as holding such a position: see, eg, Corporations and Markets Advisory Committee, 'The Social Responsibility of Corporations' (December 2006) 81 [3.1].

5 It is not only economists who recognise the 'legal fiction' that is the corporation: see, eg, the discussion of Diplock LJ in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 504.

6 Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan, 1933) 226, as cited in Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 412.

7 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 463 (at footnote 218); see also R Goddard, 'Percival v. Wright: the end of a remarkable career? ' (2000) 116 *Law Quarterly Review* 197.

8 Ibid 412-413. Rotman cites John C Coffee Jr, 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 *Columbia Law Review* 1618, 1664 in support of this position.

development of corporate law in Australia. This is necessary to perceive the modern approach to corporate regulation, as it relies heavily on its history, both in case law and statute. Secondly, this chapter outlines how the current Australian understanding of the fiduciary obligation, as discussed in the previous chapter, applies to directors in particular. Thirdly, the various other duties imposed on directors from legislative and common law jurisdictions are considered, so that the role of the fiduciary obligation within this structure can be isolated. Finally, the accepted fact-based occasions of fiduciary obligations between directors and shareholders are analysed to consider whether they are aberrations, or whether they indicate a new status-based fiduciary obligation and what, if any, are the limitations to be placed on that new category.

### *3.2 History of the Corporate Form and Corporate Law*

As was the case with much of the court system and common law, Australia inherited its initial approach to corporations and the laws governing them from England. As such, it is necessary to understand the development of both the corporate form and the legal structure surrounding it, and to acknowledge how the intervention of Chancery resulted in the corporate form that we recognise today. As the history of the fiduciary obligation was traced in Chapter Two in order to understand why it takes its current form, the current position regarding obligations owed by directors in corporations finds its basis in the historical development of the corporate form. Knowledge of the history of corporate law in Australia, which has been described as tortuous,[9] is required to understanding the approach to regulation by the Commonwealth and the courts. The majority of conflict

[9] Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 50.

has not been due to the content of the corporations law, but the idiosyncrasies of the *Australian Constitution* and Australian politics.

### 3.2.1 *The Development of the Corporation in England*

The modern English 'joint stock company' is recognised as having evolved from the unincorporated partnership.[10] As is often noted, a proper understanding of modern doctrines and institutions necessitates an awareness of the historical process by which they have developed. Although the scope of this study does not permit an exposition of the history of the corporation from its medieval Italian city-state roots to the British Empire's overseas trading monopolies,[11] it is important to consider one aspect in detail.

Following a period of inflated speculation now known as the 'South Sea Bubble',[12] the English Parliament passed the *Royal Exchange and London Assurance Corporation Act 1917*,[13] more colloquially known as the Bubble Act, in a futile attempt to staunch the exuberant trading and price increases.[14] The Bubble Act, 'which, even now when we read it, seems to scream at us from the statute book',[15] focussed on unincorporated

---

10 Ibid 27, 37.

11 Many detailed texts cover this development and history, such as: C A Cooke, *Corporation Trust and Company: An Essay in Legal History* (Manchester University Press, 1950); Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge Uni Press, 2000); Sir William Holdsworth, *A History of English Law* (Sweet and Maxwell, 2nd ed, 1937); Frederic William Maitland, 'Trust and Corporation' in H. D. Hazeltine, G. Lapsley and P. H. Winfield (eds), *Maitland: Selected Essays* (Books for Libraries Press, Inc, 1936) . A concise summary of the important features of this time period can be found in Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009), Chapter 2.

12 Discussed in great depth in many sources, including: Sir William Holdsworth, *A History of English Law* (Sweet and Maxwell, 2nd ed, 1937); C A Cooke, *Corporation Trust and Company: An Essay in Legal History* (Manchester University Press, 1950).

13 *Royal Exchange and London Assurance Corporation Act 1719* (6 George 1 c 18). 6 George 1 c 18

14 C A Cooke, *Corporation Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) 83.

15 Frederic William Maitland, 'Trust and Corporation' in H. D. Hazeltine, G. Lapsley and P. H. Winfield (eds), *Maitland: Selected Essays* (Books for Libraries Press, Inc, 1936) 208.

societies and the stock traders,[16] and arguably set a trend for 'knee-jerk' legislative reactions to corporate scandal which continues to the present day.[17] To overcome the difficulties inherent in achieving incorporation following the Bubble Act, Chancery lawyers fashioned a remedy in the form of the deed of settlement.[18] After the Bubble Act, purchasing a charter was no longer possible and achieving incorporation through official channels was a protracted and difficult process. Unincorporated associations found their basis instead in articles of association in the form of a deed of settlement signed by those participating in the association.[19] While the deed provided for the method of management of the business, and a basis for protest by the members if the management departed from its provisions, it did not address the issue of property holdings or legal personality to sue.[20] As such, the assets of the association were placed in the name of trustees, selected by the members.[21] Over time, notions of limited liability were introduced to the deed,[22] along with the assumption of rights and obligations of transfer, and the ability to alter the deed with a special majority of the members, rather than unanimous consent.[23] This ultimately led to the introduction in 1844 of legislation

---

16 Sir William Holdsworth, *A History of English Law* (Sweet and Maxwell, 2nd ed, 1937) 219.

17 Most recently visible in the *Public Company Accounting Reform and Investor Protection Act* (Pub. L. No. 107-204, 116 Stat. 745) ('the Sarbanes-Oxley Act'), although this is perhaps an interpretation favoured by business lobbyists keen to avoid fundamental scrutiny: Roman Tomasic, "And They All Lived Happily Ever After?' - Improving corporate law after Enron: A review essay' (2007) 20 *Australian Journal of Corporate Law* 232, 234, 238.

18 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 35; C A Cooke, *Corporation Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) 86-87.

19 A B DuBois, *The English Business Company after the Bubble Act 1720-1800* (Octagon Books, 1938) 217.

20 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 35.

21 Ibid 35-36.

22 Although its effectiveness was questioned by the courts: See *Rex v Dod* (1808) 9 East 516, where Lord Ellenborough declared at 527 that the limited liability provided in that deed of settlement as 'a mischievous delusion' (referred to in C A Cooke, *Corporation Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) 97).

23 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 37-38.

to enable these 'deed of settlement' corporations to secure corporate status through formal registration.[24]

The *Joint Stock Companies Act 1844* adopted the constitutional structure of the deed of settlement company, vesting management powers in directors, and other powers and functions in the assembly of shareholders in general meeting. Accountability mechanisms, including obligations to hold company meetings, to audit and to publish company accounts, were included, but there were no directors' duties.[25] Limited liability was granted by statute eleven years later.[26] In the *Joint Stock Companies Act 1856*,[27] the 'deed of settlement' ultimately gave way to two documents, the memorandum of association and the articles of association.[28] The system of registration as revised by that 1856 Act largely remains in operation today. The doctrine of separate legal personality[29] and limited liability continued the externalisation of the costs of corporate behaviour, shifting some of the risk away from shareholders and onto stakeholders.[30]

### 3.2.2 *The Development of the Corporate Regulation in Australia*

The Australian system of corporate regulation had a tempestuous history, in large part due to the question of who should regulate corporations in Australia. The current

---

24 *Joint Stock Companies Act 1844* 7 & 8 Vict, c 110.

25 *Joint Stock Companies Act 1844* 7 & 8 Vict, c 110 ss 20, 33, 36; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 38.

26 *Limited Liability Act 1855* 18 & 19 Vict, c 133.

27 *Joint Stock Companies Act 1856* 19 & 20 Vict, c 47.

28 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 38.

29 *Salomon v Salomon & Co* [1897] AC 22;

30 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 144-146. Shareholders retain some risk as the residual stakeholder, and, for example, fall beneath the pari passu distribution available to unsecured creditors in an insolvent winding up: *Corporations Act 2001* (Cth) s 563A.

regulation of corporations in Australia has been described as complex and fragile,[31] but in light of the history behind corporations law in Australia, it is rather remarkable that it exists in any form at all.

Apart from some minor legislation, there was no significant Australian corporations legislation until the English *Companies Act 1862*[32] was adopted. English reforms were mostly faithfully applied by the Australian colonies,[33] although Victoria implemented its own measures to manage fraudulent practices arising out of its mining boom.[34] Prior to Federation in 1901, a national scheme of company regulation was already being considered and attempted.[35]

The initial roadblock to nationalised regulation of corporations in Australia occurred due to the wording of s 51 of the Constitution, which empowers the Commonwealth parliament to make laws with respect to certain heads of power, enumerated in the sub-sections which follow.[36] In *Huddart, Parker & Co Ltd v Moorehead*[37] the High Court restrictively interpreted the corporations power in s 51 of the Constitution,[38] serving to illustrate the conservative approach taken to constitutional interpretation by the High Court in the newly formed Commonwealth. Chief Justice Griffith interpreted the Australian Constitution according to the reserved powers doctrine:

---

31 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 50.

32 *Companies Act 1862* 25 & 26 Vict, c 89.

33 According to Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 42.

34 The no liability company form: *Mining Companies Act 1871* (Vic).

35 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 42.

36 See generally Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006), Chapter 3.

37 *Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 330.

38 *Commonwealth of Australia Constitution Act 1900* (Imp) (‘the Constitution’).

> [I]t should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words.[39]

As s 51(i) specifically gives the Commonwealth Parliament power to make laws with respect to trade and commerce between the States, that is, inter-State trade, the other powers within s 51 were to be construed so as not to extend s 51(i) beyond its express ambit. Intra-State trade was an area reserved for State power.[40] This decision placed the governance of corporations in the hands of the individual States.[41]

Impetus for a national system continued to grow in the post-war recovery period, until all States and Territories adopted the *Uniform Companies Acts* in 1962. The shift toward a national economy combined with the burden placed on companies operating in more than one jurisdiction due to the differences in the State companies legislation and regulation provided sufficient incentive for this uniform legislation.[42] However, following concerns about speculative interest in a mining company, Poseidon NL, in 1969,[43] a Commonwealth system of legislation and regulation was considered anew.[44]

In 1971, the High Court overruled the restrictive interpretation of s 51(xx) of the Constitution in *Huddart Parker & Co Pty Ltd v Moorehead*. The decision in *Strickland v*

---

39 *Attorney-General (NSW) v Brewery Employees' Union (NSW)* (1908) 6 CLR 469 ("*The Union Label Case*"), 503 (Griffiths CJ).

40 *Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 330, 348-349; 354 (Griffiths CJ), Barton J concurring at 363-366; O'Connor J concurring at 374.

41 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006) 84, 100.

42 Victoria, *Parliamentary Debates*, Legislative Council, 28 November 1961, 1553 (Sir Arthur Warner, Minister for Transport); Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 42.

43 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 43. There, Redmond goes so far as to state that '[t]here was *undoubtedly* a great deal of abuse of the investing public … and manipulative activities in securities trading.' [emphasis added]

44 Senate Select Committee on Securities and Exchange, 'Australian Securities Markets and their Regulation' (1974), Ch 15-16; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 43.

*Rocla Concrete Pipes Ltd*[45] reversed the emasculated reading of s 51(xx) which adherence to the reserved powers doctrine had produced,[46] but did not set out precisely what the scope of the Commonwealth's legislative power with respect to corporations entailed. The double dissolution in 1975 saw the Commonwealth power, which *Strickland* suggested was available, remain untested at that time.[47] Instead another co-operative scheme was introduced by enactment in the Australian Capital Territory[48] which was then applied as the *Companies Code* in each State, enabling the concern expressed by the court in *Huddart Parker & Co Pty Ltd v Moorehead* to be bypassed. The important shift in this legislation was towards a nationalised regulator. The National Companies and Securities Commission[49] was named as a federal regulator, subject to directions from a Ministerial Council.[50]

Commonwealth dissatisfaction with the co-operative scheme was apparent,[51] and the *Corporations Act 1989* (Cth), which relied solely on the Commonwealth legislative power, was prepared and received assent on 14 July 1989.[52] The Act was passed by Parliament but not proclaimed,[53] due to a constitutional challenge from New South

45 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
46 Ibid 488 (Barwick CJ).
47 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006) 85-86; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 4th ed, 2005) 47.
48 *Companies Act 1981* (ACT).
49 Established by *National Companies and Securities Commission Act 1979* (Cth) s 5.
50 For example, *Companies Code 1981* s 38.
51 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 May 1988, 2993 (LF Bowen MP); Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1990, 3663 (The Hon M Duffy). The primary complaints were that there was insufficient accountability to Parliament due to the scheme's collegiate decision-making structure, and that it had caused a degree of administrative duplication and operational inefficiency: Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 44.
52 Of particular interest to this thesis is that the *Close Corporations Act 1989* (Cth) also received assent at this time, but appears to have suffered the same defect as the other Corporations legislation of that era. It was eventually repealed by the *First Corporate Law Simplification Act 1995* (Cth).
53 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006) 101.

Wales[54] as to whether or not s 51(xx) of the Constitution included the power of incorporation.[55] The precise wording of the relevant sub-section is:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth…

In a single judgment, six judges held that the head of power in s 51(xx) excluded the process of incorporation itself, and limited it to one with respect to corporations formed under some independent source of power.[56] This seemed to mirror a view raised by Sir Samuel Griffiths during the Convention Debates:

> There are a great number of different corporations. For instance, there are municipal, trading and charitable corporations, and these are all incorporated in different ways according to the law obtaining in different States. … I think the States may be trusted to stipulate how they will incorporate companies, although we ought to have some general law in regard to their recognition.[57]

Following negotiations, the *Corporations Law Companies Act 1989* was applied by each State and the Northern Territory as the local corporations law, creating a uniform *Corporations Law* in scheme not dissimilar from the 1962 *Uniform Companies Act*.[58] Additionally, a co-operative regulatory arrangement between the Commonwealth and States, a 'cross-vesting' scheme, gave litigants had the choice of entering either the Federal Court or the State and Territory Supreme Court systems. Two other principal changes were made and have been retained in the current system. The national regulator, acting through State delegates, was replaced with a single regulator with sole

---

54 In addition, there were separate challenges from South Australia and Western Australia.

55 *New South Wales v Commonwealth* (1990) 169 CLR 482 ('the Incorporation Case'). This case did not deal with the parts of the Act which regulated the internal affairs and the winding up of corporations, because the Commonwealth had agreed that, if the incorporation provisions were considered unconstitutional, that the whole scheme would be abandoned: Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006)103.

56 *New South Wales v Commonwealth* (1990) 169 CLR 482, 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ). Justice Deane dissented, finding that the word 'formed' merely drew a contrast with the foreign corporations also mentioned in that head of power, and was not meant to hold temporal significance: 505-506.

57 *Official Report of the National Australasian Convention Debates*, Sydney, 1891, vol 1, 686.

58 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 45.

responsibility for the administration and enforcement of corporations law, answering only to the Commonwealth Minister and Parliament. Also, the Ministerial Council's role was reduced, and the Commonwealth Parliament's independence was increased, making amendment of the scheme less cumbersome.

This cross-vesting scheme was declared constitutionally invalid,[59] which meant that any decision of the Federal Court made under the uniform *Corporations Law* was invalid.[60] States validated the past decisions of the Federal Court in purported exercise of state jurisdiction. In order to overcome these malingering constitutional uncertainties, despite previous unwillingness[61] the States referred their powers with respect to 'corporations', corporate regulation and the regulation of financial products and services to the Commonwealth.[62] This allowed for the new national corporations legislation to be passed in the form of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) ('the *ASIC Act*'). Should any state decide, in the future, to

59 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Re Hughes* (2000) 202 CLR 535.

60 These decisions, *Re Hughes* (2000) 202 CLR 535 in particular in relation to ASIC, challenged the constitutionality of Commonwealth regulatory enforcement powers: Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006) 104.

61 Much of this unwillingness has been attributed to the loss of fees collected by the states for the incorporation of companies within their jurisdictions: Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006) 101.

62 The referral of power was not without caveats. Firstly, that the referrals did not enable the Commonwealth to amend these Acts in order to regulate industrial relations matters (see, for example: *Corporations (Commonwealth Powers) Act 2001* (SA), s1(3)), and secondly, the referrals were subject to both early termination options and a five year sunset clause, which could and has been may be extended by the States ((see, for example: *Corporations (Commonwealth Powers) Act 2001* (SA), s5(1) which currently states that 'the references terminate on the day that is the 15th anniversary of the day of commencement of the Corporations legislation'. The original version of the legislation stated 'on the 5th anniversary', States and was amended by the *Corporations (Commonwealth Powers) (Extension of Period of References) Amendment Act 2005* (SA) to state that the termination was 'on the 10th anniversary', which was amended to its current form by *Corporations (Commonwealth Powers) (Termination Day) Amendment Act 2011* (SA).).

terminate their referral of power, a referendum in order to resolve the limitations of s 51(xx) may be necessary.[63]

### 3.2.3 *The Current Structure of the Corporate Form and Regulation In Australia*

From this historical survey, and the history outlined in the previous chapter, it can be seen that the Australian company initially relied on the development of the company under English law, and particularly the intervention of the court of Chancery. The interpretation of the Constitution has led to a unique system of Commonwealth legislation, reliant on State referral, and a Commonwealth regulator.

Modern Australian companies must have at least one member,[64] and at least one director responsible for managing the company's business.[65] Most proprietary companies and all public companies have a company secretary, responsible for administrative duties.[66] Once registered under the *Corporations Act*, a company has the legal capacity and powers of an individual both within Australia and extra-territorially.[67] As such, registered companies have separate legal personality. Creditors seeking recompense for a liability incurred by a company limited by shares may only look to the company and its assets, unless a court decides to 'lift the corporate veil', exposing the shareholders or others to liability for the debt.[68] The key organs of a company are the board of directors

---

63 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006) 105.

64 *Corporations Act 2001* (Cth) s 113-114.

65 *Corporations Act 2001* (Cth) s 201A. Public companies must have a minimum of three directors.

66 *Corporations Act 2001* (Cth) s 204A (public companies); Appointment of a secretary in proprietary companies has been optional since March 2000, but statistics suggest they are still commonly used: Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 10, 113-114.

67 *Corporations Act 2001* (Cth) s 124(1).

68 *Briggs v James Hardie & Co Pty Ltd* (1989) 7 ACLC 841.

and the shareholders in general meeting.[69] Acts of these organs within their respective powers are deemed to be acts of the company, and not merely acts taken by the organs on its behalf. The organs of the company derive their power and authority from the company Constitution,[70] the statutory replaceable rules[71] and the *Corporations Act*.

### *3.3 The Fiduciary Obligation as Owed to the Corporation*

The current position regarding the fiduciary obligation owed by directors to the corporation flows from the historical development of the corporate form. The precursor to the modern company was the joint stock company, which was legally a partnership. The stockholders were status fiduciaries to each other under either of two traditional analyses: partners were deemed to be agents of one another and therefore attracted fiduciary obligations, or they attracted fiduciary obligations because they were joint principals in a business undertaking.[72] When joint stock companies assumed corporate status, this naturally changed the legal circumstances, including the basis for fiduciary obligations. Upon incorporation, a new legal person entered the relationship – the company. The stockholders were no longer principals in relation to the business; their ‘partner’ status was replaced with ‘shareholder’ status as defined by statute. This transformation shifted contractual and vicarious liability to the new corporate entity, granting the shareholders limited liability in companies of that form, with the company now contracting as principal and assuming responsibility for the torts of its employees. It

---

69 This would be the members in general meeting the case of companies not using shares.

70 Public companies that wish to be listed on the Australian Stock Exchange must have a Constitution: Australian Securities Exchange, *ASX Listing Rules* (1 January 2012) <http://www.asxgroup.com.au/asx-listing-rules-guidance-notes-and-waivers.htm> 1.1 Condition 1A. ASIC may request the Constitution of a proprietary company under *Corporations Act 2001* (Cth) s 138.

71 See the table listed at s 141 of the *Corporations Act 2001* (Cth). The replaceable rules can be displaced or modified by the company’s Constitution: *Corporations Act 2001* (Cth) s 135(2).

72 Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277 , 279.

also erased the fiduciary obligations that the former stockholders had owed to each other upon their conversion to statutory investors of equity capital in the business of the corporation.[73] Managing partners, who became directors of the company, continued to owe fiduciary obligations to the owner of the business, which was now the company. Consequently there is still a fiduciary obligation owed by those who act on behalf of another. All that changed was the identity of the party to whom those obligations are owed.

The management of the company is vested in a board of directors.[74] It is argued that it is because the powers of management and control of the company's affairs and its assets are vested in its' directors, that the law imposes statutory, common law and equitable duties upon those directors.[75] The company director is 'undoubtedly' a holder of fiduciary office, which attracts the application of fiduciary obligations to their behaviour.[76] But the beneficiary to whom the director owes fiduciary obligations is the company.[77]

Finn placed the rationale for equity's supervision of directors on the basis of their autonomy.[78] 'The freedom which they enjoy in their decision-making, the lack of direct control by their respective beneficiaries, has attracted equity's supervision.'[79] This sentiment had been enunciated earlier in that decade by Laskin J from the Canadian Supreme Court in *Canadian Aero Service Ltd v O'Malley*:

---

73 Ibid 279-280.

74 *Corporations Act 2001* (Cth), s 198A-E.

75 Julian Svehla, 'Director's Fiduciary Duties' (2006) 27 *Australian Bar Review* 192, 192.

76 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 8.

77 See, for example, *Percival v Wright* [1902] 2 Ch 421 at 426; although the principle has been present since *Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq 461. The accepted exceptions to this position will be discussed below.

78 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 3.

79 Ibid 3.

> Strict application [of fiduciary obligations] against directors and senior management officials is simply a recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general meeting or at special meetings. [80]

Another justification was suggested by Spigelman CJ, when his Honour discussed the ability of the directors to dispose of company property as being justification to apply the same stringent test with respect to the exercise of fiduciary power to dispose of property as is applied to trustees of a traditional trust.[81] This analysis is perhaps simply a specific example of the first justification above, as discussed by Mason J in *Hospital Products*:

> The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. [82]

This discussion of whether it is a question of autonomy, access to property or vulnerability which attracts equity's attention to the director is simply a reconsideration of the earlier debate as to the fundamental principle underlying all relationships where a fiduciary obligation operates. Ultimately, it is recognised at law in Australia that directors are within the accepted status-based relationships in which fiduciary obligations are owed.[83]

---

80 *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371, 384.

81 *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277; also discussed as the foundation for a category of fiduciary obligations in L.S. Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 64. Analogies are often made between directors and trustees, but this has been criticised as a distraction: Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277, 284; Robert Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 *Law Quarterly Review* 449, 450-451.

82 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 97.

83 Ibid 68, 96; and in other jurisdictions: see, eg, *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14.

### 3.3.1 *The 'No Profit' and 'No Conflict' Rules*

Company directors are subject to the 'no profit' and 'no conflict' rules under their fiduciary obligation to the company:[84] a person who owes a fiduciary obligation to another ('the fiduciary') must not place themselves in a position where their personal interests or duties conflict with, or may possibly conflict with, the interests of the person to whom the duty is owed ('the beneficiary'), nor may they secretly profit from the relationship.[85] These obligations are also the basis of duties owed by directors under legislation, which will be discussed below.[86]

### 3.3.2 *The Misappropriation Rule and the Business Opportunity Rule*

In addition to the standard expression of the 'no profit' and 'no conflict' rules,[87] in the corporate context these rules are often further broken down into specific examples which relate to the conduct of directors.[88] In their 'Company Directors' text, Austin, Ford and Ramsay articulate the business opportunity rule and the misappropriation rule as fiduciary 'rules'.[89] They also break the 'no conflict' rule down into two parts (the conflict of duty and duty, and the conflict of interest and duty).[90] In contrast, when editing the Ford text, *Principles of Corporations Law*, Austin and Ramsay list the

84 *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592 (Latham CJ), as discussed above in Chapter 2.2.

85 *Moss v Moss (No 2)* (1900) 21 LR (NSW) Eq 253, 258 (Simpson CJ in Equity).

86 Division 1 ('General Duties') and Division 2 ('Disclosure of, and voting on, matters involving, material personal interests') of Part 2D.1 of the *Corporations Act 2001* (Cth), which will be discussed in detail in Chapter 4.5.

87 As discussed in Chapter 2.2.

88 These rules apply to executive and non-executive directors, defacto and shadow directors, and officers of the company: R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Australia, 2005) 366.

89 R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Australia, 2005) 360.

90 Ibid 309.

obligations as the 'no profit' rule (embracing the business opportunity rule on this occasion), the 'no conflict' rule[91] and the misappropriation rule.[92]

The misappropriation rule is simply stated: a director may not apply company property for his or her personal benefit, or for the benefit of any other person, without the authority of the company in general meeting.[93] This has been held to extend to improper destruction of company property, such as the closing down of a family company in disregard of the interests of the shareholders.[94] This is, in fact, a specific example of the operation of the 'no conflict' rule, with the addition that the property cannot go to the benefit of a third party. That does not differ from the standard approach under the fiduciary obligation.

Although in one text Austin, Ford and Ramsay articulate the business opportunity rule[95] as a separate duty on directors,[96] it is best to view it in context as a particular application of the 'no profit' rule. It provides that a company director who, absent company consent, usurps for their own benefit, whether personally or though an associate, a business opportunity the company is (or might reasonably be expected to be) interested in

---

91 As traditionally understood encompassing the dual conflicts, which Austin, Ford and Ramsay saw it necessary to articulate individually.

92 R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths Australia, 14th ed, 2010) 479.

93 P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 79; R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths Australia, 14th ed, 2010) 479, 507 -509.

94 Neil J Young QC, 'Conflicts of Interest in the context of Private Equity Transactions' (Paper presented at the Law Council Workshop, Stamford Grand Glenelg, 21 July 2007), 19, discussing *Mordecai v Mordecai* (1988) 12 NSWLR 58.

95 R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Australia, 2005) 366, but discussed in R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths Australia, 14th ed, 2010) 479 as the 'Corporate Opportunity Doctrine'. These labels are used interchangeably by many academics.

96 R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Australia, 2005) 366.

pursuing commits a breach of fiduciary duty.[97] Business opportunities are more typically treated as akin to property of the company in English than Australian authority, as demonstrated by the English decision of *Industrial Development Consultants Ltd v Cooley*.[98]

Questions also arise as to whether the business opportunity rule ought to apply indiscriminately to large public companies and closely held companies, and whether the rule should differentiate between executive directors and independent directors, and its application to other 'officers' of the corporation.[99] Further discussion of the business opportunity rule takes place below, as it is explicitly raised in a number of the practical examples under detailed consideration.

In reality, both the misappropriation rule and the business opportunity rule are particular examples of the operation of the 'no profit' rule specific to the corporate sphere of activity; to identify them as separate rules introduces unnecessary complexity.

### 3.3.3 *Other 'Fiduciary' Obligations*

As is often the case in a field of law where statute has encompassed many underlying common law and equitable principles, there are areas of contention which have arisen alongside the accepted conceptual position that directors owe their fiduciary obligations to the company. The three most prominent areas of contention are the improper categorisation of the duty to act *bona fide* in the best interests of the company and the

---

97 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 113; Neil J Young QC, 'Conflicts of Interest in the context of Private Equity Transactions' (Paper presented at the Law Council Workshop, Stamford Grand Glenelg, 21 July 2007), 22.

98 *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443.

99 John Glover, *Commercial Equity - Fiduciary Relationships* (Butterworths, 1995) 131.

duty of due care and skill,[100] and then, in a somewhat more complex example, the 'fiduciary duty of disclosure.'

#### 3.3.3.1 *The Duty to Act Bona Fide in the Best Interests of the Company*

The duty to act *bona fide* in the best interests of the company is regularly described in corporate law texts as being fiduciary in nature.[101] This is not entirely accurate, as the duty itself is not fiduciary, although it can be seen as related to the 'no conflict' rule. Many of the cases from which this mislabelling has arisen discuss the difficult position of a director who owns shares in the company to which he owes his fiduciary obligations.[102] In *Mills v Mills*, when discussing the duty to act *bona fide*, Latham CJ observed:

> I do not read the general phrases which are to be found in the authorities with reference to the obligations of directors to act solely in the interests of the company as meaning that they are prohibited from acting in any matter where their own interests are affected by what they do in their capacity as directors. Very many actions of directors who are shareholders, perhaps all of them, have a direct or indirect relation to their own interests. It would be ignoring realities and creating impossibilities in the administration of companies to require that directors should not advert to or consider in any way the effect of a particular decision upon their own interests as shareholders. A rule which laid down such a principle would paralyse the management of companies many directions. Accordingly, the judicial observations which suggest that directors should only consider the interests of the company and never their own interests should not be pressed to a limit which would create quite an impossible position.[103]

The duty to act *bona fide* in the best interests of the company can, without question, find a source in equity as a 'duty of good faith',[104] but to describe it as a fiduciary obligation

---

100 The statutory enactments of these duties will be canvassed in Chapter 4.5.1.

101 See, for example, Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009), 399; Robert Baxt, Keith Fletcher and Saul Fridman, *Corporations and Associations: Cases and Materials* (LexisNexis Butterworths, 10th ed, 2009) 309.

102 For example, *Mills v Mills* (1938) 60 CLR 150.

103 Ibid 163-164.

104 *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, 135.

is not correct.[105] Additionally, if it were fiduciary, then this would imply that fiduciary obligations can be prescriptive, which the High Court has firmly denied.[106]

This mistake in language is also deeply rooted in the history of the legislative enactment of this equitable duty. The legislative enactment of this duty is found in s 181(1) of the *Corporations Act*:

> A director or other officer of a corporation must exercise their powers and discharge their duties:
> (a) In good faith and in the best interests of the corporation; and
> (b) For a proper purpose.

In the Explanatory Memorandum which accompanied the Corporate Law Economic Reform Program Bill 1998 (Cth), s 181 was stated 'to mirror the fiduciary duty of a director to act in what they believe to be in the best interests of the corporation and for proper purposes.'[107] Although this statement is clearly in relation to the duty which is the subject of s 181, this is not an accurate statement of the content of the fiduciary obligation. Whilst a director may consider the best interests of the company in order not to breach the 'no conflict' requirement of the fiduciary obligation, the duty is for the fiduciary not to place themselves in a position of conflict – that is, to remain loyal – not a positive duty to act in the best interests of the company.[108] The second element of 'acting for a proper purpose' suffers from the same complaint.

---

105 Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) July *Law Quarterly Review* 452, 457-459.

106 As discussed above at Chapter 2.2.3; *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ); 137-138 (Gummow J).

107 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) [6.7].

108 The proscriptive-prescriptive debate is covered in detail in Chapter 2.2.3.

### 3.3.3.2 *The Fiduciary Duty of Due Care and Skill*

The potential for duties of due care and skill to be considered as fiduciary obligation has been mooted at an academic level.[109] For similar reasons to those discussed above, a duty of care and skill 'is not to be equated with or termed a "fiduciary" duty.'[110] It is significantly harder to see this duty, and its statutory counterpart in s 180, reflected in either the 'no conflict' or 'no profit' rules within the fiduciary obligation. A court pronounced that even a trustee's duty of care and skill is not fiduciary but equitable, which casts strong doubt on the ability of a directors' duty of care and skill to be fiduciary.[111] Certainly though, the director's duty of care and skill to the company is recognised as an equitable duty.[112]

### 3.3.3.3 *The Fiduciary Duty of Disclosure*

As discussed previously,[113] the High Court in *Breen v Williams* held that, in Australia, fiduciaries are subject to proscriptive obligations only:[114] the duties to avoid unauthorised conflicts and profits. Challenging this 'reductionist' model of fiduciary duties[115] is the claim that directors are also bound by a 'positive fiduciary duty of disclosure'.[116] Langford's choice to describe the Australian model of fiduciary obligation established by the High Court as 'reductionist' is unfortunate. It implies that the duties are

---

109 Albeit, on one occasion, by a judge writing extra-curially: J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) .

110 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237; as discussed by Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) July *Law Quarterly Review* 452, 456.

111 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237-238.

112 Ibid 235-237.

113 At Chapter 2.2.3.

114 *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ); 137-138 (Gummon J).

115 Rosemary Langford, 'ENT Pty Ltd v Sunraysia Television Ltd: A Positive Fiduciary Duty of Disclosure' (2008) 26 *Company and Securities Law Journal* 470, 472.

116 Ibid 470.

inappropriately or unacceptably narrow, and suggests that the position that fiduciary obligations are proscriptive is somehow in the minority. In fact, the cases which advocate a positive fiduciary duty of disclosure are decidedly in the minority in Australia. The three cases which have been seen as applying this concept in particular are *Fraser v NRMA Holdings Ltd,*[117] *ENT Pty Ltd v Sunraysia Television Ltd*[118] and *Commonwealth Bank of Australia v Fernandez.*[119] They appear to indicate an expansion of the accepted proscriptive fiduciary obligations by establishing a positive obligation on directors to disclose information in certain circumstances, in addition to the well-accepted 'no conflict' and 'no profit' obligations. There is no question that such a positive obligation can be found within the *Corporations Act*: for example, in relation to disclosure for related party transactions in ss 218-219, and the penalty for providing false information is clear in s 1309. However, the discussion here focuses on the questionable labelling of the duty as 'fiduciary'.

The Full Court of the Federal Court considered the issue in *Fraser v NRMA,*[120] one year before the decision of the High Court in *Breen v Williams*.[121] *Fraser v NRMA* concerned a booklet of information distributed to members of two companies limited by guarantee which were to be demutualised. The contents of that booklet were found at first instance to be midleading and deceptive under then s 52 of the *Trade Practices Act 1974* (Cth).[122] On appeal, the Federal Court engaged in a discussion of the disclosure required from directors, including its source at law, and breadth once operational. The discussion commenced with reference to the '*Bulfin v Bebarfald's* duty', which had been recognised

117 (1995) 55 FCR 452 ('*Fraser v NRMA*').
118 (2007) 61 ACSR 626.
119 (2010) 81 ACSR 262 ('*CBA v Fernandez*').
120 *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.
121 *Breen v Williams* (1996) 186 CLR 71.
122 Now contained in Schedule 2, 'The *Australian Consumer Law*', to the *Competition and Consumer Act 2010* (Cth).

as applicable by the trial judge.[123] This is a duty to make proper and accurate disclosure to the members, most particularly where the interests of the directors may be adverse to those of the members whom they are advising, as expressed in *Bulfin v Bebarfald's Ltd* [124] by Long Innes CJ. Chief Justice Long Innes, sitting in equity, makes no mention of this duty being fiduciary in nature. If this were in fact a 'fiduciary duty of disclosure', it seems unlikely that his Honour, as a judge sitting in an equitable jurisdiction (which still existed as a separate jurisdiction in New South Wales at that time) would have failed to mention or discuss this fact.

In the paragraph which follows the discussion of the '*Bulfin v Bebarfald's* duty', the Court in *Fraser v NRMA* states that

> [a] duty to make disclosure of relevant information arises as part of the fiduciary duties of the directors to the company and its members in relation to proposals to be considered in general meeting. A fiduciary duty is a duty to provide such material information as will fully and fairly inform members of what is to be considered at the meeting and for which their proxy may be sought.[125]

For this proposition, the Court relied on a history of United Kingdom and Canadian cases. Leaving aside for one moment that the 'fiduciary duty' defined by the court here does not resemble the accepted fiduciary obligation described in the previous chapter, none of these early cases directly discuss a 'fiduciary' duty to disclose relevant information.[126] The cases do discuss such a duty existing at equity, but, as the following

---

[123] *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, 465.

[124] *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423, 432.

[125] *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, 466 (a joint judgment of Black CJ, von Doussa and Cooper JJ). The cases are cited as a list, with only one extracted quotation from the final authority mentioned, *Goldex Mines Ltd v Revill* (1974) 54 DLR (3d) 672, further down the same page.

[126] This could arguably be due to their age, as discussed above in relation to the timing of the word 'fiduciary' entering into legal parlance. But as all cases post-date the 1850s, by which time

analysis will show, the Full Court appears to have treated the words 'fiduciary' and 'equitable' as interchangeable, which they are not.[127]

The cases relied upon by the Federal Court in *Fraser v NRMA*[128] are as follows. The first authority is that of *Jackson v Munster Bank*.[129] This Irish case makes no mention of the word 'fiduciary' at all, let alone a 'fiduciary' duty of disclosure. The case concerned a circular which had been published to convene a meeting of the shareholders at which resolutions would be proposed to alter the Articles of Association, authorising advances to the directors and increasing the remuneration of the directors. It included proxy forms drawn in favour of two of the directors. The plaintiffs alleged that the directors sought to indemnify themselves against and obtain release from breaches of trust which they had committed.[130]

The circular was held to contain statements by which the shareholders may have been misled and which were calculated to obtain proxies from the shareholders without their having the information which would enable them to form a just judgment as to whom to entrust their votes.[131] The Vice-Chancellor specifically noted here, that 'when a Chairman of a Company thinks proper to do an unnecessary act, namely, to make a commentary on the Resolutions which the Directors are about to bring forward… it should be fair and candid commentary.'[132]

---

'fiduciary' could be found in fairly common use, this is not a strong argument in favour of a 'fiduciary duty of disclosure'.

127 This would be similar to treating the words 'tort' and 'negligent' as interchangeable.

128 *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.

129 *Jackson v The Munster Bank (Ltd)* (1884) 13 LR Ir 118.

130 Ibid 130.

131 Ibid 134.

132 Ibid 137.

The second authority relied upon by the Federal Court was *Tiessen v Henderson*.[133] The case makes no mention of a 'fiduciary' duty on the part of directors to disclose an interest to the shareholders. Instead, Kekewich J in Chancery held that:

> the application of the doctrine in *Foss v Harbottle* to joint stock companies involves as a necessary corollary the proposition that the vote of the majority at a general meeting, as it binds both dissentient and absent shareholders, must be a vote given with the utmost fairness – *that not only must the matter by fairly put before the meeting, but the meeting itself must be conducted in the fairest possible manner*.[134]

Justice Kekewich discusses the disclosure of a director's interest in the context of the fact that a shareholder may prudently leave matters in which they are not personally interested to the decision of the majority; but that in order to do so, they must have been given sufficient information to have a fair chance of determining in their own interest whether they are, in fact, disinterested. Facts not stated in this circular included that two directors of the company were to have a large proportion of shares on which there was to be a call in favour of the guarantors, and that the guarantors were to be some of the directors of the company, and that they would derive a personal benefit from this.[135]

*Peel v London and North Western Railway Company*[136] was the third authority raised by the Federal Court in *Fraser v NRMA*[137] in relation to the duty to disclose. This judgment, on appeal from Chancery, concerned whether it was proper for the company to pay the expenses of printing, posting and stamping a circular and proxies sent out by the

---

[133] *Tiessen v Henderson* [1899] 1 Ch 861.
[134] Ibid 866 (emphasis added).
[135] Ibid 870.
[136] *Peel v London and North Western Railway Company* [1907] 1 Ch 5. This is actually *Peel v London and North Western Railway Company (No 1)*, as distinguished from the judgment as to costs in the same matter which followed later that year. It was cited without numerical reference by the Federal Court.
[137] *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.

directors prior to the half-yearly general meetings. The Court of Appeal discussed the duty of the directors to inform the shareholders of the facts, of their policy, and the reasons why they considered that this policy should be supported by the shareholders in general meeting, and held that it was proper that the cost of distributing this material be borne by the company. The judgments, particularly of Vaughan Williams LJ and Fletcher Moulton LJ, find a positive duty on the directors to take care that a sufficient statement of the facts and opinions of the directors be made available to the shareholders, particularly if they perceive a danger that the corporation will take a step which may be injurious to the corporation.[138] Again, there is no discussion which elevates this to the level of a fiduciary duty to inform the shareholders.

The fourth authority, another appeal from Chancery, *Baillie v Oriental Telephone and Electric Co Ltd*[139] again contained no reference to a fiduciary duty of disclosure. It concerned an extraordinary general meeting convened in a parent company to ratify the alteration of articles of association of a subsidiary company which had occurred some six years earlier. The alterations had increased the remuneration of the directors and given them a percentage of the net profits. The meeting would also authorise the directors to retain the profits received, and to alter the articles of the parent company to allow the directors to receive remuneration from subsidiary companies without being accountable, and to exercise voting powers in those companies as they saw fit. The very substantial amount of remuneration received by the directors was not disclosed to the shareholders in the notice of meeting, the circular accompanying the notice, nor when the chairman addressed the issue at the meeting itself. The Court of Appeal held that there was a

138 *Peel v London and North Western Railway Company* [1907] 1 Ch 5, 13-14 (Vaughan Williams LJ), 16 (Fletcher Moulton LJ).

