

## Presentation to Society of Corporate Law Academics Conference

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### **Several issues in directors' duties - Stepping stones and continuous disclosure; the best interests duty and corporate purpose; and the limits of derivative actions**

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#### **Introduction**

In the first essay in her book *Three Essays on Torts* written in 2021, Professor Stapleton distinguished between two approaches to academic law, one of which she describes as “reflexive ... scholarship” which gives priority to analysis of the case law, and the other of which involves the development of “grand theories”. Professor Stapleton makes clear her preference for the former approach and emphasises that, in the context of tort law:

“The resolution of most tort cases does not require the fresh identification and articulation of the common law, but only the application of stable established principle, crystallised in precedent, which will take account of fairness, justice, reasonableness and policy considerations”.

The same could be said of most Australian corporations law cases, with the very important qualification that the results of such cases are now largely driven by statute, even more than cases in tort are now impacted by the civil liability legislation.

I make these general comments by way of introduction to this paper, which is an exercise in specific commentary and does not develop any “grand theory” of corporations law. I should confess that this approach is more a matter of taste, rather than reflecting the principled justifications for that approach identified by Professor Stapleton. With that introduction, I propose to address three issues in respect of directors' duties. First, I will address the statutory duty of care and diligence, the ongoing “stepping stones” debate and the overlap between continuous disclosure and directors' duties. Second, I will address the interaction between the statutory “best interests” and proper purposes duties and wider statements of corporate purpose. Third and finally, I will briefly address issues as to the statutory derivative action.

#### **The duty of care and diligence, “stepping stones” and continuous disclosure**

Claims for breach of the duty of care and diligence are most often brought by the Australian Securities & investment Commission (“ASIC”)<sup>1</sup>, or might be brought by the company, usually after a change of control or change of management or against a

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<sup>1</sup> Well-known examples include proceedings brought by ASIC in relation to the failures of HIH, One.Tel, the James Hardie matter and the failure of Storm Financial: *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253; [2002] NSWSC 171; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; (2009) 75 ACSR 1; [2009] NSWSC 1229; *Morley v Australian Securities and Investments Commission* (2010) 81 ACSR 285; [2010] NSWCA 331; *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345; (2012) 88 ACSR 246; [2012] HCA 17; *Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261; (2020) 144 ACSR 107; [2020] FCAFC 52.

former director or employee<sup>2</sup>, or by a liquidator.<sup>3</sup> They could also be brought in a statutory derivative action, which I address below, or in an oppression claim.

Section 180 of the *Corporations Act* 2001 (Cth) ("*Corporations Act*") deals with a director's duty of care and diligence. That section requires a director or other officer of a corporation to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in the corporation's circumstances and occupied the office held by, and had the same responsibilities within the corporation as, the director or officer. The statutory duty of care and diligence under that section overlaps with directors' duty of care arising at general law. The cases indicate that a contravention of that section generally requires that an act or omission involve a reasonably foreseeable risk of harm to the company's interests, and that risk of harm must be balanced against the potential benefits that could reasonably be expected to accrue to the company from that conduct.<sup>4</sup>

There has been controversy, at least in the academic commentary<sup>5</sup>, as to the application of this approach where the alleged breach of directors' duties arises from director's conduct in respect of a company's contravention of the *Corporations Act* or another statutory regime. Academic commentary which has characterised these cases as involving several "stepping stones":

"The first stepping stone involves an action against the company for contravention of the *Act*. The establishment of corporate fault then leads to a second stepping stone; a finding that by exposing their company to the risk of criminal prosecution, civil liability or significant reputational damage, directors contravened their statutory duty of care with the attendant civil penalty consequences."<sup>6</sup>

I should here note that the so-called "stepping stones" are arguably no more than issues that would typically arise in any claim for breach of directors' duties, namely the nature of the allegedly wrongful conduct (here, the conduct alleged to have breached another section of the *Act*); the materiality of that conduct and whether it caused loss or damage to the corporation; and whether it was a breach of the relevant statutory duty. The

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<sup>2</sup> For example, *Vanguard Financial Planners Pty Ltd v Ale* (2018) 354 ALR 711(2018) 125 ACSR 1; [2018] NSWSC 314; *Taxa Australia Pty Ltd v Wang* (2018) 130 ACSR 531; [2018] NSWSC 1412; *Pages Property Investments Pty Ltd v Boros* [2020] NSWSC 1270.

<sup>3</sup> For an example in the Supreme Court of New South Wales, *Re Waterfront Investments Group Pty Ltd (in liq)* (2015) 105 ACSR 280; [2015] NSWSC 18.

<sup>4</sup> *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395.

<sup>5</sup> A Herzberg and H Anderson, "Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability" (2012) 40 *Fed Law Rev* 181; T Bednall and P Hanrahan, "Officers' Liability for Mandatory Disclosure: Two Paths, Two Destinations" (2013) 31 *C&SLJ* 474; AJ Black, "Directors' Statutory and General Law Accessory Liability for Corporate Wrongdoing" (2013) 31 *C&SLJ* 511; R Teele Langford, "Directors' Duties: Corporate Culpability, Stepping Stones and Mariner: Contention Surrounding Directors' Duties Where the Company Breaches the Law" (2016) 34 *C&SLJ* 75; M McGregor, "Stepping Stone Liability and the Directors' Statutory Duty of Care and Diligence" (2018) 36 *C&SLJ* 245; A Zhou, "A Step Too Far? Rethinking the Stepping Stone Approach to Officers' Liability" (2019) 47 *Fed L Rev* 151; C Carr and R Cunningham, "A Step too far? The 'stepping stone' approach and 180(1) of the Corporations Act 2001 (Cth)" (2019) 34 *AJCL* 58; P Hanrahan & T Bednall, "From Stepping Stones to Throwing Stones: Officers' Liability for Corporate Compliance Failures after Cassimatis" (2021) 49 *Fed Law Rev* 380; I Ramsay & M Webster, "An analysis of the use of stepping stones liability against company directors and officers" (2021) 50 *Aust Bar Rev* 168.

<sup>6</sup> Herzberg & Anderson, 182; see also *Australian Securities & Investments Commission v Fortescue Metals Group Ltd* (Full Court of the Federal Court) per Keane CJ at [10].

Courts have rightly rejected a broader proposition that *any* contravention of the *Corporations Act* necessarily involves a breach of director's duties.<sup>7</sup> However, there are now many cases that treat a failure to prevent a contravention of the *Corporations Act*, or taking steps that would give rise to such a contravention, as a breach of directors' duties on the facts of the particular case.<sup>8</sup>

I will first address some of the earlier case law, before turning to the academic commentary and a recent example of the application of this approach in continuous disclosure cases. An early case in this category was *Australian Securities & Investment Commission v Narain* (2008) 169 FCR 211; (2008) 66 ACSR 688; [2008] FCAFC 120, where the Full Court of the Federal Court held that the chief executive officer of a listed company had contravened the duty of care and diligence under s 180 of the *Act* in respect of the release of a misleading statement to Australian Securities Exchange. Directors were also found to have breached the duty of care and diligence under s 180 of the then *Corporations Law*, in circumstances that also gave rise to contraventions by the corporation, in the James Hardie proceedings<sup>9</sup> and the Centro proceedings.<sup>10</sup>

An ultimately unsuccessful claim was also framed in that way in *Australian Securities & Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364; (2011) 81 ACSR 563; [2011] FCAFC 19. The Full Court of the Federal Court held that announcements made by the company contravened the misleading and deceptive conduct prohibition; that ASIC's case for breach of the continuous disclosure provisions also succeeded, because the company had not corrected the misleading statements the Full Court had found it had made; that company's chief executive was involved in the contraventions of the continuous disclosure and misleading and deceptive conduct provisions; and that these matters also gave rise to a contravention of the duty of care and diligence under s 180 of the *Act*. The Full Court of the Federal Court's decision that liability was established was overturned by the High Court in *Forrest v Australian Securities & Investments Commission* (2012) 91 ACSR 128; (2012) 91 ALR 399; [2012] HCA 39, which rejected their factual basis in the finding that the relevant announcements were misleading or deceptive or likely to mislead or deceive.

