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Abstract
[extract] This article examines the potential for interrelationship and interaction between the remedy in cases of oppression or injustice - commonly referred to as the oppression remedy - and the proposed statutory derivative action.

The oppression remedy has been a part of Australian statutes since the 1958 Companies Act, having been imported from the UK. The statutory derivative action has not yet found its way into Australian statutes. At the time of writing, the draft of the proposed provisions is a matter for public comment.

Keywords
oppression remedy, statutory derivative action, corporate law

PROPOSED NEW STATUTORY DERIVATIVE ACTION - DOES IT GO FAR ENOUGH?

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Introduction

This article examines the potential for interrelationship and interaction between the remedy in cases of oppression or injustice[1] - commonly referred to as the oppression remedy - and the proposed statutory derivative action.[2]

The oppression remedy has been a part of Australian statutes since the 1958 Companies Act,[3] having been imported from the UK. The statutory derivative action has not yet found its way into Australian statutes. At the time of writing, the draft of the proposed provisions is a matter for public comment.[4]

Control

The two remedies relate to a question of *control* - *control* of the corporate form. Alternatively, they relate to the steps being taken on behalf of shareholders to redress the imbalance in the modern company form between control exercised by directors and managers and that exercised by shareholders. Much of the regulation of corporations is aimed at directors and managers and what they may or may not do. This certainly has been the main thrust of legislative action and regulatory focus in Australia since the so called excesses of the 1980's.[5]

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1 *Corporations Law* s 260.

2 Companies and Securities Advisory Committee (CASAC), *Report on a Statutory Derivative Action (*July 1993) (CASAC Report). Provisions proposed to be housed in ss 245A - 245G.

3 s 94.

4 *Proceedings on Behalf of a Company (Statutory Derivative Action); Draft Provisions and Commentary*, September 1995 (Commentary).

5 See, for example, the inroduction fo Part 3.2A on related party transactions in the Corporations Law, the introduction for the civil pernalty regime, changes to the trading whilst insolvent provision, etc.

In 1932, Berle and Means published their treatise on *The Modern Corporation and Private Property*. This work proposed that those who own large public corporations do not control them and, conversely, those who control such corporations do not have significant ownership interests in them.[6] In their work Berle and Means had pointed out that shareholders in large public corporations had in effect exchanged control for liquidity.[7]

Berle and Means identified five major control types[8] that apply to corporations. Whilst their work was confined to public corporations, the types of control identified are applicable to all companies:

1. **Private ownership** - this gives rise to control through complete ownership of the corporate form.

2. **Majority control** - control that arises as a result of the ownership of a majority of the shares.

3. **Control through a legal device** - the person who exercises the control does not own a majority of the issued shares but is nonetheless able to control the entity through, for example, the use of non-voting shares, super shares (as proposed in the relatively recent case of News Corporations Limited), or shares with weighted voting rights, etc.

4. **Minority control** - this is where the particular group only holds a small number of shares but nevertheless is able to control the corporation. This can particularly be the case with public companies that have a large but scattered shareholder base such that a holder of perhaps as low a figure as 10% is able to exercise control.

5. **Management control** - this occurs where the share register is widespread and there is no single group that has minority control. Often this can be the case in public companies the majority of shares in which are held by institutions.

In his work on shareholders rights and remedies, Willcocks acknowledges that members of an Australian company do not in general control the company and its operations.[9] The reason for this is quite simply that the management and control of an Australian company is vested in its board of directors.[10] As Greer LJ stated in *John Shaw & 875Sons (Salford) Limited v Shaw:* [11]

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6 See Redmond P (ed), *Companies & Securities Law Commentary and Materials* LBC (1988) at 181.

7 See for example Wolfson N, *The Modern Corporation: Free Markets versus Regulation* Free Press (1984) Chapter 2 at 20 et seq.

8 See Redmond above n 6 at 182 for a discussion of these.

9 Willcocks P, *Shareholders' Rights and Remedies* Federation Press (1991) at 1.

10 Corporations Law Table A Regulation 66.

11 [1935] 2 KB 113 at 134.

> If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

This statement itself supports the view that the modern corporation is an abstraction devoid of physical form, existing only in contemplation of the law and therefore incapable of expressing its will without the mediation of natural persons.[12] On any view, companies are contractual structures where the board of directors and majority shareholders control and dominate the affairs.[13] Because of this, the law imposes on the natural representatives of the non-natural corporate form, fiduciary obligations that operate over and above and in addition to any contractual rights and remedies. This is because the non-natural company form is in need of protection extending beyond normal contractual remedies.

Where there is a breach of an obligation in favour of the company it follows naturally that it is the company that should be the person that takes the legal action. Indeed, that was the position in *Foss v Harbottle*,[14] where the court held that, in case of a breach of the duties owed to the company, the proper plaintiff was the company itself.