139 *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503.

requirement for full and frank disclosure to the shareholders of the facts upon which they are asked to vote, but did not find that this flowed from a fiduciary obligation. The special resolutions which had been obtained at the meeting could not be supported, as the sanction of the shareholders had not been sought and given on a fair and reasonably full statement of the facts.[140]

*Pacific Coast Coal Mines Ltd v Arbuthnot*[141] was the fifth authority, and again discussed the need to put the shareholders in a position to judge for themselves whether or not to adopt a resolution at a special meeting, without indicating any fiduciary obligation. Here, the Privy Council on appeal from the Court of Appeal in British Columbia advised that resolutions to consent to buying out the shares of the directors and releasing them from liability for any claims were held to be ineffective due to the absence of proper notice putting each shareholder in a position to judge whether or not to consent.[142]

The sixth and final authority relied upon by the Federal Court in *Fraser v NRMA*[143] was *Goldex Mines Ltd v Revill.*[144] The Ontario Court of Appeal held that '[w]here information is sent to shareholders that is untrue or misleading, the duty to shareholders is breached, whether the senders were required by statute to send out that class of information, or whether they simply chose to.'[145] Interestingly, this finding was made in the context of deciding whether or not the plaintiff shareholders had standing to bring a class action against the corporation and other shareholders with adverse interests. The

140 Ibid 514.
141 *Pacific Coast Coal Mines Ltd and Ors v Arbuthnot and Ors* [1917] AC 607.
142 Ibid 618.
143 *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.
144 *Goldex Mines Ltd v Revill* (1974) 54 DLR (3d) 672.
145 Ibid 680.

quote extracted above comes under the heading, 'The right to sue',[146] and appears to be the Canadian response to the doctrine in *Foss v Harbottle*. This judgment in itself seems to suffer from a similar condition to the judgment in *Fraser v NRMA*: the conflation of 'duties arising under equity' and 'fiduciary obligations' as one and the same.[147]

The Federal Court in *Fraser v NRMA*[148] cited the discussion undertaken by the Ontario Court of Appeal in *Goldex* of the previous Ontario case of *Charlebois at al v Bienvenu*[149] which ranged across the two concepts. Justice Fraser held in *Charlebois* that calling an annual meeting and electing directors after the directors sent out a misleading information circular was a breach of the directors' fiduciary duty to the company. The Court in *Goldex* then declared that

> such an act is also a breach of duty to other shareholders. If the directors of a company choose, or are compelled by statute, to send information to shareholders, those shareholders have a right to expect that the information sent to them is fairly presented, reasonably accurate, and not misleading.[150]

Although the misleading circular is a breach of the directors' fiduciary duty to the company, the Court does not clearly state that it is also a breach of a fiduciary duty the directors owe to the shareholders – merely a breach of duty. As noted previously in this chapter, a fiduciary for one obligation is not *ipso facto* a fiduciary for all, or potentially any, other obligations which are owed.[151]

---

146 Ibid 676.

147 However, the Canadian courts have generally been prepared to allow the fiduciary obligation a more pro-active role, including prescriptive action, but this has more generally been found in other relationships than commercial ones: see, eg, parent-child and Indigenous person-Crown, as discussed in G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 146, 156-158.

148 Although the Federal Court misspelled the case name as '*Charlebois et al v Bienveau*' when quoting the *Goldex Mines* judgment at 466.

149 *Charlebois et al v Bienvenu* [1967] 2 OR 635.

150 *Goldex Mines Ltd v Revill* (1974) 54 DLR (3d) 672, 679.

151 As discussed previously in Chapter 2.2.1; P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 2.

Later, the Ontario Court of Appeal in *Goldex* stated:

> The principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important – that the majority must act fairly and honestly. Fairness is the touchstone of equitable justice, and when the test of fairness is not met, the equitable jurisdiction of the Court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonesty has caused. *The category of cases in which fiduciary duties and obligations arise is not a closed one…*[152]

Until the last sentence, this statement clearly echoes the United Kingdom cases relied upon by the Federal Court in *Fraser v NRMA*, particularly the judgment of Kekewich J in *Tiessen*.[153] The sudden reference by the *Goldex* court in the emphasised sentence, raising the fact that the categories of relationships where fiduciary obligations will be imposed not being closed, comes as a surprise, given the quoted context. As has been shown above, fiduciary obligations, of all equitable concepts, have little to do with concepts of fairness, and in no way rely on the kind of misrepresentation or *mala fides* the Ontario Court of Appeal was discussing immediately prior to this reference.[154]

It can potentially be concluded that this reference to fiduciary obligations follows from the prior discussion of directors' fiduciary obligations in *Charlebois*, from which the Court concluded there was a breach of duty to the shareholders.

As can be seen, the cases referred to by the Federal Court in *Fraser v NRMA* do not present a clear and unambiguous development of a concept of a 'fiduciary duty of disclosure', and ought not to be relied upon as such.[155] They are all judgments from

---

152 *Goldex Mines Ltd v Revill* (1974) 54 DLR (3d) 672, 680 (emphasis added).

153 *Tiessen v Henderson* [1899] 1 Ch 861.

154 See, for example, the discussion in Chapter 2.1.3, 'The Development of the Fiducairy Obligation', that the *bona fides* of the fiduciary provide no protection from breach, and Chapter 2.2.2, 'The Definition Debate', that fairness is not contemplated under any of these bases for a fiduciary obligation.

155 Contra Rosemary Langford, 'ENT Pty Ltd v Sunraysia Television Ltd: A Positive Fiduciary Duty of Disclosure' (2008) 26 *Company and Securities Law Journal* 470.

foreign jurisdictions.[156] Five of them do not refer to such a duty as 'fiduciary' in any context, and the lone case which does use the word fiduciary in proximity to a discussion of a duty to the shareholders does not clearly identify this particular duty as fiduciary in nature, or attempt to provide any appropriate etymology for such a claim.

It is also not a case of a new development being only partially supported by previous cases: if read in the light suggested, *Fraser v NRMA* would inappropriately convert waiver into a prescriptive duty.[157] Four of the cited cases do clearly involve behaviour by directors for which the company could have sued for breach of both the no profit and no conflict rules,[158] raising the potential for the directors to seek the defence of fully informed consent. However, the consent that they have sought and, in many of the cases, received was found by the courts to be of a lesser standard than fully informed, perhaps leading the courts to discuss the need for full and frank disclosure without overtly discussing the defence.

A careful analysis of the cases cited clearly shows the misconception of the 'fiduciary duty to disclose' which has arisen as a result. In light of the true nature of these decisions, it is difficult to accept that a duty to make disclosure of relevant information to the shareholders arises as part of the fiduciary obligation of the directors to the company. This is particularly so given that there was no discussion beyond mere citation for all but

156 That is not to disparage the utility of foreign judgments, but it does lessen the impact of a seemingly long string of authority.

157 As discussed above at Chapter 2.2.3, it is not accepted in Australia that fiduciary obligations are prescriptive in nature.

158 *Jackson v The Munster Bank (Ltd)* (1884) 13 LR Ir 118, *Tiessen v Henderson* [1899] 1 Ch 861, *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503, *Pacific Coast Coal Mines Ltd and Ors v Arbuthnot and Ors* [1917] AC 607.

one of the six authorities presented by the Court immediately following that statement.[159] This concern for correct use of authority should not be read as an argument that equity is incapable of bearing children,[160] particularly within this field, but is a plea that if a child is to be born, there should at least be some discussion about and appropriate justification of the 'miracle'[161] of its birth.

Following *Fraser v NRMA*, there was no rush to take up arms for the 'fiduciary duty of disclosure', perhaps due to the decision of the High Court in the following year in *Breen v Williams*,[162] which established that, in Australia, fiduciary obligations are only proscriptive in nature.[163] However, this did not mean that this misconception was consequently overcome or forogotten. The next decision to reassert the 'fiduciary duty of disclosure' came 12 years later in *ENT Pty Ltd v Sunraysia Television Ltd*.[164]

The judgment of Austin J in the Supreme Court of New South Wales in *ENT*[165] focussed on whether the directors of Sunraysia had made sufficient disclosure to the members in relation to the sale of that company's main undertaking, Swan TV. The directors had unanimously recommended the sale to shareholders in an Explanatory Memorandum

---

159 *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, 466. As mentioned above, the Federal Court did quote a short extract from *Goldex Mines Ltd v Revill* (1974) 54 DLR (3d) 672, where that court discussed the case of *Charlebois et al v Bienvenu* [1967] 2 OR 635.

160 Once again adapting the metaphor used by Michael Kirby, originally coined by Lord Denning: Michael Kirby, 'Equity's Australian Isolationism' (Paper presented at the W A Lee Equity Lecture, Queensland University of Technology, 19 November 2008) <http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol65+/2008/2323-W_A_Lee_Equity_Lecture_2008_(final).doc>, 19.

161 The word miracle is not used lightly, given Kirby's discussion under the heading 'Hostility to Invention and Expansion' in the W A Lee Equity Lecture: Michael Kirby, 'Equity's Australian Isolationism' (Paper presented at the W A Lee Equity Lecture, Queensland University of Technology, 19 November 2008) <http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol65+/2008/2323-W_A_Lee_Equity_Lecture_2008_(final).doc>, 20-45.

162 *Breen v Williams* (1996) 186 CLR 71.

163 Ibid 113 (Gaudron and McHugh JJ); 137-138 (Gummon J).

164 *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626 ('*ENT*').

165 Ibid.

accompanying the Notice of General Meeting at which the shareholders were expected to vote on the sale.[166] Justice Austin ultimately held that the material provided to the shareholders had deficiencies which related to 'material information that the ordinary shareholder needs to have in order to decide whether to approve the Sale Proposal, and would expect to be provided with.'[167]

In reaching that conclusion, Austin J spends some time discussing the 'director's duty of disclosure'[168] as it was contended by the plaintiff that the court should grant an injunction halting the meeting process because the directors of Sunraysia had not discharged the '*Bulfin v Bebarfald's* duty', as was discussed previously in relation to *Fraser v NRMA.* Indeed, in *Bulfin v Bebarfald's Ltd*,[169] Long Innes CJ discussed a number of the cases later relied upon by the Federal Court in *Fraser v NRMA.*[170]

Although Long Innes CJ in *Bulfin v Bebarfald's Ltd*[171] makes no mention of the duty being fiduciary in nature, after raising this duty Austin J continues his discussion of the 'fiduciary obligation of the directors'[172] by considering the case of *Chequepoint Securities Ltd v Claremont Petroleum NL*,[173] and in particular the words of McLelland J:

> Where directors take it upon themselves to urge or recommend or advise members to exercise their powers in general meeting in a particular way, they are in general required to make a full and fair disclosure of all matters within their knowledge which would enable the members to make a properly informed judgment on the matters in question.[174]

166 Ibid 630.
167 Ibid 644.
168 The heading chosen by Austin J, although he refers to it as a 'fiduciary duty of full and fair disclosure' two paragraphs above.
169 *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423.
170 *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.
171 *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423.
172 *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626, 631.
173 *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.
174 Ibid 96.

Justice McLelland is rephrasing the '*Bulfin v Bebarfald's* duty' more broadly, applying it to circumstances where directors volunteer advice or an opinion to members. Again, not only does McLelland J also not label the duty as fiduciary, but only contends that there is a requirement 'in general', and not even specifically in equity.[175]

The finding in *ENT* of a positive fiduciary duty of disclosure is in direct contradiction to the judgment of the High Court in *Breen v Williams*.[176] Justice Austin does refer back to *Fraser v NRMA*[177] to establish his acceptance of a positive fiduciary obligation existing, but does not discuss High Court decision of *Breen v Williams* which was subsequent to the Federal Court judgment in *Fraser v NRMA*, and clearly contradicts this statement of a positive fiduciary obligation.

Additionally, Austin J's decision in *ENT* marks a departure from his own previous rulings in relation to disclosure and fiduciaries. In his earlier consideration of the discussion by Brennan J of the defence of fully informed consent in *Daly v Sydney Stock Exchange Ltd*[178] (which had raised questions in other courts as to whether it imposed expansive and prescriptive obligations of disclosure on the part of the fiduciary)[179] Austin J concluded in *Aequitas v AEFC*[180] that Brennan J was not prescribing further duties, but merely referring to the contractual aspects of the adviser-client relationship and explaining the nature of disclosure required of the fiduciary in order to satisfy the

---

175 Ibid.
176 *Breen v Williams* (1996) 186 CLR 71.
177 *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.
178 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371.
179 Including the Supreme Court of South Australia and Queensland, as discussed by Vince Battaglia, 'Dealing with Conflicts: The equitable and statutory obligations of financial services licensees' (2008) 26 *Company and Securities Law Journal* 483, 489.
180 *Aequitas Ltd v AEFC Leasing Pty Ltd* (2001) 19 ACLC 1006.

defence.[181] This was similar to the conclusion reached in the same year by Finkelstein J in *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)*,[182] when he refused to describe the obligation to seek informed consent as a positive duty but instead described it as a 'means by which the fiduciary obtains the release or forgiveness of a negative duty.'[183] The shift from this position in *Aequitas v AEFC* to the outcome in *ENT* six years later is quite marked. The remainder of the judgment in *ENT* very adequately discusses the reasonable limits which must be placed on any such duty of disclosure and does not raise any controversy.

This description of a positive 'fiduciary duty of disclosure' appeared another three years after *ENT* in *CBA v Fernandez*.[184] The case dealt with irregularities around the first meeting of creditors in a voluntary administration, and while considering whether the administrator had complied with his duties, Finkelstein J raised the *Bulfin v Bebarfald's* duty:[185] the directors owed a fiduciary duty to members 'to give them full information of all matters material to the business that is to be transacted at the company meeting.'[186] The court concluded that the information must be sufficient to allow members to determine whether they would attend the meeting in order to vote, following *Fraser v NRMA*[187] with no further discussion. Two assumptions made this duty relevant on the facts: first, that an administrator is under the same duty to advise creditors when convening a meeting as a director would be when convening a meeting of members, and secondly, that the duty arises whether or not the administrator is urging a particular

181 Vince Battaglia, 'Dealing with Conflicts: The equitable and statutory obligations of financial services licensees' (2008) 26 *Company and Securities Law Journal* 483, 489-490.

182 *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566

183 Ibid 576 (Finkelstein J); as cited and discussed in Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 182; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 101.

184 (2010) 81 ACSR 262.

185 *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423.

186 *Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262, 272.

187 *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.

approach. Justice Finkelstein proceeded on the basis that both assumptions were an accurate statement of the legal position, but acknowledged that '[n]either assumption is self-evidently correct. Rather, there is good reason to think that the opposite is the true position.'[188] Unfortunately for the development of the law in this area, as these two assumptions were not put in issue before the court, neither the assumptions nor the underlying 'fiduciary duty of disclosure' were fully articulated in the resulting judgment.

Interestingly, none of the cases which support the concept of a 'fiduciary duty of disclosure' undertake the initial step of finding a fiduciary relationship between the directors and any beneficiary. Although undoubtedly the company is the beneficiary of fiduciary obligations as one of the status-based relationships, that first step is vital to a discussion of the obligation, as, in the circumstances before the court, the shareholders acting in their capacity as an organ of the company were entitled to grant fully informed consent.[189] It is rather hard to understand how a director can owe a 'fiduciary duty' of any nature without first having been established as a fiduciary with obligations flowing to some ascertainable beneficiary. Certainly, if the courts were considering a director-shareholder relationship, this point warranted discussion. As discussed earlier, the director-shareholder relationship has not enjoyed recognition as a status-based fiduciary since the days of the joint stock company.[190]

---

188 *Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262, 272.

189 That is, the shareholders as a whole, not individually, acting as the company in general meeting.

190 See discussion above, at Chapter 3.2.1.

These cases suprisingly seem to suggest that a director can owe a 'fiduciary duty' without first being found to be a fiduciary.[191] That cannot be reconciled with the prophylactic nature of the fiduciary obligation.

It appears perfectly reasonable that the directors owe their fiduciary obligations to the shareholders, when they are acting as an organ of the company by making decisions in general meeting. There, the directors will then be constrained by the 'no conflict' and 'no profit' rules. As such, they are not able to place themselves in a position of conflict with the interests of the shareholders acting as the company, nor profit from that relationship, without being in breach of their fiduciary obligations. In the quotation provided above from Long Innes CJ in *Bulfin v Bebarfald's Ltd*[192] the directors would have breached their fiduciary obligation to the shareholders[193] by permitting their individual interests to be adverse to those of the shareholders, when acting as the company. The directors would most certainly be interested, therefore, in the defence of 'fully informed consent' which they could obtain from the shareholders, either before or after their actions. This would seem to completely traverse the sphere covered by the concept of a 'fiduciary duty of disclosure' – the directors must fully and accurately inform the shareholders of the circumstances of their profit and/or conflict, and obtain their consent to proceed, or their pardon for past behaviour if they wish to raise the defence. In fact, the defence covers more ground than the 'fiduciary duty of disclosure' as it permits absolution for a breach already committed.

---

191 As discussed previously in Chapter 2.1.3, it is generally agreed that the finding of a party to be a fiduciary is the first step in the process – it makes no implication that all obligations owed will be fiduciary in nature, nor that the parties cannot then contract out of these obligations. It remains, however, a necessary first step: P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 2, 201.

192 *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423.

193 Termed 'corporators' in *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423.

At the very least, it is clear from these decisions that directors are required to be transparent to shareholders about their actions, particularly when seeking waiver for a breach of fiduciary obligation. This does suggest that the court is willing to see the shareholders as the repository of the fiduciary obligation in certain circumstances – which is wholly appropriate, when they are acting as the company in general meeting, representing the company as the active decision-making organ at that time.

### 3.3.4 *Practical Examples: Cooley, Regal, Boardman, Queensland Mines and Peso*

The following five cases provide interesting practical examples of the potential opportunities for breaching fiduciary obligations commonly facing directors. These cases can be hard to reconcile not only with each other but with the state and intent of the law, but they provide an excellent opportunity to examine the potential special case of closely held companies that will later become the focus of this thesis.

The defendant in the English case of *Industrial Development Consultants Ltd v Cooley*[194] was a director of the plaintiff company. In his capacity as director, he pitched a project to a public Gas Board, which rejected the pitch on the basis that it was their policy not to employ development companies. The Gas Board offered the contract to the defendant personally, due to his background and experience in the field. The defendant falsely represented to the plaintiff that he was ill, and consequently obtained a release from the plaintiff, and accepted the Gas Board's offer.[195] Justice Roskill held that the information about the Gas Board contract came to the defendant in his fiduciary capacity as director of the plaintiff, and, regardless of the fact that the contract was ultimately only offered to

[194] *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 ('*Cooley*').
[195] Ibid 443-445.

him personally, he was duty-bound to pass that opportunity on to the plaintiff.[196] The opportunity was of exactly the type that the plaintiff relied upon the defendant to obtain, which made him liable to account to the plaintiff for the profits from the contract.[197]

This case aptly demonstrates the prophylactic nature of the fiduciary obligation, acting here in both its conflict and profit aspects. It was not, however, the false representation by the defendant in order to leave the plaintiff company which caused him to have been in breach of the obligation. The strictness of this rule is perhaps better demonstrated by the English decision of *Regal (Hastings) Ltd v Gulliver*.[198] The company Regal owned a cinema in Hastings. Through a subsidiary, the company wished to lease two more cinemas, in order to make the business a more attractive package for sale. The landlord requested personal guarantees from the directors of Regal in relation to the rent, which they were unwilling to give, but would otherwise permit the leases if the subsidiary could demonstrate an issued share capital of £5000.[199] In exchange for shares, Regal (as directed by the board of directors) contributed £2000, but rather than seek a loan for the remainder, Regal’s four directors put in a further £500 each, the Chairman of the Board found outside subscribers for another £500 and the company solicitor was asked to and contributed the final £500. After the leases had been established, Regal was sold,[200] with a reasonable profit per share obtained for both Regal and its subsidiary.[201] The new owners of Regal sued, claiming that the directors and solicitor had breached their

196 Ibid 451.
197 Ibid 453.
198 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (‘*Regal (Hastings)*’).
199 Ibid 140.
200 Although not to the original purchaser for whom the ‘attractive’ offer of three cinemas together had been built: ibid 142-143.
201 Ibid 143.

fiduciary obligations to Regal, as they had personally profited from their investment in the subsidiary.[202]

In *Regal (Hastings)*, in contrast to *Cooley*,[203] the directors at all times acted *bona fide*, and the opportunity was one which the plaintiff company was not in a position to pursue. Additionally, although the company Regal was the plaintiff, control of that company had changed hands between the breach and the suit. The company was at all times the beneficiary of the duty, but those who stood to actually benefit from the suit were not involved with the company at the time of the breach and thus obtained what was, in essence, a windfall. This strictness has been the subject of academic criticism,[204] and has been relaxed in other jurisdictions, such as the United States of America, where directors may pursue opportunities personally if it is impossible for the company to do so.[205] This point was addressed directly by Lord Porter in *Regal (Hastings)*: 'it is to my mind immaterial that the directors saw no way of raising the money save from amongst themselves and from the solicitor to the company, or, indeed, that the money could in fact have been raised in no other way.'[206] The opportunity may have been impossible for the company to pursue without the intervention of the directors, but their Lordships declined to perceive impossibility as having an impact on the strict nature of the underlying fiduciary obligation.

---

202 Ibid 149-150. An exception was made for the Chairman, who had not subscribed for shares himself, but had found investors for those shares. As he had not profited personally, an account of profits was not ordered against him: 150-151. Futher exception was made for the solicitor, who had only subscribed at the request of his client, Regal: 152. Lords Porter and Wright concurred with these points, as made by Lord Russel of Killown.

203 *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443.

204 See, for example, Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 143; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 114-115.

205 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 115.

206 *Regal (Hastings)* [1967] 2 AC 134, 158.

Although the bright line approach in England may seem overly strict, its relaxation in the United States of America and the subsequent need to define the concept of 'impossibility' is no more preferable. As discussed above,[207] a solution is to ensure that the defence has been satisfied by seeking fully informed consent. If such consent is not forthcoming, then perhaps that is simply a restriction that directors must accept upon taking up their post: not all corporate opportunities can be pursued once one agrees to act for the benefit of another.

Mention of fully informed consent leads to consideration of *Boardman v Phipps*,[208] which is recognised as a seminal case on this topic from which the argument may reasonably be made that fully informed consent can, in some circumstances, be hard or impossible to achieve in any practical sense. Boardman was the solicitor of a family trust,[209] which held shares in a textile company.[210] The company was not performing as well as Boardman believed that it might, and he, along with one of the beneficiaries of the trust, Tom Phipps, attended at a general meeting of the company to raise their concerns on behalf of the trust. Correspondence with two of the trustees following this meeting resulted in Boardman and Tom Phipps purchasing shares in the company personally, as one of the trustees firmly rejected the idea of the trustees or the trust itself purchasing more shares.[211] The third trustee suffered from senility and did not take part in the running of the trust.[212] After Boardman and Tom Phipps took control of the company, the company capitalised some assets and made a distribution of capital without

207 See Chapters 2.1.3 and 3.3.3.3.
208 *Boardman v Phipps* [1967] 2 AC 46.
209 This case does not involve a breach of fiduciary obligations by a director of a company. However, the ability to seek fully informed consent of the Board of Trustees rather than the beneficiaries of the trust is analogous to the debate as to whether or not fully informed consent should be sought from the board of directors or the shareholders in general meeting.
210 *Boardman v Phipps* [1967] 2 AC 46, 71-72.
211 As noted in the judgment of Viscount Dilhorne, the trust could not have purchased the shares without the approval of the court: *Boardman v Phipps* [1967] 2 AC 46, 76.
212 Ibid 72-73.

reducing the values of the shares.[213] This distribution benefited the trust and Boardman and Tom Phipps personally. Shortly thereafter, John Phipps, another beneficiary under the trust, sued both men, alleging that at all times they had been acting in a fiduciary capacity and were therefore accountable to the beneficiaries for any profit they had made.[214]

In each of the High Court, the Court of Appeal and the House of Lords Boardman and Tom Phipps were found to have breached a fiduciary obligation and to be accountable to the trust for their profits. Viscount Dilhorne noted that the appellants could not claim that they had the consent of the trustees, as they did not seek the consent of the senile trustee, but did not discuss the inability of a senile person to grant consent, in any event.[215] Lords Hodsen and Cohen did not deal with consent by the trustees specifically, and Lord Guest acknowledged that it was not contended that the trustees had given consent.[216] Lord Upjohn acknowledged that there was 'much argument upon the impact of the fact that the [third trustee] was at all material times incapable of acting in the trust owing to disability.'[217] However, his Lordship held that information learned by a fiduciary during the course of their duties would create a breach of obligation if acted upon resulting in profit, and as such did not discuss the need for consent any further.[218] The precise circumstances of this case would not likely be replicated within the corporate context, as the position of the courts in relation to 'sleeping directors' has been made

213 Ibid 73-83.
214 Ibid 83.
215 Ibid 93 (Viscount Dilhorne, in dissent).
216 Ibid 117.
217 Ibid 128.
218 Ibid 129-130.

quite clear.[219] That does not, however, render the discussion of consent, and the remedial flexibility which the court demonstrated in this case of no use for corporate scenarios.[220] The defence remains available to directors who have or will be placed in breach of their fiduciary obligations, and must be sought from the members in general meeting, after full information has been provided.

Further complexities arise in instances where a company ceases to pursue an opportunity. Although this was the situation in *Regal (Hastings)*,[221] it was also considered by the Privy Council on appeal from the Supreme Court of New South Wales in the case of *Queensland Mines Ltd v Hudson*[222] with the opposite result. In *Queensland Mines*, the plaintiff company alleged a breach of fiduciary obligations from its former managing director, Hudson, in relation to the exploitation of iron ore opportunities in Tasmania.[223] Hudson had negotiated with the Tasmanian government in relation to exploration licences for iron and coal, using the name and backing of Queensland Mines throughout much of the negotiation process.[224] The licences were, however, issued in his personal name, and when Queensland Mines was unable due to the financial circumstance of its key backer[225] to contribute financially, Hudson resigned as managing director of Queensland Mines and informed the Tasmanian government that he would be personally

219 See, eg, *Southern Cross Interiors Pty ltd (in liq) v Deputy Commissioner of Taxation* (2001) 19 ACLC 1513, and the discussion regarding the use of the *Corporations Act 2001* (Cth) s 588H(4) defence of 'good reason' for non-participation in management.

220 The remedy used in this case was an account of profits with a stipend for the skill applied by the fidcuairies in turning that profit, and will be discussed more below at Chapter 4.6.4.

221 *Regal (Hastings)* [1967] 2 AC 134.

222 *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 ('*Queensland Mines*').

223 Ibid 6-7.

224 Due to the limitations on Queensland Mines (having been formed to exploit uranium deposits in Queensland), it had always been in mind that a new company would be formed to exploit the Tasmanian licence opportunities: *Queensland Mines* (1978) 18 ALR 1, 6-7.

225 Mr Korman, who was the controller of Stanhill, which in turn controlled the 51% shareholder of Queensland Mines, a company called Factors.

responsible for the obligations owed under the licences.[226] At first instance, Hudson was called to account for profits made from these licences, as they had arisen directly from his involvement with Queensland Mines and use of the company's name in the negotiating period.[227] The Privy Council disagreed, finding that Hudson had been left 'on his own, for better or for worse, with the Tasmanian licences.'[228] He was not obliged to account.

These two outcomes appear hard to reconcile, but are easily distinguished on the facts. In *Regal (Hastings)*, the company was only able to pursue the lease opportunity due to the capital contributed by the directors in the subsidiary company. The directors then profited when the parent company was sold due to their holding in the subsidiary. Lord Russell held that the shares were obtained only by reason of the fact that they were directors of the parent company, and that the by then ex-directors were therefore liable to account for the profit made from the shares.[229] In *Queensland Mines*, the company was unable to pursue the opportunity due to liquidity problems.[230] The managing director Mr Hudson then resigned and, with the full knowledge of the company board, successfully pursued the opportunity. The Privy Council held that once the company had rejected the opportunity, there was no conflict of interest between the director and the company.[231] Consequently, *Queensland Mines* has been interpreted by some courts as indicating that a fiduciary is not bound to account for a benefit or gain derived by virtue of their position,

226 *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, 7-8. Hudson eventually found an American company to back the exploitation.

227 Ibid 8.

228 Ibid 10.

229 *Regal (Hastings)* [1967] 2 AC 134, 149.

230 And also possibly limitations as to its original purpose – being exploitation of uranium in Queensland, rather than iron ore in Tasmania. There had always been an intention to incorporate a new entity to follow through with the iron ore opportunity in Tasmania, rather than allow Queensland Mines to move forward there itself: *Queensland Mines* (1978) 18 ALR 1, 6.

231 Ibid 9-10.

if they can show that the beneficiary gave 'fully informed consent' to the benefit or gain.[232]

*Queensland Mines* appears to raise a further question in relation to the available defence for breach of fiduciary obligations: who consents for the company? On first inspection, the outcome of *Queensland Mines* seem to say that the board of directors can consent, and that seeking the consent of the shareholders in general meeting is an unnecessary step. It appears throughout much of the Privy Council judgment as though the court is accepting of the fully informed consent of the board of Queensland Mines as sufficient to excuse Hudson from breach of his fiduciary obligations. For example, their Lordships state: 'the board of the company knew the facts, decided to renounce the company's interest, ... and assented to Mr Hudson doing what he could with the licences at his own risk and for his own benefit.'[233] As calling meetings of shareholders is often considered an onerous task, this might be seen as a boon by directors. Dal Pont suggests to the contrary that the only clear protection the directors could obtain against a finding of breach of fiduciary obligation would be to secure a resolution of the shareholders in general meeting.[234] Dal Pont correctly notes that, even with the affected director excused from voting, their potential influence on the board cannot be ignored.[235]

Upon closer inspection of the facts of *Queensland Mines*, it becomes apparent that this case turned on a very narrow scenario, where both shareholders had some form of significant representation on the board. There were two shareholders in the company Queensland Mines. The first, AOE Ltd, holding 49% of the shares was a company of

---

232 *Hurley v BGH Nominees Pty Ltd [No 2]* (1984) 37 SASR 499, 506 (Walters J).
233 *Queensland Mines* (1978) 18 ALR 1, 9-10.
234 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 117-118.
235 Ibid 118.

which Mr Hudson was chairman and managing director, which was also almost wholly owned by another company of which Mr Hudson was the managing director, KI Ltd. The other shareholder, Factors Ltd, holding 51% of the shares, was a subsidiary of a holding company controlled by Mr Korman and his family.[236] The three members of the board of directors of Queensland Mines at the relevant times were Mr Hudson, as managing director, a son of Mr Korman and a director of Factors Ltd (Mr Redpath and then later Mr Gladstones).[237] The information held by the members of the board led to the decision that the board reached to pass up the relevant opportunity – and the same outcome would have been achieved from the shareholders. The consent of the board of directors in this case can be considered as equivalent to the consent of the shareholders, rather than as an exception to the position that fully informed consent must be sought from the shareholders. Read in this way, the case then seems to be entirely consistent with the accepted approach to the defence of fully informed consent, which is confirmed by the final comment by the Privy Council before advising the appeal be dismissed: 'The shareholders were Factors and AOE, both of whom were represented on the board.'[238] By the board granting consent, the shareholders had, in effect, granted their fully informed consent.

Dal Pont further opines that the need to seek the approval of the shareholders in general meeting for waiver of the directors' breach of fiduciary obligation to the company in some way runs contrary to the fact that fiduciary obligations are owed to the company, and not to the shareholders.[239] That analysis is mistaken. Seeking the approval of the shareholders in no way contradicts the notion that fiduciary obligations are owed to the

[236] *Queensland Mines* (1978) 18 ALR 1, 5.
[237] Ibid 8.
[238] Ibid 11.
[239] G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 118.

company, as the shareholders acting as a collective in general meeting are an organ of the company. The emphasis on seeking consent from the shareholders in general meeting satisfies the strict prophytactic nature of the fiduciary obligation, as it attempts to avoid the possibility of members of the board being placed in a position of conflict by approving their own breaches. Clearly, in cases such as the particular facts of *Queensland Mines*, this conflict arises regardless, as the shareholders and the Board were essentially one and the same.

The defences of fully informed consent or having the breach waived are, in most situations,[240] not so onerous that fiduciaries ought to be able to escape the strict liability inherent in fiduciary obligations.[241] Given that these defences exist, it is difficult to identify any significant harm in otherwise strictly applying the fiduciary obligation. Rather, the primary harm in imposing a strict obligation which can only be waived by fully informed consent appears to be an increased workload on shareholders. Further, there are numerous administrative difficulties in placing decisions in the hands of the shareholders, both in calling the requisite shareholder meetings and in disseminating the information required in order to reach the threshold of informed consent. There are already concerns with information overload leading to irrational shareholder decisionmaking,[242] and requiring ratification or informed consent of breaches would undoubtedly add to a shareholder's 'workload' – but shareholding is also not something to be taken lightly.[243] In addition, there is a strong argument that shareholder approval is

240 *Boardman v Phipps* [1967] 2 AC 46 (as discussed above) providing perhaps the classic example of where this is not true.

241 Melvin Aron Eisenberg, 'The Structure of Corporation Law' (1989) 89 *Columbia Law Review* 1461, 1469, 1474 and 1480.

242 Robert A Monks and Nell Minow, *Watching the Watchers - Corporate Governance for the 21st Century* (Blackwell Publishers Inc, 1996), 91-93 and 105.

243 Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004), 144 and 150-152.

not reliable as a valid check on the board of directors,[244] and in certain circumstances the consent of the shareholders is not effective.[245]

The decision in *Queensland Mines* makes no reference to the earlier Canadian authority of *Peso Silver Mines Ltd v Cropper*,[246] where the director who purchased a claim which had previously been offered to and rejected by the company was found not to have breached his fiduciary duty. The lack of breach appeared there to be solely based on the prior rejection by the company, although no prior consent or later waiver for the act was sought. Despite various academic critiques of this decision, there have been numerous cases where corporate rejection has been a full defence to a breach of the business opportunity rule – the language of *Queensland Mines* conforming as an example of such. Whether viewed as a separate obligation on directors, or as an example of the 'no profit' rule, it is hard to align the traditionally strict application of a fiduciary obligation with the ability to pursue an opportunity to your own advantage constrained merely by the requirement that the company must have first 'rejected' it, for whatever reason.

The business opportunity rule highlights a concern held by many in relation to fiduciary obligations: the close analysis of the facts which must be undertaken by the courts in order to reach a conclusion. Cases such as *Peso Silver Mines* and *Queensland Mines* are only acceptable in light of the strict nature of the fiduciary obligation if the companies in those cases legitimately rejected the opportunity. Authorising the director then to be able to act on that opportunity is a logical corollary of this rejection, and if it is a *bona fide*

---

244 Melvin Aron Eisenberg, 'The Structure of Corporation Law' (1989) 89 *Columbia Law Review* 1461, 1474-1478; Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 918.

245 Such as if it constitutes a fraud on the minority, is given by an insolvent company to the prejudice of its creditors, or where the majority is tainted by the same improper purpose as the directors:G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 118-119.

246 *Peso Silver Mines Ltd (NPL) v Cropper* [1966] SCR 673.

rejection, then the reasons for the rejection should be sufficient to convince the shareholders or board to grant authorisation. Evans once described the *Regal Hastings* decision as 'commercial Puritanism',[247] which is perhaps too harsh. It was a strict application of the fiduciary obligation, arising out of those particular facts. Yes, had the business not changed hands, nothing would potentially have come of the transactions undertaken by the directors. But that in itself does not mean that there was no breach of fiduciary obligation – it aptly demonstrates that the 'company', particularly when the board of directors is the decision-making organ, may not be the best watchdog of its own interests.

Flannigan draws on his discussion of 'access to the assets of another', analysed above, to explain the fundamental impact of incorporation. Incorporation radically changed the nature of the grant of access in this relationship, and therefore the fiduciary consequences.[248] Partners in a joint stock company grant limited access to each other's assets. Shareholders, on the other hand, grant open access to the corporation, with their share subscriptions conveyed to the corporation for the purposes of the corporation. As such, from a status-based fiduciary perspective, shareholders no longer owe fiduciary duties to each other, as they have no access to each other's assets, and the directors do not owe fiduciary obligations to the shareholders, as their 'limited access' is now to the assets of the corporation and not to the shareholders. The transition from stockholder in a joint stock company to shareholder in a corporation reflects a move from the position of a recognised status-based fiduciary to a more attenuated relationship.

---

247 Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 2003), 136. This description is absent from the latest edition of the same text, Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) where he discusses *Regal (Hastings)* at 142-145.

248 Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277, 280.

### *3.4 Fact-based Instances of the Fiduciary Obligation Owed to Shareholders*

The director-shareholder relationship is not one of the status-based relationships recognised by the courts, and as such there is no presumption of fiduciary obligations between the parties.[249] The exposure of directors to fact-based fiduciary obligations to shareholders is the same exposure we all have, according to Flannigan.[250] It is the ordinary consequence of the direct application of a general civil liability, in the same fashion as the application of tort liability for losses we negligently inflict on our neighbours.

*Percival v Wright*[251] marked the commencement of the judicial position that directors owe their fiduciary obligations to the company, and not to individual shareholders. In this case, shareholders of an unlisted, closely held company contacted the company secretary seeking to sell the shares they held at a price previously determined by an independent valuer. The chairman and two directors offered to purchase the shares, and the shareholders accepted. They subsequently discovered that the board had been approached by a potential purchaser of the entire company, and that the price in negotiation prior to and at the time of the share purchase was considerably higher than what was paid for their shares. The shareholders argued that the transfers should be set aside because the directors held a fiduciary position as trustees for the individual shareholders because of the negotiations for the sale of the undertaking. This argument was rejected by Swinfen Eady J,[252] in a judgment which has been the subject of a great

---

[249] See discussion at Chapter 2.2.1.

[250] Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277, 294.

[251] *Percival v Wright* [1902] 2 Ch 421.

[252] Ibid 426.

deal of academic criticism[253] and led to attempts by many courts to confine it to its facts.[254] This decision, when taken in combination with the 'proper plaintiff' principle from *Foss v Harbottle*,[255] has left shareholders with only limited standing to bring an action in their own right for a fiduciary injury to the company.[256]

The court in *Hospital Products* stressed that the list of relationships which will attract fiduciary obligations is not exhaustive and the categories of potential fiduciaries are not closed.[257] In certain circumstances, courts have been willing to find that a fiduciary obligation has arisen between directors and shareholders. Outside of situations where the directors had specifically held themselves out as acting as the agents of shareholders,[258] or older cases where companies and partnerships had not yet become strictly separate ideas,[259] the courts have held the following fact examples to give rise to a fiduciary obligation from the director to the shareholder:

1. When a director purchases shares from a shareholder;
2. When a company is about to be wound up;

---

253 See for example, Louis Loss, 'The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States' (1970) 33 *Modern Law Review* 34, 40-41; P D Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977), 11; Robert Valentine, 'The Director-Shareholder Fiduciary Relationship: Issues and Implications' (2001) 19 *Company and Securities Law Journal* 92, 97.

254 For example in Canada, New Zealand and Australia respectively: *Farnham v Fingold* [1971] 3 OR 688; *Coleman v Myers* [1977] 2 NZLR 225, particularly Woodhouse J at 324; *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 555, where the decision is called 'anomalous' by Handley JA.

255 *Foss v Harbottle* (1843) 67 ER 189.

256 The issues raised by this limitation (including access to justice, appropriate enforcement mechanisms, and remedial certainty) are addressed in more detail below at Chapter 4.6.

257 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68.

258 Such as *Allen v Hyatt* (1914) 30 TLR 444, as cited in Robert Valentine, 'The Director-Shareholder Fiduciary Relationship: Issues and Implications' (2001) 19 *Company and Securities Law Journal* 92, 100.

259 Such as *Walsham v Stainton* (1863) 46 ER 268, as cited in Robert Valentine, 'The Director-Shareholder Fiduciary Relationship: Issues and Implications' (2001) 19 *Company and Securities Law Journal* 92, 100.

3. Improper use of the share issue power; and
4. Closely held companies.[1]

The relevant cases within each of these fact examples will be discussed below, before conclusions are drawn from these scenarios.

### 3.4.1 *When a director purchases shares from a shareholder*

Most judicial discussion of the director-shareholder fiduciary obligation revolves around directors purchasing shares from a shareholder.[2] The decision of *Coleman v Myers*[3] was one of the first to discuss a modern circumstance in which directors owe fiduciary obligations to shareholders, as, until then, *Percival v Wright* had been instrumental in denying the possibility of a fiduciary obligation within this relationship.[4] Two directors of a company were aware that the company's assets were far more valuable than the company accounts revealed. They set up a new company, which made a takeover bid for the shares in the original company at what was, in reality, a substantial undervalue. At first instance, Mahon J held that 'in any transaction involving the sale of shares between director and shareholder, the director is the repository of confidence and trust' and so 'there is inherent in the process of negotiation for sale a fiduciary duty owing by the director.'[5] Justice Mahon also criticised the decision of *Percival v Wright*[6] as being

1 This is not suggested as an exhaustive list of the occasions on which the courts will find a fiduciary obligation from the director to the shareholders, but simply the current examples in which such a relationship has been found.

2 Robert Valentine, 'The Director-Shareholder Fiduciary Relationship: Issues and Implications' (2001) 19 *Company and Securities Law Journal* 92, 93.

3 *Coleman v Myers* [1977] 2 NZLR 225, referred to with implied approval in *Hurley v BGH Nominees Pty Ltd [No 2]* (1984) 37 SASR 499, 509-511 (Walters J).