This issue then arose at first instance and on appeal in the proceedings against the directors of Storm Financial, Mr and Mrs Cassimatis. At first instance in *Australian*

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<sup>7</sup> *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052; *Australian Securities & Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623; [2007] FCA 973 at [27]; *Australian Securities & Investments Commission v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1; [2008] NSWSC 1224 at [51].

<sup>8</sup> *Australian Securities and Investments Commission v Mariner Corp* (2015) 241 FLR 502; 327 ALR 95; 106 ACSR 343; [2015] FCA 589; *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023; at [539].

<sup>9</sup> *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; (2009) 71 ACSR 368; [2009] NSWSC 287; *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205; (2010) 81 ACSR 285; [2010] NSWCA 331 (Court of Appeal); *Australian Securities and Investments Commission v Hellicar* (2012) 286 ALR 501; (2012) 88 ACSR 246; [2012] HCA 17; *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370. In *Shafron v Australian Securities and Investments Commission* [2012] HCA 18; (2012) 286 ALR 612; (2012) 88 ACSR 126, the High Court also upheld a finding that the company secretary/general counsel had breached s 180 of the *Corporations Law* by failing to provide adequate advice to the company's board and chief executive officer in respect of compliance with its disclosure obligations. For commentary, see T Bednall & V Ngomba, "The High Court and the C-suite: Implications of Shafron for company executives below board level" (2013) 13 C&SLJ 6.

<sup>10</sup> *ASIC v Healey* (2011) 83 ACSR 484; [2011] FCA 717; and, as to penalty, *ASIC v Healey (No 2)* (2011) FCR 430; [2011] FCA 1003.

*Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023, Edelman J (then sitting in the Federal Court of Australia) held that Mr and Mrs Cassimatis had contravened s 180 of the *Act* in exercising their powers as directors of Storm in a manner that caused or permitted (by omission) Storm to contravene the suitability requirements in former s 945A of the *Act* by giving inappropriate advice to be given by that entity to the class of investors who were, inter alia, retired or close to retirement and had little or no prospect of rebuilding their financial position if they suffered substantial loss.

On appeal in *Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261; (2020) 144 ACSR 107; [2020] FCAFC 52, Mr and Mrs Cassimatis challenged both Edelman J's finding that Storm had contravened former s 945A of the *Act* and his Honour's finding that they had contravened s 180 of the *Act*. The majority (Greenwood and Thawley JJ) upheld both findings and held that the Mr and Mrs Cassimatis had breached their duty by failing to guard against foreseeable harm to Storm Financial arising from the contravention of former s 945A of the *Act*.

Greenwood J observed (at [79]) that:

"The contraventions of the particular sections of the *Act* by Storm were, of course, material to the foreseeable risk of serious harm to Storm which the appellants, as a matter of primary obligation on their part, were required to guard against, in the exercise of their powers of management and the discharge of their duties of management, by exercising the required statutory degree of objective care and diligence that a reasonable person would exercise in their position, in the corporation's circumstances and having the same responsibilities within the corporation as the appellants, particularly having regard to the degree of control the appellants exercised over Storm ... Had ASIC not been able to establish conduct that engaged contraventions of the sections of the *Act* by Storm as found, it would have been difficult, if not impossible, to sustain the contention that the appellants engaged in a contravention of s 180(1) by failing to guard against a foreseeable risk of serious harm to Storm which was said to have arisen out of such contraventions. *Importantly in this context, shorthand phrases such as stepping stones to liability on the part of a director or officer are unhelpful and apt to throw sand in the eyes of the analysis. The appellants were not found to have contravened s 180 of the Act because the corporation contravened the Act. The contraventions of the Act by Storm were a necessary element of the harm, but not sufficient by themselves to result in a contravention of s 180 by the appellants as directors. The foundation of the liability of the appellants resides entirely in their own conduct in contravention of the objective degree of care and diligence.*" [emphasis added]

Greenwood J then observed (at [178]) that:

"the contravention of s 180(1), by [Mr and Mrs Cassimatis], did not arise simply because the corporation contravened [former s 945A]. The contraventions by Storm arose out of a primary failure on the part of the appellants, as directors, to act in accordance with the objective standard of care and diligence required of them by s 180(1), and features of that conduct engaged conduct which brought about the contraventions by Storm of the identified sections of the *Act*."

Thawley J similarly observed (at [464]-[465]) that:

"ASIC's case was that the conduct of Mr and Mrs Cassimatis as directors of Storm failed to meet the standard of care and diligence required by s 180(1). Their conduct exposed Storm to a foreseeable risk of harm, in circumstances where reasonable directors, with the same responsibilities as Mr and Mrs Cassimatis, in Storm's circumstances, would not have done so or would have taken some preventative action. The material facts

which gave rise to the foreseeable harm included that their conduct caused Storm to contravene the [Act]. The issues which arise under s 180 require attention to the circumstances as they existed at the time of the exercise of powers and discharge of duties. A breach of s 180(1), in situations broadly analogous to the present, might potentially be demonstrated by showing that conduct exposed the company to relevant jeopardy because it was likely to result in future contravention by the company or that the direct and immediate consequence of the conduct was that the company contravened the Corporations Act or some other law. It might potentially be demonstrated by showing that a failure to act was likely to result in contravention by the company or failed to bring a continuing contravention to an end. Whether or not there was a failure to meet the standard prescribed by s 180(1) depends on the particular facts.

*A breach of s 180(1) lies in the director's conduct in not meeting the relevant standard in light of such matters. A company's contravention might be a material fact relevant to the question whether a director failed to meet the standard mandated by s 180(1) by exposing a company to risk; but it is not an essential ingredient of liability in the way it is in a case of accessorial liability."* [emphasis added]

Thawley J also observed (at [465]) that Edelman J had approached the matter as a question of direct liability of Mr and Mrs Cassimatis for failing to meet the standard of care and diligence set by s 180(1) and not as a "backdoor method" for visiting accessorial liability upon them for a contravention by Storm. Rares J agreed with the majority in upholding the finding at first instance that Storm had contravened former s 945A of the Act but dissented as to the finding of a contravention of s 180 of the Act. With respect to those who take a different view, I want to suggest that the majority's reasoning here put these issues in their proper context.

Turning now to the debate in the academic commentary, in an early article addressing the issue in 2012<sup>11</sup>, Herzberg and Anderson were generally supportive of an approach that allows a finding of breach of directors' duties where directors permit the company to contravene the law, as an alternative to liability under specific statutory regimes. Mr Bednall and Professor Hanrahan, in their 2013 article<sup>12</sup>, argue that the consequences of imposing derivative liability on directors should not be more harsh than the consequences of a primary contravention of specific legislation by the director.