Shareholders have their contractual remedies which manifest themselves in the positive controls that may be exercised by them in, for example, voting to remove directors who do not represent the will of the shareholders. The difficulty is being able to win the proxy fight by getting the numbers at the requisite meeting. If the numbers are not able to be mustered, the shareholders must revert to negative control measures ie. legal remedies in order to redress the imbalance in control between the owners of the business and the directors/managers of the business.[15] At least one commentator has referred to this as the tension between control and accountability.[16]

In many public companies the share register is very widely held and it is often very difficult to remove directors or to bring about change.[17] This is exacerbated by the growth of institutional investment holdings and the

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12 Redmond above n 6 at 204.

13 Corkery J et al, *Shareholders' Actions Against Company Controllers*, Chapter 4 Laws of Australia: Business Organisations (loose leaf series) at 193 and see s180 of the Corporations Law which provides that the memorandum and articles of a company have the effect of a contract under seal between the company, the members and the officers of the company.

14 (1843) 2 Hare 461; 67 E R 189

15 Willcocks above n 9 at 16 et seq.

16 Ramsay I, 'Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action' (1992) 15 UNSWLJ at 151.

17 An example can be found in the recent difficulties experience in respect of Coles Myer Limited.

inability or lack of desire on the part of those institutions to seek to exercise control over the management of companies. Therefore, shareholders, particularly small shareholders, are to a very large extent, becoming more and more bound to rely on the aspects of negative control as opposed to positive control.

Oppression Remedy

The oppression remedy is contained in s 260 of the Corporations Law and provides in part:

> S 260 (1) [***Application to Court***] *An application to the Court for an order under this section in relation to a* ***company*** *may be made:*
>
> *(a) by a* ***member*** *who believes:*
>
> *(i) that 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; or*
>
> *(ii) that an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members, 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 members as a whole; or*
>
> *(b) by the Commission, in a case where it has investigated, under Division 1 of Part 3 of the ASC Law:*
>
> *(i) matters being, or connected with, affairs of the company;*
>
> *or*
>
> *(ii) matters including such matters.*

The section was derived from the UK legislation which was developed from the recommendations of the Cohen Committee.[18]

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18 Currently contained in ss 459-461 of the *Companies Act* 1985 as amended in 1989 which differ from the provisions of s 260 - Willcocks above n 9 at 19; for a discussion of the development of the English law see Griggs L & Lowry J, 'Minortiy Shareholder Remedies: A Comparative View'

Access to Information

One of the most difficult things to achieve in any litigation is to gather the facts. This can be critical in an action for oppression particularly as the majority of information is probably in the hands of the controllers of the company. Those are the persons who would normally be the focus of the litigation.

It may well be that the member needs to get access to the company's records in order to determine whether or not an action should be instituted. Section 319 of the Corporations Law provides a mechanism to enable access to documents. Whilst there are a number of limits to the provisions' operations, it is a mechanism designed to help shareholders particularly where action is contemplated under s 260.[19] However, in itself it requires an application to the court with the onus being on the applicant to satisfy the court that access should be granted.

Orders

Section 260 confers on the court a wide discretion in relation to the orders that it may make when a case under s 260 has been made out. Generally speaking, the court may make such order as it thinks fit.[20] The only limit on the court's ability to make orders is that it may only make a winding up order if it is of the opinion that the order would not unfairly prejudice the oppressed member or members.[21]

There can be no doubt that s 260 is a very powerful source of negative control for shareholders:

> The provisions contained in s 260 have been drafted in wide form in order to accommodate the almost limitless varieties of oppressive behaviour possible and the need for the court to have an appropriately extensive discretionary power to effect justice in the particular circumstances of individual cases.[22]

This may be the explanation for the courts not having decided the type of conduct that will give rise to relief under s 260.[23] However, that may also be a function of the number of actions instituted.[24] In the period

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(1994) J of Bus L, at 463-487; see Welling B, *Corporate Law in Canada, the Governing Principles* (2nd ed): Butterworths (1991) at 555 for a discussion of the operation of the provisions in the UK.

19 For an anysis of s 319 see McDonough D, *Annotated Mergers and Acquisitions Law of Australia,* (3rd ed) LBC (1993) at 37-40; and Willcocks above n 9, Ch 9.

20 s 260 (2).

21 s 260 (4).

22 *Re Bodaibo Pty Ltd* (1992) 6 ACSR 509 at 515 per Vincent J.

23 Willcocks above n 9 at 17.

24 Ramsay I, 'Enforcement of Corporate Rights and Duries by Shareholders and the Australian Securities Commission: Evidence and analysis' (1995) 25 ABLR 174 at 180.

September 1989 - March 1994 there were only 25 reported oppression actions in Australia.[25]

The section provides a list of suggested relief. However, it is up to the applicant to tell the court the relief that is sought[26] which may or may not be contained in that list:-

- **winding up:** as mentioned above this is subject to the limitation mentioned; namely, that a winding up order may only be made if the court is satisfied that the making of it would not unfairly prejudice the oppressed member or members.[27]
- **future conduct:** the court can make orders as to the future conduct of the company including for example orders to replace the board of directors as in *Re Spargos Mining NL*[28].