4 In spite of findings to the contrary, such as the Privy Council decision in *Allen v Hyatt* (1914) 30 TLR 444, and the development of the special facts doctrine in the United States of America, such as in *Strong v Repide* 213 US 419 (1909). See also F Dawson, 'Coleman v Myers [1977] 2 NZLR 225: Duties of directors in a take-over situation' [1979] 8 *New Zealand Universities Law Review* 256; B A K Rider, 'Percival v. Wright—Per Incuriam' (1977) 40 MLR 471; B A K Rider, 'A Special Relationship on the Special Facts' (1978) 41 MLR 585, and the sub-chapter to follow: 3.4.1.1.

5 *Coleman v Myers* [1977] 2 NZLR 225, 277-278.

contrary to contemporary commercial morality, and concluded that it was wrongly decided. On appeal, the court held that the question of whether fiduciary obligations arose depended on the nature of the relationship between the parties,[7] and that in this case, the directors owed the shareholders fiduciary obligations. The Court of Appeal commented specifically that although *Percival v Wright* was correctly decided on its facts, the idea that 'anybody holding the office of director of a limited liability company is for that reason alone released from what otherwise would be regarded as a fiduciary responsibility owed to those in the position of shareholders of the same company' was not the law,[8] and on that point, *Percival v Wright* must be overruled.

This position was relied upon by Handley JA in his judgment on appeal in *Brunninghausen v Glavanics*,[9] where his Honour explicitly declined to follow *Percival*, despite very similar facts.[10] Brunninghausen ('B') and Glavanics ('G'), brothers-in-law, were both directors and the only shareholders in an importing company, with G being rewarded with one-sixth of the shares, at no cost to himself, upon the formation of the company and being a director in name only. Following a falling out, G's separate company began competing with the joint company. G agreed to sell his shares to B, at the prompting of one of their mothers-in-law, to restore family harmony. Prior to the execution of the documents, but after an oral agreement in relation to the purchase of the shares had been made, a potential purchaser made an offer for the joint business which would have significantly increased the value of G's shares. The sale of G's shares was progressed with haste, without alteration to the agreement.

---

6 *Percival v Wright* [1902] 2 Ch 421.
7 *Coleman v Myers* [1977] 2 NZLR 225, 325 (Woodhouse J), 330 (Cooke J) and 370 (Casey J).
8 Ibid 324 (Woodhouse J).
9 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 ('*Brunninghausen*').
10 Ibid 559.

At first instance, Bryson J found that the facts gave rise to a fiduciary duty owed by B to G,[11] although his Honour rejected the contention that the director-shareholder relationship 'as such and without more' gave rise to a fiduciary relationship where the director purchases shares from a shareholder.[12] His Honour relied upon findings that B's conduct fell outside 'the range of honest dealing according to ordinary community standards'[13] and that G was dependent on B for advice and information concerning the negotiations, despite being a co-director.

Arguably, however, none of these facts are decisive indicators of a fiduciary relationship. Justice Bryson also suggested that B owed fiduciary obligations to G in part because the shareholding structure of the joint importing company was more indicative of a 'trading equity with co-owners' artificially contrived into the form of a company.[14] However, it is not clear what value should be placed on such a statement, because all corporations are 'artificially contrived', existing only because of legislation facilitating their formation. This issue is directly raised in the decision of Handley JA on appeal, when his Honour cites the statement by Loss[15] that *Percival v Wright*

> had enjoyed a remarkable career for a lower court decision and that '… this elevation of the corporate ghost (the *persona ficta*) over the flesh-and-blood owners of the company [was] a monument to the ability of lawyers to hypnotise themselves with their own creations'.[16]

No matter the fictional nature of the corporate form, the parties were free to choose to incorporate, and any question of the validity of that incorporation is not related to

11 *Glavanics v Brunninghausen* (1996) 19 ACSR 204, 217 ('*Glavanics*').
12 Ibid 215.
13 *Glavanics* (1996) 19 ACSR 204, 224.
14 Ibid 222.
15 Louis Loss, 'The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States' (1970) 33 *Modern Law Review* 34, 40-41.
16 *Brunninghausen* (1999) 46 NSWLR 538, 559.

fiduciary obligations.[17] All of the issues mentioned by Bryson J would seem, in fact, to relate more clearly to a claim for unconscionable conduct at common law[18] than to fiduciary obligations.

On appeal, this decision was affirmed in the judgment of Handley JA, with whom Priestly and Stein JJA concurred.[19] Although Handley JA agreed that directors owe their fiduciary obligations to the company, he held that this principle should not be permitted to preclude recognition of a fiduciary duty to shareholders in relation to dealings in their shares, where this would not compete with any duty owed to the company.[20] In this particular case, Handley JA found that the special knowledge of the purchase offer known exclusively to B created an advantage for B which gave rise to fiduciary obligations. G's inability to obtain information and his non-participation as a director meant that G was vulnerable to B's abuse.

Again, however, although advantages to one party and vulnerability in another are certainly present in many relationships which attract fiduciary obligations, they are not determinative in and of themselves. They could just as equally point to a claim of unconscionable conduct. There is no doubt here that G felt pressured to accept B's offer 'for the sake of family harmony',[21] and not necessarily because of any investigation which led him to believe the price was a fair one. But again, this does not automatically

17 The Court applying partnership principles to closely held corporations is not unique to this case, and will be discussed below in the section entitled 'When a company is about to be wound up'.
18 *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447.
19 *Brunninghausen* (1999) 46 NSWLR 538.
20 Ibid 549-550.
21 Ibid 543.

attract a fiduciary obligation. Justice Handley also found that G was entitled to expect 'that he would not be cheated by non-disclosure of negotiations.'[22]

It would appear that this expectation not to be cheated must be a corollary of the fiduciary obligations. Flannigan notes that in virtually every transaction undertaken, one party is in a position of advantage to the other, and one party will have superior information to the other.[23] This is just as true as, for example, buying a vintage car when the purchaser happens to know a reclusive collector who will pay more for this particular car than they have offered the seller as it is of a director purchasing shares from a shareholder. The shareholder is entitled to disclosure from the purchaser when another seller would not be so entitled, if they are not also owed fiduciary obligations by the other party. Information disparity is not unique to the sale of shares. The information and goodwill of the company are both assets of the company, and not of G. B had special access and power, just as the purchaser of the vintage car who happens to know a reclusive collector has special access and power – but it is the prior relationship between the parties, B and G, within the corporate form, that sets these situations apart. That relationship was explained by Handley JA as follows:

> The plaintiff's continuing directorship was an empty shell which the judge rightly disregarded. He was effectively a disenfranchised, minority shareholder, locked into the company. Any attempt to insist on his rights as a director would have led to his removal, if necessary by a court ordered meeting of members with a quorum of one: see *Re El Sombrero Ltd* [1958] Ch 900. The company had never been an incorporated partnership in any sense and his removal as a director would not have created a basis for winding up on the just and equitable ground. The plaintiff therefore was almost totally powerless.[24]

22 Ibid 559.

23 Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277, 298.

24 *Brunninghausen* (1999) 46 NSWLR 538, 55.

This is a useful description of the plight of a shareholder in a small proprietary comapny to move forward with, particularly in relation to the final category of cases to be considered within the part of Chapter 3, those relating to closely held companies.

The parties proceeded under a fiduciary obligation argument here, although the situation would appear to be covered by insider trading legislation, because that claim was barred by elapse of time.[25] The transactions occurred in 1987 when the relevant insider trading legislation was s 128(1) of the *Securities Industry (NSW) Code 1980*.[26] B was a director of the company, and thus an 'officer' with the required 'connection' to the company under the legislation. He acquired the relevant information as a consequence of that connection – he was approached by the potential purchaser due to his position within the corporation.[27] B was not able to raise the defence available under s 128(10) that the 'other party to the transaction knew, or ought reasonably to have known, of the information before entering into the transaction.' Although G was also a director of the company, if B chose to conceal the information from him, G would not have been able to uncover it due to the nature of the relationship and his fairly inactive role in the corporation.[28]

25 *Glavanics* (1996) 19 ACSR 204, 228-229. Arguments based on this legislation were made, but the Amended Statement of Claim did not raise a claim on that basis. It is possible that the available remedies also played some part in the decision to proceed on this basis, which will be considered in Chapter 4.5.5 and 6.4.

26 The NSW codification of the *Securities Industry Act 1980* (Cth).

27 At first instance, Bryson J made findings on this point specifically although that was in relation to his discussion of the fiduciary obligation: *Glavanics* (1996) 19 ACSR 204, 221-222.

28 Justice Bryson also made a number of separate findings on this point again in relation to the discussion of a fiduciary obligation, but there is no reason why this would not equally apply to a finding under the *Securities Industry (NSW) Code 1980*: *Glavanics* (1996) 19 ACSR 204, 221, 222, 223.

Although unable to make a decision based on this legislation, Bryson J at first instance felt that the provisions illustrated the 'views of the community in our time about the responsibility of directors and others with access to insider information.'[29]

It is clear from these cases that in the specific circumstance of a director purchasing shares from a shareholder, regardless of the size and scope of the company, it is jurisprudentially sound to find a fiduciary obligation owed to the shareholder by the director.

#### 3.4.1.1 *The position of Percival v Wright in light of recent authorities*

In addition to the decision of *Coleman v Myers*,[30] the more recent decision of *Thexton v Thexton*[31] reiterates this New Zealand approach to the fiduciary obligation between directors and shareholders in specific circumstances.[32] The company structure and facts of *Thexton v Thexton*[33] resemble *Brunninghausen*,[34] as does the outcome. A father and son, both named David, were involved in a company which distributed fruit juice, with David Jr more involved in the management and running of the business. David Snr initially had a 1% interest in the company, which was discussed as increasing to 50% with essentially partnership terms between the pair, but in eventuality only grew to a 20% increase with no directorship involved for David Snr. During negotiations for a joint venture with another business about which David Snr was aware but uninvolved in the details, David Snr agreed to sell his 20% to David Jr, at a price which later proved to

29 *Glavanics* (1996) 19 ACSR 204, 229.
30 *Coleman v Myers* [1977] 2 NZLR 225.
31 *Thexton v Thexton* [2001] 1 NZLR 237.
32 An appeal was mounted to the Court of Appeal, but was not successful, and the specific issue of the fiduciary obligation was not addressed in the Court of Appeal judgment: *Thexton v Thexton* [2002] 1 NZLR 780.
33 [2001] 1 NZLR 237.
34 (1999) 46 NSWLR 538.

be substantially below their 'fair' value.[35] Justice Salmon at first instance held David Jr to owe fiduciary obligations to the company by virtue of s 131 of the *Companies Act 1993* (NZ), and was argued by counsel for David Snr's estate as owing those obligations to his father due to the circumstances in this case.[36] Justice Salmon agreed that the 'relationship between company director and shareholder is not generally regarded as being of a fiduciary character but it may be, depending on all the circumstances.'[37] His Honour cited extensively from the judgment in *Coleman v Myers*,[38] and agreed that in this case, the evidence supported the fact that David Jr owed a fiduciary obligation to David Snr, due to the family nature of the company, and that, although David Snr had a high degree of involvement in the company as a stakeholder and employee, thanks to David Jr's position in the company he was reliant upon David Jr for information and advice.[39] Further, as this transaction was to be David Snr's exit from the company, and provide for his retirement, there was particular significance to the transaction in question.[40]

By contrast to *Thexton v Thexton*, a number of English authorities contribute to the doubtful authority provided by *Percival v Wright*[41] not only by application of *Coleman v Myers*,[42] but by direct attack on the reporting of the judgment in *Percival v Wright*. In *Re Chez Nico*,[43] although dealing with a fairly different factual scenario involving a public company attempting to convert to a private company by way of a purported take over,

35 *Thexton v Thexton* [2001] 1 NZLR 237, 249: fair value was the relevant price discussed due to a pleading using s 149 of the *Companies Act 1993* (NZ) restricting share dealings by directors other than for fair value – much in the same way as was mooted but not run in relation to insider trading for *Glavanics* (1996) 19 ACSR 204, due to the statute of limitations.
36 *Thexton v Thexton* [2001] 1 NZLR 237, 253.
37 Ibid.
38 *Coleman v Myers* [1977] 2 NZLR 225.
39 *Thexton v Thexton* [2001] 1 NZLR 237, 253-254.
40 Ibid 254.
41 *Percival v Wright* [1902] 2 Ch 421.
42 *Coleman v Myers* [1977] 2 NZLR 225.
43 *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 ('*Re Chez Nico*').

Browne-Wilkinson V-C discusses in depth the inaccuracy of the headnote accompanying the reported *Percival v Wright* judgment.[44] Vice-Chancellor Browne-Wilkinson states:

> The headnote in *Percival v Wright* reads as follows:
>
> > 'The directors of a company are not trustees for individual shareholders, and may purchase their shares without disclosing pending negotiations for the sale of the company's undertakings.'
>
> That proposition has long been regarded as established by *Percival v Wright*. But as the Court of Appeal of New Zealand have pointed out in *Coleman v Myers*, [P *Percival v Wright*] is very doubtful authority for the broad proposition contained in the headnote. ... When [*Percival v Wright*] is carefully examined, it is clear that the central points were conceded. ... The only decision was that in general the fiduciary duties of directors are owed to the company, not to the shareholders, and that on the concessions made [by the parties in *Percival v Wright*] there was nothing in the facts of that case to justify imposing any duty on the directors to the shareholders as opposed to the company. The actual decision [of *Percival v Wright*] does not bear out the headnote.[45]

This criticism was reiterated verbatim seven years later in *Platt v Platt*,[46] also in the Chancery Division of the High Court. Deputy Judge Mackie describes *Coleman v Myers* and *Re Chez Nico* as 'cases of the highest persuasive authority and ... plainly right.'[47] Unlike *Re Chez Nico*, *Platt v Platt* involved a private family company of the type discussed within this chapter. Three brothers held shares in a company which held a BMW dealership, although the sole involved brother, Keith, owned ordinary shares whereas the two brothers who were uninvolved in the business, Denis and Colin, owned preference shares. Keith took advantage of a number of difficult years of trading and some pressure by BMW in relation to the precarious state of the business, which he vastly overstated to his brothers, to transfer back the preference shares to him for only £1.[48] Deputy Judge Mackie outlines the characteristics of the company in *Coleman v Myers*, and found that they 'bear resemblance to those in this case', and on that basis,

---

44 Ibid 208.

45 Ibid, full citations included in the original judgment omitted for clarity.

46 *Platt v Platt* [1999] 2 BCLC 745, 755.

47 Ibid.

48 Ibid, 746-752.

there is a fiduciary obligation owed between the directors and shareholders on these facts.[49]

In *Peskin v Anderson*,[50] Mummery LJ, with whom Latham and Simon Brown LJJ agreed on this point, criticises *Percival v Wright*'s 'apparently unqualified width',[51] but limits this by adding 'few would doubt that, as a general rule, it is important for the wellbeing of a company (and the wider commercial community) that directors are not overexposed to the risk of multiple legal actions by dissenting minority shareholders.'[52] This does not, in Mummery LJ's consideration,

> preclude, in special circumstances, the coexistence of additional duties owed by the directors to shareholders. ... A duality of duties may exist. ... The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations... These duties may arise in special circumstances which replicate the salient features of the well-established categories of fiduciary relationships.[53]

Lord Justice of Appeal Mummery then raises both *Coleman v Myers*[54] and *Brunninhausen*[55] as examples where 'fiduciary duties of directors to shareholders were established in the specially strong context of the familiar relationships of the directors

49 Ibid 756.
50 *Peskin v Anderson* [2001] 1 BCLC 372.
51 Ibid 379.
52 Ibid.
53 Ibid.
54 *Coleman v Myers* [1977] 2 NZLR 225.
55 *Brunninghausen* (1999) 46 NSWLR 538.

and shareholders and their relative personal positions of influence in the company concerned.'[56]

As with *Re Chez Nico,*[57] *Peskin v Anderson*[58] did not involve a company of the type which attracted a fiduciary obligation between the directors and shareholders. In essence, directors of a company which owned an automobile club and motoring services business, did not owe obligations to former members when that business was sold and the profits from that sale distributed amongst current members, after an alteration to their articles which removed a prohibition on such distributions.[59] Lord Justice of Appeal Mummery agrees with the first instance judge that the factors raised by the appellants' counsel 'are insufficient to found a claim for the existence and breach of a fiduciary duty... There was nothing special in the factual relationship between the directors in this case...'[60]

All three English authorities[61] criticise the reporting of, and the breadth ascribed to the original judgment of *Percival v Wright*, and through that criticism, reiterate the position taken by this thesis that, in certain factual circumstances which are developed within this chapter, it is appropriate to find a fiduciary obligation owed by directors to shareholders.

---

56 Ibid 380.

57 *Re Chez Nico* [1992] BCLC 192.

58 *Peskin v Anderson* [2001] 1 BCLC 372.

59 Ibid 374.

60 Ibid 384.

61 A slight issue with these English authorities is the tendency to discuss a fiduciary duty to disclose (see, eg, *Platt v Platt* [1999] 2 BCLC 745, 756; *Peskin v Anderson* [2001] 1 BCLC 372, 379-380, 384.) *Re Chez Nico* [1992] BCLC 192, 208 describes the fiduciary duties as 'carrying with them a duty of disclosure', which at least does not label that duty as fiduciary, but is equally unhelpful. All three cases involved scenarios where shares were transferred or might have been re-taken had information about a future dealing, about which the directors were informed, been made known to the shareholders. As discussed in Chapter 3.3.3.3, whilst there may be a duty of care in equity which would only be satisfied by disclosure of such information when the director is purchasing shares from a shareholder, it is inaccurate to describe this behaviour as a 'fiduciary' duty of disclosure.

### 3.4.2 *When a company is about to be wound up*

In *Mesenberg v Cord Industrial Recruiters Pty Ltd*,[62] it was held that directors in a two person company may owe fiduciary duties to shareholders when a company is about to be wound up. Through a 'quasi-partnership' analysis, Young J held that

> where a two person company is in its death throes, but has not yet been wound up, the fiduciary duty imposed on its director is not only owed to the company, but also to the other quasi-partner, and produces what is so akin to a personal right of a shareholder that it is proper for the shareholder to sue to enforce the right.[63]

The use of the agency or partnership analogy, if founded in the facts, explains this director-shareholder relationship leading to fiduciary obligations without establishing the ability of them to attach to that relationship – it relies on the fact-based finding, and does not promote the relationship to a status-based finding of fiduciary obligations. This was the mechanism used by the courts in *Allen v Hyatt*,[64] a case which, like *Brunninghausen*, involved a share purchase by directors from other shareholders. Liability there was imposed on the directors as if they had been appointed agents of the shareholders whose shares they purchased, which Bryson J discussed in *Glavanics* as being obviously on a constructive basis, as there was no true agency.[65]

The concept referred to as 'quasi-partnership' or 'in substance partnership' was analysed in depth by the English courts in the decision of *Ebrahimi v Westbourne Galleries*, [66] with the Court ultimately criticising the use of such labels. *Ebrahimi* was referred to in

[62] *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128.
[63] Ibid 139.
[64] *Allen v Hyatt* (1914) 30 TLR 444.
[65] *Glavanics* (1996) 19 ACSR 204, 217. There were a number of factual differences in relation to *Allen v Hyatt* (1914) 30 TLR 444, including the number of shareholders and directors concerned (over 29 shareholders in total, and at least 7 directors – unfortunately more precise numbers are not available from the report) which were much more substantial than in *Brunninghausen* (1999) 46 NSWLR 538.
[66] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ('*Ebrahimi*').

the judgment of Handley JA in *Brunninghausen* as being 'not directly in point',[67] which is an accurate description for the reasons from Lord Wilberforce's judgment which will be set out below.

In *Ebrahimi*, a former director was seeking a winding up order for the company that he had formed with his business partner which had taken over their business partnership. At a later point in time, the other director's son was introduced as a third director for the company. The company had never paid dividends, always distributing the profits made by way of directors' remuneration. Following a disagreement between the appellant and the other two directors, he was removed as a director by an ordinary resolution of the company in general meeting, as permitted by the articles of association of the company.[68]

At first instance, Ploughman J refused to make an order that the other directors purchase the appellant's shares or sell their shares to him under s 210 of the *Companies Act 1948*.[69] However, his Honour did order the winding up of the company which was sought under s 222(f) of the *Companies Act 1948*, which provided that a 'company may be wound up by the court if … the court is of the opinion that it is just and equitable that the company should be wound up.' His Honour held that, in removing Ebrahimi from his directorship, the father and son directors had committed an abuse of power and that it had been a breach of the good faith which partners owed to each other to exclude him from all participation in the business which they had established on the basis that all should participate in the management.[70] This finding was overruled by the Court of Appeal, who held that the company could be wound up for just and equitable grounds if

---

67 *Brunninghausen* (1999) 46 NSWLR 538, 556.
68 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.
69 *Companies Act 1948* 11 & 12 Geo 6, c 38.
70 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 360.

Ebrahimi had shown a further condition, that the exercise of the power to remove him had not been *bona fide* in the interests of the company, which he had not proven.[71] The Court of Appeal decision was subsequently reversed by the House of Lords.

Lord Wilberforce, with whom Viscount Dilhorne and Lord Pearson agreed,[72] found significance in the words 'just and equitable' appearing in s 35 of the *Partnership Act 1890*[73] as a ground for dissolution of a partnership.[74] His Honour felt that this provided 'a bridge between cases under s 222(f) of the Act of 1948 and the principles of equity developed in relation to partnerships.'[75] This was a useful link for the line of reasoning Lord Wilberforce followed, but is a little diminished by his Lordship mentioning in the preceding paragraph that the 'just and equitable' power in the *Companies Act 1948* existed in the *Companies Act 1862*[76] and in the *Joint Stock Companies Winding Up Act 1848*,[77] both of which clearly predate the *Partnership Act 1892*.[78]

Lord Wilberforce accepted the appellant's argument that where, as it was here, the members of the company were in substance partners, and that a winding up of the company may be ordered if the facts could justify a dissolution of the partnership between them, without the *mala fide* requirement added by the Court of Appeal.[79] Although his Lordship felt that the authorities for granting winding up orders on 'just and equitable' grounds were very sound, he felt that the partnership analogy had limitations.

---

71 Ibid 360-361.

72 Lord Cross of Chelsea offered separate reasons, but also found for the appellant.

73 *Partnership Act 1890* 53 & 54 Vict, c 39.

74 The copy of the judgment appearing in the Appeal Cases reports actually refers at 375 to s 25 of the *Partnership Act 1892*, but no such Act exists.

75 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 375.

76 *Companies Act 1862* 25 & 26 Vict, c 89.

77 *Joint Stock Companies Winding Up Act 1848* 11&12 Vict, c 45; also cited in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 374.

78 Although this Act was merely a codification of the existing common law.

79 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 381. Lord Cross concurred on this point at 386.

His Lordship reiterated the overarching impact of the *Companies Act* on the relationship, but felt that equity entitled the Court to subject the exercise of legal rights to equitable considerations such as the personal relationship arising between the individuals within a company 'which might make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way'[80] as 'there is room in company law for the recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure.'[81]

Although Lord Wilberforce recognised the potential for obligations outside of the company structure to exist, his Lordship disliked the tendency to call these directors 'in substance partners' or 'quasi-partners', as it tended to obscure the legal reality chosen by the parties, and consequently the obligations flowing from that reality.[82] Given the judicial and academic uncertainty within this field, this admonition from Lord Wilberforce carries significant weight. It is not because this relationship was 'like a partnership' that the winding up was ordered, but because the *Companies Act* permitted consideration of 'just and equitable' grounds for a winding up.

In this way, *Ebrahimi* sits apart from considerations of a director-shareholder fiduciary relationship. The Court did not discuss how it might have decided the case had the legislative provision not existed. It is not clear what the outcome might have been if Ebrahimi had argued instead that the directors owed each other fiduciary obligations, such as partners do, nor whether the court would have permitted equity to intervene here without the words 'just and equitable'.

80 Ibid 379.
81 Ibid.
82 Ibid 380.

The choice to incorporate would seem to destroy any previous relationship between the incorporators, and thus any automatic assumption of fiduciary obligations. Directors do not owe one another fiduciary obligations, and the choice to adopt the corporate structure could be seen as an express decision to remove the fiduciary obligations between the former partners. The directors in *Ebrahimi* may be considered vulnerable in a way that other directors are not, in that the previous partnership had rendered the two original directors vulnerable to one another, because they were used to expecting the treatment given to a partner and the 'mutual confidence'[83] which existed in their previous relationship. Arguably, that must have changed with the introduction of the third director into the company, who was a stranger to the original partnership. It would not be possible for this new director to be 'vulnerable' in the same way, as they were not a partner originally. As such, the separation of the two directors who do owe one another fiduciary obligations from the third director seems inappropriate, and the prior 'trust' must be seen to have been dissipated by the introduction of a stranger.

An expectation of continued involvement in the management of the new entity was discussed at first instance by Plowman J as being the basis of the wrong done to Ebrahimi by his removal,[84] but the interrelationship of this expectation with the traditional fiduciary obligation is not clear. In any event, it is not clear that Ebrahimi had such an expectation. The only evidence pointing to such an expectation is the distribution of the company's profits by way of directors' remuneration rather than dividends. Had the two directors continued on alone, neither could have ousted the other, as they each only held 50% of the shares in the company. The natural consequence of the introduction of a third director, who had the ability to create a

[83] Ibid 379.
[84] Ibid 380-381.

majority vote, was the removal of such a stalemate. This was a situation entirely of the participants' own making. Here, a director/shareholder placed himself in a position to be ousted from his directorship, but his shareholding remained unaffected.[85] By contrast, in *Brunninghausen*,[86] a director/shareholder placed himself in a position of ignorance within the company and therefore sold his shares unaware of their true potential value. It could be argued that, as far as equity is concerned, these two persons are no different – but that does not make Ebrahimi a beneficiary of fiduciary obligations.

Even if it could be said that the directors in *Ebrahimi* continued to owe fiduciary obligations to one another, it is then necessary to establish that there was a breach of those obligations. If the remaining directors had made good on the assurance that they gave the court that, in future, dividends would be paid,[87] a breach of the profit rule may not be made out. There is no clear conflict of interest here, other than the promotion of 'easier management' for the remaining directors over the third director's involvement as a director. Neither the 'no profit' nor the 'no conflict' rules is breached in a clearly identifiable manner here.

If there was a fiduciary obligation held between the original directors in *Ebrahimi*, and that obligation was breached, it remains unclear what remedy would be sought in equity. Clearly, any inappropriate profits could be recovered with an account of profits, but that would not fully assist a plaintiff in Ebrahimi's shoes, who wished to be reinstated to the board.

---

85 Other than his inability to dispose of the shares without the consent of the two remaining directors: *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 381. His position as a shareholder was clearly protected by member's rights and remedies under the legislation.

86 *Brunninghausen* (1999) 46 NSWLR 538.

87 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 381.

Despite the lack of discussion in Ebrahimi of the fiduciary solution, and the general complaint as to the 'quasi-partnership' reasoning employed in cases such as *Mesenberg v Cord Industrial Recruiters Pty Ltd*, it is accepted in Australian law that directors may owe fiduciary obligations to the shareholders in a company approaching winding up.

### 3.4.3 *Improper use of the share issue power*

In *Ngurli Ltd v McCann*,[88] the High Court held that, when directors exercise the share issue power, a shareholder has the right to sue in their own name to prevent dilution of their shareholding. Despite the duty to exercise the share issue power for a proper purpose being owed to the company, none of the cases asserting this right discuss the shareholder's standing to bring such a claim, and very few mention the rule in *Foss v Harbottle*.[89]

Adding to this creating of standing in the shareholder, in his judgment in *Residues Treatment*,[90] King CJ asserted the existence of a shareholder's personal right,[91] grounded in equity, to prevent the dilution of shareholder voting power.[92] Academic commentary notes the difficulties with this formulation and particularly with the source of this personal right,[93] which enables the shareholders to personally enforce this breach of the duty which is owed to them, in a way which they are not able to do in relation to other

88 *Ngurli Ltd v McCann* (1953) 90 CLR 425.

89 Ben Saunders, 'Putting the Spoils of Litigation into the Shareholders' Pockets' (2004) 22 *Company and Securities Law Journal* 535, 540, citing James Mayanja, 'Standing to Challenge the Implementation of Improper Defensive Measures' (1995) 5 *Australian Journal of Corporate Law* 66, 69.

90 *Residues Treatment & Trading Co Ltd v Southern Resources Ltd (No 4)* (1988) 14 ACLR 569.

91 Personal rights being a recognised exception to the rule in *Foss v Harbottle*: Ben Saunders, 'Putting the Spoils of Litigation into the Shareholders' Pockets' (2004) 22 *Company and Securities Law Journal* 535, 540.

92 Ibid.

93 Ibid, citing various other academic works which both support and criticise this formulation by King CJ.

duties. This judgment has received little further judicial interpretation, with seeming approval in single judgments of State Supreme Courts and no appellate level discussion.[94]

This area of law is now governed in depth under the *Coporations Act*,[95] and has been examined in other High Court authority such as *Whitehouse v Cartlon Hotels*,[96] which deals explicitly with the dilution of voting power as an illegitimate purpose for which to use the power to issue shares. Consequently, such an issue, should the substantial object have been the impermissible purpose,[97] would be in breach of the s 181(1) duty for directors to exercise their powers and discharge their duties in good faith in the best interests of the company and for proper purposes.

### 3.4.4 *Closely held companies*

Of particular interest in the context of this thesis are the cases involving 'closely held companies.'[98] Many of the case examples raised previously occur within corporate structures which can be described as 'closely held', and so also fall within this final category. The common facts of these cases in which fiduciary obligations were recognised as owed by directors to shareholders are: few directors, few shareholders

---

94 Ibid 541.

95 Improper use of powers can be a breach of directors' duties, in particular *Corporations Act 2001* (Cth) s 181(1). Further, it could lead to members' remedial responses such as the action for oppression under Part 2F.1 and the statutory derivative action under Part 2F.1A. The statutory directors' duties are dealt with in greater depth in Chapter 4.5.

96 *Whitehouse v Cartlon Hotels Pty Ltd* (1987) 162 CLR 285.

97 Ibid 294.

98 The use of this phrase is not novel: see, eg, Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, Reprinted ed, 1996), 228 on. Although these prior uses have assisted this thesis, no particular previous definition of this phrase has been adopted as entirely appropriate to the argument presented here.

(with the shareholders also often being directors), and family or private companies.[99] In light of the seemingly consistent recognition of the courts of fiduciary obligations from director to shareholder in such circumstances the question arises; should these particular circumstances gain explicit recognition as one of the status-based relationships?

As already discussed, in *Glavanics* Bryson J was prepared to find that a director owed fiduciary obligations to a shareholder on the basis of the limited shareholding in that corporation.[100] Justice Bryson stated that '[f]or the purposes of granting or withholding equitable remedies the importance of the corporate personality and structure is in my opinion, greatly diminished in circumstances of two kinds,' one of which 'is where there are very few members, very few directors and their relationships are not impersonal but close.'[101] This is essentially applying the equitable maxim 'equity looks to the substance and not the form'[102] to the situation.

Whilst the intent of Bryson J's statement is clearly correct, it is open to three criticisms. First, equitable principles and remedies operate regardless of the corporate structure established under the *Corporations Act*, as the Act itself declares in ss 185 and 193.[103] Secondly, the factors discussed by Bryson J are not determined to be relevant to corporate structure or governance under the *Corporations Act*. Justice Bryson's decision may therefore be open to criticism for either inappropriately redefining types of corporate structure in a way which the *Corporations Act*, which specifically provides that a

---

99 The table set out below details the breakdown of the facts of these cases and sets out the common circumstances which can be described as 'closely held'.

100 *Glavanics* (1996) 19 ACSR 204, 222.

101 Ibid 216-217

102 Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 25; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 18.

103 The legislative provisions will be discussed in further detail in Chapter 4.

proprietary corporation need have only one member and one director,[104] does not, or for suggesting that there is a 'sliding scale' of corporate personality, and the resulting duties owed by officers of the corporation, depending on the number of directors and shareholders. Finally, Bryson J emphasised that relationships in larger companies are 'impersonal' which prevents the attachment of fiduciary obligations,[105] but on that basis, the information disequilibrium which was present and pivotal in *Glavanics* is more likely to exist.

At the time of his judgment, Bryson J's approach was certainly not the norm when dealing with directors' fiduciary obligations to public corporations. The approach in *Glavanics*[106] (as affirmed in *Brunninghausen*[107]) is in stark contrast with that taken by the House of Lords in the older decision of *Ebrahimi v Westbourne Galleries Ltd*.[108] It ignored Lord Wilberforce's firm disapproval of the tendency to call directors 'in substance partners' or 'quasi-partners' on the basis that it tended to

> obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company and not a partnership or even a quasi-partnership…[109]

Lord Wilberforce argued that such re-labelling inevitably leads to 'linguistic confusion'[110] which could ultimately result in legal confusion if taken out of context.[111] In spite of the strength with which his Lordship stated the position, he accepted that

---

104 *Corporations Act 2001* (Cth), s114 and s201A(1) respectively. Section 219(1) of the *Companies Act* 1981 (Cth), which would have been the relevant Act at the time of the transactions (although in force in each state as the *Companies Code*), provided that 'a public company shall have at least 3 directors and a proprietary company shall have at least 2 directors.'

105 *Glavanics* (1996) 19 ACSR 204, 217.

106 Ibid.

107 *Brunninghausen* (1999) 46 NSWLR 538.

108 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

109 Ibid 380.

110 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 387. Similar lamentations have been made in relation to the inappropriate use of the labels

> there is room in company law for the recognition of the fact that behind [the company], or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure.[112]

This statement by Lord Wilberforce is particularly pertinent in the closely held company, where there may not be an entirely or purely commercial relationship between the shareholders and directors, as alluded to Bryson J in *Glavanics* above.

Two cases decided in 2009 applied the findings in *Brunninghausen*:[113] *Jones v Jones*[114] and *Crawley v Short.*[115] In *Jones v Jones,* Judd J found a strong factual basis for a fiduciary duty between a director who was also a shareholder and the other director. His Honour felt that 'the factual basis for the fiduciary duty in the present case is stronger than it was in *Brunninghausen*'[116] because the first plaintiff and first defendant held joint interests in the business of the group, and the first plaintiff was entitled to expect that the first defendant would promote their joint interests, even after his resignation as a director. The first defendant confirmed this in an email to the first plaintiff, when he stated that, should he stay on as a shareholder, the first defendant would 'continue to fulfil all of [his] fiduciary duties and act at all times in the best interests of all shareholders.'[117]

---

trustee and agent in fiduciary law: Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 352-353; Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 402, particularly at footnote 99.

111 Flannigan points out a long history of such confusion in his article, Robert Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 *Law Quarterly Review* 449, 456, seeming to commence with the statutory use of trust terminology in relation to winding up under the *Companies Act 1862* 25 & 26 Vict, c 89. Similar confusion has occurred in relation to the so-called 'fiduciary duty of disclosure' discussed above in Chapter 3.3.33.

112 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379.

113 *Brunninghausen* (1999) 46 NSWLR 538.

114 *Jones v Jones* (2009) 27 ACLC 1021.

115 *Crawley v Short* (2009) 262 ALR 654.

116 *Jones v Jones* (2009) 27 ACLC 1021, 1030.

117 Ibid.

Clearly, acknowledging his position as a holder of fiduciary obligations was a point of distinction from the factual circumstances of *Brunninghausen*.

Justice Judd commented that the strong factual basis for a fiduciary duty was 'augmented' by representations made by the first defendant to the first plaintiff during the course of negotiations to sell the corporation that there was no take-over offer on the table.[118] This reference to the representations (which were ultimately found to amount not only to deceit, but misleading and deceptive conduct in contravention of s 9 of the *Fair Trading Act 1999* (Vic)[119]) by Judd J was unfortunate, as it seems to imply that a finding of fiduciary obligations between the first plaintiff and first defendant is stronger or more appropriate because of the tortious behaviour and *Fair Trading Act* breaches.[120] Fiduciary obligations, of all equitable concepts, act in strict application to take away the fruits of temptation,[121] and in no way rely on misrepresentation or *mala fides*.[122]

In *Crawley v Short*, the New South Wales Court of Appeal overturned, in part, a decision of White J at first instance, finding in contrast to the trial judge that Crawley had

---

118 Ibid.

119 Ibid 1032.

120 Actions in tort and potentially under the relevant consumer protection legislation are clearly alternative causes of action that will often be available to a shareholder in the scenario where an argument for a breach of a fiduciary obligation owed by the director to the shareholder can be raised (see further discussion in Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 362), or where issues in relation to oppression of the shareholders can be argued (see Chapter 4.5.3 below). However, these separate causes of action are considered beyond the scope of this particular study, although they remain areas with future research potential. Significant work in this field has been undertaken since *Nocton v Lord Ashburton* [1914] AC 932 and the more recent discussion by the Court of Appeal in *Daniels v Anderson* (1995) 37 NSWLR 438 including Joseph W Bishop Jr, ' Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers' (1968) 77 *Yale Law Journal* ; Michael Whincop, 'A Theoretical and Policy Critique of the Modern Reformulation of Directors' Duties of Care' (1996) 6 *Australian Journal of Corporate Law* 72; A S Sievers, 'Directors' Duty of Care: What is the new standard?' (1997) 15 *Company and Securities Law Journal* 392 Michelle Welsh and Helen Anderson, 'Directors' Personal Liability for Corporate Fault: An Alternative Model' (2005) 26(2) *Adelaide Law Review* 299. See also discussion in J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005).

121 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 63-64.

122 As noted in the discussion above at Chapter 2.2.

breached a fiduciary obligation which he owed to Short during various dealings, which included removing Short as a director of two corporations of which Crawley and his wife were the other two directors.[123] Justice White found that, although there could be cases where a director who was also a shareholder could owe a duty to another shareholder, '*Brunninghausen* told against it when the same acts constituted a breach of the fiduciary duty to the company.'[124]

On appeal, the judgment of Young JA, with which Allsop P and MacFarlan JA concurred, concluded that this was too narrow a reading of *Brunninghausen*. The scenarios listed by Young JA, when it was likely that a director/shareholder would owe fiduciary obligations to another shareholder, are described in a slightly different manner than has been done in this thesis.[125] According to Young JA,

> this will occur where: one shareholder undertakes to act on behalf of another shareholder; where one shareholder is in a position to have special knowledge and knows that another shareholder is relying on her to use that knowledge for the advantage of another shareholder as well as herself; and where the company is in reality a partnership in corporate guise, nowadays termed a quasi partnership.[126]

As was discussed previously, the use of the phrase quasi-partnership is regrettable.[127] However, Young JA went on to note that

> there may be closely held corporations where the interests of the shareholders are diverse so that no such duty can be implied. The prime illustration is a home unit company where each shareholder is only interested in his or her own home unit.[128]

123 *Crawley v Short* (2009) 262 ALR 654, 657-659, 672.
124 Ibid 672.
125 Above at Chapter 3.4.
126 *Crawley v Short* (2009) 262 ALR 654, 672. His Honour was careful to note that this is not an exhaustive list.
127 See above, Chapter 3.4.2.
128 *Crawley v Short* (2009) 262 ALR 654, 672, citing *Woods v Cann* (1963) 80 WN (NSW) 1583.

This highlights a particular difficulty with a fiduciary obligation owed to a class, as not all constituents of that class may have the same interests, placing the fiduciary in an impossible position.

One case in 2011 distinguised *Brunninghausen*, albeit to a slightly different scenario: *McClymont v Critchley*.[129] The plaintiff, an unsophisticated investor, sued, amongst others, Critchley, who was a sole director and most significant shareholder of a proprietary company, Paramatta South Pty Ltd. The relevant basis of her suit against Critchley was that he, in breach of his fiduciary obligation, failed to disclose certain information about Paramatta South to her, prior to her becoming a shareholder of that company. At [172], Biscoe AJ found this fact to be significant in distinguishing *Brunninghausen*, where the director failed to disclose information affecting the value of an existing shareholder's shares in a small proprietary company which the director was purchasing, and the director consequently derived a direct personal benefit from the transaction. By contrast, *McClymont v Critchley*

> is concerned with a director's duty not to an existing shareholder but to someone purchasing shares in a small proprietary company. The consideration was paid to the company, Parramatta South, not to Critchley. Critchley's potential benefit, like that of the other shareholders, was tied to the fate of the company. In the latter situation, no case, so far as I am aware, has applied the law of the fiduciary rather than the law of the marketplace.[130]

As the plaintiff was not a shareholder at the time when the information was not provided, no fiduciary obligation could be grounded on the director-shareholder relationship. Due to that finding, Biscoe AJ did not then consider whether the failure to disclosure would have been a breach of the fidcuairy obligation, per the plaintiff’s statement of claim, or would simply have denied them the ability to rely on the defence of fully informed

[129] *McClymont v Critchley* [2011] NSWSC 493 (14 June 2011).
[130] Ibid [172].

consent, as discussed previously.[131] A further argument from the plaintiff that Critchley held himself out as a financial advisor, to ground a fiduciary obligation in that relationship, also failed.[132] The discussion undertaken by Biscoe AJ of the relevant authority in the area of the fiduciary obligation owed by directors is on the most part uncontroversial; however, Biscoe AJ does repeat the same mistaken reading of *Brunninghausen* as made by Justice White and reversed on appeal by the New South Wales Court of Appeal in *Crawley v Short*.[133] That had no impact for this decision.