Ms McGregor (in 2018<sup>13</sup>) contends that the "stepping stone" case law is not an unprincipled expansion of the statutory duty of care; that a contravention of s 180 of the Act can be established where it is foreseeable that the director's conduct permitting the company to contravene the Act would jeopardise the company's interests and that conduct falls short of the standard of care and diligence required by law; and that amounts to primary rather than derivative liability.

On the other hand, Ms Zhou, in 2019<sup>14</sup>, characterises the "stepping stone" approach as a "novel" interpretation of general duties of directors and argues that:

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<sup>11</sup> Herzberg and Anderson, "Stepping-Stones – from corporate fault to directors? and civil liability" (2012) 40 *Fed Law Rev* 181.

<sup>12</sup> T Bednall and P Hanrahan, "Officers' liability for corporate disclosure: Two paths two destinations?" (2013) 31 *C&SLJ* 474.

<sup>13</sup> M McGregor, "Stepping stone liability and the directors' statutory duty of care and diligence" (2018) 36 *C&SLJ* 245.

<sup>14</sup> A Zhou, "A Step Too Far? Rethinking the stepping stone approach to officers' liability" (2019) 47 *Fed L Rev* 151.

*"It is doubtful whether the approach represents a legitimate interpretation of the general statutory duties, to the extent that it subverts several existing routes to officers liability and remedies under the [Act]."*

It is not apparent to me why it is not "legitimate" to characterise a failure to comply with statutory obligations as a breach of directors' duties, as any other failure by a director may also amount to a breach of directors' duties; and it is not apparent to me why the availability of a parallel remedy "subverts", as distinct from supplementing, the existing statutory regime.

Carr and Cunningham, also in 2019<sup>15</sup>, contend that the "stepping stone" approach is inconsistent with the proper construction of s 180 of the Act, risks the imposition of "back door" liability on directors and is unnecessarily ambiguous. This contention finds limited support in the cases which have found a breach of the section from conduct falling within the concept.

In a 2019 article<sup>16</sup>, Bathurst CJ (as he then was) and Ms Wootton note that a company's breach of the law is neither necessary nor sufficient to give rise to directors' liability at general law or by statute, and recognise the potential overlap between liability imposed under the Corporations legislation and liability imposed under specific legislation, such as environmental protection legislation, workplace relations legislation and health and safety legislation. They also rightly recognise that the liability imposed on a director under a "stepping stone" analysis is not derivative in nature and that different causes of action may lead to different consequences.

In a further article in 2021<sup>17</sup>, Professor Hanrahan and Mr Bednall maintained their earlier opposition to the "stepping stone" approach, and preferred Rares J's criticism of that approach in the minority in *Cassimatis* to the majority's approval of that approach. They argue (p 400) that:

"It is disingenuous to proceed to decide these cases on the basis that responsibility for harm suffered by a corporate as a consequence of a breach of the law is no different from harm suffered by a company as a result of other causes that may be attributed to a breach of the duty of care and diligence by the directors, and therefore that the stepping-stone cases are not actually a form of accessorial liability."

I am not persuaded by this proposition. No doubt, an allegation of primary liability for breach of directors' duties could be made against a director in circumstances that the director could also be contended to be an accessory to the company's breach, either under the *Corporations Act* or under other statutory regimes; but that does not transform primary liability into accessorial liability; and it is not apparent to me why it is "disingenuous" to describe liability that is in fact primary liability as having that character. Again, this proposition seems to me to reduce to the complaint that, although it is a commonplace that a particular breach may give rise to more than one cause of action, primary liability should not be available where accessorial liability is available.

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<sup>15</sup> C Carr and R Cunningham, "A step too far? The 'stepping stone' approach and s 180(1) of the *Corporations Act* 2001 (Cth) (2019) 34 *AJCL* 58.

<sup>16</sup> TF Bathurst and NA Wootton, "Directors' and Officers' Duties in the age of regulation?" in P Hanrahan and A Black (eds), *Contemporary Issues in Corporate and Competition Law: Essays in honour of Professor Robert Baxt AO* (2019), pp 3-24.

<sup>17</sup> P Hanrahan & T Bednall, "From stepping stones to throwing stones: Officers' liability for corporate compliance failures after *Cassimatis*" (2021) 49 *Federal Law Rev* 380.

Professor Hanrahan and Mr Bednall also argue that this approach is an “end run” that allows ASIC:

“to obtain orders against officers using the negligence path in circumstances where the same orders would not have been available (in respect of the same conduct) via the involvement path.”<sup>18</sup>

They argue that a finding of breach of directors’ duties exposes a director to civil penalty liability, which would not arise, for example, from a claim for knowing involvement in a misleading and deceptive conduct case. A possible response to this criticism is that it is commonplace in civil and regulatory litigation that different causes of action lead to different outcomes and different remedies. It is arguably neither surprising nor inappropriate that claims for breach of directors’ duties and for civil penalties are pursued in these cases, where they were properly available (much, of course, turns on that somewhat open-ended qualification). There is no particular reason to assume that the natural order of things is that civil penalty orders should not be available in respect of such conduct, and the legislature appears to take the contrary view, since the range of provisions subject to civil penalties is steadily expanding. A regulator that seeks such penalties also typically sets the bar higher for its success, since the Courts will have regard to the *Briginshaw* standard in determining civil penalty claims.<sup>19</sup>

Turning now to recent cases concerning continuous disclosure, this approach has also recently been applied in this context. The continuous disclosure regime was, of course, introduced by the *Corporate Law Reform Act* 1992 (Cth), although the fault elements in respect of accessorial liability to a contravention have been amended, more than once, since that time. In *Australian Securities and Investments Commission v Vocation Ltd (in liq)* (2019) 371 ACR 155; 136 ACSR 339; [2019] FCA 807 (“*Vocation*”), the Federal Court of Australia considered the scope of a director’s liability for breach of duty in the context of continuous disclosure and the provision of information to underwriters in respect of a capital raising. Nicholas J there held that *Vocation* had contravened the continuous disclosure requirements under s 674 of the *Act* and had also contravened the prohibition on misleading or deceptive conduct in s 1041H of the *Act* in its answers to a diligence questionnaire in respect of the capital raising. His Honour also held that *Vocation*’s chief executive officer had contravened the duty of care and diligence under s 180 in causing or permitting *Vocation*’s contravention of both provisions. His Honour also held that *Vocation*’s chair had accepted information provided by management uncritically and without challenging the correctness of the advice or the assumptions on which that advice was given and had contravened s 180 of the *Act* for part of the relevant period.

A similar finding was also reached in *Australian Securities & Investments Commission v Big Star Energy Ltd (No 3)* (2020) 359 ALR 17; 148 ACSR 334; [2020] FCA 1442. ASIC there alleged that Big Star Energy Ltd (“Big Star”) had breached its continuous disclosure obligations under s 674 of the *Act* by announcing that it had entered into two sale agreements in respect of significant assets, without disclosing the identity of the purchaser or the fact that it had not assessed the prospect of the purchaser completing the sale agreement or that the purchaser had advised that it had funding in place in respect of only one of those agreements. Banks-Smith J found that Big Star had

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<sup>18</sup> Bednall & Hanrahan, 400.