- **acquisition of shares:** when the applicant wishes to exit the investment it is usual for an order to be made requiring purchase of the applicant's shares.[29] Alternatively, there could be an order requiring sale of the other parties' shares.
- **proceedings:** under s 260(2)(g) the court can order the institution or defence of proceedings etc.

- **receiver or receiver and manager:** in an appropriate case a receiver or receiver and manager can be appointed. However, it may not be best in some cases to do that as for example it may lead to an act of default under financing arrangements.[30]

- **injunction:** the court may grant an injunction that restrains activity[31] or an injunction that requires activity.[32]

Whilst the section does allow action to be taken by the ASC[33] that may only be done following an investigation.

As mentioned above, there is no clear statement of the width of the section.[34] Indeed, this is the very strength of the section. The provision covers conduct that is unjustly detrimental to any member of a company, whatever form it takes and whether it adversely affects all of the members of the company or whether it is discriminatory.[35]

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25 Ibid.
26 *Meyers v Scottish Co-operative Wholesale Society* (1954) SC 381 at 388.
27 Cf s461 of the Corporations Law.
28 (1990) 3 ACSR 1; and see also *Re Harmer Ltd* [1959] 1 WLR 62.
29 Willcocks above n 9 at 41.
30 *Re Spargos Mining NL* (1990) 3 ACSR 1 and *Re Enterprise Gold Mines NL* (1991) 3 ACSR 531.
31 *Re Posgate & Denby (Agencies) Ltd* (1986) 2 BCC 99, 352.
32 *Re Spargos Mining NL* (1990) 3 ACSR 1 at 51.
33 s 261 (1)(b).
34 Willcocks above n 9 at 17.
35 CASAC Report above n 2 at 6, 7; and *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539.

In one sense s 260 provides for its own form of a derivative action.[36] This arises because the section entitles a member to apply to the court in respect of the affairs of the company which are being conducted *in a manner that is contrary to the interests of the members as a whole*. In such an event the court is able to direct the company to take action in relation to proceedings etc. that would be for the benefit of the company and members as a whole.[37]

Shortcomings

Whilst the section is very powerful, it nonetheless has difficulties. In its deliberations on the need for a statutory derivative action, the Companies and Securities Advisory Committee concluded that there were a number of shortcomings inherent in s 260.[38] The difficulties with the section have also been the subject of close examination by others with the identification of the following matters[39]:

- the definition of 'affairs of the company' may not include the act of a nominee director to a subsidiary;[40]
- it may be argued that a resolution of the company in general meeting is not an act by or on behalf of the company;
- the question of whether conduct can be considered to be unfairly prejudicial or unfairly discriminatory if it affects all members the same;
- the fact that applicants for relief are limited to registered shareholders and the ASC;
- the phrase contrary to the interests of the members as a whole is uncertain. Does it mean that it must be contrary to the interests of each and every member?
- the section does not deal specifically with the issue of costs;
- the standard of proof for shareholders is onerous.

Be that as it may the section still provides an effective means to redress the issue of control.

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36 Ibid.
37 Ibid.
38 Ibid at 7 and 8.
39 Griggs L, 'Specific Problems with the Oppression Section' (1993) 9 Q.U.T.L.J. 101; (1993) Companies and Securities Law Journal 10; and see Ramsay I, 'Corporate Governance, Shareholder Litigation and the Prospect for a Statutory Derivative Action' (1992) 15 UNSWLJ 149.
40 See *Re Novabron Pty Ltd* (1986) 11 ACLR 279; *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLT 692; *In the matter of Richard Pitt Co Pty Ltd and the Companies Act 1962* (1979) ACLC 32, 453.

Statutory derivative action

In its report of July 1993 the Companies and Securities Advisory Committee[41] observed that for many years there had been widespread discontent with the obstacles that confront shareholders that wish to litigate against the management of a company:-

- the rule in *Foss v Harbottle;*
- expense of litigation;
- difficulty of obtaining information.

With the exception of the first, the above problems are the same as those faced by the large majority of litigants whether in the commercial environment or elsewhere. Moreover, there is no demonstratable need for the introduction of a statutory derivative action in the form proposed. To an extent its proposed introduction is a political response to the excesses of the 1980's.

The rule in *Foss v Harbottle* arose out of the case which involved what was in reality a representative action, on behalf of the plaintiffs and all of the other shareholders in a company, against five directors of the company. The allegations in the case were:

(i) the directors caused the company to purchase from those directors land owned by them and paid an excessive price for the land; and

(ii) the directors raised money in a manner not authorised by their powers under the Act of parliament that had created the particular company.

The essence of the decision in that case was that the proper plaintiff was the company and not the individual shareholder. This is the rule in *Foss v Harbottle*.

The rule has two aspects to it:-

> 'First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done then *cadit quaestio*'.[42]

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41 CASAC Report above n 2 at 1.

42 *Edwards v Halliwell* [1950] All ER 1064 at 1066.

Clearly there are advantages to the rule.43 However, it is equally clear that there is a need to reform the law if shareholders are to have a meaningful ability to oversee the actions of directors and management and to exercise control over their decisions.