*Jones v Jones*[134] and *Crawley v Short*[135] add to the Australian jurisprudence following *Brunninghausen* that, in certain circumstances, directors will owe fiduciary obligations to shareholders, albeit currently as decided on an *ad hoc* basis by the court. *McClymont v Critchley*[136] distinguished *Brunninghausen* appropriately, as the relevant relationship was not in place at the time when the ‘breach’ of the fiduciary obligation occurred, and does not detract from the jurisprudence added by the other three cases.

The circumstances are defined by this thesis as those involving ‘closely held companies’. On the basis of the preceding case law, it would appear appropriate to consider an initial definition of this term as as a proprietary company with three or less directors, and 6 or less shareholders.

131 See above, Chapter 3, ‘Other ‘Fiduciary’ Obligations: The Fiduciary Duty of Disclosure’.
132 *McClymont v Critchley* [2011] NSWSC 493 (14 June 2011) [161].
133 *Crawley v Short* (2009) 262 ALR 654, 672.
134 *Jones v Jones* (2009) 27 ACLC 1021.
135 *Crawley v Short* (2009) 262 ALR 654.
136 *McClymont v Critchley* [2011] NSWSC 493 (14 June 2011).

| Case Name | Jurisdiction | Type | No of Dirs | No of Sh's | Coincidence of Dir-Sh | Legal Grounds for a finding of Fiduciary Obligations |
|---|---|---|---|---|---|---|
| *Coleman v Myers* | New Zealand | 'Co Ltd' 'Private' | 2 | At least 22[1] | 2 | • Position as director, and the close nature of the company<br>• The few shareholders had come to rely on the directors not only to manage the company, but 'for the protection and cultivation of their own particular interests as shareholders.' |
| *Brunninghausen v Glavanics* | New South Wales | Pty Ltd | 2[2] | 2 | 2 | • The relationship between the directors and shareholders is not impersonal, but close.<br>• 'The special knowledge acquired by the defendant in the course of his management of the company was of an opportunity for an advantageous sale of its undertaking. This was an opportunity available only to the company, although the transaction might have been structured as a sale of all its shares. The benefit would have accrued to both shareholders had the defendant not purchased the plaintiff's shares.' |
| *Mesenberg v Cord Industrial Recruiters Pty Ltd* | New South Wales | Pty Ltd | 2 | 2 | 2 | • 'quasi-partnership'.<br>• Approaching winding up. |
| *Jones v Jones* | Victoria | Pty Ltd[3] | 1 | 3 | 1 | • When D resigned as director, leaving J as sole director, J gave an assurance to D that should D continue to remain as a shareholder, J would 'continue to fulfil all of my fiduciary duties and act at all times in the best interests of all shareholders.'<br>• This supported the strong factual basis on which a fiduciary obligation was already founded. |
| *Crawley v Short* | New South Wales | Pty Ltd | 3 | 3[4] | 2 | • There will be a variety of situations where a shareholder or director/shareholder holds a special position where he or she may owe duties to another shareholder, including in a closely held company. |

[1] Up to 3rd gen descendents of founder, and employees/ex-employees.
[2] Although only 1 participating.
[3] Although structured through a group, including unit trusts.
[4] Although one of these 'three' was one shareholder ultimately controlling 2 separate shares, so practically 2.

**Table A:** Summary of cases addressing fact based instances of fiduciary obligations owed by directors to shareholders

Whilst the 'two out of three' approach to the definition of the 'small proprietary company' in the *Corporations Act*,[137] being reliant on the hallmarks of consolidated revenue, consolidated gross asset value and employee numbers, is a unique and helpful approach in relation to, for example, reporting requirements,[138] more relevant in the fiduciary context under consideration by this work is the number of persons involved.

The numbers of three or less directors and 6 or less shareholders are chosen on the basis of the examples provided by case law and the problems of managing conflicting obligations when more than a small number of persons is involved. It may prove with time that even 6 is, in fact, too diverse a holding to be appropriate for the title 'closely held company'.[139] Consequently, the previous definition raised by the unsuccessful *Close Corporations Act 1989* (Cth) of no more than 10 members,[140] with no reference to their potential directorial role or otherwise, is not appropriate, but leads usefully to the next potential element of a definition of closely held company.

There is a repeated appearance within the case law of a coincidence of director-shareholder roles within companies where fiduciary obligations have been found between directors and shareholders. As such, it would be possible to conclude that a required element of a closely held company is the coincidence of director-shareholder roles. However, given that this adds a level of complexity to the definition, it is necessary to consider whether that element is of sufficient value to warrant its insertion. Other than

137 *Corporations Act 2001* (Cth) s 45A(2).

138 See, eg, *Corporations Act 2001* (Cth) s 292(2).

139 This definition is examined more within Chapter 5.

140 *Close Corporations Act 1989* (Cth) ss 6 and 16: 'subject to this Act, any natural person, or any natural persons not exceeding 10 in number, may, by subscribing his or her name, or their names, to a founding statement and complying with the requirements as to registration under this Part, form a close corporation.'

the reference in *Crawley v Short*[141] to the position of a director-shareholder, none of the cases turned specifically on the fact that the director concerned was also a shareholder. It is generally accepted that directors are offered shareholdings within a company in order to align their interests to those of the company,[142] which is less relevant when considering the scenarios provided by these cases and more likely to be useful in larger companies than under consideration here. Given the relative simplicity of the definition without this element and the complexity it introduces if required, the balance seems to fall against its inclusion.

Finally, the 'personal' closeness of the shareholders and directors, say where siblings are co-directors for example, is not chosen as a determinative factor for closely held companies, because it is not a deemed determinative in the vast majority of the status-based relationships already acknowledged at equity.[143] Further, there are other areas of the law which focus on the vulnerability between relatives,[144] and although such a factor can be used once the relationship is accepted as fiduciary to highlight the particular vulnerability of the parties, it would not be ideal as the primary determinative factor when defining closely held companies.

---

141 *Crawley v Short* (2009) 262 ALR 654.

142 Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook Co, 16th ed, 2012) 318; it could also be recognised as a role of the fiduciary obligation itself.

143 Only in the controversial case of parent-child is any kind of familial relationship required for fiduciary obligations to attach: see the discussion above at Chapter 2.2.1.

144 For example, the presumption against intention to create legal relations between family members in contract; certain relationships deemed to be of 'influence' *Louth v Diprose* (1992) 175 CLR 621. The burden of proof is on the defendant to rebut thi presumption: *Louth v Diprose* (1992) 175 CLR 621, 628 (Brennan J).

### 3.5 *The Definition Debate: A Director-Shareholder Relationship*

If it is recognised that within the context of closely held companies, directors will be found to owe their fiduciary obligations to the shareholder on an *ad hoc* basis, then for the sake of certainty – both of the law and for participants within such companies – this relationship ought to be added to the list of status-based relationships. Valid assessment of a development of the status-based list of relationships to include this relationship requires such a relationship to fit within the established doctrinal underpinnings of the fiduciary obligation. In light of the ongoing controversy surrounding a general justification for fiduciary obligations, it is necessary to assess the director-shareholder relationship in the context of the more prevalent theories discussed in Chapter 2:[145] voluntary assumption, the 'entrusting' element, expectation of loyalty, unjust enrichment, vulnerability or disadvantage, and limited access arrangements.

The element of 'voluntary assumption' is difficult to discern within the director-shareholder relationship on a general basis. Although it is clear that the director has 'voluntarily assumed' their position[146] (after all, no-one is forced to become a director), it is not clear that they have voluntarily assumed any responsibility towards the shareholders in particular. They undertake to act in the interests of the company, not the shareholders. The interests of the company may not always be the same as the interests of the shareholders – such as decisions as to whether an extra dividend should be paid, or whether that money could be better turned back into the company for a future potential profit. As discussed in this Chapter, there are specific situations where a director can be seen as undertaking to act on behalf of the interests of shareholders, or a particular group

---

145 These theories were discussed in abstract in detail at Chapter 2.2.2.

146 Their written consent is required by *Corporations Act 2001* (Cth) ss 117(2)(d), 201D.

of shareholders, but that points to a fact-based fiduciary relationship, and not a status-based relationship. In closely held corporations, however, it is more possible that this element would regularly be present.

As Dal Pont notes, trust is not clearly determinative of the existence of the fiduciary obligation. It is also difficult to argue that the 'entrusting' element is present in all director-shareholder relationships.[147] However, as discussed by Bryson J in *Glavanics v Brunninghausen*, where there are few members and few directors, their relationship is not impersonal, but close.[148] As such the 'entrusting' element is more likely to be regularly present.

In relation to the 'loyalty' element, which struggles to justify even those relationships accepted as status-based, one of the only categories where there would likely be loyalty on every occasion is the specific circumstances of closely held company.[149] However, there would not be an expectation of loyalty to the shareholders in every director-shareholder relationship. Given that this criterion fails to appropriately explain the fiduciary obligation in general, it would not be reliable to adopt in the specific circumstances addressed here.

An 'unjust enrichment' approach would, under traditional analysis, be problematic for the director-shareholder relationship, as the loss would be deemed to be 'at the expense of' the company, and only vicariously by the shareholders through a potential decrease in

---

147 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 107; Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879, 912.

148 *Glavanics* (1996) 19 ACSR 204, 217.

149 As Tuch states, this criterion fails to explain the proscriptive nature of the fiduciary obligation in general and does not appear any more useful when looking at relationships which are not considered among the list of status-based relationships: Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488 495-496.

the value of their shareholding. This is supported by the doctrine of 'reflective loss', which was established by the finding in *Prudential Assurance Co Ltd* that a shareholder

> 'cannot recover a sum equal to the diminution in the market value of his shares… because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss.'[150]

The doctrine of reflective loss is not without criticism, and has been judicially challenged, with the New Zealand Court of Appeal holding that 'where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that is it not also a personal loss to the individual.'[151] Given that a fiduciary obligation from the director to the shareholder would be an independent duty, it could be said that this element of 'at the expense of' is satisfied. This approach finds support in the *Corporations Act* and other High Court decisions which specifically provide that shares are personal property, and a reduction in personal property is clearly a personal loss.[152] It would be necessary to distinguish between a reduction in the number of shares held and a decline in the value of shares held, as shares which decline in value are not necessarily destroyed or damaged in a traditional property sense. Again, this element can more clearly be seen in a closely held company, than in companies generally.

For the director-shareholder relationship, the theory of vulnerability or disadvantage is again problematic, as it could vary vastly even within one corporation's shareholding. Some large or wholesale investors could hardly be described as vulnerable in a

---

150 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 Ch D 204, 222-223.

151 *Christensen v Scott* [1996] 1 NZLR 273, 280.

152 See, eg, *Corporations Act 2001* (Cth) s 1070A(1)(a); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; as discussed in Ben Saunders, 'Putting the Spoils of Litigation into the Shareholders' Pockets' (2004) 22 *Company and Securities Law Journal* 535, 542-543.

traditional sense when compared to a retail or 'Mum and Dad' investor. The inherent restrictions on the market for shares of a shareholder in a proprietary company in contrast to shares in a publicly traded company might be perceived as indicative of commercial vulnerability. If the hallmark of vulnerability is the information asymmetry seen in many corporate bodies, would it then be impossible to describe a director who was also a shareholder as vulnerable?[153] Whilst it would add an extra layer of complexity if some shareholders could be found to be beneficiaries of a fiduciary obligation on the basis of 'vulnerability', however defined, when other shareholders within the same corporation could not be, but there does not appear to be any reason why this could not be so. Has the law simply not kept up to date with corporate or business practice?[154] Some shareholders may not fulfil the criteria for protection as beneficiaries of a fiduciary obligation when others clearly do.

The 'limited access' justification as posited by Flannigan is a particular hurdle for the director-shareholder relationship, as there is no access, limited or otherwise, to assets of the shareholder by the director. As Flannigan describes it,

> [s]hareholders grant open access to the corporation. Their subscriptions are conveyed to the corporation for *its purposes*. The corporation thereafter makes *its assets* (acquired both from shareholders and creditors) available to its directors on a limited access basis. (original emphasis)[155]

Shares may be the personal property of the shareholder, but it is the company's property, either in terms of assets or opportunities, which is usually the subject of a claim for

153 Further complexity is added when considering the information asymmetry which can exist even within boards, due to the presence of both executive and non-executive (or even independent) directors.

154 Similar criticisms have been made on the basis of the application of the single legal entity doctrine expounded in *Salomon v Salomon & Co* [1897] AC 22 to corporate groups in the modern corporate context.

155 Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277, 293.

breach of a fiduciary obligation. Shareholders hand over assets (whether money or property) as a capital subscription for their shares, and shares generally attract a right to receive assets on a winding up on a *pro rata* basis. This open access that they grant the company is also granted to the directors. There is no 'limited access' to the assets of the shareholder which they have handed over as subscription.

### *3.6 Conclusions*

Commentators have noted that 'a new corporate jurisprudence may be emerging with regard to small, closely held proprietary companies.'[156] There are good reasons to limit this potential expansion so as to exclude at least widely-held public companies. It would appear from the judgment of Bryson J in *Glavanics* that his Honour was particularly prepared to find that a director held fiduciary obligations to the shareholder on the basis of the limited shareholding in that company.[157] His Honour further stated that

> [f]or the purposes of granting or withholding equitable remedies the importance of the corporate personality and structure is in my opinion, greatly diminished in circumstances of two kinds… [one of which] is where there are very few members, very few directors and their relationships are not impersonal but close.[158]

This development could be challenged on the grounds that the courts arguably are inappropriately redefining or restricting the corporate structure in a way the legislation does not envisage. The *Corporations Act* specifically provides that a proprietary

156 Ben Saunders, 'Putting the Spoils of Litigation into the Shareholders' Pockets' (2004) 22 *Company and Securities Law Journal* 535, 539 citing Stephen Bottomley, 'New Directions in Corporate Governance for Small Proprietary Companies?' (1996) 7 *Australian Journal of Corporate Law* 135, 135.

157 *Glavanics* (1996) 19 ACSR 204, 222.

158 Ibid 216-217.

company need have only one member[159] and one director.[160] But in that situation, there is clearly no scope for a breach of fiduciary duty, as the director, company and shareholder are all effectively one and the same. Further, redefinition of a system envisaged by the common law or legislature would appear to be entirely the kind of behaviour for which equity was first developed as a system of law.

A challenge to this case law on such grounds ought not succeed. Although perhaps not clearly expressed at times, the courts are engaging in analogy between closely held companies and partnership or agency relationships – precisely the style of reasoning required in order to find fiduciary obligations on an *ad hoc* basis. If directors hold themselves out as agents of the shareholders, or allow partnership-like behaviour despite the the company structure, then they enter into the kind of limited access arrangement that Flannigan promotes and naturally owe fiduciary obligations to their principal, the shareholder.

The more accurate challenge to raise is whether the courts have correctly applied the analogy to facts which truly demonstrate the existence of such an arrangement, or if they have been persuaded by the appearance of 'hallmarks' of a fiduciary relationship (such as vulnerability, trust, lack of 'arms length dealings', ability to abuse a position) to apply it too widely. In many cases, it does not appear that the courts have considered the doctrinal basis under which the fiduciary obligation exists at all, let alone whether it ought to apply on the facts before them. This is not a reason to overlook such development entirely, but does create an opportunity to clarify, refine and frame the doctrine of the fiduciary obligation in ways which the court can then apply constitently.

159 *Corporations Act 2001* (Cth) s 114.
160 *Corporations Act 2001* (Cth) s 201A(1).

In a closely held company, the minority shareholders may never be able to procure the company to sue the directors, and, as will be discussed in the next chapter, the company remedies which they can commence have limitations which a personal action would not.[161] Compared to a large public company with a majority of disinterested, non-director shareholders, these situations are vastly different.

An additional point that should be considered is the extent to which those beyond directors may be subject to these obligations.[162] Fiduciary obligations may be imposed on any person authorised to act or do business on behalf of a company, no matter their title. As Glover noted, equity is concerned with what people do, not with what official title they hold.[163] This may in fact be the best example of the courts' willingness to find a fiduciary relationship beyond the status-based categories.

Directors do not owe fiduciary obligations to shareholders on any status-based justification, but it is clear that they may be held to be subject to such obligations in certain fact-based scenarios. The situations outlined above have predominantly involved closely held proprietary companies, to the point where it is possible that, in closely held companies, as defined by this thesis, there is a strong argument to be made for a rebuttable presumption of a status-based fiduciary obligation.

Directors satisfy many of the court-recognised indicia of relationships which impose fiduciary obligations. This is hardly surprising, given that they are one half of the status-

---

161 The remedies available under such an action will be discussed in Chapter 4.6.

162 The *Corporations Act 2001* (Cth) itself contemplates such breadth, by applying the statutory duties (to be discussed in full in Chapter 4) to directors and 'other officers', as defined in s 9.

163 John Glover, *Commercial Equity - Fiduciary Relationships* (Butterworths, 1995), 117. Glover uses the word 'officer' in his discussions, which includes directors, executive officers, receivers, administrators, liquidators and others who can act on a corporation's behalf, including agents.

based director-company relationship. However, the key features, as discussed by Tuch,[164] are also present in many director-shareholder relationships. There is often behaviour by directors which indicates an undertaking to act in the interests of the shareholders, which has always been considered highly indicative of fiduciary obligations. However, the absence of a positive undertaking, or even an implied one, is not fatal: no such undertaking occurred in *Brunninghausen*.[165] Directors certainly occupy a position of trust and confidence, and by that trust and confidence must be bestowed by the shareholders.[166] Directors hold a position of power in many senses: fiscal, informational and in terms of status, both socially and within the company itself. The corresponding vulnerability is not, however, created in the company, but in the shareholders. Directors have the power to affect the interests of the shareholders in very real and practical sense, in addition to the interests of the company. Finally, there can be, particularly in closely held companies, a real or justifiable expectation from the shareholders that the directors will act in the interests of the shareholders in and for the purposes of the relationship.

The two more fact-dependant variables are the 'undertaking to act' and 'real or justifiable expectation of action', which are, unfortunately, pivotal in determining whether or not a fiduciary obligation should exist in a certain relationship. It is clear that closely held companies could satisfy these criteria more readily than a diversely held public company, but there is no reason why, behaviour permitting, the latter could not also be held to contain a fiduciary obligation to the shareholders. The need for the particular behaviour

164 Discussed in detail in Chapter 2.2.2.7.

165 (1999) 46 NSWLR 538.

166 Outside of appointment upon registration of the company via Form 201 (which includes written consent of both the directors and members as to their participation in the company to be registered: *Corporations Act 2001* (Cth) ss 117(2)(d), 117(5), 120(1)), directors are appointed by the general meeting: s 201G, or confirmed by a resolution of the shareholders if appointed under s 201H. Both ss 201G and 201H are, however, replaceable rules: s 141 *Corporations Act 2001* (Cth).

to permit this, however, is why the latter category ought to remain as a potential fact-based scenario, rather than be acknowledged as a status-based fiduciary obligation. The real likelihood that such variables will arise in a closely held company is why it is more realistic to express the fiduciary obligation as owed by directors to the shareholders in that corporate structure.

This chapter has established the three further propositions put forward by this thesis:

**Proposition 3:**

There are recognised exceptions to the standard position that fiduciary obligations are owed by directors to their company, and not to the shareholders.

**Proposition 4:**

These exceptions primarily involve 'closely held companies'

**Proposition 5:**

In closely held companies, the shareholder is the appropriate beneficiary of fiduciary obligations owed by directors

Additionally, it has established a definition:

**Definition:**

A 'closely held company' is a proprietary company with three or less directors, and 6 or less shareholders.

In the next chapter, the role of the fiduciary obligation within the wider scheme of regulation applied to companies is discussed. With a particular focus on those regulations which impact most heavily on directors, the various legal, quasi-legal, managerial, market-based and commercial cultural norms known more generally as corporate governance are canvassed to ensure that the fiduciary obligation is not in conflict with their aims or methods. The remedies currently available to shareholders are considered in turn, to ensure a multiplicity of responses is not created by a fiduciary obligation to the shareholders in closely held companies.

# 4 FIDUCIARY OBLIGATIONS WITHIN CORPORATE GOVERNANCE

## *4.1 Introduction*

The previous chapter argued that, in relation to the company form, the fiduciary obligation has suffered some misconception and misapplication in the past. Building on Chapter 2, it established that the fiduciary obligation consisted of the 'no conflict' and 'no profit' rules, which, when applied to the corporate setting, produced the particular instances known to corporate law as the misappropriation rule and the business opportunity rule. Chapter 3 clarified that no other obligations are fiduciary, despite past errors of language and conflation of the categories of 'equity' and 'fiduciary'. It concluded with a discussion of the factual circumstances where courts have previously been inclined to find a fiduciary obligation between directors and shareholders. From those circumstances, a working definition of a closely held company was established, in which a fiduciary obligation from a director to the shareholder could be established on more than an *ad hoc* basis. This chapter will consider how such an obligation would fit with the wider system of regulation applied to the corporate form.

The fiduciary obligation is one of a variety of duties owed by directors. These duties form part of a mechanism known as 'corporate governance',[1] one aspect of which relates to control of the behaviour of directors. It is important to consider the position of the fiduciary obligation within this wider corporate governance context for a number of reasons. There would be no need to alter the existing framework of the fiduciary obligation if another duty, norm or statutory provision (or a combination thereof) provides the desired outcome of enabling shareholders in a closely held company to act

1 This term will be defined in more detail below, at Chapter 4.2.

directly, and on their own behalf, on a breach of fiduciary obligations by the director. Further, such an alteration ought not be considered if it would conflict with the wider philosophy of corporate governance, as a consistent approach prevents confusion.

As such, this chapter commences with a short consideration of how corporate governance relates to the primary relationships within a company, before discussing why corporate governance is important. It will then discuss the theory of convergence and a global model of corporate governance, in order to ascertain whether changes within an Australian corporate governance regime would be overtaken by global considerations. Finally, it will outline the current Australian methods of corporate governance, and highlight the role of the fiduciary obligation within that context.

### *4.2 What is Corporate Governance?*

Although commentators claim that the concepts of corporate governance were visible even in Plato's dialogue dealing with Guardians of the Republic and the governance of Greek City States,[2] the term itself did not frequently emerge in literature until the 1980s, and only became an established field in the 1990s.[3] Certainly if the corporate form with multiple owners of a structured entity can be traced back to classical antiquity, it seems only logical that corporate governance in some form developed alongside it.

---

2 Bob Tricker, 'Where do we go from here?' (1997) 5(4) *Corporate Governance: An International Review* 177, 177.

3 Robert A Monks and Nell Minow, *Watching the Watchers - Corporate Governance for the 21st Century* (Blackwell Publishers Inc, 1996) 290-291; Bob Garratt, *The Fish Rots from the Head: The Crisis in our Boardrooms* (Profile Books, Revised ed, 2003) xvii. According to Branson, a copyright search in 1993 by publishers of his treatise on corporate governance confirmed that no prior work with such a title existed in the United States: Douglas M Branson, 'The Very Uncertain Prospects of 'Global' Convergence in Corporate Governance' in Thomas Clarke (ed), *Theories of Corporate Governance* (Routledge, 2004) 259, 261.

Corporate governance is defined by the Australian Securities Exchange ('ASX') as 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations.'[4] This definition is consistent with the comments of the HIH Royal Commission,[5] which stated

> [a]t its broadest, the governance of corporate entities comprehends the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations. It includes the practices by which that exercise and control of authority is in fact effected.
> The relevant rules include applicable laws of the land as well as the internal rules of a corporation. The relationships include those between the shareholders or owners and the directors who oversee the affairs of the corporation on their behalf, between the directors and those who manage the affairs of the corporation and carry out its business, and within the ranks of management, as well as between the corporation and others to whom it must account, such as regulators. The systems and processes may be formal or informal and may deal with such matters as delegations of authority, performance measures, assurance mechanisms, reporting requirements and accountabilities.
> The term corporate governance has a descriptive content, in the sense of denoting a simple statement of a governance model that is in place. It is also commonly used in an aspirational sense, by way of holding out a model which practice should seek to emulate. Reference can be made in this regard to various statements of corporate governance principles or guidelines on good corporate governance practice, some purely hortatory, others more prescriptive, that have been published or promulgated in recent years.[6]

This is a very broad statement, which, as discussed below, raises both formal and non-formal systems of control. At the heart of such systems are the primary relationships within a company, which are between the shareholders, directors and management. Shareholders pool their assets to form the company, and elect a board of directors to direct and manage the company.[7] They delegate most of the powers of ownership to the board. As the board can only act when it meets, it hires management to have the

4 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Australian Stock Exchange, 2007) <http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=#>, 5.

5 Commonwealth, HIH Royal Commission, *Report: The Failure of HIH Insurance* (2003) .

6 Ibid Volume 1, 101-102.

7 Corporations and Markets Advisory Committee, 'The Social Responsibility of Corporations' (December 2006) [3.1].

practical, day-to-day oversight of the company, and delegates a large part of its power to them. Consequently, management is accountable to the board, and the board is accountable to the shareholders. Bosch believes that it 'is because these accountabilities are not well-understood, and even less well-observed, that failures in governance occur.'[8]

In most views of the corporate body, the board of directors plays a pivotal role.[9] In the orthodox description of a company, the board of directors is placed at the apex of a triangle, with a top down view of the affairs of the organisation from the perspective of a sustained and fixed identity.[10] Beneath the board are the shareholders, and beneath them at the base of the triangle is management. An alternative, dynamic, 'business brain' view of the company places the board in the central circle of three concentric rings, surrounded in the closest ring by all stakeholders, who are then surrounded by management in the outermost ring.[11] Either view emphasises the important role the board plays within a company, and demonstrates why much corporate governance is directed towards that body and its behaviour. Interestingly, these descriptions do not accurately reflect either the flow of obligations within the corporate structure or the delegation of responsibility, as they place the shareholders/stakeholders between the management and the board. This may be due to their genesis within economic or other social science fields, where the focus is not centred on obligations or delegation.

---

8 Henry Bosch, 'The Changing Face of Corporate Governance' (2002) 25(2) *University of New South Wales Law Journal* 270, 270.

9 The duties under the *Corporations Act 2001* (Cth) mostly apply to directors and officers, as defined within s 9. Consequently, consideration of 'the board' may also generally involve consideration of senior management in the modern corporation.

10 John Elkington, *Cannibals with forks: the triple bottom line of 21st century business* (Capstone, 1997) 286-287, drawing on the concepts of using metaphor to describe organisation discussed by Gareth Morgan, *Images of Organization* (Sage Publications, 2nd ed, 1997) 18-19.

11 John Elkington, *Cannibals with forks: the triple bottom line of 21st century business* (Capstone, 1997) 286-287; Bob Garratt, *The Fish Rots from the Head: The Crisis in our Boardrooms* (Profile Books, Revised ed, 2003), 4.

Regardless of how the individuals within the company are defined, the company itself is recognised at law as a person.[12] As was highlighted within the first chapter, there is a perception that punishment of 'the company' is particularly difficult, given its legal status as a person but lack of a singular individual which represents that person.[13] The dichotomy between the 'nexus of contracts' approach to the company[14] and the entity theory of the company,[15] has largely been avoided in Australian law, by regulating both the individuals and the company for whom they act.[16] It has long been recognised in relation to corporate punishment that a 'dual focus on the firm and the individual is necessary. Neither can safely be ignored.'[17] As Le Mire explains, maintaining this dual focus provides significant personal disincentives to the decision-makers within a company, but providing a response against the company itself acknowledges the role that corporate culture may play on the decision-making process of the individuals within.[18]

### *4.3 Why is Corporate Governance Important?*

A frequently observed concomitant of economic downturn is some degree of corporate failure, which reignites discussion of current corporate governance measures and how

12 By combination of *Corporations Act 2001* (Cth) ss 117, 119, 124.

13 See, generally: Mervyn A King, *Public Policy and the Corporation,* Cambridge Studies in Applied Econometrics (Chapman and Hall, 1977); John C Coffee Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1980) 79 *Michigan Law Review* 386.

14 As favoured by 'law and economics' scholars: see, eg, Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, Reprinted ed, 1996); Andrei Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737.

15 See, eg, M Stokes, 'Company Law and Legal Theory' in W Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) ; David Millon, 'Theories of the Corporation' (1990) 2 *Duke Law Journal* 201.

16 Suzanne Le Mire, 'Document Destruction and Corporate Culture: A Victorian Initiative' (2006) 19 *Australian Journal of Corporate Law* 304, 311.

17 John C Coffee Jr, 'No Soul to Damn: No Body to Kick: An Unscandalised Inquiry Into the Problem of Corporate Punishment' (1980) 79 *Michigan Law Review* 386, 410.

18 Suzanne Le Mire, 'Document Destruction and Corporate Culture: A Victorian Initiative' (2006) 19 *Australian Journal of Corporate Law* 304, 311.

they should be improved – whether or not the failure could be attributed to purely economic variables. It is inappropriate to equate all corporate failure with bad corporate governance, as even well-governed companies will be subject to strong economic and competitive forces, and nothing can provide an absolute guarantee of investments.[19] However, there is evidence that governance practices in the majority of infamous corporate collapses were generally poor, that there was little or no accountability, and in some cases, that corporate controllers were enriching themselves directly due to this lack of accountability.[20]

Good corporate governance relies on effective checks and balances, which are not static concepts. The business community needs to value good corporate behaviour and its contribution to company performance and shareholder value in order for it to operate effectively.[21] This is particularly true of modern corporate governance, as the profile of the standard investor has changed dramatically in recent times. From 1986 to 2010, the percent of adult Australians holding shares directly and indirectly rose from 9% to 43%.[22] In 2010, 7.262 million people owned shares in some form or another, and 6.586

---

19 Jillian Segal, 'Corporate Governance: Substance over Form' (2002) 25(2) *University of New South Wales Law Journal* 320, 320; Henry Bosch, 'The Changing Face of Corporate Governance' (2002) 25(2) *University of New South Wales Law Journal* 270, 271

20 Henry Bosch, 'The Changing Face of Corporate Governance' (2002) 25(2) *University of New South Wales Law Journal* 270, 271; Jillian Segal, 'Corporate Governance: Substance over Form' (2002) 25(2) *University of New South Wales Law Journal* 320, 327-331. Bosch discusses the evidence gathered in the One.Tel and Harris Scarfe court cases, the HIH Royal Commission, and the examples of Bond Corporation and Rothwells, and Segal considers many of the same circumstances, through the lense of the role of the regulator.

21 Jillian Segal, 'Corporate Governance: Substance over Form' (2002) 25(2) *University of New South Wales Law Journal* 320, 343-344.

22 Australian Associated Stock Exchanges, 'Australian Shareownership 1986' (Australian Associated Stock Exchanges, 1986); Australian Stock Exchange, '2000 Australian Shareownership Study' (Australian Stock Exchange, 2000); Australian Securities Exchange, '2006 Australian Share Ownership Study' (Australian Securities Exchange, 2006); Australian Securities Exchange, '2010 Australian Share Ownership Study' (Australian Securities Exchange, 2010). Share ownership has in fact shown a downward trend over the past decade, having reached a high of 55% in 2004: Australian Securities Exchange, '2010 Australian Share Ownership Study' (Australian Securities Exchange, 2010), 6. Much of this decrease can be attributed to a drop in ownership of shares listed on foreign exchanges: Australian Securities Exchange, '2010 Australian Share Ownership Study'

million or 39% of the adult Australian population were direct investors in the Australian share market.[23] Given the high proportion of direct investors and the current political climate, corporate failures receive a high degree of press scrutiny, whether or not they have come about through bad governance.

There is also some evidence that good corporate governance does not only decrease the risk of corporate collapse, but that it can actually improve performance of companies. Bosch cites the surveys conducted in the United States of America on behalf of the Californian Public Employees Superannuation Fund ('CalPERS'), one of the largest institutional investors in the world.[24] CalPERS practices proactive investment, publishing its own standards of corporate governance[25] against which it assesses the performance of the companies in which it invests and takes an interventionist role in companies it believes to be poorly governed. Surveys conducted by Wilshire Associates of 42 companies targeted by CalPERS show that, on average, their share prices lagged behind the Standard and Poor's 500 Index by 66% in the five years before CalPERS intervention, and then outperformed the Index by 52.5% in the five years after it.[26] This

(Australian Securities Exchange, 2010), 8. Regardless, the increase from 9% to 42% remains substantial. The particular impact that the introduction of compulsory Superannuation laws by the Keating Labor government in 1992 had in this increase is not specifically addressed by these discussions. As of 2010, 13% of the population had a self-managed superannuation fund. 52% of self-managed superannuation funds held shares in a company listed on ASX, but from 2008 to 2010, the proportion of self-managed superannuation funds that held shares listed on overseas exchanges declined substantially, from 12% to 3%: Australian Securities Exchange, '2010 Australian Share Ownership Study' (Australian Securities Exchange, 2010), 10.

23 Australian Securities Exchange, '2010 Australian Share Ownership Study' (Australian Securities Exchange, 2010), 6.

24 Henry Bosch, 'The Changing Face of Corporate Governance' (2002) 25(2) *University of New South Wales Law Journal* 270, 272.

25 California Public Employees Superannuation Fund, 'Corporate Governance Facts' (2009) <http://www.calpers.ca.gov/index.jsp?bc=/about/facts/home.xml>.

26 Steven L Nesbitt, 'Long-term Rewards from Shareholder Activism: A Study of the "CalPERS Effect"' (1994) 6 *Journal of Applied Corporate Finance* 75 as cited in Henry Bosch, 'The Changing Face of Corporate Governance' (2002) 25(2) *University of New South Wales Law Journal* 270, 272.

would seem to rebut the position argued by many, even within the legal community, that all activist shareholders are a potential danger to companies.[27]

Good corporate governance is therefore considered desirable and important for two key reasons: in a well-governed company, the risks of fraud and corporate collapse would appear to be reduced, and evidence suggests that good corporate governance can improve performance even in an honestly managed and financially sound company.

### *4.4 Future Methods of Corporate Governance*

In light of the potential for good corporate governance to improve performance and reduce risks of fraud and corporate collapse, it might be expected that corporate governance would be similar, if not the same, across the globe. Importantly for this thesis, as it recommends changes to that system, is that such amendments would not shortly be overcome by convergence towards a global system of governance with a different focus than the current Australian regime. It is certainly not true that current corporate governance regimes across the globe are consistent, as corporate form and corporate practice differ, and consequently so do the methods of governing them.[28] According to the proponents of the 'Law Matters' thesis, the history and tradition of the law within the community is responsible for the majority of the differences.[29] La Porta et al divide commercial law into two broad legal traditions: common law, which is English

---

27 For example, *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 547 per Handley JA, who describes the shareholder relying on their legal rights against directors as pursuing 'harassing actions'.

28 Douglas M Branson, 'The Very Uncertain Prospects of 'Global' Convergence in Corporate Governance' in Thomas Clarke (ed), *Theories of Corporate Governance* (Routledge, 2004) 259, 266-268.

29 See, for example: Rafael La Porta et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113.

in origin, and civil law, which has the Roman Law as its origin[30] and in modern times has split into three major families: French, German and Scandinavian.[31] Corporate governance structures in common law countries such as Australia, the United Kingdom and the United States of America, are generally based on the shareholder approach or outside model of corporate control.[32] CLERP Paper No 3 reflected the Australian approach to this divide:

> the achievement of corporate goals and profit maximisation is monitored by the owners of the corporation, its shareholders, to whom the corporate management is accountable. The focus of the shareholder approach is profit maximisation for the owners of the corporation.[33]

The corporate governance structures of civil law countries are instead said to be based on a stakeholder approach, or insider model of corporate control. The corporate governance structures of these countries seek to align the interests of multiple stakeholders, such as employees, managers, creditors, suppliers, customers and other members of the community.[34] However, it is claimed that, in general, civil law countries give investors and creditors weaker legal rights than common law countries.[35]

---

30 Rafael La Porta et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113, 1115. This article neglects to address other significant legal systems of the world and their influence on commercial laws within their own regions, including socialist law, Islamic law, Hindu law, and Chinese law. It is not clear whether the authors considered and then excluded these legal systems from their discussion for some particular reason. The limitation of the discussion to only the civil and common law systems will be continued for the purposes of this chapter, as extending the basis of the 'Law Matters' argument is beyond the scope of this thesis.

31 Ibid.

32 CLERP, 'CLERP Proposals for Reform Paper No 3 – Directors' Duties and Corporate Governance' (Department of Treasury, 1997) [7.2.1]. The Corporate Law Economic Reform Program (CLERP) is part of an ongoing government initiative to review and reform corporate law. The acronym CLERP comes from the *Corporate Law Economic Reform Program Act 1999* (Cth), which introduced the co-operative scheme declared constitutionally invalid in 1999, as discussed in Chapter 3, and below under the heading 'Statutory Directors' Duties'. Both before and after 1999, the Government has published its proposals for reform in the corporate field as 'CLERP papers'.

33 Ibid [7.2.1].

34 Ibid.

35 Rafael La Porta et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113, 1116.

The use of the terms ‘insider’ and ‘outsider’ by the CLERP Paper No 3 is not ideal, as it is can be quite misleading.[36] The term ‘outsider’ can be used to describe a shareholder in a large company that does not have core shareholders who own enough of an interest to exercise an ‘inside’ influence.[37] This is aligned with the traditional Berle and Means concept of ‘separation of ownership and control’ in larger public companies with dispersed shareholdings.[38] This concept of the company is not only far from universal, but also inappropriately denies the existence of other models, such as the closely held company as defined within the previous chapter. Private or proprietary companies play important roles in the economy in many countries, and even among publicly traded companies there may be core shareholders who can exercise considerable influence over management.[39] Shareholders may also be considered ‘insiders’ in that they have a personal interest in the company via their investment and have access to information due to this position. When compared to the detailed ‘insider knowledge’ of the workings of the company, as held by a manager or high level employee, the description of a shareholder as an ‘outsider’ once again appears appropriate. On the other hand, many stakeholders such as environmentalists and other specialised interest groups would be hard to classify as ‘insiders’ in a traditional sense, as they have little or no actual connection to the company, and it would make more sense to label them as ‘outsiders’. As such, the labels ‘shareholder primacy model’ and ‘stakeholder primacy model’ are to

[36] Further, its precise application in the Australian legal setting has been challenged: Alan Dignam and Michael Galanis, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2005) 28 *Melbourne University Law Review* 1, who suggest that at least Australia’s listed market may have traditionally been misclassified.

[37] Brian R Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002) 16 *Transnational Law* 13, 15; Franklin Gevurtz, *Global Issues in Corporate Law,* American Casebook Series (Thomson West, 2006) 70.

[38] Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Transaction Publishers, Revised ed, 1968). See also Brian R Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002) 16 *Transnational Law* 13, 15; Franklin Gevurtz, *Global Issues in Corporate Law,* American Casebook Series (Thomson West, 2006) 70.

[39] Brian R Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002) 16 *Transnational Law* 13, 16; as cited in Franklin Gevurtz, *Global Issues in Corporate Law,* American Casebook Series (Thomson West, 2006) 71.

be preferred for their lack of linguistic ambiguity, and from now on will be used throughout the thesis.

Both civil and common law jurisdictions have suffered corporate governance failures in the past, suggesting that neither model is working perfectly.[40] Whilst CLERP Paper No 3 does not purport to decide which of these two models should be preferred, it does highlight some perceived benefits of the shareholder primacy model.[41] The report states that the shareholder primacy model favours external accountability and as such should be preferred, given the rising dependence on external finance.[42] This presumes that the 'external accountability' under the shareholder primacy model is always an effective control mechanism, which may be an overly simplistic view of the situation.[43] The report also contends that the focus under the shareholder primacy model on the maximisation of shareholder wealth leads the company to be more flexible and responsive to the market.[44] It also suggests that there may be a global shift towards the shareholder primacy model, but does not offer any evidence to support this conclusion.[45] This perhaps reflects an intellectual bias within the report, as there was academic opinion in the years leading up to the CLERP Paper No 3 suggesting the reverse would be true –

---

40 Given that the ideal corporation as expounded by Berle and Means in their revised edition of their 1932 book Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Transaction Publishers, Revised ed, 1968) can also hardly be said to exist in reality, the use of the description 'perfectly' is ironically intended.

41 This is perhaps unsurprising, as the CLERP reports are advising the Federal Government of Australia.

42 CLERP, 'CLERP Proposals for Reform Paper No 3 – Directors' Duties and Corporate Governance' (Department of Treasury, 1997) [7.2.1]. Australian companies are generally very highly leveraged.

43 See for example, Mike Burkart, Denis Gromb and Fausto Panunzi, 'Large Shareholders, Monitoring, and the Value of the Firm' (1997) 112(3) *Quarterly Journal of Economics* 693; Stuart L Gillan and Laura T Starks, 'Corporate Governance Proposals and Shareholder Activism: the Role of Institutional Investors' (2000) 57 *Journal of Financial Economics* 275; Elizabeth Boros, 'Virtual Shareholder Meetings' (2004) 0008 *Duke Law & Technology Review* 9/1/2004; Elizabeth Boros, 'What is the right division of power between boards of directors and shareholders?' (Paper presented at the Law 125 Distinguished Speakers Series, Ligertwood Building, University of Adelaide, 20 May 2008).