<sup>19</sup> *Briginshaw v Briginshaw* [1938] 60 CLR 336 at 361 – 362; *Wilson HTM Investment Group Ltd v Pagliaro* [2012] NSWSC 1068 at [102].

contravened s 674(2) of the *Act* by failing to notify ASX of three matters, the identity of the purchaser under the relevant agreements, that it had not verified or determined the purchaser's capacity to complete the agreements and that it had been informed by the purchaser that it had not yet received all funding approvals necessary to complete the purchase of the assets. Her Honour found that it was not established that Mr Cruickshank had actual knowledge that the information was of such a nature that it had to be disclosed, and his knowing involvement in the company's contravention of the continuing disclosure obligation was therefore not established. However, her Honour found that Mr Cruickshank had contravened s 180 of the *Act* by failing to exercise reasonable care and diligence in respect of the disclosure, that failure had caused Big Star to contravene the continuous disclosure requirements under s 674 of the *Act* and it was foreseeable that that contravention might harm Big Star's interests. This approach is similar to that taken by Nicholas J in *Vocation*. Again, that approach might be described as involving "stepping stones" reasoning, but is ultimately no more than a finding of breach of directors' duties in the particular case, where that breach arises from a failure to comply with another statutory requirement. It does, however, show that liability may be established on that basis where accessorial liability would not be established. An appeal from that decision was dismissed in *Cruickshank v Australian Securities and Investments Commission* (2022) 403 ALR 67; [2022] FCAFC 128; and the High Court declined Mr Cruickshank's application for special leave to appeal from that decision.

In *Australian Securities and Investments Commission v Holista Colltech Ltd* [2024] FCA 244, Derrington J made declarations of a contravention of s 674(2) of the *Corporations Act* (as to which partial admissions were made) in respect of a company's failure to notify ASX of adverse information concerning orders for its product and associated revenue and also held, inter alia, that the company's managing director and chief executive officer had (as he admitted) breached his duty of care and diligence under s 180 of the *Act* in failing to ensure that announcements he approved for submission to ASX were not misleading or deceptive or likely to mislead or deceive, and failing to qualify, withdraw, or correct such announcements. In *Australian Securities and Investments Commission v Isignthis Ltd* [2024] FCA 669, a company was held to have breached its continuous disclosure obligations in respect of its failure to disclose the termination of its relationship with a major credit card provider. Its director was held to have breached s 674(2A) of the *Act*, s 1309 of the *Act* by providing false and misleading information to ASX and to have breached the duty of care and diligence under s 180 of the *Act*. These are also arguably "stepping stone" cases.

### **The best interests duty and corporate purpose**

As this audience obviously knows, s 181 of the *Corporations Act* requires a director or officer of a corporation to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation and for a proper purpose. That section overlaps with the director's general law duties to act for proper purposes and in good faith and in the company's interests. The bulk of authority indicates that this section requires a director to act in what he or she honestly believes to be the best interests of the company, and that the substantial purpose for which they discharge their duties must be a proper one, a matter which is determined on an objective approach.<sup>20</sup>

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<sup>20</sup> *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; [2012] WASCA 157 per Lee AJA and Drummond AJA, although Carr AJA treated that question as primarily subjective; *Re*

This section requires directors and officers to exercise their powers and duties in good faith in the best interests of the *corporation*, although there is an important issue as to the extent to which the interests of the “corporation” are identical to the interests of its present (and likely future) shareholders.<sup>21</sup> Several cases have treated the best interests of the company and the best interests of shareholders as coincident.<sup>22</sup> In *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199 at 217, Isaacs J observed that a constitutional power which permitted directors to refuse the registration of a share transfer

“must be exercised, as all such powers must be, bona fide – that is, *for the purpose for which it was conferred*, not arbitrarily or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole.”

In *Peters’ American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 412, Dixon J observed that:

“The ‘company as a whole’ is a corporate entity consisting of all of the shareholders.”

However, his Honour also noted the difficulty in applying that concept where, for example, an exercise of majority shareholder power would adversely affect the interests of the minority.

In *Greenhalgh v Ardenne Cinemas Ltd* [1951] Ch 286 at 291, Lord Evershed MR observed that:

“I think it is now plain that ‘bona fide for the benefit of the company as a whole’ means not two things but one thing. It means that the shareholders must proceed upon what, in [his or her] honest opinion, is for the benefit of the company as a whole. The second thing is that the phrase, the ‘company as a whole’ does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators [ie shareholders]: It means the corporators as a general body.”

In *Provident International Corporation v International Leasing Corp Ltd* [1969] 1 NSW 424 at 437, 440, Helsham J observed that directors could consider the interests of current and future members in deciding how to promote the company’s best interests.

In a fuller discussion at first instance in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1; (2008) 70 ACSR 1; [2008] WASC 239 at [4389], Owen J first addressed the question to whom directors’ duties are owed and observed that:

A director’s fiduciary duties are owed to the company, not to the shareholders (or to creditors): *Esplanade Developments Ltd v Divine Holdings Pty Ltd* [1980] WAR 151 at 157; 4 ACLR 826 at 831. While the corporate veil may now appear threadbare (largely as a result of legislative intervention), the doctrine of separate legal personality survives. For example, in *Bell v Lever Bros Ltd* [1932] AC 161, Lord Atkin, at 228, indicated that this was so even in relation to a shareholder who owned 99% of the issued capital. The

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*Colorado Products Pty Ltd (in prov liq)* above at [421]; *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552 at [494]; *Hart Security Australia Pty Ltd v Boucousis* [2016] NSWCA 307; (2016) 339 ALR 659 at [75] (per Meagher JA, with whom Bathurst CJ and Beazley P agreed).

<sup>21</sup> P Hanrahan, Companies, Corporate Officers and Public Interests: Are we at a Legal Tipping Point? (2019) 36 C&SLJ 665.

<sup>22</sup> For review of the case law, J Edelman, “The Future of the Australian Business Corporation: A Legal Perspective” (2020) 14 *The Judicial Review* 199.

principle has been confirmed by the High Court in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; 180 ALR 249; 38 ACSR 122; [2001] HCA 31 at [18] (*Pilmer*) where, in a joint judgment, McHugh, Gummow, Hayne and Callinan JJ said:

[18] It may be readily accepted that directors and other officers of a company must act in the interests of the company as a whole and that this will usually require those persons to have close regard to how their actions will affect shareholders. It may also be readily accepted that shareholders, as a group, can be said to own the company. But the company is a separate legal entity and the question ... is what damage (if any) did it suffer ... The question is not whether the shareholders ... were adversely affected."

His Honour then turned to the content of the duty and observed (at [4393]-[4395]) that:

"This does not mean that the general body of shareholders is always and for all purposes the embodiment of "the company as a whole". It will depend on the context, including the type of company and the nature of the impugned activity or decision. And it may also depend on whether the company is a thriving ongoing entity or whether its continued existence is problematic. In my view the interests of shareholders and the interests of the company may be seen as correlative not because the shareholders are the company but, rather, because the interests of the company and the interests of the shareholders intersect. This, it seems to me, is consistent with what was said in authorities such as *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 438-40 and *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614 at 620 (*Ashburton*). I think this is the sense in which the well-known statement by Street CJ in *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 at 730; 10 ACLR 395 at 401 (*Kinsela*) is to be understood:

In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise.