Legislation

The legislative provisions for the introduction of the statutory derivative action - called 'proceedings on behalf of a company' in the proposed legislation - are in draft form. It is proposed that they be contained in ss 245A - 245G of the Corporations Law. The pivotal provisions are:

Section 245A [Bringing, or intervening in, proceedings on behalf of a company.]

> *(1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which a company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:*
>
> *(a) the person is:*
>
> *(i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate;*
>
> *(ii) an officer or former officer of the company; or*
>
> *(iii) the ASC; and*
>
> *(b) the person is acting with leave granted under section 245B.*
>
> *(2) Proceedings brought on behalf of a company must be brought in the company's name.*
>
> *(3)* ***The right of a person at common law to bring, or intervene in, proceedings on behalf of a company is abolished.*** (My emphasis).

Section 245B [Applying for and granting leave.]

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43 CASAC Report above n 2 at 1.

(1) A person referred to in paragraph 245 A(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.

(2) The Court must grant the application if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them or for the step in them; and

(b) the applicant is acting in good faith; and

(c) it is in the best interests of the company that the applicant be granted leave;

(d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

The additional provisions which are set out in the Annexure to this paper provide for such matters as the substitution of another person for the person granted leave by the court, the effect that a resolution ratifying conduct has on an application or action before the court, the granting of leave to discontinue etc., the general powers of the court and costs.[44]

Power to investigate

One important feature of the proposed legislation is that the Court will have power under s 345F(d) to appoint an independent person to investigate, and report to the Court on:

- the financial affairs of the company;
- the facts or circumstances which give rise to the cause of action the subject of the proceedings; or
- the costs incurred by parties to the proceedings and the person granted leave.

44 See draft sections 245C - 245G in the Annexure.

This provision bears some similarity to the position that applies in South Africa with the court's power to appoint a curator *ad litem.*

This could be a very important mechanism in situations where the applicant does not have all the necessary information in relation to the matter complained of but is able, nevertheless, to establish cause for further investigation.

Application

In making an application there will be a need to notify the company. The court will want to at least give the company the opportunity to be heard, particularly when there is a fundamental reason why leave should not be granted to, say, commence an action. Where an action has already been commenced it may be that the parties to that litigation may need to be heard if a third person is to be given leave to, as it were, 'step into the shoes' of the company.

One of the important features of the proposed legislation is that it moves the power of enforcement in respect of the overall concept of corporate governance from the public arena to the private arena. In so doing it places in shareholders' hands a tool to achieve managerial accountability.[45] Also, it should in time have some economic effect as one would expect that as a result there should be less call on the resources of the regulator. However, that saving may well be offset by the increase in costs associated with the need for an application to the court. We can only assess this after the legislation has been operating for a time.

Shortcomings

The proposed sections have addressed a number of the shortcomings identified in relation to s 260[46]. However, there are a number of shortcomings with the proposed new provisions that should be addressed.

Who may apply? - The persons who may apply are a member, former member or person entitled to be registered as a member of the company or a related company, an officer or former officer of the company (but not a related company) or the ASC. I have some difficulty with this:

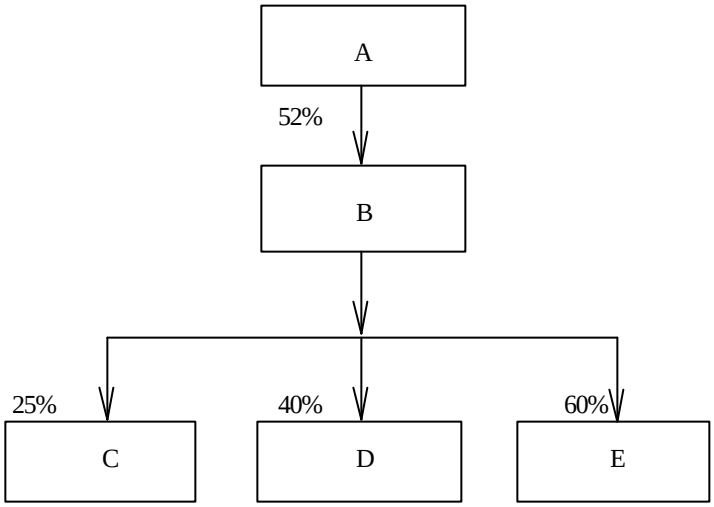
1. What does the term 'entitled to be registered' mean? Does it for example include a transfer upon which stamp duty has not been paid or a transfer the registration of which has been refused by the directors under the rights or pre-emption provisions of the articles of

45 CASAC Report above n 2 at 4 and the material there cited and see the above generally.

46 See above text accompanying footnote 38 et seq.

association? Also, will it be necessary for such a party to firstly prove to the court that he or she is 'entitled to be registered'?

2. Why should a shareholder of a related body corporate have the right to make an application in respect of a company in which there may be no interest, direct or indirect held by that person? On the basis of the definition of the term 'related body corporate' it could mean that a person entitled to be registered as a shareholder of company E could apply to the court in respect of proceedings in relation to company A.