44 CLERP, 'CLERP Proposals for Reform Paper No 3 – Directors' Duties and Corporate Governance' (Department of Treasury, 1997) [7.2.1].

45 Ibid.

that Anglo-Saxon corporate governance regimes would be replaced by those modelled after Germany and Japan,[46] or possibly, given the content of much academic work following CLERP, it was simply ahead of its time.[47]

Even if there is no single global approach to corporate governance, it would seem logical that similar facets of governance would be appearing within the disparate systems that are currently available. However, the arguments surrounding the potential for what can be termed as ‘convergence’ within corporate governance structures and practices are complex. Convergence has been defined within this debate to refer to harmonisation of both substantive law and regulatory structures.[48] It would seem logical that as the market for capital globalises and the ability to base a company in any jurisdiction worldwide becomes commonplace, countries perceived to have a ‘better’ system of corporate governance will have an advantage in attracting both company headquarters and capital investors.[49] To the contrary, incorporation practices in the United States of America began to be described as a ‘race to the bottom’ as long ago as 1974,[50] although there is

46 Andrei Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737, 737, citing various works published in the United Kingdom and United States of America.

47 See, for example: John C Coffee Jr, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1999) 93 *Northwestern University Law Review* 641, 649 on; Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439; Holly Gregory, 'The US Corporate Governance Crisis in Context' in Institutional Investor Journals (ed), *Corporate Governance: A Guide to Corporate Accountability* (Institutional Investor Inc Journals Group, 2003) 19-20.

48 Anita Anand and Peter Klein, 'Inefficiency and Path Dependency in Canada's Securities Regulatory System: Towards a Reform Agenda' (2005) 42 *Canadian Business Law Journal* 41 53.

49 This could be described as ‘survival of the fittest’: Charles Darwin, *On the Origin of Species* (John Murray, 1859). The link to the Darwinian undercurrents of the law matters thesis was also made by Brian R Cheffins, 'Corporate Law and Ownership Structure: A Darwinian Link' (2002) 25(2) *University of New South Wales Law Journal* 346, 354.

50 See, for example, William L Cary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 *Yale Law Review* 663; Lucian Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' (1992) 105(7) *Harvard Law Review* 1435. Delaware is frequently described as the winner of this dubious honour: Lucian Bebchuk and Alma Cohen, 'Firms' Decisions Where to Incorporate' (2003) 46 *Journal of Law and Economics* 383 385; Mark J Roe, 'Delaware's Competition' (2003) 117(2) *Harvard Law Journal* 588 590.

recent academic opinion to suggest that this debate is misconceived.[51] Wealth maximisation may prove to be a more powerful factor than a shareholder's concern for the strength of their protection. Competition theory would suggest that some degree of intra-convergence may occur within each model of corporate governance, but there is unlikely to be inter-convergence between the two models, primarily due to the concept of path dependency. Path dependency recognises the importance of historical events, such as relationships between states at the time of federation, in analysing present circumstances, even if those historical events have no relevance to the present issue.[52] Academics acknowledge the effect of 'path dependency' within corporate governance systems,[53] meaning it is possible that the shareholder primacy model would never be appropriate within a civil law system, and vice-versa, due to the underlying differences between the civil and common law systems and their approaches to the law. There may be 'historical constraints on the ability to achieve'[54] convergence between the two models, as they each focus on outcomes which may not be effectively combined.

In light of path dependency, recognising that the Australian system of corporate governance exists within the shareholder primacy model entails an acknowledgment that corporate governance mechanisms developed within a civil law system may not be

---

51 See, for example, John C Coffee Jr, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1999) 93 *Northwestern University Law Review* 641, 650 at footnote 31; Mark J Roe, 'Delaware's Competition' (2003) 117(2) *Harvard Law Journal* 588.

52 Anita Anand and Peter Klein, 'Inefficiency and Path Dependency in Canada's Securities Regulatory System: Towards a Reform Agenda' (2005) 42 *Canadian Business Law Journal* 41 54, applying the use of path dependency as used by economists to discuss technology adoption and industry evolution, particularly in Stan Liebowitz and Stephen Margolis, 'The Fable of the Keys' (1990) 33 *Journal of Law and Economics* 1, where they debate whether the market-first-entry of the Qwerty keyboard ensured its success over its rival, the Dvorak keyboard, which was argued to be ergonomically superior.

53 See, for example, John C Coffee Jr, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1999) 93 *Northwestern University Law Review* 641, 646.

54 Stan Liebowitz and Stephen Margolis, 'The Fable of the Keys' (1990) 33 *Journal of Law and Economics* 1 55.

appropriate for adoption. However, a corollary is also true: that corporate governance methods adopted by other common law jurisdictions, or which function within both systems, will likely be appropriate governance for the Australian corporate environment. As such, although the discussion within this thesis of the role of the fiduciary obligation within corporate governance may be applicable to other jurisdictions which embody the shareholder-primacy model, it may not be appropriate to all of them, nor beyond.

### *4.5 Current Corporate Governance Philosophy*

The scholarly field contributing to the development the concept of corporate governance includes input from a variety of academic fields, including but not limited to legal academics. As such, many discussions of corporate governance involve few references to the statutory and legal framework in which companies and corporate officers operate,[55] preferring to focus on specific behaviours of directors or business norms. Although undoubtedly business community norms play a vital role in influencing the behaviour of corporate players, it is only part of the picture. Any discussion of a system by which organisations are directed and controlled[56] must include the legal framework in which it operates, and equally cannot fail to discuss the non-legal framework. As Farrar comments, 'the concept of corporate governance transcends the law and takes into account varieties of non-law or self-regulation and other business practices.'[57]

---

55 For example, Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004); Henry Bosch, 'The Changing Face of Corporate Governance' (2002) 25(2) *University of New South Wales Law Journal* 270; John Elkington, *Cannibals with forks: the triple bottom line of 21st century business* (Capstone, 1997); Robert A Monks and Nell Minow, *Watching the Watchers - Corporate Governance for the 21st Century* (Blackwell Publishers Inc, 1996). The lack of legislative citation does not diminish the valuable contribution of which such works are capable.

56 Jillian Segal, 'Corporate Governance: Substance over Form' (2002) 25(2) *University of New South Wales Law Journal* 320, 343-344.

57 John Farrar, 'In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance' (2001) 13 *Australian Journal of Corporate Law* 1.

A full picture of corporate governance comprises a complex mixture of legal, quasi-legal, managerial, market based and commercial cultural norm factors. Current mechanisms of corporate governance include:[58]

1. Statutory directors' duties found in the *Corporations Act*;
2. Insider trading provisions;
3. Oppression provisions;
4. Winding up provisions;
5. Insolvency provisions;
6. The provisions of the Australian Consumer Law and *ASIC Act*;
7. Australian Securities Exchange Listing Rules and the ASX Corporate Governance Recommendations;
8. Business community expectations and norms; and
9. Non-statutory directors' duties deriving from common law (such as contract and torts) and equity.[59]

These mechanisms will now be briefly examined. This thesis does not attempt to provide an exhaustive study of these mechanisms, but merely to highlight the role they play as part of the greater concept of corporate governance. Bodies of work are available which canvas these individual topics in great detail, and from which this thesis draws the basis

[58] Hanrahan, Ramsay and Stapledon include a far broader list of mechanisms in Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 118-120, such as the structure of the board, the product market in which the company operates, and the labour market for managers, to name just a few. It is not questioned that these mechanisms play a role in determining the environment in which the company exists, but their individual input into corporate governance is limited. The seven items listed here are selected for the weighty influence they exert on corporate governance.

[59] Given the confusion which may stem from referring to 'common law' directors' duties which would include both contractual and equitable duties, as opposed to 'Common Law' directors' duties, which would exclude the equitable duties, the heading 'non-statutory directors' duties' has been used.

of its examination.[60] This broad picture will enable the role of the fiduciary obligation to be considered in context, not only as a mechanism of corporate governance in its own right, but also as an equitable response available to the shareholder.

### 4.5.1 *Statutory Directors' Duties*

As was discussed in relation to the fiduciary obligation in Chapter Two and the Australian corporate form and regulatory schemes in Chapter Three above, the current position regarding the directors' duties as they exist in legislation is based on the historical development of these duties in England and then through the individual colonies. The historical analysis in Chapter Three was concerned with the general history of corporate legislation as it developed in Australia, whereas this analysis considers the development of the statutory directors' duties in particular.

Despite previous praise from the courts for Parliament's abstention from formulating precise rules for the conduct of business affairs,[61] the early 20th Century saw obligations of directors appearing as legislative duties. Section 149 of the *Companies Act 1929* (UK) required directors to declare any interest which might create a direct or indirect conflict

60 See generally, R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Australia, 2005); R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths Australia, 14th ed, 2010); Robert Baxt, Keith Fletcher and Saul Fridman, *Corporations and Associations: Cases and Materials* (LexisNexis Butterworths, 10th ed, 2009); F H Callaway, *Winding Up on the Just and Equitable Ground,* Monash Studies in Law (Law Book Company, 1978); Thomas Clarke (ed), *Theories of Corporate Governance* (Routledge, 2004); John Farrar, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3rd ed, 2008); Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012); Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook Co, 16th ed, 2012); Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009); Christopher Symes and John Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2009); Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002).

61 *Dovey v Cory* [1901] AC 477, 488 (Lord Macnaughten), cited with approval in *In Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407, 427 (Romer J).

with their position as a director. Repeating the existing position under the 'general law'[62] in statute was intended to highlight to directors their responsibilities, and to provide some protection to shareholders.[63] This section was reproduced in Australia by s 129 of the *Companies Act 1936* (NSW) and s 149 of the *Companies Act 1938* (Vic), and much of the remainder of the Act was also reproduced in the Australian legislation. The Victorian Act introduced further statutory duties in 1958, with s 107 requiring directors to act honestly at all times, and to use reasonable diligence in the discharge of their duties.[64] Further, it prohibited all officers of the company from gaining an improper advantage from the misuse of information,[65] which bore resemblance to the 'no profit' and 'no conflict' rules, created a penalty for breach[66] and expressly retained the operation of the common law duties.[67]

When Victoria and the other states adopted the uniform company scheme in 1962,[68] it included a further attempt to define the fiduciary obligations of 'no conflict' and 'no profit' in statute.[69] Despite the major reforms that occurred in company law over the subsequent period, the substantive provisions remained mostly unaltered, as the focus of the reforms was instead on uniformity of administration and regulation. The provision relating to the 'no conflict' rule became s 228 of the *Companies Code*, and the provision relating to the 'no profit' rule became s 229, and was also extended to include misuse of

62 The phrase 'the general law' is used extensively in the corporate law field (see, eg, *Corporations Act 2001* (Cth) s 193). It is intended to refer to both the common law and equity, but can be confusing for those unfamiliar with this term of art.

63 Hansard, HC (Series 5) Vol 220 Col 1306-1308 (25 July 1928), as cited in Johann Kirby, 'The History and Development of the Conflict and Profit Rules in Corporate Law - a Review' (2004) 22 *Company and Securities Law Journal* 259, 264.

64 *Companies Act 1958* (Vic) s 107(1).

65 *Companies Act 1958* (Vic) s 107(2).

66 *Companies Act 1958* (Vic) s 107(3).

67 *Companies Act 1958* (Vic) s 107(4).

68 As discussed above, see Chapter 3.2.2.

69 Sections 123 and 124 respectively of the *Companies Act 1962* (Cth) passed in each State ('the *Companies Code*').

information by employees and former officers,[70] and misuse of position.[71] The introduction of the *Corporations Act 1989* (Cth) again saw renumbering of the provisions, with little substantive alteration.[72]

During the 1990s, directors' duties began receiving more attention,[73] and reforms, particularly to the treatment of the 'no conflict' rule, were drafted.[74] Disclosure of conflicts was limited to directors of proprietary companies,[75] and a new provision prevented directors of public companies from voting, or being present for discussion, at board meetings on matters where they had a material personal interest.[76] A new part was introduced to deal with related party transactions by public companies,[77] which has been attributed as a response to the corporate collapses of the 1980s where dishonest related party transactions were considered responsible.[78] The obligations were placed on the company in relation to transactions with related parties, including directors, but did not include any duties on directors in relation to their personal interests or profits.

The next major review of statutory directors' duties occurred in the lead up to *CLERP*,[79] which sought, amongst other issues, to address concerns that regulation and uncertainty about directors' duties was adversely distracting directors from risk taking and wealth creation.[80] The amendments suggested under *CLERP* were ultimately enacted by the

70 *Companies Code*, s 229(3).
71 *Companies Code*, s 229(4).
72 Conflict (*Corporations Act 1989* (Cth), s231) and Profit (*Corporations Act 1989* (Cth), s232).
73 For example, the report of the Senate Standing Committee of Legal and Constitutional Affairs, 'Company Directors' Duties' (Commonwealth Parliament, 1989).
74 Corporate Law Reform Bill 1992 (Cth).
75 Corporate Law Reform Bill 1992 (Cth) s 231.
76 Corporate Law Reform Bill 1992 (Cth) s 232A.
77 Corporate Law Reform Bill 1992 (Cth) Part 3.2A.
78 Johann Kirby, 'The History and Development of the Conflict and Profit Rules in Corporate Law - a Review' (2004) 22 *Company and Securities Law Journal* 259, 267.
79 *Corporate Law Economic Reform Program Act 1999* (Cth).
80 CLERP, 'CLERP Proposals for Reform Paper No 3 – Directors' Duties and Corporate Governance' (Department of Treasury, 1997).

Commonwealth after the States referred their powers with respect to corporations, corporate regulation and the regulation of financial products and services to the Commonwealth[81] in order to overcome the malingering constitutional uncertainties[82] which arose in the wake of the *Re Wakim; Ex parte McNally*[83] and *Re Hughes.*[84] This allowed for the new national corporations legislation which reflected the law proposed in *CLERP* to be passed in the form of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth).

Under the *Corporations Act,* directors are subject to a number of duties which can be broken into two general themes: duties which relate to care and diligence, and duties which relate to loyalty and good faith.[85] These themes mirror the position at common law and equity, which will be discussed in the ninth category below.

The duties which reflect the theme of care and diligence are contained in ss 180 and 588G of the *Corporations Act*, and s 180(1) states:

> 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:

---

81 The referral of power was not without caveats. Firstly, the referrals do not enable the Commonwealth to amend these Acts in order to regulate industrial relations matters (see, for example: *Corporations (Commonwealth Powers) Act 2001* (SA), s1(3)). Secondly, the referral is subject to both early termination options and a five year sunset clause, which may be extended by the States (see, for example: *Corporations (Commonwealth Powers) Act 2001* (SA), s5(1) which currently states that 'the references terminate on the day that is the 15th anniversary of the day of commencement of the Corporations legislation'. The original version of the legislation stated 'on the 5th anniversary', and was amended by the *Corporations (Commonwealth Powers) (Extension of Period of References) Amendment Act 2005* (SA) to state that the termination was 'on the 10th anniversary', which was amended to its current form by *Corporations (Commonwealth Powers) (Termination Day) Amendment Act 2011* (SA).)

82 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006) 104. The impact of constitutional uncertainties in the field of corporate law has been considered previously in Chapter 3.2.2.

83 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

84 *Re Hughes* (2000) 202 CLR 535.

85 Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 213.

(a) were a director or officer of a corporation in the corporation's circumstances; and
(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.[86]

The requirement for care and diligence is tempered by s 180(2), the business judgment rule, which creates a 'safe harbour' for directors. It can operate as a defence to exculpate a director who has made a well-informed business decision.

> A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
> (a) make the judgment in good faith for a proper purpose; and
> (b) do not have a material personal interest in the subject matter of the judgment; and
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
> (d) rationally believe that the judgment is in the best interests of the corporation.
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.[87]

Although arguably related to the duty of care,[88] the requirement to monitor the financial health of the company as stated by the director's duty to prevent insolvent trading[89] is discussed under the fifth category below, as a member of the insolvency provisions.

The duties which reflect the theme of loyalty and good faith are contained in ss 181-183, 191-196 and Chapter 2E of the *Corporations Act*.

Section 181(1) requires directors to exercise their powers and discharge their duties in good faith in the best interests of the company, and for a proper purpose. The statutory treatment of the 'no profit' rule is divided into improper use of position and improper use

86 *Corporations Act 2001* (Cth) s 180(1).
87 *Corporations Act 2001* (Cth) s 180(2).
88 Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 236.
89 *Corporations Act 2001* (Cth) s 588G.

of information,[90] with criminal liability for breaches of these rules.[91] The provision which encompass the 'no conflict' rule exists in a separate section, and it requires disclosure by directors in all companies, except for single director proprietary companies.[92] The underlying fiduciary obligation is expressly preserved.[93]

The description of the duties in ss 182-183 as the 'statutory fiduciary duties'[94] should be avoided, as it is not entirely accurate. The Australian jurisdiction is not alone in perpetuating this 'linguistic confusion',[95] as the equivalent sections of the Canadian legislation have also been similarly labelled by both academics and the courts.[96] Although the equitable fiduciary obligations may have been the original source of the concepts expressed in the *Corporations Act*, the statutory duties are clearly stated not to subsume the equitable fiduciary obligations.[97] And while the statutory duties and fiduciary obligations do operate in a similar way, there are important distinctions.

For example, the statutory duties introduce an element requiring the director not to 'improperly use' their position or information,[98] which is not considered under the equitable concept of the fiduciary obligation. There are further procedural and substantive differences, such as the approach to proving causation, which is higher under

---

90 *Corporations Act 2001* (Cth) ss 182-183. The Use of Position and Use of Information sections may be seen as general expressions of the 'business opportunity rule' as discussed in John Glover, *Commercial Equity - Fiduciary Relationships* (Butterworths, 1995), 131.

91 *Corporations Act 2001* (Cth) s 184.

92 *Corporations Act 2001* (Cth) s 191; *Digital Pulse Pty Ltd v Harris* (2002) 166 FLR 421, 426. Although the decision on exemplary damages for fiduciary breach was reversed by the New South Wales Court of Appeal in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, the position on this point was not amended. Section 191(2) provides exceptions to the duty to disclose.

93 *Corporations Act 2001* (Cth) ss 185, 193.

94 See, eg, Companies and Securities Advisory Committee, 'Company Directors and Officers: Indemnification, Relief and Insurance' (Parliament of Australia, 1992) 4.

95 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 387.

96 Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Scribblers Publishing, 3rd ed, 2006) 377, 428; *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461, [32].

97 *Corporations Act 2001* (Cth) s 185.

98 *Corporations Act 2001* (Cth) ss 182(1), 183(1).

the statute than the 'but for' test used in the equitable duty.[99] The defence of fully informed consent that can be obtained under the fiduciary obligation is dealt with quite differently under the statutory scheme, as the ability to ratify a breach of the equitable duties may not cure a breach of the statutory duties.[100] It may, however, go towards enabling the relevant director or officer to avail themselves of the broader defences contained in the *Corporations Act*.[101]

Chapter 2E of the *Corporations Act* is 'designed to protect the interests of a public company's members as a whole, by requiring member approval for giving financial benefits to related parties that could endanger those interests.'[102] The provisions establish the procedure by which members may approve benefits to 'related parties',[103] the information which must be provided,[104] specific exemptions[105] and the consequences of breach.[106]

### 4.5.2 *Insider Trading Provisions*

Whilst not overtly directed towards the exercise and control of authority within companies in the same manner as the preceding provisions, on closer analysis the insider trading provisions contained in Part 7.10, Division 3 of the *Corporations Act* can arguably form an indirect mechanism within corporate governance. Insider trading

---

99 As discussed in Andrew Hanak, *A Defence of the Company Directors' Duty of Care, Skill and Diligence*, (PhD Thesis, University of Monash, 2005), 85-90.

100 See, eg, *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574; cf *Carabelas v Scott* (2003) 177 FLR 334, as discussed by Andrew Hanak, *A Defence of the Company Directors' Duty of Care, Skill and Diligence*, (PhD Thesis, University of Monash, 2005), 84.

101 *Corporations Act 2001* (Cth) ss 1317S, 1318.

102 *Corporations Act 2001* (Cth) s 207.

103 'Related parties' as defined by *Corporations Act 2001* (Cth) s 228; procedure per *Corporations Act 2001* (Cth) s 217 et seq.

104 *Corporations Act 2001* (Cth) s 219 et seq.

105 *Corporations Act 2001* (Cth) ss 210-216.

106 *Corporations Act 2001* (Cth) s 209.

occurs when any person in possession of inside information about a company (an 'insider') uses that information to acquire, or dispose of, Division 3 financial products.[107] An insider is also prohibited from passing that information on for the purpose of acquiring or disposing of financial products,[108] or encouraging others to do so.[109] An insider can be either a natural person or a company. Inside information, under s 1042A, is information not generally available but which, if it were available, a reasonable person would expect to have a material effect on the price or value of the Division 3 financial product.[110] A precursor to these provisions could have been considered as an argument in the case of *Brunninghausen v Glavanics*,[111] and would likely be raised in most cases of self-interested dealings which would fall foul of the fiduciary obligation at the heart of this thesis, but for the requirement of dealing in a Divison 3 financial product.

Contravention of the insider trading provisions is an offence under s 1311 of the *Corporations Act 2001* (Cth), and can lead to fines, imprisonment or a combination of both. There are also civil penalties under s 1317G of the *Corporations Act 2001* (Cth) for an individual or substantially more for a body corporate. Compensation to any person who has suffered loss may be ordered under s 1317H, including compensation for loss of profits. There are a number of exceptions to the prohibition, listed in s 1043B to 1043K, and defences.

---

107 *Corporations Act 2001* (Cth) s 1043A(1).
108 *Corporations Act 2001* (Cth) s 1043A(2).
109 *Corporations Act 2001* (Cth) s 1043A(1).
110 *Corporations Act 2001* (Cth) s 1042D further defines 'a reasonable person would be taken to expect information to have a material effect on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.'
111 (1996) 19 ACSR 204, as discussed previously in Chapter 3.4.1.

Under the current provisions, a director purchasing the shares of a shareholder when they are aware of an offer to take over the business which has not yet been communicated to the shareholders, but which would see the value of those shares increase, could be pursued under insider trading. The defendant may have been able to raise a defence to a criminal prosecution by arguing that the shareholder, who was also the other director of the company, ought reasonably to have known of the information, but did not trouble himself to keep informed of the company business. That is not relevant for a civil proceeding, which could be brought by ASIC on behalf of injured parties.[112]

Where there is an instance of insider trading by a director, there will usually be a concurrent breach of fiduciary duty to the company, as there is a breach of the profit and conflict rules. The insider trading provisions add to corporate governance by not only creating a criminal consequence, which can include imprisonment, but also by allowing ASIC to bring an action on behalf of injured parties, which can include individual shareholders and not just the company itself.[113]

### 4.5.3 *Oppression Provisions*

Section 232 of the *Corporations Act* confers jurisdiction on a court to grant relief if 'the court is of the opinion that the conduct of a company's affairs … is either contrary to the interests of the members as a whole or 'oppressive to, unfairly prejudicial to or unfairly discriminatory against' a member or members whether in that capacity or any other capacity.'[114] In the case of a commercial company, the court must assess 'whether objectively in the eyes of a commercial bystander, there has been unfairness, namely

112 As was the case in *Australian Securities and Investment Commission v Petsas* (2005) 23 ACLC 269.
113 *Australian Securities and Investment Commission Act 2001* (Cth), s 50.
114 *Joint v Stephens* (2008) 26 ACLC 1467, Neave JA at 1496 for the Court.

conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair'.[115] Fairness is to be assessed in the context of the particular situation, as conduct which may be considered fair within a commercial context may not be fair in the context of a family company.[116] Persons with standing to seek an order under s 233 for oppression as defined in s 232 are described in s 234, and include current and former members.[117]

The current view of oppression in Australian law has been described as narrow,[118] following the judgment of the High Court in *Wayde v New South Wales Rugby League Ltd*.[119] Courts have shown a reluctant to intervene in the board's decision-making process in such cases, as long as the decision could have been reasonably reached by those involved. As such, there will only be oppression where the decision could not have been reasonably reached, which, as was seen in *Wayde*, became a very narrow construction.

As discussed in *Joint v Stephens,*[120] there is no requirement under oppression for the applicant to come to the court with clean hands, nor that it be 'just and equitable' for the court to provide relief.[121] This distinguishes an oppression remedy from the approach

---

115 *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692, 704 as cited in *Joint v Stephens* (2008) 26 ACLC 1467 1497.

116 *Chase Corporation (Aust) Ltd v North Sydney Brick and Tile Co Ltd* (1994) 35 NSWLR 1, as cited in R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths Australia, 14th ed, 2010) 777-778.

117 'Member' is defined in ss 9 and 231 of *Corporations Act 2001* (Cth).

118 Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002; Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 790; also citing that opinion as expressed in relation to a discussion of oppression under s 461in R Baxt and K Fletcher, *Afterman and Baxt's Cases and Materials on Corporations and Associations* (Butterworths, 6th ed, 1992) 769.

119 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 466-468 (Mason A-CJ, Wilson, Deane and Dawson JJ); 471-473 (Brennan J).

120 *Joint v Stephens* (2008) 26 ACLC 1467.

121 *Re London School of Electronics Ltd* [1986] Ch 211, 222 as cited in *Joint v Stephens* (2008) 26 ACLC 1467 1497.

usually followed by the court when considering cases of fiduciary obligation, as a child of equity.[122] However, the behaviour of the applicant for relief against oppression will be considered and has been recognised to have two particularly significant results: 'first, it may render the conduct of the other side, even if it is prejudicial, not unfair … Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant…'[123]

As the test is an objective one, it is unnecessary to prove that the respondent knew or believed that their conduct was unfair – but the question of whether the respondent's conduct was unfairly prejudicial is to be assessed by reference to what was known by the respondent at the time of the conduct.[124] To take a step on the basis of an honest belief of fact may not amount to acting unfairly, even though it is subsequently discovered that the belief was mistaken.[125] This is again quite different from the position under fiduciary obligations, where an honest director can still be found in breach of their 'no profit' and 'no conflict' obligations.

It may be necessary to weigh the competing interests of different groups within the company in relation to a fiduciary obligation owed to shareholders – if, for example, an act that places the best interests of the shareholders above those of the directors would be

---

122 Chapter 2 raised the issues of the equitable maxims, relevantly here that 'those who seek equity must do equity' and the overlapping 'one who comes into equity must come with clean hands'. See Chapter 2.1.1.

123 *Re London School of Electronics Ltd* [1986] Ch 211, 222 as cited in *Joint v Stephens* (2008) 26 ACLC 1467 1496.

124 *Joint v Stephens* (2008) 26 ACLC 1467, 1497-1498.

125 Ibid 1498 citing *Chase Corporation (Aust) Ltd v North Sydney Brick and Tile Co Ltd* (1994) 35 NSWLR 1, 26.

harmful to the company. As such, it is important to note that such a weighing of interests already takes place when the court considers whether conduct contravenes s 232.[126]

Section 233(1) states that '[t]he Court can make any order under this section that it considered appropriate in relation to the company, including' an order that the company be wound up, modification of the constitution, restraining and mandating orders, such as the purchase of shares at a fair price, amongst other things.[127] The option to bring an action for oppression under s 232 may be more attractive than a statutory derivative action under s 236, as it is not necessary to apply for leave of the court, and the member will receive the benefit personally, if the action is successful. On the other hand, an indemnity for legal costs may be available when bringing a statutory derivative action and it is available to a wider range of injured parties.[128]

As both the statutory derivative action and an action for oppression are alternative courses of action for shareholders with an option to pursue directors for a breach of fiduciary obligation, they will be discussed in more detail below.[129]

### 4.5.4 *Winding Up Provisions*

The court has wide discretionary powers under s 461 of the *Corporations Act* to wind up a company. These statutory bases for seeking the winding up of a company cannot be

126 See, eg, *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 466; *Joint v Stephens* (2008) 26 ACLC 1467, 1497.

127 *Corporations Act 2001* (Cth) s 233(1).

128 Susan Woodward, Helen Bird and Sally Sievers, *Corporations Law - In Principle* (LawBook Co, 7th ed, 2005) 282.

129 See Chapter 4.6.

excluded by the constitution of the company.[130] Section 462 establishes who has standing to apply for a company to be wound up, which includes contributories, defined in s 9 to include shareholders, and has been held in some jurisdictions to grant standing to directors.[131]

The provisions in s 461(1)(e), (f), (g) and (k) enable winding up:

- where the directors have acted in their own interests rather than in the interests of the members as a whole, or where the directors have acted in a manner that appears to be unfair or unjust to other members;[132]
- where the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of the members as a whole;[133]
- where an act or omission by or on behalf of the company, or a resolution of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole;[134] and
- on 'just and equitable grounds'.[135]

Section 461(1)(e) has two limbs: firstly, directors acting in their own interests rather than in the interests of 'the members as a whole', and secondly, unfairness or unjustness to

130 *Re Peveril Gold Mines* [1898] 1 Ch 122, as cited in Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002), 780.

131 Applications were successfully made in NSW (but not Victoria) under Art 66 of Table A in Schedule 1 of the *Corporations Law* at that time, which is now contained in the replaceable rule enunciated in s 198A(2): as cited in Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002), 781.

132 *Corporations Act 2001* (Cth) s 461(1)(e).

133 *Corporations Act 2001* (Cth) s 461(1)(f).

134 This includes proposed acts, omissions and resolutions: *Corporations Act 2001* (Cth) s 461(1)(g).

135 *Corporations Act 2001* (Cth) s 461(1)(k).

'other members'. The business judgment rule enshrined in s 180(2) may have a moderating effect on the extent to which the courts will interfere with reasonable business decisions.[136] The 1974 equivalent of this section was considered to be wider in scope than what is now s 461(1)(k).[137]

Sections 461(1)(f) and (g) both relate to oppression or unfair prejudice or discrimination, and as such are counterparts to s 232(d) and (e) discussed above. Due to the overlap in these provisions, academics consider that the court will opt to explore the alternative remedies available under s 233 rather than order the company wound up,[138] as judges are 'extremely reluctant to wind up a solvent company'.[139]

As in the case of *Ebrahimi*,[140] the court may order that a company be wound up on just and equitable grounds under s 461(1)(k) of the Act.[141] These provisions were mentioned in passing in the decision of *Joint v Stephens*.[142] Although the facts differed greatly from *Ebrahimi*, the underlying corporate structure in both cases was remarkably similar. Both cases involved three director-shareholders, one of whom, after some squabbling, was excluded from the business as a director or employee, but remained a 'trapped' minority shareholder, an ideal scenario for a fiduciary obligation to be owed to the shareholders on

---

136 Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 788.

137 *Re Eastern Copper Mines* [1975] CLC 28,239 at 28,243-44, as cited in Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 788.

138 Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 789; Susan Woodward, Helen Bird and Sally Sievers, *Corporations Law - In Principle* (LawBook Co, 7th ed, 2005) 283; R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 13th ed, 2007) 694.

139 *International Hospitality Concepts Pty Ltd v National Marketing Concepts Inc (No 2)* (1994) 13 ACSR 368, 372; *Re Enterprise Gold Mines NL* (1991) 9 ACLC 168, 212-213.

140 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, discussed in depth in Chapter 3.4.2.

141 Treatise solely on the ability to wind up on just and equitable grounds are available. One body of work on which this short treatment relied is: F H Callaway, *Winding Up on the Just and Equitable Ground*, Monash Studies in Law (Law Book Company, 1978).

142 *Joint v Stephens* (2008) 26 ACLC 1467.

this thesis' argument.[143] The Court of Appeal decided that oppression was made out in *Joint v Stephens*, and consequently did not discuss whether the company would have been wound up on just and equitable grounds.

Under s 467(4), where the application is made by members on the ground that it is just and equitable that the company should be wound up (s 461(1)(k)) or that the directors have acted in a manner that appears to be unfair or unjust to other members (s 461(1)(e)), the Court must order the winding up of the company – unless another form of relief is available or the court believes that the applicant is acting unreasonably in seeking the winding up order.[144]

### 4.5.5 *Insolvency Provisions*

A director has a duty to prevent the company from trading whilst insolvent.[145] They will be liable if they either were aware, or should have been aware of the company's condition. Under s 588H there are four defences available to a director who otherwise has contravened s 588G. These are:

- reasonable grounds to expect solvency;
- reasonable reliance on information as to solvency provided by others;
- non-participation in management; and
- reasonable steps taken to prevent incurring of debt.[146]

---

[143] See the discussion at Chapter 3.4.2.

[144] Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 792.

[145] *Corporations Act 2001* (Cth) s 588G.

[146] Again, detailed works on the director's duty to prevent insolvent trading are available. Some of the works on which this short treatment relied are: Andrew Hanak, 'The Interaction of the Company Director's Duty of Care and the Director's Obligations Relating to Insolvent Trading and Financial

Section 588G is a civil penalty provision, contravention of which may lead to proceedings being instituted by ASIC. On an application for a declaration of contravention, ASIC may apply for a pecuniary penalty order against the director.[147] In the event that a director's failure to prevent insolvent trading is found to be dishonest, an offence will have been committed.[148] Further, the Court may order that the director compensate the company.[149]

Where a company is in liquidation the liquidator has the statutory right to recover against the directors of the company, as a debt due to the company, an amount equal to the amount of the loss or damage suffered by creditors as a result of unsecured debts being incurred by the company at a time when it was insolvent.[150] A liquidator may institute this recovery whether or not a civil penalty has been sought by ASIC against the directors in relation to the contravention. Finally, an individual creditor, as opposed to the liquidator, may seek compensation from directors on satisfying the requirements of ss 588R-588U of the *Corporations Act*.

In addition to the provision targeting a director of a company trading whilst insolvent, the liquidator also has access to the general 'claw back' provisions of Part 5.7B of the *Corporations Act*. Section 588FE establishes a period of time prior to the commencement of the winding up in which the liquidator may challenge transactions on

---

Reporting' (2003) 25 *Company and Securities Law Journal* 180; R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Australia, 2005) Chapter 10; Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook Co, 16th ed, 2012) Chapter 13.5; Christopher Symes and John Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2009) Chapter 12.

147 *Corporations Act 2001* (Cth) s 1317J.

148 *Corporations Act 2001* (Cth) s 588G(3).

149 *Corporations Act 2001* (Cth) s 588J.

150 *Corporations Act 2001* (Cth) s 588M.

a number of bases,[151] and the following section enables application to the court to enforce repayment of such transactions, thereby swelling the amount to be distributed to creditors.[152] These provisions do not directly place duties or obligations on the directors, but do heighten the need to consider transactions carefully when a company is in financial difficulties.

### 4.5.6 *Australian Consumer Law and ASIC Act Provisions*

In addition to the various provisions of the *Corporations Act* discussed above which may or may not act overtly upon directors, other legislation focuses the mind of the director in a way which directs how they choose to exercise and control their authority.[153] Two final examples are raised here: Part 2-2 of the Australian Consumer Law ('ACL') which proscribes 'unconscionable conduct' by a company in the course of trade or commerce,[154] and its equivalent in Part 2, Division 2, Sub-division C of the *Australian Securities and Investments Commission Act 2001* (Cth) ('the *ASIC Act*') which concerns unconscionable conduct in relation to financial products and services. These provisions are selected for discussion over, for example, those provisions within Work Health and

[151] For example, that it was an unreasonable director-related transaction according to the definition in s 588FDA, is provided with a time limit of 4 years: *Corporations Act 2001* (Cth) s 588FE(6A).

[152] *Corporations Act 2001* (Cth) s 588FF.

[153] The insider trading provisions mentioned previously provide an explicit example within the *Corporations Act 2001* (Cth) which do not necessarily appear to impact as heavily within corporate governance as those legislative provision which contain the directors' duties, for example. Other authors include environmental, interpersonal and market mechanisms (see, eg, Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 118-120).

[154] The ACL is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth). Part 2-2 of the ACL was previously Part IVA of the *Trade Practices Act 1974* (Cth), and the relevant case law on this Part of the previous Act remains valid when considering the ACL, as there are no material changes to the words of the provisions.

Safety legislation[155] which curtails directorial authority, because of their greater potential for interaction with the fiduciary obligation.

Section 20 of the ACL prohibits a company from engaging in unconscionable conduct, as 'within the meaning of the unwritten law,'[156] whilst in trade or commerce. At common law, unconscionable conduct occurs in two well recognised circumstances. The first is where a weaker party is in a position of 'special disadvantage' with respect to dealing with the stronger party. The older case law recognises special disadvantage as including poverty or need, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education.[157] More recent cases have indicated that the categories are not closed, and have included infatuation[158] and emotional dependence[159] as further examples of special disadvantage. It is required that the stronger party is, or ought to be, aware of the special disadvantage. Once these two elements have been proven by the weaker party, the burden of proof then shifts to the stronger party to establish that the transaction is fair, just and reasonable.[160] The second recognised circumstance is where a wife signs a surety guaranteeing her husband's debts.[161]

---

155 A national scheme similar to the *Uniform Companies Acts* discussed in Chapter 3.2.2 above is currently being introduced via the *Work Health and Safety Act 2011* (Cth) and its state counterparts.

156 Another phrase used by Parliament to describe the common law and equity. A similar use is made of the phrase 'general law' in s 193 of the *Corporations Act 2001* (Cth).

157 *Blomley v Ryan* (1956) 99 CLR 362, 405.

158 *Louth v Diprose* (1992) 175 CLR 621.

159 *Bridgewater v Leahy* (1998) 194 CLR 457.

160 *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447.

161 This second scenario can be seen as a specific example of the criteria listed in the first example, but is recognised in the case law as its own particular category of unconscionable conduct: *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

Section 21 prohibits unconscionable conduct in connection with goods or services, other than with a publicly listed company. Sections 12CA-12CC of the *ASIC Act* mirror this provision, but apply in relation to financial services only.[162]

Section 18 of the ACL prohibits a person, including a company, from engaging in misleading or deceptive conduct in trade or commerce. Sections 12DA-DC of the *ASIC Act* cover misleading and deceptive conduct in relation to financial services. Similarly, Part 7.10 of the *Corporations Act 2001* (Cth) creates civil and criminal liability for certain types of dealing with financial services and products, including civil liability for misleading and deceptive conduct in s 1041H.[163]

The question of whether conduct is misleading or deceptive is judged by its likely effect on an average member of the target audience.[164] There are no fixed categories of conduct which will definitely be considered as misleading or deceptive, or which will definitely not be. Each piece of conduct will be considered within its own circumstances, as long as it occurs in trade or commerce. That phrase has been widely interpreted to include anything which comes within the business of trading.[165]

Both unconscionable conduct and misleading or deceptive conduct in trade or commerce at common law can be grounds for rescinding a contract entered into because of the conduct.[166] There is an additional right to damages under s 236 of the ACL for both grounds. Any loss caused by the conduct is recoverable, but it is limited to loss actually

[162] This is due to the previous structure of the *Trade Practices Act 1974* (Cth), wherein ss 51AA-AC did not apply to financial services due to s 51AAB.

[163] *ASIC v Macdonald (No 11)* [2009] NSWSC 287 before Gzell J in the New South Wales Supreme Court contemplated the predecessor to this section, s 995(2) of the *Corporations Law*.

[164] *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, 85-87.

[165] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 602-604 for example.

[166] JW Carter, *Carter's Guide to Australian Contract Law* (LexisNexis, 2nd ed, 2011) 369. At common law, the only remedy for unconscionable conduct is rescission.

incurred and does not included expectation loss.[167] The court also has discretion to make various orders for conduct under the ACL, including declaring the contract void wholly or in part, and varying the contract.[168] The remedial provisions of the ACL are mirrored in Part 2, Division 2, Sub-division G of the *ASIC Act*.

### 4.5.7 *Australian Securities Exchange Listing Rules and Corporate Governance Principles*

The Australian Securities Exchange ('ASX') Listing Rules contain two mandatory requirements relating to corporate governance for companies listed on this exchange.[169] Firstly, companies are required to provide a statement in their annual report disclosing the extent to which they have followed the ASX Corporate Governance Principles and Recommendations in the reporting period.[170] The Governance Principles are permissive, not mandatory, but if a company has not followed a particular Principle, then the company must disclose why that Recommendation is inappropriate for it – the 'if not, why not' approach.[171] The Corporate Governance Principles and Recommendations comprise eight Principles which are followed by Recommendations relating to that Principle. The Principles are that the company should:[172]

---

167 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494.

168 ACL s 243. This remedy is at the discretion of the court: ACL s 237.

169 These rules are discussed for completeness, although the definition as put forward by this thesis does not immediately include public companies, and therefore excludes these rules from strict application.

170 ASX Listing Rule 4.10.3

171 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments' (Australian Stock Exchange, 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf> 5-6. These Principles were originally released in 2007 as ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Australian Stock Exchange, 2007) <http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=#>.