Modern theories of corporate governance rest (at least in part) on the proposition that an objective of the corporation is to increase shareholder value. But especially in large corporations with many shareholders ranging from experienced investor institutions to "mums and dads", there may be practical difficulties in identifying the "interests of shareholders" as the fixing point against which to identify a duty. Sectional interest may have to be taken into account and balanced. In this respect I adopt the comment in JD Heydon, "Directors' Duties and the Company's Interests", *Equity and Commercial Relationships*, P Finn ed, Law Book Co, Sydney, 1987, pp 134-5:

The duty which is owed to the company is not to be limited to, or to be regarded as operating alongside, a duty to advance the interests of shareholders. There is no superadded duty to shareholders ... And the directors' duty to the company is not to be limited to the duty to consider shareholders, because, for example, businessmen in their daily talk reveal that they are constantly considering, without impropriety, interests other than those of the shareholders. To consider only the short-term interests of the present shareholders would mean that every dollar available for dividend should be paid out; that no attempt to re-invest funds or expand the company's market by price cutting could be allowed.

The law prevents directors from exercising their powers merely to maintain control, or otherwise advance their self interest, or to advance third party interests, or to effectuate some bye motive. But the law permits many interests and purposes to be advantaged by company directors, as long as there is a purpose of gaining in that way a benefit to the company. [Footnotes omitted.]

This is where the relevant distinction arises. It is, in my view, incorrect to read the phrases “acting in the best interests of the company” and “acting in the best interests of the shareholders” as if they meant exactly the same thing. To do so is to misconceive the true nature of the fiduciary relationship between a director and the company. And it ignores the range of other interests that might (again, depending on the circumstances of the company and the nature of the power to be exercised) legitimately be considered. On the other hand, it is almost axiomatic to say that the content of the duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored.”

More recently, in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills (a firm)* (2018) 128 ACSR 324 at [749] Elliott J at [748] questioned whether the statement in *Greenhalgh* represented the law and referred to *Provident International Corporation* and *Bell Group* as authority that “the general body of shareholders does not always, and for all purposes, embody ‘the company as a whole’”.

The application of the best interests and proper purposes duty obviously overlaps with the debate, in Australia and internationally, between “shareholder value”, “stakeholder” interests and “enlightened shareholder value” models of a corporation and, now, a further debate as to whether a company should have an identified corporate purpose. Mr Ang, in an article written in 2021, also provides useful descriptions of these “models as follows:

“The principal elements of the ‘shareholder primacy’ model are that: (i) control over the corporation should rest with the shareholders; (ii) directors should be required to manage the corporation in the interests of its shareholders only; (iii) other corporate stakeholders, including employees, suppliers and customers, should have their interests safeguarded by contractual and regulatory means instead of participation in corporate governance; (iv) minority shareholders should have strong protection from exploitation by controlling shareholders; and (iv) the key measure of shareholders’ interests is the market value of the publicly traded corporation’s shares. ...

The ‘stakeholder’ model ... posits that the purpose of the corporation is to create value for stakeholders ... which include shareholders, employees, creditors, customers, suppliers and communities. ... Stakeholder theorists argue that stakeholderism and shareholderism are not mutually exclusive because taking into account stakeholder interests and managing stakeholder relationships are not simply about corporate social responsibility but because they are necessary to maximise shareholder value. ...

[Enlightened shareholder value] comprises four elements:

- (i) The board must act in good faith in the best interests of the company, a duty which is owed not to the shareholders but to the company as a separate legal entity;
- (ii) The best interests of the company refer to the enhancement of long-term shareholder value and sustainability (as opposed to short-term profit maximisation);
- (iii) In enhancing long-term shareholder value and sustainability, the directors must consider the interests of the company’s stakeholders, which include employees, suppliers, customers, creditors, regulators, the environment and the wider community; and

- (iv) management and control remain with the board and shareholders respectively, and stakeholders' interests are not directly enforceable."<sup>23</sup>

Justice Edelman, writing extra-judicially in 2020, has observed that:

"The idea that a corporation may have moral responsibilities to a wider subsection of the community than just its shareholders is not new. Although it is actually much older than this, the debate is best known for having started in the early 1930s, when Berle and Merrick Dodd wrote of the challenges of identifying who should be the beneficiaries of directors' exercises of corporate power. At least over the last eight decades, the debate has focused heavily on comparisons between the shareholder primacy theory, namely the theory that a company exists for the purpose of generating profits for shareholders, and the stakeholder theory, being the theory that directors of companies must consider and accommodate a broader range of stakeholder interests including employees, contracting counterparties, communities affected by the operations of the company, and the public more broadly.

In more recent times, there have been attempts to reconcile the shareholder and stakeholder theories on the basis that a corporation could justify acting according to the stakeholder theory because by doing so it could ensure long-term financial success by having social licence to operate, thereby minimising the amount of applicable regulation and the gusto of regulatory enforcement." [footnotes omitted]<sup>24</sup>

Justice Edelman has also noted that there has, of course, been a longstanding debate in the American academic commentary as to the extent to which a company can take into account stakeholder interests.<sup>25</sup> There have also been some tentative indications of a move towards a more expansive view as to stakeholder interests in America and, in 2019, the Business Roundtable, an association of company chief executives and directors, revised its earlier formulation of the corporate purpose to include a "fundamental commitment" to deliver value to the corporation's stakeholders. There is an ongoing controversy in the American academic literature as to whether that movement is genuine or amounts to "window dressing", and those developments have also generated political controversy.

Some commentators accept that Australia, like the United States, is properly characterised as a "shareholder primacy" jurisdiction. Professor Hanrahan takes a more nuanced position, accepting that Australian law supports shareholder primacy, with the qualification that shareholder and broader community interests can and should be taken into account in promoting the company's financial success. On the other

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<sup>23</sup> L Ang, "The start of history for corporate law: Shifting Paradigms of Corporate Purpose in the Common Law" (2021) 38 *Wis Int'l LJ* 427 at 434-435.

<sup>24</sup> Edelman, "The Future of the Australian Business Corporation: A Legal Perspective", note #, 200.

<sup>25</sup> AA Berle Jr, "Corporate Powers as Powers in Trust" (1931) 44 *Harv L Rev* 1049; Merrick Dodd, Jr, "For whom are corporate managers trustees?" (1932) 45 *Harv L Rev* 1145; L M Fairfax, "Doing well while doing good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries" (2002) 59 *Wash and Lee L Rev* 409 at 432; L M Fairfax "The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric in Corporate Norms" (2006) 31 *J Corp L* 675; W Savitt & A Kovvali, "On the promise of stakeholder governance: A response to Bebchuk and Tallarita" (2021) 106 *Cornell L Rev* 1881; L M Fairfax, "Stakeholderism, Corporate Purpose and Credible Commitment" (2022) 108 *Va L Rev* 1163; L Bebchuk, Kastel and R Tallarita, "Stakeholder Capitalism in the time of COVID" (2023) 40 *Yale J on Reg* 60; A Kovvali, "Stakeholderism silo busting" (2023) 90 *U Chi LR* 203; AM Lipton, "Will the real Shareholder Primacy please stand up?" (2024) 117 *Harv L Rev* 1584; WW Bratton, "Shareholder Primacy versus Shareholder Accountability" (2024) 47 *Seattle UL Rev* 405. For a useful discussion of the various concepts of "shareholder primacy" see T Connor & A O'Beid, "Clarifying Terms in the debate regarding 'Shareholder Primacy'" (2020) 35 *AJCL* 276.