Interestingly, such a person would not have any right to obtain access to books and records under s 319 as only a member may make such an application.[47]

3. The applicant needs to show that the company is unlikely to bring the proceedings etc; the applicant is acting in good faith; it is in the best interests of the company that leave be granted; there is a serious

47 McDonough above n 19.

question to be tried; and that the company has been notified of the application or, if not, the leave should in any event be granted. There is no requirement, for example, that the applicant show a sufficient interest which would justify leave being granted.

4. Officers or former officers may apply. The term 'officer' is defined in s 82A of the Law to the following effect:-

'82A (1) ['officer'] Subject to subsection (2), 'officer', ...:

(a) .....; or

(b) .....;

includes;

(c) a director, secretary, executive officer or employee of the body or entity; and

(d) a receiver and manager, appointed under a power contained in an instrument, of property of the body or entity; and

(e) an administrator of the body or entity;
(ea) an administrator of a deed of company arrangement executed by the body or entity; and

(f) a liquidator of the body or entity appointed in a voluntary winding up of the body or entity; and

(g) a trustee or other person administering a compromise or arrangement made between the body or entity and any other person or persons.

82A (2) [Exclusions] None of the following is an officer of a body corporate, or of an entity within the meaning of Parts 3.6 and .7:

(a) a receiver who is not also a manager;

(b) a receiver and manager appointed by a court;

(c) a liquidator appointed by a court'.

This provides a very wide category of persons including person who, in some cases, act with total control of the company and therefore could sue in the name of the company. Such a person would be a liquidator.

Seemingly, the legislation will give such persons a right to apply after they have relinquished their positions.[48]

Proper purpose - Subject to interpretation by the courts there would not appear to be any need for an applicant to show that they are acting for a proper purpose.[49] Presumably the need to act in 'good faith' would encompass a need not to act for a collateral purpose. However, that is not stated and will need to be derived through case law.

Best Interests of the company - Section 245B requires that the court be satisfied that it is in the 'best interests of the company' that leave be granted. Normally the issue of whether or not proceedings are to be instituted, compromised or settled is a management issue. This provision will require the court to effectively make decisions that it otherwise tends to avoid or at least refuses to review. This is particularly the case where the company in question has been asked to institute the proceeding but the board has declined to do so.[50]

In such an environment the court may place a heavy onus on an applicant to satisfy the court to enable it to make what is in effect a managerial decision.

In the Commentary[51] currently circulating with the proposed draft provisions the following is stated in relation to the criterion of 'best interests of the company':

> This criterion will allow the court to focus on the true nature and purpose of the proceedings. It also recognises that a company might have sound business reasons for not pursuing a cause open to it and that its management might legitimately have decided that to refrain from taking action would be in the best interests of the company. For example, a decision may be taken in a case where, although it may be clear that there was a breach of duty by a director, the loss to the company may only be minimal. In this case, the costs of taking proceedings may outweigh any benefit to the company.

The statement seems to accept that the company will appear on any application and adduce evidence of the decision making process of the board where, for example, the board has made a decision not to proceed. This will mean that the application to the court in such circumstances will be in the nature of an appeal from a decision of the board. I have some doubts that the courts will readily embrace such a task. Applications to the court could well become a very involved process with not insignificant legal costs.

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48 Cf the position under s 260 as to which see Willcocks above n 9 at 22.

49 Cf s 319; McDonough above n 34.

50 Ford H and Austin R, *Ford and Austin's Principles of Corporation Law (7th ed)* Butterworths (1995) at 257 et seq; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 particularly at 832; and *Harlowe's Nominees Pty Ltd v Wood-side (Lakes Entrance) Oil C NL* (1968) 121 CLR 483 at 493.

51 Commentary above n 4 at 5.

Serious question - There is a need to show that there is a serious question to be tried if proceedings are to be instituted. This presupposes that the applicant has been able to collect sufficient evidence. This is one of the very difficulties identified with the rule in *Foss v Harbottle*.[52] However, whilst s 319 will provide some assistance it will not be of any help to a person 'entitled to be registered' or to any officer or former officer. An officer too is restricted in his or her right of access to the records of a company. As a matter of law an officer may only have a right of access as part of his or her obligation to undertake due diligence or as otherwise authorised by statute.[53]

Interaction/Interrelationship

It is difficult now to identify the potential for the interaction/interrelationship between s 260 and the new statutory derivative action in Australia. The provisions for the statutory derivative action are only in draft form.

However, it could be anticipated that potential litigants will choose one course or the other. If they were to make application under the oppression remedy and at the same time seek to act on behalf of the company pursuant to the statutory derivative action it is perhaps possible that a court might see that as being an abuse of process. In any event, any applicant pursuant to the provisions of s 260 will always run the risk of being exposed to costs. An applicant under the statutory derivative suit would similarly bear a costs exposure but that may well be minimised as it would only relate to the initial application.