172 Each Principle is phrased in an abstract way, as listed here within the thesis. Each Principle is then explained within a sentence which follows the Principle. These sentences all commence,

1. lay solid foundations for management and oversight;
2. structure the board to add value;
3. promote ethical and responsible decision-making;
4. safeguard integrity in financial reporting;
5. make timely and balanced disclosure;
6. respect the rights of shareholders;
7. recognise and manage risk; and
8. remunerate fairly and responsibly.[173]

The ASX considers these to be the ‘core principles’ of corporate governance, with each of equal importance. Each Principle is explained in detail and commentary about implementation of the Principles is contained in the Recommendations which follow them.[174] Although these Principles are not mandatory, and only apply to listed public companies, they establish a position within the Australian corporate community which holds weight for discussion beyond those parameters, rendering them, some more obviously than others, relevant to even closely held proprietary companies.[175]

---

“companies should’: see, eg, ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments' (Australian Stock Exchange, 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf> 10-12.

173 Ibid.

174 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments' (Australian Stock Exchange, 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf; ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Australian Stock Exchange, 2007) <http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=#> 3.

175 For example, Principle 4 deals primarily with the role and composition of an Audit Committee: ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments' (Australian Stock Exchange, 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf> 11. This may be less useful to a small proprietary company than Principle 1 in relation to management and oversight, and Principle 6 in relation to communication with shareholders.

Disclosure of corporate governance principles in annual reports has been adopted by the vast majority of the market, with reporting levels[176] at 84% of all entities reviewed in 2004, increasing to 90.5%[177] of all entities reviewed in 2007[178] and stabilising at 92%[179] in the final report produced in 2010.[180] Although this seems positive, reporting on the Principle does not mean that the company concerned has chosen to follow the Principle. For example, 'if not, why not' reporting on the Recommendations accompanying Principle 2 indicated that 45% of listed companies who were reporting on the Recommendation that the 'majority of the Board be independent directors'[181] were not applying that Recommendation to their corporate structure, and 38% of listed companies who reported were not applying the Recommendation that 'the chairperson should be an independent director'.[182] The main reasons given by listed entities in 2007 for not adopting this Recommendation were board or company size. Other reasons included were that, in the company's circumstances, the skills and experience of the non-independent directors were appropriate, the high cost of independent directors, or

176 The aggregate of the levels of adoption of the Recommendations and the levels of 'if not, why not' reporting against the Recommendations, according to the Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in 2007 Annual Reports' (18 June 2008) <http://www.asx.com.au/documents/about/analysis_corp_govenance_disclosure_2007_annual_reports.pdf> [4].

177 Ibid [10].

178 Ibid [95]. In the 2007 Report, the ASX reviewed 1,291 listed entity annual reports, including the annual reports of 84 listed trusts. This number is approximately 67% of all listed entities at 30 June 2006, the total number being 1,930.

179 Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in Annual Reports for Year Ended 30 June 2010' (Australian Securities Exchange, 2010) <http://www.asx.com.au/documents/about/corporate_governance_disclosures_30_june_2010_analysis.pdf > [8].

180 As at 1 July 2009, the Official List comprised 2122 entities. Once debt listings, foreign exempt listings, stapled entities, and entities with a different financial year end were removed, 181 entities were delisted or did not produce a 2010 annual report. All other entities were included in the 2010 report: Ibid Appendix 1.

181 Recommendation 2.1, ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Australian Stock Exchange, 2007) <http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=#>.

182 Ibid Recommendation 2.2.

resource limitations of the entity.[183] In 2009, the number of listed companies indicating that they were not in compliance with Recommendation 2.1 that the majority of the board be independent had grown slightly to 48%.[184] It is not possible to track the development of this figure in the final report of 2010, as the 'if not, why not' figures in relation to independent directors were not released for that year.[185]

At the very least, the 'if not, why not' reporting required that the issue be considered, and that reasons why the recommendation was not to be followed be found and explained to the ASX. There is a danger that once such a structure has been created, the same reasons will be offered on a yearly basis, without any review of whether or not the non-compliance with the recommendations remains valid. The ASX chooses to see this in a positive light, finding that it indicates the flexibility of the system.[186]

Secondly, if it is to be listed on the Standard and Poor's All Ordinaries Index, the company must have an Audit Committee.[187] In addition, Listing Rule 12.7 requires that the composition of the audit committee for all companies in the top 300 of that Index must comply with Recommendation 4.2 and comprise only non-executive directors, a

183 Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in 2007 Annual Reports' (18 June 2008) <http://www.asx.com.au/documents/about/analysis_corp_govenance_disclosure_2007_annual_reports.pdf> [44].

184 Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in Annual Reports for Year Ended 30 June 2009' (Australian Securities Exchange, 2009) <http://www.asx.com.au/documents/about/analysis_corporate_governance_disclosures_in_annual_reports_.pdf> [14].

185 The ASX reports were themed around a number of 'key focus areas', which did not include the 'Independence of Directors' in the 2010 report: Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in Annual Reports for Year Ended 30 June 2010' (Australian Securities Exchange, 2010) <http://www.asx.com.au/documents/about/corporate_governance_disclosures_30_june_2010_analysis.pdf > [11].

186 Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in 2007 Annual Reports' (18 June 2008) <http://www.asx.com.au/documents/about/analysis_corp_govenance_disclosure_2007_annual_reports.pdf> [21].

187 ASX Listing Rule 1.1 Condition 13 and ASX Listing Rule 12.7

majority of independent directors, an independent chairperson who is not the chair of the board and at least three members.[188]

The ‘if not, why not’ reporting numbers for this Principle are particularly high, with 27% of listed companies not complying with the recommendation that ‘the board should establish an audit committee’[189] and 55% of those who did comply with that recommendation not complying with the recommendation about the Audit Committee structure in 2007.[190] The ‘if not, why not’ figures on Audit Committees were not provided in 2009 or 2010.

The ASX states that:

> Where entities have not fulfilled their obligations under Listing Rule 4.10.3 either by confirming adoption of the various Recommendations or by providing ‘if not, why not’ reporting ASX will be making contact with the entity prior to the end of the 07/08 financial year to follow up this non-compliance.[191]

It does not explain precisely what the ‘follow up’ will entail, or if any consequences will result, although the Report does explicitly mention the ASX’s power to suspend or de-list companies where there is a breach of the Listing Rules,[192] and states that, of the entities which have been followed up with in the past, ‘they have taken action such as appointing

---

188 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments' (Australian Stock Exchange, 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf> 26.

189 Ibid Recommendation 4.2.

190 Ibid Recommendation 4.3.

191 Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in 2007 Annual Reports' (18 June 2008) <http://www.asx.com.au/documents/about/analysis_corp_govenance_disclosure_2007_annual_reports.pdf> [24].

192 Ibid [34].

additional independent directors and re-arranging the committee composition to ensure compliance.'[193]

The ASX also notes that adoption and overall reporting rates are higher for the top 500 entities compared to the rates for the market as a whole. It attributes this to factors such as the higher profile that these companies will have with investors, and consequently the greater scrutiny to which they will be subjected, the greater access to resources to recruit independent directors and ability to devote time and resources to corporate governance reporting.[194]

### 4.5.8 *Business Community Expectations and Norms*

There have been a great number of studies involving the impact of business and social norms on specific commercial fields,[195] and more general studies discussing the impact of game theory and collective behaviour on law and legal sanctions.[196] This area has received recent attention in relation to the impact of corporate law, with Jordan discussing the impact of the law in creating a 'culture of compliance'[197] which may ultimately be necessary for the legitimacy and, therefore, utility of corporate governance. Further, Hill considered that commercial norms and practices can have the impact of

---

193 Ibid [63].

194 Ibid [32].

195 See, for example, Bernstein's study of the impact of Jewish cultural norms on the Diamond industry of New York in Lisa Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *Journal of Legal Studies* 115.

196 For example, Eric A Posner, *Law and Social Norms* (Harvard University Press, 2nd ed, 2002); Eric A Posner (ed), *Social Norms, Nonlegal Sanctions, and the Law* (Edward Elgar Publishing, 2007).

197 Cally Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33 *Melbourne University Law Review* 626, 631.

subverting legal rules,[198] and corporate culture is acknowledged as able to significantly affect the behaviour of individuals.[199] As such, the impact of business and commercial norms, whilst difficult to assess, must be considered in addition to the more apparent 'rules' discussed above.

In relation to corporate governance, relevant community norms would include attitudes towards executive remuneration,[200] structure and composition of boards of companies not listed on the ASX,[201] and activism of institutional investors.[202] Hill notes that, internationally, there is a trend towards shareholder empowerment through an increase in shareholder rights,[203] whilst acknowledging that 'commercial norms and practices ... may operate to shift power away from the shareholders, towards the board of directors.'[204]

---

198 Hill, Jennifer, *The Rising Tension between Shareholder and Director Power in the Common Law World* (Law Working Paper No 152/2010, European Corporate Governance Institute, April 2010) http://ssrn.com/abstract=1582258, 6.

199 Suzanne Le Mire, 'Document Destruction and Corporate Culture: A Victorian Initiative' (2006) 19 *Australian Journal of Corporate Law* 304, 312 citing C Parker, *The Open Corporation* (Cambridge University Press, 2002) 32-33 and L Dallas, 'A Preliminary Inquiry Into the Responsiblity of Corporations and their Directors and Officers for Corporate Climate: the Psychology of Enron's Demise' (2003) 35(1) *Rutgers Law Journal* 1, 10.

200 Such as whether or not it ought to be incentive based, or determined by some other method.

201 Including the ratio of non-executive to executive directors, the position of Chairperson being occupied by a non-executive director, and 'board culture' issues, such as group solidarity and group dynamics: Andrew Keay, 'The Authorising of Directors' Conflicts of Interest: Getting a Balance' (2012) 12 *Journal of Corporate Law Studies* 129, 139-145.

202 Hanrahan, Ramsay and Stapledon list these business norms as 'mechanisms' which impact upon corporate governance: Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012), 118-120.

203 Hill, Jennifer, *The Rising Tension between Shareholder and Director Power in the Common Law World* (Law Working Paper No 152/2010, European Corporate Governance Institute, April 2010) http://ssrn.com/abstract=1582258, 3-4.

204 Ibid 6.

### 4.5.9 *Non-statutory Directors' Duties*[205]

#### 4.5.9.1 *Contract*

The scope of contractual duties and obligations owed by a director to the company will depend on the terms of the contract between the parties,[206] although there will generally be an implied duty of skill and care imposed where professional services are proffered.[207] 'The implied term of reasonable care in a contract of professional services arises by operation of law. It is one of those terms that the law attaches as an incident of contracts of that class.'[208] The duty of care in contract is likely to be similar in nature to the duty under s 180 of the *Corporations Act*; that the director exercises the care and skill expected of a person who occupies the position in question. Importantly, the particular contractual undertakings between the parties can modify or displace other categories of non-statutory directors' duties, particularly the fiduciary obligations, which must 'accommodate [themselves] to the terms of the contract so that [they are] consistent with, and conform to, them.'[209]

205 Given the confusion which may stem from referring to 'common law' directors' duties which would include both contractual and equitable duties, as opposed to 'Common Law' directors' duties, which would exclude the equitable duties, the heading 'non-statutory directors' duties' has been used.
206 Julian Svehla, 'Director's Fiduciary Duties' (2006) 27 *Australian Bar Review* 192, 193.
207 *Astley v Austrust* (1999) 197 CLR 1. This may be true even for independent directors, where a formal contract many not be in place.
208 Ibid 22 (per Gleeson CJ, McHugh, Gummow and Hayne JJ).
209 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 97 (Mason J).

#### 4.5.9.2 *Tort*

A director owes a tortious duty to exercise care and skill in performance of their functions and the discharge of the duties of their office.[210] A director is under a common law duty of care and can be liable as a tortfeasor for negligence.[211] If there is negligence in performing a contract, alternative claims may exist in both contract and tort.[212] However, it is possible to contract out of a tortious duty.

#### 4.5.9.3 *Equity*

As discussed in Chapter 3, the equitable doctrine of fiduciary obligations is applied to directors, with the beneficiary traditionally recognised as the company. Although the relationship of director and company is an accepted category of fiduciary relationship,[213] not all duties and obligations owed by the director to the company will be fiduciary in nature. As can be seen above, some will exist at common law, some in equity, and only a subset of those equitable obligations will be fiduciary in nature. As argued previously, a director's duty of care and skill to the company is also an equitable duty, but is not fiduciary.[214] Neither is the duty to act in good faith and in the best interests of the company fiduciary, although it is equally equitable. It is unfortunate that such mistaken labelling abounds, as the determination of the nature of a particular obligation is

---

210 *Daniels v Anderson* (1995) 37 NSWLR 438, 502-505 (Clarke and Sheller JJA); *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 235-237 (Ipp J); Julian Svehla, 'Director's Fiduciary Duties' (2006) 27 *Australian Bar Review* 192, 193; J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) , 197. Justice Heydon challenges the finding of this objective duty by the court in *Daniels v Anderson*, but accepts that it exists for the purposes of his argument.

211 *Daniels v Anderson* (1995) 37 NSWLR 438.

212 Following the line of cases which commenced with *Hedley Byrne v Heller & Partners Ltd* [1964] AC 465.

213 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96-97 (Mason J).

214 See Chapter 3.3.3.

important because of the differing rules relating to causation, remoteness, limitation periods and remedies available.[215] Both of these equitable duties operate in a manner similar to their statutory counterparts, and are owed to the company.

Although fiduciary obligations have often been overlooked as a source of corporate governance in the past,[216] it is clear that in certain circumstances, the courts are willing to recognise them as a method of controlling authority exercised within companies. The reticence to rely on fiduciary obligations is perhaps because they are subject to exclusion or variation via contract,[217] or because the obligations are not intended 'to advance nominate performance *except* in the specific sense that self-regard must not compromise the undertaking.'[218] Simply because they are couched in proscriptive language does not, however, prevent fiduciary obligations from contributing to corporate governance through both their deterrent and disclosure effects. The description of the fiduciary obligation as being 'imposed by private law, but its function is public, and its purpose

---

215 J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) , 189-191.

216 Jennifer Hill and Charles M Yablon, 'Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict' (2002) 25(2) *University of New South Wales Law Journal* 294 list at 301 three basic techniques to control directors' conflicts of interest, placing self-control via fiduciary obligations in a separate category to corporate governance techniques and aligning managerial self-interest with the interests of shareholders.

217 The inherent tension between the ability to exclude fiduciary obligations which are imposed by law because they are demanded on the facts is discussed briefly by Neil J Young QC, 'Conflicts of Interest in the context of Private Equity Transactions' (Paper presented at the Law Council Workshop, Stamford Grand Glenelg, 21 July 2007), 9 and 38. Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 208-209.

218 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 426 (original emphasis). Flannigan defines his use of the word 'nominate' earlier within the same article as follows:

'I use "nominate" generically to refer to "named" idiosyncratic arrangements. A trust is one nominate undertaking. An agency arrangement is another. They are examples of limited access arrangements that attract status fiduciary accountability across the full range of the relation. Other nominate arrangements may only attract fiduciary accountability in certain respects (for example, confidential information) or because of special limited access interactions (for example, between shareholders or between directors and shareholders).'

Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 376.

social'[219] and as 'a pragmatic communal response to the corrosive mischief of opportunism'[220] would seem a perfect fit with the principles set out in the ASX Corporate Governance Recommendations and the wider philosophy of corporate governance.[221]

### *4.6 Alternative Courses of Action for Shareholders*

Of the nine mechanisms of the current corporate governance regime discussed above, not all are available as causes of action for shareholders. The statutory directors' duties, including the duty to prevent insolvent trading, and the insider trading prohibition are enforced by ASIC, as they are civil penalty provisions.[222] The consumer protection mechanisms will be open to shareholders in limited circumstances.[223] The ASX Listing Rules are not mandatory for public companies, and have no direct application to proprietary companies beyond being systemically supportive of corporate governance in the same way as business community expectations and norms. These expectations and norms will not be a cause of legal action, but they will be a mechanism by which shareholders can place pressure on their directors to behave appropriately.[224]

---

219 Lord Wedderburn, 'Trust, Corporation and the Worker' (1985) 23 *Osgoode Hall Law Journal* 203, 221 as cited by Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003) 339.

220 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 376.

221 As required by ASX Listing Rule 4.10.3 (Australian Securities Exchange, *ASX Listing Rules* (1 January 2012) <http://www.asxgroup.com.au/asx-listing-rules-guidance-notes-and-waivers.htm>); ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments' (Australian Stock Exchange, 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf>.

222 *Corporations Act 2001* (Cth) s 1317E.

223 Discussion of these circumstances is beyond the scope of this thesis, which has focussed primarily on the obligations provided by the *Corporations Act* in contrast with the fiduciary obligation. Briefly, remedies for the statutory cause of undue influence (s 20(1) ACL) include pecuniary penalties, injunctions, damages and compensation orders: ACL, Ch 5, Part 5-2.

224 This may be a weak alternative, depending on what the community expectation or norm is – for example, if the norm behaviour for directors is to misuse their position, that norm is hardly

Shareholders will have standing to bring winding up proceedings, and the statutory action for oppression. But the non-statutory duties, including the current fiduciary obligation, are recognised as owed to the company, the proper plaintiff for actions under breach of such duties will be the company.[225] The common law exceptions to the proper plaintiff principle are no longer relevant, as the common law derivative action by a shareholder on behalf of the company has been abolished by the *Corporations Act*.[226] Now, shareholders may be able to seek standing to pursue a statutory derivative action on behalf of the company.[227] They may also seek an injunction to prevent breach of the *Corporations Act*,[228] and orders to inspect the books of the company,[229] but both of these remedies require a degree of 'insider' knowledge in order for them to be sought at a time when they can be useful as remedies.

As such, the utility of the remedies of oppression, winding up, and the statutory derivative action will be discussed, to determine whether a change to the current fiduciary obligation would be firstly, appropriate in light of the current corporate governance regime and secondly, providing a solution to a problem which is not currently addressed by the existing framework. Having already discussed the content of these actions above, the focus of these sections is on their utility as remedial actions. The remedies available under an action for breach of fiduciary obligation will be outlined, to ensure that there is no inconsistency in their application as remedies within this field.

---

supportive of shareholder rights. They may, however, explicitly be considered in cases in relation to the directors' duty of care.

225 *Foss v Harbottle* (1843) 67 ER 189, as mentioned previously in Chapter 3.4. Clearly, actions for breaches of the members' personal rights provided for in the Corporations Act or within an express contract, do not fall foul of the proper plaintiff rule.

226 *Corporations Act 2001* (Cth) s 236(3).

227 *Corporations Act 2001* (Cth) Part 2F.1A.

228 *Corporations Act 2001* (Cth) s 1324. Dispute as to the availability of this remedy to members in relation to restraining breached of the civil penalty provisions have been raised (see, eg, *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128) but will not be discussed in this thesis.

229 *Corporations Act 2001* (Cth) s 247A.

### 4.6.1 *The Oppression Remedy*

Empirical work has been undertaken by Ramsay in the field of the oppression remedy[230] and confirms the oppression remedy as one of the most widely used corporate law remedies available to shareholders.[231] Examination of the details of the type of company involved, the behaviour concerned and the remedies both sought and granted produces an interesting picture. In nearly 73 per cent of the cases the company concerned was 'private'.[232] In nearly 81 per cent of the cases there was no pre-existing partnership underlying the corporate structure.[233] The most common complaint was exclusion from management, with breaches of fiduciary duty being the third most common.[234] The most popular remedy sought was the winding-up of the company, which is available in response to oppression under s 233(1)(a) of the *Corporations Act*. In contrast, the most popular relief granted, by quite a substantial amount, was an order requiring another shareholder to buy out the plaintiff's shares.[235]

Oppression was found in 40.9 per cent of the cases, but was established with the consent of the parties in a further 4.5 per cent. In almost 30 per cent of cases, the court did not apply any test other than that formulated by the words of the section.[236] When the court did use another test, the most popular was the one found in *Wayde v New South Wales*

---

230 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, following up on previous work undertaken in the same field in 1995.

231 Ibid 23; Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 582.

232 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 31 (Table 2).

233 Ibid 32 (Table 3).

234 40.9% pleaded exclusion from management, 26.1% pleaded breach of fiduciary duties: Ibid 27-28.

235 37.5% of applicants sought winding up, but 25.3% were granted a share buyout, with the next most common relief ordered being a declaration, at 9.3%: Ibid 28. The remedy of share purchase is available under the *Corporations Act 2001* (Cth) ss 233(1)(d), (e) or (j).

236 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 28-29.

*Rugby League Ltd*[237] which held that a decision of the directors was oppressive when no such board of directors acting reasonably could have made such a decision.[238]

Relief from oppression acts to correct behaviour which is either 'contrary to the interests of the members as a whole,'[239] or 'oppressive to, or unfairly prejudicial to, or unfairly discriminatory against, a member or members.'[240] The first element contains a clear link to the mischief which the fiduciary obligation seeks to prevent: determination of whether an action is contrary to the interests of the members as a whole will involve similar considerations to whether a fiduciary obligation owed by the directors to the shareholders has been breached. Apart from the wording of s 232, no current statutory duty expressly requires directors to take the interests of the members as a whole into account. It does, however, support the idea that the interests of the members as a whole are able to be determined, which is helpful when considering the proposed change to the fiduciary obligation.

This particular study undertaken by Ramsay spanned cases from the 1960s through to 1997,[241] and as such does not explicitly cover the current wording of s 232. However, it does demonstrate a number of relevant points for this thesis, and nothing in the intervening years suggests that these points would not be true today. Firstly, the remedy is most widely used by minority shareholders in proprietary companies with less than 10 shareholders. Secondly, in all or most of these companies, all or most of the shareholders are involved in the management of the company. Thirdly, the most

---

237 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459.

238 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 29.

239 *Corporations Act 2001* (Cth) s 232(d).

240 *Corporations Act 2001* (Cth) s 232(e).

241 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 30 (Table 1).

common complaint was exclusion from management.[242] This is consistent with the shareholder primacy model, but the degree of shareholder involvement with management would not necessarily be the norm across all closely held proprietary companies.

As such, a fiduciary obligation owed by the directors to the shareholders in a closely held company would be consistent with the remedy offered in s 232, and not entirely overlapping the current remedial model. Additionally, as the defence to breach is to proactively seek fully informed consent from the shareholders in general meeting, it might be possible to head off concerns about oppressive conduct before such behaviour can occur.

### 4.6.2 *Winding Up*

Winding up, the process of in 'realising of the company assets, ceasing or sale of its operations, payment of its debts (if any) and distribution of surplus assets (if any) among its members,'[243] is not a viable solution for a shareholder who wishes to continue to hold their interest in a solvent company, and it is arguable perceived as a measure of ultimate last resort by the statute.[244] It can be sought as a remedy under an action to relieve against oppression,[245] or separately under s 461 of the *Corporations Act*. In fact, research indicates that in nearly one-third of the cases in which an application for relief from oppression was made, the remedy of winding up on just and equitable grounds was

242 Ibid 29.

243 Australian Securities and Investments Commission, 'Information Sheet 78: Winding up a solvent company' (2010) <http://www.asic.gov.au/asic/asic.nsf/byHeadline/Winding-up%20a%20solvent%20company>.

244 For example, if the action to wind up is sought on just and equitable grounds under s 461(k) of the *Corporations Act*, s 467(4) insists that the court consider whether other remedies are available to the applicant.

245 *Corporations Act 2001* (Cth) s 233(1)(a).

also sought.[246] When sought as a remedy for oppressive conduct, it was not often granted by the court: it was sought in 37.5% of all oppression applications, but in only slightly more than 45% of the applications was oppression found or agreed – and then, in only 6.7% of those cases in which relief was granted was that relief winding up.[247]

For a shareholder not involved with management, who does not wish to give up their interest in a closely held company, winding up does not currently provide a viable solution – and given the reluctance of the court to provide it when sought, it does not appear to be a reliable source of relief on a more general basis in any event. The fiduciary obligation offers a method of responding to the director's behaviour which does not exclude the shareholder from the company, unlike winding up.

### 4.6.3 *The Statutory Derivative Action*

The *Corporations Act* provides that a shareholder may bring a derivative action on behalf of the company against directors if their duties are breached.[248] Soon after its introduction, fears were expressed that problems associated with funding would prevent useful utilisation of the statutory derivative action.[249] A study undertaken by Ramsay and Saunders has confirmed that, at least for the five years of its availability, the

---

246 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 26.

247 Ibid 28, 36.

248 *Corporations Act 2001* (Cth) s 236.

249 Michael J Duffy, 'Shareholder Democracy or Shareholder Plutocracy? Corporate Governance and the Plight of Small Shareholders' (2002) 25(2) *University of New South Wales Law Journal* 434, 457-458, 460.

statutory derivative action has not often been pursued,[250] with no noticeable increase in use when compared to the previous use of the derivative suit for fraud on the minority.[251]

The vast majority of statutory derivative actions involved privately held companies,[252] and the most common allegation was a breach of directors' duties.[253] Leave to proceed with the action was only granted by the court in 19 of the 31 applications studied.[254] Most importantly, particularly in the eyes of the applicant, in only four of the successful applications were costs granted for the leave application, and in none of the applications was the ability of the court to fund the substantive proceeding utilised.[255] Given the extensive costs involved with court action under the *Corporations Act*, this presents a significant barrier to entry to the average shareholder,[256] regardless of whether the concerned company is public or proprietary.

Consequently, the statutory derivative action has not proven to be a significant deterrent for corporate misconduct, particularly in relation to breaches of the directors' duties. The derivative action remains a costly and uncertain option for shareholders, even under the

---

250 Ramsay, Ian M and Ben Saunders, Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action, Melbourne Law School Legal Studies Research Paper No 250, available from http://ssrn.com/abstract=914465.

251 As discussed in Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 527.

252 Redmond noted the discussion by Ramsay and Saunders at [27] that one of the justifications for the introduction of the statutory derivative action had been as an 'important means of maintaining investor confidence'. They imputed from that that the primary role of this action was intended to be in large public companies, which may be a valid assumption. However, the use of the statutory derivative action has been mostly limited to small proprietary companies attempting to overcome internal disputes: Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009) 532, at footnote 69.

253 52% of applications: Ramsay, Ian M and Ben Saunders, Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action, Melbourne Law School Legal Studies Research Paper No 250, available from http://ssrn.com/abstract=914465.

254 Ibid.

255 Ibid.

256 See the discussion at Chapter 4.2 above, on the prevalence of shareholding in the Australian population. Once consequence of such a high percentage of adults holding shares directly or indirectly is that the average shareholder reflects a larger proportion of the population, and consequently access to justice issues which arise in relation to the 'average Australian' can be equated to the 'average shareholder'.

provisions introduced into the *Corporations Act* to ameliorate the position at common law. As such, a remedy provided by the introduction of a fiduciary obligation owed by directors to shareholders could be a viable alternative.

### 4.6.4 *Remedies for Breach of Fiduciary Obligation*

The remedies available for breach of any equitable doctrine will be considered within the broader considerations which equity holds as paramount.[257] The 'flexible and pragmatic approach of equity' seeks to impart 'practical justice' within the 'minimum equity necessary' in the circumstances of each case.[258]

As the court aims to identify the fiduciary's gain or the beneficiary's loss as a result of the breach of fiduciary obligation,[259] the main equitable remedies likely to be under consideration are an account of profits or equitable compensation.[260]

An account of profits is a gain-stripping remedy, which removes any unauthorised profits generated by the breach.[261] Like most equitable remedies,[262] there is flexibility to an account of profits, in that the court has discretion when considering the profits for which

257 This thesis does not attempt to go beyond outlining the remedies available for a breach of fiduciary obligation, and does not argue for the development of any new equitable remedy. Reliance has been placed on the many indepth works published in this area, including in general, G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011); Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012); R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002); Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010); and specifically, David Wright, *Remedies* (Federation Press, 2010).

258 *Tillett v Varnell Holdings Pty Ltd* [2009] NSWSC 1040 (30 September 2009) [93].

259 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 110.

260 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 149.

261 Ibid 1042.

262 Ibid 1029.

it makes the order for the fiduciary to account.[263] Courts have, for example, granted stipends to defaulting fiduciaries, when the profit made has been due to the application of their particular skills.[264]

Equitable compensation is defined as the monetary sum awarded to a claimant in response to the loss suffered as a result of the equitable obligation breached by the defendant.[265] It is compensatory, not retributive, in nature, aspiring to return the plaintiff to the position they would have been in had the breach not occurred.[266] Equitable compensation is determined by equitable principles, which do not necessarily reflect the rules for assessment of common law damages.[267] The main differences are that relief via equitable compensation is independent of the limitations of common law causation,[268] forseeability and remoteness.[269]

Other equitable remedies which may be available on the circumstances of each case include injunctions,[270] specific performance,[271] rescission,[272] and the strongest and

---

263 This flexibility is discussed in detail in Matthew Conaglen, 'The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms' (2011) 70 *Cambridge Law Journal* 548; G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 1042.

264 *Boardman v Phipps* [1967] 2 AC 46.

265 *Nocton v Lord Ashburton* [1914] AC 932.

266 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298.

267 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 201. Damages remain the principle common law remedy, and as such, were only made available to the equity jurisdiction through the passage of the *Chancery Amendment Act 1858* (UK).

268 This point remains somewhat contentious amongst equity scholars: see, eg, Matthew Conaglen, 'Equitable Compensation for Breach of Fiduciary Dealing Rules' (2003) 119 *Law Quarterly Review* 246.

269 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 1022.

270 See generally G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011), Chapter 31. The specific examples of Mareva and Anton Piller orders are canvassed in G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011), Chapter 32. See also: Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) Chapters 40-41; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010), Chapter 24.

271 See generally G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011), Chapter 32; Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012), Chapter 42; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010), Chapter 23.

perhaps most unusual remedy of the constructive trust, whereby title to an asset which has been generated into the hands of the defaulting fiduciary by the breach of obligation can be sought by the beneficiary of the obligation.[273] This remedy has been the subject of much judicial reluctance in the past decade due to its potential impact upon innocent third parties,[274] and, under guidance of the current High Court, would appear less likely to be ordered when alternative remedies remain available to beneficiaries.[275]

Despite concern that fiduciary obligations could be argued simply in order to widen the availability of relief, or create an entitlement to equitable remedies,[276] on closer inspection, the remedies available for a breach of fiduciary obligation are in line with the remedial opportunities available to the shareholder under the *Corporations Act*. Shareholders under a scheme whereby they were beneficiaries of a fiduciary obligation would not, therefore, be unduly advantaged over shareholders in companies which did not fall under such a scheme. The true difference offered by a fiduciary obligation owed to the shareholders by the director lies in the direct ability of shareholders to take action for breach of that obligation. It removes the need to rely on the statutory derivative

---

272 See generally G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011), Chapter 35; Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012), Chapter 44; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010), Chapter 27.

273 G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011) 149; Chapter 38; Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012), Chapter 46; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010), Chapter 28.

274 See, eg, *Giumelli v Giumelli* (1999) 196 CLR 101; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1. There is further difficulty with this remedy due to considerations of when the trust arose, particularly when there has been a breach of fiduciary obligation involved. The detail of these difficulties does not impact upon this thesis, but is covered in depth by a number of academics, including: G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011), 1113-1116; Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 820-825; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 582-584.

275 This is not inconsistent with the *Corporations Act* approach to winding up: *Corporations Act 2001* (Cth) s 467(4).

276 Dal Pont believes this is a technique of pleading, but one to which modern courts are alive: G E Dal Pont, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011), 1021-1022.

action, and is consistent with the approach of the oppression remedy to bring consideration of the 'interests of the members as a whole' to the fore.

### 4.6.5 *Pleas for Relief*

It is also worth noting, although not strictly related to members' remedies or directors' defences to claims of breach, the *Corporations Act* provides avenues for honest directors to apply to the court for relief in relation to their behaviour. Relevant to the fiduciary obligation is the provision s 1318.[277] It provides that a person, such as a director, who has been found liable for, *inter alia*, a breach of trust or duty, who has acted honestly, and having regard to all the circumstances of the case, ought fairly be excused for their breach, then the director may be relieved wholly or in part from their liability by the court.

As this section already covers the fiduciary obligation as currently recognised by law in Australia, an alteration or addition to the beneficiary of that obligation would not challenge the operation of this provision. No significant alteration to the content of the fiduciary obligation is mooted, nor would it arise from the addition of the shareholder as the beneficiary of such an obligation in closely held companies.

## *4.7 Conclusion*

Corporate governance relates to the primary relationships within a company, as its mechanisms impact most clearly on the directors, management and shareholders.

[277] *Corporations Act 2001* (Cth) s 1317S mimics the relief available in s 1318, but in relation to the civil penalty provisions contained within the Act. Should the fiduciary obligation to shareholders be introduced via legislation, as to be discussed in Chapter 5, it may be necessary to contemplate its role within the civil penalty scheme.

Regardless of the approach taken to describe the corporate structure, it is clear that the majority of corporate governance is aimed at those who direct and control the company. It is also clear that convergence at a global level in the approaches to corporate governance is unlikely, and as such, changes within an Australian corporate governance regime are not expected to be overtaken by global considerations.

The picture of current corporate governance mechanisms in Australia is complex. Not only does it involve various statutory and non-statutory duties, but also is clearly influenced by the types of conduct which are prohibited, both at common law and statute. Further, it attempts in the most part to apply the same governance across radically different corporate structures, necessitating its statement in the broadest terms and, in the case of the ASX principles, its 'if not, why not' implementation. Those mechanisms which rely on market structure or norms within corporate governance are not immediately applicable to the closely held company as defined here.

The duties that directors owe encourage a certain type of behaviour and interest. They require a reasonable level of care from directors when exercising their powers and prohibit self-interested behaviour, or behaviour which will harm the company. They require the disclosure of circumstances which could give rise to self-interested behaviour. None of this is particularly onerous, nor should it be unexpected for a person in control of the assets and well-being of another person to be required to behave in such a way. The prophylactic nature of the fiduciary obligation fits well within such a regime, as it encourages behaviour from the fiduciary which benefits the beneficiary. The question whether that beneficiary could be the shareholders in closely held companies, rather than the company, does not change the prophylactic effect that the obligation causes.

The underlying precept of freedom of contract has a strong impact within this field, allowing the contract of employment between the director and company to act as a primary tool in governing their relationship. The contract can exclude the operation of fiduciary and tortious duties in this relationship. This primacy of contract ought to come under closer scrutiny, particularly in circumstances involving a company contracting with a director, given the potential for disparity between the parties. Although both are legal persons, one is artificial, existing only by virtue of legislation. There is a great deal of potential for this situation to be abused. However, some of this potential has been curtailed by the enshrining of common law and equitable principles in statute, which cannot be excluded via contract.

In addition to the legal framework in which directors must operate, there are also the ASX Corporate Governance Principles with which a listed company ought to comply, and the acceptable norms of business conduct which will affect behaviour. These Principles and Recommendations, whilst promoting ethical and responsible behaviour by directors, are more focussed on the potential for harm to be caused by excessively stringent governance in restricting business growth through risk-taking behaviour. This is demonstrated by the choice of non-mandatory Recommendations coupled with the 'if not, why not' reporting approach. Because companies take and operate within many different structures and circumstances, a broad-ranging mandatory corporate governance scheme is not ideal. Many arguments are put forward regarding the necessity of freedom to take risks in order to create wealth for the shareholder, none of which are essentially wrong. Competent business risk-taking is clearly required to create wealth, and is obviously intended to be protected under the business judgment rule. But the danger remains that once a company first provides reasons for non-compliance through the 'if not, why not' reports, it will simply continue to provide those same reasons year after year, without proper reconsideration of the company's position.

The substantive legal provisions are not self-implementing – action must be taken to enforce their observance. As statutory derivative actions are not often pursued, where the company remains viable this enforcement must primarily fall to ASIC. Yet, given the funding restrictions inherent on any government body and the public interest requirement which ASIC must satisfy before seeking civil recovery, ASIC's impact and utility as an enforcement mechanism is significantly constrained. Similarly, actions open to the liquidator or creditors to claw back funds transferred as a result of unfair loans and insolvent transactions, or to recover compensation from directors for insolvent trading, are only available after the company's demise, when the assets have been depleted so that shareholders are unlikely to benefit significantly.[278] As such, a right in favour of those directly affected by derelictions of duty by directors must be considered as a potential source of effective enforcement. Fiduciary obligations might provide the basis for such a right, in specific circumstances.

There is no question that corporate governance has a difficult task: protecting the company from abuse at the hands of those who control it, without restricting the freedom to create wealth through necessary business endeavours. In the limited circumstances of the closely held company, a fiduciary obligation owed by the directors to the shareholders would not conflict with the current approach to corporate governance, and

[278] The priority distribution scheme as described in *Corporations Act 2001* (Cth) ss 555-563A would not permit the shareholders to profit inappropriately over the priority creditors, such as employees, if the company were insolvent. If a company is insolvent, that is, there are not sufficient assets to meet the debts as they become due and payable (s 95A), then there will not be sufficient assets for the liquidator to return 100c in the $1 to unsecured creditors, who share pari passu. The shareholders, who rank after the pari passu creditors, would consequently receive nothing in an insolvent winding up.

not unduly burden directors with new duties for consideration. It can provide a viable remedial solution to shareholders who would not currently seek the alternatives present in the *Corporations Act*.

This chapter has established two further propositions put forward by this thesis:

> **Proposition 6:**
>
> Recognising the shareholder as beneficiary of fiduciary obligations within closely held companies is consistent with corporate governance philosophy in Australia.
>
> **Proposition 7:**
>
> Recognising the shareholder as beneficiary of fiduciary obligations within closely held companies does not conflict with the other duties owed by directors, nor the other remedies available to shareholders.

In the next chapter, the method of implementation of a fiduciary obligation owed by directors to shareholders in closely held companies is addressed. The discussion in Chapters Three and Four in relation to the statutory duties is used to highlight the difficulties with legislative enactment of equitable principles. This difficulty is set against the uncertain position of intermediate courts in relation to development of legal principles, including those of equity, following the decision of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.[279]

---

279 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 203 CLR 89.

# 5 HOW WOULD A CHANGE BE IMPLEMENTED?

## 5.1 *Introduction*

Chapter Four established that recognition of a fiduciary obligation between directors and shareholders in closely held companies is consistent with the current corporate governance philosophy in Australia through an examination of the regulatory mechanisms in place. Further, it established that such an obligation would not create conflict between the remedial options available to shareholders, nor the current duties owed by directors. This chapter considers the practicalities of recognising such an obligation, and draws conclusions as to the most effective method of implementation at law.

The idea of fiduciary obligations operating as 'a pragmatic communal response to the corrosive mischief of opportunism'[1] is entirely consistent with existing corporate governance philosophy. Shareholders currently have little input into corporate governance beyond electing directors whom they must trust will implement appropriate internal governance, and threatening to remove those directors if they do not.[2] The alternative of exiting the company through selling their shares is more readily available to shareholders in a public (and publicly-traded) company. Its corollary effect of reducing the share price, thereby effecting a market control mechanism enforcing corporate governance is not present when considering the proprietary company, and particularly the closely held company. The recognition of a fiduciary obligation owed by

1 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 376.

2 Even the utility of these powers has been questioned: Jennifer Hill, 'Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware' (2010) 63(1) *Vanderbilt Law Review* 1, 11, particularly at footnote 44.

directors to shareholders could be an appropriate method of actively including shareholders in the regime without permitting a ‘chilling effect on entrepreneurial activity’[3] which could flow from excessive external interference.

Of course, there are critics of the idea that shareholders can usefully contribute in the arena of corporate governance. Hill discusses a criticism of the shareholder empowerment debate which found the idea of greater shareholder involvement pernicious, suggesting that shareholders are likely to abuse any participatory powers.[4] The fiduciary obligation, due to its nature as a proscriptive mechanism,[5] avoids attracting such criticism. The obligation to seek informed consent from the beneficiary only arises once the potential for breach of the fiduciary obligation is identified, whether or not a breach has occurred, as it acts to activate the defence to a claim of breach. As such, there is no ongoing monitoring cost, either in terms of continual time and effort by the shareholder nor restrictions on business risk-taking by the directors on a day-to-day basis. The remedies which flow from a finding of a breach of fiduciary obligations appear appropriate and relevant to assisting healthy corporate governance, as they are generally not punitive, but restore profits to the rightful recipients and compensate for loss suffered.

---

3 Andrew Tuch, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488. This comment was made in the context of the courts imposing strict duties of care and skill on directors, and the prescriptive-proscriptive fiduciary obligation debate, discussed above at Chapter 2.2.2. It is used here simply because it is an example of the type of emotive description common to discussions surrounding increasing shareholder participation.

4 Hill, Jennifer, *The Rising Tension between Shareholder and Director Power in the Common Law World* (Law Working Paper No 152/2010, European Corporate Governance Institute, April 2010) http://ssrn.com/abstract=1582258, 21-22.

5 *Breen v Williams* (1996) 186 CLR 71, 95 (per Dawson and Toohey JJ), 113 (per Gaudron and McHugh JJ), as discussed above at Chapter 2.2.2.