hand, Professor du Plessis contends that the statutory duty to act in a company's best interests is a duty to the company as a separate legal entity, not necessarily coincident with that of its shareholders.<sup>26</sup> Professor Keay and Justice Glazebrook, writing extra-judicially, support an "entity primacy" view which requires directors to enhance the interests of the entity rather than its shareholders as its owners.<sup>27</sup>

The duty to act in the corporation's interests and wider purposive obligations can often, but not always, be reconciled in a practical way and it seems that directors of Australian public companies have generally not, in practice, felt constrained from having regard to community or stakeholder interests by the best interests and proper purposes requirements.<sup>28</sup> The outer limit to that reconciliation is highlighted by Professor Hanrahan's question whether a corporation is obliged to act ethically and responsibly only where it is in the corporation's interests, broadly or narrowly defined to do so, or whether the obligation to act ethically and responsibly is an absolute obligation, applying even where to act in that manner would be detrimental to the success of the corporation's business. There is no difficulty with that question where acting ethically and responsibly will advance the company's business, but what if that is not the case? For example, do directors breach their duties by permitting a company to breach environmental legislation or join a cartel where it will be profitable to do so, after taking into account any adverse financial and reputational consequences if the company is caught?

The Australian formulation of the statutory best interests and proper purpose duties differs from the English and New Zealand statutory provisions dealing with these duties, and the difference reflects the ongoing debate at the interests that may be properly taken into account by company directors. This issue has been recognised in Australia at since the Corporations and Markets Advisory Committee's 2006 report dealing with the social responsibility of corporations which recognised the interest of stakeholders and the need to balance longer term societal impacts against short term financial gain but did not support an amendment to the statutory best interest and proper purposes duties to incorporate these interests.<sup>29</sup> Successive editions of the ASX Corporate Governance Council's Corporate Governance Principles have also recognised the need for listed companies to act ethically and responsibly.

By contrast with s 181 of the *Corporations Act*, the English statutory regime expressly acknowledges other stakeholder interests, although its practical application may not be very different from the Australian approach. Section 172 of the *Companies Act 2006* provides that:

"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

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<sup>26</sup> JJ Du Plessis, "Directors' Duties to act in the best interests of the corporation: 'Hard cases make bad law'" (2019) 34 *AJCL* 3.

<sup>27</sup> A Keay, "Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model" (2008) 71 *MLR* 683; J Glazebrook, "Meeting the challenge of corporate governance in the 21<sup>st</sup> century" (2019) 34 *AJCL* 106 at 109.

<sup>28</sup> As to directors' attitudes, S Marshall and I Ramsay, "Stakeholders and Directors' Duties: Law, Theory and Evidence" (2012) 35 *UNSWLJ* 291.

<sup>29</sup> For comment, see P Hanrahan "Corporate Governance in these "exciting times"" (2017) 22 *AJCL* 142 at 144.

- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.”<sup>30</sup>

Section 131 of the *Companies Act* 1993 (NZ) similarly requires that a director, when exercising his or her powers or performing his or her duties, must act in good faith and in what the director believes to be the best interests of the company. New Zealand case law had left open application of shareholder and stakeholder primacy models under that section. In *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2021] 1 NZLR 43; [2020] NZSC 100 at [28]-[31], Glazebrook J identified three possible approaches without deciding between them:

“It is the duty of directors to act in the best interests of the company. The traditional view is that this requirement is fulfilled by directors acting in the best interests of the shareholders as a whole. This is known as the shareholder primacy model.

The main competing model of corporate governance is the stakeholder model, whereby the interests of those with some stake in the company and its business (such as employees, creditors and the wider public) should be taken into account by the directors, alongside the interests of shareholders. Wider considerations beyond maximising profits might therefore be acceptable for directors under the stakeholder model.

A third view is that the concentration should be on the company itself. This approach arguably allows other interests to be taken into account more explicitly than under the traditional approach, as long as it is in the best interests of the company to do so.

We do not for the purposes of this appeal need to decide which of the competing models of corporate governance is correct. Even under the traditional approach, it is accepted that the interests of creditors have to be considered where the company is insolvent or nearly insolvent.” [citations omitted]

Subsequent to that decision, s 131(5) was introduced by the *Companies (Directors’ Duties) Amendment Act* 2023 and provides that:

“To avoid doubt, in considering the best interests of a company or holding company for

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<sup>30</sup> For comment, see V Ho, “Enlightened shareholder value: Corporate governance beyond the shareholder-stakeholder divide” (2010) 36 *J Corp Law* 59; R Williams, “Enlightened shareholder value in UK company law” (2012) 35 *UNSWLJ* 360.

the purposes of this section, a director may consider matters other than the maximisation of profit (for example, environmental, social and governance matters).”<sup>31</sup>

There is also an open question, in the Australia law, whether the best interests duty can also be treated as a fiduciary duty at general law. The relationship between a director and company is, of course, a traditional, status-based, fiduciary relationship.<sup>32</sup> However, the High Court has, of course, emphasised that Australian courts only recognise fiduciary duties of proscriptive or prohibitive character, imposing the obligation on the fiduciary not to obtain an unauthorised profit or to be in a position of conflict, and the existence of a fiduciary relationship does not impose a positive legal duty on the fiduciary to act in the beneficiary’s interests.<sup>33</sup> A different result may still be open in the corporations law. In the appeal in *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; [2012] WASCA 157; the majority in the Court of Appeal of the Supreme Court of Western Australia held that the director’s duties to act in good faith and in the company’s interests and for proper purposes, although imposing positive obligations, can nonetheless be characterised as fiduciary, and Carr AJA took substantially the same view.<sup>34</sup> This question was subsequently noted in *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [345]ff, where Edelman J observed that it may be incorrect, on the current state of Australian authorities, to characterise a breach of positive duties by a director, such as duties to act in good faith and in a company’s interests and for proper purposes, as a breach of fiduciary duty. His Honour nonetheless noted (at [348]–[349]) that the High Court “appears to have recognised that there may be a fiduciary prescriptive liability to account, where that liability is associated with a proscriptive fiduciary duty”<sup>35</sup>; that it may be possible to describe the “proper purposes” duty in negative terms, as a duty not to act for collateral purposes; and that the duty or duties to act in good faith in the interests of the company could alternatively be characterised as prescriptive conditions upon the exercise of a fiduciary power.

### Corporate purpose statements

Recent proposals for corporate purpose statements arguably further complicate this issue.<sup>36</sup>

The British Academy, in work led by Professor Mayer, has articulated a wider vision of the purpose of a company’s business as “to profitably solve the problems of people and planet and not profit from causing problems”. In his writings, Professor Mayer has

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<sup>31</sup> For commentary, see L Buckley, “Directors’ Duty of Loyalty and ESG Considerations: Aotearoa New Zealand’s Controversial Companies (Directors’ Duties) Amendment Act 2023 (2024) 39 *AJCL* 323.

<sup>32</sup> *Hospital Products Ltd v United States Surgical Corp* [1984] HCA 64; (1984) 156 CLR 41 per Gibbs CJ at 68. For a sample of the academic literature, see RP Austin, “Fiduciary Accountability for Business Opportunities” in PD Finn (ed), *Equity and Commercial Relationships*, 1987; WMC Gummow, “The equitable duties of company directors” (2013) 87 *ALJ* 753; JD Heydon, “Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?” in S Degeling and J Edelman, *Equity in Commercial Law* (2005) at 187–237; M Pearce, “Company directors as ‘super-fiduciaries’” (2013) 87 *ALJ* 464; Rosemary Teele Langford, *Directors’ Duties: Principles and Application*, 2014.