There are some difficulties in relation to ss 245A - 245G as they are currently drafted. However, on balance it could reasonably be expected that there will be a swing in favour of the new statutory derivative action particularly having regard to the costs question and the ability to sue in the name of the company.

One of the issues that I believe potential litigants will need to address though is whether or not the matter they seek to redress is in the nature of a personal action or a derivative action. They will perhaps need to carefully draw their writs to ensure they are not struck out on technical grounds. Litigants need to identify clearly whether the matter complained of is in the nature of a breach of duty owed to the company and therefore actionable only in the name of the company through a derivative suit or otherwise.

The rule in *Foss v Harbottle* will continue to live. This is because the rule in *Foss v Harbottle* effectively said that where there is a breach of duty owed to the company the proper plaintiff is the company itself. It is the

52 CASAC Report above n 2 at 1.

53 See *The State of South Australia v Barrett* (unreported) Full Court of the South Australian Supreme Court (27 April 1995).

exceptions to the rule that are intended to be removed by s 245 A(3). Under the statutory derivative action that will remain the position. That is to say, where there has been a breach of duty owed to the company action needs to be taken under the statutory derivative action route as opposed to the oppression remedy in s 260 unless the applicant is perhaps able to come under the oppressive remedy derivative action.[54] Even then the statutory derivative action may well be the better approach due to the matter of costs. Irrespective of whether s 260 or s 245A is relied on the action will be in the name of the company where a duty to the company has been breached. In that way the rule in *Foss v Harbottle* will remain.

There is some difficulty with the fact that ss 245A - 245G are to be introduced without totally removing from s 260 the ability to bring what may arguably be a type of statutory derivative action under s 260 (2)(g).

Both provisions seek to empower shareholders with the ability to control, monitor and review the decision making processes. This leads to a resolution in the control imbalance. As that is the case why not combine them? Why is it perceived that the derivative action should be left on its own? By its very nature it is interwoven with s 260 and, for that matter, to an extent with s 319. The better approach would be to set out a code of members' remedies in the Corporations Law.

The situation in Canada as regards the interrelationship and interaction between the derivative action and the oppression remedy was considered by the Dickerson Committee.[55] That Committee considered that the objective of the statutory derivative action was to remedy wrongs to the corporation whereas the oppression remedy would generally be invoked by minority shareholders in a close corporation.[56] That may well become the position in Australia except that in Australia it would be a closely held corporation not a close corporation unless the close corporation legislation were reintroduced.

The Dickerson Committee in Canada believed that the two pieces of legislation could live side by side. However, at least one commentator is of the view that 'the interaction is unclear and confusing'.[57] That particular commentator has suggested that a better alternative would be to combine the derivative and oppression actions into a single provision.

It is difficult to see a justification for the provisions to be separated if in truth they are both designed to achieve the same end of overseeing the actions of directors and management by providing shareholders with an avenue to seek redress for a wrong done.

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54 CASAC Report above n 2.

55 *Proposals for a New Business Corporation Law for Canada*, Ottawa (1971).

56 Anisman P, 'Majority - Minority Relations in Canadian Corporations Law; An Overview' (1986-1987) 12 Can Bus LJ 473 at 476.

57 MacIntosh J, 'The oppression remedy. Personal or Derivative' (1991) 70 Can BR 29 at 30.

An alternative

There is no doubt that shareholders face a difficult task if they are in the minority and wish to challenge the actions of directors. This was certainly the case in the Independent Resources group of companies out of which was spawned cases such as *Re Spargos Mining NL* to which reference has previously been made.

However, the steps being taken to address the imbalance are, with respect, being taken on a piecemeal basis. When one looks at South Africa and Canada it can be seen that Australia is tending to follow others in its corporate law reform programme. A better approach would be to enquire into and identify with some precision the limits that should be placed on the control that may be exercised by shareholders over directors and management - in other words identify the means for monitoring the actions of management. That is the central issue.

As mentioned above there does not appear to be an unequivocal statement to justify the introduction of the statutory derivation action. Seemingly, it arises from a combination of what are said to be the difficulties with the rule in *Foss v Harbottle*, the shortcomings of s 260, the costs of litigation and the inability of shareholders to easily obtain the requisite information.

It is not the rule in *Foss v Harbottle* which causes the difficulty but the exceptions to it. Those exceptions are narrow and in some cases difficult to understand. A particular difficulty arises in trying to identify the effect that ratification can have on a particular circumstance.

To an extent the difficulties with the exceptions to the rule may be overcome by use of s 1324 of the Corporations Law. That section provides that a person may apply to the court for an injunction - to either stop or cause activity. In order to ground the court's jurisdiction it is necessary to show that there has been a breach of the Corporations Law, an attempt to breach it, etc. Importantly, the ability to seek an injunction is not confined to members of the company. It extends to any person who can show their interests have been affected.