However, while the courts have recognised the value in extending directors' fiduciary obligations to shareholders in certain factual circumstances, there is no indication that they would be willing to consider stating this as a general principle. Although none of the general justifications for fiduciary obligations[6] have been universally accepted either by academics or courts, the hallmarks they discuss can still provide a useful tool for determining the likelihood that a fiduciary obligation will exist within a certain relationship. It is clear that most of these general justifications do not support a finding that directors owe fiduciary obligations to shareholders, other than in the specific circumstances of a closely held company.

### 5.2 *Limitations on Recommendations*

Outside closely held companies, it may not be appropriate to extend the list of status-based fiduciary obligations to include the relationship of director-shareholder. The practical difficulties are of particular significance, as noted by Young JA in *Crawley v Short*.[7] In many public companies traded on the ASX, it would be a practical impossibility for directors to owe a fiduciary obligation to shareholders even on an aggregate basis. Circumstances could occur where the shareholders to whom the directors owed their duties could change from one resolution to the next resolution, within a single board meeting.

This criticism cannot be ignored, as certainty is of great importance – however, it could be addressed by restricting the extension discussed in this thesis to proprietary companies. This would not impede the utility of such an extension, as the vast majority

[6] As listed previously at Chapter 2.2.2 and discussed again in detail at Chapter 3.5.
[7] *Crawley v Short* (2009) 262 ALR 654, 672.

of registered companies are proprietary: as at 1 January 2006, 98.6 per cent of all registered companies were proprietary.[8] Should fears as to the application of this extension remain, then it would also be possible to further limit the extension to 'closely held companies', and this provides an opportunity to define the situations in which the obligations would flow in a manner which is most consistent with the principles and policy behind fiduciary obligations.

The question naturally becomes then how should we define a closely held company in Australia. Following an international example, it would be logical that such a definition would make reference to the amount of trading in the company's stock, or excluding companies which trade their stock entirely from consideration.[9] Shares which are not often traded would lead more often to the development of a closer, less impersonal relationship between the directors and shareholders[10] than in a company whose shareholding is changing constantly. Smaller shareholdings and low numbers of directors/managers would also seem likely to lead to development of closer relationships, as would a higher incidence of director-shareholders. These elements would need to be

---

8 As at 1 January 2006 there were 1,392,458 proprietary companies and 18,963 public companies, of whom only 1,873 were listed on the Australian Stock Exchange. As at 30 June 2011, there were 1.84 million registered companies, of which 2,200 were listed entities (including registered schemes & foreign companies): Australian Securities and Investments Commission, 'Annual Report 2010-2011' (Australian Securities and Investments Commission, 2011) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual-report-2010-11.pdf/$file/annual-report-2010-11.pdf>, 10. Unfortunately, a breakdown of proprietary:public ratio was not released in the latest Annual Report in 2012; in fact, the word 'proprietary' did not appear once in 159 pages. However, there is nothing to indicate that the percentage of public unlisted companies would have grown substantially out of proportion with the growth in proprietary companies in the last 7 years.

9 See generally: *Donahue v Rodd Electrotype Co* 328 N.E.2d 505 (Mass, 1975); See, eg, *Model Statutory Close Corporations Supplement* to the *Model Business Corporations Act*, §§ 3(b), 11, 12 ("*MSCCS*"); *Delaware General Corporation Law* §§ 342(a)(2). Other states may require a specific restriction, such as restriction on transfer: *MSCCS* §§ 11, 12; Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 288; James D Cox, Thomas Lee Hazen and F Hodge O'Neal, *Corporations* (Aspen Law and Business, 1997) 360.

10 One of the key points mentioned by Bryson J in *Glavanics v Brunninghausen* (1996) 19 ACSR 204, 216-217.

carefully considered, as would the method of recognition of a closely held company – should this be an elected status, as is can be in the United States of America?[11]

However, once the test for a closely held company was established, that would lead to a position of legal certainty. When a company achieved closely held company status, directors would know that they owed fiduciary obligations to shareholders. Certainty of duties would be a clear benefit from such a reform. Shareholder awareness of such an obligation owed to them might also improve their participation and interest in the activity of the directors and company.

### 5.3 *Methods of Implementation*

Accepting a fiduciary obligation owed by directors to shareholders in closely held companies would align to a significant extent with what Black describes as 'decentered' regulation, where regulation is 'diffused throughout society' rather than solely centred on the state.[12] As a proscriptive legal response, it cannot be ignored that the fiduciary obligation appears at first glance to fall within the regulatory understanding known as command and control ('CAC') – rules backed by sanctions,[13] even if those sanctions are non-criminal. However, as has already been canvassed in previous chapters,[14] from its inception the fiduciary obligation has been concerned with control of self-interested

---

[11] See eg, *California Corporations Code* § 158; *Delaware General Corporation Law* §§ 342, 344. Cf *Maryland Corporations and Associations Code* § 4-101(b), which only requires election of close corporation status.

[12] Julia Black, 'Critical Reflections on Regulation' (2002) *Australian Journal of Legal Philosophy* 1, 2.

[13] Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 1999) 35; Julia Black, 'Critical Reflections on Regulation' (2002) *Australian Journal of Legal Philosophy* 1, 2. The legal rules generally considered under CAC regulation are statutory rules developed by the government: Stephen Bottomley, 'Where did the law go? The deregulation of Australian corporate regulation' (2003) 15 *Australian Journal of Corporate Law* 1, 1-2.

[14] See, eg, Chapter 2.1.3.

behaviour by those who are immediately affected – a private legal response to private behaviour, which was developed due to a lacuna in the common law. The object of the fiduciary obligation has more in common philosophically with codes of conduct and best-practice standards than CAC regulation. It is perhaps due to the fact that the beneficiary in this relationship is not a natural person that state intervention through CAC regulation occurs.[15]

An oft-cited concern within regulatory theory is the tension and trade-off between ‘flexibility and certainty, between responsive and prescriptive regulation, and between informality and formality’.[16] The fiduciary obligation already exists within these parameters, and has demonstrated over 200 years of application within case law a healthy balance between these criteria. It is capable of flexibility where necessary through the defence of fully informed consent, but also provides sufficient certainty through the ‘no profit’ and ‘no conflict’ rules. It is generally proscriptive, but can, through the defence, cause greater transparency and facilitate the flow of information. It is formal in the sense that it is a rule of equitable law, but existing within equity enables it to be more informal than the strictures of contract, for example. It may be inflexible in the sense that it is not as flexible as delegated legislation,[17] but due to the other fields of law with which it interacts, it can be flexibly applied by those within the specific relationship.[18]

---

15 The only other relationship with a non-natural person involved is the Crown-Indigenous person relationship, which is not recognised in Australia as resulting in fiduciary obligations: see Chapter 2.2.1. The employee-employer relationship can also demonstrate this issue, if the employer is a company – and in that scenario, is directly analogous to the director-company relationship. The promoter-company relationship can be considered a sub-category of the director-company relationship, and so is not dealt with separately.

16 Stephen Bottomley, 'Where did the law go? The deregulation of Australian corporate regulation' (2003) 15 *Australian Journal of Corporate Law* 1, 12, when describing the work of Julia Black.

17 Bottomley discusses the traditional response that delegated legislation is ‘more flexible’ than primary legislation: Ibid 7 and 12-13.

18 See Chapter 2.2.3.

As Bottomley notes, modern corporate regulation is not uniform in structure or practice, and different aspects attract different regulatory considerations.[19] The different approach offered by the fiduciary obligation, as demonstrated in the previous chapter, assists in providing shareholders in closely held companies with a significant remedial response that enables them to remain within the company, rather than relying on strategies which lead only to exit.

### 5.4 *Recognition of amendment via case law*

Recognition via case law that, in closely held companies, directors and shareholders are a in status-based relationship that will attract fiduciary obligations, would be the most beneficial solution. Firstly, this would recognise the growing body of case law where fiduciary obligations have been imposed on an *ad hoc* basis to such relationships. Acknowledgement of the category of closely held companies as a status-based relationship in which the fiduciary obligation is owed by the directors to the shareholders would lead to certainty, which benefits both the directors who owe the duty and the shareholders who may wish to act upon it. Secondly, expansion of the status-based list would counter fears that this list is in fact closed.[20] Although the High Court has stated that the list is not closed, there has been no High Court authority expanding the list since its inception in 1984.[21] Thirdly, equity has an established body of case law in relation to not only the fiduciary obligation but also the remedies which are available, meaning there would be reasonable clarity of expectation on the part of both shareholders and directors.

---

19 Stephen Bottomley, 'Where did the law go? The deregulation of Australian corporate regulation' (2003) 15 *Australian Journal of Corporate Law* 1, 14.

20 See Chapter 2.2.1.

21 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41. The lack of expansion was discussed in Michael Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 457 on.

However, despite these benefits, this change is unlikely to be brought about through the courts. The 2007 High Court decision of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[22] expressly stated that:

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory laws.[23]

Following such reasoning, until the High Court saw fit to expand the list of status-based relationships where fiduciary obligations exist, intermediate courts would not be bound to uphold the decision of a trial judge making such an expansion. Findings on an *ad hoc* basis would remain secure, as this has been recognised as possible by the High Court,[24] but the certainty from attaining status-based recognition cannot be achieved by any court other than the High Court.

When this reasoning is combined with the admonishment in *Garcia v National Australia Bank*[25] that it is for the High Court 'alone to determine whether one of its previous decisions is to be departed from or overturned',[26] the role of the inferior courts would appear severely curtailed.[27] This is true not only in the instance of the fiduciary obligation, but for equity in general. In a climate where courts and academics appear opposed to 'judicial activism',[28] such expansion may occur, but too slowly for the

---

22 (2007) 230 CLR 89 ('*Farah*').

23 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 203 CLR 89, 151-152.

24 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

25 (1998) 194 CLR 395.

26 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 403.

27 Keith Mason, 'President Mason's Farewell Speech' (2008) 82 *Australian Law Journal* 768, 769.

28 This phrase is often used in a rather derogatory sense. The author does not contend that amendment of the status-based categories of relationships in which fiduciary obligations are recognised would amount to 'judicial activism'. However, that appears to be the view of some courts and academics. Cf *Nelson v Nelson* (1995) 184 CLR 538, 602; *Armitage v Nurse* [1998] Ch 241, 256; J D Heydon,

commercial world.[29] The elucidation of these principles by the courts, as and when they do occur, can be still be of assistance in interpreting the principles; however, direct expansion is best delivered via another mechanism.

### 5.5 *Recognition of amendment via legislation*

In the above circumstances, it would be more efficient to effect such a change through statute, as long as the statutory obligation accurately reflected the purpose and policy behind the fiduciary obligation at equity. This is unfortunate, as Australia has, to some degree, inherited what Jordan discusses as an English suspicion of 'codification' and statutory law in general.[30] However, the corporate world has a long history with statutory law,[31] and is already subject to the significant and substantial *Corporations Act*. As such, there would not appear to be a cultural barrier to overcome by recognising the fiduciary obligation as owed by directors to shareholders in a closely held company through legislative enactment.

Further, there are benefits to legislation beyond what Millet LJ identified as parliament's ability to permit wide consultation and receive advice from various sources.[32] Not only would legislation have the capacity to be drafted and enacted quickly, but it could also ensure that the resulting obligation was not subordinate to contractual dealings between

---

'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, particularly from 123 on.

29 As discussed by Michael Kirby, 'Equity's Australian Isolationism' (Paper presented at the W A Lee Equity Lecture, Queensland University of Technology, 19 November 2008) <http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol65+/2008/2323-W_A_Lee_Equity_Lecture_2008_(final).doc>, 29 on.

30 Cally Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33 *Melbourne University Law Review* 626, 633.

31 As was outlined previously in Chapter 3.2, and drawn upon for the discussion of the statutory mechanisms of corporate governance as outlined in Chapter 4.5.

32 *Armitage v Nurse* [1998] Ch 241, 256. To what extent descriptions such as this can be considered polite judicial 'buck-passing' remains unclear.

the parties,[33] which is the default position for fiduciary obligations as enforced through equity.[34] Although any legislative enactment may draw inspiration from the fiduciary obligation, it would, as is currently the case in the *Corporations Act*, be a statutory obligation, and not founded in equity. Nevertheless, if carefully drafted as suggested below, it can serve the same aims and achieve the same outcomes as its equitable counterpart.

A convenient comparison can be made in light of the recommendations made in the *Inquiry Into Financial Products and Services in Australia* ('the Ripoll Report').[35] The committee resolved on 25 February 2009 to report on issues associated with the collapses of particular financial products and financial services providers;[36] received submissions from a variety of interested parties,[37] and took evidence at public hearings.[38] The first recommendation of the Ripoll Report is of particular interest:

> The committee recommends that the *Corporations Act* be amended to explicitly include a fiduciary duty for financial advisers operating under an AFSL, requiring them to place their clients' interests ahead of their own.[39]

This recommendation is of interest for two reasons: firstly, it advocates legislative reform in order to enforce an equitable obligation, and secondly, it does not fully state that

---

33 However, although *Corporations Act 2001* (Cth) s 140(1) provides that there is a contract between each director and the corporation, it does not make such a similar provision relating to shareholder-director relationships. This aspect, as well as the consideration of the fiduciary obligation as on equal standing with contract, would depend on the final drafting.

34 See previous discussion in Chapter 2.2.3, drawing from the judgments in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

35 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (2009).

36 Ibid vii, [1.1].

37 Appendix 1 contained the names of those from whom the 407 written submissions were received. This included members of the public, banks, financial services industry associations and legal associations.

38 Appendix 2 listed the witnesses who gave evidence at public hearings.

39 Ibid [2.6].

obligation, leading to potential inaccuracy if it were adopted into legislation on the basis of the Ripoll Report.

Firstly, the recommendation of legislative enforcement is well within the ambit of the committee, as the final term of reference listed by the committee was 'the need for any legislative or regulatory change.'[40] There does not, however, seem to have been a great deal of discussion regarding the potential methods for implementation of a fiduciary obligation between a financial advisor and their client, least of all whether legislative amendment would be the most appropriate vehicle. This may be due to the fact that this is a parliamentary committee, consisting of people who deal almost exclusively with the implementation of law via legislation, and that the majority of submissions appear to have assumed that amendment of the *Corporations Act* would be the method of implementation.[41] The relevant chapter of the report was headed 'Suggestions for regulatory reform', but no method of regulation beyond the *Corporations Act* appears to have been discussed. The committee declared that it had heard a number of proposals to raise the standards of financial advisors, and that they fell into three categories, the first of which was 'imposing a higher legislative standard through a fiduciary duty for financial advisers to place clients' interests first.'[42]

Secondly, it is unfortunate that the Ripoll Report chose to include the phrase 'requiring them to place their clients' interests ahead of their own',[43] as that is only part of the various submissions that were made to them. For example, the ASIC submission made it clear that the requirement to put the client first only arose if there was a conflict between

---

[40] Ibid vii, [1.1].

[41] Ibid, see, for example, ASICs' submissions, extracted at [6.3]; Professional Investment Services at [6.6]; Industry Super Network at [6.7]; Association of Financial Advisors discussed at [6.1.

[42] Ibid [6.2].

[43] Ibid [6.29].

the interests of the advisor and the client,[44] which approaches an accurate statement of the fiduciary obligation, but is still not entirely correct. As noted by Lindgren, the 'no conflicts' duty prohibits conflict, it does not support prioritisation of them, and so either the description of the obligation is wrong, or the use of the words 'fiduciary duty' is otiose.[45] Further, it is inconsistent with the proscriptive nature of fiduciary obligations to describe them in terms of a positive duty to act, such as by use of the word 'require'.[46]

The Act that followed the Ripoll Report in 2011[47] implements the Report's recommendations as follows. According to the Act, the 'provider must act in the best interests of the client in relation to the advice',[48] and thereafter, in the specific instance where the provider knows or ought reasonably to know that the interests of the client and the provider conflict, establishes that when giving the advice the interests of the client must be given priority.[49] Additionally, the 'best interests' of the client are defined within the Act to include significant obligations on the financial advisor beyond the scope of the equitable obligation, such as identification of the 'objectives, financial situation and needs' of the client as provided through the client's instructions.[50] Further, whether the information provided by the client through those instructions was complete and accurate,

---

[44] As cited in Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (2009) [6.3].

[45] Kevin Lindgren, 'Fiduciary Duty and the Ripoll Report' (2010) 28 *Company and Securities Law Journal* 435, 436.

[46] Ibid 441.

[47] Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth). The first reading occurred on 24 November 2011. The text of the Bill passed both Houses on 25 June 2012 and *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) was assented to on 27 June 2012.

[48] *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) Schedule 1, which inserts s 961B into the *Corporations Act 2001* (Cth).

[49] *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) Schedule 1, which inserts s 961J into the *Corporations Act 2001* (Cth).

[50] *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) Schedule 1, which inserts s 961B(2)(a) into the *Corporations Act 2001* (Cth).

and if not, to make reasonable enquiries to obtain complete information.[51] The financial advisor is also required to conduct 'a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client' before recommending such products.[52] A later provision in the Act deals with 'conflicted remuneration', which it defines as any benefit, whether monetary or not, which 'could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.'[53] Although this is a closer representation of the foundation of the 'no profit' rule within the fiduciary obligation than the preceding sections are in relation to the 'no conflict' rule, it also draws elements of the 'no conflict' rule into discussion, highlighting the fact that in many instances where one of these rules is breached, there is a concurrent breach of the other rule.[54] As such, it is better not to attempt to extrapolate them as separate duties, but to recognise them as coexisting within the fiduciary obligation itself. The Act then continues to provide that various parties associated with financial advisors must not provide 'conflicted remuneration',[55] which far exceeds the scope of the fiduciary obligation.

Much as occurred in relation to ss 182-183 of the *Corporations Act*, although this duty may draw inspiration from the fiduciary obligation which operates in equity, it does not represent an accurate legislative implementation of that obligation. It has been phrased

---

51 *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) Schedule 1, which inserts s 961B(2)(c) into the *Corporations Act 2001* (Cth).

52 *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) Schedule 1, which inserts s 961B(2)(e) into the *Corporations Act 2001* (Cth).

53 *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) Schedule 1, which inserts s 963A into the *Corporations Act 2001* (Cth).

54 See the previous discussion in Chapter 2, raised again in Chapter 3 specifically in relation to the director-company relationship.

55 *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) Schedule 1, which inserts ss 963J-936K into the *Corporations Act 2001* (Cth).

as a positive duty which goes into significant detail as to what investigation is required of the financial advisor, and separates out the fundamental elements of the fiduciary obligation to create separate duties in relation to the 'no conflict' rule and the 'no profit' rule.

Lindgren offers an accurate and simplistic method of implementing a fiduciary obligation via statute, through consideration of the provision prohibiting unconscionable conduct in the *Trade Practices Act 1974* (Cth), now replicated in identical terms under the Australian Consumer Law.[56] Although Lindgren's analysis was not taken up in the legislative enactment in relation to financial advisors, it provides an excellent method of proceeding in relation to the closely held company. Lindgren notes that the unconscionable conduct provision is carefully worded so that it does not attempt to provide a definition of the term 'unconscionable' in the statute, instead defining unconscionable as it is found 'within the meaning of the unwritten law, from time to time, of the States and Territories'.[57] He suggests that it would be also preferable to avoid the word 'fiduciary' altogether.[58] This last point is true of the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth), which chose to focus instead directly on the 'client's best interests' and situations of conflict.

Borrowing from the example provided previously by s 51AA(1) of the *TPA*, Lindgren in his discussion of the financial advisor role suggests wording the legislation simply to

---

56 *Trade Practices Act 1974* (Cth) s 51AA(1), as cited in Kevin Lindgren, 'Fiduciary Duty and the Ripoll Report' (2010) 28 *Company and Securities Law Journal* 435, 440. Section 511AA is now Part 2-2 of the ACL, as contained in Schedule 1 to the *Competition and Consumer Act 2010* (Cth).

57 *Trade Practices Act 1974* (Cth) s 511AA(1).

58 Kevin Lindgren, 'Fiduciary Duty and the Ripoll Report' (2010) 28 *Company and Securities Law Journal* 435, 441.

provide a specific example of when the underlying concept in equity will be enforced, such as:

> Financial advisors are deemed to owe fiduciary obligations, within the meaning of the unwritten law, from time to time, of the States and Territories, to their clients.

He concludes that long as the legislation defines ‘financial advisors’ and ‘clients’ appropriately, nothing further ought to be required. As was noted above, this was not the course of action taken by Parliament.[59]

However, for the same reasons as Lindgren raised in relation to the financial advisor, this neutral wording drawing heavily on the underlying equitable principle and case law is ideal when considering the closely held company. Such an obligation could be enacted as follows:

> Directors of closely held companies are deemed to owe fiduciary obligations, within the meaning of the unwritten law, from time to time, of the States and Territories, to the shareholders of that company.

Again, as long as ‘directors’, ‘closely held company’ and ‘shareholders’ are defined, this avoids the confusion apparent when contrasting ss 182-183 to the equitable understanding of a fiduciary obligation. This phrasing retains the underlying fiduciary obligation as a proscriptive, not prescriptive, obligation, consistent with its development in equity and its role within corporate governance as discussed above.[60]

---

59 The position at equity has been confirmed by the recent judgment of Rares J in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 (21 September 2012), where the defendant was found to have breached their fiduciary obligation (and also to have engaged in misleading and deceptive conduct) to their clients, three Western Australian councils. As discussed in Chapter 2 previously, from [721], Rares J discusses the fiduciary obligation as owed by the defendant to their clients, and although it is not explicitly stated, suggests that all financial advisors will owe fiduciary obligations to their clients on a status-based relationship analysis: [732]-[733]. This was addressed in more detail in Chapter 2.

60 See Chapter 2, under discussion of the ‘proscriptive/prescriptive debate’, and Chapter 4, where the role of the equitable duties in general and the fiduciary obligation specifically are discussed and

## 5.6 *Conclusions*

Although ideally equitable principles, including the fiduciary obligation and the categories of status-based relationships to which it applies, ought to be developed by the courts, and most importantly, the High Court, in order to keep pace with the corporate world it may be necessary to implement the recommendations made by this thesis as legislative enactments. Should such enactments conform to the recommendations of Lindgren as outlined above, drawing significantly on the definition of the phrase 'fiduciary obligation' from equity, then the role of the courts in the development of that jurisdiction continues to carry weight.

The final proposition of this thesis has been established:

> **Proposition 8:**
>
> Although the most jurisprudentially sound method of implementation may be through the courts and equity, the more efficient method of implementation is via legislative intervention.

Further, the initial definition of the closely held company can now be seen as justified:

> Definition:
>
> A 'closely held company' can be defined as a proprietary company with three or less directors, and 6 or less shareholders.

---

aligned with other corporate governance mechanisms, such as the ASX Corporate Governance Guidelines.

This chapter addressed the method of implementation of a fiduciary obligation owed by directors to shareholders in closely held companies. The discussion in Chapters Three and Four in relation to the statutory duties is used to highlight the difficulties with legislative enactment of equitable principles. This difficulty is set against the uncertain position of intermediate courts in relation to development of legal principles, including those of equity. As such, it concludes that the most efficient method of implementation would be via legislative enactment of the type described by Lindgren above, as it would enable the underlying equitable development and case law to continue to play an active role in the obligation. The next chapter provides conclusions, drawing each proposition out from the discussion which has taken place.

# 5 CONCLUSIONS

This thesis opened with Chancellor Thurlow's oft-cited observation about the difficulties with punishment and the corporate form: a problem which arises not from the existence of separate legal personality, nor limited liability and the corporate veil, but from the fractured psyche of the 'corporate person'. This facet of corporate personality exists within all versions of the corporate form, but provides particular opportunity for mischief by directors within closely held proprietary companies, where the ability of a shareholder to exit for value is more curtailed than in public companies. This thesis has argued that the fiduciary obligation has an important role to play within the larger scheme of corporate governance in Australia, and, in particular, in relation to closely held companies.

Rather than interfere with the corporate form itself, or add another complexity to an already multifaceted system of corporate governance, steps should be taken to revitalise one of the mechanisms already in existence, which is currently occasionally overlooked, within the specific parameters suggested by this thesis.

The appropriate mechanism for this task is the fiduciary obligation for a number of reasons. Firstly, despite some ongoing points of contention in relation to the doctrine of the fiduciary obligation, there is a clear historical development of the overarching field of equity generally and the fiduciary obligation specifically. Through the explanations of both historical development and case law set out within this thesis, the content of the obligation is clear: the fiduciary must not be placed in a position where their personal interests or duties conflict with, or may possibly conflict with, the interests of the beneficiary, nor can they secretly profit from the relationship. Although there is no consensus on the 'critical feature' for identifying relationships where fiduciary obligations will exist between the parties, the current judicial trend suggests voluntary assumption and vulnerability or disadvantage as justifications. The lack of consensus is not fatal to the doctrine: it is, perhaps, inevitable due to the flexibility inherent within many equitable doctrines, and fiduciary obligations more than most. Australian fiduciary obligations are proscriptive, not prescriptive. There is abundant case law in relation to the impact of the fiduciary obligation on the director-company relationship to provide a solid foundation for consideration of the alternative applications of the fiduciary obligation, such as proposed by this thesis.

In relation to the corporate context, duties or rules outside of the 'no conflict' and 'no profit' conceptualisation are either idiosyncratic examples of these precise formulations due to the corporate relationship, or currently the result of conflation of the terms 'equity' and 'fiduciary'. The ability to trace concrete conclusions through the case development is ideal for the foundation of examinations such as the one undertaken in this thesis.

**Proposition 1:**

Fiduciary obligations in Australia are proscriptive, consisting of a duty of loyalty and a duty to account for benefits gained.

**Proposition 2:**

Despite difficulties with acceptance of a general proposition supporting fiduciary obligations, the current High Court of Australia holds fiduciary obligations to arise in circumstances which combine voluntary assumption with vulnerability or disadvantage.

Secondly, despite the equitable development of the principle on a case by case basis, the heart of the fiduciary obligation is consistently the requirement for the fiduciary to act in the interests of the beneficiary through the ‘no conflict’ and ‘no profit’ rules. Whether described as ‘a pragmatic communal response to the corrosive mischief of opportunism,’[1] or taking away the fruit of temptation rather than simply placing it on a higher shelf,[2] it is clear that the fiduciary obligation aims to support and protect a beneficiary who is vulnerable to their fiduciary. This theme is clear throughout the development of the fiduciary obligation within the corporate context, and in the practical examples drawn from the case law discussed in detail within this thesis. It has already been the basis of *ad hoc* findings of fiduciary obligations between directors and shareholders, leading to the definition posited by the thesis. The focus of the fiduciary obligation on preventing opportunism makes it an ideal tool for study in the case of directors and corporate governance, which may then prove to elucidate the various other duties owed by directors.

That is not to suggest that the fiduciary obligation can fix all ills. The evaluation in this thesis has revealed a number of important limitations on the ability of shareholders to be the beneficiaries of fiduciary obligations owed by directors. These limitations have led to the development of the definition of a closely held company, as the ideal circumstance in which recognition of the shareholders as the beneficiary of the fiduciary obligation owed by directors should be made.

Commencement of the discussion of this definition within the structure of companies

---

1 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375 376.

2 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 64; Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) July *Law Quarterly Review* 452, 463.

limited by share does not unduly restrict the scope of the thesis, as such companies represent the vast majority of companies registered in Australia.[3] Further restriction of the definition to proprietary and not public companies equally does not unduly restrict the scope of this thesis,[4] and is necessary for a number of reasons.

Firstly, due to the broad alienability of publicly traded shareholdings, there are practical difficulties in asking directors to owe a duty to shareholders within a publicly traded company. Although not all public companies are listed for trading on the ASX, in light of the other reasons for a restriction within the definition, it makes sense to limit the definition to proprietary companies only.

Secondly, it is the nature of the relationship between the shareholders and the directors which attracts the fiduciary obligation – and such 'closeness', as identified by Bryson J in *Glavanics v Brunninghausen*,[5] is more likely to exist within the proprietary structure than the public. Thirdly, publicly held companies are more likely to employ a variety of mechanisms to align the interests of 'managers' with those of the 'investors' to assist in overcoming the gap between management and risk bearing.[6] These two rationales are both generalisations – not all public companies will conform to these models, and some proprietary companies will fit within such descriptions.

It is the final point which settles the limitation: the developments within the case law where fiduciary obligations have been found to be owed to shareholders by directors on

3 More than 99 per cent: Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012) 5.
4 Proprietary companies outnumbered public companies at a ratio of 73:1 in 2006.
5 *Glavanics v Brunninghausen* (1996) 19 ACSR 204, 216-217
6 See generally Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, Reprinted ed, 1996), 232-233.

an *ad hoc* basis are limited to proprietary companies.

**Proposition 3:**

There are recognised exceptions to the standard position that fiduciary obligations are owed by directors to their company, and not to the shareholders.

**Proposition 4:**

These exceptions to the standard position that fiduciary obligations are owed by directors to their company and not to the shareholders primarily involve closely held companies.

**Proposition 5:**

In closely held companies, the shareholder is the appropriate beneficiary of fiduciary obligations owed by directors.

**Definition:**

A closely held company is a proprietary company with less than 3 directors and less than 6 shareholders.

The survey of corporate governance mechanisms available in Australia demonstrates that a fiduciary obligation owed by directors to shareholders within closely held companies would be consistent with, and even enhance, corporate governance aims and aspirations. The central aims of the fiduciary obligation are clearly consistent with those of corporate governance when considered as 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations'.[7] The various mechanisms outlined within the thesis act as checks and balances on the division of ownership and control within the corporate form. As the fiduciary obligation is already in place as one of these mechanisms, it is only necessary to consider whether a change in the beneficiary would somehow alter this mechanism to no longer fit the broader aims of corporate governance. In light of the restriction built in to the definition of the closely held company, the shareholders as beneficiary of the fiduciary obligation cannot be said to interfere with the remaining mechanisms. Many of these already contemplate consideration of the shareholders, when acting as the company organ in general meeting. The fiduciary obligation would not promote pernicious action by the shareholders, as it is proscriptive in nature, not prescriptive. Further, the ability of the directors to seek the fully informed consent of the shareholders for a breach of the fiduciary obligation shoulders some of the monitoring costs which may otherwise be associated with the recognition of this obligation. The alternative actions currently available to shareholders would not be undermined by a fiduciary obligation owed to shareholders, as they seek to respond to slightly different harm. The typical remedial consequences for a breach of a fiduciary obligation would, although providing an appropriate remedy, not unduly encourage inappropriate shareholder suits.

> **Proposition 6:**
>
> Recognising the shareholder as beneficiary of fiduciary obligations within closely held companies is consistent with corporate governance philosophy in Australia.

---

7 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Australian Stock Exchange, 2007) <http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=#>, 5.

**Proposition 7:**

Recognising the shareholder as beneficiary of fiduciary obligations within closely held companies does not conflict with the other duties owed by directors, nor the other remedies available to shareholders.

Despite having highlighted the potential pitfalls of legislative enactment, this thesis concludes that statutory implementation would be the most effective method of introducing such an obligation. That is not to deny the opportunity of the courts to improve and refine such an obligation, following its introduction within statute, however, as discussed, waiting for judicial pronouncement alone might prove futile. It is not recommended that the obligation be phrased within the statute in the manner of ss 180-183 or the new provisions in relation to financial advisors.[8] Lindgren's suggestion in response to the Ripoll Report, to mimic the method of incorporating the definition of unconscionable at equity under the *ACL*, appears appropriate for the legislative enforcement of this obligation.[9]

An alternative is available through the primary Australian soft law instrument, the ASX Corporate Governance Principles and Recommendations – but the efficacy of this mechanism for proprietary companies is very limited. An 'opt-out' rather than an 'opt-in' scheme is also recommended for all proprietary companies on registration. A separate 'opt-in' scheme for public companies could always be implemented alongside such a scheme for proprietary companies.

8 *Corporations Act 2001* (Cth); *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

9 Kevin Lindgren, 'Fiduciary Duty and the Ripoll Report' (2010) 28 *Company and Securities Law Journal* 435; Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (2009).

**Proposition 8:**

Although the most jurisprudentially sound method of implementation may be through the courts and equity, the more efficient method of implementation is via legislative intervention.

These cumulative propositions, established over the course of the thesis, aim to support the current corporate governance regime within Australia, whilst directing attention to those participants in closely held companies, which the market mechanisms largely overlook. Whilst enabling shareholder involvement, both as a potential remedy but also as an element of a director's defence to a claim of breach, the fiduciary obligation operates to reinforce those duties already in operation.

# 6 BIBLIOGRAPHY

## 6.1 *Books, Book Sections, Edited Books*


American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (American Law Institute Publishers, 1994)

Arminjon, P, BĖ Nolʹde and M Wolff, *Traité de droit comparé* (Librairie Générale de Droit et de Jurisprudence, 1950)

Austin, R P, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Australia, 2005)

Austin, R P and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths Australia, 14th ed, 2010)

Austin, R P and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 14th ed, 2009)

Austin, R P and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 13th ed, 2007)

Bakan, Joel, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004)

Baldwin, Robert and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 1999)

Baxt, R and K Fletcher, *Afterman and Baxt's Cases and Materials on Corporations and Associations* (Butterworths, 6th ed, 1992)

Baxt, Robert, Keith Fletcher and Saul Fridman, *Corporations and Associations: Cases and Materials* (LexisNexis Butterworths, 10th ed, 2009)

Berle, Adolf A and Gardiner C Means, *The Modern Corporation and Private Property* (Transaction Publishers, Revised ed, 1968)

Berle, Adolf A and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan, 1933)

Branson, Douglas M, 'The Very Uncertain Prospects of 'Global' Convergence in Corporate Governance' in Thomas Clarke (ed), *Theories of Corporate Governance* (Routledge, 2004) 259

Callaway, F H, *Winding Up on the Just and Equitable Ground,* Monash Studies in Law (Law Book Company, 1978)

Campbell, John Lord, *The Lives of the Lord Chancellors and the Keeper of the Great Seal of England* (John Murray, 1845)

Carter, JW, *Carter's Guide to Australian Contract Law* (LexisNexis, 2nd ed, 2011)

Chambers, Robert, 'The Importance of Specific Performance' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005)

Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans, The Colonial Press, Revised ed, 1900)

Clarke, Thomas (ed), *Theories of Corporate Governance* (Routledge, 2004)

Cooke, C A, *Corporation Trust and Company: An Essay in Legal History* (Manchester University Press, 1950)

Cox, James D, Thomas Lee Hazen and F Hodge O'Neal, *Corporations* (Aspen Law and Business, 1997)

Cross, Frank B and Robert A Prentice, *Law and Corporate Finance* (Edward Elgar, 2007)

Dal Pont, G E, *Equity and Trusts in Australia* (Lawbook Co, 5th ed, 2011)

Dal Pont, G E and D R C Chalmers, *Equity and Trusts in Australia* (Lawbook Co, 4th ed, 2007)

Darwin, Charles, *On the Origin of Species* (John Murray, 1859)

David, René, *Traité élémentaire de droit civil comparé: Introduction à l'étude des droits étrangers et à la méthode comparative* (Librairie Générale de Droit et de Jurisprudence, 1950)

Degeling, Simone and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005)

DuBois, A B, *The English Business Company after the Bubble Act 1720-1800* (Octagon Books, 1938)

Easterbrook, Frank H and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, Reprinted ed, 1996)

Elkington, John, *Cannibals with forks: the triple bottom line of 21st century business* (Capstone, 1997)

Evans, Michael, *Equity and Trusts* (LexisNexis Butterworths, 2003)

Evans, Michael, *Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2009)

Evans, Michael, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012)

Farrar, John, *Corporate Governance in Australia and New Zealand* (Oxford University Press, 2001)

Farrar, John, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3rd ed, 2008)

Finn, P D (ed), *Essays in Equity* (Lawbook Co, 1985)

Finn, P D, 'Fiduciary Law and the Modern Commercial World' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, 1992)

Finn, P D, *Fiduciary Obligations* (The Law Book Company Ltd, 1977)

Finn, P D, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989)

Ford, H A J, R P Austin and I M Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis Australia, 12th ed, 2005)

Garratt, Bob, *The Fish Rots from the Head: The Crisis in our Boardrooms* (Profile Books, Revised ed, 2003)

Getzler, Joshua, 'Am I My Beneficiary's Keeper?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005)

Gevurtz, Franklin, *Global Issues in Corporate Law,* American Casebook Series (Thomson West, 2006)

Gillen, Mark R, *Securities Regulation in Canada* (Thompson Carswell, 3rd ed, 2007)

Glover, John, *Commercial Equity - Fiduciary Relationships* (Butterworths, 1995)

Gregory, Holly, David Murgio and Jane Pollack, 'United States' in Global Competition Review (ed), *Corporate Governance* (Law Business Research, 2003)

Gummow, William, 'Conclusion' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005)

Hanrahan, Pamela, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 8th ed, 2006)

Hanrahan, Pamela, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 12th ed, 2011)

Hanrahan, Pamela, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (CCH Australia, 13th ed, 2012)

Harpum, Charles, 'Fiduciary Obligations and Fiduciary Powers - Where Are We Going?' in Peter Birks (ed), *Privacy and Loyalty* (Oxford University Press, 1997) 145

Harris, Ron, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge Uni Press, 2000)

Hazen, T L, *Treatise on the Law of Securities Regulation* (West Publishing Co, 3rd ed, 1995)

Heydon, J D, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005)

Holder, R F, *Bank of New South Wales: A History* (Angus and Robertson, 1970)

Holdsworth, Sir William, *A History of English Law* (Sweet and Maxwell, 2nd ed, 1937)

Horrigan, Brian, 'Comparative Corporate Governance Developments and Key Ongoing Challeges from Anglo-American Perspectives' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005)

Jordan, Cally, *International Survey of Corporate Law in Asia, Europe, North America and the Commonwealth* (The Centre for Corporate Law and Securities Regulation, 1997)

Joseph, Sarah and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2nd ed, 2006)

King, Mervyn A, *Public Policy and the Corporation*, Cambridge Studies in Applied Econometrics (Chapman and Hall, 1977)

Laffont, Jean-Jacques and David Martimort, *The Theory of Incentives: The Principal-Agent Model* (Princeton University Press, 2002)

Lehane, J R F, 'Fiduciaries in a Commercial Context' in P D Finn (ed), *Essays in Equity* (Lawbook Co, 1985) 95

Lipton, Phillip, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook Co, 16th ed, 2012)

Macintyre, Stuart, *A Concise History of Australia* (Cambridge University Press, 3rd ed, 2009)

Maitland, Frederic William, 'Trust and Corporation' in H. D. Hazeltine, G. Lapsley and P. H. Winfield (eds), *Maitland: Selected Essays* (Books for Libraries Press, Inc, 1936)

Mason, Sir Anthony, 'Fusion' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005)

Mason, Sir Anthony, 'Themes and Prospects' in P D Finn (ed), *Essays in Equity* (Lawbook Co, 1985)

Meagher, R P, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002)

Micklethwait, John and Adrian Wooldridge, *The Company: a Short History of a Revolutionary Idea* (Modern Library, 2003)

Mitchell, Lawrence E and Dalia Tsuk Mitchell, *Corporations: Cases and Materials* (Carolina Academic Press, 2006)

Monks, Robert A and Nell Minow, *Watching the Watchers - Corporate Governance for the 21st Century* (Blackwell Publishers Inc, 1996)

Morgan, Gareth, *Images of Organization* (Sage Publications, 2nd ed, 1997)

Moye, John E, *The Law of Business Organizations,* West Legal Studies (Cengage Learning, 6th ed, 2004)

National Association of Corporate Directors, *Key Agreed Principles to Strengthen Corporate Governance for US Publicly Traded Companies,* Director's Handbook Series (2009)

National Association of Corporate Directors, *Report of the NACD Blue Ribbon Commission on Director Professionalism,* Blue Ribbon Commission Report (2005)

Parker, C, *The Open Corporation* (Cambridge University Press, 2002)

Parkinson, Patrick, 'Fiduciary Obligations' in Patrick Parkinson (ed), *Principles of Equity* (Lawbook Co, 2nd ed, 2003)

Parkinson, Patrick (ed), *The Principles of Equity* (Lawbook Co, 2nd ed, 2003)

Posner, Eric A, *Law and Social Norms* (Harvard University Press, 2nd ed, 2002)

Posner, Eric A (ed), *Social Norms, Nonlegal Sanctions, and the Law* (Edward Elgar Publishing, 2007)

Posner, Richard, *Economic Analysis of Law* (Aspen Publishers, 7th ed, 2007)

Radan, Peter and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010)

Redmond, Paul, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 4th ed, 2005)

Redmond, Paul, *Companies and Securities Law: Commentary and Materials* (Lawbook Co, 5th ed, 2009)

Rossouw, G J and Alejo José G Sison (eds), *Global Perspectives on Ethics of Corporate Governance* (Palgrave Macmillan, 2006)

Rotman, Leonard I, *Fiduciary Law* (Thomson Carswell, 2005)

Ryan, Lori Verstegen, 'Business Ethics and Corporate Governance in North America' in G J Rossouw and Alejo José G Sison (eds), *Global Perspectives on Ethics of Corporate Governance* (Palgrave Macmillan, 2006)

Smith, Lionel, 'Fusion and Tradition' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005)