<sup>33</sup> *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71; *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165 at 197–8.

<sup>34</sup> At [918]–[933] per Lee AJA, at [1956] and [1978] per Drummond AJA. Carr AJA also observed (at [2733]) that he was not prepared to hold, on the present state of authority, that duties to act in the company’s interests were not fiduciary duties.

<sup>35</sup> Referring to *Bofinger v Kingsway Group Ltd* [2009] HCA 44; (2009) 239 CLR 269 at 290.

<sup>36</sup> For commentary, see M Welch et al, “The end of the ‘End of History for Corporate Law’” (2014) 20 *AJCL* 147; EB Rock, “For whom is the corporation managed in 2020? The debate over corporate purpose” (2021) 76 *Bus L* 363.

argued that corporations should be required to articulate a purpose which should be directed to finding ways of solving problems profitably where profits are defined net of the costs of avoiding and remedying problems; that the corporate purpose should not be aspirational or descriptive but should be built around problem-solving; and that a corporation's purpose statement can provide a basis for trust in the firm's commitments to deliver public and private benefits and define its legitimate sources of profits.<sup>37</sup>

Professor Mayer in turn gives several examples of the purpose statements of several companies, put a high level of generality. Kershaw and Schuster point to several examples of corporate purposes, which are plainly not sufficiently specific to provide any real limit to a company's activities, as follows:

“Google – “to organise the world's information and to make it universally accessible and useful.” ...

Unilever – “[To] add vitality to life ... and meet every day needs for nutrition, hygiene and personal care with brands that help people feel good, look good and get more out of life”.

Royal Bank of Scotland “To serve customers well”.<sup>38</sup>

Where purpose statements are put in such general terms, it would only be in an extreme case that a company's conduct would be so inconsistent with its general purpose to give rise to possible liability for misleading or deceptive conduct, consistent with the way in which recent greenwashing cases have been put.<sup>39</sup>

No doubt, the optimist might suggest that wider statements of corporate purpose, even if not legally enforceable, will affect corporate values and the way in which corporate executives and directors approach decisions. Justice Edelman, writing extra-judicially, has also argued that a statement of corporate purpose could be an important consideration in determining whether conduct had met the relevant standard of care for the purposes of directors' liability.<sup>40</sup> He also notes that a statement of a company's purpose, implicitly with sufficient specificity, would assist in identifying whether directors' powers had been improperly exercised, in a way that could give rise to a contravention of s 181 of the *Corporations Act*. These propositions assume a degree of specificity in that statement of purpose, sufficient to determine whether particular conduct was consistent or inconsistent with that statement of purpose, and it is not clear to me that the several examples of corporate purpose statements to which I have referred have

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<sup>37</sup> C Mayer, *Prosperity: Better business makes the greater good*, 2018, pp 22-24; C Mayer, *The Future of the Corporation and the Economics of Purpose*, ECGI, November 2020, C Mayer, “What is wrong with Corporate Law? The purpose of law and the law of purpose”, ECGI, 2022; for commentary, see L Ang, “The Start of History for Corporate Law: Shifting Paradigms of Corporate Purpose in the Common Law” (2021) 38 *Wis Intl LJ* 417; S Marshall and I Ramsay, “Corporate purpose: Legal Interpretations and Empirical Evidence” in T Clarke et al, *The Oxford Handbook of the Corporation*, 2018, 168-193; R Grantham, “People, Planet and Profits: Re-purposing the Company” (2021) 38 *C&SLJ* 250 at 253; D Kershaw & E Schuster, “The Purposive Transformation of Company Law” (2021) 69 *Am J Comp L* 478; JE Fisch and SD Solomon, “Should corporations have a purpose?” (2021) 99 *Tex L Rev* 1309; Bratton, note #, 478-479.

<sup>38</sup> Kershaw and Schuster, note #, 490.

<sup>39</sup> *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 308; *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Ltd* [2024] FCA 850; ASIC Report 763, “ASIC's Recent Greenwashing Interventions”; M Legg, “Greenwashing and Enforcement: The Regulator and Private Litigation” (2024) 39 *AJCL* 366.

<sup>40</sup> Edelman, “The Future of the Australian Business Corporation: A Legal Perspective”, note #.

that degree of specificity.

Professor Grantham has also rightly recognised that this concept of “purpose” appears to be directed to the “end goal” of the corporation, so that the relevant corporate purpose is not directed to whether a company builds mousetraps, but the purpose that it seeks to achieve by doing so. He also notes that the concept of “purpose” appears to be used in the current ASX Corporate Governance Principles in this sense, a relevant to the formulation of a company’s strategic plans and the conduct of its business.<sup>41</sup>

Professor Grantham also recognises the risk that accountability of company management will be diluted if management may determine not only how the company’s interests will be pursued, but what those interests are.<sup>42</sup> Professors Fisch and Solomon have in turn argued that aspirational statements of purpose outside the corporation’s constitution do not provide justification for corporate decisions, particularly decisions which are inconsistent with the pursuit of shareholder value, although they recognise a role for purpose in facilitating a company’s pursuit of agreed business objectives.<sup>43</sup> The business judgment rule, whether in its statutory form or in the form of Courts’ reluctance to exercise commercial judgments in place of managers’ commercial judgments, will also limit any prospect of enforcement of purpose statements or commitments to stakeholder interests.

In a thoughtful article, Kershaw and Schuster argue that a higher level purpose:

“delivers a reordering of the corporate priorities required to support purpose, away from an immediate and ever-present focus on short-term profitability and towards sustainable value creation which also benefits other stakeholders.”

This may be an unduly optimistic view, where it assumes that the purpose which the company adopts will be directed to promoting stakeholder values, rather than narrower financial interests.<sup>44</sup> They also point out, in a somewhat complex statement, that:

“meaningful purpose companies can only exist where they operate within a purposive ecology which mediate ... shareholder pressures and thereby allows companies to make internal and external credible commitments to their mission purpose”.

They recognise that that can be achieved where, for example, a controlling shareholder is committed to the company’s purpose statement or, possibly, where a founder or well-regarded senior managers have sufficient influence over shareholders to achieve commitment to that purpose. On the other hand, they recognise that the corporate environment in the United Kingdom (and, in interpolate, Australia) which protects shareholder activism will potentially compromise a company’s commitment to a statement of corporate purpose. They point out that a company that promotes a beneficial purpose at the expense of its profit may attract an intervention by shareholder activists, or by takeover, where abandoning that corporate purpose and returning the company to promoting narrower shareholder interests would potentially increase shareholder earnings and share value.

A thoughtful American commentator, Professor Bratton, has also pointed to the radical

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<sup>41</sup> Mayer, “The Future of the Corporation and the Economics of Purpose”, note #; Kershaw & Schuster, note #; Grantham, note #.

<sup>42</sup> Grantham, note #, 267.

<sup>43</sup> Fisch & Solomon, note #.

<sup>44</sup> Kershaw & Schuster, note #, 480.

implications of Professor Mayer's view, by contrast with the more limited scope of enlightened shareholder value models:

"Implementation of such a program would be anything but simple. Each [of] ownership rights and profit and loss accounting would have to be reconfigured from the ground up, a project calling for a tremendous commitment of both technical wherewithal and political will.