The purpose of s 1324 was said in *Broken Hill Proprietary Co Ltd v Bell Resources Ltd*[58] to be to enable persons to obtain relief in the form of an injunction to prevent actual or proposed conduct which is in contravention of the Corporations Law.[59] The section is to be given a broad interpretation limited only by the purpose and object of the Corporations Law.[60]

Any person who applies for an injunction needs to be able to show that he or she will be a person 'whose interests have been .....' affected by

58 (1984) 8 ACLR 609.
59 Ibid at 613 - 614.
60 Ibid.

the conduct, etc. Whether or not a person falls into that group will depend on the existence of a sufficient nexus between that party and the alleged failure to comply with the Corporations Law.[61]

Therefore that section could perhaps be used by any shareholder that believes a director of a company has breached a duty to the company such as one found in s 232. In addition in obtaining an injunction the shareholder could seek the payment of damages to the company in reliance on s 1324 (10). That award of damages can be made either in substitution for the injunction or in addition to it.[62]

Situations may arise which would preclude the use of s 1324. Therefore, there may be a justification for revising the Corporations Law. However, that should only be done through a broader approach to the subject matter. It should not be confined to a simple adoption of a statutory derivative action. What is needed is a provision that:

- identifies and prescribes that management of the company is to be vested in the directors.

- acknowledges that where a breach of an obligation occurs which is owed to the company the proper and only plaintiff should be the company.

- identifies a mechanism whereby a person whose interests may be affected by the activity or non-activity is able to apply to the court for approval to 'step into the shoes' of the company to ensure that action is taken and properly prosecuted where the action or inaction is against the company itself, ie. derivative in nature. Where the action is one that is personal, the aggrieved party should be able to apply for any injunction or damages as under the current s 1324.

That third element could include the proposed ss 245A - 245G, the existing s 260 and s 1324. The advantage of such an approach is that it could be developed as a coherent set of remedies for shareholders and others whose interests may be affected by action or inaction.

Proposed new alternative provision

Set out below is a proposed section that could form the basis of the new provision:

Remedies of Members and Others

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61 *QIW Retailers Ltd v David Holdings Pty Ltd (No 2)* (unreported), Federal Court of Australia, Cooper J, G3012 of 1992.

62 s 1324 (10).

260(1) Where a person by act or omission, has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute -

(a) unfair commercial conduct;

(b) a breach of this Law, a regulation, a provision of the constitution of a company or the terms of a resolution of a company; or

(c) a breach of a duty owed to a company by that person whether the duty is owed by virtue of a provision of this Law or otherwise,

the Court may, on the application of the Commission, or a person whose interests have been, are, or would be effected by the conduct, make such order or orders, including an interim order or orders, as it thinks just, including, without limiting the generality of the foregoing, any one or more of the following orders:-

(d) an order that a company be wound up:

(e) an order regulating the future conduct of the affairs of a company;

(f) an order for the purchase of the shares of any member by the other members of a company, on such terms and conditions, as the Court thinks fit, including the reduction of the capital of the company;

(g) an order requiring a company to purchase the shares of a member or members of a company on such terms and conditions as the Court thinks fit;

(h) an order directing that the applicant:-

(i) bring proceedings on behalf of a company, intervene in any proceedings to which a company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings including but not limited to the settling or compromising of the proceedings; or

(ii) be substituted for a person in respect of which a prior order has been made under paragraph (i) to undertake the terms of that order or any variation thereof;

(i) an order appointing a receiver or receiver and manager of any or all of the property of a company;

(j) an order restraining any person from engaging in specified conduct or from doing any specified act or thing;

(k) an order requiring a person to do any specified act or thing;

(l) an order requiring the payment of a sum for damages to any person whether a party to the application or not; or

(m) an order appointing an independent person to investigate, and report to the Court on such matters as the Court may direct including but not limited to the financial affairs of a company; the facts or circumstances that gave rise to the cause of action the subject of the application or the matter or the costs incurred in applying to the Court or complying with any order of the Court made pursuant to this section.

260(2) The Court may vary or discharge any order made under section 260(1).

260(3) The Court must grant an application for an order in the nature contemplated by section 260(1) (h) if it is satisfied that:-

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the step in them;

(b) the applicant is acting in good faith;

(c) it is in the best interests of the company that the order be granted;

(d) if proceedings have not been commenced there is a serious question to be tried; and

(e) either:-

(i) at least 14 days notice of the application has been given to the company of the intention to apply to the Court and the reasons for so applying; or

(ii) it is appropriate to grant the order even though paragraph (i) has not been satisfied.

260(4) A ratification or approval of an act, omission or conduct by the members of a company shall be a relevant matter to be taken into account by the Court in determining whether to grant an order in the nature of an order contemplated by section 260(1) (h) but any such ratification or approval shall not act as a bar to the Court granting any order;

260(5) Where an order in the nature contemplated by section 260(1) (h) has been granted the proceedings commenced or intervened in may not be settled or compromised without leave of the Court.

260(6) In relation to any application made under section 260(1) or in relation to the carrying out of an order made under section 260 (1) the Court may at any time

make such orders as it thinks just about the costs of the person who makes the application including an order for the indemnification of costs.