Stokes, M, 'Company Law and Legal Theory' in W Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986)

Sugarman, David and Ronnie Warrington, 'Land Law, citizenship and the invention of "Englishness".' in John Brewer and Susan Staves (eds), *Early Modern Concepts of Property* (Routledge, 1996)

Sutherland QC, Harry, *Fraser and Stewart: Company Law in Canada* (Carswell Thompson Professional Publishing, 6th ed, 1993)

Symes, Christopher and John Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2009)

Tomasic, Roman, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002)

Tully, Stephen (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005)

Virgo, Graham, *The Principles of Equity and Trusts* (Oxford University Press, 2012)

Welling, Bruce, *Corporate Law in Canada: The Governing Principles* (Butterworths, 2nd ed, 1991)

Welling, Bruce, *Corporate Law in Canada: The Governing Principles* (Scribblers Publishing, 3rd ed, 2006)

Woodward, Susan, Helen Bird and Sally Sievers, *Corporations Law - In Principle* (LawBook Co, 7th ed, 2005)

Wright, David, *Remedies* (Federation Press, 2010)

Zweigert, K and H Kötz, *An Introduction to Comparative Law* (T Weir trans, Oxford University Press, 3rd ed, 1998)

## 6.2 *Journal Articles*

Anand, Anita and Peter Klein, 'Inefficiency and Path Dependency in Canada's Securities Regulatory System: Towards a Reform Agenda' (2005) 42 *Canadian Business Law Journal* 41

Armour, John, Henry Hansmann and Reiner H Kraakman, *Agency Problems, Legal Strategies, and Enforcement* (Law Working Paper No 135/2009, European Corporate Governance Institute, November 2009) http://ssrn.com/abstract=1436555

Austin, R P, 'Commerce and Equity – Fiduciary Duty and Constructive Trust' (1986) 6 *Oxford Journal of Legal Studies* 444

Battaglia, Vince, 'Dealing with Conflicts: The equitable and statutory obligations of financial services licensees' (2008) 26 *Company and Securities Law Journal* 483

Bebchuk, Lucian, 'The Case for Increasing Shareholder Power' (2005) 118(3) *Harvard Law Review* 833

Bebchuk, Lucian, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' (1992) 105(7) *Harvard Law Review* 1435

Bebchuk, Lucian and Alma Cohen, 'Firms' Decisions Where to Incorporate' (2003) 46 *Journal of Law and Economics* 383

Bernstein, Lisa, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *Journal of Legal Studies* 115

Bishop Jr, Joseph W, ' Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers' (1968) 77 *Yale Law Journal* 1078

Black, Julia, 'Critical Reflections on Regulation' (2002) *Australian Journal of Legal Philosophy* 1

Blair, MM and LA Stout, 'Trust, Trustworthiness and the Behavioural Foundations of Corporate Law' (2001) 149 *University of Pennsylvania Law Review* 1735

Boros, Elizabeth, 'Virtual Shareholder Meetings' (2004) 0008 *Duke Law & Technology Review* 9/1/2004

Bosch, Henry, 'The Changing Face of Corporate Governance' (2002) 25(2) *University of New South Wales Law Journal* 270

Bottomley, Stephen, 'New Directions in Corporate Governance for Small Proprietary Companies?' (1996) 7 *Australian Journal of Corporate Law* 135

Bottomley, Stephen, 'Where did the law go? The deregulation of Australian corporate regulation' (2003) 15 *Australian Journal of Corporate Law* 1

Bratton, William W, 'Enron and the dark side of shareholder value' (2002) 76(5) *Tulane Law Review* 1275

Brebner, Julie, 'Breen v Williams: A Lost Opportunity or a Welcome Conservatism?' (1996) 3 *Deakin Law Review* 237

Bujaki, Merridee and Bruce J McConomy, 'Corporate Governance: Factors Influencing Voluntary Disclosure by Publicly Traded Canadian Firms' (2002) 1(2) *Canadian Accounting Perspectives* 105

Burkart, Mike, Denis Gromb and Fausto Panunzi, 'Large Shareholders, Monitoring, and the Value of the Firm' (1997) 112(3) *Quarterly Journal of Economics* 693

Cary, William L, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 *Yale Law Review* 663

Cassidy, Julie, 'Standards of Conduct and Standards of Review: Divergence of the Duty of Care in the United States and Australia' (2000) 28 *Australian Business Law Review* 180

Cheffins, Brian R, 'Corporate Governance Convergence: Lessons from Australia' (2002) 16 *Transnational Law* 13

Cheffins, Brian R, 'Corporate Law and Ownership Structure: A Darwinian Link' (2002) 25(2) *University of New South Wales Law Journal* 346

Cheffins, Brian R, 'Using Theory to Study Law: A Company Law Perspective' (1999) 58(1) *Cambridge Law Journal* 197

Chesterman, Simon, 'Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of the Law'' (1997) 24(3) *Journal of Law and Society* 350

Coffee Jr, John C, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1999) 93 *Northwestern University Law Review* 641

Coffee Jr, John C, 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 *Columbia Law Review* 1618

Coffee Jr, John C, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1980) 79 *Michigan Law Review* 386

Conaglen, Matthew, 'Equitable Compensation for Breach of Fiduciary Dealing Rules' (2003) 119 *Law Quarterly Review* 246

Conaglen, Matthew, 'The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms' (2011) 70 *Cambridge Law Journal* 548

Conaglen, Matthew, 'The Nature and Function of Fiduciary Loyalty' (2005) July *Law Quarterly Review* 452

Dallas, L, 'A Preliminary Inquiry Into the Responsiblity of Corporations and their Directors and Officers for Corporate Climate: the Psychology of Enron's Demise' (2003) 35(1) *Rutgers Law Journal* 1

Dawson, Sir Daryl, 'The Legal Services Market' (1996) 5 *Journal of Judicial Administration* 147

Dawson, F 'Coleman v Myers [1977] 2 NZLR 225: Duties of directors in a take-over situation' [1979] 8 *New Zealand Universities Law Review* 256

DeMott, Deborah A, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke Law Journal* 879

DeMott, Deborah A, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona Law Review* 925

Dempsey, G and A Greinke, 'Proscriptive Fiduciary Duties in Australia' (2004) 25 *Australian Bar Review* 1

Dignam, Alan and Michael Galanis, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2005) 28 *Melbourne University Law Review* 1

Duffy, Michael J, 'Shareholder Democracy or Shareholder Plutocracy? Corporate Governance and the Plight of Small Shareholders' (2002) 25(2) *University of New South Wales Law Journal* 434

Eisenberg, Melvin Aron, 'The Structure of Corporation Law' (1989) 89 *Columbia Law Review* 1461

Farquhar, Keith, 'Hodgkinson v Simms: The Latest on the Fiduciary Principle' (1995) 29 *University of British Columbia Law Review* 383

Farrar, John, 'In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance' (2001) 13 *Australian Journal of Corporate Law* 1

Flannigan, Robert, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 *Law Quarterly Review* 449

Flannigan, Robert, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35

Flannigan, Robert, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375

Flannigan, Robert, 'The Economics of Fiduciary Accountability' (2007) 32 *Delaware Journal of Corporate Law* 393

Flannigan, Robert, 'Fiduciary Duties of Shareholders and Directors' (2004) (May) *Journal of Business Law* 277

Flannigan, Robert, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285

Gillan, Stuart L and Laura T Starks, 'Corporate Governance Proposals and Shareholder Activism: the Role of Institutional Investors' (2000) 57 *Journal of Financial Economics* 275

Goddard, R, '*Percival v. Wright*: the end of a remarkable career?' (2000) 116 *Law Quarterly Review* 197

Hanak, Andrew, 'The Interaction of the Company Director's Duty of Care and the Director's Obligations Relating to Insolvent Trading and Financial Reporting' (2003) 25 *Company and Securities Law Journal* 180

Hansmann, Henry and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439

Hargovan, Anil, 'Director's Liability for Insolvent Trading, Statutory Forgiveness and Law Reform' (2010) 18 *Insolvency Law Journal* 96

Heydon, J D, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110

Hill, Jennifer, *The Rising Tension between Shareholder and Director Power in the Common Law World* (Law Working Paper No 152/2010, European Corporate Governance Institute, April 2010) http://ssrn.com/abstract=1582258

Hill, Jennifer, 'Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware' (2010) 63(1) *Vanderbilt Law Review* 1

Hill, Jennifer and Charles M Yablon, 'Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict' (2002) 25(2) *University of New South Wales Law Journal* 294

Jordan, Cally, *Unlovely and Unloved: Corporate Law Reform's Progeny*, University of Melbourne Legal Studies Research Paper No. 325. Available at SSRN: http://ssrn.com/abstract=1125542

Jordan, Cally, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33 *Melbourne University Law Review* 626

Karjala, Dennis S, 'An Analysis of Close Corporation Legislation in the United States' (1989) 21 *Arizone State Law Journal* 663

Keay, Andrew, 'The Authorising of Directors' Conflicts of Interest: Getting a Balance' (2012) 12 *Journal of Corporate Law Studies* 129

Kirby, Johann, 'The History and Development of the Conflict and Profit Rules in Corporate Law - a Review' (2004) 22 *Company and Securities Law Journal* 259

Kirby, Michael, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444

Klinck, Dennis, 'Lord Nottingham and the Conscience of Equity' (2006) January *Journal of the History of Ideas* 123

La Porta, Rafael et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113

Langford, Rosemary, 'ENT Pty Ltd v Sunraysia Television Ltd: A Positive Fiduciary Duty of Disclosure' (2008) 26 *Company and Securities Law Journal* 470

Le Mire, Suzanne, 'Document Destruction and Corporate Culture: A Victorian Initiative' (2006) 19 *Australian Journal of Corporate Law* 304

Liebowitz, Stan and Stephen Margolis, 'The Fable of the Keys' (1990) 33 *Journal of Law and Economics* 1

Lindgren, Kevin, 'Fiduciary Duty and the Ripoll Report' (2010) 28 *Company and Securities Law Journal* 435

Lord Wedderburn, 'Trust, Corporation and the Worker' (1985) 23 *Osgoode Hall Law Journal* 203

Loss, Louis, 'The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States' (1970) 33 *Modern Law Review* 34

MacKerron, J, 'Variety of Choice in the Corporate Law 'Menus' of the Great Lake States' (1994) 71 *University of Detroit Mercy Law Review* 469

Manne, Henry G, 'Our Two Corporation Systems: Law and Economics' (1967) 53(2) *Virginia Law Review* 259

Mason, Keith, 'President Mason's Farewell Speech' (2008) 82 *Australian Law Journal* 768

Mayanja, James, 'Promoting Enhanced Enforcement of Directors' Fiduciary Obligations: The Promise of Public Law Sanctions' (2007) 20 *Australian Journal of Corporate Law* 157

Mayanja, James, 'Standing to Challenge the Implementation of Improper Defensive Measures' (1995) 5 *Australian Journal of Corporate Law* 66

McInnes, Mitchell, 'A New Direction for the Canadian Law of Fiduciary Relations?' (2010) 126 (April) *Law Quarterly Review* 185

Millon, David 'Theories of the Corporation' (1990) 2 *Duke Law Journal* 201

Nesbitt, Steven L, 'Long-term Rewards from Shareholder Activism: A Study of the "CalPERS Effect"' (1994) 6 *Journal of Applied Corporate Finance* 75

Nicholson, Brent, 'The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation' (1992) Nov 1 *American Business Law Journal* <http://www.allbusiness.com/legal/338572-1.html>

Nolan, R C, 'The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report' (2005) 6 *Theoretical Inquiries in Law* 413

Nosworthy, Beth, 'Directors' Fiducairy Obligations: Is the Shareholder an Appropriate Beneficiary?' (2010) 24(3) *Australian Journal of Corporate Law* 282

Ontario Securities Commission, 'Request for Comments - Proposed Repeal and Replacement of NP 58-201, NI 58-101, NI 52-101 and 52-110CP' (2008) 31 *Ontario Securities Commission Bulletin* 12158

Pistor, Katharina et al, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2002) 23 *University of Pennsylvania Journal of International Economic Law* 791

Posner, Richard, 'An Economic Approach to the Law' (1975) 53 *Texas Law Review* 757

Ramsay, Ian M, 'Corporate Theory and Corporate Law Reform in Australia' (1994) 1(2) *Agenda: A Journal of Policy Analysis and Reform* 179

Ramsay, Ian M, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23

Ramsay, Ian M and Ben Saunders, Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action, Melbourne Law School Legal Studies Research Paper No 250, available from http://ssrn.com/abstract=914465

Rider, B A K, 'Percival v. Wright—Per Incuriam' (1977) 40 *Modern Law Review* 471

Rider, B A K, 'A Special Relationship on the Special Facts' (1978) 41 *Modern Law Review* 585

Rock, Edward and Michael Wachter, 'Corporate Law as a Facilitator of Self Governance' (2000) 34 *Georgia Law Review* 529

Roe, Mark J, 'Delaware's Competition' (2003) 117(2) *Harvard Law Journal* 588

Saunders, Ben, 'Putting the Spoils of Litigation into the Shareholders' Pockets' (2004) 22 *Company and Securities Law Journal* 535

Scott, Professor Austin W, 'The Fiduciary Principle' (1949) 37 *California Law Review* 539

Sealy, L.S., 'Fiduciary Obligations, Forty Years On' (1995) 9 *Journal of Contract Law* 37

Sealy, L.S., 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69

Sealy, L.S., 'Some Principles of Fiduciary Obligation' (1963) *Cambridge Law Journal* 119

Segal, Jillian, 'Corporate Governance: Substance over Form' (2002) 25(2) *University of New South Wales Law Journal* 320

Shankman, Neil A, 'Reframing the Debate Between Agency and Stakeholder Theories of the Firm' (1999) 19(4) *Journal of Business Ethics* 319

Shleifer, Andrei and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737

Sievers, A S, 'Directors’ Duty of Care: What is the new standard?' (1997) 15 *Company and Securities Law Journal* 392

Svehla, Julian, 'Director's Fiduciary Duties' (2006) 27 *Australian Bar Review* 192

Tomasic, Roman, "And They All Lived Happily Ever After?' - Improving corporate law after Enron: A review essay' (2007) 20 *Australian Journal of Corporate Law* 232

Tricker, Bob, 'Where do we go from here?' (1997) 5(4) *Corporate Governance: An International Review* 177

Tuch, Andrew, 'Obligation of Financial Advisors in Change-of-control Transactions: Fiduciary and other questions' (2006) 24 *Company and Securities Law Journal* 488

Valentine, Robert, 'The Director-Shareholder Fiduciary Relationship: Issues and Implications' (2001) 19 *Company and Securities Law Journal* 92

Vlahakis, Patricia, Jeffrey M Wintner and Joshua R Cammak, 'Understanding the Sarbanes-Oxley Act of 2002' (2002) 10(5) *Corporate Governance Advisor* 13

Weinrib, Ernest J, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1

Welsh, Michelle and Helen Anderson, 'Directors' Personal Liability for Corporate Fault: An Alternative Model' (2005) 26(2) *Adelaide Law Review* 299

Whincop, Michael, 'A Theoretical and Policy Critique of the Modern Reformulation of Directors' Duties of Care' (1996) 6 *Australian Journal of Corporate Law* 72

## 6.3 *Reports*

Commonwealth, HIH Royal Commission, *Report: The Failure of HIH Insurance* (2003) .

*Official Report of the National Australasian Convention Debates*, Sydney, 1891

'Report of the Attorney General's Committee on Securities Legislation in Ontario' (Queen's Printer, March 1965 1965)

ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Australian Stock Exchange, 2007) <http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=#>

ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments' (Australian Stock Exchange, 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf>

Australian Associated Stock Exchanges, 'Australian Shareownership 1986' (Australian Associated Stock Exchanges, 1986)

Australian Securities and Investments Commission, 'Annual Report 2010-2011' (Australian Securities and Investments Commission, 2011) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual-report-2010-11.pdf/$file/annual-report-2010-11.pdf>

Australian Securities Exchange, '2006 Australian Share Ownership Study' (Australian Securities Exchange, 2006)

Australian Securities Exchange, '2010 Australian Share Ownership Study' (Australian Securities Exchange, 2010)

Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in 2007 Annual Reports' (18 June 2008)

<http://www.asx.com.au/documents/about/analysis_corp_govenance_disclosure_2007_annual_reports.pdf>

Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in Annual Reports for Year Ended 30 June 2009' (Australian Securities Exchange, 2009) <http://www.asx.com.au/documents/about/analysis_corporate_governance_disclosures_in_annual_reports_.pdf>

Australian Securities Exchange, 'Analysis of Corporate Governance Disclosures in Annual Reports for Year Ended 30 June 2010' (Australian Securities Exchange, 2010) <http://www.asx.com.au/documents/about/corporate_governance_disclosures_30_june_2010_analysis.pdf >

Australian Stock Exchange, '2000 Australian Shareownership Study' (Australian Stock Exchange, 2000)

Cadbury, Sir Adrian, 'The Financial Aspects of Corporate Governance' (Financial Reporting Council, London Stock Exchange, 1 December 1992 1992)

CLERP, 'CLERP Proposals for Reform Paper No 3 – Directors' Duties and Corporate Governance' (Department of Treasury, 1997)

Companies and Securities Advisory Committee, 'Company Directors and Officers: Indemnification, Relief and Insurance' (Parliament of Australia, 1992)

Corporations and Markets Advisory Committee, 'The Social Responsibility of Corporations' (December 2006)

Lannoo, Karel, 'Corporate Governance in Europe: Report of a CEPS Working Party' (Centre for European Policy Studies, 1995)

Ontario Securities Commission, 'Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure for Investors by Business Combinations and Private Placements' (Department of Financial and Commercial Affairs, 1970)

Qantas Airways Ltd, 'Annual Report' (2007) <http://qantas.republicast.com/ar2007/>

Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (2009)

Senate Select Committee on Securities and Exchange, 'Australian Securities Markets and their Regulation' (1974)

Senate Standing Committee of Legal and Constitutional Affairs, 'Company Directors' Duties' (Commonwealth Parliament, 1989)

The Conference Board, 'Commission on Public Trust and Private Enterprise: Findings and Recommendations' (2003)

Dickerson, Robert, John Howard and Leon Getz, 'Proposals for a New Business Corporations Law in Canada' (1971)

The Select Committee on Company Law, 'The Interim Report of the Select Committee on Company Law' (Legislative Assembly, 1967)

## 6.4 *Cases*


*Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq 461

*Aequitas Ltd v AEFC Leasing Pty Ltd* (2001) 19 ACLC 1006

*Allen v Hyatt* (1914) 30 TLR 444

*Armitage v Nurse* [1998] Ch 241

*Astley v Austrust* (1999) 197 CLR 1

*Attorney-General (NSW) v Brewery Employees' Union (NSW)* (1908) 6 CLR 469 ("*The Union Label Case*")

*Australian Securities and Investment Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35

*Australian Securities and Investment Commission v Petsas* (2005) 23 ACLC 269

*Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287

*B (KL) v British Columbia* [2003] 2 SCR 403

*Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503

*Baker v Hellner Realty Co* 265 Mich 625 (1933)

*Bank of Boston Connecticut v European Grain and Shipping Ltd (The Dominique)* [1989] AC 1056

*Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 513

*Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59

*Baumgartner v Baumgartner* (1987) 164 CLR 137

*The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1

*Billage v Southee* (1952) 68 ER 623

*Bishop of Winchester v Knight* (1717) 1 PWms 406

*Blewett v Millett* (1774) 7 Bro PC 367

*Blomley v Ryan* (1956) 99 CLR 362

*Boardman v Phipps* [1967] 2 AC 46

*Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606

*Brant Investments Ltd v KeepRite Inc* (1991) 80 DLR (4th) 161

*Bray v Ford* [1896] AC 44

*Breen v Williams* (1994) 35 NSWLR 522

*Breen v Williams* (1996) 186 CLR 71

*Bridgewater v Leahy* (1998) 194 CLR 457

*Briggs v James Hardie & Co Pty Ltd* (1989) 7 ACLC 841

*Brunninghausen v Glavanics* (1999) 46 NSWLR 538

*Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423

*Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45

*Canadian Aero Service Ltd v O'Malley* [1974] SCR 592

*Carabelas v Scott* (2003) 177 FLR 334

*Carpenter v Danforth* 52 Barb 582 (NY, 1868)

*Cede & Co v Technicolor Inc* 634 A.2d 345 (Del 1993)

*Chan v Zacharia* (1984) 154 CLR 178

*Charlebois et al v Bienvenu* [1967] 2 OR 635

*Chase Corporation (Aust) Ltd v North Sydney Brick and Tile Co Ltd* (1994) 35 NSWLR 1

*Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1979] 3 All ER 1025

*Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94

*Cholmondeley v Clinton* (1821) 4 ER 721

*Christensen v Scott* [1996] 1 NZLR 273

*Citizens Insurance Co of Canada v Parsons; Queen Insurance Co v Parsons* (1991) 7 App Cas 96 (JCPC)

*Clarkson v Davies* [1923] AC 100 (Ontario PC)

*Coleman v Myers* [1977] 2 NZLR 225

*Colvin v Hartwell* (1837) 7 ER 488

*Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447

*Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262

*Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390

*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594

*Consul Development Pty Ltd v DPC Estates Pty Ltd* (1984) 154 CLR 178

*Coomber v Coomber* [1911] 1 Ch 723

*Crawley v Short* (2009) 262 ALR 654

*C-Shirt Pty Ltd v Barnett Marketing & Management Pty Ltd* (1996) 37 IPR 315

*Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371

*Daniels v Anderson* (1995) 37 NSWLR 438

*Darvall v North Sydney Brick & Tile Co Ltd (No 2)* (1989) 16 NSWLR 260

*Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318

*Digital Pulse Pty Ltd v Harris* (2002) 166 FLR 421

*Donahue v Rodd Electrotype Co* 328 N.E.2d 505 (Mass, 1975)

*Dovey v Cory* [1901] AC 477

*The Earl of Oxford's Case* (1615) 1 Chan Rep 1

*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360

*Emerald Partners v Berlin* 787 A.2d 85 (Del, 2000)

*ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626

*Ex parte Lacey* (1802) Ves Jun 625

*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 203 CLR 89

*Farnham v Fingold* [1971] 3 OR 688

*Fexuto v Bosnjak Holdings* (1998) 28 ACSR 688

*Fill Buildings Inc v Alexander Hamilton Life Insurance Co* 396 Mich 453 (1976)

*Filmer v Gott* (1774) 2 ER 156

*Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566

*Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574

*Foskett v McKeown* [2000] 3 All ER 97

*Foss v Harbottle* (1843) 67 ER 189

*Frame v Smith* [1987] 2 SCR 99

*Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1

*Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452

*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480

*Friend v Booker* (2009) 239 CLR 129

*Furs Ltd v Tomkies* (1936) 54 CLR 583

*Galambos et al v Perez* (2009) 312 DLR (4th) 220

*Garcia v National Australia Bank Ltd* (1998) 194 CLR 395

*Gartside v Isherwood* (1788) 28 ER 1297

*Gibson Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569

*Giumelli v Giumelli* (1999) 196 CLR 101

*Glavanics v Brunninghausen* (1996) 19 ACSR 204

*Gluckstein v Barnes* [1900] AC 240

*Goldex Mines Ltd v Revill* (1974) 54 DLR (3d) 672

*Great Eastern Railway Company v Turner* (1872-73) LR 8 Ch App 149

*Grimes v Donald* 673 A.2d 1207 (Del 1996)

*Guerin v R* (1984) 13 DLR (4th) 321

*Hamilton v Wright* (1842) 8 ER 357

*Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298

*Hedley Byrne v Heller & Partners Ltd* [1964] AC 465

*Higgins v New York Stock Exchange Inc* 10 Misc 3d 257 (2005)

*Hodgkinson v Simms* [1994] 3 SCR 377

*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41

*Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 330

*Hurley v BGH Nominees Pty Ltd [No 2]* (1984) 37 SASR 499

*In Re Auto Specialties Manufacturing Co, Boyd v Sachs* 153 BR 503 (WD Mich 1993)

*In Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407

*In re The Walt Disney Company Derivative Litigation* 906 A.2d 27 (Del, 2006)

*In the Matter of a Proposed Arrangement Concerning BCE Inc*, Court of Appeal, Quebec, 500-09-018525-089 (21 May 2008)

*Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443

*International Hospitality Concepts Pty Ltd v National Marketing Concepts Inc (No 2)* (1994) 13 ACSR 368

*Jackson v The Munster Bank (Ltd)* (1884) 13 LR Ir 118

*Jacobus Marler Estates Ltd v Marler* (1916) 85 LJPC 167

*John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1

*John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113

*Johnson v Buttress* (1936) 56 CLR 113

*Joint v Stephens* (2008) 26 ACLC 1467

*Joint v Stephens* [2007] VSC 145 (14 May 2007)

*Jones v H F Ahmanson and Co* 460 P.2d 464 (Cal, 1969)

*Jones v Jones* (2009) 27 ACLC 1021

*Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223

*Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461

*Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14

*Law Society (NSW) v Foreman* (1994) 34 NSWLR 408

*Lenark Pty Ltd v TheChairmen1 Pty Ltd* [2011] NSWSC 529 (6 June 2011)

*Louth v Diprose* (1992) 175 CLR 621

*LT King Pty Ltd v Besser* (2002) 172 FLR 140

*M(K) v M(H)* (1992) 96 DLR (4th) 289

*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1

*Maguire v Makaronis* (1997) 188 CLR 449

*Mannesmann* Case No 3 StR 470/04 (Bundesgerichtshof FRG 2005)

*Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494

*MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675

*McClurg v Minister of National Revenue* [1990] 3 SCR 1020 (SCC)

*McClymont v Critchley* [2011] NSWSC 493 (14 June 2011)

*McInerney v MacDonald* (1992) 93 DLR (4th) 415

*McNamara Business & Property Law v Kasmeridis* (2007) 97 SASR 129

*Meinhard v Salmon* (1928) 164 NE 545

*Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128

*Mills v Mills* (1938) 60 CLR 150

*Mordecai v Mordecai* (1988) 12 NSWLR 58

*Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692

*Moss v Moss (No 2)* (1900) 21 LR (NSW) Eq 253

*Muschinski v Dodds* (1985) 160 CLR 583

*Nadan v The King* [1926] AC 482

*Nelson v Nelson* (1995) 184 CLR 538

*New South Wales v Commonwealth* (1990) 169 CLR 482

*News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410

*Ngurli Ltd v McCann* (1953) 90 CLR 425

*Nixon v Blackwell* 626 A.2d 1366 (Del, 1993)

*Nocton v Lord Ashburton* [1914] AC 932

*Norberg v Wynrib* (1992) DLR (4th) 449

*Northern Trust Co v Butchart* (1917) 35 DLR 169

*O'Rourke v Hoeven* [1974] 1 NSWLR 622

*O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262

*Orman v Cullman* 794 A.2d 5 (Del, 2002)

*Pacific Coast Coal Mines Ltd and Ors v Arbuthnot and Ors* [1917] AC 607

*Parker v McKenna* (1874) LR 10 Ch App 96

*Pavan v Ratnam* (1996) 23 ACSR 21

*Peel v London and North Western Railway Company* [1907] 1 Ch 5

*Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461

*Pepper v Litton* 308 US 295 (Va, 1939)

*Peskin v Anderson* [2001] 1 BCLC 372

*Percival v Wright* [1902] 2 Ch 421

*Perlman v Feldmann* 219 F 2d 173 (2nd Cir, 1955)

*Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187

*Peso Silver Mines Ltd (NPL) v Cropper* [1966] SCR 673

*Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165

*Platt v Platt* [1999] 2 BCLC 745

*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 Ch D 204

*Queensland Mines Ltd v Hudson* (1978) 18 ALR 1

*Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192

*Re Eastern Copper Mines* [1975] CLC 28,239

*Re Enterprise Gold Mines NL* (1991) 9 ACLC 168

*Re Hughes* (2000) 202 CLR 535

*Re James* (1803) 8 Ves Jun 337

*Re London School of Electronics Ltd* [1986] Ch 211

*Re Morris Fletcher and Cross' Bills of Costs* [1997] 2 Qd R 228

*Re Peveril Gold Mines* [1898] 1 Ch 122

*Re Stanley* [1906] 1 Ch 131

*Re Wakim; Ex parte McNally* (1999) 198 CLR 511

*Re West of England and South Wales District Bank, ex parte Dale & Co* (1879) 11 Ch D 772

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

*Residues Treatment & Trading Co Ltd v Southern Resources Ltd (No 4)* (1988) 14 ACLR 569

*Rex v Dod* (1808) 9 East 516

*Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129

*Richard Brady Franks Ltd v Price* (1937) 58 CLR 112

*Salomon v Salomon & Co* [1897] AC 22

*Salt v Cooper* (1880) 16 Ch D 544

*Securities and Exchange Commission v Chenery Corporation* 318 US 80 (1942)

*Simons v Cogan* 549 A.2d 300 (Del, 1988)

*Sinclair Oil Corporation v Levien* 280 A.2d 717 (Del. 1971)

*Smith v Van Gorkom* 488 A.2d 858 (Del, 1985)

*Southern Cross Interiors Pty ltd (in liq) v Deputy Commissioner of Taxation* (2001) 19 ACLC 1513

*Southern Pacific Co v Bogert* 250 US 483 (2nd Cir, 1919)

*Stoelwinder v Southern Health* [2001] FCA 115 (23 February 2001)

*Stoelwinder v Southern Health Care Network* (2000) 97 IR 76

*Stone v Ritter* 911 A.2d 362 (Del 2006)

*Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468

*Strong v Repide* 213 US 419 (1909)

*Thexton v Thexton* [2001] 1 NZLR 237

*Thexton v Thexton* [2002] 1 NZLR 780

*Tiessen v Henderson* [1899] 1 Ch 861

*Tillett v Varnell Holdings Pty Ltd* [2009] NSWSC 1040 (30 September 2009)

*Traub v Barber* 45 N.Y.S.2d 575 (App Div 1982)

*Trustees of Dartmouth College v Woodward,* 17 US (4 Wheat) 518 (1819)

*United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 151 CLR 1

*Walley v Walley* (1687) 1 Vern 484

*Walsham v Stainton* (1863) 46 ER 268

*Walton v Morgan Stanley & Co* 623 F 2d 796 (2d Cir 1980)

*Warman International Ltd v Dwyer* (1995) 182 CLR 544

*Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459

*West-Deutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669

*White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 3 BFRA 599

*White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd (No 2)* [2009] NSWCA 194

*White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2008] NSWSC 1225

*Whitehouse v Cartlon Hotels Pty Ltd* (1987) 162 CLR 285

*Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 (21 September 2012)

*Winthrop Investments v Winns* [1975] 2 NSWLR 666

*Woods v Cann* (1963) 80 WN (NSW) 1583

*York and North-Midland Railway Co v Hudson* (1845) 51 ER 866

## 6.5 *Legislation*

*Administration of Justice Act 1840* (Imp) 4 Vict, c 22

*Australian Constitution*

*Australian Securities and Investment Commission Act 2001* (Cth)

*Bank of New South Wales (Change of Name) Act 1982* (NSW)

*Bank of New South Wales Act 1850* (NSW) 14 Vic

*British North America Act 1867* (UK c 3)

*Business Corporations Act*, RSO 1990, c B-16

*Business Corporations Act*, RSO 1990, c B.16

*Canada Act 1982* (UK)

*Canada Business Corporations Act*, RSC 1985, c C-44

*Chancery Amendment Act 1858* (UK)

*Close Corporations Act 1989* (Cth)

*Commonwealth of Australia Constitution Act 1900* (Imp)

*Companies Act 1862* 25 & 26 Vict, c 89

*Companies Act 1948* 11 & 12 Geo 6, c 38

*Companies Act 1958* (Vic)

*Companies Act 1962* (Cth)

*Companies Act 1981* (ACT)

*Companies Act*, SO 1907, c 34

*Companies Code 1981*

*Competition and Consumer Act 2010* (Cth)

*Constitution Act 1867*

*Corporate Law Economic Reform Program Act 1999* (Cth)

Corporate Law Reform Bill 1992 (Cth)

*Corporations (Commonwealth Powers) Act 2001* (SA)

*Corporations Act 1989* (Cth)

*Corporations Act 2001* (Cth)

*Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth)

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth)

*Criminal Code*, RS 1985, c. C-46

Del. Court of Chancery Rules (as amended at 1 August 2009)

*Delaware Constitution*

*Directors Liability Act*, SO 1891, c 34

*Equity Act 1866* (Imp) 30 Vict, c 20

*First Corporate Law Simplification Act 1995* (Cth)

*Income Tax Act*, RSC 1985, c 1 (5th Supp.)

*Joint Stock Companies Act 1844* 7 & 8 Vict, c 110

*Joint Stock Companies Act 1856* 19 & 20 Vict, c 47

*Joint Stock Companies Winding Up Act 1848* 11&12 Vict, c 45

*Judicature Act 1873* 36 & 37 Vict c 66

*Legal Practitioners Act 1981* (SA)

*Limited Liability Act 1855* 18 & 19 Vict, c 133

*Mining Companies Act 1871* (Vic)

*National Companies and Securities Commission Act 1979* (Cth)

*Ontario Companies Act*, SO 1897, c 28

*Partnership Act 1890* 53 & 54 Vict, c 39

*Privy Council (Appeals from the High Court) Act 1975* (Cth)

*Public Company Accounting Reform and Investor Protection Act* (Pub. L. No. 107-204, 116 Stat. 745) ('the Sarbanes-Oxley Act')

*Qantas Sale Act 1992* (Cth)

*Royal Exchange and London Assurance Corporation Act 1719* (6 George 1 c 18)

*Sale of Shares Act*, SM 1912, c 75

*Sarbanes-Oxley Act of 2002* Pub L No 107-204, 116 Stat 745.

*Securities Act*, RSO 1980, c 466

*Securities Act*, RSO 1990, c S.5

*Securities Act*, SO 1966, c 142

*Securities Act*, SO 1978, c 47

*Securities Industry Act 1980* (Cth)

*Security Frauds Prevention Act*, SO 1928, c 34

*South Australia Act 1834* (Imp) 4 & 5 Wm 4, c 95

*Statute of Westminster Act 1931* (UK)

*Supreme Court Act 1878* (Imp) 41 & 42 Vict, c 116

*Supreme Court Amendment Act 1867* (Imp) 32 Vict, c 7

*Trade Practices Act 1974* (Cth)

### 6.6 *Other*

*The 7:30 Report*, aired 14 December 2006, produced by Ben Hawke, transcript available online at http://www.abc.net.au/7.30/content/2006/s1811985.htm

Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1990

Commonwealth, *Parliamentary Debates*, House of Representatives, 25 May 1988

CSA Staff Notice 58-303 "Corporate Governance Disclosure Compliance Review" (2007) 30 *Ontario Business Commission Bulletin* 5818

Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth)

NI 58-101 Disclosure of Corporate Governance Practices (2005) 28 *Ontario Securities Commission Bulletin* 3634

NP 58-201 Corporate Governance Guidelines (2005) 28 *Ontario Securities Commission Bulletin* 5383

Victoria, *Parliamentary Debates*, Legislative Council

Michael Adams, Course Materials provided for *Applied Corporate Law*, Semester 2, 2008. Chartered Secretaries Australia, Graduate Diploma in Applied Corporate Governance

ASIC Media Centre, 'ASIC v Citigroup' (2007) *Media Releases* <http://www.asic.gov.au/asic/asic.nsf/byheadline/07-193+ASIC+v+Citigroup?openDocument>

Australian Securities and Investments Commission, 'Information Sheet 78: Winding up a solvent company' (2010) <http://www.asic.gov.au/asic/asic.nsf/byHeadline/Winding-up%20a%20solvent%20company>

Australian Securities Exchange, *The ASX Corporate Governance Council* (2002) <http://www.asx.com.au/supervision/governance/corporate_governance_council.htm>

Australian Securities Exchange, *ASX Listing Rules* (1 January 2012) <http://www.asxgroup.com.au/asx-listing-rules-guidance-notes-and-waivers.htm>

Becklumb, Penny, 'Canada Business Corporations Act: Insider Trading' (2008) PRB 99-38E

Ben-Amar, Walid and Ameur Boujenoui, 'Factors Explaining Corporate Governance Disclosure Quality: Canadian Evidence' (Paper presented at the Illinois International Accounting Symposium, University of Hawai'i at Manoa, June 7-9 2007)

Black, Ashley, 'ASIC claims against Citigroup rejected' (2007) *Mallesons Stephen Jaques Publications and News* <www.mallesons.com/publications/2007/Jun/9001048W.htm>

Blake Dawson Waldron Lawyers, 'Financial Services Update' (2007) April <http://www.bdw.com/publications/financial/financial042007.pdf>

Boros, Elizabeth, 'What is the right division of power between boards of directors and shareholders?' (Paper presented at the Law 125 Distinguished Speakers Series, Ligertwood Building, University of Adelaide, 20 May 2008)

California Public Employees Superannuation Fund, 'Corporate Governance Facts' (2009) <http://www.calpers.ca.gov/index.jsp?bc=/about/facts/home.xml>

California Public Employees Superannuation Fund, 'Global Principles of Accountable Corporate Governance' (2010) <http://www.calpers-governance.org/docs-sof/principles/2010-5-2-global-principles-of-accountable-corp-gov.pdf>

Clow, Robert, 'Deal Could Put $100m in the Kitty for Qantas Management', *The Australian* 24 November 2006, 23

Council of Institutional Investors, 'Corporate Governance Policy' (2010) <http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%204-13-10.pdf>

Creedy, Steve, 'Qantas execs buy the blue sky', *The Australian* 3 February 2007, 33

CSA Secretariat, 'Introduction to the Canadian Securities Administrator' (2009) <http://www.securities-administrators.ca/uploadedFiles/General/pdfs/FINAL%20-%20CSA%20document%202009%20-%20as%20of%20150409.pdf>

Dickerson, Robert, John Howard and Leon Getz, 'Proposals for a New Business Corporations Law in Canada' (1971)

Edgecliffe-Johnson, Andrew, 'Murdoch hopes for peaceful annual meeting', *The Financial Times (FT.com)* (New York), 15 October 2012 <http://www.ft.com/cms/s/0/d619e5ba-16e3-11e2-8989-00144feabdc0.html#axzz2A6C7z0x9>

Egan, Byron F, 'Director Fiduciary Duties under Delaware and Texas Law' (Paper presented at the 29th Annual Conference on Securities Regulation and Business Law Problems, Dallas, Texas, 2007)

Gleeson, Murray, 'The Constitutional Decisions of the Founding Fathers' (2007) <http://www.hcourt.gov.au/speeches/cj/cj_27mar07.pdf>

Gluyas, Richard, 'Conflict Concerns Over Qantas Boss Stake', *The Australian* 27 November 2006, 33

Gregory, Holly, 'The US Corporate Governance Crisis in Context' in Institutional Investor Journals (ed), *Corporate Governance: A Guide to Corporate Accountability* (Institutional Investor Inc Journals Group, 2003)

Gregory, Holly and David Murgio, 'Corporate Governance - United States' (2007) *Getting the Deal Through* <http://www.weil.com/news/pubdetail.aspx?pub=4049>

Andrew Hanak, *A Defence of the Company Directors' Duty of Care, Skill and Diligence*, (PhD Thesis, University of Monash, 2005)

Investment and Financial Services Association, *IFSA Guidance Notes* (2005) <http://www.ifsa.com.au/public/content/ViewCategory.aspx?id=619>

Jackson, Margaret, *When Private Equity Knocks* (2007) <http://www.qantas.com.au/regions/dyn/au/publicaffairs/details?ArticleID=2007/mar07/0001>

Kirby, Michael, 'Equity's Australian Isolationism' (Paper presented at the W A Lee Equity Lecture, Queensland University of Technology, 19 November 2008) <http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol65+/2008/2323-W_A_Lee_Equity_Lecture_2008_(final).doc>

Korporaal, Glenda, 'Sell-off Deal Demands Full Disclosure', *The Australian* 2 February 2007, 6

Laidlaw, Stuart, 'Enron effect takes toll on TD earnings', *Toronto Star* (Toronto, Ontario), 26 August 2005

McFarland, Janet, 'No Excuse for Another Delay in Posting Reforms' (2005) *GlobeAdvisor.com* <https://secure.globeadvisor.com/servlet/ArticleNews/story/gam/20050125/RMCFAR25>

Ontario Securities Commission, *Governance and Accountability* (7 August 2009 2009) <http://www.osc.gov.on.ca/About/Governance/ga_index.jsp>

Ontario Securities Commission, 'Regulators Propose Corporate Governance Rules for Issuers' (2004) <http://www.osc.gov.on.ca/Media/NewsReleases/2004/nr_20040116_osc-corporate.jsp>

Sexton, Elisabeth, 'Watchdog Boardroom Blitz', *The Sydney Morning Herald* 16 February 2007, 1

The Select Committee on Company Law, 'The Interim Report of the Select Committee on Company Law' (Legislative Assembly, 1967)

Watts, Jamie, 'Role and Duties of the Superintendent' (Paper presented at the Institute of Arbitrators and Mediators Australia Continuing Professional Development, Adelaide, 24 February 2009)