For present purposes, Mayer's value lies in showing us what purposivism would mean were we to take it seriously. So, doing so would entail more than mere modification [of] shareholder primacy. It would require its destruction. Seeing this lets us put the recent public-regarding developments in corporate governance in perspective. They herald only a minor transformation of shareholder primacy. There has been no structural shift towards a welfarist corporation, merely a handful of welfarist incidents."<sup>45</sup>

### Statutory derivative actions

A statutory derivative action was introduced in Canada in 1985, in New Zealand in 1994, in Australia by the Corporate Law Economic Reform Program Act 1999 with effect from 2000, and in the United Kingdom as s 260 – 264 of the *Companies Act* 2006 with effect from 1 October 2007. Each of these regimes requires a plaintiff who seeks to bring a derivative action to establish, inter alia, that it is acting in good faith and that the proposed action appears to be (or, in Australia, is) in the company's interests and of notification to the company's directors of the intention to bring the leave application. Each of the regimes provides that, where leave is granted, the Court has power to order the company to pay reasonable costs incurred by the plaintiff in connection with the derivative action, although that power is rarely exercised in Australia.

Applications are often brought for leave to bring statutory derivative actions under s 237 of the *Corporations Act*, or in the court's inherent jurisdiction which is applicable where a company is in liquidation or, possibly, other forms of insolvency administration. The relevant considerations for grant of leave to bring a derivative claim are specified in s 237(2) of the *Corporations Act*, which requires the court to grant leave if satisfied of five matters, including that the applicant is acting in good faith; that the grant of leave is in the best interests of the company; and that there is a serious question to be tried. Matters relevant to whether the applicant is acting in good faith include the applicant's honest belief that a good cause of action exists and has reasonable prospects of success (although that belief will be tested against whether a reasonable person in the circumstances would hold that belief) and whether the applicant is seeking to bring the action for a collateral purpose.<sup>46</sup> The case law indicates that the requirement that the grant of leave is in the best interests of the company is a relatively demanding one and the Court must be satisfied that the proposed action actually is, on the balance of probabilities, in the company's best interest, with relevant matters including the prospects of success of the proceedings, their likely costs, the likely recovery if the proceedings are successful and the likely consequences if they are not.<sup>47</sup> A party

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<sup>45</sup> Bratton, note #, 481.

<sup>46</sup> *Swansson v RA Pratt Properties Pty Ltd* [2002] NSWSC 583; (2002) 42 ACSR 313 at 320-321; *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859 at [29]; *Chahwan v Euphoric Pty Ltd t/as Clay & Michel* [2008] NSWCA 52; (2008) 65 ACSR 661; *Showtime Management Australia Pty Ltd v Showtime Presents Pty Ltd* [2008] NSWSC 618 at [77]; *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2010] NSWSC 91; (2011) 86 ACSR 432 at [110]–[111]; *Re Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235 at [58]; *Huang v Wang* [2016] NSWCA 164; (2016) 114 ACSR 586.

<sup>47</sup> *Swansson v Pratt* above; *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* above at [44].

seeking such leave is typically required to indemnify the company against costs, charges and expenses of and incidental to bringing and continuing the derivative claims for which leave is granted.<sup>48</sup> Sections 236–237 do not apply to a company that is in liquidation but leave to bring derivative actions can be granted in the court's inherent jurisdiction in that case.<sup>49</sup>

The majority of these applications are successful, although some fail, typically for a failure to satisfy the good faith requirement or an inability to establish a serious question to be tried.<sup>50</sup> However, it is unlikely that a derivative action will much assist a shareholder who has a radically different vision of the way in which a company should be managed. That issue arose in England when a shareholder of Shell Plc, Client Earth, sought leave to bring a derivative claim against all of Shell's directors, claiming a declaration that they were in breach of directors' duties and injunctive relief in respect of steps to be taken to address climate change and implement an earlier decision of a Dutch Court. Leave to bring that derivative action was refused, where the Court held that a *prima facie* case was not established, given the complexity of the business judgment in issue; and that a proper purpose was also not established were Client Earth held a very small proportion of the Shell shares on issue and the Court characterised the application as an attempt to impose its views as to the right strategy for dealing with climate change on other shareholders. An application for leave to appeal from that decision was refused both at first instance and by the Court of Appeal.<sup>51</sup> There is little reason to think that a different result would occur in Australia, irrespective of one's view as to the merits of the underlying policy issues.

The case law has also recognised that a relevant and significant matter in determining whether the proceedings are in a company's best interests is the adequacy of an indemnity in respect of the costs to which the company would be exposed by the conduct of proceedings and in the event of their failure and, in assessing the value of any indemnity given to a company, the Court will also have regard to the financial strength of the party giving the relevant indemnity.<sup>52</sup> I recognise that, in some cases, impecunious plaintiffs will not obtain leave for that reason, where the Court does not permit access to the company's assets to fund the proceedings, and some would not agree with that view. On the other hand, it is plainly possible that a particular case may appear sufficiently strong that it is in the company's best interests to bring it, and leave should be granted, absent such an indemnity.<sup>53</sup>

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<sup>48</sup> *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Ltd* [2012] NSWSC 462 at [33]; *Cooper v Myrtace Consulting Pty Ltd* [2014] FCA 480 at [29]; *Re Sundara Pty Ltd* [2015] NSWSC 1694.

<sup>49</sup> *Chahwan v Euphoric Pty Ltd (trading as Clay & Michel)* [2008] NSWCA 52; (2008) 245 ALR 780; *Carpenter v Pioneer Park Pty Ltd* [2008] NSWSC 551; (2008) 71 NSWLR 577 at [23] – [36]; *Re Sundara Pty Ltd* [2015] NSWSC 1694.

<sup>50</sup> See, for example, *Mount Gilead Pty Ltd & Hobhouse v L Macarthur-Onslow* (2021) 398 ALR 629; [2021] NSWSC 948, *aff'd* *Mount Gilead Pty Ltd v Macarthur-Stanhams (as executor of Estate of late Lee Macarthur-Onslow)* (2023) 168 ACSR 32; [2023] NSWCA 37; *Re Gillespies Cranes Nominees Pty Ltd* [2024] NSWSC 1136 (application for leave to appeal and appeal pending).

<sup>51</sup> [2023] EWHC 1897 (Ch). For criticism of that decision, see J Sarra, "The Climate Change Conundrum – Private Litigation as a Mechanism to Advance Public Interests?" (2023) 74 *UNBLJ* 1; J Negime, "A Shell for Directors? Issues Facing Climate-Oriented Derivative Action Claims" (2024) 39 *AJCL* 286.

<sup>52</sup> *Power v Ekstein* (2010) 77 ACSR 302; [2010] NSWSC 137; *Re Fishinthenet Investments Pty Ltd* [2014] NSWSC 260 at [31][ff]; *The App Shop Pty Ltd v Jalal Brothers Pty Ltd* [2019] NSWSC 490 at [19]; *Re Australian International Yacht Club Ltd* [2020] NSWSC 1884 at [15]; *Re Wonga Pastoral Development Co Pty Ltd* at [41][ff].

<sup>53</sup> For example, *Re 1derful Pty Ltd* (unpublished, 8 December 2023).