260(7) For the purposes of section 260(1) a person whose interests have been, are, or would be affected include but are not limited to a present or former, member, beneficial owner of shares, creditor or officer of a company or a related corporation.

Annexure

Proposed new provisions by CASAC

'245C [Substitution of another person for the person granted leave]

(1) Any of the following persons may apply to the Court for any order that they be substituted for a person to whom leave has been granted under section 245B:

(a) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or

(b) an officer, or former officer, of the company; or

(c) the ASC.

The application may be made whether or not the other person has already brought the proceedings or made the intervention.

(2) The Court may make the order if it is satisfied that:

(a) the applicant is acting in good faith; and

(b) in all the circumstances, it is appropriate to make the order.

(3) An order substituting one person for another person has the effect that:

(a) the grant of leave is taken to have been made in favour of the substituted person; and

(b) if the other person has already brought the proceedings or intervened - the substituted person is taken to have brought those proceedings or to have made that intervention.

245D [Effect of ratification by members]

(1) A ratification or approval of conduct by members of a company;

(a) does not prevent a person from bringing or intervening in proceedings with leave under section 245B or from applying for leave under that section; and

(b) does not have the effect that proceedings brought or intervened in with leave under section 245B must be determined in favour of the defendant, or that an application for leave under that section must be refused.

(2) The Court may take into account a ratification or an approval of the conduct by members of a company in deciding what order or

judgment (including as to damages) to make in proceedings brought or intervened in with leave under section 245B or in relation to an application for leave under that section. In doing this, it must have regard to:

(a) how well-informed about the conduct the members were when deciding whether to ratify or approve the conduct; and

(b) whether the members who ratified or approved the conduct were acting for proper purposes.

245E [Leave to discontinue, compromise or settle proceedings brought, or intervened in, with leave]

Proceedings brought or intervened in with leave must not be discontinued, compromised or settled without the leave of the Court.

245F [General Powers of the Court]

(1) The Court may make any orders, and give any directions, that it thinks just in relation to proceedings brought or intervened in with leave, or an application for leave, including:

(a) interim orders;

(b) directions about the conduct of the proceedings, including requiring mediation; and

(c) an order directing the company, or an officer of the company, to do, or not to do, any act; and

(d) an order appointing an independent person to investigate, and report to the Court, on:

(i) the financial affairs of the company;

(ii) the facts or circumstances which gave rise to the cause of action the subject of the proceedings; or

(iii) the costs incurred in the proceedings by the parties to the proceedings and the person granted leave.

(2) A person appointed by the Court under paragraph (1)(d) is entitled, on giving reasonable notice to the company, to inspect the books of the company for any purpose connected with their appointment.

245G [Power of the Court to make costs orders]

At any time, the Court may, in relation to proceedings brought or intervened in with leave under section 245B or an applicant for leave under that section, make any orders it thinks just about the costs of the person who applied for or was granted leave of, the company or of any other party to the proceedings or application, including an order requiring indemnification for costs.

Remedies Of Members And Others

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(b) a breach of this Law, a regulation, a provision of the constitution of a company or the terms of a resolution of a company; or

(c) a breach of a duty owed to a company by that person whether the duty is owed by virtue of a provision of this Law or otherwise,

the Court may, on the application of the Commission, or a person whose interests have been, are, or would be effected by the conduct, make such order or orders, including an interim order or orders, as it thinks just, including, without limiting the generality of the foregoing, any one or more of the following orders:-

(d) an order that a company be wound up;

(e) an order regulating the future conduct of the affairs of a company;

(f) an order for the purchase of the shares of any member by the other members of a company on such terms and conditions as the Court thinks fit;

(g) an order requiring a company to purchase the shares of a member or members of a company, on such terms and conditions, as the Court thinks fit, including the reduction of the capital of the company;

(h) an order directing that the applicant:-

(i) bring proceedings on behalf of a company, intervene in any proceedings to which a company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings including but not limited to the settling or compromising of the proceedings; or

(ii) be substituted for a person in respect of which a prior order has been made under paragraph (i) to undertake the terms of that order or any variation thereof;

(i) an order appointing a receiver or receiver and manager of any or all of the property of a company;

(j) an order restraining any person from engaging in specified conduct or from doing any specified act or thing;

(k) an order requiring a person to do any specified act or thing;

(l) an order requiring the payment of a sum for damages to any person whether a party to the application or not; or

(m) an order appointing an independent person to investigate, and report to the Court on such matters as the Court may direct including but not limited to the financial affairs of a company; the facts or circumstances that gave rise to the cause of action the subject of the application; or the matter of the costs incurred in applying to the Court or complying with any order of the Court made pursuant to this section.

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260 (5) Where an order in the nature contemplated by section 260 (1)(h) has been granted the proceedings commenced or intervened in may not be settled or compromised without leave of the Court.

260 (6) In relation to any application made under section 260 (1) or in relation to the carrying out of an order made under section 260 (1) the Court may at any time make such orders as it thinks just about the costs of the person who makes the application including an order for the indemnification of costs.

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